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Title: English-Only Rules: Legal Protections Affecting Municipal Employes

by

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ENGLISH-ONLY RULES: LEGAL PROTECTIONS AFFECTING MUNICIPAL EMPLOYEES

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I. APPLICABLE LAW

42 U.S.C. Sec. 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(b) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

* * *

(c) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

* * *

29 CFR Part 1606, Sec. 1606.7 Speak-English-only rules.

(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.

* * *

Executive Order 13166: *Improving Access To Services For Persons With Limited English Proficiency.* 65 Fed. Reg. 59,121, August 11, 2000

Municipalities that have employees who are protected by Title VI of the Civil Rights Act of 1964 should review the U.S. Department of Justice Policy Guidance on National Origin Bias Against Persons With Limited English Proficiency, effective August 11, 2000. *See* BNA Fair Employment Practices Manual 405:271.

(Title VI does not apply to employment complaints unless a primary objective of the Federal financial assistance is to provide employment. *Maldonado et al v City of Altus*, 433 F. 3d 1294 (10th Cir. 2006), citing 42 U.S.C. Sec. 2000d-3.)

II. WHY DO EMPLOYERS IMPOSE SPEAK-ENGLISH-ONLY RULES?

A. Employees complain that their co-workers using another language are talking about them. *See Gutierrez v Municipal Court,* 838 F. 2d 1031 (9th Cir. 1988), *reh'g denied,* 861 F.2d 1187 (9th Cir. 1988) *vacated as moot,* 590 U.S. 1016 (1989); *Gonzales v Salvation Army,* 89-1679-CIV-T-17 (11th Cir. 1991); *Velasquez v Goldwater Memorial Hospital*, 88 F. Supp.2d 257 (S.D.N.Y. 2000); *Maldonado et al v City of Altus, supra; Tran v Standard Motor Products,* 10 F. Supp.2d 1199 (D.C. Kansas 1998); *Barber v Lovelace Sandia Health Systems,* 409 F. Supp.2d 1313 (D.C. N. Mex. 2005) and many more.

B. Employer thought it was offensive and derisive to speak a language that others don't understand. *See Kania v Archdiocese of Philadelphia,* 14 F. Supp.2d, 730 (E.D. Pa. 1998).

C. Customers complained or might complain about hearing a foreign language. *See Gotfryd v Book Covers,* 97 C 7696 (N.D. Ill. 1999); *EEOC v RD's Drive-In,* Civ02 1911 PHXLOA; *Garcia v Gloor,* 618 F. 2d 264 (5th Cir. 1980), *cert. den.* 449 U.S. 1113, 101 S. Ct. 923, 66 L. Ed.2d 842 (1981).

D. Employer thought the English-only rule would promote racial harmony. *See Garcia et al v Spun Steak,* 13 F.3d 296, 65 FEP Cases 1162, (9th Cir. 1993) *cert. den.* 512 U.S. 1228 (1994); *Gutierrez v Municipal Court, supra.*

E. Streets workers spoke Spanish on the 2-way radio and supervisors and co-workers could not understand. *See Maldonado et al v City of Altus, supra.*

F. Employer believed that supervisors would not be able to manage workers whom they could not understand. *See Gutierrez v Municipal Court, supra; Gonzalez v Salvation Army, supra.*

G. Employer believed the rule would curtail harassment by employees. *See Long v First Union Bank,* 894 F. Supp. 933 (E.D. Va. 1995).

H. Employees might not understand warnings or would be distracted while working with heavy equipment or dangerous machinery. *See Maldonado et al v City of Altus, supra; Garcia et al v Spun Steak, supra; Saucedo v Brothers Well Service, Inc.*, 464 F. Supp. 919 (S.D.Texas 1979).

I. Employees' English will improve if they are required to practice. *See Garcia v Gloor, supra,* and *Prado v Luria & Son,* 975 F. Supp. 1349 (S.D. Fla. 1997).

J. "This is America." *See Rosario v Cacace,* 767 A. 2d 1023, 1026 (N.J.Super.2001) and "The boss doesn't want to hear any Mexican talk." *See Saucedo v Brothers Well Service, Inc., supra.*

III. HOW DO THE COURTS ANALYZE THESE REASONS?

A. Before the EEOC Guideline.

A case that is often cited to support English-only rules was decided before the EEOC Guideline on Speak-English-only rules was promulgated. In *Garcia v Gloor, supra*, decided in 1980, a salesman was discharged for speaking Spanish on the sales floor. The employer's rule permitted Spanish to be spoken only when the salesman was dealing with a Spanish-speaking customer. The salesman claimed a violation of Title VII, but the Fifth Circuit saw no discrimination because the salesman was able to speak English. The court's opinion noted that the EEOC had never promulgated a guideline dealing with language.

Although there was no EEOC guideline calling for employers with English-only rules to demonstrate business necessity, the employer did offer business reasons for the rule and the court did analyze them. The employer claimed that English-speaking customers don't like to hear Spanish, the sales literature was in English, it would be easier for non-Spanish-speaking supervisors to manage employees, and, besides, abiding by the rule would help the Spanish-speaking salesmen to improve their English. The Fifth Circuit found these justifications perfectly sensible, and, thus, not discriminatory.

Another pre-guideline case reached a different result, but used similar common-sense analysis. In *Saucedo v Brothers Well Service, Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979) the employee of Mexican ancestry was discharged for speaking Spanish. The employer defended by claiming that it was necessary for well construction workers to use one language because they used dangerous equipment. The defense was unsuccessful because the English-only rule was not enforced consistently and the employer could not show a clear connection to safety. The supervisor's statement that "The boss doesn't allow any Mexican talk" showed discriminatory animus and undermined business necessity claims.

It may be that the main effect of the EEOC guideline has just been to emphasize the connection between language and culture and to persuade courts to examine proffered business justifications more closely. This means that outcomes are determined almost entirely by facts and results may be hard to predict.

B. After the Guideline.

Earlier cases are more likely to follow the guideline. As immigration increases, courts seem to be more tolerant of language restrictions in the workplace. For example, in *Carino v University of Oklahoma Board of Regents,* 750 F. 2d 815, 819 (10th Cir. 1984), the court ruled in favor of a plaintiff who was denied advancement because of his accent,[1] holding:

[1] All the cases I could find treat accent discrimination the same as language discrimination. *See Carino, supra* and *Fragante v City and County of Honolulu,* 888 F. 2d 591, 595, 49 FEP 437, 51 FEP 190, 104 ALR Fed. 801, *cert. den.* 494 U.S. 1081 (1990).

" . . . A foreign accent that does not interfere with a Title VII claimant's ability to perform the duties of the position he has been denied is not a legitimate justification for adverse employment decisions." (Citations omitted.) 750 F. 2d at 819.

The U.S. Court of Appeals for the 9th Circuit followed that analysis in ruling for the plaintiffs in *Gutierrez v Municipal Court,* 838 F. 2d 1031, 51 FEP Cases 435 (9th Cir. 1988), *vacated as moot,* 490 U.S. 1016 (1989). There the plaintiff and her co-workers were hired because they were fluent in Spanish. They were required to use Spanish in dealing with members of the public who spoke only Spanish. But they were forbidden to speak Spanish at other times while doing their work.

The court noted that language is very closely related to culture and, thus, to national origin and ancestry. Discrimination against one's language amounts to discrimination against one's national origin and can only be justified by business necessity. 838 F. 2d at 1039.

The court's opinion stresses that business necessity means more than business purpose, citing Atonio *II*, 827 F. 2d at 442. Rather, the business necessity exception requires a justification sufficiently compelling to override the discriminatory impact of the challenged rule. Further, the rule must be effective in carrying out the business purpose it is alleged to serve, and there must be available no acceptable less discriminatory alternative that would accomplish the purpose as well. 838 F. 2d at 1041, 1042.

The opinion goes on to reject all of the justifications offered by the defendant municipal court.

Again in *Fragante v City and County of Honolulu,* 888 F. 2d 591, 596, 49 FEP Cases 437, 51 FEP Cases 190, 103 ALR Fed. 801, (9th Cir. 1989), *cert. den.* 494 U.S. 1081 (1990), the court, relying on the guideline, said:

" . . . accent and national origin are obviously inextricably intertwined in many cases . . ." Therefore " . . . an adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance . . ." 888 F. 2d at 596.

In *Fragante,* the plaintiff was denied a clerical position because of his accent. Honolulu defended by stating that he would have to deal with 200-300 angry and disgruntled citizens every day and he had a very pronounced accent. It was hard to understand him. The court thought that was an adequate showing of business necessity and that there was no discrimination. 888 F. 2d at 598.

C. The 9th Circuit and some other courts now reject the EEOC Guideline.

The Court of Appeals for the 9th Circuit has abandoned *Gutierrez and Fragante.* In *Garcia et al v Spun Steak,* 998 F.2d 1480, 1993 U.S. App LEXIS 17599, 62 FEP Cases 525 (9th Cir. Cal. 1993), *cert. den.* 512 U.S. 1228 (1994), restaurant employees who were able to

speak English were required to do so at all times while working, though not at lunch or on break. There were some other exceptions. The Court explicitly refused to follow the EEOC guideline, holding that speaking English at all times is not a burden for English-speaking employees. For the same reason, the court refused to find a disparate impact on the Spanish-speaking plaintiffs. Since they *could* speak English, speaking Spanish was merely a choice.

There was a spirited dissent, arguing that the guideline was rational and ought to be followed, and a much lengthier dissent to the 9th Circuit's denial of rehearing *en banc*. See 13 F. 3d 296 (9th Cir. 1993).

The concept that speaking English is not burdensome for a "bilingual" employee is subject to dispute, but a number of courts have found it convincing. In *Long v First Union Bank*, 894 F. Supp. 933 (E.D. Va. 1995), the court saw nothing discriminatory about an English-only rule where all the employees were able to speak English. "Conversation on the job is a privilege." 894 F. Supp. at 941.

In *Kania v Archdiocese of Philadelphia*, 14 F. Supp.2d 730 (E.D. Pa. 1998), the court rejected the claim of an employee who was discharged for speaking Polish at work. The court saw no disparate impact on a bilingual speaker and agreed with the opinion in *Spun Steak* that the EEOC Guideline should be disregarded. 14 F. Supp.2d at 735.

Likewise, in *Rosario v Cacace*, 767 A. 2d 1023, 1028, 337 N.J. Super. 578 (2001), plaintiff and all the other employees were bilingual, but the supervisor was not. The court approved plaintiff's discharge for speaking Spanish because "bilinguals do not have the right or privilege to speak the language of their choice during office hours." 767 A. 2d at 1028.

D. Plaintiffs have succeeded in complaints of English-only rules when enforcement of the rules is accompanied by harassment or when the showing of business necessity is weak or non-existent.

In *EEOC v Premier Operator Services, Inc.* 113 F. Supp.2d 1066 (N.D. Tex. 2000), the court allowed both compensatory and punitive damages to employees who were discharged after they refused to sign a memo requiring only English to be spoken on work premises; and in *EEOC v Synchro-Start Products*, 29 F. Supp.2d 911 (N.D. Ill. 1999) the plaintiffs were awarded damages because the employer's English-only rule applied to all employees, even those who couldn't speak English!

In both *Premier Operator Services*, *supra*, and *Synchro-Start Products, supra*, the court believed that the rule applied by the employer went far beyond what might have been necessary to solve any management or communication problem connected with the use of two languages. In the Texas case, the rule applied to lunch periods, break periods, and even personal phone calls. The "English-Only" sign was right next to the "No Guns—No Knives" sign in the work place. The business necessity argument is weakened when the rule is not closely connected with work issues. And the placement of the sign supported a conclusion of discriminatory animus.

There actually are several cases where the employer applied an English-only rule to employees who did not speak English. The EEOC settled a case against Anchor Coin, a Colorado casino, where, contrary to the advice of low-and middle-level supervisors, the company imposed an English-only rule on all employees. Many of the workers did not speak English at all and had to get their work assignments from bilingual employees when no one was looking. As often happens in these cases, it all started when a human resources director thought that Spanish-speaking employees were talking about her. Because there was evidence of harassment as well, the employees recovered $1.5 million in the settlement. See *EEOC v Anchor Coin*, Civil Action No. 01-B-564 (D.C. Colo. 2003).

An EEOC settlement with very similar facts recovered $2.44 million for the plaintiffs, $1 million in cash and $1.44 million in tuition vouchers. See *EEOC v University of Incarnate Word*, (W.D. Texas 2001).

And in the *"Buenos Dias"*case, *EEOC v Watlow Batavia, Inc.*, (N.D. Ill. 2000), and assembly-line worker was fired after greeting a co-worker by saying "good morning" in Spanish. Under the consent decree approved by the court, Watlow was to pay $192,500 to eight Hispanic former employees and will provide comprehensive training to its management personnel, post a notice at its plant detailing the outcome of the litigation, and maintain employment records. EEOC press release, September 1, 2000.

IV. A CURRENT ANALYSIS: *Maldonado et al v City of Altus*, 433 F. 3d 1294, 97 FEP Cases 257, 2006 U.S. App. LEXIS 592 (10th Cir. 2006).

A. Facts

The Streets Commissioner received a complaint from one of his employees. "They are speaking Spanish on the (2-way) radio and I can't understand what they are saying." The Commissioner called Human Resources and was advised "Tell them not to speak Spanish on the radio." (So far, so good.)

Instead of taking this advice, the Streets Commissioner ordered all of his employees not to speak Spanish at work at any time, and advised them that the City would be adopting a formal English-only policy. (Starting to spin out of control.)

A foreman complained that this was not the usual procedure for the adoption of a new work rule and he should have been informed in advance. (Red flag.)

Nevertheless, the City adopted a written English-only policy. But the policy was communicated orally in different versions. Employees were told it was OK to speak Spanish unless a non-Spanish-speaking person was present. If they were speaking Spanish and a non-Spanish-speaking person entered the room, they were to switch to English. (Do you see trouble coming?)

Apparently the rule and communication of it resulted in jokes and teasing that had not happened previously.

The plaintiffs claimed violations of Title VI, Title VII, both disparate impact and disparate treatment, 42 U.S.C. Sec. 1981, as well as their rights to free speech and equal protection. The City of Altus gave the following reasons for adopting the English-only rule for all City employees:

1. It was necessary for all employees and supervisors who used radios to understand each other.
2. Other employees thought that Spanish speakers were talking about them.
3. There were safety concerns because of the use of heavy equipment.

The District Court dismissed all of the plaintiffs' claims on summary judgment, relying on the 9th Circuit's *Spun Steak* decision. The plaintiffs appealed.

B. Analysis by the 10th Circuit Court of Appeals.

The Court of Appeals upheld the dismissal of the Title VI claim and of the free speech claim. It upheld dismissal of the claims against the individual defendants, based on qualified immunity. But it reversed the district court's dismissal of the Title VII disparate impact and disparate treatment claims, of the claim of intentional discrimination under 42 U.S.C. Sec. 1981, and of the 42 U.S.C. Sec. 1983 claim of denial of equal protection of the law. These claims were remanded to the district court for trial.

The court noted that there was no written record of any communication, management or safety problems related to language, and managers stated in their depositions that they were not aware of any safety problems related to language. The plaintiffs testified that they had been taunted and harassed after the promulgation of the rule and that they felt they were working in a hostile environment.

The court held that there could be a disparate impact claim of hostile environment. It held that a reasonable juror could find, on the facts of record, that the defendants had created a hostile working environment for plaintiffs because of their national origin.

> "The less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language . . ." 433 F. 3d at 1305.

As for business necessity, the court held that a reasonable juror could find that the City's evidence of business necessity was insufficient and thus summary judgment for the City was not appropriate. The court also held that a reasonable juror could find that the creation of the hostile environment constituted intentional discrimination, disparate treatment.

With respect to the EEOC guideline, the court differed with the 9th Circuit opinion in *Spun Steak, supra*, stating that the guideline was reasonable and provided helpful insight.

At this writing, we do not know whether this case will be settled, retried, or appealed. But it is an excellent current example of what can go wrong when municipal managers overreact (perhaps it's fair to say) to a single employee complaint.

V. If you must impose an English-only rule in your workplace, here are some cautions:

1. Be sure that all employees understand safety rules. Do what it takes. Safety comes first.

2. Check state equal rights laws. They may be more restrictive. Don't rely on "English-only" state laws or constitutional provisions without studying them very carefully. See the 9th Circuit's analysis in *Gutierrez v Municipal Court*, 838 F. 2d at 1043, 1044. Even though *Gutierrez* has no precedential value because the U.S. Supreme Court vacated the decision as moot, the analysis of the California "English-only" constitutional amendment is rational and would probably be followed.

3. Be sure legal staff thoroughly understand the reasons why managers want to impose the rule and be sure that you verify the facts the managers present. Those managers will be the ones on the witness stand when you are proving your affirmative defense of business necessity.

4. Before managers impose the English-only rule, suggest that they examine other means of meeting service and communication goals. Example: Train receptionists and other employees who meet the public to listen to people who speak with an accent. This is a habit that most people can learn.

5. When management has decided to impose an English-only rule, work with supervisors on the details. A far-reaching rule may not be necessary. Be sure the rule doesn't cover non-problems.

6. When the details of the rule are settled, be sure all supervisors understand the application of the rule and are able to teach employees how to follow the rule. Can they answer questions about the rule? Can they explain why it's necessary? Do their explanations match the written rule? Are they consistent?

7. The rule is much more likely to be found to violate employees' rights if it covers breaks, lunch time, personal phone calls, and informal conversation. If it is to be justified by business necessity, there has to be a business reason for each element of the rule's coverage.

8. The rule cannot permissibly cover employees who are not able to speak English.

9. Train supervisors to avoid statements like "This is America!" and other statements with emotional content, as well as outright harassment.

10. Inability to speak English is not a disability that has to be accommodated. This is not an ADA issue.

11. Don't forget compliance with the Executive Order on Improving Access to Services for Persons with Limited English Proficiency.

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