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Language in the Workplace

By Robert D. Park

Is a language-related rule national origin discrimination?

On June 20, 1994, the United States Supreme Court let stand a ruling by the U.S. Ninth Circuit Court of Appeals [*Garcia v. Spun Steak Co*., Supreme Court #93-1222, Lower Court Decision: 998 F.2d 1480 (9th Cir. 1993)] wherein a California company may continue to require most employees to speak English on the job.

The issue arises from Title VII, of the Civil Rights Act, and the guidelines set forth by the Equal Employment Opportunity Commission (EEOC) concerning discrimination in the workplace based on national origin. Does a rule by an employer requiring employees to use English while working constitute national-origin discrimination?

Perhaps not surprisingly, the EEOC said "Yes," and a federal court in San Francisco agreed.

Spun Steak Company is a California corporation that produces poultry and meat products in South San Francisco for wholesale distribution. Spun Steak employs thirty-three workers, twenty-four of whom are Spanish-speaking. Virtually all the Spanish-speaking employees are Hispanic. While two employees speak no English, the others have varying degrees of proficiency in English.

The plaintiffs in this case, Pricella Garcia and Maricela Bultrago, are fully bilingual in Spanish and English.

Spun Steak's president, Kenneth Bertelson, received complaints that Garcia and Bultrago made derogatory, racist comments in Spanish about two co-workers, one of whom is African-American and the other Chinese-American. After an investigation, Mr. Bertelson concluded that an English-only rule would promote racial harmony and enhance worker safety as some non-Spanish-speaking employees claimed the use of Spanish was a distraction while they were operating machinery. In addition, the U.S.D.A. inspector in the plant spoke only English and thus could not determine if product-related concerns were raised in Spanish. The following rule was posted:

> *[I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.*

In addition, Spun Steak adopted a rule forbidding offensive, racial, sexual, or personal remarks of any kind.

Written exceptions were issued allowing the clean-up crew to speak Spanish and allowing the foreman certain discretion.

Garcia and Bultrago, however, persisted in speaking Spanish and for two months they were not permitted to work next to each other. Local 115 protested the English-only policy and requested that it be rescinded, but to no avail.

In May, 1991, Garcia, Bultrago and Local 115 filed charges of discrimination with the EEOC. The ensuing investigation determined that "there is reasonable cause to believe Spun Steak violated Title VII of the Civil Rights Act of 1964, as amended, by adopting its English-only rule and its retaliation when Garcia, Bultrago, and Local 115 complained." The case ended up in the federal district court.

In short, the district court granted the Spanish-speaking employees' motion for summary judgment, concluding that the English-only policy disparately impacted Hispanic workers without a sufficient business justification.

Under Title VII, a plaintiff alleging discrimination may proceed under two theories of liability: (1) disparate treatment; or, (2) disparate impact. The latter is concerned with the consequences of employment practices, not simply motivation.

In *Spun Steak* intentional discrimination was not alleged by the Spanish-speaking employees, rather, the policy had a discriminatory impact. They argued: (1) it denies them the ability to express their cultural heritage on the job; (2) it denies them the privilege of employment that is enjoyed by monolingual speakers of English; and (3) it creates an atmosphere of inferiority, isolation, and intimidation.

"[The Court of Appeals held] that the English-only policy does not inexorably lead to an abusive environment for those whose primary language is not English."

The circuit court found (1) there is nothing in Title VII which requires an employer to allow employees to express their cultural identity; (2) a privilege is by definition given at the employer's discretion and in this instance, the employer defined the privilege narrowly — bilingual employees who are able to speak English can converse on the job (the privilege of speaking was not denied, only the choice of language); and finally (3) the bilingual employees are able to comply with the rule and there is no evidence that the atmosphere is infused with hostility toward Hispanic workers. *Indeed, substan-tial evidence indicates the policy was enacted to prevent employees from intentionally using Spanish to isolate and intimidate members of other ethnic groups.*

In holding that the English-only policy does not inexorably lead to an abusive environment for those whose primary language is not English, the Appellate Court reached a conclusion *opposite* to the EEOC's long standing position. Under the EEOC's "scheme" (the Court's term), an employer must always provide a business justification for such a rule because of the EEOC's conclusion that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin… (The Court) will not defer to `an administrative construction' of a statute where there are compelling indications that it is wrong." The Ninth Circuit encompasses Guam, and the states of Hawaii, Alaska, Washington, Oregon, California, Arizona, Nevada, Idaho, and Montana.

Can language be used to intentionally isolate and intimidate members of other ethnic groups?

Juanita F. McNeil an English-speaking African-American believes so. She has filed suit in the U.S. District Court, Southern District of New York [*Juanita F. McNeil v. Marie Aguilos and Belleview Hospital*, Cite as: 831 F.Supp. 1079] charging Bellevue Hospital with discrimination and retaliation based on her non-Filipina status.

> *District Judge Sotomayor: At the heart of this action are the allegations by pro se plaintiff… an English-speaking African-American, that Filipina-American nurses spoke Tagalog in her hospital workplace in order to isolate and harass her, and that their communication in Tagalog impeded her ability to perform her job effectively. The questions in this case are troubling, and the issues and problems are likely to become more pervasive as our society grows increasingly multiracial and polyglot (*emphasis added). *There is no simple solution, for just as a workplace English-only policy potentially violates the rights of non-English speakers, plaintiff here contends that allowing co-workers to communicate in a foreign language violates her rights as a native English speaker.*

Conclusions (in part): This suit raises difficult legal issues, some of first impression, all of great importance. The importance of the issues and their position on the *cutting edge* of civil rights law suggest that eager, competent counsel should be readily obtainable and delays should not be too severe.

The Court urged the plaintiff to move for the assignment of *pro bono* counsel by October 12, 1993. At this writing the case is still pending.

Two cases from the Southern District of Texas: (1) a bilingual employee and (2) a monolingual Spanish speaker.

Down Texas way, Hector Garcia filed a discrimination suit in the U.S. District Court, Southern District of Texas, against his employer, Alton V.W. Gloor who had, among other rules set down, prohibited sales persons from speaking Spanish on the job except to Spanish-speaking customers [*Garcia v. Alton W. Gloor, et al*, 618 F. 2d 264 (5th Cir. 1980)]. Among the reasons given for the rule were: employees would improve their English; and it would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates — both valid business reasons. Mr. Garcia is a native born, bilingual Mexican-American who had completed the first semester of tenth grade in Texas public schools.

Keep in mind that this case, like the Spun Steak case above, involves the narrow issue of whether the English-only rule as applied imposes a discrimi-natory condition of employment on an employee who is bilingual, English/Spanish.

In June, 1975, Gloor overheard Garcia speaking Spanish with another employee and for that, in combination with other deficiencies, fired Garcia. According to his own testimony, Garcia had violated the English-only rule "at every opportunity since the time of his hiring…"

At trial an expert witness for Garcia testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others. (Language as ethnic identification and as an expression of Hispanics' cultural heritage and pride seem to be common threads in language suits.)

The district court concluded that the *speak-only-English* rule did not discriminate on the basis of national origin and on May 22, 1980, the Court of Appeals, Fifth Circuit affirmed the decision. In so doing, the Court noted, *"no authority cited to us gives a person a right to speak any particular language while at work; …if the employer engages a bilingual person, that person is granted neither right nor privilege by statute to use the language of his personal preference* (emphasis added)."

Also from the Southern District of Texas we have Natividata Vasquez, a monolingual Spanish-speaking part-time truck driver who was denied re-employment by McAllen Bag & Supply Company after the

company instituted a policy requiring its drivers to be able to speak English. Vasquez's suit [*Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)] charged discriminatory hiring practices on the basis of national origin.

The area where the alleged discrimination occurred is 85 percent Mexican-American with 60 percent of the population as monolingual Spanish-speakers. In 1977, the employer instituted a policy of hiring only drivers who could speak English or were bilingual since the employer could communicate with his drivers only in English. Vasquez, although he had performed satisfactorily in the past, was not re-hired.

The district court found that there was no showing of the requisite *motive* for discrimination in a policy of hiring only English-speaking or bilingual truck drivers. On November 6, 1981, the Court of Appeals, Fifth Circuit, which includes the states of Texas, Alabama, Florida, Georgia, Louisiana, Mississippi as well as the Canal Zone, affirmed that finding.

These cases clearly show that the courts are not bound by guidelines set down by the EEOC when there is no statutory or legislative history to support those guidelines. The EEOC *presumes* that English-on-the-job rules are discriminatory, placing the burden on employers to justify them as a *business necessity*.

According to Barnaby Zall, an expert in this field of law, the Supreme Court has never considered whether a language-related rule is prohibited as national origin discrimination. Lower courts (as shown above) have rejected the idea, saying that while language might be used as a tool to discriminate, regulating language alone (without an intent to discriminate) is not national origin discrimination. However, the ACLU and the Clinton administration claim that language-related rules based on national origin discrimination are prohibited. ■