COMMON LANGUAGE POLICIES IN THE WORKPLACE: DANGERS FOR THE EMPLOYER AND REMEDIES FOR THE EMPLOYEE[1]

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Title VII of the Civil Rights Act of 1964, as amended, protects against discrimination in employment on a variety of protected categories, including national origin. Employers who adopt common language[2] policies, which usually are categorized as "English-only" workplace policies, today face more challenges and a stronger likelihood of litigation than ever before. According to the Equal Employment Opportunity Commission (EEOC), charges of discrimination involving a workplace English-only rule resulted in 32 lawsuits in 1996. That figure has risen to 228 cases in 2002, a 612% increase. Charging parties and/or plaintiffs have argued that English-only workplace policies constitute national origin discrimination. Plaintiffs arguing national origin discrimination on the basis of an English-only policy have in the past been thwarted by the judicial system's prevailing view that such policies are not discriminatory if an employee is bilingual and able to speak English. However, this view has been challenged in recent years. English-only discrimination suits have resulted in large settlements and bad public relations for employers. The EEOC and other legal organizations keep a careful eye for English-only cases and are not hesitant to file suit against employers who adopt such policies.

American history is replete with instances of fear of the "newest arrivals" to the country. In the nineteenth century, this sentiment was directed against Irish, eastern European and Chinese immigrants. At the present time, Spanish-speaking immigrants are the so-called "newest arrivals," although Spanish speakers have been present in what is now the United States for almost 500 years. In any case, the primary group that is the focus of today's English-only policies are Spanish-speaking employees.

The EEOC has adopted the following regulation:

> Sec. 1606.7 Speak-English-only rules.
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> (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

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[2] In this article, "common language," and "English-only" policies mean the same thing unless otherwise indicated. The distinction lies in that some employers have adopted "common language" policies which allow employees to speak a common language other than English at the workplace while performing work-related duties.

> 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.
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> (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.
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> (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.

29 C.F.R. §1606.7 (footnote omitted). Essentially, the EEOC guideline sets forth rebuttable presumptions and burdens of proof regarding English-only policies. California has statutorily adopted the EEOC regulation. *See* CAL. GOV. CODE §12951 (2005).

The first reported opinion on an English-only policy was *Saucedo v. Bros. Well Svc., Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979). In *Saucedo*, a supervisor unilaterally started an English-only rule at the work site. In finding for the plaintiff, the district court found that "[a] rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees," and defendant had not shown that "there was any business necessity" for this rule.

An older case that is often cited in English-only cases is *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). *Garcia* involved an employee who spoke both Spanish and English who was terminated for violating an English-only rule. The Fifth Circuit held that a worker who is fully capable of speaking English cannot assert a claim of national origin discrimination on the basis of an English-only rule. This decision predates the

EEOC regulation by several years. Since *Garcia*, some courts have adopted its reasoning and others have not.

The first case following the adoption by the EEOC of its guideline was *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). This was also the first case that gave deference to the EEOC guideline. It found that English-only policies adversely impact Spanish-speaking employees. Given that it was vacated as moot by the Supreme Court, however, it has no precedential value.

A Ninth Circuit panel reached a different conclusion in the subsequent decision of *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993). In *Garcia*, the Ninth Circuit explicitly rejected the EEOC guideline. It did not, however, foreclose future lawsuits regarding English-only rules. It should be noted that subsequent to the *Garcia* decision is when the California legislature adopted the EEOC guideline by statute.

A district court in the Fourth Circuit has also rejected the EEOC guideline. In *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933 (E.D. Va. 1995), the defendant employer instituted an English-only policy that allowed and instructed employees to speak only English to each other even while attending to a Spanish-speaking customer. The court cited to evidence that the Spanish-speaking employees were using their fluency to "isolate and to intimidate members of other ethnic groups." *Id.* at 941. However, following the lawsuit, and during the pendency of the litigation, the employer rescinded its English-only policy.

There is no Tenth Circuit bright-line rule on whether the EEOC guideline is to be given deference or not. However, at least one district court did give weight to the EEOC guideline: *Tran v. Standard Motor Products, Inc.*, 10 F. Supp. 2d 1199 (D. Kan. 1998). While giving deference to the EEOC guideline, the court in *Tran* still found for defendant, finding that plaintiff had failed to show that the policy adversely affected his employment in any way. Similarly, in *Marquez v. Baker Process, Inc.*, 2002 U.S. App. LEXIS 13288 (10th Cir. 2002) (unpublished opinion), the Tenth Circuit in a non-published opinion found for defendant on a claim of discrimination arising from plaintiff being asked to cease using profanities in Spanish at the workplace. While this Tenth Circuit panel gave deference to the EEOC guideline, it still found that the employer had a legitimate basis for directing plaintiff not to use profanities in Spanish. In *Sanchez v. City of Altus*, 2004 U.S. Dist. LEXIS 3252 (W.D. Okla. 2004), a district court within the Tenth Circuit rejected the EEOC guideline. It found for defendant employer primarily because the plaintiffs were bilingual employees who spoke Spanish. Given their bilingualism, and relying on the *Spun Steak* decision for the proposition that no discrimination can lie for an English-only policy when the plaintiffs are bilingual, this district court granted summary judgment for defendant.

The reader should not erroneously assume from a review of the above cases that English-only policies pass muster when applied to bilingual employees. This trend has been called into question and even rejected in some recent cases. In *EEOC v. Premier Operator Svcs., Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000), a defendant employer's English-only policy prohibited the speaking of Spanish on company premises, unless they

were assisting a Spanish-speaking customer. This blanket policy was found to be discriminatory, with the court citing that employees adhering to the policy would be unable to speak to their Hispanic colleagues in the lunchroom—"even between a Hispanic husband and wife." The decision also reflects the growing use of linguists as experts at trials involving English-only policies. In *Premier Operator*, a Professor of Linguistics and Hispanic Language and Culture testified on the concept of "code switching." Essentially, code switching refers to bilingual persons unconsciously switching from English to their original or primary language, and then back to English. Code switching is embodied in the EEOC regulation. 29 C.F.R. §1606.7(c). Evidence was adduced that code switching cannot typically be "turned off" and that bilingual speakers' automatic continued use of Spanish under these circumstances would lead to discriminatory practices at work. The court agreed that the blanket English-only policy was discriminatory. Plaintiffs were eventually awarded $700,000 in damages.

There have been several large settlements reached in recent years involving English-only cases. *EEOC v. Synchro-Start Products*, 29 F. Supp. 2d 911 (N.D. Ill. 1999), resulted in a $50,000 settlement. The district court gave deference to the EEOC's presumptions set forth in its regulation, and specifically rejected the Ninth Circuit's proposition in *Spun Steak* that bilingual workers subjected to an English-only rule could not prove a discrimination case. It specifically relied on the EEOC's scheme that "such English-only rules may create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." *Id.* at **13.

Martinez v. Lennox Healthcare and Vencor (N.D. Cal. 1999) resulted in a settlement of $52,500. More recent cases have resulted in substantially higher damages. In *Solero v. Watlow Batavia*, 1999 U.S. Dist. LEXIS 8924 (N.D. Ill. 1999), the lawsuit resulted in a $192,500 settlement. This is the so-called "Buenos Dias" case, because an employee was reprimanded for simply saying "buenos dias" (good morning) to a supervisor.

Recently, the EEOC has teamed up with the Mexican American Legal Defense and Educational Fund (MALDEF) in two cases which resulted in substantial money settlements. *EEOC v. University of Incarnate Word* (W.D. Tex. filed 1999; settled 2001), resulted in a settlement of $2.44 million. There, 18 Hispanic housekeepers were subjected to an English-only rule. The director of housekeeping prohibited the housekeepers from speaking Spanish and required that they speak only English in the workplace at all times, even while at lunch and during employee breaks. Some of these housekeepers spoke little or no English, and the English-only rule resulted in housekeepers meeting in closets to discuss job assignments for the day, with the bilingual employees providing direction to the non-English speakers. The employees who failed to comply with the English-only policy were subjected to repeated verbal and physical abuse as well as ethnic slurs.

The second EEOC/MALDEF case, *EEOC v. Anchor Coin* (D. Colo. 2003), resulted in a $1.5 million settlement. The reason given for implementing the restrictive language policy in this matter was that a non-Spanish-speaking employee felt that other

employees were "talking about her in Spanish." The housekeeping manager chastised employees for speaking Spanish at any time saying, "English-English-English," or "English-only" at Hispanic employees when encountering them in the halls, resulting in the employees suffering great embarrassment and emotional distress.

A review of these reported and unreported cases, while being mindful of the EEOC regulation, suggests that employees should generally be allowed to use any language they wish while at work, except in certain limited situations such as the following:

(a) Legitimate Safety Concerns. Employees can be required to use a common language when working with other employees on a project where there are legitimate safety concerns and a warning may need to be sounded (e.g., two employees servicing a vehicle commonly use the "call and echo" system for safety reasons).

(b) Communicate in a Common Language When Possible. For example, management/supervisors and non-management employees, if able to do so, should communicate in a language common to both. If able, employees may be required to communicate in a language common to a customer or client needing assistance.

(c) Teamwork Projects. When communication is needed among employees who are working together as a team on a particular project, and they are able to do so, a common language may be selected while the employees are working together. This does not preclude the use of a common language other than English. That is, employees who are fluent in Spanish working on a project together should be allowed to speak Spanish to one another.

The case law also suggests that having a blanket English-only policy violates Title VII. Workers should be allowed freedom to express themselves in any language on breaks, in the lunchroom and in other situations where they are not performing work-related duties. If there is a legitimate concern, such as one involving employee safety, it should be spelled out in a written policy. Moreover, all employees must be properly trained and instructed in any workplace language policy.

There has been no New Mexico decision on the subject of English-only and/or common language policies. However, it is likely that a New Mexico court would give deference to the EEOC guideline. If so, the employer would have the burden of proving some legitimate business necessity for having such a rule. The plaintiff should be prepared to engage expert witnesses on linguistics and multiculturalism and on "code switching" to demonstrate that an English-only policy disparately impacts persons of a particular ethnic origin.

An employer who does not have legitimate and well-founded reasons for implementing some English-only or common language policy should not implement any

policy at all. The EEOC, MALDEF and other groups carefully monitor and scrutinize employers who adopt such policies. Absent some valid and legitimate business reason, most commonly a safety reason, these employers will be subjected to charges of discrimination, costly litigation and bad press. In other words, when it comes to English-only workplace policies, an employer should be mindful of the phrase, “if you don’t need it, don’t do it.”