

## ENGLISH ONLY? RETHINKING LANGUAGE REQUIREMENTS IN A MULTICULTURAL WORK WORLD

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### ABSTRACT

This article explores how language discrimination is discouraged by federal regulations and some court cases. Employers who presume that “English only, no accents” is a bonafide occupational qualification will find such a policy limited by law to occasions where customers or other co-workers are not able to understand the employees’ English or when the workplace is disrupted by the use of other languages during work. In several recent cases, most notably *Fragante v. Honolulu* [1], the courts are taking a searching look at such policies to be sure they do not mask discrimination based on national origin.

Employers that are considering requiring English-only workplaces need to be aware that the Equal Employment Opportunity Commission regulations and several court cases consider such policies suspect since they may mask national-origin discrimination and may have a disparate impact on non-English speaking employees. When does an employee’s foreign language accent create a legitimate nondiscriminatory reason for nonselection? When can an employer legitimately require English only at the workplace? When does it mask discrimination based on national origin? How will the employer and the court decide? The following discussion will outline some of the basic legal constraints on business as they address these issues.

As immigrants are drawn to our shores by the promise of the availability of well-paying jobs, many of these new workers find the ability to speak and understand English a difficult obstacle to surmount. For many employers, this new reality poses problems. Lost productivity, employee discord, safety problems, and dangerous communication failures can arise in the multilingual workplace. Communication with customers, other employees and supervisors can be disrupted when employees have an incomplete command of the English language.

Employers facing such problems may and have reacted in several, often predictable, ways. Some institute English lessons or enroll workers in English as a Second Language classes either at worksites or with outside providers. Many mandate English-only rules for the workplace, while others resort to firing or refusing to hire workers whose command of English is problematic. The acts of refusing to hire and/or firing workers over non-English speech have led to a surge in litigation under the rubric of “language discrimination” under Title VII discrimination based on national origin. Currently, bilingual employees, per se, are not a protected class under the Civil Rights Act of 1964 and 1991 [2, p. 44], although non-English speakers may have some protection. A review of current court cases sheds light on this subject and suggests some possible solutions for employers confronting this issue.

### CURRENT CASES

These management problems have not gone unnoticed by the courts. Due to the onslaught of discrimination cases in this area, the courts have begun to offer employers guidance in avoiding discriminatory practices as they address the needs of a multilingual workplace. Specifically, these cases point to the EEOC’s position that “English-only” policies are to be avoided unless the employer can establish a legitimate nondiscriminatory need, such as the need for clear communication with English-speaking clients or co-workers, or the need to reduce serious employee discord due to language differences. The burden to prove such a need remains with the employer. The current cases cited here offer factual examples to assist employers and employees in assessing their current difficulties in multi-language settings.

For instance, some courts have held that discrimination on the basis of “primary language” spoken is completely illegal. A married couple was awarded \$150,000 in attorney fees because the employer required English proficiency for the purpose of signing a contract for insurance policies (in English). The employer was also ordered to spend \$100,000 in outreach programs for non-English speaking employees [3]. This new trend follows the EEOC’s assertion that English-only policies mask national-origin discrimination [4].

In contrast, the older cases, such as the landmark case of *Spun Steak*, held the employer, as an at-will employer, had the ability to regulate the workplace environment. Therefore, the employer could institute such policies. In *Garcia vs.*

*Spun Steak* [5], two Mexican employees insulted a Chinese employee in Spanish. Despite warnings to desist, the employees persisted in using Spanish to inflame others. The employer claimed he was reducing stress and trying to achieve racial harmony by instituting the English-only policy in his ethnically diverse meat-packing plant. Such differences between precedent cases point to the courts' focus on the employer's reasons or justifications for instituting an English-only policy.

In still another kind of case, employees who have been denied promotion because of language issues have challenged such actions on the grounds of discrimination based on national origin. In *Xieng v. People's National Bank* [6], a Cambodian-born refugee was turned down for the position of loan officer because of "English issues," despite successfully passing an American Institute of Banking Course in effective English and receiving positive supervisory recommendations from several managers for the loan officer position. In addition, Xieng had successfully filled in for a comparable position at the company. Testimony revealed that he would only be promoted if he could bring in Cambodian customers. In addition, he was being denied the position because "he could not speak 'American'" [6, at 577]. In its ruling, the court held that "national origin discrimination includes the 'linguistic characteristics' of a national origin group" [6, at 578]. The bank had contended, unsuccessfully, that 1) the ability to speak English was a job requirement; 2) the employee had documented difficulties with the English language; and 3) the employer had a good faith belief that . . . lack of communication skills would materially interfere with job performance [6]. The bank's position was largely refuted by the employee's actual successful job experience in several, closely related positions.

This case appears to follow the newer standard, first enunciated in *Fragante v Honolulu* that employers must have a legitimate need for an English-only policy to survive legal scrutiny [1]. In *Fragante*, once the plaintiff employee was able to establish a prima facie case of discrimination, the burden shifted to the employer to provide evidence that the employee was rejected for a "legitimate, nondiscriminatory reason" [1, at 595]. The facts of *Fragante* present a familiar, difficult situation for employers and employees alike. The employer in this case could demonstrate such a legitimate nondiscriminatory reason [1]. *Fragante* had applied for a job but was denied employment because of his alleged deficient oral communication skills. The 9th Circuit agreed that *Fragante*'s heavy Filipino accent was a "legitimate nondiscriminatory reason for his nonselection." However, the court also indicated that because the employer could easily use an individual's foreign accent as a pretext for national origin discrimination, courts must take a very searching look at adverse employment decisions based upon claims of deficient oral communication skills [1].

When language interferes materially with job performance, the employer may claim the employee's foreign accent constitutes a legitimate reason for nonpromotion [3]. There must, therefore, be a factual basis for a denial of promotion, or

the good faith standard will not be enough to enable the company to prevail [3]. As Dutton noted, this means that the relationship between communication skills and job performance is really the linchpin to the issue of whether language discrimination has occurred. [3, p. 42].

Since *Xieng* and *Fragante*, several more-recent cases have been decided that shed even more light on this relationship between communication skills and job requirements. In *Maldonado et al. v. City of Altus, Oklahoma*, there was a challenge to the city's business communication policy [8]. This policy required Altus municipal employees to speak only English in the workplace and in any business communications when that speech was for or otherwise represented the city. Such rules are often termed "English-only" policies. More than 27 states have now adopted some form of English-only policies for state workers. While many of these policies have gone unchallenged, some such as the Illinois law, have been held to be unlawful discrimination.

In Oklahoma, in the *Maldonado* case, the employees believed this policy discriminated against them based on national origin. The policy was designed to relate to actual business communications only. The city's position was that the English-only policy was developed to prevent employees who only spoke English from being excluded from company work and to address potential safety issues. The city agreed that no specific instance had occasioned the implementation of this policy. When the policy was challenged in court, it survived at the lower level but was remanded for trial on the employer's intent at the appeals level. The limited scope of the policy (i.e., business communications only) allowed the lower court to find it nondiscriminatory. Again, the district court focused on the business need for the policy. The 10th circuit found the evidence of business necessity scant and remanded the matter to trial in 2006 [8].

However, under the EEOC standard, an "at all times" workplace English-only rule is presumed to be overly broad and burdensome, while a policy that the employees speak only English at certain times is permissible if the employer can show that the rules are justified by business necessity [9]. The EEOC regulations are designed to focus the employers' attention on this requirement. All of the recent cases agree with and point to the EEOC burden on employers to demonstrate their reasons for any English-only policies.

EEOC regulations and policy were specifically addressed and defined in detail in *Garcia v. Spun Steak Co.* [5]. In *Spun Steak*, one question that was addressed related to whether a company could require bilingual workers to speak only English on the job. As mentioned above, several workers were abusing other workers in Spanish. The rule did not limit speech during breaks or lunch times. The court held that bilingual employees should be able to comply with the rule even if it was actually inconvenient for employees. Next, the court asked whether a non-English-speaking worker can be required to learn and speak English. It did not answer that question directly. In its ruling, the court held that a) requiring *bilingual* employees to speak English in the workplace does *not* support disparate

impact claims under Title VII, because the employees had the ability to switch between languages, and that b) these English-only rules are designed to insure that non-bilingual workers (English-only speakers) would not feel left out in the workplace conversations or discussions. The non-English-speaking workers' rights were not defined, and the court left open the question as to the disparate impact such a rule would have on such non-English speakers. The notion of silencing individuals was disturbing to the court as this would create a serious negative impact on these individuals [5].

The courts go even further in some cases and inquire as to the alleged impact of bilingual speaker's accents on the employer's business. The following cases demonstrate how employer objections to heavy accents are considered. In a 1998 case, *Rivera v. Baccarat, Inc.* [10], a Manhattan retail sales representative was told not to speak Spanish at the job, and that her boss didn't like Hispanics. The court found national-origin discrimination in violation of Title VII. In its decision, the court stated, "Accent and national origin are obviously intertwined . . . unless an employee's accent materially interferes with her job performance, it cannot legally be the basis for an adverse employee action" [10, at 324]. Damages of \$104,373 were awarded, plus attorney fees of \$102,437 and interest. The employee clearly showed a nexus between the employer's policy and the adverse impact on her, while the employer failed to meet the EEOC guidelines by failing to establish the nexus between communication skills and job requirements [10].

In this type of discrimination suit, both parties must establish facts that support legitimate needs. In a 2003 case, *Argueta v North Shore Long Island Jewish Health Systems, Inc.*, it was alleged that Argueta was discharged for disciplinary reasons (striking a coworker) [11]. Argueta alleged that she was terminated for her race, color, or national origin and that the discipline was a pretext for covering up discrimination against her. She (Argueta) had been offered reinstatement by the facility but turned it down because she believed that North Shore did not want to correct its behavior. Because she was unable to put forth a prima facie case or propose an illegitimate reason for the adverse employment action, the court entered a summary judgment for the defendant [11].

Argueta alleged that North Shore had an English-only policy, but could establish no causal connection between the policy and her termination. The fact that she was a Spanish speaker did not establish the nexus between acts of individual discrimination and the firm's decision to terminate her [11]. This case further affirms the need for employees to establish a prima facie case for discrimination and the nexus between that and actions based on English-only rules. Thus, Argueta failed to provide legally sufficient evidence which could contradict a well-presented, legitimate reason for the adverse employment action against her [11].

All of these cases point to the employer's need to justify its English-only policies. The employer at will is not given a license to dictate language requirements. Managers need to look closely at their workplace operations to determine the

actual need of the organization for such a policy or risk expensive litigation if an employee feels discriminated against due to language restrictions.

### **WHERE ARE WE NOW?**

The cases discussed illustrate that English-only rules may be subject to EEOC claims of discrimination based on national origin. Discrimination based on national origin cases may proceed on two types of liability theories: disparate treatment and disparate impact. Disparate treatment is rare because it requires actual animus against the employee. Disparate impact, on the other hand, does not require actual discriminatory intent and focuses solely on the impact of policies on protected persons. Since businesses typically will raise affirmative defenses to disparate impact claims, employees must prove a causal connection between their non-English accents and the employer's actions. Plaintiff employees prevail when an impact is shown, and the employer is unable to prove the business's need for the policy.

### **ADVICE TO MANAGERS**

Based on the various court rulings discussed in this article, employers should consider carefully their needs versus the legal issues raised before adopting any English-only policies. Toward this end, a combination of reactive and proactive policies and practices is discussed below. For all companies, certain universal responses to language issues should be employed to avoid illegal discrimination based on national origin. Universally, both long- and short-range planning should include human resource components. By forecasting employee needs, each company should be able to more accurately tailor its recruiting and retention efforts to include linguistic requirements for its workforce.

For example, employees could be asked to update their personnel files to include language and cultural experiences, regardless of how acquired, to educate the employer as to its workforce composition and abilities. This would demonstrate the company's awareness of the importance of English/bilingual abilities if competency needs arise. Such information about employees who grew up in families where foreign languages were spoken, or who took language classes in high school or college, or gained experience while traveling or during military service, could be used to "partner" such individuals with employees for whom English proficiency is less than desired, and in the process, benefit not only these employees, but also the company.

A reassessment of the importance of foreign language/cultural experiences should be sought, perhaps even preferred, in new hires. This will create a more "international flavor" to the workforce. In addition, managers should be provided with "cultural awareness" training as part of their orientation and management-development activities. With the increasingly diverse nature of the workplace,

such activities are essential to today's effective management and may reduce employee discord faster than any English-only rule.

Additionally, activities such as "international" meals and internal communication of cultural concepts (i.e., holidays) make the workplace more "user-friendly" for all employees. This should also establish a more positive atmosphere that will encourage better understanding of the importance of having a common linguistic communication medium for all workers.

### **PROBLEM PREVENTION**

For current employees, English language assessment tools should be considered to determine the levels of English proficiency (in terms of both oral and written communication skills). These assessments demonstrate an employer's proactive efforts in assessing language competencies before they become a problem. If an employer followed such an assessment with efforts to improve English communication skills, employees would be supported, as opposed to discriminated against, due to language. If the need for communication is the focus, the employer and employee win.

Partnering with local schools and colleges should be considered. From the formal test of English as a foreign language (TOEFL) to more informal assessments, companies will be able to determine more effectively the linguistic needs of individual employees. For some, inviting literacy volunteers to assist those with minimal English skills to providing more formal classes should be considered. These activities could be held before or after work or during lunch. To be successful they should be validated and supported by all levels of the firm's management. Much of this assistance can be provided at little or no cost to employers. Making company space available for these efforts will also reinforce the need for English proficiency. It may be possible to partner with local schools or colleges of education to provide English teachers as part of their individual teacher training, especially for those preparing to work in the field of adult education or ESL education.

### **OTHER EMPLOYER RESPONSES**

Where possible, companies should plan to include forecasting for English communication requirements for employees in the future. Having lead time should enhance recruitment efforts in this regard. When supported by management, the results should be very positive. Evaluating managers on performance appraisals regarding the progress their employees are making towards competence in written and spoken English should be considered. Job descriptions should be reviewed and updated to include present and future language competency needs. In addition, businesses that are increasing their presence in the international business arena should consider hiring language majors as part-time employees. Others can

provide bilingual support for employees for whom English is a second language. Among the jobs of particular concern are “technical support” and “collections.” When these are outsourced, efforts must be made to include English competency requirements for subcontractors and outsourced employees.

If companies planning ahead are cognizant of court decisions and are proactive in anticipating market requirements, they should be able to avoid many of the pitfalls that were the focus of the court decisions reviewed in this article. Awareness of the EEOC policies and regulations can inform employers so that workplace discrimination and ensuing expensive litigation are minimized.

Positive experiences with bilingual and multilingual employees must become a reality in our firms. With our increasingly multicultural business world, English-only rules must be reviewed and workplaces must more clearly reflect today’s cultural realities. At the same time, companies must be prepared to assist employees in achieving the level of English proficiency necessary for success in the business world today.

#### ENDNOTES

1. *Fragante v. City of Honolulu*, 888 F. 2d 591 (9th Cir. 1989).
2. Kenneth L. Sovereign, *Personnel Law*, 4th ed., Englewood Cliffs, NJ: Prentice Hall, 1999.
3. Gail Dutton, One Workforce, Many Languages, *Management Review*, 87(11), pp. 42-47, 1998.
4. 29 CFR Sections 1606.1-1606.8.
5. *Garcia v. Spun Steak*, 998 F. 2d 1480 (9th Cir. 1993).
6. *Xieng v People’s National Bank*, 63 WN App 572, 821 P 2d 520 (1991).
7. 29 CFR Section 1606.1.
8. *Maldonado et al. v. City of Altus, Oklahoma*, 433 F. 3d 1294 (10th Cir. 2006).
9. 29 CFR Section 1606.7 (b).
10. *Rivera v. Baccarat*, 10 F Supp 2d 318 (1998).
11. *Argueta v. North Shore Long Island Jewish Health System*, 2003 US Dist. LEXIS 20456 (2003).

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