

# **Language diversity and discrimination in the American workplace: Legal, ethical, and practical considerations for management**

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## **ABSTRACT**

The cultural, ethnic, and national origin diversity of the United States, and concomitantly the diversity of the U.S. workforce, including the language diversity of employees, has produced a reaction by employers to the use of languages other than English in the workplace. Consequently, employer language policies, particularly language restrictions in the form of English-only rules, have spawned a spate of legal complaints and moral condemnations against these purportedly discriminatory and unethical policies. Tension and conflict at today's typically multicultural workplace have been engendered by the languages that the employees may speak, may wish to speak, and perhaps only can speak. Language policies at the workplace, therefore, have important legal, moral, social, and practical ramifications which are presented in this paper.

Keywords: Language, diversity, discrimination, EEOC, national origin, English-only, business necessity

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## INTRODUCTION

The principal purposes of this article are to examine the laws and legal and management commentary regarding language policies in the workplace, especially the very controversial “English-only” rules. As will be seen, the primary legal challenge to language policies in the workplace is the prohibition against national origin discrimination found in Title VII of the Civil Rights Act of 1964. Also, it should be noted initially that the legal treatment supplied in this article is based primarily on federal law, though some state law is briefly mentioned. The article first discusses culture, language, and diversity in the United States and in the American workforce, with particular attention being paid to very recent Census data as well as information provided by the Equal Employment Opportunity Commission (EEOC). The article then provides an overview of civil rights law, focusing on the prohibition against national origin discrimination and the relationship of language to national origin. In this overview, the authors explain and differentiate a direct evidence type of discrimination case from an indirect case. The authors also explain and differentiate a disparate treatment type of discrimination case from a disparate impact type of case. As will be seen, the latter type of lawsuit is of critical importance in language discrimination law, particularly in challenging English-only policies.

The article next provides an overview of the key federal agency in the U.S. – the EEOC – created and empowered by Congress to enforce civil rights laws. EEOC procedures are briefly discussed. In the next section of the article, the authors address and explain the very important EEOC “guidelines” on language policies in the workplace, particularly concerning English-only rules. The critical distinction the agency makes regarding English-only rules “applied at all times” vs. English-only rules “applied at certain times” is underscored and explicated. In this section reference is made to EEOC precepts on language embodied in the *Code of Federal Regulations* as well as in the agency’s Compliance Manual. In the next section of the article, the authors discuss and analyze federal case law on language discrimination. As will be seen, the law of language discrimination is a bit confusing because there are disagreements between the EEOC and certain federal courts as well as among the federal courts on key substantive and procedural aspects of language discrimination law, especially regarding English-only policies. Nevertheless, the authors strive to make this important area of the law as clear as possible. The authors pay particular attention as to how the courts have defined the “business necessity” test which is the keystone for a valid English-only policy.

The authors then deal with certain language discrimination issues closely related to the main issue of the legality of English-only policies. These additional language areas which are briefly discussed and examined are: English fluency, foreign accent, bilingual employees, non-English-speaking employees, and foreign language fluency. Next, though the major focus of the article is on language discrimination, nonetheless the authors cover briefly the topic of national origin harassment based on language. The authors then discuss the moral and ethical implications that arise when an employer adopts language policies, especially English-only rules. Finally, the authors, based on their analysis of the laws, the legal and management commentary, and their own legal and management experience, make several detailed recommendations to employers and managers as to how to avoid liability for national origin discrimination and harassment generally and specifically when adopting language policies. The authors, in particular, furnish suggestions on how an employer can craft a legal English-only policy; and concomitantly the authors list and explain several examples of “business necessity” which can legally sustain an English-only policy. The goal of the authors is to help employers and managers establish legal,

moral, and efficacious language policies at work while increasing the value to all stakeholders affected by such policies.

## **CULTURE, LANGUAGE, AND DIVERSITY IN THE WORKPLACE**

The increasing diversity of the United States and the country's workforce is clearly reflected by the 2010 census. The Census Bureau reported that as of July 1, 2009, the population of the United States was 307,007,000 (U.S. Census Bureau, 2011 Statistical Abstract, Table 4). From April 1, 2000 to July 1, 2009, there was a population increase of 25,582,000, with the "White alone, not Hispanic" increasing by 4,274,000, but with the Asian population increasing by 3,425,000 and the Hispanic population increasing very substantially by 25,582,000 (U.S. Census Bureau, 2011 Statistical Abstract, Table 5). From 2000 to 2009, the Asian population increased by 32.3% and the Hispanic population increased by 37.1%; but the "White, not Hispanic" category increased by merely 2.2% (U.S. Census Bureau, 2011 Statistical Abstract, Table 6). The Census Bureau reported that for the United States as a whole, the percentage of the foreign born population was 12.5%; but for some states the foreign born percentage was much higher, for example, California at 26.8, New York at 21.7, New Jersey at 19.8, Nevada at 18.9, and Florida at 18.5% (U.S. Census Bureau, 2011 Statistical Abstract, Table 38). The *Sun-Sentinel* (2011) newspaper also reported 2010 census data indicating that for the first time in the history of the United States, the majority of young people in two states – California and New Mexico – now are identified as Hispanic; and in eight additional states – Nevada, Arizona, Texas, Mississippi, Georgia, Florida, Maryland, and Hawaii – "white" children are in a minority compared to children from other racial and ethnic groups combined. Furthermore, the *Sun-Sentinel* (2011) also reported that for the first time in the history of the U.S., births have surpassed immigration as the main cause of the growth in the Hispanic population. In particular, regarding the Mexican-American component of the Hispanic population, the *Sun-Sentinel* (2011) indicated that Mexican-American population increased by 7.2 million as a result of births in the decade ending in 2010, whereas new immigrants added 4.2 million people. The valid point that the *Sun-Sentinel* (2011) made is that the Hispanic population in the U.S. is going to continue to increase regardless of efforts to control immigration and to prevent illegal immigration, especially at the U.S.-Mexico border.

The language data provided by the 2010 census is also very revealing. The Census Bureau reported that in 2008, out of a total population (five years of age and older) of 283,150,000, 34,560,000 spoke Spanish as the language "spoken at home," 2,466,000 spoke Chinese, 1,225,000 spoke Vietnamese, 1,488,000 spoke Tagalog, 1,979,000 spoke French or French Creole, 1,052,000 spoke Korean, and 1,112,000 spoke German as "languages spoken at home" (U.S. Census Bureau, 2011 Statistical Abstract, Table 53). For the states, the percentage of people over five years of age who speak a language other than English at home was a dramatic 42.3% in California, and a very high 33.8% in Texas, 35.4% in New Mexico, 29% in New York, 27.9% in Nevada, 27.5% in Arizona, and 25.9% in Florida (U.S. Census Bureau, 2011 Statistical Abstract, Table 54).

The Equal Employment Opportunity Commission has reported using 2000 census data that about one in ten Americans is foreign born with the largest number of immigrants at that time coming from Latin America and Asia (EEOC, Compliance Manual, Section 13.1, 2011). The proportion of Hispanics in the U.S. has risen substantially, as the EEOC has reported that in 2000 that one in eight Americans is of Hispanic origin.

The composition of the workforce in the United States has grown increasingly more diverse ethnically. The EEOC, again using 2000 census data, has reported that in 1999, immigrant workers numbered 15.7 million, representing 12% of U.S. workers; and also has reported that of the 12.7 million new jobs created in the U.S. between 1990 and 1998, 38%, representing 5.1 million jobs, were filled by immigrants. In 2000, furthermore, Hispanics, Asians, and American Indians made up 15.2% of the workforce employed by private employers having 100 or more employees (EEOC, Compliance Manual, Section 13.1, 2011).

Concomitantly, the number of employees who are not native English speakers has also increased substantially. The EEOC has reported that in the year 2002 approximately 45 million Americans, representing 17.5% of the population, spoke a language other than English in the home; and of these individuals, approximately 10.3 million, representing 4.1% of the total population, spoke little or no English, which was an increase from 6.7 million in 1999. The EEOC also has reported that in 1990 approximately 31.8 million Americans, representing 13.8% of the population, spoke a language other than English in the home; and of these individuals, 6.7 million people, representing 2.9% of the total population, spoke little or no English (EEOC, Compliance Manual, 2011, Note 42). The EEOC, moreover, has reported that for the fiscal year 2002, the agency received 228 charges challenging English-only policies.

The cultural diversity of recent immigrants to the U.S., including the various languages they speak, was also plainly underscored by the *Miami Herald* (Torrens, 2011), which reported that a sizeable number of Latin American immigrants to New York City not only do not speak English, which is understandable, but they also do not speak Spanish! Thus they are at a decided disadvantage in finding employment in New York. What languages then do these immigrants speak? The *Miami Herald* (Torrens, 2011) related that they speak as their primary and perhaps only languages the ancient, indigenous, pre-Columbia languages of their native lands. For example, many Mexicans in New York City speak Mixteco, Chinanteco, Otomi, Nahautl, and Trque; Guatemalans speak Quiche; and Peruvians speak Quechua; and all these languages existed long before the Spanish arrived in the “New World.” Today, however, these immigrants from Latin America are now reported to be taking Spanish classes to learn the “primary” language of their native countries, as apparently not knowing Spanish in New York City, let alone English, is a barrier to employment (Torrens, 2011).

The major reason for the increased language conflict at the workplace, however, is the marked increase in the labor force of employees representing ethnic groups whose primary language is not English. As clearly indicated by the aforementioned EEOC and Census Bureau data, this language trend is bound to continue. As such, significant numbers of new members to the U.S. workforce will be speaking a language other than English as their primary language. Furthermore, it is a reasonable and logical supposition that these employees will be speaking their primary, non-English language to their fellow employees who are members of the same ethnic, cultural, and national origin background.

Accordingly, as the U.S. population and composition of the workforce continues to rapidly become more diverse, the prohibition in Title VII of the Civil Rights Act of 1964 against discrimination based on national origin emerges as even more important in ensuring equality and fairness in employment relationships. One thus would expect that as the number of employees who are bilingual or who do not speak English at all continues to expand, the legal challenges to employer language restrictions, especially English-only policies, will also continue to rise and to acquire greater legal importance. Moreover, as U.S. society becomes increasingly more diverse, including, of course, the U.S. consumer, and as the economy becomes a truly global one,

employers now more frequently seek out bilingual employees. Additionally, employers may require that some employees be fluent in languages other than English. Nonetheless, other employers and their managers and supervisors, who very well may be monolingual, may want to restrict the use of languages other than English in the workplace. Therefore, these employers for a variety of reasons increasingly have implemented and will continue to institute workplace policies that limit the communication by and among employees other than in English, frequently called “English-only” rules. Civil rights and immigrant rights groups, however, have and continue to condemn these policies as illegal, racist, xenophobic, immoral, as well as exhibiting an irrational fear of a traditional, “white,” Anglo, English-speaking society which may feel it is being swamped by “hordes” of Hispanic, Asian, and African and Afro-Caribbean immigrants. Stoter (2008) asserts that “in recent decades, anti-immigration sentiments have been increasing...and English-only rules seem to be the natural response to the growing uneasiness many Americans feel about the recent flux of immigrants” (pp. 597-98). Stoter (2008), in addition, declares that “arguably many English-only rules are linked to the building xenophobia within the nation” (p. 597).

There is, admittedly, a strain in U.S. culture and history of an “American” nation and “American” nationality, encompassing language – the English language – and the English language as the only language spoken by people who are (or were) primarily monolingual. Stoter (2008) notes that the U.S. does not have an “official declared language,” but “nonetheless, thirty states have amended their constitution or adopted legislation to declare English their official language” (pp. 595-96). Yet the old “traditional” belief that immigrants coming to the U.S. should, and must, learn English, and quickly too, may be waning. Furthermore, many people today see any attempts – whether by government entities or private sector employers – to discourage or restrict the use of languages other than English as a violation of their legal civil right to equality and their moral right to be treated with dignity and respect.

Nevertheless, as more and more non-English speaking immigrants “flood” the workplace, some employers are rightfully concerned that the workplace will become deluged with a variety of languages, thereby impeding safety, efficiency, harmony, productivity, and possibly alienate a customer base. Certain employers as a result believe there is a need to adopt English-only policies to combat what they feel is too much diversity in language at the workplace. Moreover, the more culturally diverse the country and the workforce become, the more important, it is often asserted, will it be to have a common language – the English language. As such, certain employers have adopted restrictive language policies prohibiting their workers from speaking Spanish, Chinese, Creole, Tagalog as well as other languages other than English. Employers contend these policies are necessary because speaking a language not understood by customers or fellow employees is inefficient and unproductive as well as perceived as rude and insensitive. Safety concerns are another often-cited reason for English-only rules, for example, in a hospital emergency room or operating room setting, in an oil refinery or on an oil rig, or on a production line, where clear, quick, and understandable communication is critical.

Language capabilities and characteristics, however, are closely tied to culture and ethnic background and thus to national origin (Pedrioli, 2011), thereby producing potential conflict in today’s increasingly diverse workforce between cultural norms and ethnic identity, manifested by language, and Title VII legal requirements as well as ethical precepts. Meitus (2007) declares:

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....Sociologists and sociolinguistics recognize that language is part of a national origin because it is a reflection of ethnicity, community, and cultural traits. 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 (915).

Yet Rodriquez (2006) emphasizes that a paradoxical situation is developing in the U.S. with employer English-only rules clashing with the employer's need for bilingual employees in order to function in a global economy:

But at the same time that the English-only rule is becoming a common feature of workplace culture, employment and management journals document employers' increasingly aggressive recruitment of bilingual employees. While the demand for bilingual employees exists at the managerial and executive levels due to the increasingly global reach of many American companies, the need for such employees in the United States has become most apparent in the consumer-services sector – the sector where English-only rules are most likely to appear. Indeed, in some markets, such as South Florida, employers treat bilingual ability less as an added plus than as a job requirement (pp. 1701-02).

Employers, therefore, must be careful that they do not get caught in a legal and ethical language “squeeze” between conflicting stakeholder demands, in particular the rights of people who only speak English in the workplace and the rights of other people who do not speak English or whose primary language is not English. The rapidly changing demographics of the population and the workforce in the United States brought about by high levels of immigration, combined with the needs of employers to conduct their businesses in a diverse and global environment, will force many employers to confront the highly contentious and challenging legal, ethical, and practical issue of language in the workplace, particularly concerning English-only and English fluency rules.

In light of this backdrop of increasing diversity in the United State's workforce, a business manager may then ponder how to avoid running afoul of language discrimination lawsuits. As characterized by scholars, “The laws, regulations, case law, and policies regarding language use in the United States form at best a patchwork and certainly have not woven themselves into a single scheme for viewing claims to language rights. International human rights treaties and interpretations by international tribunals have also failed to provide coherent analyses of claims of right in the language arena” (Gilman, 2011, p.4). Thus, we proceed to answer this query by cautiously venturing “down the rabbit hole” knowing that this area of law is ever evolving, both domestically and internationally.

## **CIVIL RIGHTS LAW OVERVIEW**

The Civil Rights Act of 1964 is of prime importance to all business managers and legal professionals in the United States. This statute prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, sex, religion, and national origin (Civil Rights Act, 42 U.S.C. Section 2000-e-2(a)(1)). Regarding employment, found in Title VII of the statute, the scope of the statutory legal provision is very broad, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as

any other “terms or conditions” and “privileges” of employment. The act applies to both the private and public sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this act is one who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year (42 U.S.C. Section 2000e(b)). One of the principal purposes of the act is to eliminate job discrimination in employment (Cavico and Mujtaba, 2008). This act was amended in 1991 to allow for punitive damage awards against private employers as a possible remedy (*Civil Rights Act of 1991 (Pub. L. 102-166), as enacted on November 21, 1991*). This amendment gives employers even more incentive to conform their workplace language policies to the law and thus avoiding potential costly liability in this area of employment law.

The focal point of this article is Title VII of the Civil Rights Act, which prohibits discrimination in employment based on certain protected categories, including national origin. The key term “national origin” is not defined in Title VII, however. Rodriquez (2006) explains that “‘national origin’ is the least well understood of the statuses listed in Title VII, in part because the legislative history does not speak with any amount of detail to its meaning, but also because the concept of national origin has no obvious definition” (pp. 44-45). Furthermore, it must be emphasized at the outset that Title VII does not explicitly prohibit discrimination on the basis of language, thereby making a connection between language and national origin a critical feature of this aspect of civil rights law. Leonard (2004) points out that any reference to language is missing from the Civil Rights Act, and a definition of “national origin” is missing too. Colon (2002) nevertheless underscores the “inextricable” connection between language and national origin:

Since the rise of the modern nation-state, language has been intimately associated with nationality. While most linguistic scholars agree that language is one of the fundamental components of nationality, at least some consider language to be the most significant factor in determining national or ethnic identity....In addition, for some minorities, including Hispanics, language may be an even stronger indicator of ethnic or national identification than is usual. Historically, the language characteristic has been a key identifier of outsider status and a source of severe prejudice in nations around the world, as well as here in the United States (pp. 247-48).

National origin discrimination, according to the EEOC, is predicated on treating employees or applicants unfavorably because they (or their ancestors) are from a particular country or part of the world, because of their ethnic background, the languages they speak, or their accent, and also if they appear to be from a certain ethnic background or members of a certain national origin group, even if they are not. The EEOC equates a “national origin group” to an “ethnic group,” which refers to a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics. Rodriquez (2006) relates that regarding the meaning of “national origin” one view in the courts appears to be that “national origin refers to where one was born or where one’s parents were born” (p. 1745). However, Rodriquez (2006) also points out that “the absence of a statutory definition has ensured confusion in the courts over the statute’s coverage” (p. 1745). Nevertheless, Title VII of the Civil Rights Act forbids discrimination against employees and applicants based on their national origin; and the EEOC in its Compliance Manual underscores that “linguistic characteristics are closely associated with national origin” (EEOC, Compliance Manual, 2011, Section 13-V, p. 14).

Discrimination based on national origin or otherwise can be direct and overt, or indirect and inferential (Smith, 2005). In a “direct” type of case, there is explicit or overt evidence, such as blatantly racist remarks, that directly manifests a discriminatory bias or intent. To illustrate, in one federal district court case, an employee, who was discharged, attempted to show a “discriminatory animus” based on “negative” statements regarding his performance; but the court ruled that such comments, even if negative, were insufficient, explaining: “No law prohibits an employer from offering constructive criticism about an employee who happens to be a minority. Although Title VII protects employees against discrimination in the terms and conditions of employment, it does not afford minorities special preference or place upon the employer an affirmative duty to afford them special treatment (i.e., only say positive things about them and their work)” (*M. Moin Masoodi*, 2011, p.51). In a language “direct” evidence case, the plaintiff employee or applicant would have to demonstrate that the protected category of national origin predicated on language actually motivated the employer’s decision to discharge or not to hire (Smith, 2005). A direct evidence case can also be proven by circumstantial evidence, such as suspicious timing, ambiguous statements, differing treatment, or behavior indicating a discriminatory animus toward the protected employee, but such evidence must establish “a convincing mosaic of discrimination” (*Ahmad Jajeh v. County of Cook*, 2011, p. 16). A language example would be when an employer has an English-only policy, but enforces it only against employees who speak Spanish, while allowing the employees to speak other languages than English. In an “indirect” type of case, there is inferential evidence of the intent to discriminate, for example, where a similarly situated person not in a protected class is treated differently than the plaintiff employee (*Sofiene Romdhani et al*, 2011). A language illustration would be when an employer, instead of having an “English-only” policy, has a “No Spanish” policy.

However, if the plaintiff employee puts forth direct evidence of discriminatory intent, then the burden shifts to the defendant employer to demonstrate that it would have taken the same employment action even if it had not considered the impermissible discriminatory factor. Similarly, if the plaintiff puts forth evidence of indirect discrimination, then the burden again shifts to the defendant employer, who now must come up with a legitimate, non-discriminatory reason for its treatment of the plaintiff employee (*Sofiene Romdhani et al*, 2011). Finally, if the defendant employer has articulated legitimate, non-discriminatory reason for the employment action, then the burden shifts back to the plaintiff employee, who must point to some evidence, direct, indirect, or circumstantial, that demonstrates that the defendant employer’s purported reason is merely a fake or a pretext (*Sofiene Romdhani et al*, 2011). An employer’s language policy, particularly an English-only rule or an English fluency requirement, may be a pretext that is masking intentional discrimination based on national origin. Similarly, basing employment decisions on a person’s foreign accent can also be a pretext for discrimination if the accent does not interfere with the person’s ability to do the job (*Carino v. University of Oklahoma Board of Regents*, 1984). However, it is important to note that the courts have stated that when an employer chooses a candidate because he or she is the best qualified person for the job, that action generally is a legitimate, non-discriminatory reason for an adverse employment decision (*M. Moin Masoodi*, 2011).

There are two further important types of employment discrimination claims against employers involving the hiring or promotion of employees – disparate treatment and disparate (or adverse) impact – that must be addressed. “Disparate treatment” involves an employer who intentionally treats applicants or employees less favorably than others based on one of the protected classes of color, race, sex, religion, national origin, age, or disability (Pedrioli, 2011;

Stoter, 2008; Meitus, 2007). The discrimination against the employee is willful, intentional, and purposeful; and thus the employee needs to show evidence of the employer's specific intent to discriminate. However, intent to discriminate can be inferred. So, for example, when the employee is a member of a protected class, such as a racial minority, and is qualified for a position or promotion, and is rejected by the employer while the position remains open, and the employer continues to seek applicants, then an initial or *prima facie* case of discrimination can be sustained (Cavico and Mujtaba, 2008; Meitus, 2007).

The "disparate treatment" doctrine was articulated by the U.S. Supreme Court case of *McDonnell Douglas Corp. v. Green* (1973) and modified by *Community Affairs v. Burdine* (1981) and *St. Mary's Honor Center v. Hicks* (1993). The analysis for a "disparate treatment" claim involves a shifting burden of proof as follows: (1) first, the complainant must put forth credible evidence to establish a *prima facie* case of discrimination; (2) then if such evidence is established, the defendant employer must next articulate, through admissible evidence, a legitimate, non-discriminatory explanation or reason, such as a business necessity, for its actions; and finally (3) the burden shifts to the plaintiff employee to establish that the employer's proffered reason was merely a pretext to hide discrimination (HR Guide, 2009; Cavico and Mujtaba, 2008; Stoter, 2008; Meitus, 2007; Lynch, 2006, pp. 72-73; *McDonnell Douglas*, 1973, pp. 802-04; *Burdine*, 1981, pp. 252-56). If the plaintiff employee cannot offer any evidence to show that the defendant employer's articulated, facially neutral reason for the termination was fake and a subterfuge to mask religious or other discriminatory intent, the employee's case cannot be sustained (*Diagne*, 2011). Regarding pretext, Stoter (2008) advises that the "courts should be inherently suspicious of English-only rules because of their propensity to act as a cloak for discrimination" (p. 597).

Hentzen (2000), however, commenting on the effectiveness of disparate treatment in a language context, advises that "ordinarily this theory is not the appropriate one to use in a national origin discrimination complaint stemming from an English-only rule because applying an English-only rule to all employees is facially neutral – there is no unequal treatment" (p. 441). Colon (2002) concurs, saying that disparate treatment language cases are "rare" because the English-only rules are neutral on their surface because all the employees are required to speak English (p. 233). Leonard (2004) also agrees and provides two examples why in the typical disparate treatment case it would be difficult to show the requisite motive to discriminate: "Employers do not, for obvious reasons, discharge Chicano workers for speaking Spanish while tolerating Spanish conversations among the Anglo employees. Also, defendants who employ a significant number of workers who speak a (language other than English) probably do so because of the demographics of their local hiring pool. Chances are high that replacement workers will share the linguistic or ethnic traits of their local hiring pool" (p. 93). Even surmounting such formidable road-blocks, a plaintiff employee in a disparate treatment claim rooted on the application of an "English-only" workplace policy must establish that he or she suffered adverse employment action in order to avoid a summary judgment motion filed by the employer (*Pacheco v. New York Presbyterian Hospital*, 2009)

The other legal avenue claimants may travel to prove their employment discrimination claims is called "disparate impact," or at times "adverse impact." This legal doctrine does not require proof of an employer's intent to discriminate (Pedrioli, p. 101; Stoter, 2008, pp. 603-04; Meitus, 2007, pp. 904-06; Lynch, 2006, pp. 71-72). Rather, "a superficially neutral employment policy, practice or standard may violate the Civil Rights Act if it has a disproportionate discriminatory impact on a protected class of employees" (Cavico and Mujtaba, 2008, p. 501).

Accordingly, “such a practice will be deemed illegal if it has a disproportionate discriminatory impact on a protected class and the employer cannot justify the practice out of business necessity” (Cavico and Mujtaba, 2008, p. 501). Disparate impact as a legal doctrine was first solidified in case law by the U.S. Supreme Court case of *Griggs v. Duke Power* (1971), further refined by the Court in *Albemarle Paper Co. v. Moody* (1975); codified in statute by the Civil Rights Act of 1991 (Civil Rights Act of 1991); and reaffirmed by the Supreme Court in *Raytheon Co. v. Hernandez* (2003).

Legal challenges to language policies at work can be based, and typically are based, on the disparate impact theory (Pedrioli, 2011, p. 106). In the federal appeals court case of *Maldonado v. City of Altus* (2006), the court explicitly recognized the use of the disparate impact theory in the context of a legal national origin discrimination challenge to an employer’s English-only rule. The *Maldonado* (2006) court ruled that the plaintiff employees did not have to prove disparate treatment; but rather could show that the English-only policy had a disparate impact based on national origin; and then the employer had the burden of demonstrating a business necessity for the policy (pp. 1303-04). Regarding an English-only rule at the workplace, it typically would be easier for an aggrieved employee to challenge the policy by means of the disparate impact theory, which does not require evidence of discriminatory intent or motive. Merely showing the disparate or adverse impact of the facially neutral English-only policy would shift the burden to the employer to show a business justification for the policy. Hentzen (2000) further explains the use of the disparate impact theory in a language case context: “The gravamen of a challenge to an English-only workplace rule is not that the individual in the protected class is treated differently than someone not in the protected class, but rather, that the application of the rule has a greater impact on the individual in the protected class. It is disparate impact, rather than the disparate treatment, that provides the primary theory for claims of national origin discrimination stemming from application of an English-only rule” (Hentzen, 2000, pp. 440-41); but this result presupposes that the employer actually has imposed an “English-only” rule in the workplace; otherwise the disparate impact case theory fails (*Polanco v. 34<sup>th</sup> Street Partnership, Inc.*, 2010). Furthermore, in a language disparate impact case, the courts allow the demonstration of the adverse impact by means of subjective evidence in addition to the traditional statistical evidence in a disparate impact claim (*EEOC v. Synchro-Start Products, Inc.*, 1999, pp.914-15).

The frequently contentious 21<sup>st</sup> century political partisanship in the United States has resulted in efforts to legally cement “English-only” policies in the country, including the workplace. In the United States House of Representatives, a proposed law, H.R. 997, titled the “English Language Unity Act of 2011,” is one attempt to declare English as the official language of the United States. However, a close reading of H.R. Bill 997, along with its uniform companion Bill 503 in the United States Senate, goes beyond formally announcing an “official” language for the United States; rather, it attempts to establish a legal presumption that “English-only” workplace language policies are valid. Specifically the legislation states that “English language requirements and workplace policies, whether in the public or private sector, shall be presumptively consistent with the Laws of the United States” (H.R. 997(a) and S. 503(4)(a), 2011) Such legislation, if enacted into law, would dramatically change the landscape of legal presumptions and common law principles surrounding the language discrimination cases and controversies which are discussed in detail later in this work.

Additionally, though the focus of this article is on federal law, it should be noted that individual states have the ability to pass state statutes and codes to address “English-only”

language policies within the workforces within their jurisdictions. Most of these state codes are similar to federal law; but nonetheless employers and managers should be mindful of their specific state employment codes. For example, the State of California passed the California Fair Employment and Housing Act (FEHA Sec. 12900 et seq.) which contains a provision that outlines when “English-only” workplace language policies are acceptable. Section 12951 of the law states:

(a) It is an unlawful employment practice for an employer, as defined in subdivision (d) of Section 12926, to adopt or enforce a policy that limits or prohibits the use of any language in any workplace, unless both of the following conditions exist:

(1) The language restriction is justified by a business necessity.

(2) The employer has notified its employees of the circumstances and the time when the language restriction is required to be observed and of the consequences for violating the language restriction.

(b) For the purposes of this section, “business necessity” means an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, that the language restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact (FEHA Sec. 12900 et seq.).

Yet it is beyond the scope of this article to address each state’s individual “English-only” language workplace policy. However, business employers and managers should be aware of their state’s language laws in addition to the federal laws, and as such draft language policies accordingly.

## **THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION OVERVIEW**

Civil Rights laws are enforced in the United States primarily by the federal government regulatory agency – the Equal Employment Opportunity Commission (EEOC). Congress has delegated to the EEOC the power to interpret, administer, and enforce Title VII of the Civil Rights Act. The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or equitable relief. However, Stoter (2008) points out that Congress only empowered the EEOC to institute a lawsuit against employers who engaged in a “pattern or practice” of discrimination; and as a result, the private cause of action allowed in Title VII became an instrumental component in employment anti-discrimination law and practice (pp. 601-02).

Civil Rights Act, it must be stressed, is a federal, that is, national law. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law, moreover, like the aforementioned California law, which may provide more protection to an aggrieved employee than the federal law does. Yet, as noted, the focus of this article, however, is on federal, that is, national, law in the United States.

The EEOC evidently is an agency involved in a great deal of regulatory and enforcement activity. According to EEOC, for the fiscal year 2010 there were 99,992 charges brought to the agency based on all statutes the agency is responsible for enforcing, whereas in 1997 the number of charges was 80,680 (EEOC, Statistics – All Statutes, 2011). For the fiscal year, 2009, 93,277 charges were instituted (EEOC, Statistics – All Statutes, 2011). For the fiscal year, 2008, the agency also received the very large number of 95,402 workplace discrimination claims, which represented a 15% increase from the previous year (EEOC Press Release, 2009). The EEOC provides updated information on charges of discrimination cases that have been filed with the agency. The *Wall Street Journal* also noted that employment discrimination claims overall had increased, now at a “record high,” totaling 95,402, which represented a 15% increase (Levitz and Shishkin, 2009, p. D1). Data also was provided by the EEOC in 2008. As reported by *HR Magazine*, the agency’s annual report of private sector discrimination charges “painted a disheartening picture” (Grossman, 2008, p. 63). There were 83,000 discrimination claims filed with the EEOC in 2007, which represented the largest one year increase since 1993 (Grossman, p. 63).

Regarding national origin-based charges, the EEOC reported that in fiscal year 2010, around 11,304 charges were received, compared to 11,134 in 2009, and compared to 6,712 in 1997. Regarding harassment claims, the EEOC relates that harassment is one of the most common type of claims filed with the agency. Specifically regarding claims of harassment based on national origin, the EEOC indicates that the number of private sector charges filed with the agency increased from 1383 charges in fiscal year 1993 to 2719 charges in fiscal year 2002; and also in fiscal year 2002, 30% of all private sector national origin charges included a harassment claim. Rodriguez (2006) reports that language discrimination complaints involving English-only rules emerged in significant numbers in the early 1980s, and that the number of complaints regarding English-only rules has increased steadily since then. Rodriguez (2006) also reports that the number of complaints instituted at the EEOC quintupled from 1996 to 2000 (pp. 1699-1700).

However, despite the prominence and power of the EEOC, the agency is constrained by the large caseloads and limited resources, as all government agencies are, but also by delimited legal leverage. It is important to note that as of 2008, the EEOC only had 200 attorneys to service the whole country (Grossman, 2008). The agency has the power to investigate and to mediate and conciliate claims, as well as to make critical findings of “reasonable cause” for discrimination, and to bring such a case to the courts. Yet the agency does not have the authority to render final legal judgments on the merits of a case or to impose financial or other sanctions on behalf of aggrieved employees. *HR Magazine* (Grossman, 2008) also provided data indicating the number of claims filed with the EEOC, the treatment, and the resolution thereof. Overall, in 2006, the EEOC filed 383 lawsuits for all types of discrimination claims. Of these, 339 ended in consent decrees or settlements and 11 were resolved by voluntary dismissal; and of the 33 cases actually resolved by court orders, the EEOC prevailed nine times. For all types of discrimination cases in 2007 which were resolved through settlement and conciliation, the EEOC collected \$66.8 million, which represented an average of \$4,140 for every claim filed (Grossman, 2008).

The Civil Rights Act allows any person who is aggrieved by a violation of the statute to institute a civil action in any court of competent jurisdiction for any and all legal redress which will effectuate the purposes of the statute. However, a plaintiff must first fulfill certain administrative prerequisites (Lynch, 2006, pp. 70-73). Grossman (2008) related the EEOC’s initial, and very practical, procedures regarding the very large number of discrimination claims the agency receives:

EEOC officials learn to cherry-pick from among the charges, looking for obvious winners, especially those that will have an impact beyond the complainant and, perhaps most important, generate publicity, serving as a deterrent....As complaints flow in, they're assigned to three baskets: Basket A, which contains potentially high-profile claims and those where discrimination seems apparent; Basket B, which holds claims that could go either way; and Basket C, which contains claims that don't look promising. When employers receive a charge, they are not told what basket it falls in. For cases in Baskets B and C, the EEOC generally offers parties a chance to settle through mediation (p. 66).

When the EEOC finds "reasonable cause," the agency grants the aggrieved party a "right-to-sue" letter which allows the employee to proceed to the federal courts (Lynch, 2006 pp. 71-73). Moreover, it should be noted, that normally individuals who feel they have been discriminated against in the workplace have 180 days to file a complaint with the EEOC and their state's corresponding "706 agency," which is the individual state's administrative agency charged with investigating allegations of discrimination in the workplace, such as the State of Florida's Commission on Human Relations or the Texas Workforce Commission. Thereafter, aggrieved parties have 90 days to file their lawsuit when their "right to sue" letter is received. Failing to follow these pre-suit procedures can result in a dismissal of the future federal court action as well as separate specific state antidiscrimination lawsuits (*Olivarez v. University of Texas at Austin*, 2009)

However, on occasion, those parties who are similarly situated may "piggy-back" the co-worker's administrative filing and intervene in ongoing federal litigation involving "English-only" workplace policy discrimination charges. This was the case in *EEOC v. Delano Health Assoc.* (2011), where 23 Filipino Americans had filed charges with the EEOC and ultimately instituted litigation based on their employer's "English-only" workplace policy. Thereafter, 29 additional employers petitioned the court to intervene under Federal Civil Procedure Rule 24, although they failed to file the pre-suit EEOC notice and receive their individual "right to sue" letters. The court allowed the 29 additional employees to join the ongoing federal discrimination lawsuit against the employer because their legal standing was deemed to be all Filipino-Americans who worked for defendants, and since their claims of discrimination under federal and state law all arose out of the same discriminatory treatment, that is, the same English only policy, as well as the same enforcement efforts by the defendants which targeted Filipino-American employees (*EEOC v. Delano Health Assoc.*, 2011).

The EEOC itself actually may go to court on behalf of the complaining employee, or the employee may also choose to be represented by private legal counsel. Regardless, in either situation, the *prima facie* case is the required initial case that a plaintiff employee asserting discrimination must establish. Basically, *prima facie* means the presentment of evidence which if left unexplained or not contradicted would establish the facts alleged. Generally, in the context of discrimination, the plaintiff employee must show that: 1) he or she is in a class protected by the statute; 2) the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; 3) the plaintiff suffered an adverse employment action, for example, the plaintiff was rejected or demoted despite being qualified, or despite the fact that the plaintiff was performing his or her job at a level that met the employer's legitimate expectations; 4) after the plaintiff's rejection or discharge or demotion, the position remained open and the employer continued to seek applicants from people with the plaintiff's qualifications. These

elements if present give rise to an inference of discrimination. The burden of proof and persuasion is on the plaintiff employee to establish the *prima facie* case of discrimination by a preponderance of the evidence (*Equal Employment Opportunity Commission v. The GEO Group, Inc.*, 2010; *Gul-E-Rana Mirza v. The Neiman Marcus Group, Inc.*, 2009; Grisham, 2006).

However, in language discrimination workplace cases, a plaintiff employee's established *prima facie* case of discrimination based on an "English-only" policy may be rebutted by the employer, as it was in *Penalver v. Resource Corp. of America* (2011). In *Penalver* (2011), to defeat the worker's established *prima facie* case of national origin discrimination based on a language workplace policy, the employer satisfied its burden of production to establish that the employee was discharged for nondiscriminatory reasons of insubordination, poor work performance and poor work attitude and failure to work well with coworkers. The court then required the plaintiff worker to bring forth evidence that the employer's reasons for discharging her were a pretext, either in whole or part. In *Penalver* (2011), the employee was unable to do so, and thus the employer was awarded summary judgment as to her national origin discrimination charges based on the employer's "English-only" workplace policy; but the employer was denied summary judgment as to the employee's retaliation claim.

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – LANGUAGE GUIDELINES**

Pursuant to its power granted by the U.S. Congress, the Equal Employment Opportunity Commission, commencing in 1980, has established guidelines with respect to language policies at work. The EEOC has articulated formalized, codified guidance via its administrative regulatory authority as to how employers should approach Title VII issues based on language policies, especially English-only rules (Stoter, 2008). Pedrioli (2011) points out that EEOC definitions, explanations, and guidelines lack the force of law because the agency was not granted substantive rulemaking authority by Congress. Accordingly, Pedrioli (2011, p. 119) explains that nonetheless, "the EEOC guidelines are entitled to judicial consideration, but courts can give less weight to the guidelines than to administrative regulations that Congress intended to have the force of law." Regarding the power of the EEOC, Lynch (2006) further explains that:

Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law or to regulations which under the enabling statute may themselves supply the basis for imposition of liability (p. 93).

Moreover, the EEOC's precepts, though articulated as "guidelines," as opposed to agency "rules and regulations," are nonetheless codified in the *Code of Federal Regulations*, specifically in Section 1606 of Volume 29 of the *Code of Federal Regulations under its authority to promulgate regulations in furtherance of 42 USCA sec. 2000-e2* (Buckman, 2007). In Section 1606.1, the EEOC initially states that national origin is defined broadly to include the language characteristics of a national origin group. The agency's English-only guidelines are specifically found 29 CFR 1606.7, titled "Speak-English-only" rules. In particular, these guidelines address situations when such workplace rules are "applied at all times," typically called "blanket"

prohibitions, versus “when applied only at certain times,” typically called narrow, limited, or tailored rules. Section 1606.7 states the following:

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

It should be noted that some federal courts have treated the foregoing as not binding upon them when determining if there has been discrimination by the employer relative workplace language policies (Buckman, 2007).

These guidelines indicate that those English-only policies that apply at all times, including breaks and meals, will be subject automatically to very close and strict scrutiny by the EEOC; but those policies that apply only to certain times and places may be valid, yet still place on the employer a burden to demonstrate a business necessity justification for the policy. In essence, the EEOC guidelines result in a situation where “the mere existence of an English-only policy is sufficient to establish a prima facie case of discrimination” (Robinson, 2009, p. 1514). However, Stoter (2008) notes that according to some courts, these guidelines “create an unfounded presumption of discrimination that unfairly allow(s) plaintiff employees to meet their initial prima facie burden of proof. For this reason, many courts and employers oppose the EEOC guidelines” (p. 614). The extent to which the courts reject, defer to, find persuasive, or ignore the guidelines will be seen in the following sections of this article.

Another important and over-arching precept regarding the adoption of any language policy, according to the EEOC, is that it be adopted for non-discriminatory reasons; and consequently any employer language policy would be illegal if it were promulgated with the intent to discriminate based on national origin (EEOC, Compliance Manual, 2011). For example, states the EEOC, an employment policy that prohibits some but not all foreign languages to be

spoken at the workplace is discriminatory and thus unlawful. According to the Supreme Court, the agency's guidelines are entitled to some deference by the courts (*General Electric Company v. Gilbert*, 1976; *Albemarle Paper Co. v. Moody*, 1975).

However, employers and managers should be mindful of the basic legal premises re-asserted in *El v. Max Daetwyler Corp* (2011) and *Joseph v. North Shore Hospital* (2011) that there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native language while on the job. In *El* (2011), the court dismissed the worker's portion of the complaint alleging national origin discrimination based on the employer's requesting him to stop greeting individuals in the workplace in Arabic, as his allegations fell short of the legal standards to state a cause of action of language discrimination. Likewise, in *Joseph* (2011), the employer's summary judgment was granted against the worker's national origin discrimination claim based on the allegation that she was criticized for conversing in French, her native language in the workplace, because the court rejected the worker's claim that evidence of discrimination can be inferred from an "English-only" policy in the workplace.

Assuming an English-only rule has been adopted by the employer for non-discriminatory reasons, the EEOC in its Compliance Manual further states that the employer's language policy must pertain to specific circumstances in the workplace. The EEOC in its Compliance Manual maintains that an employer's "English only" rule, which requires employees to speak only English at the job, is permissible only if the rule is established for non-discriminatory reasons and the rule is narrowly tailored, and is necessary to ensure the safe or efficient operation of the employer's business (EEOC, National Origin Discrimination, 2011). The key test for the EEOC is "business necessity," though the agency admits there is no precise test for making this critical business necessity evaluation. The EEOC, however, does provide some illustrations where business necessity would justify an English-only rule, to wit: 1) to effectuate communications with customers, co-workers, and supervisors who only speak English; 2) to facilitate communications in emergency or other situations where employees must speak a common language to maintain and promote safety; 3) to effectuate cooperative work assignments where the English-only rule is necessary to promote efficiency; and 4) to enable a supervisor or manager who only speaks English to monitor the performance of an employee whose job duties require communication with co-workers or customers (EEOC, Compliance Manual, 2011). The EEOC cites a specific example of a petroleum company that operates an oil rig and that has a rule requiring all employees to speak only English during an emergency as well as when the employees perform job duties in laboratories and in processing areas where there is a danger of fire. This rule does not apply to casual conversations between employees in non-emergency situations and when the employees are not performing job duties in the laboratories or processing areas. This limited type of rule, says the EEOC, does not violate Title VII since it is narrowly tailored and predicated on safety requirements (EEOC, Compliance Manual, 2011, Example 20).

The EEOC also advises that the employer should notify the employees about the establishment of the English-only rule and the consequences for its violation. This notice, says the EEOC, can be accomplished by any reasonable means under the circumstances, such as meetings, emails, or postings. Stoter (2008) notes that the EEOC puts great emphasis on notice, "because bilingual employees may casually revert back to their native language" (p. 614). Furthermore, in some cases, based on the English proficiency of the workforce, it may be necessary for the employer to provide this notice not only in the English language, but also in some other languages spoken by the employees. The EEOC, in addition, counsels that a "grace period" should be granted before compliance when the new English-only rule is required to

ensure that all the employees have in fact been notified and that they have been given a chance to conform to the rule. Finally, the EEOC recommends that in order to minimize any adverse impact of an English-only rule on non-English speaking employees, the employer should consider implementing an “incentive” for those employees to improve their English language skills, such as English classes (EEOC, Compliance Manual, Note 50).

In reviewing the EEOC’s activities to prevent national origin discrimination based on language, Rodriquez (2006) asserts that “the agency’s efforts of the last several years represent part of a national strategy by the EEOC to target English-only workplace rules. . . . The EEOC’s position long has been that English-only rules may constitute unlawful national origin discrimination under Title VII. . . . What is more, from the EEOC’s point of view, an English-only rule may serve as a red flag indicating that other discriminatory practices exist or could emerge in the workplace” (p. 1737). Yet Meitus (2007) points out that there is a conflict between the EEOC guidelines and the aforementioned disparate impact theory: “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. Unlike disparate impact, once there is evidence proving an employer implemented an English-only policy at all time or only at certain times, an employee is relieved of any burden of proving the policy led to discrimination or caused harm to employees in a Title VII protected class” (pp. 913-14). The problem for employers, and their legal counsel, as will be seen more fully throughout the rest of this article, is that without any definitive pronouncement from the courts, especially the Supreme Court, as to what legal theory prevails – EEOC guidelines or disparate impact – employers will not know exactly what language policies will be presumed to be discriminatory pursuant to Title VII.

## LANGUAGE DISCRIMINATION CASE LAW

There is nothing in Title VII which protects explicitly or specifically provides that an employee has a right to speak his or her native or primary language while on the job (*Long v. First Union Corp.*, 1995). Unfortunately, even though this legal principle provides clarity and direction to business employers and managers, it definitely is not a complete statement of the law in this area. Rather, English-only rules typically are challenged in the courts as contravening the prohibition in Title VII of the Civil Rights Act against national origin discrimination. The federal courts have ruled that English-only rules can create a discriminatory work environment based on national origin (*EEOC v. Premier Operator Servs, Inc.*, 2000). To illustrate, in *EEOC v. Synchro-Start Prods., Inc.* (1999, pp. 914-15), the federal district court stated that English-only rules may produce a discriminatory work environment based on national origin. Yet the federal courts have upheld the legality of English-only rules in the workplace if the employer can show it had a legitimate, non-discriminatory, business reason for applying the rule (*Garcia v. Gloor*, 1980).

However, to complicate matters, the federal courts apparently are divided on the meaning and application of the EEOC guidelines for English-only rules. There consequently have been some “mixed signals” pertaining to language by the courts. Smith (2004) points out that in the past “while the EEOC has promulgated rules that presume English-only policies generally to be invalid if employees have to speak English at work, a number of courts have held otherwise” (p. 244). As a result, some courts do not defer to the EEOC guidelines because they impermissibly presume that English-only policies produce a disparate or disproportionate impact on a protected

national origin class without providing proof of the adverse impact (*Long v. First Union Corp.*, 1995; *Garcia v. Spun Steak Co.*, 1993). For example, in *Garcia v. Spun Steak Co.* (1993), the Ninth Circuit Court of Appeals rejected the EEOC's presumption in the agency's guidelines that an English-only rule would have a disparate or adverse impact on employees in the absence of any proof (p. 1490). A court that does not defer to the EEOC's guidelines thus places the initial burden on the plaintiff employee to demonstrate that an English-only policy actually caused a disparate or adverse impact on the employee (*Kania v. Archdiocese of Philadelphia*, 1998). These courts, in essence, treat language as a "mutable" or changeable characteristic, that is, one that is more of a deliberate choice (*Garcia v. Spun Steak Co.*, 1993). Yet other federal courts appear to treat the EEOC guidelines as creating, in effect, a presumption of disparate impact by the mere promulgation of an English-only policy by the employer (*EEOC v. Synchrono-Start Prods., Inc.*, 1999).

Moreover, certain federal courts have upheld English-only policies without specifically addressing the EEOC guidelines (*Garcia v. Gloor*, 1980; *Gonzalez v. Salvation Army*, 1991; *Prado v. L. Luria & Son*, 1997). A key factor for the courts in upholding an employer's English-only policy is whether it is limited to work areas or work stations and work times. To illustrate, in one federal district court case that deemed the employer's policy to be unlawful, the court underscored that the employer's Hispanic employees were "forced to be constantly on guard to avoid uttering their native language, even in their most private moments in the lunch room or on break," and also that one employee was reprimanded for speaking Spanish to her husband while at lunch in the break room (*EEOC v. Premier Operator Services, Inc.*, 2000, p. 1075).

In reviewing the decisions of the federal courts, Robinson (2009) concludes that "overall, courts range in their treatment of the (EEOC) guidelines from those that have held the guidelines deserve no deference to those that have held that must receive 'great deference'" (p. 1517). Stoter (2008) concurs, stating that the courts "disagree over both the proper amount of deference to accord the EEOC guidelines and whether English-only rules created an inference of discrimination" (p. 621). Weeden (2007) further explains the problem with language discrimination law:

Many scholars perceive the critical split in authority concerning the analysis of English-only rules is based on the burden shifting responsibilities of Title VII litigants. The EEOC Guideline seems to place the opening burden on the employer to present a legitimate justification for an English-only rule, while the court in *Spun Steak* went along with the traditional view of disparate impact case law and the 1991 Civil Rights Act, placing on the employee the first burden of proving that the employer's English-only rule has had a discriminatory impact (p. 955).

Nevertheless, one point is clear, and that is if the employer does adopt an English-only policy, the employer must give adequate notice to the employees of the policy, especially if the consequences of violating the policy are severe. For example, in *Saucedo v. Brothers Well Service, Inc.* (1979), the federal district court overturned the discharge of two Spanish-speaking employees who were discharged for speaking two words of Spanish in violation of an English-only because the employees were not given proper notice of the policy and especially the severe consequences for violating the policy (pp. 921-22). The court deemed that the discharge of the employees was the result of "racial animus" (*Saucedo v. Brothers Well Service, Inc.*, 1979).

## I. The Business Necessity Requirement

The courts, as well as the EEOC, have recognized that the employer does possess the prerogative to decide how it will conduct its business and manage its employees, including instituting language policies. However, an employer's English-only rule can violate Title VII with regard to national origin discrimination unless the employer can establish a business necessity for the rule (*EEOC v. Synchro-Start Products, Inc.*, 1999). The courts have enumerated several business reasons that could rise to the level of "business necessity" so as to justify an English-only rule. Facilitating effective communication can be a business necessity. For example, in the federal appeals case of *Montes v. Vail Clinics, Inc.* (2007), the court upheld the dismissal of a Spanish-speaking employee who was instructed to speak only English while working in the operating room, though she was permitted to speak Spanish outside the operating room as well as during breaks. The court accepted the employer's asserted business reason for the rule, that is, to facilitate effective communication in the operating room (*Montes v. Vail Clinics, Inc.*, 2007, pp.1171-72). Safety considerations at the workplace clearly can rise to the level of a business necessity. For example, in one case, the federal appeals court upheld an English-only policy at a hospital because communication in English and also fluency in English were necessary for the safe and effective delivery of healthcare at the hospital (*Garcia v. Rush*, 1981). In the aforementioned *Saucedo v. Brothers Well Service* (1979), the federal district court did accept the safety rationale and noted that the drilling of wells is an inherently dangerous activity, but the court also noted that the plaintiff employees were not engaged in well drilling when they spoke Spanish (p. 921). Managing interpersonal relations at the workplace is another valid reason for an English-only policy. For example, preventing or mitigating interpersonal conflicts, avoiding situations where non-foreign language speaking employees feel left out of conversations, and preventing non-foreign language speaking employees from feeling they are being talked about in a language they do not comprehend (*Roman v. Cornell University*, 1999, p. 237). Similarly, an English-only policy may be legitimate and necessary for an employer when its purpose is to prevent employees from intentionally using their fluency in a foreign language to isolate and intimidate employees of a different ethnic background who do not speak that foreign language (*Long v. First Union Corp.*, 1995, p. 941). In another federal district court case, the court upheld as a legitimate justifications for an English-only rule the employer's objectives to promote safety and prevent injuries by means of effective communication on the production line and to ensure effective communication among employees and between the employees and supervisors, as well as the employer's attempt to redress a situation at work where non-Vietnamese workers believed they were being talked about by Vietnamese employees (*Tran v. Standard Motors Products, Inc.*, 1998, p. 1210). In the federal district court case, affirmed by the court of appeals, of *Gonzalez v. Salvation Army* (1999), the legitimate business purpose accepted by the courts was the employer's objective to stop complaints by non-Spanish-speaking employees and customers. Such was the accepted rationale in *Long v. First Union Corp.* (1995), where the employer was a bank which adopted an English-only rule as a response to complaints from customers as well as employees.

To compare, in *Gutierrez v. Municipal Court* (1988), the Ninth Circuit Court of Appeals struck down an English-only rule that forbid a Hispanic court clerk from speaking Spanish except when performing her duties as a court translator and when she was at lunch or on a break. The court held that the English-only rule had a disparate or adverse impact on the employee, but the employer did not show a sufficient reason for the policy to meet the business necessity

requirement (*Gutierrez v. Municipal Court*, 1988, p. 1039). Leonard (2004) thus declares that “language...is plainly relevant to workplace decision-making. No one would argue seriously that the ability to speak English is unnecessary to most jobs in this country. Our business, commercial, and government culture is Anglophone. In the typical case, we expect that communication, recordkeeping, and client contact will be done in English” (pp. 130-31).

## II. The Bona fide Occupational Qualification Defense

While most courts use the “business necessity” doctrine to analyze language cases, the courts theoretically could use the traditional *bona fide* occupational qualification (BFOQ) defense of civil rights law (Cavico and Mujtaba, 2008; Lynch, 2006). In a BFOQ case, the employer admits to discriminating against certain employees, or rather, to use a euphemism, “classifying” certain employees, because a certain characteristic is necessary to the normal operations of a business (Cavico and Mujtaba, 2008). That is to say, there is a direct nexus or connection between the favored characteristic and successful job performance. In such a situation, an English-only policy or an English fluency requirement might rise to the level of a BFOQ if it were reasonably necessary to the normal operations of the business. However, Leonard (2004) points out that the BFOQ doctrine has been construed narrowly by the courts, which mandate that the qualification be, in actuality, essential to the business operation. Accordingly, Leonard (2004) posits that “relatively few classifications will survive this test...On rare occasions, sex or national origin may make a difference in job performance” (p.89). Smith (2005) concurs, stating that the narrowness of the BFOQ exception means that “BFOQ defense has been nearly entirely eliminated as a defense in national origin cases” (p. 241).

## III. English Fluency

Can an employer refuse to promote an employee or hire an applicant due to an inability to communicate in English? The EEOC maintains that generally an employer only can require that an employee be able to speak fluent English if fluency in the English language is necessary to perform the job effectively (EEOC, National Origin Discrimination, 2011; EEOC, Compliance Manual, 2011). However, the EEOC counsels that since the degree of fluency in the English language can vary from position to position, the employer should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions. Furthermore, the EEOC advises that an employee’s or applicant’s lack of proficiency in the English language may impede job performance in some circumstances and not others. The EEOC in its Compliance Manual provides two examples, to wit: In one, an applicant who is adequately proficient in spoken English in order to qualify as a cashier at a fast-food restaurant may lack the English language skills to work as a manager in the same restaurant requiring the completion of large amounts of “paperwork” in English. In the other example, a person, who is a Central American national, applies for a sales position with a small retailer of home appliances in a non-bilingual, English-speaking community. The applicant has very limited oral communication skills in English. The applicant is informed by management that he is not qualified for a sales position because his ability to effectively assist English-speaking customers is limited. However, management offers to consider him for a position in the stock room. The EEOC concludes the example by stating that excluding the applicant from obtaining the sales position does not violate Title VII (EEOC,

Compliance Manual, 2011, Example 18). The “sum and substance” of the examples, according to the EEOC, is that the employer should not demand a greater degree of fluency in English language skills than is required for the particular position.

There is case law in conformity with the EEOC guidelines regarding language capabilities. To illustrate, in one federal district court case, the court ruled that the employer did not violate Title VII by demoting the employee because the employee’s language capabilities were too limited for the employee to create detailed and complex scientific manuscripts required for the position (*Shieh v. Lyng*, 1989). Yet Weeden (2007) warns that “the rejection of applicants for employment who cannot speak English may well be discriminatory if the job can be performed by a person lacking the ability to speak English” (p. 962).

#### **IV. Foreign Accent**

Can the employer refuse to promote an employee or hire an applicant who has a foreign accent? Accent and national origin, according to the U.S. Ninth Circuit Court of Appeals, are “obviously inextricably intertwined,” and as a result the courts and the Equal Employment Opportunity Commission will engage in a “very searching look” at employment decisions based on accent (*Fragrante v. City and County of Honolulu*, 1989, p. 596). Hentzen (2000), in addition, indicates that the connection between language and national origin encompasses foreign accent. Smith (2005), in addition, emphasizes that “often times skilled immigrants find themselves underemployed because of their ‘lack’ of English skills, or...perceived lack of English skills due to their foreign accent” (p. 252).

Nonetheless, the Equal Employment Opportunity Commission’s foreign accent precept holds that basing employment decisions on an employee’s or an applicant’s foreign accent does not violate Title VII if the person’s accent materially interferes with the person’s ability to do the job. The EEOC also maintains that an employer cannot base an employment decision on an employee’s foreign accent unless the employee’s accent seriously interferes with the employee’s job performance (EEOC, National Origin Discrimination, 2011). The determination as to whether a person’s accent will interfere with his or her job performance depends, says the EEOC, on the specific duties of the position in question as well as the extent to which the person’s accent adversely affects his or her abilities to perform the job (EEOC, Compliance Manual, 2011). The EEOC advises that as a general rule the employer can predicate an adverse employment decision on accent if effective oral communication in English is required to perform the job duties and the person’s foreign accent materially interferes with his or her ability to communicate effectively in English. The EEOC has provided an example of an employment decision where foreign accent is a material factor, to wit: An employee is a concierge who assists guests with directions and travel arrangements. Numerous people have complained that they cannot understand the employee because of his “heavy” accent. The employer hotel then transfers the employee to a clerical position that does not entail extensive spoken communication in English. The EEOC indicates that this transfer would not violate Title VII since the employee’s foreign accent materially interferes with his ability to perform the functions of the concierge position (EEOC, Compliance Manual, 2011, Example 17). The EEOC, moreover, provides some examples of positions where effective oral communication in English may be required, to wit: teachers, customer service representatives, and telemarketing personnel; nevertheless, the EEOC cautions that even in the aforementioned cases, the employer still must ascertain whether the person’s accent interferes with his or her ability to do the job.

There are several court cases which illustrate the preceding accent rules. For example, in one U.S. Court of Appeals case, the court decided that an employee with a noticeable Filipino accent was illegally demoted as a supervisor and was not considered for a supervisory position at a new facility because his accent would not have interfered with his duties as a supervisor (*Carino v. University of Oklahoma Board of Regents*, 1984, p. 819). Yet in another Court of Appeals case, the court decided that the employer acted in a legal manner by refusing to hire a person with a pronounced Filipino accent because the position as a Division of Motor Vehicles clerk required constant phone communication with the public, and the record disclosed that the applicant's pronounced accent would make it difficult for him to be understood in oral communication, especially over the telephone, though the applicant placed very high on the civil service exam and was otherwise eligible for the position (*Fragrante v. City and County of Honolulu*, 1989, pp. 597-98). Similarly, in another Court of Appeals case, the employee, a Chinese-American, though regarded as a highly proficient technical employee with 14 years tenure, was discharged for his allegedly poor communication skills (*Ang v. Proctor & Gamble*, 1991). The court, the Sixth Circuit Court of Appeals, upheld the discharge notwithstanding the employee's claim of accent discrimination; but an important factor in the case was that the employee had been warned repeatedly to improve his communication skills (*Ang v. Proctor & Gamble*, 1991, pp. 549-50). In another case, an applicant for a teaching position, who was from Bogota, Columbia, was not hired for a full-time position because of student evaluations saying that she was difficult to understand due to her foreign accent. The federal District Court ruled in favor of the school district saying that her perceived substantial foreign accent interfered with her communication skills, and thus the county as the employer had a legitimate and non-discriminatory reason not to hire her (*Poskocil v. Roanoke County School District*, 1999). What makes the aforementioned case quite interesting as well as controversial is that the plaintiff applicant was applying for a position to teach Spanish!

## V. Bilingual Employees

The rights of bilingual employees regarding English-only policies present a problematic area of the law, as there appears to be a clash between the Equal Employment Opportunity Commission and certain federal courts. To illustrate, in the case of *Garcia v. Spun Steak Company* (1993), the Ninth District Court of Appeals ruled that the EEOC guidelines for employer English-only policies could not be applied to truly bilingual employees because these employees do not suffer any adverse impact from these policies. The court explained that the privilege to speak a language is just that – a “privilege (which) is by definition, given at the employer's discretion” and therefore the “employer has the right to define its contours” (*Garcia v. Spun Steak Company*, 1993, p. 1487). The federal appeals court for the Fifth Circuit, in *Garcia v. Gloor* (1980), has construed a bilingual employee's choice as to what language to use was not only a mutable or changeable characteristic, but also merely a matter of “preference,” and thus not protected by Title VII like national origin (pp. 269-270). The court ruled that there could be no discriminatory or disparate impact on the bilingual employee because the employee could comply with the English-only rule (*Garcia v. Gloor*, 1980, p. 270). The court reasoned that the “language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice” and consequently is not legally protected (*Garcia v. Gloor*, 1980, p. 270). It is also important to point out that in *Garcia v. Gloor* (1980) the employer limited its English-only rule to conversations at work, except at meal or break times or when employees were

communicating with Spanish-speaking customers (p. 266). A similar decision regarding bilingual employees was made by the federal district court in *Kania v. Archdiocese of Philadelphia* (1998) and in *Gonzalez v. Salvation Army* (1991). In the *Kania* case, the court reasoned that since the plaintiff employee was bilingual, “because she could have readily complied with the English-only rule, it did not cause a legally cognizable adverse impact upon the terms and conditions of her employment. Accordingly, (plaintiff employee) has failed to prove that the defendants engaged in national origin discrimination as a matter of law” (*Kania v. Archdiocese of Philadelphia*, 1998, p. 736). Two other federal district courts also have rejected the notion that an English-only policy could have a disparate or adverse impact on bilingual employees (*Prado v. L. Luria & Son, Inc.*, 1997; *Navarette v. Nike, Inc.*, 2007). Furthermore, it should be noted that the courts have been especially leery of finding a limited English-only policy’s proffered justification to be a pretext when the policy is applied to a bilingual employee who is capable of communicating while not violating the policy (*Perez v. The New York & Presbyterian Hospital*, 2009). Leonard (2004) agrees with the preceding decisions and explains that “even if we presume that language is an inseparable aspect of ethnicity and national origin..., we must acknowledge that language is neither an immutable characteristic nor is it irrelevant to the proper management of the workplace. In fact, the vast majority of workers who speak (a language other than English) are bilingual and capable of communicating well in English” (p. 99). Yet Robinson (2009) criticizes this series of bilingual case law, asserting that “employers would seemingly never be required to show a business justification for an English-only policy in a disparate impact case brought by bilingual employees, as these individuals could always choose to avoid the policy’s consequences by speaking in English” (p. 1521).

However, in *EEOC v. Premier Operator Services, Inc.* (2000), the court ruled that as a matter of law an English-only policy produced a disparate impact on bilingual employees because of their national origin. Important points for the federal district court in the *Premier* case were the fact that the employees faced a real risk of losing their jobs even if their violation of the English-only policy was inadvertent and that the employees were denied the right to speak Spanish even in informal conversations (*EEOC v. Premier Operator Services, Inc.*, 2000, p.1070). The court in striking down the language policy felt that the employees were being constrained to the degree of being uncomfortable, intimidated, and punished severely (*EEOC v. Premier Operator Services, Inc.*, 2000, p.1070). Similarly, McCalips (2002) maintains that “language is not simply a matter of choice but rather it is the result of psychological and linguistic phenomena that make complying with English-only policies burdensome for some bilingual speakers. Because this difficulty in complying subjects bilingual employees to a greater risk of discharge and feelings of inferiority, isolation and discomfort, at least one district court has found that English-only policies do have a disparate impact along national origin lines” (pp. 430-31). Colon (2002) adds that “psycho-linguistic research done since *Gloor* demonstrated that speaking only English is not simply a matter of preference for many bilingual national origin minorities” (p. 246). “For bilinguals,” Colon (2002) continues, “the disparity in workplace privileges imposed by an English-only rule has consequences that reach far beyond the ‘mere inconvenience’ of having to check their natural instinct to combine both English and their primary language in their conversation” (p. 254). Pedrioli (2011) adds that bilinguals confront a more complicated situation due to their speech patterns: “Foremost is what linguists call code-switching, via which bilinguals move back and forth between their two languages while speaking with members of their cultural group. This phenomenon can take place within a sentence or between sentences. Code-switching ‘is often inadvertent and unconscious.’” (Pedrioli, 2011,

p.121). Accordingly, McCalips (2002) counsels that “the best hope for plaintiffs would then seem to be psycho-linguistic evidence showing that language is not a deliberate choice and therefore employment practices that punish employees for their use of their native languages while on the job create a disparate impact on the basis of national origin in violation of Title VII” (p. 437).

## **VI. Non-English Speaking Employees**

A difficult legal as well as practical issue emerges when the employer adopts an English-only policy, but the employer presently has employees who cannot speak English or whose English language skills are not sufficiently developed to be considered as truly bilingual employees. Federal case law exists indicating that an employer may be in violation of the Civil Rights Act by committing national origin discrimination if it enforces its English-only policy against employees who cannot speak English (*EEOC v. Synchro-Start Products, Inc.*, 1999; *Garcia v. Spun Steak Co.*, 1993). One legal commentator (Moore, 1999) points out that “the courts’ delineation between bilingual and monolingual employees raises an important question: How developed do an employee’s English communication skills have to be before he or she is ‘bilingual’ so that an English-only rule does not have a legally adverse effect on him or her” (p. 304)? Nonetheless, another legal commentator (Leonard, 2004) believes that this issue of monolingual employees is, in essence, moot in most cases, to wit: “There are relatively few employees who speak only a (language other than English). Most were hired in spite of an obvious inability to speak English, presumably because language was irrelevant to the type of work done. A few jobs, such as assembly line work or food processing, can be done without a word of English....Because of their limited numbers, preserving claims by monolingual workers are not likely to expand business liability or litigation costs greatly” (p. 115).

## **VII. Foreign Language Fluency**

The EEOC maintains that the requirements for foreign language fluency are, in essence, the same for English fluency requirements; that is, requirements for foreign language fluency must actually be necessary for the positions for which they are required (EEOC, Compliance Manual, 2011). The EEOC further explains that a business with a diverse customer base can hire and assign work based on the applicant’s or employee’s foreign language ability. The EEOC provides an example, to wit: an employer can assign bilingual Spanish-speaking employees to take care of customers who speak Spanish, while assigning employees who speak only English to take care of English-speaking customers. However, the EEOC counsels that employers should make these determinations based on business needs and employee language capabilities (EEOC, Compliance Manual, 2011). Leonard (2004) also notes that “even if the ability to communicate in a (language other than English) is a job requirement, it is likely that English will also be necessary...to communicate with supervisors, to complete government reports, and so forth” (p. 131).

## **VIII. National Origin Harassment and Language**

Civil rights law makes it unlawful to harass an employee because of the employee’s national origin. The EEOC relates that harassment can include offensive or derogatory remarks

about a person's national origin, ethnicity, language, or accent (EEOC, National Origin Discrimination, 2011). Harassment also includes ethnic slurs, workplace graffiti, or other offensive conduct. The law, however, does not prohibit simple teasing, off-hand comments, or isolated incidents that are not very serious. Nonetheless, harassment becomes illegal when to a reasonable person it is so severe and frequent that it produces a hostile, offensive, or abusive work environment, or when it engenders an adverse employment decision, such as a discharge (EEOC Compliance Manual, 2011). A hostile or offensive environment can be produced by the actions of managers, supervisors, co-workers, or even non-employees, such as customers or business partners. The EEOC in its Compliance Manual lists five factors that should be used to determine if national origin harassment rises to the level of creating a hostile work environment: 1) whether the conduct was physically threatening or humiliating; 2) the frequency and repetition of the conduct; 3) whether the conduct was hostile or patently offensive; 4) the context in which the harassment occurred; and 5) whether management responded appropriately when it learned of the harassment. A case illustration of a hostile work environment caused by language is the Tenth Circuit Court of Appeals case of *Maldonado v. City of Altus* (2006), where the appellate court reversed the district's court decision in favor of the employer city which had adopted an English-only policy for the employees. The appeals court ruled that there was sufficient evidence for a reasonable jury to find that a hostile work environment existed toward Hispanic employees, in particular by the fact that the manager told the employees of the policy in private due to fears that other employees would learn of the English-only policy and use the policy to harass the plaintiff employees, and that the plaintiff employees had been taunted by the policy and made to feel inferior (*Maldonado v. City of Altus*, 2006, pp. 1304-06). *Maldonado* is also important because the court indicated that although it was not formally adopting the EEOC guidelines, nonetheless the guidelines as well as the agency's conclusions were "entitled to respect" (*Maldonado v. City of Altus*, 2006, p. 1306). *Maldonado* is also worth noting for the fact that its holding also explained that the municipality's (employer's) English-only policy was not a violation of the First Amendment free speech right even if the employer was a governmental entity (Buckman, 2007).

Accordingly, if an employer cannot justify its English-only policy by showing business necessity, or if the English-only policy is overbroad, overly intrusive, or applied in a discriminatory fashion, such a policy can engender a hostile, abusive, or offensive work environment based on national origin, thereby triggering legal liability for harassment. If the language policy is created or applied in such a way that it engenders a work environment or atmosphere of isolation, inferiority, or intimidation on the part of the employees, then the policy could constitute national origin harassment. However, a "Catch-22" type situation can materialize for the employer. That is, the employer can also be at risk legally if an English-speaking employee contends that his or her fellow employees harassed the employee by consistently speaking a foreign language that the employee did not understand (*McNeil v. Aquilos*, 1993).

## **ETHICAL CONSIDERATIONS**

Language policies at the workplace of course must be legal, but such policies also must be moral. The authors believe that there are three major ethical theories that apply, and should be applied, to language policies in the workplace, especially English-only rules. These three ethical theories are: Ethical Egoism, Utilitarianism, and Kantian Ethics. They can be used to test

language policies to make sure they are moral. Ethical Egoism requires that the employer in crafting language policies advances its own self-interest in prudent and rational manner and in the long-run; Utilitarianism requires that an employer adopt a policy that is not only good for the employer but also achieves the greater good for all its stakeholders, such as the employees, customers, the local community, and society as a whole; and Kantian ethics requires that the employer policy, even though achieving the employer's good and the greater good, nonetheless neither demean nor disrespect any stakeholders (Cavico and Mujtaba, 2009). The objective, therefore, is to create language policies that are legal as well as moral pursuant to Egoism, Utilitarianism, and Kantian ethics.

Any ethical analysis to determine the morality of language policies at the workplace must recognize that the employer, employees, and society as stakeholder groups have interests that must be recognized. Employers of course are interested in achieving and maintaining a safe, harmonious, efficient, effective, and productive workplace. Employees naturally are interested in being employed, being continuously employed, and advancing themselves with pay and promotions at work, as well as maintaining their dignity and self-respect. The effect of language policies at the workplace on society as a whole as a stakeholder group would be critical to any Utilitarian ethical analysis. Society would be interested in maintaining employment and a stable economy, avoiding unemployment and its concomitant "costs" – financial and otherwise, controlling immigration, and developing a diverse, capable, and growing workforce (Lynch, 2006). Kantian ethics emerges as critically important to any moral examination of language policies, especially restrictive language policies, at the work place. Treating people in a fair and equitable manner and respecting their human dignity are hallmarks of morality pursuant to Kantian ethics, as well as animating rationales for civil rights laws. For a Kantian, even if an action, such as a restrictive language policy at the workplace, achieves the "greater good" and thus is moral pursuant to Utilitarian ethics, if the action is demeaning and disrespectful to any stakeholder group, it is immoral, regardless of the fact that it produces overall good consequences. The difficulty in resolving workplace language disputes is caused by a clash of values: the value to the employee to have the freedom to speak the language that the employee feels is part of his or her national origin versus the value to the employer to have the freedom to run its business in a safe, efficient, and effective manner. The ethical challenge for employers in the language context herein is to encourage and assist their non-English-speaking and immigrant employees to learn English without trampling on their moral rights to reflect and express their cultural identities and ethnic backgrounds, especially when manifested by speaking their primary language, which is a language other than English in many cases. The employer should take heed that when management forbids employees from speaking their primary language, which presumably is the language they speak most naturally and comfortably, the employer risks creating an atmosphere of intimidation, inferiority, and isolation, which could degenerate into a demeaning and disrespectful and thus immoral work environment. Language is clearly an essential component of one's cultural identity and ethnic background. Speaking a particular language at work, moreover, can subject the employee to discriminatory and adverse conditions based on his or her national origin. Furthermore, Weeden (2007) warns that "an English-only preference that is not job related or justified by business necessity rejects cultural diversity and sets in motion the ethnic or racial hostility often associated with the language one speaks" (p. 947). The ethically aware employer thus must be aware of the link between language and national origin. The authors of this article believe that in the vast majority of cases, employers adopt language policies, including English-only rules, for ethically egoistic reasons, that is, to

ensure productivity and advance profits, and not for arbitrary, capricious, irrational, biased, prejudicial, or racist reasons.

Yet the employer must be cognizant that some of its employees who only speak English might be isolated, intimidated, and even slighted by conversations between co-workers in a language the employees do not understand. Managers, therefore, have to achieve a proper balance between conflicting rights and needs so as to attain a productive workplace, but one where all the employees are treated in a legal and moral manner and a general environment of good will and harmony prevails. Lynch (2006) emphasizes that “an employee’s primary language should be respected, but only so far as it does not infringe on legitimate business interests of the employer” (p. 100). Moreover, it is certainly in the egoistic self-interest of the employer in today’s diverse society and global economy to attract and retain a diverse pool of employees.

The presence of a legitimate job-related reason for an English-only policy is critical to not only any legal but also and ethical analysis. Weeden (2007) declares that “it is fundamentally unfair to allow an employer’s arbitrary English-only requirement, that is not job-related, to be used as a tool to discharge an employee for speaking his primary language on an involuntary basis” (pp. 962-63). However, if necessary for business reasons to have an English-only policy, the moral employer should be careful that the policy does not intrude on the employees’ private conversations on their own “free” time at work. The freedom of the employees to converse in their primary language, especially to engage in “small talk,” at certain times and places can be a legal right, but it is surely an employee moral right too. Similarly, the employer also should understand, and forebear, if employees, who perhaps have been speaking another language other than English at work for some time, carelessly speak a few words in a foreign language is “technical” violation of a valid English-only policy. Stoter (2008) concurs, emphasizing that “bilingual employees should not be punished for casual usage or slips because usage is not entirely within their control” (pp. 636-37). The moral employer must be cognizant of the fact that an English-only policy could be quite burdensome for some employees, especially recent immigrant employees who do not speak English or whose primary language is not English. As such, the employer must effectively notify the employee of the rule, the consequences for violating the rule, and give the employees adequate time to adapt to the rule. The employer may have the legal right to restrict the use of languages other than English to certain times and places, as well as to further restrict inappropriate topics or the use of profanity; but an overbroad or zealously enforced restrictive language policy would be demeaning and disrespectful to the employees, as such a policy would materially impede the employees in their moral rights to express their cultural heritage and ethnic background at work. Moreover, the employer, as a moral employer, should be tolerant to employees whose primary language is not English, who as a result inadvertently or subconsciously switch into speaking a language other than English. Weeden (2007) advises that “fostering cooperation and solidarity among employees obliges employers to allow linguistic diversity in some contexts” (p. 970).

Accordingly, as a moral as well as practical matter, an English-only rule should not be strictly enforced, and if there are violations, the employer should not severely sanction the offending employee, especially if the infraction is a minor one. The moral employer, moreover, must make an accommodation to the needs of its employees who do not speak English or whose English language skills are deficient. As such, the employer should provide English-language training, and “incentivize” the employees to learn English, as well as provide bilingual mentors, supervisors, and training manuals to employees. The goal is to help the employees to get

adjusted to the firm's corporate culture – an organizational culture that is, and justifiably so, English-based for work communication, but one that treats all the employees as well as all the firm's stakeholders with dignity and respect. And once that goal is attained, the employer's language policies can be deemed to be not only legal but also moral in an Egoistic, Utilitarian, and Kantian ethical sense.

Those managers that are not persuaded that the ethical course of action is to avoid inflexible, intolerant workplace language policies, the economic and social reality would command such action. A reflection of the global business community has one scholar noting: "In our increasingly globalized world in which people regularly interact with other languages and language communities within and outside of their countries of origin, it is time to strive for greater consolidation of language rights. History has shown that dangerous divisions among language groups usually do not take place in societies where language diversity is respected, but rather where language differences are treated as undesirable" (Gilman, 2011, p. 70). Embracing diversity by adopting a workplace language policy that is accommodating, flexible, and tolerant is the globally moral as well as socially responsible course of action.

## **IMPLICATIONS AND RECOMMENDATIONS FOR MANAGEMENT**

As the number of immigrant, non-English-speaking, and bilingual employees continues to increase rapidly, employers can expect even more national origin lawsuits, particularly language discrimination ones, in the coming years. Generally, employers can mitigate the risk of discriminatory employment decisions and concomitant civil rights lawsuits by establishing clear, written, objective, job-related criteria for employment positions and promotions, applying these criteria consistently to all candidates, and fairly evaluating all candidates. Similarly, such criteria should exist for discipline, demotion, and discharge of employees. The more objective and precise the criteria are, and the more they are directly tied to business needs, the less chance there will be for managers to engage in arbitrary, capricious, and discriminatory decision-making. The failure to hire someone, or the discharge of an employee, due to inadequate English skills, or due to a foreign accent, very well could be illegal national origin discrimination unless these employment actions are justified by legitimate business reasons.

Certainly, the question of whether an employee is sufficiently fluent to do a job in the English language or for that matter any language is a legitimate functional question for management. Yet, since language is so closely related to national origin, if an employer is relying on a particular language for a job position, the employer must ensure that there is a legitimate business necessity for the language requirement, so as to justify any employment burden imposed on an employee or an applicant. Language requirements can be reflected in advertisements and postings for job positions. If so, prospective applicants must be clearly advised that language ability is a job qualification. English language skills, for example, should be specified explicitly, and, of course, must be justified by business necessity, such as safety considerations. All advertisements naturally should state that the employer is an "Equal Opportunity Employer." Similarly, if an employer is basing employment decisions based on foreign accent, the employer should examine very carefully the decision-making criteria for the position to be sure they are required by business necessity, and thus do not violate Title VII. The employer is advised to differentiate between a foreign accent that is merely apparent and one that is so "heavy" that it materially hinders the communication capabilities that a person needs to do the job in question. So long as the foreign accent does not interfere with the employee's ability to

perform the job in question, the foreign accent cannot be a legitimate reason for basing an employment decision.

Bilingual employees can offer very special and valuable skills and knowledge to an employer that can attract new customers and clients, develop new markets, better and more fully improve communication between global departments and divisions, and accordingly materially enhance a business. Such workers are plainly needed to satisfy non-English speaking customers at home and when U.S. companies expand overseas and interact globally. Bilingual employees thus legitimately may command premium salaries. Yet if fluency in another language is required by the job, then the employer should specify this requirement clearly and, of course, make sure it is a justifiable one; and then the employer can pay more for an employee who is bilingual; but if the additional language is not a legitimate job requirement, and the employer nonetheless pays the bilingual employee more money “merely” because the employee can speak, for example, Spanish, which may come quite naturally to the employee, in addition to English, the employer now risks a national origin discrimination lawsuit from other non-bilingual employees as well as a deteriorating morale situation in the workplace if other employees feel the bilingual employee is being unfairly and overly compensated. Consequently, the employer is best advised to take heed of the old HR adage: “Pay the position and not the person.”

Regarding the highly contentious and legally problematic subject of English-only policies, the employer must be cognizant of the fact that no matter how well justified and how carefully crafted, such English-only policies can disadvantage an employee’s or prospective employee’s job opportunities, and also can produce an atmosphere of isolation, intimidation, and inferiority at work due to an employee’s national origin. As such, if the employer is contemplating promulgating an English-only rule, the employer is well advised to weigh the business justification for such a rule against the possible discriminatory effects of the rule. A reasonable, legitimate, business justification for the rule will, of course, be required, such as improving safety or facilitating management communication, or improving communication among the employees, or avoiding misperceptions and morale problems when the employees do not understand one another. Yet the employer is also advised to ascertain the likely effectiveness of the rule in fulfilling management objectives, the effect of the rule on the employees, particularly those not proficient in English, and whether there are any alternatives to an English-only rule that would be as effective in achieving the employer’s goals. Such an English-only policy should be narrowly tailored to work times and work places. For example, if the employer believes it is losing sales because English-speaking customers are too intimidated to approach Spanish-speaking sales employees, or if the employer perceives that customers feel they are being treated rudely by employees speaking only in Spanish, the employer can impose an English-only policy on the employees while they are on duty, as the courts and the EEOC maintain that customer preference can rise to the level of a business necessity. However, the employer should ascertain whether it is truly necessary that the policy apply to the employees while they are waiting to enter the workplace, particularly if there are no customers in this waiting area. Similarly, it would be unreasonable for the employer to require employees to speak English generally, but to allow, and for that matter, insist that Spanish-speaking employees speak Spanish to customers who approach them in Spanish, so as not to lose a sale, and then to reprimand and punish those Spanish-speaking employees for speaking Spanish while on their “free time” at break or during meals. Such a “double standard” will cause problems for the employer – legally, ethically, and practically – as will a “blanket” language policy that requires the use of English at all times and places in the workplace, even during employee breaks. An

employer should recognize from the forgoing legal analysis of these policies that “totally forbidding the use of another language... is likely to result in a discriminatory work environment, characterized by an atmosphere of inferiority, isolation and intimidation”. (45B American Jurisprudence, 2<sup>nd</sup> ed. Sec. 861, Aug. 2011). The employer, therefore, should craft its English-only policy very carefully so that it is narrowly written to forbid the use of languages other than English only during work times. Moreover, the policy should specifically and explicitly state that the employees are free to speak any language they choose during their breaks and meals or other free time, though they should be reminded to be sensitive to other employees who may not understand the language they are speaking.

The English-only rule should apply to all languages and to all employees; it should not prohibit only one language, such as Spanish, or it will be deemed to be discriminatory. One point is very clear – the more restrictive the employer’s English-only policy is the more closely the EEOC will scrutinize it. Effective notice to the employees of the employer’s English-only policy is another critical factor, particularly concerning employees whose primary language is not English. Accordingly, Lynch (2006) advises that,

If an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the (Equal Employment Opportunity) Commission will consider the employer’s application of the rule as evidence of discrimination on the basis of national origin (p. 78).

The presence of a business necessity is yet another critical factor for legal analysis. However, “there is no exact definition of the business necessity that employers are required to prove,” as Meitus (2007, p. 917) correctly observes. Nonetheless, based on an analysis of the case law, EEOC guidelines, legal and management commentary, the authors of this article can supply a list of business justifications that can rise to the level of a “business necessity” so as to sustain an English-only policy, to wit:

- To satisfy customers who cannot understand languages other than English, and who may be irritated, offended, and “put-off” by employees speaking a language that the customers do not understand, and also to facilitate an employer policy of having employees approach English-speaking customers initially in English.
- To effectuate communication at work, and especially when business information, trade literature, and company materials are only available in English, and the employees must be able to understand same and thus need to be fluent in English.
- To effectuate communication “for cooperative work assignments in which English is absolutely necessary to promote efficiency” (Lynch, 2006, p. 100).
- To improve the English-speaking skills of bilingual employees due to speaking English at work.
- To allow managers and supervisors who only speak English to be better able to oversee, monitor, communicate, and manage a bilingual or multi-lingual workforce.
- To promote racial, ethnic, and cultural harmony at work, to improve morale, to avoid workplace disharmony and disruption, to reduce alienation and tensions, and to avoid a hostile and offensive work environment.

- To ensure that the workplace is free of discriminatory, insulting, and abusive remarks, based on national origin or other characteristics, particularly when the employer has evidence that a foreign language was used inappropriately at work, or the employer has received complaints from employees or clients who only speak English that other bilingual employees were speaking a non-English language in front of employees, and particularly if bilingual employees purportedly were making rude and derogatory comments against other employees in a language other than English.
- To promote and enhance worker safety, especially in dangerous situations, and to prevent accidents and injuries, particularly by employees who cannot effectively communicate or are distracted by co-workers' use of a language they do not understand.
- To effectuate communication in health care settings, "such as a hospital emergency room where immediate and well-understood communication can mean the difference between life and death" (Hentzen, 2000, p. 440).
- To enhance product quality and avoid product flaws and defects.

Generally, regarding business necessity, Weeden (2007) counsels that "a proper construction of the disparate impact analysis...demonstrates that an employer may not use an English-only rule without meeting the business necessity or job relatedness test independent of the EEOC guidelines" (pp. 958-59). Pedrioli (2011, p. 120) advises that "business necessities come in a variety of forms." Specifically, Pedrioli (2011) underscores the business reason of communication, that is, facilitating communication with customers, coworkers and supervisors, facilitating communication to foster safety and efficiency, and facilitating communication for monitoring and supervision by supervisors and managers. Rodriguez (2006) specifically underscores the safety rationale as one that has been recognized by the courts and the EEOC; but adds two caveats for English-only rules predicated on safety: first, in a safety situation, for example, dealing with dangerous substances and equipment, the rule must only be applied to those conversations conducted in the course of performing the dangerous job; and second, "'safety' cannot simply be invoked...The concern for safety must be demonstrated, and the rule must be tailored to meet the purported need" (p. 1762). Leonard (2004) emphasizes that avoiding workplace disruption is a valid reason for an English-only rule. Leonard (2004) explains that,

Maintaining business harmony among workers is imperative in any place of employment. A key element in creating harmonious conditions is to avoid the perception of secretive communications among employees. Individuals have a well known tendency to feel marginalized, insulted, and even threatened when they believe that others are talking about them behind their backs. In a diverse workplace there exists the specific possibility that Anglophones (of whatever race or ethnicity) will perceive that conversations by coworkers in a (language other than English) are targeting them on racial or ethnic grounds (p. 132).

Leonard (2004) also underscores that "effective management requires that supervisors know what employees are saying and how they feel. Unless a supervisor is multi-lingual, conversations in (languages other than English) tend to deprive management of information that it needs to regulate the workplace...Permitting pockets of conversation in (languages other than English) creates a risk that employers will be deprived of information that they need to manage the often complex dynamic of the workplace" (p. 134). Smith (2005) notes that customer preference, though not consistently accepted as a defense by the courts, is still allowed in

language cases, including accent cases, as a business necessity defense when employers “feel pressured” by their customers “hostility” to employees speaking a language other than English or speaking English with an accent (pp. 262-63). Rodriguez (2006) agrees that customer reactions can rise to the level of business necessity defense, but warns:

Of course, the law does not permit employers to anticipate all negative reactions by customers. Title VII very clearly limits the employer’s authority to decide that negative customer reactions to race or gender (at least in some contexts) justify a refusal to hire members of disfavored groups, or a decision to place all employees of a particular race in positions with minimal customer contact....Through Title VII, the courts thus have developed a set of expectations for customers – that their preferences, whether widely shared or idiosyncratic, bear some rational relationship to otherwise legitimate expectations (p.1768).

Many business justifications, therefore, can rise to the level of a “business necessity” to validate an English-only rule. The “business necessity” doctrine does recognize that the employer has an interest in controlling its workplace and managing its employees; and the law also recognizes that this employer interest can supersede legally the employee’s desire to speak in a preferred, typically primary, language. However, one legal commentator warns that the “business necessity” standard will nonetheless require the employer “to meet a very high level of scrutiny to prevent employers from skirting enforcement of the Civil Rights Act of 1964 and masking the discriminatory purpose of their English-only workplace rules with banal justifications” (Hentzen, 2000, p. 452).

The employer, in addition, should also take heed of the EEOC’s recommendation that the employer consider incentives, such as English training classes, for those employees whose native language is not English, so that they may improve their English language skills. Such training will afford the employees the language skills they will need to maintain their jobs and to qualify for promotions where English language fluency is critical; and such training indicates that the employer is acting in a reasonable and fair manner. Smith (2005) also recommends that the employer provide “cross-cultural awareness” and linguistic training to employees who are native English speakers so that they can better understand people who speak with a foreign accent and so that they can become more tolerant to foreign-accented speech (pp. 266-67).

Yet language, after all, though tied to national origin, is a “mutable” or changeable characteristic, like grooming, as opposed to race and color, which are inalterable characteristics. One can learn English or another language, or learn to improve one’s English, especially if there are incentives in the form of job placement, raises, and promotion. Furthermore, the personal experience of the authors is that people generally are not hostile, and in many cases are quite receptive, to learning a new language, especially if given a good reason. People plainly are able to learn new languages, as well as to improve their language skills, and frequently do. Even bilingual employees can learn to restrict themselves to English in certain circumstances if they are provided with a valid business justification for the restriction which is fairly and gradually applied to all employees.

In order to prevent harassment based on national origin, the employer must clearly and firmly state in its Code of Ethics or Code of Conduct that all employees are always to be treated as human beings with dignity and respect, and consequently any harassment based on national origin will not be tolerated and will be severely punished. These policies must be effectively

communicated to the employees, who must be provided with channels of communication to report complaints of national origin harassment, and managers must be trained to recognize and to respond effectively to national origin harassment as well as harassment of all types, of course. Yet the employer, even the most well intentioned one, can find itself in, as noted, a “Catch-22” type situation, that is, the employer is concerned because certain employees are speaking in a language, say Spanish, which the other employees do not understand, and these non-Spanish-speaking employees may feel they are being treated rudely and insulted by their Spanish-speaking co-workers. As such, the employer, fearful of national origin harassment civil rights lawsuits based on an offensive work environment, adopts an English-only policy so as to effectuate better management supervision and monitoring of employee communication and comments as well as to impose a consistent understandable language on all the employees while they are working; but now the employer may risk national origin discrimination civil rights lawsuits by adopting the English-only policy if it is deemed to be overbroad, discriminatory, or not justified! Balancing these competing stakeholder interests is a tricky and demanding proposition in today’s diverse society and global economy; but it is one that management must attain in a legal, equitable, and practical manner.

In particular, in developing an “English-only” workplace policy, employers and managers should try to track the EEOC template articulated in the aforementioned *Code of Federal Regulations* (at 29 CFR 1606.7). Specifically, rules that require employees to speak only English at all times in the workplace would be viewed as a “burdensome term and condition of employment” (29 CFR 1606.7(a) 2011). However, if the English-only rule is applied only at certain times “where the employer can show that the rule is justified by a business necessity” (29 CFR 1606.7(b)), and only enforced during time periods where the business interests to be protected are present, it likely will withstand the scrutiny of courts. Furthermore, it would be advisable that the employer’s policy be phased in after adequate notice “of the general circumstances when speaking only English is required and of the consequences of violating the rule” (29 CFR 1606.7(c)). Thus, it would be prudent that such a rule be memorialized in personnel and employee handbooks and manuals, and that the workers acknowledge receipt of such a policy via a written signature. Nevertheless, the subject language policy should be narrowly tailored to serve the legitimate business interest, equally applied to all workers in a nondiscriminatory manner, and the employer also must guard against any policy application that creates an atmosphere of intimidation, harassment or inferiority. Adherence to these preceding recommendations and suggestions, the authors expect, will enable employers and managers to achieve a legal, moral, and efficacious language policy and workplace.

## Summary

The United States of America as a country and concomitantly the U.S. workforce are increasingly more diverse. Ethnic and cultural diversity is today the “new reality” in the United States of America. The economy, moreover, is now a truly global one, and thus an even more diverse one; but employers can benefit from this diversity by having a diverse labor force too. Diversity enables the employer to retain talented and knowledgeable people from all segments of the U.S. population as well as the world. Diversity in employment also will allow the employer to use its diverse employees to relate well to a diverse customer base. Furthermore, greater awareness of the diversity of the employees and the applicant pool and the showing of greater respect to the cultures of the employees, as well as a greater sensitivity to cultural differences,

will benefit the employer and its stakeholders by achieving a more tolerant and harmonious, and accordingly a more efficient, effective, and productive workplace.

However, also today in the United States, it clearly is becoming even more challenging for employers to manage this increasingly diverse, multi-cultural, multi-ethnic, and multi-lingual workplace. The employer's right to set workplace policy and to manage its workforce in order to fulfill its business needs, including setting forth language restrictions at work, very well could clash with the employees' rights to maintain their ethnic identity and national origin and to express themselves culturally, including, of course, their use of language. Employers and employees, as well as U.S. society as a whole, therefore, can expect to see continuing and heightened tensions and conflict in the workplace as the country and its workforce become increasingly more diverse ethnically, culturally, and linguistically.

This article has revealed that there is substantial legal acceptance – from the courts, the EEOC, and legal and management commentators – that discrimination based on language can constitute national origin discrimination prohibited by Title VII of the Civil Rights Act. Yet this article also has indicated that legal support does exist today for an employer to have a valid English-only policy, but only if it is narrowly and carefully crafted, not discriminatory, and justified by business necessity. Language policies, including English-only rules, may be a legitimate tool for the employer to use to control and manage a linguistically diverse workplace, so long as the language restrictions are not discriminatory and supported by rational business needs and objectives. However, it is also safe to assume that the EEOC will continue to very closely examine English-only rules and other language requirements, and concomitantly to demand that employers plainly demonstrate the business justification for such language policies.

The prudent as well as ethical employer, therefore, must be keenly aware of its business needs regarding language, fully cognizant of the national origin legal ramifications of its language policies, especially English-only rules, pursuant to federal and state civil rights laws, as well as to be aware of the practical consequences of such rules, especially the potential negative effects on the morale, harmony, and productivity of employees to whom the rules are applied. The authors of this article trust that they raised the awareness – legally, ethically, and practically – of employers and managers to this increasingly important area of employment relations, and that they educated employers and managers as to their legal and ethical rights and responsibilities regarding language policies in the workplace.

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