NOTE

Garcia v. Spun Steak Co.: The Ninth Circuit Requires That Title VII Plaintiffs Prove the Adverse Effect of a Challenged English-Only Workplace Rule

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I. INTRODUCTION

As increasing numbers of immigrants who speak a variety of languages enter the work force across the United States, some employers have attempted to force their employees to speak English on the job.¹ These employers argue that English-only policies are necessary to keep the workplace from becoming a "Tower of Babel" in which safety, productivity, and worker harmony suffer.² In response, employees have challenged the English-only rules under federal employment discrimination laws on the grounds that the rules constitute national origin discrimination. These employees concede that English-only policies may be applied to all employees without animosity on the employer's part toward any national origin group. However, they contend that such policies disparately impact employees of non-Anglo origin in violation of Title VII of the Civil Rights Act of 1964.³

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2. Id.


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,
In *Garcia v. Spun Steak Co.*, the Ninth Circuit identified the evidentiary burden that employees challenging English-only workplace policies must meet to make a prima facie case of disparate impact discrimination under Title VII. The Ninth Circuit panel held that employees challenging English-only rules cannot establish a violation of Title VII through mere assertions that the rule has caused them harm. Rather, the plaintiffs must actually show that the application of the English-only policy has a significant adverse effect on the working conditions of the plaintiffs that is not felt to the same degree by the employee population as a whole.

This holding explicitly rejects an Equal Employment Opportunity Commission (EEOC) guideline, under which English-only rules are per se discriminatory. The decision allocates the burdens of production and proof in accordance with Congressional intent and with the Supreme Court's interpretation of Title VII, and fairly balances employees' need for protection from employment practices that are "built-in headwinds" against protected employees with employers' need to manage today's culturally diverse workforce without fear of unwarranted litigation.

The *Spun Steak* court correctly resisted the temptation to expand Title VII's reach beyond that intended by Congress, holding that the statute does not protect an employee's right to cultural expression through the language of the employee's national origin. The court retained a cause of action for those employees who do not speak English fluently and who can establish that English-only rules deny them the right to converse on the job. The court also reaffirmed the right of employees to maintain a Title VII action when English-only rules are harshly applied or create a hostile environment. By limiting

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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.


4. 998 F.2d 1480 (9th Cir. 1993).
5. Id. at 1486.
6. Id.
7. Id. at 1489.
8. Id. at 1488-89.
the group of potential plaintiffs to those actually harmed by the policy, the decision wisely allows employers discretion to manage the inevitable problems that arise in a multilingual work force without having their decisions subject to unnecessary judicial scrutiny. Although the decision recognizes that English-only rules may impact Title VII in some circumstances, the court held that an employer’s good-faith imposition of these rules on fully bilingual employees does not violate Title VII.

Section II of this Comment presents an overview of the substantive law and the enforcement mechanisms of Title VII. Section III outlines the development of federal discrimination law regarding English-only rules. Section IV examines the Spun Steak decision, and Section V analyzes the implications of this decision and its effect on discrimination law in the Ninth Circuit.

II. TITLE VII: THE LAW AND ITS ENFORCEMENT

The text of Title VII specifies certain groups, or protected classes, who may claim relief under Title VII. Title VII prohibits discrimination by private employers, labor organizations, and employment agencies with respect to hiring, promotion, and terms of employment. The imposition of burdensome terms and conditions of employment on a protected class is also prohibited.

A. Filing a Charge with the EEOC

Title VII requires aggrieved employees to seek mediation and conciliation of their charge through the EEOC or a qualified state agency before bringing court action against the

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10. Title VII defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person.” Id. § 2000e(b). The federal government, Indian tribes, and bona fide membership clubs are specifically excluded from this definition, and other entities are partially excluded. Id. Coverage now extends to U.S. employers operating in foreign countries. Id. § 2000e(f) (Supp. III 1991).

11. Id. § 2000e-2(c), (d) (1988).

12. Id. § 2000e-2(b).

13. Id. § 2000e-2(a)-(d).

employer. The EEOC investigates the complaint and either dismisses the complaint under a "no-cause" finding or attempts to negotiate a settlement between the employer and the employee.

If attempts at conciliation fail, the EEOC may bring suit against the employer or it may intervene in a suit brought by the employee. If the EEOC does not file suit within 180 days, it must issue a "right-to-sue" letter to the complaining employee upon demand, and the employee may bring suit within 90 days.

Decisions of the EEOC are not binding on courts, which try charges de novo. Investigative files of the EEOC can be obtained by the opposing parties for purposes of litigation, but the records of reconciliation hearings are sealed and cannot be used in a later lawsuit.

**B. Judicial Relief**

Title VII empowers courts to grant injunctive relief, orders requiring reinstatement to employment, declaratory relief, back pay, and attorneys' fees. Plaintiffs must prove discrimination under either of two theories of discrimination: disparate treatment or disparate impact. The Supreme Court defined the two theories in *International Bros. of Teamsters v. United States* as follows:

"Disparate treatment" ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, reli-

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15. 42 U.S.C. § 2000e-5(b), (c), (f) (1988). Courts have held that the EEOC has authority to enforce conciliation agreements in the federal courts. EEOC v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); EEOC v. Liberty Trucking Co., 695 F.2d 1038 (7th Cir. 1982).
18. Id. § 2000e-4(g)(6).
19. Id. § 2000e-5(f); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, 1 EEOC COMPLIANCE MANUAL § 66.6 (1987) [hereinafter EEOC COMPLIANCE MANUAL].
23. 1 EEOC COMPLIANCE MANUAL, supra note 19, § 83.1(a).
gion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII . . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.26

The rules of proof in each theory are derived from Title VII and decisions of the United States Supreme Court. These rules specify what an employee must prove to establish a prima facie case.27 The rules similarly specify the evidence an employer may present to rebut the prima facie case, thereby disentitling the employee to a judgment.28 Each theory requires a three-step process of allegation and rebuttal.

1. Rules of Proof for Disparate Treatment

A facially discriminatory employment policy can only be justified where the classification is a bona fide occupational qualification (BFOQ). For example, a nursing home policy that only female nurses are hired to care for its female patients to satisfy concerns for personal privacy and modesty has been found to meet the BFOQ exception.29 Where a policy turns on a characteristic that is so closely identified with one of the prohibited classifications that the characteristic is synonymous with protected status, the policy is also unlawful unless justified as a BFOQ. Employment distinctions based on pregnancy, for example, constitute unlawful sex discrimination unless a BFOQ exception applies because only women can become pregnant.30 When a prohibited classification determines an employee's

26. Id. at 334 n.15 (citations omitted).
28. Id.
treatment, no animus toward the protected class affected by the policy must be shown to prove disparate treatment.\textsuperscript{31}

Where employment discrimination is covert, however, a plaintiff must prove that the employment practice objected to was motivated by discriminatory intent or animus to prevail on a disparate treatment claim.\textsuperscript{32} Unless the employer's intent to discriminate is self-evident, it may be very difficult for the plaintiff to prove the employer's subjective state of mind.\textsuperscript{33} The rules of proof for disparate treatment aid plaintiffs by allowing rebuttable presumptions of intent to be made based on circumstantial evidence.\textsuperscript{34} To make a prima facie case of disparate treatment, the plaintiff need only present sufficient evidence to give rise to an inference of discrimination.\textsuperscript{35} The burden of production is then shifted to the employer, who must offer some legitimate, nondiscriminatory reason for the employment decision to avoid summary judgment for the plaintiff.\textsuperscript{36} If the employer carries this burden, the plaintiff is given the opportunity to prove that the reason offered by the employer was mere pretext for discrimination.\textsuperscript{37} The ultimate burden of persuasion

\textsuperscript{31} Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (holding that "whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates, but rather on the explicit terms of the discrimination").


\textsuperscript{33} "Even an employer who knowingly discriminates . . . may leave no written records revealing the forbidden motive and may communicate it orally to no one." La Monntagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).

\textsuperscript{34} Former Justice Rehnquist explained the reason for such a presumption:

[W]e are willing to presume . . . from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not that the employer, who we generally assume to act with some reason, based his decision on impermissible considerations such as race.

\textit{Furnco}, 438 U.S. at 577.

\textsuperscript{35} In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court held that a plaintiff can establish a prima facie case in a refusal to hire case by showing (1) membership in a protected class; (2) application and qualification for the job the plaintiff was seeking; (3) rejection of the applicant; and (4) that the employer continued to seek applications from persons with qualifications similar to the plaintiff's. \textit{Id.} at 802. The Supreme Court has instructed lower courts to adapt this test to situations other than claims for failure to hire. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

\textsuperscript{36} \textit{McDonnell Douglas}, 411 U.S. at 802.

\textsuperscript{37} \textit{Id.} at 804.
that there was intentional discrimination remains with the plaintiff at all times.\textsuperscript{38}

2. Rules of Proof for Disparate Impact

The disparate impact theory was judicially created by the United States Supreme Court in \textit{Griggs v. Duke Power Co.},\textsuperscript{39} and was recently sanctioned by Congress in the Civil Rights Act of 1991.\textsuperscript{40} To establish a prima facie case of disparate impact, a plaintiff must prove that a specified employment practice caused a harmful effect on a protected class of employees.\textsuperscript{41} The burden of both production and proof then shifts to the employer unless it can establish that the practice was required by business necessity.\textsuperscript{42} If the employer carries this burden, the employee may suggest alternative, less discriminatory practices that accomplish the employer's purposes.\textsuperscript{43} If the employer refuses to adopt these methods, the plaintiff will prevail.\textsuperscript{44}

The disparate impact theory has been the subject of heated controversy since its formulation.\textsuperscript{45} Employers object that the burden shifting that occurs under the theory may force employers to abandon nondiscriminatory employment practices or to adopt quotas to avoid expensive and time-consuming litigation.\textsuperscript{46}

\textsuperscript{38} Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
\textsuperscript{39} 401 U.S. 424 (1971) (holding that company policies requiring a high school diploma and satisfactory aptitude test scores for all but low-level positions at a power plant discriminated against black job applicants and employees).
\textsuperscript{40} The relevant portion states as follows: "An unlawful employment practice based on disparate impact is established under this title 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 . . . ." 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. III 1991). The term "demonstrates" is defined to mean, "meets the burdens of production and persuasion." \textit{Id.} § 2000e-2(m).
\textsuperscript{42} \textit{Griggs}, 401 U.S. at 431.
\textsuperscript{45} See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 205-41 (1992) (arguing that the disparate impact theory creates adverse results for both employers and employees and should be abandoned).
\textsuperscript{46} The wide range of practices that have unequal effects and the danger that an employer may inadvertently overcompensate and face a reverse discrimination charge led Justice Blackmun to characterize one employer as walking a "high tightrope without a net beneath him." United Steelworkers of America v. Weber, 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring) (quoting Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)).
III. APPLICATION OF FEDERAL DISCRIMINATION LAW TO ENGLISH-ONLY RULES

The common law provides no protection for a worker's choice of language on the job. Under the employment-at-will doctrine, an employer is free to establish inequitable workplace rules if it chooses and to fire an employee without notice for any reason or no reason.47 While the First and Fourteenth Amendments limit the power of government to restrict an employee's choice of language,48 private employers face no such constitutional limitation. Any restraint on an employer's power to dictate an employee's speech must then originate either in a contractual obligation or in enacted legislation. Although there are no explicit terms in Title VII regulating workplace language rules, the EEOC and some courts have found Title VII applicable.

This Section discusses the development of the law prohibiting language discrimination and focuses on the question of whether an English-only rule should be presumed to have an adverse and disparate impact on a fully bilingual employee.

A. EEOC Application of Title VII to English-Only Rules

The EEOC has regarded language rules with suspicion, determining that under Title VII certain workplace language practices often constitute national origin discrimination.49 The EEOC has generally analyzed workplace language rules under a disparate impact theory, finding them allowable only when justified by business necessity.50 In its early decisions, the EEOC allowed employers to justify English-only rules by safety concerns, but subjected all business necessity defenses offered by employers to strict scrutiny.51 During the final days of the

47. Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir. 1964).
49. 2 EEOC COMPLIANCE MANUAL, supra note 19, § 623.1 (1984) ("Language requirements or policies may in certain circumstances constitute unlawful employment discrimination under title VII.").
50. Id. § 623.6.
51. See, e.g., Decision 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861, 1862 (E.E.O.C. 1983) (finding that the English-only rule applied at an oil refinery while employees performed job duties in laboratory and processing areas and during emergencies was
Carter Administration, the EEOC promulgated its "Speak-English-Only" Guidelines, which state that an English-only rule may be a "burdensome term and condition of employment." The Guidelines state that the EEOC will presume that English-only rules applied "at all times" violate Title VII, and will allow English-only rules applied "only at certain times" when justified by business necessity. This presumption against English-only rules is based upon the principles that one's "primary language" is essential to cultural expression, that such rules may disadvantage the employee, and that a hostile environment may result from such rules. The EEOC has vigorously enforced these Guidelines.

### B. English-Only Rules in the Courts

Federal courts hearing Title VII suits have agreed with the EEOC's assertion that English-only rules can result in national origin discrimination. *Hernandez v. Erlenbusch*, decided in

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52. The EEOC has the power to issue procedural regulations to carry out the provisions of Title VII. 42 U.S.C. § 2000e-12(a) (1988). Regulations issued pursuant to this power are codified in Title 29 of the Code of Federal Regulations. The regulations are not law, but are entitled to considerable deference by the courts unless inconsistent with congressional intent. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973). The portion relevant to English-only rules is found at 29 C.F.R. § 1606.7 (1993).

53. Section 1606.7 of the Guidelines on National Discrimination Because of National Origin provides as follows:

(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.

29 C.F.R. § 1606.7 (1993).

54. Id.

55. Id.


1973, was brought under 42 U.S.C. §§ 1981, 1982, and 1985 rather than Title VII. In Hernandez, a tavern's rule of seating Hispanics at separate tables to appease Anglo customers who objected to hearing conversations conducted in Spanish was found to constitute unlawful discrimination. Hernandez helped to establish language as an important aspect of national origin that might be protected by federal courts.

In Saucedo v. Brothers Well Service, Inc., the first reported case challenging an English-only workplace rule, a bilingual Hispanic oil field worker was awarded damages and attorneys' fees for his Title VII disparate impact complaint after he was fired without warning for speaking three words of Spanish. Because the employer's conduct in Saucedo was so egregious, the court readily determined that the plaintiff had suffered adverse impact actionable under Title VII. In the more difficult cases that followed, courts searched for a proper means of determining for whom and under what circumstances English-only rules are prohibited under Title VII.


One of the leading cases on English-only rules, Garcia v. Gloor, was decided shortly before publication of the EEOC Guidelines. In Gloor, the Fifth Circuit recognized that the connection between national origin and language varies among individuals. The court reasoned that where a language rule is not motivated by intent to discriminate, the enforcement mechanisms of Title VII should only be set in motion where the con-

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58. Id. at 754. The Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988), grants all persons the same right to make and enforce contracts "as is enjoyed by white citizens." Id. 42 U.S.C. § 1982 guarantees that "[a]ll citizens of the United States shall have the same right . . . to . . . purchase . . . personal property." Id. § 1982. 42 U.S.C. § 1985 prohibits conspiracies to violate a citizen's civil rights. Id. § 1985. Title VII does not provide a cause of action for customers against sales establishments.


61. Id. at 921-22.

62. The plaintiff was not told there was any company rule against speaking Spanish. Id. at 921. The supervisor who fired the plaintiff assaulted a second Hispanic employee who verbally defended the plaintiff for speaking Spanish. Id.

63. Id. at 922. The court found it significant that the supervisor was not reprimanded or discharged for the assault. Id. at 921. Not only did this cut against the employer's safety justification for the English-only policy, but the firing of the plaintiff while taking no action against the supervisor was disparate treatment. Id.

64. 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981).
nection between language and national origin is sufficiently strong.\textsuperscript{65} The \textit{Gloor} court then held that English-only rules do not cause a discriminatory effect on fully bilingual employees because for them language is a matter of personal preference rather than an essential aspect of national origin and compliance with the rule is not a burdensome term or condition of employment.\textsuperscript{66}

The court examined the text of Title VII and cases interpreting the statutes and found that the statutes were directed at discrimination based on the exercise of a fundamental right or on immutable characteristics such as race.\textsuperscript{67} Title VII was not directed at employment decisions based on matters of personal choice such as grooming codes or length of hair.\textsuperscript{68} Judge Rubin wrote the following:

The [Equal Employment Opportunity] Act does not prohibit all arbitrary employment practices. It does not forbid employers to hire only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all. It is directed only at specific impermissible bases of discrimination—race, color, religion, sex, or national origin.\textsuperscript{69}

This did not mean that employers could impose English-only rules on all bilingual workers free of any Title VII restrictions. The court held that when an employee is not fluent in the English language, English-only rules could result in impermissible discrimination based on national origin.\textsuperscript{70} In addition, the court held that an employee who could show that the rule created a hostile work environment, that she was disciplined for inadvertently slipping into her native language, or that she was prohibited from speaking her language of choice during breaks or outside the workplace, could assert a viable claim of national origin discrimination under Title VII.\textsuperscript{71}

\textsuperscript{65} "Neither the statute nor common understanding equates national origin with the language one chooses to speak. Language may be used as a covert basis for national origin discrimination . . . ." \textit{Id.} at 268.

\textsuperscript{66} \textit{Id.} at 270. The trial court made no finding as to the extent to which Garcia's violation of the language rule weighed in the employer's decision to fire him. \textit{Id.} at 267-68. Judge Rubin wrote that "[p]erhaps under the evidence he could not, once the omelet had been cooked, determine which eggs had contributed to it." \textit{Id.} at 268.

\textsuperscript{67} \textit{Id.} at 269.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.} at 272.

\textsuperscript{71} \textit{Id.} at 270.
Because no adverse impact sufficient to make Garcia's prima facie case was found, the court did not consider whether business necessity justified the rule.\textsuperscript{72} In dicta, the court rejected the contention of the plaintiff and the EEOC that an employer must accomplish its business needs in the least restrictive manner possible, stating that "[j]udges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment by imposing a solution that appears less restrictive."\textsuperscript{73}

2. \textit{Jurado v. Eleven-Fifty Corp.:} The Ninth Circuit Follows Gloor

In \textit{Jurado v. Eleven-Fifty Corp.},\textsuperscript{74} a bilingual disc jockey performing on Los Angeles radio station KIIS as Val Valentine was fired for refusing to follow an English-only format on the air.\textsuperscript{75} Jurado periodically spoke Spanish on his program at the request of his employer's program director, but was told to stop after a drop in ratings thought to be a result of confusion caused by the bilingual programming.\textsuperscript{76} Jurado brought a Title VII action alleging both disparate treatment\textsuperscript{77} and disparate impact against KIIS.\textsuperscript{78} The United States District Court for the Central District of California granted summary judgment for KIIS on both claims, and Jurado appealed.\textsuperscript{79}

The Ninth Circuit panel affirmed the summary judgment against Jurado.\textsuperscript{80} The court accepted the employer's explanation that the English-only order was not motivated by racial animus, finding that the order resulted from "a programming

\textsuperscript{72} Id. at 267. The court below found that valid business reasons offered by the employer, rather than discriminatory intent, motivated the decision to terminate Garcia, thus precluding a finding of disparate treatment. \textit{Id.} at 266-67. The employer's asserted business reasons were that (1) English-speaking customers objected to communications between employees that they could not understand; (2) the employer wished to encourage fluency in English; and (3) the rule was needed to enable non-Spanish speaking supervisors to oversee the work of subordinates. \textit{Id.} at 267.

\textsuperscript{73} Id. at 271.
\textsuperscript{74} 813 F.2d 1406 (9th Cir. 1987).
\textsuperscript{75} Id. at 1408.
\textsuperscript{76} Id. at 1409.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1412.
\textsuperscript{79} Id. at 1409.
\textsuperscript{80} Id. at 1413.
decision motivated by marketing, ratings, and demographic concerns."81

The court also rejected Jurado's claim that the English-only order was itself a discriminatory act as used against a bilingual person such as himself.82 Adopting the reasoning of the Fifth Circuit in Gloor, the court held that "[a]n employer can properly enforce a limited, reasonable, and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as 'a matter of individual preference.'"83 The court found that the rule imposed by the station had met the Gloor criteria and that the bilingual plaintiff's violation of the rule was a valid, nondiscriminatory reason for his dismissal.84


Some commentators were not so quick to accept the reasoning of Gloor and Jurado. They protested that the deep connection between language and culture required that a bilingual employee's language rights be protected.85 The concerns of these commentators were shared by the EEOC, which published the Speak-English-Only Guidelines in the same year that Gloor was decided. The Guidelines take the position that rules denying employees the right to speak their language of national origin are in all cases a burdensome condition of employment that is only justified by business necessity.86 In 1987, only a month after Jurado, the critics of Gloor found a sympathetic ear on the Ninth Circuit Court of Appeals, when it adopted the EEOC Guidelines as the proper standard for determining the validity of English-only workplace rules.

In Gutierrez v. Municipal Court,87 the Ninth Circuit explicitly declined to follow Gloor's holding that English-only rules cause no disparate or adverse impact for a bilingual employee.88

81. Id. at 1410.
82. Id. at 1411.
83. Id. (quoting Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980)).
84. Id.
86. 29 C.F.R. § 1606.7 (1993).
87. 838 F.2d 1031 (9th Cir. 1988), vacated and cert. granted, 490 U.S. 1016 (1989).
88. Id. at 1040-41.
Responding to the employer's contention that the plaintiff suffered no disparate or adverse impact from a limited English-only rule because she was fully bilingual, Judge Reinhardt wrote that "we do not think English-only rules can be so easily immunized from judicial scrutiny." The Gutierrez court instead held that English-only rules are per se discriminatory unless justified by business necessity, regardless of the English fluency of the employees affected by the rules. Although the court purported to leave Jurado undisturbed, the Gutierrez court clearly reversed the holding in Jurado. The deferential attitude toward the decisions of employers exhibited in Jurado was thus replaced with a decidedly hostile one.

In Gutierrez, a bilingual clerk employed by the Southeast Judicial District of the Los Angeles Municipal Court challenged a rule prohibiting Spanish except in conversations with the public. The municipal court judges instituted the rule in response to complaints by African American and Anglo clerks that they were being ridiculed in Spanish by the plaintiff. A three-judge panel of the Ninth Circuit found that Gutierrez had made her prima facie case of disparate impact. Citing several law review articles written by commentators advocating language rights, the court held that "English-only rules generally

89. Id.
90. Id. at 1040.
91. The Gutierrez court distinguished the two decisions as follows: We note that in Jurado v. Eleven-Fifty Corp. . . . we cited Garcia v. Gloor in support of our decision that a radio station's English-only rule, with which its disk-jockey employee could readily comply, did not have an adverse impact on that employee. However, the issues involved in Jurado were far different from the ones presently before us. The Jurado rule was considerably more restricted than and bore little or no resemblance, either in purpose or effect, to the edict of the municipal court judges. Id. at 838 (citation omitted).
92. Judge Kozinski protested that "[t]he panel . . . buries a prior opinion of this circuit whose holding is directly contrary. Jurado v. Eleven Fifty Corp." Gutierrez v. Municipal Court, 861 F.2d 1187, 1188 (1988) (denying rehearing en banc) (Kozinski, J., dissenting) (citation omitted) [hereinafter Gutierrez II]. "In hamhanded fashion, the Gutierrez panel throws Jurado's rationale out the window and substitutes its own." Id. at 1190.
93. Gutierrez, 838 F.2d at 1036. The plaintiff also brought non-Title VII claims under 42 U.S.C. §§ 1981, 1983, and 1985(3), which are beyond the scope of this Comment.
94. Several of the 27 full time court clerks, including Anglos, African Americans, and even some Hispanics complained that a handful of Hispanic clerks were increasingly using Spanish to cloak their conversations, and that they occasionally made it clear that they were discussing coworkers. Gutierrez II, 861 F.2d at 1191 (citations omitted).
95. Gutierrez, 838 F.2d at 1040.
have an adverse impact on protected groups and . . . should be closely scrutinized." The court found that "[t]he EEOC guidelines, by requiring that a business necessity be shown before a limited English-only rule may be enforced, properly balance the individual's interest in speaking his primary language and any possible need of the employer to ensure that in particular circumstances only English shall be spoken." The court summarily rejected five business justifications offered by the municipal court and affirmed the trial court's injunction barring the municipal court from enforcing the English-only rule.

The Gutierrez panel took great pains to distinguish its decision from the contrary result reached in Jurado just one month earlier. The Gutierrez opinion characterized Jurado as a decision in which the speech of the employee/plaintiff was the product that the employer was offering to the public. Unlike the speech in Jurado, the speech in Gutierrez concerned intra-employee communication that had no direct effect on the operation of the court. Furthermore, the Gutierrez court suggested that even if the English-only rule in Jurado had presented a prima facie case of disparate impact, the rule was justified by business necessity.

After the decision, the Ninth Circuit denied the municipal court's petition for a rehearing en banc. In a spirited dissent, Judge Kozinski complained that the Gutierrez panel had engaged in "creative revisionism" by seeking to distinguish Jurado on "fanciful . . . insubstantial" grounds. The opinion, Judge Kozinski asserted, merited en banc reconsideration because it had the result of "hamstringing employers who would assuage racial and ethnic tensions created by the use of a second language in the workplace, . . . bring[ing] about many of the conditions the Civil Rights Act was meant to eliminate."

Judge Kozinski's dissent quoted a newspaper account of a black employee who had complained to the municipal court judges about the use of Spanish. The clerk recalled her
humiliation when she tripped or dropped something and a group of bilingual clerks suddenly started bantering excitedly in Spanish while laughing at her. Judge Kozinski also pointed to a letter in the record, signed by eight of the twenty-seven full time clerks who supported the English-only rule:

If the [Municipal Court] Judge's ruling is overturned it will have an adverse effect. Spanish is not essential when relating to fellow employees, and in many cases is used to undermine supervision and to talk about fellow employees. Feelings are hurt and tension builds. This is when employee camaraderie and morale begin to deteriorate.

One Hispanic clerk remarked that when she heard about the English-only rule her "interpretation of it was, 'be more courteous. Do not abuse your Spanish-speaking or bilingual abilities.' I completely support the rule." Summarizing his dissent, Judge Kozinski wrote the following:

[I]t is highly unwise to prohibit all employers everywhere from adopting [an English-only] rule, even when they have reason to believe that language is being used to exclude and isolate employees of a particular race or ethnic group. Our society is too complex, and the factual permutations far too diverse, to permit the imposition of a universal rule by judicial fiat.

4. The State of the Law After Gutierrez

The Gutierrez decision created a split between the circuits over the requirements for a prima facie case of language discrimination. The Ninth Circuit presumed that English-only rules always have adverse impact, while the Fifth Circuit tied the presence of adverse impact to the fluency of the plaintiff's English. The Supreme Court, however, vacated Gutierrez as moot without explanation, possibly because the plaintiff was no longer employed at the municipal court. Gutierrez was
applauded by language rights advocates,\(^{112}\) who urged adoption of the EEOC Guidelines by future courts, and the decision continued to serve as persuasive authority.\(^{113}\)

**IV. **GARCIA v. SPUN STEAK: PLAINTIFFS MUST PROVE THAT IMPACT IS ADVERSE

In Garcia v. Spun Steak Co.,\(^{114}\) the Ninth Circuit defined the evidentiary burden a Title VII plaintiff must meet to estab-

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\(^{113}\) Smothers v. Benitez, 806 F. Supp. 299, 307 (D.P.R. 1992) (holding that a classification on the basis of language can be equivalent to a classification by national origin); Asian American Business Group v. City of Pomona, 716 F. Supp. 1328, 1330 (C.D. Cal. 1980) (finding “a person’s primary language is a part of and flows from his/her national origin”).

After the Gutierrez decision was vacated by the Supreme Court, district courts in the Ninth Circuit heard two additional cases challenging workplace language requirements. In Dimaranan v. Pomona Valley Hospital Medical Center, 775 F. Supp. 338 (C.D. Cal. 1991), a Filipina American nurse claimed that the banning of Tagalog on her shift resulted in discrimination based on both disparate impact and disparate treatment. Id. at 343-44. The court dismissed the disparate treatment claim for lack of evidence that the hospital’s restriction was based on racial animus. Id. at 344.

The court also rejected the disparate impact claim, reasoning that the no-Tagalog policy was not an English-only rule because Spanish was allowed on the shift during the limited period of time that the policy had been effect. Id. at 342, 345. Rather, the court wrote, the policy was “at most, a shift-specific directive tailored to respond to certain conflicts among identified staff nurses.” Id. at 342. The court further found that the no-Tagalog policy was not a facially neutral employment practice triggering disparate impact analysis because it was obviously directed only at the Filipina nurses and therefore was expressly neutral. Id. at 345. The court, however, held that the hospital had violated 42 U.S.C. § 2000e-3(a) by retaliating against Dimaranan for her opposition to the language policy. Id. at 345-47.

In Cota v. Tucson Police Dept., 783 F. Supp. 458 (D. Ariz. 1992), the United States District Court for the District of Arizona rejected claims of both disparate impact and disparate treatment by Hispanic police officers forced to speak Spanish on the job without additional compensation under a police department rule that applied to all officers. Id. at 460-62. The court found that statistical evidence presented by the Hispanic officers showing that Hispanic officers were called upon to speak Spanish more than non-Hispanic officers failed to infer intent and thus was insufficient to make a prima facie case of disparate treatment. Id. at 468. The disparate impact claim failed when the court found that the effect on the Hispanic plaintiffs was nondiscriminatory and nonadverse. Id. at 473. “The legal meaning of the term ‘disparate impact’ cannot be stretched to include every type of statistically significant impact.” Id. at 474 (quoting Gay v. Waiters’ & Dairy Lunchmen’s Union, Local No. 30, 694 F.2d 531, 550 (9th Cir. 1982)).

\(^{114}\) 998 F.2d 1480 (9th Cir. 1993).
lish a prima facie case of disparate impact where employment practices adversely affect conditions of employment. The Guiterrez presumption that English-only rules are per se discriminatory was explicitly rejected in favor of a standard requiring proof of adverse impact for English-only rules as well as for other allegedly discriminatory practices.\textsuperscript{115}

Spun Steak, Co., a corporation that produces meat products, is located in South San Francisco. At the time of the suit, it employed mostly bilingual Hispanics as well as two employees who spoke only Spanish.\textsuperscript{116} Responding to complaints that two bilingual Hispanics had repeatedly harassed and insulted an African American and a Chinese American worker with derogatory and racist comments, Spun Steak passed an English-only rule for the alleged purpose of promoting worker harmony.\textsuperscript{117}

The two employees who had allegedly harassed others, Garcia and Buitrago, received written warning letters when they continued to speak Spanish in violation of the rule.\textsuperscript{118} When Spun Steak refused the union's demand to rescind the rule, the union local, Garcia, and Buitrago filed discrimination charges with the EEOC.\textsuperscript{119} The EEOC investigated and determined that there was reasonable cause to believe that Spun Steak had violated Title VII.\textsuperscript{120} Subsequently, Garcia, Buitrago, and the union local brought suit against Spun Steak on behalf of all Spanish-speaking employees of Spun Steak.\textsuperscript{121} The EEOC filed an amicus brief supporting the plaintiffs.\textsuperscript{122}

The United States District Court for the Northern District of California issued a preliminary injunction striking Spun Steak's English-only rule.\textsuperscript{123} On appeal by Spun Steak, the plaintiffs presented three arguments in support of the district court's decision. Relying on the reasoning of Guiterrez, the

\begin{itemize}
  \item \textsuperscript{115} Id. at 1487 n.1.
  \item \textsuperscript{116} Id. at 1483.
  \item \textsuperscript{117} Id. The rule also had purported secondary purposes: (1) to eliminate distraction to employees operating dangerous equipment, and (2) to enhance product quality by enabling the USDA inspector to better understand concerns about products. Id.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 1483-84.
  \item \textsuperscript{121} Id. at 1484.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id. at 1480.
\end{itemize}
plaintiffs based their complaint on the EEOC Guidelines. The plaintiffs claimed that the English-only rule caused an adverse impact by (1) denying them the ability to express their cultural heritage on the job; (2) denying them a privilege of employment enjoyed by monolingual speakers of English; and (3) creating an atmosphere of inferiority, isolation, and intimidation. Judge O'Scannlain, who had previously joined Judge Kozinski in a strong dissent to the Ninth Circuit's decision declining to rehear Gutierrez, wrote for the majority of the Spun Steak court.

The Spun Steak court first examined whether the disparate impact theory was applicable, when the plaintiffs had neither been denied jobs or promotions, nor suffered other objectively manifest harm from the English-only rule. The court interpreted the Spanish-speaking plaintiffs' complaint to allege discrimination as to "conditions of employment" prohibited under 42 U.S.C. § 2000e-2(a)(1) rather than discrimination affecting "employment opportunities" prohibited under § 2000e-2(a)(2). Judge O'Scannlain noted that the Supreme Court had not yet decided whether the disparate impact theory may be applied to employment practices affecting conditions of employment under § 2000e-2(a)(1). However, in Meritor Savings Bank v. Vinson, the Supreme Court applied a disparate treatment analysis to employment practices affecting conditions of employment. Following the Supreme Court's instruction that the language of § 2000e-2(a)(1) be interpreted "broadly," the Spun Steak court found that intent to discriminate was not an essential element of a claim under § 2000e-2(a)(1), and that a disparate impact charge alleging adverse effect on conditions of employment could be maintained.

While acknowledging that the subjective effects of an employment practice affecting conditions of employment might be more difficult to prove than the quantifiable effects on which
disparate impact is usually based, the court held that actual proof of disparate impact is required nonetheless.\textsuperscript{133}

To establish a prima facie case of disparate impact from a practice affecting terms and conditions of employment, an employee may not "merely assert that the rule has harmed members of the group to which he or she belongs."\textsuperscript{134} Instead, the plaintiff must prove the following:

(1) the existence of adverse effects of the rule;
(2) that the rule adversely impacts terms, conditions, or privileges of employment of the protected class;
(3) that the adverse effects are significant;
(4) that the employee population in general is not affected by the rule to the same degree.\textsuperscript{135}

The court justified this four-part analysis by asserting that Title VII "is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Title VII protects against only those policies that have a significant effect."\textsuperscript{136} This more exacting formulation enabled the court to distinguish between the actionable claim of non-English speaking employees and the nonactionable claim of the bilingual employees.

Having established the parameters of the substantive law, the court turned its attention to the plaintiffs' individual claims. The court first considered the cultural heritage claim.\textsuperscript{137} While recognizing the importance of language as a link to ethnic culture and identity, the court held that Title VII does not confer substantive privileges such as a right to cultural expression on the job. "[A]n employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII that requires an employer to allow employees to express their cultural identity."\textsuperscript{138} Because a right to cultural expression could not be considered a protected privilege of employment, the court rejected the plaintiffs' argument that a Title VII claim could be based upon a policy that

\textsuperscript{133} Id. at 1486.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 1488.
\textsuperscript{137} Id. at 1487.
\textsuperscript{138} Id.
denied workers the ability to express their cultural heritage on the job.

The court next turned to the plaintiffs' assertion that the English-only rule disparately impacted Spanish-speaking employees by denying them the privilege of conversing in their chosen language. The court rejected this claim on the reasoning that the employer had granted its employees merely the privilege of conversing on the job, rather than a broader privilege of conversing on the job in the language of the employee's choice. Citing Garcia and Jurado, the court found that for a fully bilingual employee, language was no more than a matter of individual preference. "The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job." Because the bilingual employee could readily converse in English on the job, the court held that the rule had no significant impact upon the employee.

The bilingual plaintiffs also argued that compliance with the English-only rule would be difficult because they sometimes inadvertently used Spanish words and phrases. This argument failed as the court found that the inconvenience of guarding against slips of the tongue did not impose a significant burden on bilingual employees, and there was no evidence presented that Spun Steak actually punished employees for such occasional speaking of Spanish.

Although the plaintiffs' arguments failed, the court did note that non-English speaking employees might still present a viable claim of discrimination under Title VII. When an employee's English skill is so limited that the employee is effectively denied the privilege of conversing on the job, the English-only rule may deny them "the privilege of speaking on the job."

Finally, the court addressed the plaintiffs' argument that the English-only rule created a hostile work environment that amounted to a condition of employment giving rise to a violation of Title VII. Although the Supreme Court explicitly approved

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139. Id.
140. Id.
141. Id.
142. Id. at 1488.
143. Id. at 1487-88.
144. Id. at 1488.
145. Id.
146. Id.
the hostile environment theory only in cases of intentional discrimination, the *Spun Steak* court did consider the plaintiffs' disparate impact claims based on the theory.\textsuperscript{147} The court adopted the standard of proof for a hostile work environment from *Vinson*, a sexual harassment case in which the Supreme Court held that disparate treatment may be found where a hostile environment is created by pervasive discriminatory practices.\textsuperscript{148} The Ninth Circuit held that to determine whether English-only rules or the manner in which they are enforced have such a pronounced effect as to amount to a hostile work environment, courts must look to the "totality of the circumstances in the particular factual context in which the claim arises."\textsuperscript{149}

Applying this standard, the court found the plaintiffs' "conclusory statements" that the English-only rule contributed to a hostile environment were insufficient to raise a genuine issue of material fact.\textsuperscript{150} The court remanded the case to the district court with instructions to grant summary judgment for Spun Steak as to claims by fully bilingual employees and to consider the merits of the claims of non-English speaking employees.\textsuperscript{151}

The court explained its rejection of the EEOC Guidelines, declaring that while the Supreme Court has approved the Guidelines as a "body of experience and informed judgment to which courts and litigants may properly resort for guidance,"\textsuperscript{152} the Guidelines are not binding on a court and should not be followed when there are "compelling indications that [its construction of a statute] is wrong."\textsuperscript{153} The *Spun Steak* panel reasoned that "Congress intended that a balance be struck in preventing discrimination and preserving the independence of the employer."\textsuperscript{154} The court thus concluded that the Guidelines contravene congressional intent by shifting the burden of proof to the employer on a presumption that English-only rules always have disparate impact.\textsuperscript{155}

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\textsuperscript{147} Id. at 1488-89.
\textsuperscript{149} *Spun Steak*, 998 F.2d at 1489.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 1490.
\textsuperscript{152} Id. at 1489 (quoting *Vinson*, 477 U.S. at 65).
\textsuperscript{153} Id. (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1986)).
\textsuperscript{154} Id. at 1490.
\textsuperscript{155} Id.
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V. The Future of English-Only Rules in the Workplace

*Spun Steak* firmly establishes that English-only rules can disparately impact protected classes in violation of Title VII. After *Spun Steak*, however, the burden of proof is squarely on plaintiffs to show that the impact of the English-only rule causes them more than mere discomfort or loss of an opportunity for cultural expression.

The *Spun Steak* decision disappointed those who hoped that the Ninth Circuit would apply the reasoning of *Gutierrez* and reinstate the EEOC Guidelines as the standard for deciding claims based on English-only workplace rules. The Ninth Circuit explicitly rejected the Guidelines' requirement that employers show business necessity for English-only rules in all circumstances. Unlike the *Gutierrez* court, which adopted the EEOC Guidelines without reservation, the *Spun Steak* court determined that the burden shifting implied by the Guidelines was inappropriate in the context of litigation. A close analysis of the *Spun Steak* decision, however, reveals that *Spun Steak* has, in fact, resurrected much of *Gutierrez*.

A. Spun Steak Partially Affirms the Guidelines

Despite its rejection of the EEOC Guidelines, the *Spun Steak* court approved three of the four principles that form the basis of the regulations. The *Spun Steak* court rejected entirely the first principle set forth in the Guidelines, which provides that an employee may not be prohibited from speaking her primary language on the job because for her it is an "essential national origin characteristic."156

The second principle advanced in the Guidelines, that an English-only rule applied to a person with limited English skills "disadvantages an individual's employment opportunities,"157 alludes to the portion of Title VII text usually associated with a charge of discrimination based upon the disparate treatment theory. The disadvantage that an employee suffers from an English-only rule, however, does not depend on discriminatory intent for its force. The language of the Guidelines omits reference to intent, thus suggesting that disparate impact analysis may be applied to English-only rules. The *Spun Steak* court adopted this principle of the Guidelines when it held that dispa-

156. 29 C.F.R. § 1606.7(a) (1993).
157. Id.
rate impact might be proved where an English-only rule denied employees with limited English skills the privilege of conversing on the job.

The hostile environment theory set forth in the Guidelines was also accepted by the *Spun Steak* court, and was applied to both cases of disparate impact and cases of disparate treatment. The court, however, added the requirement that the plaintiffs show that the English-only rule has such a pronounced effect that a hostile environment results.

The *Spun Steak* court also sanctioned the final principle of the Guidelines, that arbitrary or discriminatory application of an English-only rule could constitute a violation of Title VII. The court's opinion stated that "we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment." Most importantly, the court rejected the Guidelines' assertion that the mere presence of an English-only rule presumptively establishes a prima facie case of disparate impact discrimination. This portion of the Guidelines directly contradicts the Supreme Court's command, and therefore was properly rejected by the *Spun Speak* court. The Supreme Court has unambiguously declared that "[t]o establish a prima facie case of [disparate impact] discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact." Although the Guidelines provide useful assistance to EEOC employees attempting to reconcile employment disputes in informal and nonbinding procedures, the rule is inappropriate in the context of litigation where the allocation of the burden of proof is critical.

The *Spun Steak* court correctly halted the unwarranted expansion of Title VII beyond the scope of its intended purpose of eliminating purposeful discrimination in hiring and promotion. The Supreme Court has stated that "[t]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment." It is doubtful, however, that Congress intended employers to be forced to justify in court each practice

158. *Spun Steak*, 998 F.2d at 1489.
159. Id.
causing either a small disparity in working conditions among different groups or minor social discomforts on the job.

An employer contesting a discrimination charge faces significant expense as well as damage to reputation and employee morale. Without a limitation on the reach of employee charges of discrimination, employers will be under constant and intensified attacks from employees, unions, and other groups who seek to include less culpable forms of discriminatory behavior under the protections of Title VII.\textsuperscript{162}

An employer facing a prima facie case of disparate impact discrimination must meet both the burdens of production and persuasion to establish a defense of business necessity.\textsuperscript{163} The defense of business necessity may be difficult to prove. Evidence is difficult to obtain when employees are unavailable or unwilling to testify against fellow employees. A small employer may be limited in its ability to pay high fees to expert witnesses, while employees may have access to other resources provided by unions and other organizations. The EEOC Guidelines placed a heavy burden on all employers to justify English-only rules by business necessity, regardless of their limited application or the existence of compelling reasons for the rules. This was an excessive burden for the employer, particularly when the link between language and national origin varies so greatly between individuals that any generalization is of little value.

An employer is under an ethical and legal duty to protect employees from racial and sexual harassment,\textsuperscript{164} whether or not the harassment is conducted in English, and whether or not the person conducting the harassment is a member of a protected class.\textsuperscript{165} Employers are increasingly required to manage

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162. See, e.g., Giaimo & Vreeburg v. Smith, 599 N.Y.S.2d 841 (App. Div. 1993). There, a white lawyer failed in a charge that black rap artist LL Cool J discriminated unlawfully against him by firing him in favor of a black attorney. \textit{Id.} at 841. While the case was not brought under Title VII, it illustrates an attempt to expand civil rights law.


164. Volume two of the \textit{EEOC Compliance Manual} § 615.7 provides as follows: The EEOC has stated that it has long recognized that . . . under Title VII, an employer has an affirmative duty to maintain a working environment free from . . . harrassment, intimidation, or insult based on race, color, religion, or national origin and that the duty encompasses a requirement to take positive action where necessary to eliminate such practices or remedy their effects. The Commission's position . . . has been upheld by the courts.


165. The United States District Court for the Southern District of New York recently ordered trial in a suit by an English-speaking African American nurse who
multiple protected classes in the same workplace, and they
must be able to balance the interests of these groups as is
required by the circumstances without undue risk of litigation.

If Title VII were meant to provide absolute protection for
cultural expression on the job, employees would logically be able
to bring actions against employers who deny them the right to
wear the clothing of their national origin to work. If Title VII
were meant to ensure that each class of employees enjoys
exactly the same comfort level in the workplace, we might see
suits seeking injunctions to compel the company cafeteria to tai-
lor its menu in proportion to the ethnic composition of the work
force, or to force employers to provide paid holidays coinciding
with traditional holidays in each employee's country of origin.
While these examples seem patently absurd, they demonstrate
that the power of the courts to intervene for the promotion of
equal opportunity must be subject to some limitation. Congress
could not have intended all disputes having racial, religious,
gender, or national origin components to be settled through
litigation.

Rather, Title VII was designed by Congress to settle most
disputes through the noncoercive means of investigation and
mediation by EEOC employees skilled and experienced in
resolving disputes between employees and employers. The
coercive power of the courts is reserved only for situations that
place a harsh burden on protected employees when that burden
is not necessitated by the general operation of the business.

In light of recent changes in Title VII that increase the pen-
alties for employers while limiting their defenses, it is critical
that courts establish limits on the range of circumstances in
which employees may force their employers into court. By set-
ting reasonable requirements for plaintiffs seeking to make a
prima facie case of disparate impact discrimination, the Ninth

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166. Lynn Martin, in remarks before the Commonwealth Club of California,
asserted that "[w]e are in the midst of a revolution in our economy. . . . Over the past 20
years, an unprecedented number of women, minorities, and immigrants have been
incorporated into the work force," Former U.S. Labor Secretary and Deloitte & Touche
Advisor Speaks on American Work Force Challenges, Business Wire, November 3, 1993,
available in LEXIS, Nexis Library, BWIRE File.

167. See infra notes 174-179 and accompanying text.
Circuit in *Spun Steak* has ensured that Title VII's purpose of protecting employees from discrimination in working conditions as well as in employment opportunities will be achieved without sacrificing the autonomy of employers.

B. Employer Defenses to Disparate Impact After Spun Steak

The *Spun Steak* decision did not directly address the issue of what is needed to show business necessity for English-only rules as a rebuttal to a prima facie case of disparate impact discrimination, leaving this issue as yet undecided in any of the circuits.\(^{168}\) To prevail on a business necessity defense, the Ninth Circuit has previously required that "[t]he practice must be essential, [and] the purpose compelling."\(^{169}\) This extremely demanding standard is difficult to meet. Where disparate impact is on a privilege of employment rather than on employment opportunities, the lesser although significant degree of harm incurred by the employee should be balanced by a lesser need on the part of the employer to show business necessity for the disparate condition. The degree of necessity for the English-only rule should be balanced against the burden imposed. An absolute standard that the rule be essential is not appropriate in such a situation. Of course, where a hostile work environment results from an English-only rule, the harm may be severe and the rule could be struck down if not essential. A more appropriate general standard may be found in a 1989 language discrimination case, *Fragante v. City & County of Honolulu*,\(^{170}\) where the Ninth Circuit stated that "an adverse employment decision may be predicated on an individual's accent when—but only when—it interferes materially with job performance."\(^{171}\) Although *Fragante* was brought under the disparate treatment theory, under which a business reason for

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168. The Fifth Circuit in *Gloor* approved the trial court's finding that business justifications given by the employer were sufficient to rebut an inference of intentional discrimination, but did not apply a business necessity analysis after finding no disparate impact on the plaintiff. Nor was the business necessity issue reached by the Ninth Circuit in *Jurado*, where the court similarly held that the plaintiff failed to make his prima facie case of disparate impact. The *Spun Steak* court stated that *Gutierrez*, in which the Ninth Circuit had applied extremely strict scrutiny to business justifications for an English-only rule, "has no precedential authority." *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 n.1 (9th Cir. 1993).


170. 888 F.2d 591 (9th Cir. 1989).

171. *Id.* at 596.
a decision need only be sufficient to rebut an allegation that it is mere pretext for discrimination, the material interference standard stated there could be applied to test the sufficiency of a business necessity defense in a disparate impact challenge to an English-only rule.\footnote{172} Where an employer institutes an English-only rule to prevent harassment, for example, the employer should be able to establish a business necessity defense by a showing that the harassment was severe enough to materially interfere with the job performance of the victims or that the harassment was in violation of Title VII.

VI. Conclusion

The \textit{Spun Steak} decision provides much-needed guidance for Ninth Circuit employers with multilingual work forces, enabling employers to better formulate policies that conform to Title VII requirements. This decision also provides a precise legal standard for application by district courts hearing Title VII disparate impact cases, especially those related to workplace language rules. The \textit{Spun Steak} decision affects language discrimination law with respect to English-only rules in three ways. First, workers will not be able challenge English-only rules as unlawful restrictions on the right to cultural expression. Second, fluently bilingual employees will be able to bring successful disparate impact suits challenging English-only rules only in exceptional circumstances. Finally, employees may successfully bring actions under a hostile environment theory when an English-only rule produces a pronounced discriminatory effect, or where an English-only rule is applied in an arbitrary or discriminatory manner.

In addition to its effect on language discrimination law, the \textit{Spun Steak} decision establishes a cause of action for employees suffering a hostile work environment as a result of other kinds of workplace policies that are not motivated by intent to discriminate but that have an adverse impact on a protected class of employees.

While the \textit{Spun Steak} decision will likely deter some disparate impact suits over English-only rules, other recent developments enhance the position of bilingual employees. The Civil

\footnote{172. See Shulman \& Abernathy, supra note 27, ¶ 4.03[2][a] (citing Gutierrez and Saucedo for the proposition that courts have rejected English-only rules when the speaking of a language other than English does not impede the operations of the business).}
Rights Act of 1991 was enacted specifically to aid employment discrimination plaintiffs, and accomplishes its purpose through a series of amendments to Title VII. First, employers defending disparate impact charges by asserting the business necessity defense will no longer be able to prevail merely by asserting the lenient "business justification" defense allowed in Wards Cove Packing Co. v. Atonio. Second, the amendments provide for compensatory and punitive damages in cases of intentional discrimination. Third, jury trials are made available for intentional discrimination cases. Fourth, expert witness fees may be awarded to the prevailing party. Finally, the mixed motive defense to intentional discrimination is elimi-
nated, and employers are now liable for discrimination whenever a discriminatory purpose contributed to an employment practice, even though other factors may also have motivated the practice. ¹⁷⁸

Employees challenging English-only rules may be expected to increasingly allege disparate treatment, producing evidence to persuade a jury that English-only rules were motivated by prejudice rather than business purpose. The availability of consequential and punitive damages in disparate treatment cases will encourage plaintiffs to bring charges of intentional discrimination, while the availability of expert witness fees may encourage plaintiffs as well.

Federal employment law will only meet its ultimate goal of bringing about voluntary employer compliance¹⁷⁹ when the needs of employers are properly balanced with the needs of employees to be protected from discrimination that significantly hinders their employment opportunities or subjects them to a discriminatory work environment. The _Spun Steak_ decision will not only encourage compliance with federal discrimination law, but it will also allow employers more freedom to enact workplace rules that balance the ever-changing dynamics of an increasingly multicultural work force. The Ninth Circuit has presented a fair and workable solution to determine when English-only rules and other employment practices affecting working conditions can be challenged in court under Title VII.

¹⁷⁸. Section 107(a) of the Act states that race, color, religion, sex, or national origin need only be a motivating factor for an employment practice to establish discrimination, "even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. III 1991). This section overrules Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). There, the Court had established a mixed-motive defense by allowing the employer to prevail by showing that it would have made the same decision even if sex had not been considered. _Id._ at 244-45.

¹⁷⁹. See EEOC v. Henry Beck Co., 729 F.2d 301, 303-04 (4th Cir. 1984). The court there noted the following:

Encouraging voluntary compliance with Title VII is among the [Equal Employment Opportunity] Commission's most essential functions. Indeed when the Commission was created in 1964, it had the power only to investigate complaints and negotiate voluntary compliance. Not until Congress amended the Act in 1972 did it give the Commission authority to seek federal court enforcement of Title VII . . . . [T]he Supreme Court [has] stated that "[c]ooperation and compliance were selected as the preferred means for achieving this goal [of assuring equality of economic opportunity]."

_Id._ at 303-04 (citations omitted). The court further noted in discussing predetermination settlement agreements that such a settlement "saves resources that might otherwise be consumed in litigation and furthers the statutory goal of voluntary compliance." _Id._ at 305.