English-Only Rules in the Workplace: The Ninth Circuit Attempts to Redefine the Parameters

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ENGLISH-ONLY RULES IN THE WORKPLACE:
THE NINTH CIRCUIT ATTEMPTS TO REDEFINE
THE PARAMETERS

Robert R. Oliva*

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I. INTRODUCTION

Can an employer be found guilty of discrimination on the basis of national origin when he imposes a rule of English-Only in the workplace? Is it a proper defense that the employee is bilingual and simply chooses to ignore the employer's rule? Is it a proper defense that the particular state has adopted an amendment to its constitution establishing that English is the official language in that state?

First, all courts agree that English-Only rules in the workplace are nondiscriminatory when there is a business necessity. However, up until April 22, 1988, when the Ninth Circuit announced its decision in *Gutierrez v. Municipal Court of Southeast Judicial District*, most courts, especially the Fifth Circuit, had been using a rather flexible test to determine business necessity.

Second, until April 22, 1988, most courts, especially the Fifth Circuit, have indicated that bilingual employees were not deemed to have any protection. In *Garcia v. Gloor*, the court stated that, "neither the statute (the Civil Rights Act) nor common understanding equates national origin with the language that one chooses to speak . . . ." However, in *Gutierrez*, the Ninth Circuit decided that even bilingual employees are protected from English-Only rules.

Finally, the court in *Gutierrez* also ruled, on a matter of first impression, that the recent California English-Only

2. *Id.*
3. *Id.* at 1038.
5. *Id.*
6. *Id.* (emphasis added).
Amendment\(^8\) has no effect on cases involving English-Only rules in the workplace.\(^9\) In light of various adopted and proposed constitutional amendments in other states, including Florida,\(^10\) Gutierrez might become the beacon for those representing individuals affected by "English-Only" rules in the workplace. However as Asian American Business Group v. City of Pomona\(^11\) suggests, caution should be exercised as the United States Supreme Court has vacated the judgment and has granted certiorari in Gutierrez.

II. CONTENT AND LITERATURE REVIEW

This article will examine the various administrative and judicial decisions in connection with English-only rules in the workplace. It does not address broader issues in connection

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8. § 6 of the California Constitution provides the following:
   (a) purpose: English is the common language of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.
   (b) English is the official language of the State of California.
   (c) Enforcement: The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.
   (d) Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this action.


9. Gutierrez, 838 F.2d at 1044.

10. Miami Herald, Mar. 6, 1988, at 1, col. 4, reported that the proposed Florida constitutional amendment is as follows:
   Section 9. OFFICIAL STATE LANGUAGE
   (a) English is the Official Language of Florida.
   (b) The Legislature shall have the power to to enforce this section by appropriate legislation.

Id. at 22, col. 2. On November 8, 1988, 84% of the Florida voters voted to accept the proposal. N.Y. Times, Nov. 10, 1988, at B10, col 4. On July 3, 1989, the United States Supreme Court rejected appeals by the Hispanic residents and let stand a ruling that the official language statutes did not violate the Voting Rights Act. N.Y. Times, July 4, 1989, at A14, col. 4.

with English-Only amendments to state constitutions which have been extensively covered by other authors.\(^\text{12}\)

Two articles have covered English-Only rules in the workplace through a discussion of discrimination on the basis of national origin.\(^\text{13}\) Another has concentrated on employer-promulgated English-Only rules as well as the discriminatory effect of English proficiency policies.\(^\text{14}\) While the first two articles are extensive treatises on Title VII, its procedural aspects and the distinctions between the bona fide occupational qualification ("BFOQ") and the business necessity defenses available, neither author concentrates on the development of the cases concerning employer-issued English-Only rules in the workplace.\(^\text{15}\) In addition, at least one, if not both, might have reached different conclusions had they considered the amended Equal Employment Opportunity Commission ("EEOC") guidelines\(^\text{16}\) in this area and Gutierrez.

**III. Prohibition Against Discrimination On The Basis On National Origin Under Title VII Of The Civil Rights Act Of 1964**\(^\text{17}\)

In the area of employment discrimination, and as it has been applied to employer-issued English-Only rules, the prohibition against discrimination emanates from the provisions in the Civil Rights Act of 1964\(^\text{18}\) that make it unlawful to


\(^\text{15}\) See supra notes 12-13.

\(^\text{16}\) Speak-English-Only Rules, 29 C.F.R. § 1606.7 (1980).


\(^\text{18}\) Id.
discriminate against any individual in connection with his term of employment on the basis of "national origin." However, the term "national origin" is not defined in the statute.

While the statute does not define national origin, the EEOC has indicated that Title VII is designed to reach widespread practices of national origin discrimination as well as many ethnically motivated overt (unintentional), as well as covert (intentional), forms of discrimination.

It was established in Griggs v Duke Power Co. that Title VII protects against intentional as well as unintentional discrimination. In Griggs, the Court held that a facially neutral rule may still be discriminatory if it has a disparate impact on protected individuals. Therefore, while an English-Only rule may be facially neutral, it may have a discriminatory impact.

IV. BURDEN OF PROOF: BASIC PROCEDURAL STEPS

As the courts distinguished between "intentional" and "unintentional" discrimination, various types of defenses that

19. 42 U.S.C. § 2000e-2(a)(1) (1981) states that "It shall be unlawful for an employer ... to discriminate against any individual with respect to his terms ... of employment ... because of ... national origin; or to limit ... his employees ... in any way which would deprive ... or ... adversely affect his status as an employee, because of such individual's ... national origin ...." Id. (emphasis added). In addition to a claim under Title VII, 42 U.S.C. § 2000e-17, some courts have recognized a remedy under 42 U.S.C. § 1981 (1981). For a discussion of a national origin claim under § 1981 and the difference between a Title VII claim, see Native-Born Acadians; supra note 13; see generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 599-614 (1976) [hereinafter SCHLEI & GROSSMAN].

20. Language Discrimination, supra note 13, at 675 n.33.

21. The original EEOC regulations in this area, Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (1970), states that "[t]he Commission is aware of widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate covert as well as the overt practices of discrimination ...." Id. § (a) para. 931.


23. Id. at 436.

24. "Language requirements in employment, even if facially neutral, may be discriminatory due to a disproportionately negative impact on a protected group." Language Discrimination, supra note 13, at 676.
may be available under each have been formulated. Under both forms of discrimination, the burden of proof shifts to the employer to prove that the discrimination was lawful. Under intentional discrimination, the employer must prove that his actions were necessary due to a BFOQ and under unintentional discrimination, the employer must prove that his actions were due to a business necessity.

As overt discrimination is the worst of the two evils, it is not surprising to find that it is easier to establish the business necessity rather defense than the BFOQ defense.

A. The 1970 Guidelines and its Progenitors

The earliest of the EEOC's pronouncements in connection with English-Only rules is entitled "Guidelines on Discrimination Because of National Origin" ("Guidelines"). As indicated earlier, the Guidelines state that Title VII reaches overt and covert discrimination. It further provides that English language tests may constitute "national origin" discrimination both when English is not an employee's first language and when English skills are not a requirement of the job to be performed.

Following the 1970 Guidelines, three administrative
cases were decided involving employer enacted English-Only rules in the workplace.32

1. EEOC Decision No. 71-44633

First, in one of the earliest cases, the EEOC extended the definitions contained in the National Labor Relations Act34 to the Civil Rights Act of 196435 and equated an English-Only rule with a denial of a term or condition of employment.36 The EEOC held that an English-Only rule, barring the use of Spanish during working and non-working hours, and directed solely against Spanish-surnamed individuals, had the unlawful effect of discriminating on the basis of national origin.37 The employer tried to use the business necessity defense and the EEOC held that the supervisors' failure to understand the employees' personal conversations was not a business necessity.38 The Commission found that any business necessity defense would not survive scrutiny where the rule was extended to the employees' non-working time.39

In extending the National Labor Relations Act definitions to Title VII the Commission held that, "[i]t is now well settled that conversation, including social conversation, at work both during working and non-working time, is a term or condition of employment within the meaning . . . of the National Labor Relations Act . . . ."40 The Commission

37. Id.
38. Id.
39. Id.
40. Id.
reasoned that the same should apply to the phrase "terms and conditions of employment" used in Title VII. The Commission concluded, "it follows, and we hold that it is a term, condition, or privilege of employment for Spanish surnamed Americans to speak Spanish at work ... ." The Commission further indicated that the rule had the effect of denying Hispanics a term, condition or privilege of employment enjoyed by the other employees, "to converse in a familiar language with which they are most comfortable . . . ."

2. *EEOC Decision No. 72-0281*

Similarly, in another action, the EEOC again held that enforcement of a rule forbidding barbers to speak Spanish during working hours was sufficient to constitute discrimination on the basis of national origin. There, the Regional Director found that the firing of an employee was not due to discrimination but due to the fact that he had filed a complaint for back wages. However, the Commission reversed the Regional Director's proposed opinion because it concluded that a factor in the firing was actually the plaintiff's violation of a long standing rule forbidding Spanish to be spoken by Spanish surnamed Americans employees in the presence of English speaking customers.

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41. *Id.*
42. *Id.*
43. *Id.*
45. *Id.*
46. *Id.* at para. 4522.
47. *Id.*
3. EEOC Decision No. 73-0377

The last of the 1970 Guidelines EEOC cases was decided in 1973. The EEOC held that a union’s policy of requiring exclusive use of the English language was a discriminatory practice. As Hispanics represented sixty-one percent of the labor force in this case, the Commission held that such a policy violated Title VII as it had a significant adverse impact on the large number of Hispanic employees that could not easily speak, read or write English.

In summary, by 1973, the EEOC decisions were broadly equating written English-Only rules enacted by employers with national origin discrimination. The Commission believed that to converse during working hours, even in a language other than English, was considered a term or condition of employment. Furthermore, it also held that neither the failure of a supervisor to understand Spanish nor the presence of non-Spanish speaking customers was sufficient reason for the rule to constitute a business necessity. This was especially true in cases where the prohibition extended to nonworking hours, as they found it hard to believe that business necessity would require that employees speak only English during breaks.

49. Id.
50. Id. at para. 4701.
51. Id. at para. 4699.
53. Id.
54. Id.
B. The Pre-1980 Judicial Interpretations

The earliest federal case involving English-Only rules was *Hernandez v. Erlensbusch* which involved patrons, not employees. In 1973, the Oregon District Court ruled that a tavern whose clientele was twenty-five percent Mexican-American could not prohibit any foreign language from being spoken on the premises because that would violate the rights of Spanish speaking customers to buy, drink and enjoy what the tavern had to offer.

In *Hernandez*, the owner had ordered his bartenders to enforce the following order: "Do not allow a foreign language to be used at the bar, if it interferes with the regular trade. If there should be a chance of a problem, ask the 'Problem' people to move to a table and turn the juke box up . . . ." The owner of the tavern explained that the rule was to avoid conflict and thus was in the best interest of the tavern's two groups of customers, "Anglo and Chicano."

Two Hispanic customers were told that if they continued to speak Spanish, they would either have to move away from the bar to a separate booth or leave the establishment. When the customers complained, the bartender took the Hispanics' drinks away and refused to refund any money. After the police were called, the customers left peacefully. Two days later the same scene took place with different customers. However this time, the Hispanic customers were followed and assaulted by three

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58. Id. at 753.
59. Id. at 756.
60. Id. at 754.
61. Id. (denoting Caucasian and Mexican-American people). Apparently, in this case the "Anglo" customers thought that they were the subject of the Hispanics' conversations. Id.
62. Id.
63. Id.
64. Id.
65. Id.
"regular" Anglo customers.66

The plaintiffs did not claim, nor did the court address, any issues of discrimination on the basis of "national origin." Instead, the plaintiffs alleged, and the court concluded that, because the tavern had such a large Mexican-American clientele, the prohibition on the use of any foreign language was tantamount to racial discrimination and violated 42 U.S.C. §§ 1981, 1982 and 1985.67

Citing Griggs,68 the court held that 42 U.S.C. § 1981 and 1982 barred this type of patent discrimination against Mexican-Americans who constituted one-fourth of the tavern's

66. Id.

67. 42 U.S.C. § 1981 provides:
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. 42 U.S.C. § 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Id. 42 U.S.C. § 1985(3) provides:
If two or more persons in any state or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The Oregon Circuit Court held that the application of the rule "deprives Spanish-speaking persons of their rights to buy, drink and enjoy what the tavern has to offer on an equal footing with English-speaking customers . . . ." The court equated the "back booth or out" order with the civil rights issues in the lunchcounter and bus cases of the 1960's. The Oregon Circuit Court found no difference between ordering lunch at a diner or ordering beer at a bar in claiming to preserve the peace when sending blacks to the back of the bus or in sending Hispanics away from the bar to a distant booth.

The first case involving an English-Only rule in the workplace reached federal court in 1979. In *Saucedo v. Brothers Well Service Inc.*, the Southern District Court of Texas held that a Mexican-American employee could not be discharged for simply speaking two words in Spanish, while other employees who had committed far more serious offenses had been retained.

In an attempt to meet the requirements of a business necessity defense, the defendant company presented evidence concerning the danger involved in drilling wells and the need to have close coordination among the members of the crew. In dicta, the court explained that an English-Only rule that is "duly and officially promulgated [and] efficiently

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69. See *id.*

70. *Id.*


73. *Id.*


75. *Id.* at 922.

76. *Id.* at 920.
communicated . . . " would be reasonable in such a setting.\textsuperscript{77}

While his non-Hispanic supervisor claimed that Saucedo was told he would be dismissed if he violated the rule,\textsuperscript{78} the facts indicate that Mr. Saucedo was not officially informed of any English-Only policy.\textsuperscript{79} Thus, the Southern District Court of Texas held that Saucedo had neither notice of the rule nor of the consequences for its violation.\textsuperscript{80}

While the court had sufficient facts to rule for Saucedo at this point, the court decided to weigh the setting in which the forbidden act, the two words in Spanish, took place.\textsuperscript{81} The court held that the business necessity failed as a defense because the Spanish utterances took place in a maintenance shop when Saucedo asked a question of another Mexican-American employee and not while he was working at a dangerous well.\textsuperscript{82}

However, all English-Only and Spanish utterances aside, the turning point in \textit{Saucedo} occurred due to the circumstances surrounding the firing and not because of his rights to be informed about the rule, or because the business necessity was a "sham," but because the employer discriminated against Saucedo.\textsuperscript{83}

At the time Saucedo was fired, an altercation ensued between Saucedo's supervisor and another Mexican-American

\begin{itemize}
\item[77.] \textit{Id.} at 921.
\item[78.] "Doc" Holliday claimed in a deposition (he did not testify in person) that "[i]n a very vague manner, that Saucedo, like other 'Mesican' [sic] employees, was told that if he spoke Spanish \textit{at any time} on the job this would be tantamount to quitting and that \textit{as soon as} they uttered any words in Spanish \textit{at any time on the job}, this would be the same as a resignation . . . ." \textit{Id.} (emphasis added).
\item[79.] Instead, when his supervisor was driving Saucedo to work one morning, he said that Doc Holliday did not allow any "Mesican" [sic] talk. \textit{Id.} at 921.
\item[80.] The court found Holliday's testimony suspect, that Mr. Saucedo's conversation with his immediate supervisor was the only time Mr. Saucedo was told about any such rule, and that he was not advised as to the consequences of failing to adhere to such rule. \textit{Id.}
\item[81.] \textit{Id.}
\item[82.] Mr. Saucedo was carrying a heavy metal part and asked another Mexican-American where to place it. Saucedo's supervisor overheard the conversation and fired Saucedo on the spot. \textit{Id.}
\item[83.] \textit{Id.} at 921.
\end{itemize}
employee. Of the three employees, Saucedo, who was not involved in the actual fight, was the only one fired. The court concluded that the crucial discrimination took place when Saucedo was fired for the harmless use of a Spanish phrase while his supervisor, who got involved in a fist fight, was not fired. In addition, the court also reluctantly recognized that the rule had a disparate impact on Mexican-American employees. It held that Saucedo was discriminated against because the rule was not properly adopted and because there was no business necessity for an automatic termination under the circumstances.

The opinion is comprised of several vague conclusions. At worst, the opinion could be seen as an unabashedly clear ruling to employers desiring to institute such rules as to the circumstances under which they are permissible. The latter conclusion is almost inevitable in light of the opening sentence of the opinion: "[t]his opinion does not hold that an employer, or this specific employer, may never institute a rule prohibiting employees from speaking foreign languages in some situations . . . ."

It should be noted that in Saucedo, as in most of the cases that preceded it, there was never an indication that the plaintiffs had any difficulty in speaking English. Therefore, all of the Spanish utterances and conversations in question to date appeared to have been strictly a matter of personal

84. Upon hearing Doc Holliday fire Saucedo, Steve Perez said to Holliday that the "English-Only" rule and Holliday were both "chicken." Id. at 922. Holliday then hit Perez in the face a number of times while the owner of the company looked on. Id.
85. Id. at 920.
86. Id. at 922.
87. Id. "Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job." Id.
88. Id.
89. Id.
90. Id. at 919-20. After almost seven years from the date of his discharge, the court finally awarded Mr. Saucedo two months pay at $2.40 per hour for a total of $896.00, plus interest. Id. at 922. His attorney's request for 120 hours of work was cut to 70 hours and his hourly rate was set at $40.00 per hour. Id. at 923.
Garcia v. Gloo\textsuperscript{91} was the first employer mandated English-Only rule case to reach a United States Court of Appeals and one that extremely limited the freedom of language.\textsuperscript{92} Hector Garcia, a 24 year old bilingual, native-born American of Mexican descent, alleged that he was fired\textsuperscript{93} from his sales job because of discrimination on the basis of national origin in violation of 42 U.S.C. § 2000e-2.\textsuperscript{94} At the root of the alleged discriminatory act was an employer-promulgated English-Only rule which applied to all sales employees except those working outside the store and those who had to communicate with Spanish-speaking customers.\textsuperscript{95}

In contrast to the prior cases, the rule did not apply to conversations during work breaks\textsuperscript{96} and, in contrast to Saucedo, the court indicated that this was not "a case where an employee inadvertently slipped into using a more familiar tongue . . . .\textsuperscript{97} In fact, the Southern District Court of Texas found that Garcia had violated the rule "at every opportunity since the time of his hiring according to his own testimony . . . .\textsuperscript{98} However, that did not mean that Garcia was properly fired. First, the Texas District Court interpreted the language of the statute.\textsuperscript{99} It reasoned that while the EEOC had an informal policy indicating that English-Only rules discriminate on the basis of national origin, it had neither adopted a formal policy nor promulgated an official regulation.\textsuperscript{100} Yet, the Texas Southern District Court noted that "Garcia

\begin{footnotes}
\footnotetext{91}{618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981).}
\footnotetext{92}{Id.}
\footnotetext{93}{Another Mexican-American Employee had asked Garcia, in English, whether an item requested by a customer was available in inventory. Id. Garcia responded in Spanish. Id. at 266.}
\footnotetext{94}{Id.}
\footnotetext{95}{Id.}
\footnotetext{96}{Id.}
\footnotetext{97}{Id. at 270.}
\footnotetext{98}{Id. at 266-67.}
\footnotetext{99}{Id. at 268.}
\footnotetext{100}{Id. at 268 n.1.}
\end{footnotes}
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contends, with support from the Equal Employment Opportunity Commission [EEOC], that the rule violates the EEO Act and the Civil Rights Act . . . ."\textsuperscript{101}

Furthermore, the court's position that the Commission had no formal policy or regulation is somewhat attenuated.\textsuperscript{102} While the earlier Guidelines did not refer to the use of English-Only rules, they did state that examples of overt and covert discrimination include "[t]he use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skills is not a requirement of the work to be performed . . . ."\textsuperscript{103} As English-Only rules are a constant job requirement, it may be argued that such rules are de facto tests which the employee needs to pass in order to maintain his employment.

Additionally, these early guidelines also indicated that Title VII "protects all individuals, both citizens and noncitizens . . . ."\textsuperscript{104} Thus, there was no indication that a citizen's bilingual ability may constitute an exception to this rule especially when one considers that most, if not all, bilingual United States citizens of Hispanic descent come "from circumstances where English was not that person's first language or mother tongue . . . ."\textsuperscript{105}

In any event, even though the EEOC's administrative interpretations are entitled to great deference,\textsuperscript{106} the court proceeded to interpret the meaning of the prohibition against

\textsuperscript{101} Id. at 267.

\textsuperscript{102} See supra text accompanying note 51.

\textsuperscript{103} Purpose, 29 C.F.R. § 1601.1(b) (1970).

\textsuperscript{104} Id. § 1606.1(c).

\textsuperscript{105} Id. § 1606.1(b).

discrimination on the basis of national origin, ignoring the EEOC’s prior administrative opinions as well as any other formal, internal or informal EEOC policy. Instead, it based its decision solely on the statute itself and pertinent judicial case law. In reaching the conclusion that Mr. Garcia’s Spanish utterances were not protected, the court narrowed the EOCC interpretations of the 1970’s and depended heavily on its conclusion that "[n]either the statute nor common understanding equates national origin with the language that one chooses to speak . . . ."

The court reasoned that:

[N]o authority cited to us gives a person a right to speak any particular language while at work . . . . [T]he rules of the workplace are made by collective bargaining or . . . by the employer. An employer’s failure to forbid employees to speak English does not grant them a privilege (to speak English). . . . [I]f the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference . . . .

The logic is rather tenous. For instance, one unintended message from Garcia is the uncomfortable conclusion that a Hispanic-American employer could fire a bilingual, United States born "Anglo" or a United States born Hispanic-American who fails to obey a Spanish-Only rule in the workplace.

The court also emphasized that, with the exception of religion, the protected classes are those that exhibit

108. Id. at 268-69.
109. Id. at 268 (emphasis added).
110. Id. at 268-69.
immutable characteristics which the individual cannot alter. However, the court reasoned that language is a mutable characteristic. Thus, although the prohibition against discrimination on the basis of national origin would protect persons who were born or whose ancestors were born in a foreign country, it would not protect bilingual individuals who, when their employer prohibits use of any language other than English on the job, decide to have a personal conversation in a non-English language of their choice.

In connection with the mutable characteristics of language, an expert 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 ...." However, that did not persuade the court in any form.

Another author, while agreeing that English-Only rules can be applied against bilingual employees who refuse to speak English to English speaking customers, severely criticized Garcia, claiming that "the very nature of a 'Speak English-Only' rule (except in safety circumstances) reeks of xenophobia and misplaced 'Americanization.'" In any event, in light of the court's theory, the question of discriminatory impact was easily resolved. The court held that the rule did

111. Id. at 269 (citing Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (1975)).
112. See id. at 270 (the court stated that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin, color, sex or place of birth.").
113. Id. at 272.
114. Id. at 267.
115. Native-Born Acadians, supra note 13, at 1167.
116. Id.

Hector Garcia was certainly not fired because he upset customers by speaking Spanish - he was not within hearing distance of any customers. Garcia was wrongfully discharged because he practiced his native tongue. Such a situation unfortunately parallels the "Americanization" process in Louisiana in the early twentieth century when educators, both Anglo and Acadians, severely whipped and scorned Acadian boys and girls for speaking French in the classroom and schoolyards.

Id. (citation omitted).
not have a disparate impact on Mr. Garcia as he was completely bilingual and merely chose to speak Spanish instead of English.\(^{117}\)

It is important to note that *Garcia* was originally instituted as a class action suit, but the court denied certification.\(^{118}\) Had the court permitted the class action, then it would have been forced to rule on the effect of the English-Only rule against individuals that were not as fluent in two languages as was Mr. Garcia.

The *Saucedo* opinion reflects dicta on the issue of business necessity.\(^{119}\) In this case the appellate decision relates, for no apparent reason, the holding of the judge of this Southern District Court of Texas\(^{120}\) regarding *valid* business reasons for the English-Only rule and expounded that the following motives, and not discrimination, were the basis for the employer imposed rule:

English-speaking customers objected to communications between employees that they could not understand; pamphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English-speaking customers, they would improve their English; and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates.\(^{121}\)

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117. *Garcia*, 618 F.2d at 268.
118. *Id.* at 267.
120. *Garcia*, 618 F.2d at 267.
121. *Id.*
Some of these "valid" business reasons may appear suspect to some as one might question the customers' interest in the employees' personal conversations, the incremental benefit of the rule in helping employees read the trade literature as they were hired with appropriate ability in the English language to be salespeople, or the lack of Spanish speaking supervisors.

C. The 1980 EEOC Guidelines: The Message Against Garcia

During the last days of President Carter's administration, on December 29, 1980, the EEOC extensively amended its "national origin" guidelines. The Commission defined "national origin discrimination broadly as including . . . the denial of equal employment opportunity . . . because an individual has the . . . cultural or linguistic characteristics of a national origin group." Furthermore, the new regulations specifically added 29 C.F.R. § 1606.7 to indicate the EEOC's policy in connection with English-Only rules. The Commission said that it would presume that rules requiring employees to speak English at all times are violative


123. Id. at § 1601.1.

Purpose. The regulations set forth in this part 1601 contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended. Based upon its experience in the administration of the Act and upon its evaluation of suggestions and petitions for amendments submitted by interested persons in accordance with § 1601.35, the Commission may from time to time amend and revise these procedures.

Id.

124. Id. at § 1606.7(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).
of Title VII and would be strictly scrutinized. However, no such presumption exists when the rule is applied only at certain times. In the latter case, the rule would be justified when the employer can show that it is required by business necessities.

Indicating its general disapproval for such rules, especially blanket rules that prohibit the use of any language other than English, the new EEOC's regulation states:

[T]he primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times 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 would result in a discriminatory environment.

In addition, the Commission recognized that some non-native bilingual people may inadvertently use their

125. See id. at § 1601.7(a) ("Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it." Id.).

126. Id. at § 1606.7(b).

127. Id. at § 1601.7(b) "The person claiming to be aggrieved has the responsibility to provide the Commission with notice of any change in address and with notice of any prolonged absence from that current address so that he or she can be located when necessary during the Commission's consideration of the charge." Id.

128. Id. at § 1606.7(a).

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.

Id.
primary language. Thus, the new regulation requires employers implementing English-Only rules during certain times only give notice to their employees of such prohibition and the penalties for violating the rule. Failure to provide the dual notice would be considered evidence of national origin discrimination in the event that an employee is affected for violation of the rule.

D. Post-1980 Judicial And Administrative Interpretations

Within 12 months after the new Guidelines were promulgated, four decisions were reported concerning employer imposed English-Only rules. However, only the administrative EEOC decision applied the new EEOC Guidelines to resolve these actions. The other three involved 42 U.S.C. § 1981 claims which required evidence and proof of discriminatory intent.

In Flores v. Hartford Police, the District Court of Connecticut held that the Hartford police academy’s English-Only rule was not enforced with the intent to discriminate on

129. Id. at § 1606.7(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." Id.).

130. Id. ("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." Id.).

131. Id. at § 1601.7(c) ("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." Id.).


133. See text accompanying note 142.

134. See text accompanying notes 135-147.

the basis of national origin.\textsuperscript{136} An action was brought against the city of Hartford claiming that the city had discriminated against police recruits based on their national origin.\textsuperscript{137} In order to show discriminatory intent, the plaintiffs presented evidence that the English-Only rule extended to class breaks and they were reprimanded for speaking Spanish in class.\textsuperscript{138}

While the court noted the schism between \textit{Garcia}\textsuperscript{139} and previous EEOC's decisions, this was not emphasized because in \textit{Flores} the rule was not attacked directly, but merely offered as evidence of intentional discrimination.\textsuperscript{140} In any event, the court said that the rule was a necessary goal in light of the need for policemen to be proficient in English and that the rule was not enforced with the intent to discriminate against the plaintiffs.\textsuperscript{141}

The second case in 1981 was an EEOC administrative decision, EEOC Decision No. 81-25,\textsuperscript{142} where a tailor shop adopted the following order, "when you are on the payroll all conversations will be in English. Either work and speak English or work and don't talk . . . ."\textsuperscript{143}

The employer said that the order was temporary, limited in scope, not enforced at all times, and when enforced was only enforced within the shop and sales area.\textsuperscript{144} The Commission held that the prohibition was a burdensome term and condition of employment in light of the then recently

\begin{footnotes}
\item[136] Id. at 190.
\item[137] Id. at 181.
\item[138] Id. at 185-86.
\item[140] \textit{Flores}, 25 FEP at 187.
\item[141] Id. at 186.
\item[143] Id.
\item[144] Id. at 4956.
\end{footnotes}
promulgated 29 C.F.R. § 1606.7(a). Furthermore, it held that because the employer's reasons for the rule did not amount to a valid "business necessity," the prohibition was a violation of Title VII. The Commission said that the problems presented by the employer could have been alleviated by measures less obtrusive than an absolute prohibition.

In Garcia v. Rush Presbyterian, the Seventh Circuit felt that an overriding need for English proficiency among hospital employees validated the adoption of an English-Only rule. While the plaintiffs' class claims were based both on 42 U.S.C. § 2000e and 42 U.S.C. § 1981, evidence concerning the English-Only rule was presented to prove the Section 1981 claim. Garcia brought an action against Rush-Presbyterian Hospital alleging discrimination against Latinos both individually and as a class. Specifically, the charges alleged that job applicants with Spanish surnames or Hispanic ancestry were subjected to disparate treatment in

145. Speak-English-Only Rules, 29 CFR § 1606.7(a) states: 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 that 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.  

Id. (footnote omitted).

146. Id.

147. Id.


149. Id. at 1222.


151. 42 U.S.C § 1981 (1870).

152. Garcia, 660 F.2d at 1219 (Perez was denied her transfer to the position of Lab Liaison Technician and was discriminatorily discharged, and Romeo was discriminatorily refused to be hired.)

153. See id. at 1217.
employment practices. In this case, while the extent of the prohibition is not clear, nearly all employees were required to speak and read English. Moreover, the Seventh Circuit reasoned that because there were other employees whose language was not English, the rule did not have a disparate impact on Hispanics.

Furthermore, the court took judicial notice of the fact that, as English is the most likely language to be used by patients in the interior of a "supposedly English speaking nation," large modern hospitals located in urban areas might have problems because of staff members' inability to communicate in English. The court equated such hospitals with the Tower of Babel (a term used even more recently in the defendant's argument in Gutierrez). However, the main reason the court ruled against the plaintiffs was that, "[t]he ability to speak and read English . . . (was a) job related requirement in . . . a highly sophisticated medical institution . . . ."

In Vasquez v. McAllen Bag & Supply Co., decided within twelve months of the promulgation of the new EEOC Guidelines, the plaintiff alleged two grounds; the first under 42 U.S.C.A. § 2000e was dismissed due to a jurisdictional requirement and the second under 42 U.S.C.A. § 1981 required proof of specific discriminatory intent. In Vasquez,

154. Id.
155. Id. at 1223.
156. Id. at 1222.
157. Id.
158. Id.
159. Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031, 1042 (9th Cir. 1988).
160. Id.
163. Vasquez, 660 F.2d at 687.
164. Id. at 688.
the plaintiff alleged that McAllen Bag and Supply's requirement that job applicants for truck driving positions speak English in an area where 85% of the residents were of Mexican-American origin and 60% were monolingual in Spanish was discriminatory.¹⁶⁵

Mr. Vazquez, who did not speak English, was denied employment by the defendant after he adopted a policy of hiring only English speaking truck drivers.¹⁶⁶ The Court held for the employer because the employee failed to prove that he was intentionally discriminated against.¹⁶⁷ In addition, the Court appeared to have been persuaded by the employer's business argument of the need to have drivers who speak English and Spanish, not just Spanish, and by the fact that the percentage of Mexican-Americans hired by the employer was not affected by the new rule.¹⁶⁸

In 1983, both the courts and the EEOC had an opportunity to state under what circumstances a "business necessity" permits the limited use of an English only rule.¹⁶⁹ In Atonio v. Wards Cove Packing Co.,¹⁷⁰ non-English speaking employees challenged the legality of Ward Cove's requirements that certain jobs be filled only by English speaking persons.¹⁷¹

In Atonio, the court ruled that an English-Only rule was justified in light of danger to employees and consumers.¹⁷² In Atonio, the plaintiffs in question were employed on ocean-going fishing vessels and at fish processing canneries.¹⁷³

¹⁶⁵. Id. at 686.
¹⁶⁶. Id. at 687.
¹⁶⁷. Id. at 687-88.
¹⁶⁸. Id. at 688.
¹⁶⁹. Id.
¹⁷⁰. Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) para 34,437 (D.C. Wash. 1983); decision on remand following 703 F.2d 329 (9th Cir. 1982); aff'd on other grounds, 37 EPD para 35,483 (9th Cir. 1987).
¹⁷¹. Id.
¹⁷². Id. at para. 33,840.
¹⁷³. Id. at para. 33,823.
The court felt that the need for safety and public consumer protection from botulism were sufficient business reasons to overcome any disparate impact.\textsuperscript{174}

In EEOC Decision No. 83-7,\textsuperscript{175} the Commission presented an appropriate and narrowly drawn English-Only rule.\textsuperscript{176} It charged an oil refinery with discrimination against Hispanics on the basis of national origin when it instituted an English-Only Rule.\textsuperscript{177} At first, the company had a very broadly written rule\textsuperscript{178} but four days after announcing it the company amended the rule and narrowed it.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{174} \textit{Id.} at para. 33,840.
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{Id.} at 7005.
\item \textsuperscript{178} The first rule was announced on August 14, 1981. It stated: "All company communications are written and spoken in English - therefore, in the interest of safety and in order to maintain good communications throughout the Plant, languages other than English are prohibited during working hours." \textit{Id.} at 7006 n.1.
\item \textsuperscript{179} The revised rule was announced on August 20, 1981. The EEOC filed charges on September 1, 1981, after this policy was announced. In this decision the court wrote:

As provided in the EEOC Guidelines, 29 CFR § 1606.7 (c):

[i]f 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.

In accordance therewith the Refinery issues the following instructions:

To insure safe and efficient operations in the \[name deleted\] Refinery terminal, laboratory and processing areas; and to insure that instructions are understandable and accurately communicated, all employees are required to speak only English while performing their job duties. Furthermore, during emergency conditions all refinery employees shall speak only English.

There are no language restrictions at any other times which would impact personal freedom and cultures . . . .

\textit{Id.} at n.2. See also 29 CFR § 1606.7(c):

\textit{Notice of the Rule.} It is common for individuals whose primary language in not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it had 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 rules 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.
The Commission concluded that the rule, as drawn, came within the then recently announced EEOC guidelines because the company stated that: employees in an oil refinery's lab work with potentially dangerous substances; that constant and open communication is needed to avoid fires, explosions and other problems; and that, if there is an accident, time is of the essence.

In *Jurado v. Eleven-Fifty Corporation*, the Ninth Circuit Court of Appeals affirmed summary judgment in favor of the employer in an action alleging race and discrimination on the basis of national origin. Mr. Jurado, a bilingual radio announcer of Mexican-American and Native-American descent, sued his employer pursuant to 42 U.S.C. §§ 1981 and 2000e, alleging disparate treatment and disparate impact in that he was fired for refusing to comply with an order requiring him to stop speaking Spanish on the air. At first, Mr. Jurado had broadcasted in English only; then, at his employer's request, he began using Spanish in an attempt to attract a larger audience. When marketing studies indicated that the Spanish program was hurting the station, Mr. Jurado was told to change back to an all English format.

With regards to the § 1981 claim, Jurado had to, but could not prove that the radio station intended to discriminate against him. Instead, the court determined that the decision to discontinue the Spanish format was a programming one based on marketing surveys, ratings and demographics. In addition, the court emphasized that, as he was bilingual,
Jurado had voluntarily chosen to continue to speak Spanish, deciding to ignore the rule as a matter of personal choice. The court held that Jurado's disparate impact claim was not warranted.

In March 1984, in *Gutierrez v. Municipal Court of Southeast Judicial District* the Southeast Judicial District of the Los Angeles Municipal Court ("LAMC") banned the use of any language other than English, except during times when court employees were acting as translators.

In response, Alva Gutierrez, a deputy court clerk/translator, challenged the rule alleging that it denied equal protection and free speech which constituted racial and national origin discrimination under 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 1981. Specifically, she requested, and was granted, a preliminary injunction to enjoin the enforcement of the rule. LAMC appealed to the Ninth Circuit.

Four months after its original announcement, the rule was amended to permit employees to use the language of their choice during breaks or lunchtime.

On appeal, the Ninth Circuit reviewed Gutierrez's Title VII challenge to determine whether the injunction was properly issued. In order to do that, the court had to determine Gutierrez's likelihood of success and the existence of irreparable injury. First, the court approached the issue of discrimination under disparate impact. The opinion of the court said:

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189. *Id.* at 1411.
190. *Id.* at 1412.
191. *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988).
192. *Id.* at 1036.
193. *Id.*
194. *Id.* at 1037.
195. *Id.*
196. *Id.*
197. *Id.* at 1038-40.
In the United States, persons of Asian and Hispanic origin constitute large minorities. Numerous members of these groups regularly communicate in a language other than English . . . [They] have made great contributions to the development of our diverse multicultural society . . . . The multicultural character of American society has a long and venerable history . . . Commentators generally agree . . . that language is an important aspect of national origin . . . The cultural identity of certain minority groups is tied to the use of their primary tongue . . . The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin . . . Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity . . . Because language and accents are identifying characteristics, rules which have a negative effect on bilinguals . . . may be mere pretexts for national intentional origin discrimination.198

Recognizing that Title VII does not address English-Only rules, the court reviewed the EEOC's latest guidelines on the subject.199 The court quoted from 29 C.F.R. § 1606.7(a) which provides that: "[t]he primary language of an individual is often an essential national origin characteristic."200 It quoted another author that stated, "language identification is extremely important in adhering to one's national origin. Since the French language is the

198. Id. at 1038-39.
199. Id. at 1039.
200. Id.
nucleus of Acadian people any employment rule which severely curtails the use of French by Acadians should be carefully scrutinized . . . .

In addition, the court indicated its agreement with the EEOC that, "an English-Only rule is . . . a burdensome condition of employment that is often used to mask national origin discrimination and that must be carefully scrutinized . . . ."

In that light, the court proceeded to evaluate LAMC's argument that according to Garcia, there is no disparate impact because Gutierrez is bilingual and can easily comply with the rule. Thus, LAMC argued that if Gutierrez does not want to obey the rule, it is merely a matter of a personal preference or choice. In reply, the court stated that, "for the reasons already given [e.g. those mentioned above], we do not think an English-Only rule can so easily be immunized from judicial scrutiny . . . ."

With those simple words, the Ninth Circuit created a conflict within the circuits. On one hand, the Fifth Circuit indicated in Garcia that bilinguals have no Title VII protection against English-Only rules and, on the other hand, the Ninth Circuit stated that Title VII protection for bilinguals cannot be so easily discarded. The court recognized that it had used the Garcia holding in its recent Jurado decision to rule that a bilingual disc jockey did not suffer disparate impact from being fired for refusing to stop using Spanish on the airwaves. However, the court distinguished the cases by stating that, "[d]espite our reference to Garcia, the determinative issue in Jurado was not

201. Native Born Acadians, supra note 13, at 1166.
203. Id.
204. Id.
205. Id. at 1040.
206. Id. at 1045.
207. Id. at 1041.
the fact that Jurado was able to comply with the rule; it was
that the employer had the right to insist that the broadcast be
conducted exclusively in English . . . .

Furthermore, the court emphasized that in Jurado, the
prohibition was very limited to the words being uttered by
one single person into a microphone during a radio show.209
It did not extend to Jurado's off-the-air conversations.210
Instead, the employer's rule was used solely to control the
product being provided to its listeners and not to control
Jurado's off-the-air conversations.211 The rule in Jurado is a
far cry from the one promulgated by LAMC which attempted
to control the work and non-work related conversation of
hundreds of employees.212

Once the court found that the LAMC rule had a
disparate impact on Gutierrez as well as many other
employees, the court had to determine whether the issuance
of the rule was warranted under the test of business
necessity.213 In language indicating the intensity of the inquiry,
the court said that "[t]he justification must be sufficiently
compelling to override the discriminatory impact . . . [T]he
rule must effectively carry out the business purpose it is
alleged to serve and there must be available no acceptable
less discriminatory alternative."214 LAMC's justifications and
the court's responses were as follows:

1. LAMC stated that the United States is an
English speaking country and California an

208. Id. at 1041 n.13.
209. Id. at 1041.
210. Id.
211. Id.
212. Instead, "the prohibition on intra-employee communications in Spanish is sweeping
in nature and has a direct effect on the general atmosphere and environment of the work
place." Id.
213. Id.
214. Id. at 1041-42. "The practice must be essential, the purpose compelling." Id. (citing
Williams v. Colorado Springs School District No. 11, 641 F.2d 835, 842 (10th Cir. 1981)).
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English speaking state. But the court responded that the rule does little when the employees are required to speak in Spanish and translate for users of the court system.

2. LAMC argued that the rule is necessary to prevent the courthouse from turning into a "Tower of Babel." Apparently this term was borrowed from Garcia v. Rush-Prebyterian, where the court equated a large modern urban hospital with the Tower of Babel. As Gutierrez indicated, the use of such a term assumes that the use of Spanish between employees is disruptive per se. Since the courthouse is already conducting business in Spanish, not complying with the rule should not create that much more of a disruption.

3. LAMC stated that the rule promotes racial harmony as the rule would prevent Spanish speaking employees from criticizing non-Spanish speakers with impunity. The court noted that there was no evidence that there was any criticism. Instead there were affidavits indicating that hearing employees converse in Spanish made non-Spanish speaking supervisors nervous. The court stated that this may be a

215. See id. at 1042.
216. Id.
217. Id.
219. Id. at 1222.
220. Gutierrez, 838 F.2d at 1042.
221. Id.
222. Id.
223. Id.
224. Id. at n.15.
reflection of supervisors' prejudices towards a language they could not understand as well as a bias against Hispanic-Americans.\textsuperscript{225} Furthermore, the adoption of the rule would tend to promote racial hostility.\textsuperscript{226} The court noted that there had been various racially discriminatory remarks directed at Hispanics following the announcement of the rule.\textsuperscript{227}

4. As in Garcia, LAMC argued that many supervisors could not understand Spanish and could not determine whether the employees were advising the public properly.\textsuperscript{228} The court quickly responded that the argument is at best disingenuous.\textsuperscript{229} As workers were requested to communicate in Spanish with the public, the rule would only help the supervisors understand intra-employee conversations.\textsuperscript{230} The court suggested that the problem could be easily solved by hiring more Spanish-speaking supervisors.\textsuperscript{231}

5. Finally, LAMC argued that the rule is required by the recent English-Only Amendment to the California Constitution.\textsuperscript{232} The court responded that the amendment does not specifically call for such a rule nor that any rule should be the general policy of the state.\textsuperscript{233} While the legislature
might be able to specifically design legislation at some future time, for now, the Amendment is merely a symbolic statement. In addition, LAMC alleged that the ballot initiative indicated an intention to require that all communication in government buildings be conducted in Spanish. The court responded that even if that were true, the intent was to reach official communications and not private communications. The rule in question is clearly designed to reach only private conversations; official communications in Spanish are already sanctioned and required. Finally, the court said that existence of the Amendment alone does not justify the business necessity test in Title VII, unless the Amendment itself meets the test.

In summary, the Ninth Circuit Court of Appeals affirmed the California District Court’s preliminary injunction as the English-Only order is likely to succeed on an adverse impact claim without meeting the business necessity test. The court also agreed that Gutierrez would be subject to irreparable injury and ruled on whether LAMC’s judges were subject to discovery. Finally, the court declared suspect two exceptions indicated by the district court. The lower court stated that the rule may be imposed if there were public relations concerns. However, the appellate court alerted the

234. *Id.* at 1044 (citing CAL. CONST. art. III, § 6(a)); *Cf.* Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575, 577 (7th Cir. 1973).
235. *See id.* at 1043.
236. *Id.* at 1044.
237. *Id.*
238. *Id.* at 1044-45.
239. *Id.*
240. *Id.* at 1045.
241. *Id.*
242. *Id.* at n.21.
parties that "public relations concerns" would not meet the business necessity test. As the Gutierrez case shows, not only private but public administrators as well must be leary of imposing rules that might affect the Title VII rights of employees. In light of well settled judicial precedents, there was no excuse for the broad language in the original English-Only rule in Gutierrez.

However, Gutierrez did not end there. On November 23, 1988, the Gutierrez panel denied a petition for rehearing. Furthermore, prompted by a suggestion for a rehearing en banc, the panel submitted the issue to the other appellate judges for a vote. As a majority of those appellate judges declined to vote for a rehearing en banc, the suggestion was rejected. Then on April 17, 1989, the United States Supreme Court granted a petition for a writ of certiorari and a motion by the United States English Foundation, Inc., to file a brief as amici curiae.

In addition to granting certiorari, the Court vacated the judgment and remanded the case to the Court of Appeals with instructions to dismiss the appeal as moot. Pursuant to that directive, on May 18, 1989, the United States Court of Appeals for the Ninth Circuit vacated the Gutierrez opinion, dismissed the appeal as moot, and instructed the district court to dismiss its original judgment.

In United States v. Munsingwear, the United States had filed a two-count complaint asking for an injunction and for treble damages respectively against Munsingwear, Inc., based on alleged violations of price regulation. After the

243. Id. at 1045-46.
244. Id.
245. Id. at 1048-49.
246. Gutierrez, 861 F.2d 1187 (9th Cir. 1988).
247. Id. at 1188.
249. Id.
250. Gutierrez, 873 F.2d 1342 (9th Cir. 1989).
parties agreed to hold the treble damages count in abeyance pending resolution of the injunction issue, the district court held that the company's prices complied with the regulation and dismissed the injunction.\textsuperscript{252} While an appeal was pending, the price of the commodity was decontrolled and the United States Court of Appeals for the Eighth Circuit dismissed the appeal for mootness.\textsuperscript{253} The United States acquiesced that the decision as it made no motion to vacate the judgment. A denial to vacate the judgment could have been appealed to the United States Supreme Court but the government never pressed the issue.\textsuperscript{254}

The company then moved the District Court to dismiss the treble damages count alleging that, as the denial of the injunction was unreversed on appeal, it became \textit{res judicata} to the second count. The motion to dismiss the second count was granted and, on appeal, the Court of Appeals affirmed. The United States Supreme Court also affirmed. Apparently prompted by the fact that the commodity price had been decontrolled during the appeal of the denial for an injunction, the Court stated that:

\begin{quote}
[T]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. . . . That procedure clears the path for future relitigation of the issues . . . .\textsuperscript{255}
\end{quote}

If one assumes the \textit{Gutierrez} was moot, a traditional application of \textit{Munsingwear} will indeed require dismissing the

\textsuperscript{252} \textit{Id.} at 37.
\textsuperscript{253} \textit{Id.}
\textsuperscript{254} \textit{Id.} at 40.
\textsuperscript{255} \textit{Id.} at 39.
appeal and vacating the judgment. But was Gutierrez moot? As in other similar situations, the order of the Supreme Court did not explain why it considered the case moot.256

In any event, as Gutierrez is vacated what, if any, is its effect? First, the Supreme Court did grant certiorari and apparently it will eventually make a ruling as to whether there are any constitutionally protected rights to speak a language or to demand that a given language be spoken. However, in the meantime, the decision stands as a beacon for a person's primary language being intricately intertwined with that person's national origin as well as with other socio-cultural needs that identify that person as an individual member of a particular race or of a national group.

That is exactly how Gutierrez was used in Asian American Group v. City of Pomona.257 In Asian American, the attack against the use of one's language was moved from a prohibition of its spoken form to a prohibition against its written form. There, the City of Pomona, California, had enacted an ordinance requiring commercial establishments that advertise in a foreign language to devote at least 50 percent of the sign to English alphabetical characters.258 However, in concluding that the ordinance violated freedom of speech, due process and equal protection, the court held that "[a] person's primary language is an important part of and flows from his/her national origin . . . [and] . . . choice of language . . . is an expression of culture. . . ."259

While both were vacated decisions, the court carefully used the analysis of Gutierrez and Olagues to strike down the ordinance. It stated that:

Olagues v. Russoniello . . . , vacated on the ground of mootness . . . ; and Gutierrez v. Municipal Court

258. Id. at 1329.
259. Id. at 1330.
of the Southeast Judicial District . . . , vacated on the ground of mootness, . . . effectively addresses language regulation and its relationship to national origin. Although this court does not rely on these cases as precedent, this court does agree with their rationale and their analysis . . .

It should be noted that none of the rules questioned in all the cases reviewed here made a reference to "national origin." The rules required to speak English only or, as in Asian American, to advertise in English. However, as Asian American indicates, if these restrictions are not equated with national origin discrimination, employers as well as government units could avoid heightened scrutiny of discriminatory laws that restrict those who use foreign languages.

V. CONCLUSION

While English-Only rules have been attacked as indications of intentional and unintentional discrimination, employees have been successful in proving the latter. In these cases, English-Only rules have been found to be permissible where there is a business necessity in a specific work area and when the rule and the penalties for its violation have been effectively communicated to the employees. Yet, the degree of scrutiny that a court undertakes when determining whether a business necessity exists fluctuates. The Fifth Circuit has traditionally used a relatively relaxed form of scrutiny, but more recently, the Ninth Circuit used a more

260. Id.
demanding test. The difference of opinion is evident when the two courts disagree as to whether the ability of supervisors and customers to understand the social conversations in Spanish of employees constitutes a business necessity.

However, courts generally agree that an English rule may constitute a business necessity when the rule is needed to protect the health and welfare of the public. Likewise, it is clear that a rule that forbids the use of a language other than English during non-working hours is not permissible.

Furthermore, there is a conflict between the Ninth and Fifth Circuits as to whether bilingual employees are entitled to any protection against these rules. It is clear that the Fifth Circuit courts are willing to deny disparate impact to the Hispanic-American where the individual is bilingual having equated the inherent need for, desire of, and socio-cultural fusion with his linguistic roots with the mutable characteristics of haircuts and mode of attire. In ruling that language is a matter of choice, these courts have tiptoed around some deserving claims of discrimination on the basis of national origin. Furthermore, the courts in the Fifth Circuit have comparatively relaxed opinions regarding the scope and intensity of the test of the business necessity defense. None of the tests undertaken by the Fifth Circuit cases compare to the business necessity test in Gutierrez. In addition, various cases in the Fifth Circuit appear to have used dicta extensively to indicate what they would accept as business needs.

By adopting a policy that English-Only rules may have

264. Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031, 1038 (9th Cir. 1988).
265. See Garcia, 618 F.2d at 269; see also Gutierrez, 838 F.2d at 1039-1040.
266. Gutierrez, 838 F.2d at 1038.
268. See Garcia, 618 F.2d at 270; see also Gutierrez, 838 F.2d at 1040-41.
269. Garcia, 618 F.2d at 269.
270. Id. at 271.
271. Gutierrez, 838 F.2d at 1041-42.
a disparate impact on bilingual as well as monolingual employees, Gutierrez redefined the parameters of English-Only rules in the workplace. However, in light of the fact that the Supreme Court has granted certiorari, we will have to wait to see whether the boundaries being drawn by the Ninth Circuit in Gutierrez and in Asian American will survive or retreat to the boundaries established by the Fifth Circuit.

272. Id. at 1031.