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English-Only Policies in the Workplace: Disparate Impact Compared to the EEOC Guidelines

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ENGLISH-ONLY POLICIES IN THE WORKPLACE: DISPARATE IMPACT COMPARED TO THE EEOC GUIDELINES

INTRODUCTION

According to the 2000 census, in the United States between 1990 and 2000 the foreign-born population increased by more than half.[1] The 2000 census also revealed that forty-seven million people speak a language other than English at home.[2] The number of employees who speak a foreign language at work has also increased substantially.[3] In order to combat problems associated with this increase, such as effective supervision, safety, efficiency, and workplace disruptions,[4] employers are implementing English-only policies. English-only policies prohibit speaking any language except English during some or all of the work day. The Equal Employment Opportunity Commission ("EEOC") reports that the increased use of these policies by employers led to quintuple complaints by employees alleging discrimination on the basis of English-only rules between 1996 and 2000.[5]

These complaints have arisen because language is a part of national origin, which is protected under Title VII. While protection arises under Title VII, there is a split between the Ninth Circuit and the Tenth Circuit over how to analyze cases concerning discrimination based on national origin as a result of English-only policies. This split highlights competing values: the value of language as a part of a person's national origin and the value of an employer's freedom in determining how to run his or her business safely and efficiently.[6]

In addressing these competing values, there are two possible approaches: 1) the EEOC Guidelines; and 2) disparate impact analysis. The EEOC Guidelines presume English-only policies lead to discrimina-

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1. Nolan Malone, Kaari F. Baluja, Joseph M. Costanzo & Cynthia J. Davis, *The Foreign-Born Population: 2000*, Census 2000 Brief, 2, *available at* http://www.census.gov/prod/2003pubs/c2kbr-34.pdf ("Between 1990 and 2000, the foreign-born population increased by 57 percent, from 19.8 million to 31.1 million, compared with an increase of 9.3 percent for the native population and 13 percent for the total U.S. population.").

2. Hyon B. Shin & Rosalind Bruno, *Language Use and English-Speaking Ability: 2000*, Census 2000 Brief, at 2, *available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf ("The number and percentage of people in the United States who spoke a language other than English at home increased between 1990 and 2000. In 2000, 18 percent of the total population aged 5 and over, or 47.0 million people, reported they spoke a language other than English at home.").

3. *See* Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 267 (1990).

4. *See id.* at 305-16.

5. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 81 (2d ed. 2001).

6. Perea, *supra* note 3, at 315 ("[E]mployers may be able to justify English-only rules that are not unduly discriminatory, based on safety and efficiency.").

tion in the workplace.[7] In contrast, the disparate impact analysis requires the employee to carry the initial burden of proving the policy led to discrimination or harm.[8]

The Ninth Circuit has been the leading source of case law on the issue of English-only policies. In 1993, the Ninth Circuit explicitly rejected the EEOC guidelines and applied a disparate impact analysis to find that an employer did not discriminate based on an English-only policy.[9] This was the controlling decision on English-only policies until a 2006 decision from the Tenth Circuit in *Maldonado v. City of Altus*.[10] The Tenth Circuit decision departed from the current law in the Ninth Circuit by not explicitly rejecting or adopting the EEOC guidelines on English-only policies.[11] Rather, the Tenth Circuit discussed the EEOC guidelines and also applied a disparate impact analysis to find that summary judgment for the employer was not appropriate.[12]

The split between the Ninth and the Tenth Circuit is important because it shows that there is a conflict over what analysis, the EEOC guidelines or disparate impact, courts should utilize in considering English-only policies. It is imperative that the courts use one analysis or the other because applying both creates confusion over what policies employers can implement without violating the law and what rights employees have to speak a foreign language in the workplace. The disparate impact analysis should be applied, not the EEOC guidelines, because disparate impact balances the importance of language with the importance of allowing employers to run safe and efficient businesses; and a disparate impact analysis is also consistent with legislative intent.

Part I of this comment addresses the disparate treatment and disparate impact analyses used for claims arising under Title VII. Part I also reviews the EEOC guidelines and their treatment of English-only policies. Part II of this comment explores the Ninth Circuit decisions regarding challenges to English-only policies. Part III discusses the lower courts' decisions and provides a detailed review of *Maldonado*. Part IV analyzes the disparate impact approach and the EEOC guidelines and argues that the disparate impact approach properly balances the rights of employers and employees, unlike the EEOC guidelines, because disparate impact protects language as a part of national origin, while also allowing employers to run safe and efficient businesses. Part IV also argues that the disparate impact approach is consistent with the legislative intent of Title VII.

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7. 29 C.F.R. § 1606.7 (West 2007).
8. Maldonado v. City of Altus, 433 F.3d 1294, 1304 (10th Cir. 2006).
9. Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993).
10. *Maldonado*, 433 F.3d at 1305.
11. *Id.*
12. *Id.* at 1306.

I. BACKGROUND

Claims based on national origin arise under Title VII, which requires either a disparate treatment or a disparate impact analysis. The EEOC, in contrast, has specific guidelines for addressing discrimination claims as a result of English-only policies.

A. Title VII

Under Title VII § 2000e-2(a):

> It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[13]

Courts and legal commentators assert that speaking a foreign language may make someone a protected group member based on national origin.[14] Therefore, claims concerning English-only policies fall under Title VII as either disparate treatment claims or disparate impact claims based on national origin.[15] In the employment context, disparate treatment protects employees against employment practices or policies involving intentional discrimination, while disparate impact protects employees against policies or practices that are substantively neutral, but lead to discrimination in practice.

1. Disparate Treatment

Disparate treatment applies when an employer intentionally discriminates against an employee, usually through an employment action such as hiring, firing or an employment policy, because that employee is a protected group member based on race, color, religion, sex, or national origin under Title VII.[16] The Supreme Court set out a method for proving disparate treatment in *McDonnell Douglas Corp. v. Green*.[17] First, the Court determined that the plaintiff employee bears the initial burden of proof in a disparate treatment claim.[18] If that burden is satisfied, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment action or policy.[19] If the em-

13. 42 U.S.C.A. § 2000e-2(a)(2) (West 2007).

14. Brief for American Civil Liberties Union of Oklahoma Foundation as Amici Curiae Supporting Appellants at 6, Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) (No. 04-6062) [hereinafter Brief for ACLU] ("Courts have long recognized that an individual's primary language is a trait closely tied to national origin."); Wayne N. Outten & Kathleen Peratis, *National Origin Discrimination*, 676 PLI/Lit 291, 299-300, 318-23 (2002); Perea, *supra* note 3, at 274-79.

15. Garcia v. Spun Steak Co., 998 F.2d 1480, 1484 (9th Cir. 1993).

16. *Spun Steak*, 998 F.2d at 1484.

17. 411 U.S. 792, 802-04 (1973).

18. *McDonnell Douglas*, 411 U.S. at 802.

19. *Id.*

ployer succeeds, the burden shifts back to the employee to show that the employer's nondiscriminatory reason for the employment decision or policy is a pretext for discrimination.[20]

The underlying theory of disparate treatment is that a policy or employment decision is discriminatory when an employer treats an employee differently "because of" race, color, religion, sex, or national origin, the protected characteristics covered by Title VII. [21] In *Hazen Paper Company v. Biggins*,[22] the Supreme Court decision turned on whether an employee was terminated *because of* his age in violation of the Age Discrimination in Employment Act (ADEA) or if the employee was terminated because his pension was about to vest, which while illegal, did not violate the ADEA.[23] The Court concluded that even if the reason for the employment action, firing the employee to prevent his retirement plan from vesting, was "correlated with" his age, the correlation was not enough to prove discrimination "because of" age.[24]

Challenges to English-only policies usually involve policies that require all groups to speak English.[25] Even though this type of policy may *correlate to* national origin, because it treats all employees the same way and does not single out employees *because of* national origin, the policy will not ordinarily lead to disparate treatment. In order to prove that an employer implemented an English-only policy *because of* an employee's national origin, the policy would have to be drafted to require "members of one national origin group to speak English while allowing members of another national origin group to speak another language."[26] An English-only policy will usually not be drafted this way. Instead, an English-only policy is more likely to require all employees to speak English, which is substantively neutral,[27] but may have a disparate impact on non-English speaking employees in practice.

2. Disparate Impact

The disparate impact burden-shifting analysis was established in 1971 in the case of *Griggs v. Duke Power Company*.[28] The key difference between disparate treatment and disparate impact is that disparate treatment addresses a policy with a discriminatory intent, while disparate impact addresses a policy that leads to discrimination in practice.[29]

20. *Id.* at 804.
21. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).
22. *Hazen*, 507 U.S. at 604.
23. *Id.* at 609-11.
24. *Id.* at 611.
25. LEWIS & NORMAN, *supra* note 5, at 80.
26. David T. Wiley, Note, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539, 549 (1995).
27. LEWIS & NORMAN, *supra* note 5, at 80 ("[E]mployer practices or rules based on language characteristics will usually . . . be neutral on their face.").
28. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971).
29. *Spun Steak*, 998 F.2d at 1484.

Twenty years later, the Civil Rights Act of 1991 ("1991 Act") reaffirmed that the standard outlined by *Griggs* is the standard that should be applied in disparate impact cases.[30]

The *Griggs* disparate impact analysis has four parts. First, the plaintiff employee must identify a discriminatory practice, which in the context of this paper is an English-only policy.[31] Second, the plaintiff employee must show that the practice has a discriminatory impact in operation, regardless of the employer's intent.[32] To show this discriminatory impact, the employee may not simply claim that the policy harmed members of his or her protected class.[33] The employee must prove that the "terms, conditions, or privileges of employment" were denied to the protected class and that this was a significant harm that did not affect employees that were not part of the protected class.[34] Third, the employer may show business necessity as an affirmative defense.[35] The Court in *Griggs* emphasized that in a disparate impact analysis "[t]he touchstone is business necessity" because "good intent or absence of discriminatory intent does not redeem employment procedures."[36] To protect employees from the "consequences of employment practices, not simply the motivation," the *Griggs* Court found that there must be a business necessity to justify an employment policy or procedure that discriminates in practice.[37]

While the description of business necessity from the *Griggs* case is ambiguous, the 1991 Act affirmed that under *Griggs* the employer had the burden of proof to show business necessity as an affirmative defense "to justify a practice shown to have a disparate impact."[38] The 1991 Act stated that "statistical reports, validation studies, expert testimony, [or] prior successful experience" may prove business necessity.[39] Despite the lack of a clear definition of business necessity, the burden lies with the employer to show business necessity once an employee proves a policy creates a disparate impact.

Finally, if the employer proves business necessity the burden shifts back to the plaintiff employee who can still prove a Title VII violation by showing there is a lesser discriminatory alternative to the English-only

30. 42 U.S.C.A. § 2000e-2(k) (West 2007); H.R. REP. NO. 102-40(I), at 24 (1991) ("In Griggs and its progeny, the courts fashioned a workable and widely accepted set of legal principles for resolving the problems caused by employment practices which, while neutral on their face, disproportionately exclude qualified workers on the basis of their sex, national origin, race or religion.").
31. *Griggs*, 401 U.S. at 431.
32. *Id.*
33. *Spun Steak*, 998 F.2d at 1486.
34. *Id.*
35. *Griggs*, 401 U.S. at 431.
36. *Id.* at 431-32.
37. *Id.* at 432.
38. H.R. REP. NO. 102-40(I), at 28 (1991).
39. *Id.*, at 38.

policy.[40] The employee can prove this by showing that another method would serve the employer's purposes without the disparate impact of the current practice.[41] For example, if an employer requires all potential job applicants without a high school diploma to pass a standardized test to be considered for a job and the test excludes a particular race, the employee may show there are other tests or methods of selecting viable job applicants as a less discriminatory alternative.[42]

In *Personnel Administrator of Massachusetts v. Feeney*,[43] the Supreme Court found that a statute requiring a hiring preference for veterans, which excluded mostly women, was not discriminatory based on sex because all non-veterans, male and female alike, were equally burdened by the statute.[44] A policy has a disparate impact when it places a group protected under Title VII at a relative disadvantage, not when it places protected and non-protected groups alike at a disadvantage.[45]

Under an English-only policy requiring all employees to speak English without exception, employees are treated equally for the purposes of disparate treatment analysis and are not entitled to recover for discrimination.[46] However, because non-English speakers may be alienated from the English speakers and placed at a disadvantage in practice, disparate impact analysis provides a promising alternative for proving discrimination. While facially neutral, these policies have a more burdensome effect on persons of particular national origins.[47] Accordingly, most claims regarding English-only policies should require a disparate impact analysis.

B. EEOC Guidelines

The EEOC guidelines recommend different burdens specifically for cases dealing with English-only policies.[48] First, the EEOC guidelines state that an English-only policy "requiring employees to speak only English at all times" creates a presumption that the policy violates Title VII.[49] Second, the guidelines address English-only policies applied only at certain times.[50] An employer may show that the policy is "justified by business necessity" under the guidelines only if the English-only policy is limited to specific periods during the workday.[51] Finally, there must

40. *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 376-77 (1988).
41. H.R. REP. NO. 102-40(I), at 42 (1991).
42. *See Griggs*, 401 U.S. at 431-33; PLAYER, *supra* note 40, at 376-77.
43. 442 U.S. 256 (1979).
44. *Feeney*, 442 U.S. at 275.
45. *See id.*
46. *See Spun Steak*, 998 F.2d at 1486.
47. *See Maldonado*, 433 F.3d at 1298; *Spun Steak*, 998 F.2d at 1483; Gutierrez v. Mun. Ct., 838 F.2d 1031, 1036 (9th Cir. 1988).
48. 29 C.F.R. § 1606.7 (2007).
49. *Id.*
50. *Id.*
51. *Id.*

be notice of the English-only policy or any employment action taken against an employee based on the policy will be considered evidence of a Title VII violation.[52]

II. THE NINTH CIRCUIT

While many lower courts have considered English-only policies in the workplace since the enactment of the EEOC guidelines, the Ninth Circuit has been the leading source of case law on the issue.[53]

A. Jurado v. Eleven-Fifty Corporation[54]

A radio disc jockey was fired when he refused to comply with an English-only order from his employer to alter his radio personality by eliminating the "street Spanish" used in his program.[55] The employer decided to eliminate Spanish because the show was not attracting the Hispanic demographic.[56]

The Ninth Circuit primarily applied a disparate treatment analysis.[57] The court found that the radio station did not have a discriminatory motive for ordering an English-only approach on the radio show.[58] The court found the decision was made strictly based on the radio station's attempt to attract listeners.[59] Therefore, the court concluded summary judgment for the employer was properly granted.[60]

The court briefly discussed the employee's disparate impact claim, citing *Griggs* for the requirement that the employee has the burden of establishing a prima facie disparate impact case.[61] The court concluded that the lower court properly decided that the policy did not "disproportionately disadvantage" Hispanics and, therefore, the employee did not establish a prima facie case.[62]

B. Gutierrez v. Municipal Court[63]

The Municipal Court in Los Angeles employed bilingual deputy court clerks to translate for the Spanish speaking public.[64] The Municipal Court put a policy into place requiring English-only at all times during the work day, unless employees were translating for a member of the

52. *Id.*
53. Garcia v. Spun Steak Co., 998 F.2d 1480, 1480 (9th Cir. 1993), Gutierrez v. Mun. Ct., 838 F.2d 1031, 1031 (9th Cir. 1988), Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1406 (9th Cir. 1987).
54. 813 F.2d 1406 (9th Cir. 1987).
55. *Jurado*, 813 F.2d at 1408.
56. *Id.*
57. *Id.* at 1409.
58. *Id.* at 1410.
59. *Id.*
60. *Id.* at 1411.
61. *Id.* at 1412.
62. *Id.*
63. 838 F.2d 1031 (9th Cir. 1988).
64. *Gutierrez*, 838 F.2d at 1036.

public.[65] Originally, this policy did not include breaks, but it was extended so that English was required during lunch and breaks.[66]

The Ninth Circuit reviewed the preliminary injunction issued by the district court to prevent employers from enforcing the English-only policy.[67] After establishing that "language is an important aspect of national origin" and discussing the requirements from the EEOC guidelines, the court adopted the EEOC's "business necessity test."[68] The court also went on to find that "[t]here can be no doubt that the use of disparate impact analysis is appropriate here."[69] The court affirmed that the English-only policy created a disparate impact because "the prohibition on intra-employee communications in Spanish is sweeping in nature and has a direct effect on the general atmosphere and environment of the work place."[70] Next, the court found that all of the business necessities presented by the employer were not adequate, including the justifications that the United States is an English speaking country and California is an English speaking state; permitting Spanish to be spoken by employees outside of their work duties is disruptive; the policy promotes racial harmony; and supervisors do not speak or understand Spanish.[71] Consequently, the court concluded that the injunction was proper.[72]

C. Garcia v. Spun Steak[73]

An English-only policy was implemented by the employer, a poultry and meat products producer, to promote racial harmony, improve worker safety, and facilitate better supervision.[74] The policy allowed employees to speak Spanish during breaks and excluded employees who did not speak English.[75] Two bilingual employees, production line workers for the company, received warning letters when they violated the policy and were no longer allowed to work next to each other.[76]

In contrast to the Ninth Circuit's decision in *Gutierrez*, the Ninth Circuit in *Spun Steak* explicitly rejected the EEOC guidelines and applied a disparate impact analysis.[77] The court reasoned that the EEOC guidelines failed to achieve a balance between the employer's freedom to

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1039-40.
69. *Id.* at 1040.
70. *Id.* at 1041.
71. *Id.* at 1041-44.
72. *Id.* at 1045.
73. 998 F.2d 1480 (9th Cir. 1993).
74. *Spun Steak*, 998 F.2d at 1483.
75. *Id.*
76. *Id.*
77. *Id.* at 1489.

run a business and the prevention of discrimination, which was inconsistent with the legislative intent of Title VII.[78]

The court also noted that while the facts in the case did not show a Title VII violation:

> Whether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate. The dynamics of an individual workplace are enormously complex; we cannot conclude, as a matter of law, that the introduction of an English-only policy, in every workplace, will always have the same effect.[79]

Under the disparate impact analysis, the court concluded that the employees did not establish a prima facie case.[80] The court emphasized that there was no evidence that the policy created a hostile working environment.[81] The court also noted that the employees did not have a right to self-expression in the workplace, and as bilingual speakers they were only inconvenienced by the policy.[82] Finally, the court concluded that even though the bilingual employees did not establish a prima facie case, the case for monolingual employees was remanded to consider if the policy created a disparate impact on those employees.[83]

III. TENTH CIRCUIT

The district courts in the Tenth Circuit did not follow the lead of the Ninth Circuit. Likewise, the Tenth Circuit failed to take a definitive stance on the EEOC guidelines or the disparate impact analysis.

A. Lower Court Decisions Leading up to Maldonado

The decisions of the district courts in the Tenth Circuit leading up to *Maldonado v. City of Altus*,[84] failed to embrace either the disparate impact analysis or the EEOC guidelines.[85]

In *Tran v. Standard Motor Products*,[86] employees alleged an English-only policy that was applied during employee-supervisor meetings and while employees were working violated Title VII.[87] The district court analyzed the issue on the premise that while the Tenth Circuit had

78. *Id.* at 1489-90.

79. *Id.* at 1489 (responding to the employees' request for the court to adopt a per se rule that English-only policies always create a hostile working environment).

80. *Id.* at 1490.

81. *Id.* at 1489.

82. *Id.* at 1487-88.

83. *Id.* at 1490.

84. 433 F.3d 1294 (10th Cir. 2006).

85. Barber v. Lovelace Sandia Health Sys., 409 F. Supp. 2d 1313, 1327-28 (D.N.M. 2005), Olivarez v. Centura Health Corp., 203 F. Supp. 2d 1218, 1224-25 (D. Colo. 2002), Tran v. Standard Motor Products Inc., 10 F. Supp. 2d 1199, 1210-11 (D. Kan. 1998).

86. 10 F. Supp. 2d 1199 (D. Kan. 1998).

87. *Tran*, 10 F. Supp. 2d at 1202.

"not addressed the issue" of the EEOC guidelines, the guidelines "offer some guidance."[88] Based on this, the court found that the business necessities given by the employer including: "(1) to ensure that all employees and supervisors could understand each other during cell meetings; (2) to prevent injuries through effective communication on the production floor; and (3) to prevent non-Vietnamese employees from feeling as if they were being talked about by Vietnamese employees" did prove legitimate business necessities for the policy.[89] The court also found that even if these were not business necessities, the employee did not prove that the policy led to discrimination or "adversely affected his employment in any way."[90] Therefore, the court upheld summary judgment for the employer.[91] However, the court pointed out that the analysis was fact-based and "the court does not foreclose the possibility that in some circumstances, an English-only policy may constitute a violation of Title VII."[92]

The court in *Olivarez v. Centura Health Corporation*[93] similarly skirted the issue of the EEOC Guidelines.[94] An employee, unsatisfied with the way the employer handled his complaints of discrimination, quit his job and alleged disparate treatment under Title VII, in part because of a policy prohibiting Spanish.[95] Here, the district court did not adopt or reject the EEOC guidelines, even though the employer relied on the EEOC guidelines to prove business necessity.[96] Instead the court, granting summary judgment for the employer, simply stated the employee did not show that the English-only policy "resulted in a job detriment to him."[97]

Like in *Tran* and *Olivarez*, the court in *Barber v. Lovelace Sandia Health Systems*[98] also declined to definitively adopt or reject the EEOC guidelines, but still considered the guidelines while analyzing the English-only policy.[99] The employer, Lovelace, a New Mexico health care provider, announced the implementation of an English-only policy at a staff meeting at one of its facilities.[100] Two bilingual employees, working at the Lovelace facility at the time, felt they were carefully scrutinized to make sure they were not using Spanish after the policy was im-

88. *Id.* at 1210.
89. *Id.*
90. *Id.* at 1211.
91. *Id.*
92. *Id.* at 1211 n.18.
93. 203 F. Supp. 2d 1218 (D. Colo. 2002).
94. *See Olivarez*, 203 F. Supp. 2d at 1224-25.
95. *Id.* at 1220-21, 1223.
96. *See id.* at 1224.
97. *Id.* at 1225.
98. 409 F. Supp. 2d 1313 (D.N.M. 2005).
99. *See Barber*, 409 F. Supp. 2d at 1327-28.
100. *Id.* at 1319.

plemented.[101] One employee resigned and the other was transferred to another Lovelace clinic.[102] The district court stated that in analyzing the case it would presume that the Tenth Circuit would give deference to the EEOC guidelines and presume that the employees established a prima facie case of disparate treatment.[103] Under these assumptions, the court found that the employer had a "legitimate and non-discriminatory reason for the policy."[104] Therefore, the court granted summary judgment for the employer.[105]

All of these cases show that the lower courts did not want to adopt or reject the EEOC guidelines without guidance from the Tenth Circuit.[106] However, instead of offering guidance, the Tenth Circuit failed to clarify this confusion by embracing a disparate impact analysis and referencing the EEOC guidelines in an opinion considering an English-only policy.[107]

B. Maldonado v. City of Altus[108]

In 2002, the City of Altus, Oklahoma, established an English-only policy.[109] The policy required City employees to speak English for all "work related and business communications during the work day."[110] However, the policy allowed employees to communicate with a Spanish speaking "citizen, business owner, organization or criminal suspect" in Spanish, and the policy did not apply during lunch, breaks, or when employees were involved in personal conversations.[111] The policy also allowed employees with limited English skills to "discuss the situation with the department head and the Human Resources Director to determine what accommodation is required and feasible."[112]

Once the written policy was established, the employees claimed that in practice the policy was more expansive than the written requirements specified.[113] The employees asserted that the policy restricted them from speaking Spanish whenever a non-Spanish speaker was present, including during breaks and on the phone.[114] The employees also complained that they were teased by non-Spanish speaking employees about the Eng-

101. *Id.* at 1320.
102. *Id.* at 1324-25.
103. *Id.* at 1335-36.
104. *Id.* at 1337-38.
105. *Id.* at 1334.
106. *See id.* at 1334-35; Olivarez v. Centura Health Corp., 203 F. Supp. 2d 1218, 1224-25 (D. Colo. 2002); Tran v. Standard Motor Prod., Inc., 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998).
107. Maldonado v. City of Altus, 433 F.3d 1294, 1303-06 (10th Cir. 2006).
108. 433 F.3d 1294 (10th Cir. 2006).
109. *Maldonado*, 433 F.3d 1294 at 1299-1300.
110. *Id.* at 1299.
111. *Id.*
112. *Id.*
113. *Id.* at 1300.
114. *Id.*

lish-only policy.[115] The City's Street Commissioner was aware of the tension the policy created because he told one of the Spanish speaking employees that "he was informing them of the English-only policy in private because [he] had concerns about 'the other guys making fun of [them].'"[116]

The employer claimed the policy was put in place to facilitate effective radio communication on the city radios, to address complaints that non-Spanish speaking coworkers felt uncomfortable when Spanish speaking employees were "speaking in front of them in a language they could not understand," and to increase safety around heavy equipment.[117] The EEOC tried to resolve the dispute over the policy and was unsuccessful.[118] The district court granted summary judgment and dismissed all of the employee's claims, including the claim that Title VII was violated under a disparate impact and a disparate treatment analysis.[119]

The Tenth Circuit considered a claim of discrimination based on national origin under Title VII, in addition to several other claims not arising under Title VII.[120]

The court addressed the employees' Title VII claim using a disparate impact analysis. First, the court began by confirming that an English-only policy may qualify as national origin discrimination.[121] The court also established that the employees did not have to prove discriminatory intent; they just had to prove that the policy led to disparate impact, in this case by creating a hostile working environment for Hispanics based on the English-only policy.[122] Second, the court explained that once an employee establishes disparate impact, the employer has the burden to show business necessity as articulated by the Supreme Court in *Griggs*.[123]

The court analyzed the employee's prima facie case, explaining that when determining if there is enough harm to establish a prima facie case of disparate impact, each English-only policy case "turns on its facts." The court cited the teasing and the extension of the English-only policy into breaks, lunch hours, and private phone calls as evidence "that the English-only policy creates a hostile atmosphere for Hispanics in their workplace."[124]

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115. *Id.* at 1301.
116. *Id.*
117. *Id.* at 1300.
118. *Id.* at 1301.
119. *Id.* at 1302.
120. *Id.* at 1298 (discussing all the claims brought by the plaintiffs including equal protection claims, a claim of retaliation, and a claim that the First Amendment was violated by the policy).
121. *Id.* at 1303.
122. *Id.* at 1303-04.
123. *Id.* at 1304.
124. *Id.*

Next, the court considered the EEOC guidelines. The court hesitated to make a decision on the effect of the guidelines, pointing out that while the Ninth Circuit rejected the guidelines altogether, the decision in this case only required the court to find that the EEOC was reasonable on the matter so it would not be "unreasonable for a juror to agree that the City's English-only policy created a hostile work environment for its Hispanic employees."[125] In its final conclusion, the Tenth Circuit did not adopt the EEOC guidelines stating:

> [W]e are not suggesting that the guideline is evidence admissible at trial or should be incorporated in a jury instruction. What we are saying is only that a juror presented with the evidence presently on the record in this case would not be unreasonable in finding that a hostile work environment existed.[126]

The court also found that a reasonable person may find there was not a business necessity for the English-only policy, so summary judgment for the employer was not appropriate.[127]

Finally, the court found summary judgment on the disparate treatment claim was not proper because the employees had evidence of a hostile work environment, which may show the employer's intent to discriminate.[128]

IV. ANALYSIS

There is value in language as a reflection of culture and ethnicity, but there is also value in allowing employers to run their businesses safely and effectively. The disparate impact analysis under Title VII balances these values and is also consistent with the legislative intent of Title VII.

A. Problems with the EEOC Guidelines

The contrast between the EEOC guidelines and a disparate impact analysis illustrates the problems with applying the guidelines. The EEOC guidelines differ from a disparate impact analysis because they create a presumption that English-only policies discriminate based on national origin without requiring proof of discrimination.[129] Unlike disparate impact, once there is evidence proving an employer implemented an English-only policy at all times or only at certain times, an employee is relieved of any burden of proving the policy led to discrimination or

125. *Id* at 1305-06.
126. *Id.* at 1306.
127. *Id.* at 1307
128. *Id.* at 1308; *see also id.* at 1298 (reversing summary judgment on the intentional discrimination and equal protection claims and affirming summary judgment on the remaining claims, including a claim of retaliation and a claim that the First Amendment was violated by the policy).
129. Outten & Peratis, *supra* note 14, at 299-300, 321.

caused harm to employees in a Title VII protected class.[130] Additionally, even if there is no discrimination or harm, a policy applied at all times will be presumed to violate Title VII under the EEOC guidelines.[131] A policy applied only at certain times may not violate Title VII under the EEOC guidelines if there is a business necessity for the policy, but this presumption again arises without a requirement that there is discrimination or harm to an employee in a Title VII protected class.[132]

This is problematic because without harm, the Supreme Court has found there is no actionable discrimination claim.[133] In a sexual harassment case arising under Title VII, the Supreme Court found that harm must be "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment'" in order for there to be an actionable discrimination claim.[134] Even though the case concerned intentional sexual harassment, the Ninth Circuit, considering an English-only policy, relied on the case to find that discrimination must be severe or pervasive because the Supreme Court's rationale also applied to neutral policies that led to discrimination.[135]

The presumption under the EEOC guidelines that an English-only policy discriminates also requires an employer that implemented an English-only policy at certain times to provide a defense for discrimination that may have never occurred or harm that is not "pervasive."[136] If the policy is applied at all times, the employer has no defense, even if the policy does not lead to discrimination or harm.[137] Under the EEOC guidelines, discrimination would be presumed in the case of the radio DJ in *Jurado* who was limited by an English-only policy that did not allow him to continue to use "street Spanish" in his radio program, regardless of whether this limitation was harmful or discriminatory.[138] Disparate impact, on the other hand, recognizes that if there is no discrimination or harm, an employer should not be penalized for an employment policy.[139] In the case of the radio DJ, the DJ may still show discrimination, but if there is no discrimination in practice or harm as a result of the policy, the case ends and there is no need for the employer to show business necessity to defend a non-discriminatory practice.[140]

The EEOC's attempt to place the burden for a Title VII claim concerning an English-only policy on the employer demonstrates its failure

130. *Id.* at 320-21.
131. *Id.*
132. *Id.*
133. *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).
134. *Vinson*, 477 U.S. at 67.
135. Garcia v. Spun Steak Co., 998 F.2d 1480, 1488-89 (9th Cir. 1993).
136. *Spun Steak*, 998 F. 2d at 1489.
137. *See* Outten & Peratis, *supra* note 14, at 320-21.
138. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1409 (9th Cir. 1987).
139. *Jurado*, 813 F.2d at 1409.
140. *See id.*

to recognize judicial precedent, academic and scholarly analysis, and the legislative intent of the 1991 Act. Furthermore, the EEOC ignores the valid competing interests of employers and employees when considering a discrimination claim under Title VII.[141]

B. Disparate Impact Protects Employee Language and Employer Rights

1. Language and National Origin

Language is an integral part of national origin because language is a reflection of a person's culture and ethnicity. As a result, discrimination can occur based on the language a person speaks. Accordingly, language as a part of national origin can be protected under Title VII.[142]

Sociologists and sociolinguistics recognize that language is part of national origin because it is a reflection of ethnicity, community, and cultural traits.[143] The existence in American society of foreign language newspapers, television, and schools demonstrates that foreign language is a thread that links communities and cultures that speak common languages together.[144] For example, Spanish is the language used by the ancestors of Latinos and links that population together by national origin.[145] Language also affects the way a person's national origin is perceived because people react to others based "upon our perception of their racial and ethnic status . . . [e]thnic 'traits' and personal characteristics are often more accurate predictors of prejudicial behavior than a person's actual national origin."[146] Courts have also recognized that language is tied to culture and ethnicity making it a part of a person's national origin.[147]

In *Gutierrez*, the Ninth Circuit emphasized the importance of language.[148] The court discussed the merits of having a multicultural society and explained the connection between a culture and that culture's language stating that "language remains an important link to . . . ethnic

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141. *See* 42 U.S.C.A. §2000e-2(k) (West 2007); Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986); Maldonado v. City of Altus, 433 F.3d 1294, 1303, 1305 (10th Cir. 2006); Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993); Gutierrez v. Mun. Ct., 838 F.2d 1031, 1039-40 (9th Cir. 1988); H.R. REP. NO. 102-40(I), at 24 (1991); Outten & Peratis, *supra* note 14, at 321.

142. Brief for ACLU, *supra* note 14, at 5-6; Outten & Peratis, *supra* note 14, at 299-300, 318-23; Perea, *supra* note 3, at 274-79.

143. Perea, *supra* note 3, at 276 ("It is through the expression of ethnicity, one's cultural continuity and cultural traits, that 'national origin' has perceptible meaning. Primary language is recognized in sociology and sociolinguistics as a fundamental aspect of ethnicity.").

144. *Id.* at 278 ("The existence in the United States of a thriving ethnic mother-tongue press, non-English commercial broadcasting, and schools designed to preserve foreign languages demonstrates that primary language is fundamental to ethnicity.").

145. David Ruiz Cameron, *How the Garcia Cousin's Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1364 (1997).

146. Outten & Peratis, *supra* note 14, at 300-01.

147. *Gutierrez*, 838 F.2d at 1039.

148. *See id.* at 1038-40.

culture and identity . . . [t]he primary language not only conveys certain concepts, but is itself an affirmation of that culture."[149] The court explained that in order to protect language it adopted the "EEOC's business necessity test."[150] By specifically adopting the business necessity part of the EEOC guidelines, this decision shows that it is not necessary to apply the EEOC guidelines as a whole to protect language as a part of national origin. Disparate impact uses business necessity and does not presume harm, which is consistent with the *Gutierrez* court's emphasis on the proper "balance" between the "individual's interest in speaking his primary language and any possible need of the employer."[151] When the court adopted a business necessity test and applied the disparate impact analysis to come to a result that protected the employees from discrimination based on national origin, the court demonstrated that disparate impact should be applied, rather than the EEOC guidelines.[152]

In contrast, the *Spun Steak* court properly rejected the EEOC guidelines, but failed to consider the importance of language. The court focused on the fact that the bilingual employees spoke English, and therefore, were able to comply with the English-only policy.[153] The court's focus on the feasibility of compliance with the English-only policy was misplaced. Title VII protects employees from policies they should not have to comply with because the policies interfere with the culture and ethnicity associated with language as a part of national origin.[154] The court should have focused on whether the English-only policy discriminated because it limited, classified, or segregated the employees.[155] The *Maldonado* court corrected this by applying disparate impact to protect language as a part of national origin without focusing on the ability of a bilingual speaker to comply with an English-only rule.[156]

The Tenth Circuit in *Maldonado* demonstrated that language can be protected under the disparate impact analysis by making the role of language an integral part of the disparate impact analysis.[157] By comparing an English-only policy to a policy requiring religious groups to wear a badge, the *Maldonado* court properly addressed the protection required for employees with a primary language other than English. The court explained:

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149. *Id.* at 1039.
150. *Id.* at 1040.
151. *Id.*
152. *Id.* at 1040, 1044-45.
153. *Spun Steak*, 998 F.2d at 1487.
154. *See* Cameron, *supra* note 145, at 1352-54.
155. *Id.* at 1362 ("The fair—and literal—reading of the statute is that limiting, segregating, or classifying an employee 'in any way' which would even 'tend' to deprive her of employment opportunities, or to 'adversely affect' her employment status, is 'unlawful.'").
156. Juliet Stumpf, *English-Only Cases: Litigating the Diverse Workplace*, 34 A.B.A. SEC. LABOR AND EMPLOYMENT LAW 6 (2006).
157. *Maldonado*, 433 F.3d at 1304-05.

> A policy requiring each employee to wear a badge noting his or her religion, for example, might well engender extreme discomfort in a reasonable employee who belongs to a minority religion, even if no co-worker utters a word on the matter. Here, the very fact that the City would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics.[158]

Based on the understanding of the value of language as a part of national origin, the employee was able show a prima facie case that an English-only policy caused disparate impact based on national origin.[159] The court referenced the EEOC guidelines only to show that it is reasonable for a jury to conclude there may be a hostile work environment as the result of an English-only policy, not to show that national origin can only be protected by a presumption that English-only policies always create a hostile work environment.[160] This demonstrates that the Tenth Circuit did not need to apply the EEOC guidelines to protect employees from discrimination.

2. Employer Rights

There is no exact definition of the business necessity that employers are required to prove in a disparate impact analysis.[161] However, there is good reason for allowing employers to make decisions on how to effectively run their businesses.

First, employers need the freedom to enact policies to run their businesses safely. In an article focusing on the importance of protecting language as a part of national origin, the author concedes that effective supervision is a legitimate business justification for an English-only policy.[162] Moreover, if employers need employees to work in hazardous work environments it is in the best interest of the employer, as well as the employee, that there is effective communication in case of an emergency: "In hazardous or potentially hazardous work environments or in emergency situations, safety is always a legitimate business interest."[163]

The argument may be made that hazardous work environments are not safer when an English-only policy is in place. In the extreme, the argument may be extended to claim that these policies prevent an employee from reporting an emergency situation because that employee cannot report the emergency in English, but is afraid to violate the policy

158. *Id.* at 1305.
159. *See id.* at 1304-06.
160. *Id.* at 1306.
161. *See* H.R. REP. NO. 102-40(I), at 32-35 (1991).
162. Perea, *supra* note 3, at 307.
163. Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory under Title VII*, 74 MINN. L. REV. 387, 434 (1989).

by reporting it in his or her primary language.[164] The court in *Maldonado* counters this argument effectively when it points out that, "[i]t would be unreasonable to take offense at a requirement that all pilots flying into an airport speak English in communications with the tower or between planes."[165] The *Maldonado* court's analogy demonstrates that employers are entitled to run a safe business and implement policies to facilitate safety.[166] The EEOC guidelines fail to reflect this legitimate right of employers by placing the burden to show business necessity on the employer first, regardless of whether the policy has a discriminatory impact.[167]

Second, an employer needs the freedom to run his or her business productively and efficiently.[168] The Ninth Circuit acknowledged the freedom of a business to make policies to run a productive business in *Jurado*.[169] The court, applying a disparate treatment analysis and a disparate impact analysis, emphasized that a radio DJ can be required to use English only on his program because "[s]uccess in radio depends on appealing to specific segments of the listening community," which is a legitimate business interest.[170] Furthermore, the Fifth Circuit, in a case on an English-only policy issued before the EEOC guidelines, recognized that "[j]udges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment."[171]

The Ninth Circuit went even further in recognizing the rights of employers to run their businesses in *Spun Steak* noting that:

> A privilege, however, is by definition given at the employer's discretion; . . . an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity.[172]

While these cases emphasize the rights of employers, the *Maldonado* court's analysis of business necessity shows that while businesses are allowed some deference to make policies to effectively and safely run their businesses, a disparate impact analysis does not over-

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164. Lisa L. Behm, Comment, *Protecting Linguistic Minorities under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 599 (1998).

165. *Maldonado*, 433 F.3d at 1305.

166. *See id.* at 1306-07.

167. *Id.* at 1305.

168. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (discussing an employer's right to determine how to properly run a business).

169. *Jurado*, 813 F.2d at 1410.

170. *Id.*

171. Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980).

172. *Spun Steak*, 998 F.2d at 1487.

value this deference to employer's needs at the cost of allowing discrimination against employees.[173] For example, the *Maldonado* court indicates that an English-only policy to facilitate communication over the company radio may be a legitimate business necessity.[174] However, the court found that there was no evidence that the policy was enacted to correct this problem or that the problem even existed, so the court did not affirm summary judgment for the employer.[175] This demonstrates that properly applied, business necessity does not sacrifice employees' rights because employers must have a legitimate business necessity, not just an explanation, for a policy that discriminates in practice.[176] Moreover, the Amicus Curiae Brief from the ACLU on the side of the employees in *Maldonado*, while favoring the EEOC guidelines, spent half the brief applying a disparate impact analysis, showing it is a standard that can be applied fairly.[177] Overall, the *Maldonado* court's opinion demonstrates that a disparate impact analysis can be applied to balance the rights of employers and prevent discrimination, without protecting employees or employers to the disadvantage of the other party.

C. Legislative Intent

The 1991 Act unequivocally demonstrated the legislative intent to codify the disparate impact analysis set forth in *Griggs*.[178] The House Report noted that "[t]he *Griggs* decision has had an extraordinarily positive impact on the American Workplace."[179] Moreover, the House Report on the 1991 Act pointed out the test set forth by *Griggs* favors both employers and employees by improving working conditions and improving procedures and standards used by employers.[180]

Even prior to 1991, courts considered the legislative intent of Title VII to create a balance between preventing discrimination and preserving an employer's freedom to run a business.[181] The Supreme Court, in a case considering gender discrimination under Title VII, stated that its repeated "emphasis on 'business necessity' in disparate-impact cases . . . and on 'legitimate, nondiscriminatory reason[s]' in disparate-treatment cases . . . results from our awareness of Title VII's balance between employee rights and employer prerogatives."[182] In contrast, the approach in the EEOC guidelines of presuming that an English-only policy is dis-

173. *See Maldonado*, 433 F.3d at 1306.
174. *See id.* at 1306-07.
175. *Id.*
176. *See id.* at 1306.
177. Brief for ACLU, *supra* note 14, at 9.
178. *See* H.R. REP. NO. 102-40(I), at 23-28 (1991).
179. *Id.* at 25.
180. *Id.* ("Major corporations have had to rethink their personnel policies . . . . In doing so, many found that they have improved the working conditions of all employees . . . there have been improvements in their procedures and standards . . . .").
181. Price Waterhouse v. Hopkins, 490 U.S. 228, 242-43 (1989).
182. *Price Waterhouse*, 490 U.S. at 242-43.

criminatory fails to achieve this balance because it favors "employee rights" over "employer prerogatives."[183]

In rejecting the EEOC guidelines in *Spun Steak*, the Ninth Circuit recognized the guidelines go against the legislative intent behind Title VII:

> It is clear that Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer. In striking that balance, the Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof.[184]

The Tenth Circuit opinion in *Maldonado* is not consistent with the legislative intent of Title VII because the court refers to the EEOC guidelines, but applies a disparate impact analysis. The court pointed out the EEOC guidelines are "'not controlling upon the courts by reason of their authority'" and proceeded to give minimal importance to the EEOC guidelines.[185] However, instead of deferring to the legislative intent of Title VII and proceeding with the disparate impact analysis that the opinion relied on up until that point, the court pointed out that while it is "not suggesting that the guideline is evidence admissible at trial or should be incorporated in a jury instruction," it is suggesting that the guidelines are an "indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference."[186] In light of this discussion of the EEOC guidelines, it may have been logical for the court to draw a conclusion about the role of the EEOC guidelines and a separate conclusion about a disparate impact analysis, but the court did not draw a conclusion on either analysis.[187] Also, the court cited the EEOC guidelines to determine that a reasonable jury may conclude that an English-only policy creates a hostile work environment.[188] However, a reasonable jury may draw the same reasonable conclusions based on a disparate impact analysis, and therefore, any reference to the EEOC guidelines is unnecessary and confusing.[189] While the court failed to recognize the legislative intent of Title VII, it still properly applied a disparate impact analysis.

The impact of this inconsistency in the courts is demonstrated in the brief drafted by the ACLU on the side of the employees in *Maldonado*

183. *See Spun Steak*, 998 F.2d at 1489-90.
184. *Id.* at 1490.
185. *Maldonado*, 433 F.3d at 1305-06 (citing *Spun Steak*, 998 F.2d at 1489-90).
186. *Id.* at 1306.
187. *Id.*
188. *Id.*
189. *See id.* at 1303-06.

that was compelled to apply both the EEOC guidelines and a disparate impact analysis.[190] This confusion can be corrected if future decisions from all the circuits follow the legislative intent of Title VII and use a disparate impact analysis.

CONCLUSION

The conflict between the Ninth Circuit's complete rejection of the EEOC guidelines and the Tenth Circuit's hesitation to reject the guidelines outright demonstrates that there needs to be an affirmative decision on what standard to apply when an English-only policy is at issue. The EEOC guidelines presume that English-only policies cause harm, while a disparate impact analysis uses burden shifting, which preserves the balance between the needs of employers and the protection of employees from discrimination. Without a definitive adoption of a disparate impact analysis or the EEOC guidelines, employers and employees cannot know what policies constitute discrimination under Title VII. In order to resolve this conflict, the disparate impact approach should be uniformly accepted. As the country's foreign population continues to grow, Title VII's protection of national origin becomes increasingly important and the disparate impact approach should be utilized by the courts in order to preserve legislative intent, protect employers by allowing employers to run business safely and effectively, and protect language as an integral part of a person's national origin.

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190. Brief for ACLU, *supra* note 14, at 9.

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