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COMMENTS

ENGLISH-ONLY IN THE WORKPLACE: A NEW JUDICIAL LENS WILL PROVIDE MORE COMPREHENSIVE TITLE VII PROTECTION

Raechel L. Adams*

The United States has always been a country of immigrants, and people from foreign countries continue to flood its borders today. To many immigrants, the United States embodies equal opportunity for all people without regard to their ethnicity or culture. Despite this image, anti-immigrant sentiment has run rampant through neighborhoods and workplaces. Such targeting of foreign nationals is possible as many identify nationality through language. In addition, many Americans seek to

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1. See Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269, 272, 342-45 (1992) [hereinafter Perea I] (observing America's history of cultural pluralism and citing, as a recent example, the influx of immigrants of Hispanic and Southeast Asian origins).


3. See Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 HARV. C.R.-C.L. L. REV. 293, 297-99 (1989) (discussing the history of anti-immigrant sentiment in the United States). Califa describes a recurring pattern of anti-immigrant backlash running through American history generally following periods of increased immigration. See id. In addition, he discusses groups that focus on restricting immigration from countries such as Mexico because they claim that the U.S. economy and culture cannot sustain such immigration. See id. at 298-99; see also Perea I, supra note 1, at 275-76 (recognizing the Anglo-Saxon cultural dominance in the United States and explaining that many Americans' reaction to pluralism is a demand for assimilation, especially with respect to language).

4. See 1 RALPH FASOLD, THE SOCIOLUMINISTICS OF SOCIETY: INTRODUCTION TO SOCIOLUMINISTICS 3 (1984) (explaining that members of a nationality identify and feel united with those who share their language because language, culture, religion, and history are the principal components of nationality). Joshua Fishman, asserting that language is the quintessential symbol and value of ethnicity, views both ethnicity and language as so fundamental to a societal identity that both are "absorbed via the mother's milk."
promote their own nationality by advocating laws declaring English the official language.\(^5\) In keeping with this movement to establish English as the official language of the United States, or at least of individual states,\(^6\) many public and private employers\(^7\) have instituted “English-only rules” in the workplace.\(^8\)

5. See Perea I, supra note 1, at 278-79. Perea describes the official English movement as one that has sought to define American culture by making English the official language. See id. at 278. Official English proponents advocate the idea that national unity depends on a single language and that English symbolizes the true American culture. See id. at 346-47. Although the movement has not succeeded in making English the official national language, it has managed to influence many state legislatures to enact statutes making English the official state language. See id. at 342; see also Califa, supra note 3, at 293-94 (stating that the public votes overwhelmingly in support of English as the official language, but arguing that English as the official language is simply a tool to promote prejudice).


7. This Comment primarily addresses the question of whether English-only rules in the private sector constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964.

8. See Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir. 1993) (explaining that the employer instituted a policy requiring employees to speak only English in connection with work). The court in Spun Steak upheld the following English-only rule:

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

Id. at 1483; see also EEOC Decision 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1823 (1981) (finding cause for a charging party's allegation that the following rule discriminated on the basis of national origin: “[W]hen you are on the payroll all conversation will be in English. Either work and speak English or work and don't talk.”).

Some employers have required more than just that employees speak English in connection with work. See Brief for Appellant Equal Employment Opportunity Commission at 4, Equal Employment Opportunity Commission v. Wynell, 95 F.3d 49 (5th Cir. 1996) (No. 95-20523); Brief for Appellant Equal Employment Opportunity Commission at 4, Equal Employment Opportunity Commission v. Wynell, Inc., 91 F.3d 138 (5th Cir. 1996) (No. 95-20419). In Wynell, the employer's personnel manual required that “all administrative
Many employees, however, feel disadvantaged as a result of these “English-only rules,” which require that employees speak only English in the workplace at certain times during the work day. Thus, some employees have begun to challenge English-only rules in court. Title VII of the Civil Rights Act of 1964 (Title VII) is the federal vehicle through which employees in the private sector challenge workplace discrimination based on language. Title VII prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

Plaintiffs challenge English-only rules under Title VII on the ground that these rules divide employees on the basis of national origin. Plaintiffs challenge English-only rules under Title VII on the ground that these rules divide employees on the basis of national origin.

transactions, supervision and direction of the children be spoken in the English language.” Id. The employer later expanded the rule to prohibit speaking Spanish on the premises, including during lunch breaks, allowing employees to speak in a language other than English only if they needed to communicate with a non-English speaking employee. See id. n.4; see also Mirta Ojito, Bias Suits Increase Over English-Only Rules, N.Y. TIMES, Apr. 23, 1997, at B1 (illustrating a trend of increased language-related lawsuits by discussing a case in which the employer prohibited employees from speaking Spanish during breaks, lunch, and within one city block of the office building).

9. See Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1409-10 (9th Cir. 1987) (involving the claim of a disk jockey of Hispanic origin who felt that complying with his employer's rule that he stop speaking Spanish would effectively take away his ethnic character).

10. See, e.g., Spun Steak, 998 F.2d at 1483 (meat workers challenged company policy requiring that only English be spoken in connection with work); Jurado, 813 F.2d at 1409 (discharged radio disk jockey challenged radio station's rule that he speak only English on his radio show); Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980) (Mexican American lumber salesman challenged discharge for answering in Spanish a co-worker's question that was asked in Spanish); Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 921-22 (S.D. Tex. 1979) (employee challenged unofficial English-only rule when terminated for speaking two words of Spanish outside context for which rule was designed).


13. See Wiley, supra note 6, at 545 (observing that the courts traditionally have analyzed English-only claims under Title VII).


15. See Gloor, 618 F.2d at 268 (Mexican American lumber salesman challenged English-only rule as discriminatory because it denied him the right to converse in the language most familiar to him). In Gloor, the plaintiff argued that his language preference was grounded in his national origin. See id. Other plaintiffs have alleged that English-only rules discriminate on the basis of race. See Hernandez v. Erlenbusch, 368 F. Supp. 752, 755 (D. Or. 1973) (characterizing a tavern's policy allowing only English to be spoken at the bar as racial discrimination against Mexican Americans). Scholars concur, however, that language restrictions are most closely linked to national origin discrimination. See Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 WM. & MARY L. REV. 805, 819 (1994) [hereinafter Perea II] (analyz-
tiffs claim that because of the inextricable connection between foreign nationality and foreign language, English-only rules inevitably impact people of foreign origin. Unfortunately, little legislative history exists to explain what Congress meant by the phrase “national origin discrimination” in Title VII. Courts and scholars point to the following definition devised by Congressman Roosevelt, one of the drafters of Title VII, as the only available definition of national origin: “the country from which you or your forebears came.” This ambiguity and plaintiffs’

16. See Robert D. King, Should English Be the Law?, ATLANTIC MONTHLY, Apr. 1997, at 55, 58, 60-61 (analyzing the history of nationalism and language in several cultures through the centuries, and recognizing that ethnic unity and cultural identification have been and still are defined by language). The first sentence of the first chapter of a basic sociolinguistics textbook reads:

When people use language, they do more than just try to get another person to understand the speaker’s thoughts and feelings. At the same time, both people are using language in subtle ways to define their relationship to each other, to identify themselves as part of a social group, and to establish the kind of speech event they are in.

2 RALPH FASOLD, SOCIOLINGUISTICS OF LANGUAGE: INTRODUCTION TO SOCIOLINGUISTICS 1 (1990). Fasold also discusses the “ethnography of communication,” the sociolinguistic theory that postulates that language is closely tied to social and cultural values. See id. at 39. For a linguistic perspective on the link between language and culture, see generally JOSHUA A. FISCHMAN, THE SOCIOLOGY OF LANGUAGE, IN READINGS IN THE SOCIOLOGY OF LANGUAGE (Joshua A. Fishman ed., 1968); MURIEL SAVILLE-TROIKE, THE ETHNOGRAPHY OF COMMUNICATION (2d ed. 1989).

17. See Long v. First Union Corp. of Va., 894 F. Supp. 933, 939 (E.D. Va. 1995) (bank employees of Hispanic origin claimed national origin discrimination and harassment because they were afraid to speak their native language once the bank instituted an English-only policy); see also Gloor, 618 F.2d at 268 (adjudicating a claim of national origin discrimination based on an employer’s English-only policy). In Gloor, the plaintiff argued that to deny an employee the right to speak the language he speaks most comfortably was to deny him a privilege of employment. See id. The argument illustrates that English-only rules affect those most comfortable with languages other than English differently from the way they affect those most comfortable speaking English. See id. A person’s national origin naturally determines the language he feels most comfortable speaking. See id.

18. See Perea II, supra note 15, at 821 (explaining that the debates preceding the passage of the 1964 Civil Rights Act included few references to national origin discrimination because Title VII was primarily enacted to combat discrimination against African Americans).

19. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 89 (1973) (citing 110 CONG. REC. 2549 (1964)). Espinoza represents one of the first judicial interpretations of the scope of the phrase “national origin” as used in Title VII. In Espinoza, the Supreme Court addressed whether national origin discrimination included discrimination based on citizenship. See
challenges have inspired a body of case law that considers whether language restrictions are a form of national origin discrimination. 20 In addition, the Equal Employment Opportunity Commission (EEOC) recently issued a guideline on the issue. 21 The guideline creates a presumption that English-only rules in the workplace discriminate on the basis of national origin. 22

As early as 1970, the EEOC provided examples of national origin discrimination in a general guideline on national origin discrimination. 23 Initially, however, the link between language and national origin was un-

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20. See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (finding that Hispanic employees failed to assert a prima facie case of discrimination under Title VII); Gutierrez v. Municipal Court, 838 F.2d 1031, 1044-45 (9th Cir. 1988) (concluding that the employer's English-only policy violated Title VII because it had an adverse impact on a protected group), vacated as moot, 490 U.S. 1016 (1989); Jurado v. Eleven Fifty-Corp., 813 F.2d 1406, 1411 (9th Cir. 1987) (holding English-only order to be business related and without discriminatory motive); Gloor, 618 F.2d at 266, 270 (holding that employees' inability to comply with an English-only rule does not render the rule discriminatory).

21. 29 C.F.R. § 1606.7 (1997). The EEOC is responsible for the enforcement of Title VII, including claims of employment discrimination on the basis of national origin. See 42 U.S.C. § 2000e-5(a) (1994). National origin-based charges filed between fiscal years 1990 and 1996 accounted for approximately 11% of all charges filed with the EEOC. See The EEOC and National Origin Discrimination Based on Language and Accent (EEOC Office of Communications and Legislative Affairs), Feb. 1997, at 4. The EEOC has litigated against private employers regarding English-only rules in Los Angeles, San Antonio, Miami, Phoenix, Houston, New York, and Baltimore. See id. Several of these cases have settled out of court, and the employers have rescinded their English-only rules. See EEOC v. American Red Cross, Civil Action No. DKC94-3050, at 3 (D. Md. Sept. 6, 1995) (settlement agreement) (requiring employer to rescind its English-only rule); EEOC v. Brown Derby Restaurant, Civil Action No. 92-2940 WMB (EEx) at 3-4 (C.D. Cal. Dec. 23, 1992) (consent decree) (prohibiting defendant from enforcing English-only policy and awarding employee $5,000 in backpay).

In recent years, the EEOC has begun to focus on language-related issues due to increased charges in that area. See EEOC National Enforcement Plan, EEOC COMPLIANCE MANUAL (BNA) No. 209, at N:3061 (1996) [hereinafter EEOC COMPLIANCE MANUAL] (identifying the EEOC's litigation strategy based on community needs). Indeed, the EEOC has identified language-related claims as a priority enforcement issue in the EEOC National Enforcement Plan. See id. at N:3062. This document sets forth priorities for the Commission's enforcement of civil rights statutes, based on public policy. See id. at N:3602 to N:3603.

22. See 29 C.F.R. § 1606.7(a).

23. See Guidelines on Discrimination Because of National Origin, 35 Fed. Reg. 421 (1970) (codified at 29 C.F.R. § 1606.1). This guideline stated that the EEOC would scrutinize the use of the following: tests in English where English language was not essential to the particular job; denial of equal employment opportunity to people associated with people of foreign origin; denial of equal employment opportunity to people associated with certain organizations that promoted "the interests of national groups"; and denial of equal opportunity to people with names, heights, and weights associated with people of foreign origin. See id.
clear. For example, one court looked to the language of Title VII for a definition of national origin discrimination and insisted that the omission of "language" in the statutory definition meant that a discrimination claim could not be premised on foreign language. The court pointed out, however, that it was ruling in the absence of EEOC guidance, implying that its holding might have differed had regulatory guidance existed.

Seemingly in response to that case, the EEOC amended its guideline on national origin discrimination in 1980, suggesting that English-only rules could be a form of national origin discrimination. The EEOC guideline on national origin discrimination now states that discrimination on the basis of national origin includes "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." Courts now generally accept that the definition of national origin includes language and regularly analyze claims regarding English-only rules under the umbrella of Title VII.

Because English-only challenges are a relatively new component of Title VII jurisprudence, these challenges have been received with diffi-

24. See Gloor, 618 F.2d at 268-69. In Gloor, a lumber and supply salesman was fired for violating company policy by speaking to a co-worker in Spanish. See id. at 266. The district court found that the plaintiff was discharged partly for deficient performance and partly because he violated the English-only policy. See id. The Fifth Circuit rejected the plaintiff's argument that the discharge violated Title VII, however, because the court refused to relate the bilingual plaintiff's language choice to his national origin. See id.

25. See id. at 268 n.1. Indeed, the EEOC's subsequent promulgation of guidelines on national origin discrimination has jeopardized the reasoning in Gloor, but no Fifth Circuit case has expressly overruled Gloor.


27. 29 C.F.R. § 1606.1 (1997). The EEOC first amended the guideline in 1974 to conform to judicial interpretations of the scope of "national origin." See 45 Fed. Reg. at 85,632. The EEOC further amended the guideline to restructure and clarify the earlier guidelines and to add the provision finding English-only rules to be national origin discrimination. See id. at 85,632, 85,635.

28. See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1484-85 (9th Cir. 1993) (discussing an English-only policy as a possible "burdensome term or condition of employment" prohibited by Title VII); Gloor, 618 F.2d at 268 (analyzing employer's English-only rule under Title VII); Long v. First Union Corp. of Va., 894 F. Supp. 933, 939 (E.D. Va. 1995) (analyzing a bank's English-only policy as national origin discrimination); cf. McNeil v. Aguilos, 831 F. Supp. 1079, 1081 (S.D.N.Y. 1993) (analyzing under Title VII plaintiff's "reverse English-only" claim of language discrimination, asserted because non-English speakers violated her rights as a native English speaker).

29. The first decision regarding a private employer's English-only rule was Saucedo v. Brothers Well Service, Inc., 464 F. Supp. 919 (S.D. Tex. 1979). In that case, an oil drilling
culty by the courts, and varying approaches to their adjudication have left this area of law in conflict. In fact, the Ninth Circuit has rejected the EEOC's guidance regarding the appropriate analysis in English-only cases, finding that the EEOC's analysis defines incorrectly the parties' burdens of proof. While the EEOC guidance creates a presumption that all English-only rules constitute national origin discrimination, the Ninth Circuit has refused to relieve plaintiffs of their initial burden to put forth evidence supporting their particular discrimination claims.

This Comment explores the current definition and analysis of national origin discrimination, as applied to challenges to English-only rules. Part I explains disparate impact, disparate treatment, and hostile work environment theories of discrimination, the general analyses currently applied in English-only cases. Part II discusses the courts' and the EEOC's treatment of English-only rules thus far, applying disparate treatment, hostile work environment, and disparate impact theories. Part III.A concludes that courts have misapplied disparate impact analysis to the context of English-only disputes. Part III.B notes that the hostile work environment theory involves a virtually unattainable evidentiary burden and concludes that plaintiffs will rarely win an English-only case on this theory. Part III.C argues that the few courts applying disparate treatment analysis are incorrectly formulating their judicial test. Part IV.A recommends that courts broaden the definition of national origin to include ethnicity and language in order to define appropriately the adverse

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30. See Spun Steak, 998 F.2d at 1489 (rejecting plaintiffs' claims that speaking English created an unreasonably hostile work environment); Gloor, 618 F.2d at 268 (refusing to find the language that an employee chose to speak equivalent to his national origin); Long, 894 F. Supp. at 941 (holding that Title VII does not protect expression of national origin and finding plaintiffs not to be adversely affected by employer's English-only rule).

31. See infra Part II (discussing split between EEOC and Ninth Circuit analyses of English-only rules as national origin discrimination).

32. See Spun Steak, 998 F.2d at 1489 (explicitly rejecting the EEOC Guideline because courts must analyze the totality of the circumstances, rather than creating per se rules).

33. See 29 C.F.R. § 1606.7(a) (1997) (stating that English-only rules will be presumed to violate Title VII because they create burdensome employment conditions).

34. See Spun Steak, 998 F.2d at 1490 (emphasizing Title VII plaintiffs' evidentiary burden).
impact of English-only rules. Finally, Part IV.B urges courts applying disparate treatment analysis to recognize the extent to which language affects nationality, thus creating a detrimental effect of English-only rules solely on people of foreign origin.

I. CURRENT ANALYSES OF TITLE VII CLAIMS: DISPARATE IMPACT AND DISPARATE TREATMENT

Courts have adopted two principal theories of liability to address the various factual patterns that have emerged in Title VII claims, and each involves a framework for evidentiary burden-shifting between the parties. When an employer imposes a discriminatory term or condition of employment with respect to a group of employees, a plaintiff may either assert disparate impact theory or disparate treatment theory.

A. Disparate Impact

Disparate impact theory applies to claims involving employers' facially neutral policies that affect a class protected by Title VII more harshly than they affect an unprotected class. In disparate impact cases, the plaintiff need not prove the employer's intent to discriminate.

35. See Patrick Wallace, Note, English-Only Rules in the Workplace: Examining the Need to Balance the Burdens of Proof Under Disparate Impact Analysis, 7 DEPAUL BUS. L.J. 223, 226-27 (1994) (stating that there are three methods of analysis applicable to Title VII claims: disparate treatment proved with evidence of direct discriminatory animus, disparate treatment proved with evidence implying discriminatory animus, and disparate impact proved by evidence of a significant adverse effect); see also 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 3-4 (3d ed. 1996) (discussing the general categories of discrimination).

36. See 1 LINDEMANN & GROSSMAN, supra note 35, at 81 & n.1 (discussing disparate impact theory and noting that it is also known as the adverse impact theory).

37. See id. at 9 (discussing disparate treatment theory). Disparate treatment theory involves an employer's treating certain employees differently from others, and the question is whether those treated differently were so treated due to their association with a protected class. See id. In contrast, disparate impact theory involves an employer's actions that unintentionally affect disproportionate numbers of protected group members. See id. at 81.


39. See Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). Employment discrimination authorities acknowledge Griggs as "the seminal adverse impact case" because the Supreme Court held that the consequences of employment actions are as significant as the motivation for them. See 1 LINDEMANN & GROSSMAN, supra note 35, at 81.

The intent requirement distinguishes disparate impact theory from disparate treatment theory. See Teamsters, 431 U.S. at 335-36 n.15 (delineating the differences between these two theories). Where an employment decision has been based on subjective criteria, how-
Through a combination of cases, the Supreme Court has set forth a burden-shifting evidentiary framework for disparate impact cases. First, the plaintiff must establish a prima facie case of discrimination by showing that the implicated employment practice significantly affects his or her protected group. The burden then shifts to the employer to demonstrate a legitimate “business necessity” for the employment practice. The burden then shifts back to the plaintiff to prove that the employer could have used other non-discriminatory means to satisfy the same business necessity. If the employer could have used non-discriminatory means, the practice is deemed to have actually been used as a “pretext” for discriminating openly. The Civil Rights Act of 1991 codified this three step framework.
B. Disparate Treatment

The second theory of liability used in Title VII cases is disparate
treatment theory. In a case of disparate treatment, an employer has
treated a member of a protected group less favorably than another and,
unlike in disparate impact cases, the plaintiff must prove discriminatory
intent in the employer's actions. For example, in International Brother-
hood of Teamsters v. United States, employees alleged that their em-
ployer, a freight carrier, discriminated against black and Hispanic-
surnamed applicants, hiring them for lower-paying and less desirable po-
sitions than the positions for which it hired white applicants. The Su-
preme Court considered the facts that only five percent of the employees
were black and only four percent had Hispanic surnames, and that all of
the black employees were hired after the litigation had begun. These
factors, along with other disparities the plaintiffs presented, amounted to
a pattern of disparate treatment and led the Court to conclude that the
distinctions made among employees were premised on race.

Like disparate impact cases, disparate treatment cases involve a bur-
den-shifting framework. In McDonnell Douglas Corp. v. Green, the
Supreme Court established this framework, stating that the plaintiff in a
disparate treatment case must first put on sufficient evidence to raise an
inference of discrimination. The burden then shifts to the employer to

46. See 1 LINDEMANN & GROSSMAN, supra note 35, at 9-10 (discussing disparate
treatment theory).
47. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15
(1977) (defining disparate treatment and distinguishing it from disparate impact); see also
Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (discussing disparate treat-
ment theory and the shifting burdens involved in such a case); Furnco Constr. Corp. v.
Waters, 438 U.S. 567, 579-80 (1978) (permitting, in disparate treatment cases, inference of
discriminatory motive in the absence of any other explanation for an employment decision
once a plaintiff has made a prima facie showing).
49. See id. at 328-29.
50. See id. at 337. The defendants argued that statistics are misleading and seem to
demand preferential treatment of certain groups, a practice Title VII does not require.
See id. at 339, 340-41 n.20. The Court pointed out, however, that the plaintiffs' statistical
evidence was well corroborated. See id. at 339-40. In addition, the Court stated that it
routinely permits plaintiffs to rely on statistical evidence to make out a prima facie case
when the statistics reflect extreme disparities in hiring. See id. at 339.
51. See id. at 342-43.
52. See 1 LINDEMANN & GROSSMAN, supra note 35, at 11-13 (discussing the shifting
burdens of proof).
54. See id. at 802. In McDonnell Douglas, the Court stressed the flexibility required
in the adjudication of plaintiffs' prima facie Title VII cases. See id. at 802 n.13. An infer-
ence of discrimination may be raised by a plaintiff in the manner that best fits the factual
articulate a legitimate non-discriminatory reason for the discriminatory treatment.\textsuperscript{55} If the employer satisfies this burden, the burden then shifts back to the plaintiff to demonstrate that the reason the employer has articulated is merely a pretext for discrimination.\textsuperscript{56}

C. Hostile Work Environment

In a subset of disparate treatment cases, plaintiffs may allege a "hostile work environment."\textsuperscript{57} In these cases, employees claim that certain behaviors in the workplace create a hostile work environment, which equals the burdensome term or condition of employment prohibited by Title VII.\textsuperscript{58} In \textit{Meritor Savings Bank v. Vinson},\textsuperscript{59} the Supreme Court articulated a definition of hostile work environment that was first put forth by the Fifth Circuit Court of Appeals in \textit{Rogers v. EEOC}.\textsuperscript{60} In \textit{Rogers}, the court had found that "terms, conditions or privileges of employment," as the phrase is used in Title VII, could encompass an atmosphere charged with discriminatory tensions.\textsuperscript{61}

\begin{footnotesize}
\begin{itemize}
\item[55.] See \textit{Burdine}, 450 U.S. at 255-56 (holding that the employer must articulate, but not prove, a non-discriminatory reason for the employment practice); \textit{McDonnell Douglas}, 411 U.S. at 802 (same).
\item[56.] See \textit{McDonnell Douglas}, 411 U.S. at 804.
\item[57.] See \textit{Meritor Sav. Bank v. Vinson}, 477 U.S. 57, 66 (1986) (stating that proof of a hostile work environment constitutes a Title VII claim). In \textit{Meritor Savings}, a female employee successfully established a Title VII claim for hostile environment sexual harassment by proving that her supervisor made unwelcome sexual advances toward her. See \textit{id.} at 65, 67. Hostile work environment cases are also known as an "abusive work environment" cases. See \textit{Harris v. Forklift Sys., Inc.}, 510 U.S. 17, 18-19 (1993).
\item[58.] See \textit{Meritor Savings}, 477 U.S. at 66-67. Generally, in order to prevail in a Title VII hostile environment claim, a plaintiff must prove that the employer subjected the plaintiff to abusive and unwelcome conduct, and that the conduct was severe and pervasive enough to unreasonably alter the plaintiff's (or a similarly situated person's) working conditions. See \textit{id.} at 65-67. Plaintiffs often assert hostile work environment claims in connection with gender-based harassment. See \textit{id.}; \textit{Harris}, 510 U.S. at 18-19. The EEOC has defined one type of sexual harassment as "[u]nwelcome sexual advances . . . [having] the purpose or effect of unreasonably interfering with an individual's . . . working environment." 29 C.F.R. § 1604.11 (1997).
\item[59.] 477 U.S. 57 (1986).
\item[60.] 454 F.2d 234 (5th Cir. 1971). In \textit{Rogers}, the plaintiff was the only employee of an optometry group to have a Spanish surname, and she charged her employer with national origin discrimination when she was terminated. See \textit{id.} at 236. She also alleged that the employer created an offensive work environment for employees by segregating patients based on their national origin. See \textit{id.}
\item[61.] \textit{id.} at 238. Although cautious not to hold that an employer’s mere ethnic or racial epithet goes so far as to constitute a hostile work environment, the court in \textit{Rogers} did
\end{itemize}
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In *Harris*, the Supreme Court listed various factors, such as the frequency and severity of the discriminatory conduct, to be considered in determining whether an environment is hostile. The Court stated that lower courts must make these determinations based on the totality of the circumstances. In practice, the Supreme Court's definition of a hostile work environment, requiring severe and pervasive conduct, has been a difficult standard for plaintiffs to meet.

II. CONFLICTED AUTHORITY REGARDING THE EFFECT AND ANALYSIS OF ENGLISH-ONLY RULES

The fact that English-only claims fall within the ambit of Title VII constrains courts to analyze plaintiffs' claims according to the theories of discrimination applicable to Title VII cases. The courts, therefore, use either disparate treatment or disparate impact analysis to determine the legality of English-only rules. Thus far, the federal appellate courts have considered few challenges to private employers' English-only rules. Moreover, the Supreme Court has yet to address the issue of

urge that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection." *Id.* at 237-38.

62. *See Harris*, 510 U.S. at 23. The Court set out, as a non-exhaustive list, the following factors: "frequency of discriminatory conduct," severity of discriminatory conduct, physical threat or humiliation resulting from discriminatory conduct (as opposed to mere offensive utterance), and unreasonable interference with job performance. *Id.*

63. *See id.*

64. *See* Miranda Oshige, Note, *What's Sex Got to Do With It?*, 47 STAN. L. REV. 565, 566-70 (1995) (arguing that the requirement that plaintiffs establish severe and pervasive discrimination implies that the courts actually condone some level of discrimination in the workplace, and proposing that hostile work environment claims be recast as straight disparate treatment claims).

65. *See* Wallace, *supra* note 35, at 226-27 (stating that in a Title VII case, an employee will allege either disparate treatment, proved with either direct or circumstantial evidence of discriminatory animus, or disparate impact).


67. *See, e.g.* Garcia v. Spun Steak Co., 998 F.2d 1480, 1483-84 (9th Cir. 1993) (Hispanic employees challenged meat distributor's policy that employees speak English in connection with work); Gutierrez v. Municipal Ct., 838 F.2d 1031, 1036 (9th Cir. 1988) (bilingual court clerk brought action against judicial district for policy requiring that clerks speak only English except when acting as translators), *vacated as moot*, 490 U.S. 1016 (1989); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1408-09 (9th Cir. 1987) (radio disk
whether a private employer's English-only rule constitutes national origin discrimination. 68

A. Disparate Treatment

Although some scholars have advocated the use of disparate treatment analysis in challenging English-only rules, 69 such challenges have been rare. 70 This infrequency is due to the fact that English-only rules appear facially neutral in their requirement that all employees speak English. 71 Thus, disparate impact analysis has been used more often. 72

Only in one case did a circuit court apply disparate treatment analysis: jockey claimed racial and national origin discrimination when program director instructor forbade his speaking Spanish on the air); Garcia v. Gloor, 618 F.2d 264, 266-67 (5th Cir. 1980) (lumberyard employee claimed that English-only policy constituted a discriminatory employment condition).

68. The Supreme Court has received only one petition for certiorari and has denied it. See Garcia v. Spun Steak, 512 U.S. 1228 (1994). Recently, however, the Court did examine the constitutionality of an amendment to Arizona’s constitution, which would have required that all state business be conducted in English. See Yniguez v. Arizona, 69 F.3d 920, 924 (9th Cir. 1995) (en banc), vacated as moot sub nom. Arizonans For Official English v. Arizona, 117 S. Ct. 1055 (1997). In Yniguez, the Ninth Circuit did not clarify the law with respect to English-only rules in private employment, instead it addressed a public sector English-only rule. See id. Although the district court had concluded that the constitutional article was an invalid regulation of speech in public employment, the Supreme Court vacated that decision on procedural grounds. See id. at 947; Arizonans For Official English, 117 S. Ct. at 1057, 1071-72.

69. See Perea III, supra note 66, at 293-95 (asserting that disparate treatment analysis is more appropriate than disparate impact analysis because English-only rules exclusively affect a protected class and thus employers use language to discriminate intentionally against employees of foreign origin); see also Dan Cooperider & Stephen Wiss, The Limits of Deference: The Ninth Circuit Rejects EEOC Guidelines on English-Only Rules in the Workplace - Garcia v. Spun Steak, 25 GOLDEN GATE U. L. REV. 119, 142-49 (1995) (arguing that the EEOC and the Ninth Circuit have failed to guide adequately lower courts’ disparate impact analysis of English-only rules, and urging acceptance of Perea’s suggestion that courts apply disparate treatment analysis).

70. See Cooperider & Wiss, supra note 69, at 147 (noting that most courts have analyzed English-only rules under disparate impact theory because courts have assumed the rules to be facially neutral). But see Jurado, 813 F.2d at 1409-11 (applying disparate treatment theory to an English-only case); Long v. First Union Corp. of Va., 894 F. Supp. 933, 941-42 (E.D. Va. 1995) (considering English-only plaintiffs’ disparate treatment claim).

71. See supra note 8 (citing examples of English-only rules that were facially applicable to all employees).

72. See supra note 70 and accompanying text (discussing this trend). But see Perea III, supra note 66, at 289 (asserting that while English-only rules appear facially neutral, they exclusively affect individuals of foreign national origin).
to an English-only challenge. In *Jurado v. Eleven-Fifty Corp.*, a bilingual plaintiff alleged race and national origin discrimination when his employer fired him from his disk jockey position for violating the radio station’s requirement that he broadcast only in English. After years of broadcasting in English, Jurado had begun using some Spanish on his radio show, pursuant to the program director’s instructions, in order to attract Hispanic listeners. Noting that the use of Spanish on the air did not, in fact, boost the station’s ratings, the station’s new program director instructed Jurado to broadcast only in English.

The Ninth Circuit affirmed the district court’s summary judgment ruling for the employer, espousing the district court’s application of disparate treatment analysis. The court explained that it was the plaintiff’s burden to prove that the station’s rule was motivated by discriminatory animus. The court ruled that Jurado’s evidence that a consultant found the station to be inordinately preoccupied with ethnicity, and that a supervisor had commented on the ethnic undertones of Jurado’s show, did not satisfy the burden of proving discriminatory intent. Thus the plain-

73. See *Jurado*, 813 F.2d at 1409-11. In *Jurado*, the court also applied disparate impact analysis and rejected the plaintiff’s argument that the English-only rule disproportionately disadvantaged Hispanics on the ground that Jurado himself was bilingual and could therefore comply with the rule. See id. at 1412.

The Eastern District of Virginia also applied disparate treatment analysis to an English-only claim. See *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 941-42 (E.D. Va. 1995). In *Long*, the employer instituted an English-only policy to eliminate tensions arising when bilingual employees spoke Spanish so that others would not understand. See id. at 939, 942. The court summarily stated that the plaintiffs had failed to prove discriminatory intent. See id. at 942. The court did not, however, methodically apply disparate treatment analysis. Rather than first assessing the merits of the plaintiffs’ prima facie case, the court skipped to the employer’s proffered reasons for the English-only policy and found them reasonable. See id.

74. 813 F.2d 1406 (9th Cir. 1987).

75. See id. at 1408. The court made no distinction between the plaintiff’s separately alleged bases of discrimination. See id. Challenges to English-only rules are usually brought as discrimination on the basis of national origin. See *supra* note 15 and accompanying text (discussing cases considering English-only rules as race and national origin discrimination).

76. See id. at 1409.

77. See id. at 1408.

78. See id.

79. See id. at 1409. The district court found that Jurado failed to establish a prima facie case under disparate treatment theory because he failed to show that the station had discharged him for discriminatory reasons. See id. The court found, instead, that the station had discharged Jurado for failing to comply with its formatting decision, a legitimate business reason. See id. at 1409-10.

80. See id. at 1409.

81. See id. at 1410. The court rejected Jurado’s argument that the decision to dis-
tiff failed to make out a prima facie case.\textsuperscript{82} In addition, the court adopted the employer's explanation that the English-only order was a "programming decision motivated by marketing, ratings, and demographic concerns."\textsuperscript{83}

Alternatively, but still within the context of disparate treatment, Jurado argued that even absent the employer's specific intent to discriminate, an English-only rule imposed on a bilingual employee could be deemed a discriminatory discharge criterion on its own.\textsuperscript{84} The court ruled, however, that in a case such as this one, where a plaintiff can comply easily with the rule but chooses not to do so, an employer may enforce a limited English-only policy.\textsuperscript{85} In other words, the court held that if an employee can comply with an employment criterion, the criterion is not discriminatory in nature.\textsuperscript{86} Thus, the plaintiff failed to present sufficient evidence of discrimination to prove disparate treatment.\textsuperscript{87}

\textit{B. Hostile Work Environment}

Courts have also analyzed whether English-only rules create a hostile work environment for employees of foreign origin.\textsuperscript{88} In Garcia v. Spun Steak Co.,\textsuperscript{89} two Spanish-speaking employees and their union challenged a meat-producing company's English-only rule.\textsuperscript{90} The employer instituted the rule after receiving complaints from other employees that the plaintiffs were insulting their co-workers in Spanish.\textsuperscript{91} Plaintiffs argued that the English-only rule created an atmosphere of "inferiority, isolation, and intimidation," thus constituting national origin discrimination charge him was racially motivated, finding that the radio station had articulated legitimate business reasons for the English-only rule: demographics and marketing concerns. \textit{See id.} \textsuperscript{82}

\textit{See id.} at 1409; \textit{see also supra} notes 52-56 and accompanying text (discussing the proof required to make out a prima facie case of disparate treatment).

\textit{Id.} at 1410.

\textit{Id.} at 1411 (noting the holding in Diaz v. AT&T, 752 F.2d 1356, 1361 (9th Cir. 1985) that an employment action based on discriminatory employment criteria may independently constitute a prima facie case of disparate treatment).

\textit{See id.} (noting that in Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), and Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7 (1986) English-only rules are permissible if they are necessary and justified by business necessity).

\textit{See id.}

\textit{See id.}

\textit{See Garcia v. Spun Steak Co.,} 998 F.2d 1480, 1488-89 (9th Cir. 1993) (scrutinizing plaintiffs' argument that the employer's English-only rule created an atmosphere of intimidation and isolation); \textit{see also infra} Part III.B (discussing hostile work environment theory).

\textit{998 F.2d} 1480 (9th Cir. 1993).

\textit{See id.} at 1483-84.

\textit{See id.} at 1483.
under Title VII. The district court granted summary judgment in favor of the plaintiffs. The Ninth Circuit, however, reversed and remanded. The court found that the bilingual plaintiffs had not made out a prima facie case because the English-only policy did not have a significantly adverse effect on Hispanics, the protected group. The court not only refused to create a per se rule that the effect of all English-only rules amounts to a hostile work environment, it also found that the plaintiffs in Spun Steak had presented insufficient evidence of a hostile environment.

C. Disparate Impact

For the most part, the EEOC and the courts seem to agree that disparate impact analysis is appropriate in English-only cases. When applying disparate impact analysis, however, authorities have confused the proper burden-shifting framework and, as a result, the law regarding disparate impact analysis of English-only cases is unsettled.

92. Id. at 1486-87.
93. See Garcia v. Spun Steak Co., No. C-91-1949 RHS, 1991 WL 268021, at *1 (N.D. Cal. Oct. 23, 1991), rev'd, 998 F.2d 1480 (9th Cir. 1993). Although the unpublished district court opinion did not reveal the court's reasoning, the Ninth Circuit stated that the Northern District of California had granted summary judgment to the plaintiffs because the English-only policy disparately impacted the employees without business justification. See Spun Steak, 998 F.2d at 1484.
94. See Spun Steak, 998 F.2d at 1490.
95. See id. at 1489.
96. See Spun Steak, 998 F.2d at 1488-89; see also supra notes 62-63 and accompanying text (discussing evidentiary requirements for hostile work environment claims).
97. See 29 C.F.R. § 1606.7(a) (1997) (explaining that English-only rules negatively impact employees of foreign origin because primary language is an essential element of national origin); EEOC COMPLIANCE MANUAL, supra note 21, at § 623.6 (advising EEOC investigators that adverse impact analysis will apply to most English-only challenges); Cooperider & Wiss, supra note 69, at 147 (observing that most courts have treated English-only rules as facially neutral and thus they require disparate impact analysis).
98. Cf. 29 C.F.R. § 1606.7(a) (stating that employers' English-only rules presumptively violate Title VII). The EEOC appears to place the initial burden on the defendant to articulate the business necessity for such rules. See id. But see Spun Steak, 998 F.2d at 1486 (holding that the initial burden rests with the employee to prove that an English-only rule is discriminatory). The Ninth Circuit's pronouncement of the law and contradiction of the EEOC on this point have critical policy implications, because one-third of the non-English-speaking population lives and works within the Ninth Circuit. See Transcript of EEOC Meeting, Mar. 14, 1995 at 26.
99. See Tanya J. Stanish, Comment, English-Only Rules in the Workplace: Discrimination or Employer Prerogative? A Comment on Spun Steak v. Garcia, 7 DEPAUL BUS. L.J. 435, 439-42 (1995) (arguing that deference given to the EEOC's statutory interpretation should be limited because the EEOC's perspective contradicts the congressional intent underlying Title VII to preserve employer prerogative in employment decisions). But
Consistent with the disparate impact paradigm for Title VII cases, a plaintiff in an English-only case must first introduce evidence that the rule adversely affects his or her protected class.\textsuperscript{100} Courts have hesitated to accept such evidence, however, such as in \textit{Garcia v. Gloor}.\textsuperscript{101} In that case, a Mexican American salesman challenged a company rule that employees speak only English except when communicating with Spanish-speaking customers.\textsuperscript{102} Garcia claimed that his employer fired him when he responded in Spanish to another Mexican American employee's question, which was asked in Spanish.\textsuperscript{103} Garcia argued that his employer violated Title VII by denying him a privilege enjoyed by employees whose native language was English.\textsuperscript{104}

The Fifth Circuit held that Garcia's claim was beyond the scope of Title VII because Title VII protects against discrimination based only on immutable characteristics, not employee preferences.\textsuperscript{105} The court held that because the plaintiff was fluent in both Spanish and English, his

\textit{see} Michael F. Patterson, Note, Garcia v. Spun Steak Company: \textit{English-Only Rules in the Workplace}, 27 ARIZ. ST. L.J. 277, 286-90 (1995) (advocating deference to the EEOC's authority to guide the law with respect to English-only claims). Patterson asserts that the Guideline merits judicial deference because it meets the Supreme Court's test that agency guidelines be thoroughly considered, involve valid rationales, and be interpreted consistently with prior and future interpretations. \textit{See id.} at 287. Patterson also finds that the EEOC sufficiently collected comments and considered amendments, such that the Commission cannot be said to have whimsically contravened congressional intent. \textit{See id.}

\textit{100.} \textit{See} Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); \textit{see also supra} notes 40-45 and accompanying text (discussing the evidentiary requirements for disparate impact cases).

\textit{101.} 618 F.2d 264, 270 (5th Cir. 1980) (finding no disparate impact on the plaintiff because he chose not to observe the English-only rule).

\textit{102.} \textit{See id.} at 266.

\textit{103.} \textit{See id.} The circumstances surrounding Garcia's discharge are not clear. \textit{See id.} at 266-67. In fact, the district court adopted the employer's testimony that Garcia was fired for a combination of reasons, including poor work performance. \textit{See id.} In addition, the court found that Garcia had violated the English-only policy not once, but repeatedly. \textit{See id.}

\textit{104.} \textit{See id.} at 268. Garcia's argument linked the privilege of speaking the language of one's choice with national origin, because national origin determines language preference. \textit{See id.}

\textit{105.} \textit{See id.} at 269 (citing Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (observing that one justification for protecting a particular characteristic through Title VII is the characteristic's immutability)); \textit{see also} Perea III, \textit{supra} note 66, at 279-84 (advocating the view that primary language is "practically immutable" and thus deserves protection under Title VII). Perea argues that language is to people of foreign origin as pregnancy is to women, and thus national origin characteristics deserve the statutory protection afforded to women. \textit{See id.} at 279-80; \textit{see also infra} notes 207-16 and accompanying text (suggesting parallel disparate treatment analyses for English-only and pregnancy discrimination cases).

\textit{106.} \textit{See Gloor}, 618 F.2d at 269 (describing the plaintiff's use of one language or another as a preference).
ability to comply with the English-only policy by speaking English meant that his speaking Spanish was not "immutable." Therefore, the policy had no discriminatory impact on him. The court rejected the plaintiff's disparate impact claim, insisting that there could be no disparate impact if the affected employee could easily comply with the rule but simply opted not to do so.

The EEOC responded to the Gloor decision by promulgating a new section of the Guidelines on Discrimination Because of National Origin (the Guideline or the EEOC Guideline). The EEOC Guideline states that rules requiring employees to speak English at all times presumptively violate Title VII due to their adverse impact on those of foreign origin. The Guideline also asserts that rules requiring employees to speak English only at certain times are presumptively discriminatory, but that an employer may rebut the presumption by showing that business necessity requires the rule. The presumption established in the Guideline implements the EEOC's view that English-only rules, by their nature, adversely impact non-native English-speakers, contrary to the Fifth Circuit's perspective in Gloor.

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107. See id. at 270.
108. See id. at 269-70.
109. See id. at 270. But see infra Parts III.A & IV.A (discussing the shortcomings of the "ability to comply" test when used in connection with disparate impact analysis).
110. 29 C.F.R. § 1606.7(a) (1997) (extending 29 C.F.R. § 1606 to regulate English-only rules).
111. See id. The Guideline reasons that requiring employees to speak English at all times constitutes a burdensome employment condition prohibited by Title VII because language is closely related to national origin. See id. Thus, prohibiting employees from speaking the language comfortable to them disadvantages them based on their national origin. See id. The Guideline does not consider the extent to which an employee can comply with an English-only rule. See id.
112. See 29 C.F.R. § 1606.7(a)-(b); see also supra notes 42-43 and accompanying text (discussing employers' business necessity defense). The business necessities employers assert most frequently in defense of English-only rules are that the rules: (1) curb ethnic tensions among employees; (2) limit disruptions in the workplace; (3) support assimilation in a predominantly English-speaking country; (4) ensure adequate supervision by supervisors who speak only English; and (5) help maintain safety in foreseeably dangerous circumstances. See Perea III, supra note 66, at 300-01 (citing cases in which employers asserted these justifications and assessing the validity of each). This Comment suggests that courts focus too quickly on employers' justifications, improperly glossing over the actual discriminatory impact of English-only rules. See infra note 189 and accompanying text (emphasizing the cultural importance of language).
113. See EEOC COMPLIANCE MANUAL, supra note 21, at § 623.6(a) (basing the presumption of discrimination on the EEOC's recognition that primary language constitutes an essential national origin characteristic).
114. See Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (finding that the employer's English-only policy had no adverse impact on the Spanish-speaking employees who could
Judicial decisions issued after the publication of the Guideline have varied in their perspective on the impact of English-only rules on non-native English-speakers. In Gutierrez v. Municipal Court, the Ninth Circuit followed the EEOC Guideline, presuming that the Municipal Court's policy, requiring employees to speak English except when acting as official translators or during personal conversations on breaks, discriminated on the basis of national origin. Following the burden-shifting paradigm, the court examined the business justifications the employer offered, namely that (1) "the United States is an English-speaking country and California an English-speaking state;" (2) Spanish spoken among co-workers disrupts the workplace; (3) the English-only rule promotes racial harmony; and (4) the English-only rule ensures efficient supervision. Ultimately, the court held each of these justifications in-

115. Compare Gutierrez v. Municipal Ct., 838 F.2d 1031, 1044 (9th Cir. 1988) (finding that employer's justifications did not override discriminatory impact of English-only rule), vacated as moot, 490 U.S. 1016 (1989), with Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (rejecting the presumption that English-only rules poison the working environment with ethnic hostility).

116. 838 F.2d 1031 (9th Cir. 1988).

117. See id. at 1036, 1040-45. The court in Gutierrez adopted the EEOC Guideline, agreeing that English-only rules create a burdensome employment condition. See id. at 1040. The court thus presumed a discriminatory impact and carefully scrutinized the employer's justifications for the English-only rule. See id. at 1041-44.

118. See Gutierrez, 838 F.2d at 1042-43. One scholar has argued that these justifications are often insufficient. See Perea III, supra note 66, at 300-17. Perea observes that an employer's choice to support English as our national language likely has no direct relation to the nature of the employer's business, and therefore may not legitimately constitute a "business justification." See id. at 301-02. Perea also asserts that "disruption in the workplace" arises through employees' perceptions of private conversations they cannot understand. See id. at 305. He points out that the personal bias that inevitably gives rise to such disruptions is an inappropriate consideration when analyzing business necessity. See id. With respect to the notion that English-only rules promote harmony among ethnic groups, Perea asserts that stereotyped fears and tensions surrounding ethnicity are precisely what Title VII works to eliminate from the workplace. See id. at 302-04. Perea argues that, ironically, it is often the private biases of the majority that result in English-only rules, thus defeating employers' own "harmony" justification. See id. Finally, Perea examines employers' justification that English-only rules ensure effective supervision. See id. at 307-10. He notes that an English-only rule must significantly aid the employer in its supervision and must be job-related in order to qualify as a business necessity. See id. at 307.

Perea provides several examples of jobs that might or might not be appropriate contexts for English-only rules. See id. at 307-10. Where conversation is the core of the job, it is likely that the language spoken by an employee will be job-related. See id. at 309-10 (commenting on the facts in Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987)). On the other hand, if employees in a sales job speak to each other in a language other than English, this may annoy customers, thus prompting supervisors to require English only. See id. at 309. The private biases of customers, however, do not justify a non-job-related employment practice. See id.
sufficient and preserved the presumption that the English-only rule had a discriminatory impact.\textsuperscript{119}

However, the Ninth Circuit’s compliance with the EEOC Guideline did not last long. The decision in Gutierrez was vacated as moot when the plaintiff quit her job while her case was pending before the Supreme Court.\textsuperscript{120} This left judicial interpretation of the EEOC Guideline and English-only case law in an unclear position. The Ninth Circuit’s decision in Gutierrez held no precedential value, yet the reasoning voiced in the opinion could not be ignored.\textsuperscript{121}

Nevertheless, the Ninth Circuit effectively ignored Gutierrez the next time it considered the adverse impact of an English-only rule.\textsuperscript{122} In Garcia v. Spun Steak Co.,\textsuperscript{123} the plaintiffs described the adverse effects of their employer’s English-only rule in three ways: (1) the rule prohibited them from expressing their culture at work; (2) the rule denied them a privilege of employment; and (3) the rule “create[d] an atmosphere of inferiority, isolation, and intimidation.”\textsuperscript{124} The court reasoned that (1) Title VII does not protect workers’ expression of their culture in the workplace;\textsuperscript{125} (2) privileges in employment, such as the ability to con-

\begin{footnotesize}
\begin{enumerate}
\item See Gutierrez, 838 F.2d at 1044-45. First, the Ninth Circuit found that requiring employees, hired specifically to translate to or from foreign languages, to speak only English did not advance the cause of creating a single language system in the state or country. See id. at 1042. Second, the court rejected the employer’s contention that foreign languages spoken among employees would create a “Tower of Babel,” reasoning that speaking a language other than English did not create a disruption, especially given that employees were hired to speak Spanish with Hispanic clients. See id. Third, the court held that the employer had not provided sufficient evidence that an English-only rule worked to ameliorate any racial tensions in the context of this case. See id. Finally, the court found illogical the argument that employees should communicate among themselves in English in order to ensure efficient supervision, considering that employees spoke Spanish for job-related purposes unchallenged by their supervisors who spoke only English. See id. at 1043.
\item See Municipal Court v. Gutierrez, 490 U.S. 1016, 1016 (1989). The Supreme Court dismissed the appeal and vacated the Ninth Circuit’s judgment because it no longer had subject-matter jurisdiction over the Title VII claim. See id. (citing United States v. Munsingwear, Inc., 340 U.S. 36 (1950)).
\item See Garcia v. Spun Steak Co., 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (arguing that dismissal on grounds of mootness does not jeopardize the reasoning of a decision).
\item See Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 n.1 (9th Cir. 1993). The court dismissed Gutierrez in a footnote, remarking that “[t]he case has no precedential authority . . . because it was vacated as moot by the Supreme Court. We are in no way bound by its reasoning.” Id.
\item 998 F.2d 1480 (9th Cir. 1993).
\item Id. at 1486-87; see also supra notes 95-96 and accompanying text (explaining the court’s reasoning with regard to plaintiffs’ hostile work environment claim).
\item See id. at 1487. The court dispensed with this argument quickly, finding it “axio-
verse, are legitimately controlled by the employer, and therefore the employer had every right to include speaking English as an employment condition; and (3) the plaintiffs did not produce sufficient evidence to prove a significant impact that amounted to a hostile work environment.

The court, after addressing the plaintiffs' specific arguments, explicitly rejected the presumption of discriminatory impact in the EEOC Guideline. The court refused to defer to an administrative agency's statutory interpretation where there were compelling indications that the interpretation contravened congressional intent. The court explained that the Guideline found no support in the plain language of the Civil Rights Act of 1991, and that it contradicted the legislators' express intent to preserve employer prerogative in management decisions.

Herein lies what many scholars perceive to be the critical split in authority regarding the analysis of English-only rules. While the EEOC Guideline appears to place the initial burden on the employer to offer a legitimate justification for an English-only rule, the court in Spun Steak followed traditional disparate impact case law and the 1991 Civil Rights Act, assigning to the employee the initial burden of proving

matic that an employee must often sacrifice individual self-expression during working hours." Id.

126. See id. at 1487-88. The court then reasoned that as an employer, Spun Steak had the right to define an employee privilege narrowly. See id. at 1487. But see Jeffrey D. Kirtner, Note, English-Only Rules and the Role of Perspective in Title VII Claims, 73 TEX. L. REV. 871, 881-82 (1995) (explaining that the court in Spun Steak unfairly adopted the employer's perspective of the employment privilege in deciding that such a privilege did not exist for these plaintiffs).

127. See Spun Steak, 998 F.2d at 1489; see also supra notes 92-93 and accompanying text (explaining hostile work environment analysis).

128. See Spun Steak, 998 F.2d at 1489-90. The court explained that in some circumstances an English-only rule could contribute to a discriminatory working environment, but it refused to adopt the per se rule of the EEOC Guideline that English-only rules themselves amount to hostile work environments. See id. at 1489.

129. See id. at 1489.

130. See id. at 1489-90 (referring to statements in the legislative history indicating Congress' preference to interfere with the internal employment decisions of an employer only to the limited extent necessary to prevent discrimination).

131. Compare Helper, supra note 66, at 409 (advocating adherence to the EEOC Guideline), and Patterson, supra note 99, at 286-88 (arguing that the Ninth Circuit in Spun Steak failed to provide compelling reasons not to defer to the EEOC's perspective on an issue within its area of expertise), with Stanish, supra note 99, at 437 (arguing the importance of employer prerogative in discrimination actions), and Wiley, supra note 6, at 573-78 (advocating rejection of the EEOC Guideline).

132. See 29 C.F.R. § 1606.7(a) (1997) ("The Commission will presume that [an English-only] rule violates Title VII . . . ") (emphasis added).
that an employer's action has had a discriminatory impact. Since the *Spun Steak* decision, no appellate court has had occasion to revisit the issue of and set precedent regarding the disparate impact English-only rules cause in the workplace. Therefore, the EEOC interpretation remains at odds with judicial analysis.

**III. THE JUDICIARY’S IMPROPER FORMULATION OF THE ADVERSE EFFECT OF ENGLISH-ONLY RULES**

Courts often fail to define appropriately the effect of English-only rules on people of foreign origin. Title VII plaintiffs traditionally have argued disparate impact theory in connection with standard hiring or promotion criteria that adversely impact a particular class of candidates. For English-only plaintiffs to succeed using disparate impact analysis, courts first must understand better the nature of the adverse impact of English-only rules. Alternatively, plaintiffs have argued hostile work environment theory when an employment condition creates an atmosphere of intimidation. In order for English-only plaintiffs to succeed using hostile work environment theory, they must make a strong showing of egregious work conditions. Applying a third alternative, plaintiffs have argued disparate treatment theory where a policy or practice facially treats one classification of employees differently from an

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133. See *Spun Steak*, 998 F.2d at 1486 (applying Supreme Court precedent that requires courts to consider first a plaintiff's prima facie evidence of adverse impact); see also supra notes 40-45 and accompanying text (discussing the burden-shifting paradigm in disparate impact cases).

134. See *Kirtner*, supra note 126, at 898-99 (asserting that courts have incorrectly assumed that an employee's “choice” of language is indicative of whether an English-only rule affects him or her).

135. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (disregarding discriminatory intent and analyzing the disparate effect of diploma and test requirements on black applicants); see also supra notes 38-39 and accompanying text (describing requirements for disparate impact claims).

136. See *Kirtner*, supra note 126, at 904 (urging courts to discard their analyses of plaintiffs' “choices” and to accept, as the Ninth Circuit did in *Gutierrez*, that English-only rules negatively affect those of foreign origin).

137. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (establishing hostile work environment as a Title VII violation because the phrase “terms, conditions, or privileges of employment” in Title VII includes the creation of a work atmosphere steeped in discrimination); see also supra notes 57-64 and accompanying text (outlining hostile work environment theory).

138. See *Oshige*, supra note 64, at 566-67 (noting the courts' stringent evidentiary requirements for hostile work environment claims, and asserting that, in the context of sexual harassment, this standard implies that courts actually condone some lesser level of discrimination).
In order for English-only plaintiffs to use disparate treatment theory, they must convince the courts that English-only rules exclusively affect people of foreign origin. In English-only cases, plaintiffs have made significant efforts to explain the adverse impact of English-only rules on people of foreign origin. The courts, however, routinely find that plaintiffs who are bilingual to some degree can comply with the English-only rules and are thus unaffected.

The ability to comply with an employment practice is not the test traditionally applied to Title VII disparate impact cases. The fact that some
female applicants meet a certain height or weight standard, for example, does not negate the fact that requiring the specific height or weight violates Title VII when the requirement excludes a disproportionate number of female applicants. Instead, courts deciding Title VII cases traditionally have examined the actual adverse impact of the policy at issue on a protected class. Likewise, courts analyzing English-only cases must consider the actual adverse impact of English-only rules.

Courts have tended to view plaintiffs as either English speakers or non-English speakers, rather than as people of foreign ethnicities who speak English at various levels of fluency. In reality, however, the actual impact of English-only policies falls on English-speaking employees and non-English-speaking employees alike when both are of foreign ori-

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Kirtner refers to various Title VII cases to show that a plaintiff's choice does not bar his or her Title VII claim. See id. at 900-03. In a sex discrimination case, for example, the Supreme Court reasoned that a retirement plan that discriminated on the basis of sex was unlawful even though employees participated in the plan voluntarily. See Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1089 (1983) (per curiam) (Marshall, J., concurring in part). The Supreme Court again pointed out the absurdity of the choice rationale in a seminal sexual harassment case. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). There, the Court found that the district court had focused erroneously on the plaintiff's "voluntary" submission to the defendant's requests for sexual favors, holding that the correct inquiry was whether the plaintiff indicated that the defendant's advances were unwelcome. See id.

145. See Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (holding that height and weight requirements had a sufficiently adverse impact on female applicants to constitute a Title VII violation); see also Diaz v. AT&T, 752 F.2d 1356, 1361-62 (9th Cir. 1985) (holding that the fact that another Mexican American was promoted instead of the Mexican American plaintiff did not negate the plaintiff's evidence of national origin discrimination).

146. See Diaz, 752 F.2d at 1361-62 (finding that plaintiff put on sufficient evidence of discriminatory impact, even though the employer hired a member of plaintiff's protected class).

147. See Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (stating that whether or not an individual speaks English matters far less than the general impact of English-only prohibitions on language minorities).

148. See Spun Steak, 998 F.2d at 1483-84 (acknowledging that members of the plaintiff class spoke English at various levels but terming them "the Spanish-speaking employees" and assuming the representative plaintiffs to be "fully bilingual"); cf. Cutler, supra note 2, at 1166, 1174 (urging a "trait-based approach" to national origin discrimination, whereby courts would analyze the adverse impact of an employment practice on employees who have assimilated to varying degrees); Kirtner, supra note 126, at 882 (arguing that a "minority-centric" perspective would dismantle the courts' view that bilingual plaintiffs are unaffected by English-only rules).
gin. In *Garcia v. Gloor*, the bilingual plaintiff argued that his employer discriminated against him on the basis of national origin when it prohibited him from speaking Spanish on the job. He alleged disparate impact, claiming that employees most comfortable speaking English enjoyed a privilege that he, due to his national origin, was denied. The Fifth Circuit held that no adverse impact could exist when a bilingual employee exercised a preference as to which language he or she spoke at any given time. In other words, the court decided that the English-only rule had the same impact on Garcia, a bilingual employee, that it had on native English-speakers. The Ninth Circuit has agreed with this approach, holding that bilingual plaintiffs do not suffer an adverse effect from an English-only rule when they can comply easily.

Legal and other scholars assert, however, that this is a great misconception. One scholar analyzing English-only rules as national origin

149. See Perea III, supra note 66, at 292 (demonstrating that the effect of English-only rules impacts almost equally on people who have no English fluency and those who are fully "bilingual").
150. 618 F.2d 264 (5th Cir. 1980). For further discussion of the case, see supra notes 101-109 and accompanying text.
151. See *Gloor*, 618 F.2d at 268.
152. See id. Garcia argued that, by prohibiting employees from speaking the language most familiar to them, their employer denied non-native English-speakers a privilege granted to native English-speakers. See id. He maintained that because language preference is often determined by national origin, the English-only rules discriminate against non-native English-speakers. See id.
153. See id. at 271.
154. Cf. id. at 270 (noting that "there can be no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference").
155. See *Garcia v. Spin Steak Co.*, 998 F.2d 1480, 1487-88 (9th Cir. 1993). The court in *Spin Steak* focused on the fact that plaintiffs in a disparate impact case must prove a significant adverse impact, and reasoned that a bilingual employee's duty, under an English-only rule, to stop himself or herself from occasionally speaking a language other than English did not constitute a significant burden. See id. at 1488. The Ninth Circuit similarly adopted an employer's "ability to comply" defense in *Jurado v. Eleven-Fifty Corp.* See *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987) (citing *Gloor*, 618 F.2d at 270). Ironically, Jurado, like many plaintiffs bringing English-only challenges, was valued by his employer for his bilingual ability, but was fired as the result of it. Cf. id. at 1408 (describing the employer's flip-flop between encouraging and discouraging Jurado's speaking Spanish on the air). The court rejected the plaintiff's assertion that an English-only rule was a discriminatory discharge criterion when applied to a bilingual employee. See id. at 1411.
156. See Perea III, supra note 66, at 292 (stating that requiring people who possess limited English proficiency to speak English at all times could be similar to "forcing a right-handed person to write left-handed"); cf. WILMA S. LONGSTREET, ASPECTS OF ETHNICITY: UNDERSTANDING DIFFERENCES IN PLURALISTIC CLASSROOM[S] 19-20
discrimination defines “bilingualism” as the ability “to speak two languages with nearly equal facility.” He explains that a person’s primary language is practically immutable, and therefore asserts that many people are not actually bilingual, although others might think they are because they can communicate, even in a very limited sense, in English. He describes bilingualism as more of “a spectrum of abilities in a second language ranging from minimal ability to communicate in a second language to equal facility in two languages.” Thus, an employer cannot necessarily contend that English-only rules have no actual adverse effect on bilingual employees because the employer cannot truly know the extent to which a given employee is bilingual.

As stated in Judge Reinhardt’s dissent from the Ninth Circuit’s decision not to rehear Spun Steak en banc, the “ability to comply” test also demonstrates courts’ insensitivity to the facts and history of discrimination. An employee’s ability to comply with a rule is no measure of whether the rule adversely affects him or her. Even when one has been “assimilated” into American society, his or her native language is always essential to his or her ethnic identity, and thus bilingualism is irrelevant to the question of impact. By employing the “ability to comply” test

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157. Perea III, supra note 66, at 292 (citing RANDOM HOUSE COLLEGE DICTIONARY 133 (1972)).
158. See id. at 279-87 (arguing that, among other reasons, difficulty in acquiring a language other than a person’s native tongue demonstrates the immutable nature of language).
159. See id. at 292 (describing the misconception that any ability to speak a second language makes a person bilingual).
160. Id. See generally William F. Mackey, The Description of Bilingualism, in READINGS IN THE SOCIOLOGY OF LANGUAGE 554 (Joshua A. Fishman ed., 1968) (explaining that the concept of bilingualism has grown broader as scholars realize that bilingual abilities function on a spectrum).
161. Cf. Perea III, supra note 66, at 292 (describing the actual detriment of English-only rules to all non-native English speakers, regardless of their proficiency in English).
162. See Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (providing examples of egregious and discriminatory historical practices with which the victims could easily comply).
163. See id. Earlier, in Gutierrez, Judge Reinhardt emphasized the importance of cultural pluralism, recognizing that language is an essential element of national origin. See Gutierrez v. Municipal Ct., 838 F.2d 1031, 1038-39 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989). He reasoned that bilingualism does not dissolve the strong tie between one’s primary language and the culture derived from national origin. See id. at 1039. Judge Reinhardt even posited that rules negatively affecting employees who speak with accents or speak foreign languages may be mere pretexts for intentionally discriminating against those people. See id.
164. See Perea III, supra note 66, at 292 (discussing the relationship between an indi-
for adverse impact, the courts have failed to recognize the actual adverse impact of English-only rules on people of foreign origin. 165

B. Hostile Work Environment Theory: Plaintiffs' Heavy Evidentiary Burden

Although the EEOC Guideline states that English-only rules may create a hostile work environment, 166 it is not surprising that the Ninth Circuit rejected the idea that English-only rules create an atmosphere of ridicule and intimidation tantamount to a per se hostile work environment. 167 The Supreme Court has held that a plaintiff may allege harassment on a hostile work environment theory so long as the discriminatory individual's fluency and the impact of English-only rules). In a similar and expanding body of law, plaintiffs and scholars make identical arguments in national origin discrimination cases based on foreign accent. See, e.g., Fragrante v. Honolulu, 888 F.2d 591, 594, 596 (9th Cir. 1989) (conceding the close connection between accent and national origin but finding no discrimination against the plaintiff because his accent would hinder his ability to perform a relevant task); Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam) (noting plaintiff's pronounced accent despite her excellent command of the English language and finding discrimination based upon her accent); Bell v. Home Life Ins. Co., 596 F. Supp. 1549, 1554-55 (M.D.N.C. 1984) (discussing case law and EEOC guidance on disparaging remarks about a plaintiff's accent as constituting actionable national origin discrimination); Rosina Lippi-Green, Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts, 23 LANGUAGE IN SOCIETY 163, 165 (1994) (equating language with social identity and arguing that rejection of one's accent indicates rejection of that person's ethnic heritage and cultural identity); Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1329 (1991) (asserting that accent is an identifier of self).

165. See Jeanne M. Jorgensen, Comment, "English-Only" in the Workplace and Title VII Disparate Impact: The Ninth Circuit's Misplaced Application of "Ability to Comply" Should Be Rejected in Favor of the EEOC's Business Necessity Test, 25 Sw. U. L. REV. 407, 420 (1996) (observing that courts finding no adverse impact probably based their decisions on factors other than plaintiffs' prima facie evidence of adverse impact); see also Perea III, supra note 66, at 292 (emphasizing the equally adverse effect of English-only rules on bilingual employees).

166. See 29 C.F.R. § 1606.7(a) (1997) (stating that English-only rules "may ... create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment").

167. See Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993). The plaintiffs in Spun Steak argued in accord with the EEOC Guideline that the English-only rule created "an atmosphere of inferiority, isolation, and intimidation," which impacted a condition of employment so significantly as to violate Title VII. Id. at 1486-87, 1489. The court, however, refused to create a per se rule that English-only policies affect employment conditions to the point of creating a hostile work environment. See id. at 1489 (rejecting the EEOC Guideline). The Spun Steak court observed the complex and individualized dynamics of various types of employment and found that the plaintiffs had presented insufficient evidence to establish that the workplace environment met the standard for "hostility" created by the Supreme Court. See id.; see also supra notes 57-64 and accompanying text (setting forth the definition of a hostile work environment).
effect of an employment practice is sufficiently severe.\textsuperscript{168} Although the EEOC has explored the idea that English-only rules create a hostile work environment,\textsuperscript{169} the legal standard of proof for such a claim, requiring severity and pervasiveness of offensive conduct, is very difficult to meet.\textsuperscript{170}

Plaintiffs have argued that English-only rules create an atmosphere of intimidation;\textsuperscript{171} however, the rules themselves probably will constitute insufficient evidence for courts to find discriminatory intent.\textsuperscript{172} The \textit{Spun

\begin{footnotesize}
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\item[168.] See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); see also 29 C.F.R. § 1604.11(a)(3) (1997) (stating that sexual harassment violates Title VII when it has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").
\item[169.] In light of the Ninth Circuit precedent, as announced in \textit{Spun Steak}, an EEOC attorney outlined the law and factors to investigate in English-only cases. See William R. Tamayo, National Origin Discrimination in Violation of Title VII of the Civil Rights Act of 1964: "English Only," Accent Discrimination and Language Fluency 6-7 (June 1997) (unpublished manuscript, on file with author). In the section discussing investigations, the attorney specifically listed questions relating to a perceived hostile work environment. See id. at 7. For example, investigators should inquire whether enforcement of the English-only rule amounts to harassment, as well as whether the discipline given is proportional to the violation. See id. at 7-8. One question asks whether the English-only rule "exacerbates existing tensions to contribute to an overall environment of discrimination," and another considers whether the rule, in combination with other discriminatory behavior, has led to an overall environment of discrimination. Id. at 7.
\item[170.] Cf. Meritor, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'"). In \textit{Meritor}, the plaintiff alleged sex discrimination (sexual harassment) under Title VII when her supervisor made suggestive comments and repeatedly requested sexual favors. See id. at 60. The Court found the plaintiff's claim meritorious, and thus set forth the test for future hostile work environment cases, in the context of sexual harassment or otherwise. See id.; see also supra notes 62-63 and accompanying text (discussing the test for hostile work environment claims).
\item[171.] See \textit{Spun Steak}, 998 F.2d at 1486-87 (noting the plaintiff's argument that the English-only policy encouraged co-workers' intimidating and isolating behavior and created a tense environment amounting to a burdensome employment condition); see also 29 C.F.R. § 1606.7(a) (1997) (stating that English-only rules themselves create an atmosphere of inferiority, isolation, and intimidation).
\item[172.] See \textit{Spun Steak}, 998 F.2d at 1489 (refusing to create a per se rule that English-only rules create hostile work environments).
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Steak court focused on this heavy burden of proof, explaining that the inquiry regarding conditions that constitute a hostile work environment is highly factual. Comparing English-only rules to employment conditions in, for example, a hostile work environment sexual harassment case indicates that the Ninth Circuit correctly refused to find that English-only rules, without further evidence of discrimination, amount to such a burdensome employment condition.

C. Disparate Treatment Analysis: The Adverse Effect of English-Only Rules Solely on People of Foreign Origin

In a disparate treatment case, a plaintiff alleges that an employer has treated him or her differently from other employees due to the plaintiff's membership in a protected class. Unlike disparate impact cases, disparate treatment cases involve employment practices that are not facially neutral.

173. See id. (stating that the complexities of individual workplaces make courts' per se regulation of them impractical).
174. See Meritor, 477 U.S. at 60, 67 (finding plaintiff's allegations that her employer repeatedly demanded sex during and after business hours, fondled her in front of other employees, and even raped her sufficiently severe to constitute actionable sexual harassment).
175. See Spun Steak, 998 F.2d at 1489 (holding that English-only rules do not per se create a hostile work environment).
176. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see also supra notes 46-56 and accompanying text (discussing disparate treatment analysis).
177. See Teamsters, 431 U.S. at 335 n.15. Eliminating disparate treatment of minorities was Congress' particular goal in enacting the Civil Rights Act of 1964. See id. Few workplace rules, however, are facially discriminatory today. See Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971) ("As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees."). Although employment discrimination has grown more subtle, disparate treatment theory remains valid, and a plaintiff need only raise an inference of discrimination to establish a prima facie case. See id.; see also Teamsters, 431 U.S. at 335 n.15.

In Rogers, the plaintiff argued that her employer, a group of optometrists, discriminated against her by segregating its patients based on national origin. See Rogers, 454 F.2d at 236. Defendants claimed that the plaintiff, as an employee, was not treated differently than other employees and therefore she had no right to allege discrimination. See id. at 238. The Fifth Circuit recognized, however, that the absence of intent does not excuse unlawful discrimination against anyone, and "that petitioners' argument does not countenance the distinct possibility that an employer's discrimination [with respect to its patients] may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees." Id. at 239.

Courts apply disparate treatment analysis primarily in examining employment decisions based on subjective criteria such as interviews, rather than those based on objective criteria like standardized tests, which are more amenable to disparate impact analysis. See
As early as 1926, plaintiffs brought national origin discrimination claims challenging employers' impermissible distinctions. Since the passage of the Civil Rights Act of 1964, courts have applied disparate treatment analysis and have found that an employer's presumption that an employee could not perform on the job because of his national origin was sufficient to establish the employer's intent to discriminate. If courts applied disparate treatment to English-only cases in the same way that they have applied it to other types of Title VII cases, they might find that English-only rules discriminate against non-native English-speakers on the basis of national origin.

Disparate treatment theory may be even more applicable to English-only claims than disparate impact theory because English-only rules exclusively affect non-native English-speakers. Under disparate impact theory, plaintiffs must show that a facially neutral policy disadvantages a particular protected group. For example, while a general intelligence test might function to exclude some white applicants, it might also exclude black applicants in disproportionate numbers if blacks have traditionally received schooling inferior to whites. Similarly, while height or

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178. See Yu Cong Eng v. Trinidad, 271 U.S. 500, 508-09, 514 (1926) (striking down an Internal Revenue provision prescribing that businesses keep books in English, Spanish, or local dialect, because provision intentionally targeted Chinese merchants unable to speak or understand such languages). Although Title VII was not enacted until 1964, courts adjudicated disparate treatment national origin discrimination claims much earlier. See id.

179. See Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1265-66 (7th Cir. 1993) (implying that discriminatory remarks, combined with evidence that the employer relied on an impermissible classification in an employment decision, may amount to disparate treatment); Carino v. University of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (finding that a university intentionally discriminated against a laboratory supervisor based on national origin when it demoted him because of his foreign accent); Berke v. Ohio Dep't. of Public Welfare, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam) (finding reasonable the inference that, because plaintiff was of foreign national origin, references to her accent, combined with good job performance, indicated that employer intentionally discriminated against her based on her national origin when it denied her two positions).

180. See Perea III, supra note 66, at 294. Perea argues that courts should treat characteristics closely related to protected classes just as they do the protected classes themselves. See id. He urges that as Congress views pregnancy discrimination as sex discrimination, the courts should view language discrimination as national origin discrimination. See id.

181. See id. at 292-94 (advocating use of disparate treatment theory in connection with English-only rules due to the close correlation between primary language and national origin).

182. See Teamsters, 431 U.S. at 336 n.15 (1977); see also supra notes 38-45 and accompanying text (explaining disparate impact analysis).

183. See Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but dis-
weight requirements might function to exclude some men, they might also exclude women in disproportionate numbers. English-only rules, however, are simply not facially neutral.

It would be disingenuous to argue that English-only rules do affect some native English-speakers but not as drastically as they affect non-native English-speakers. English-only rules are aimed specifically at non-native English-speakers and are examples of disparate treatment. The fact that English-only rules apply directly to non-native English-speakers indicates intentional discrimination, regardless of the fact that some non-native English-speakers also speak English.

IV. LANGUAGE, CULTURE, AND ETHNICITY: THE INEXTRICABLE LINK TO NATIONAL ORIGIN

Plaintiffs alleging that English-only rules discriminate on the basis of national origin usually lose in court because courts have not recognized the inextricable connection among national origin, language, culture, and

184. See Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (holding that exclusion of women in disproportionate numbers constitutes actionable discrimination on the basis of sex). In Dothard, the Supreme Court acknowledged the discriminatory impact on women when a prison's height requirement for correctional officers would exclude 33.29% of the women who applied but only 1.28% of the men, and the weight requirement would exclude 22.29% of the women who applied but only 2.35% of the men. See id.

185. See Perea III, supra note 66, at 289-90 (pointing out that courts have not even challenged the incorrect assumption that English-only policies are facially neutral).

186. See id. at 292 (explaining the adverse effect of English-only rules on all non-native English speakers).

187. See id. at 290 (“An English-only rule will never have any adverse impact on persons whose primary language is English.”). The wording of the English-only rule at issue in Spun Steak provides an excellent example. It specifically targeted Spanish-speakers by announcing, in part: “During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.” Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir. 1993). This rule was more of a “no-Spanish” rule than an “English-only” rule. See id.; see also Califa, supra note 3, at 294 (asserting that the English-only movement targets Hispanics in particular).

Although addressing accent discrimination and not English-only rules, one scholar explains that discrimination based on language is intentional. See Lippi-Green, supra note 164, at 165-66. She observes that people view accent as how “the other” speaks. Id. at 165 (providing examples of regional accents and the judgmental adjectives often used to describe them). The author claims that to be fair, when judging employer-employee communication, courts should place more emphasis on the listener. See id. at 166, 184. The reason for this, she asserts, is that prejudiced listeners inevitably will not understand speakers with foreign accents because they do not wish to. See id. at 166.

188. See Califa, supra note 3, at 294 (stating that although English-only rules appear benign, they may be designed to target certain national origin groups).
Plaintiffs could meet their initial burden more easily under both disparate impact and disparate treatment analyses if courts were to broaden their understanding of national origin to encompass ethnicity and language.189

Comprehension by the courts of the effect of language restrictions on non-native English-speakers would facilitate plaintiffs' disparate impact arguments.191 Appreciation of other cultures would guide the courts to examine a particular rule's actual discriminatory effects and an employer's justifications, rather than a plaintiff's ability to comply with the rules.192 As for plaintiffs asserting disparate treatment, if courts better understood the effect of English-only rules on non-native English-speakers, they would recognize that English-only rules exclusively affect

189. See Perea II, supra note 15, at 807-08 (opining that courts have been unsympathetic to discrimination claims of plaintiffs "whose ethnicity differs from that of the majority"). Perea cites with approval the EEOC's view that national origin inevitably determines ethnic traits. See id. at 830-31. Perea also discusses what he terms the "correlation problem." See id. at 851. Just as ethnicity correlates closely enough to race to be protected under Title VII, Perea asserts that language and national origin are also inextricably correlated because one's national origin almost always determines his primary language. See id.

Perea points out that even if courts accept the correlation theory, however, several issues remain in English-only cases. See id. at 851-52. First, courts would still have discretion with respect to which ethnic traits correlate acceptably with a protected class; thus, courts could claim, as the Fifth Circuit did in Gloor, that language is independent of national origin. See id. at 852; see also Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980). Second, the correlation theory is subjective in that courts cannot easily define how closely an ethnic trait must correlate with a protected class in order for it to function as a proxy. See Perea II, supra note 15, at 852. Perea suggests basing protection on the ethnic traits themselves, and not on national origin, because ethnic traits are more obvious to the observer and thus more likely to be the actual basis for discrimination. See id. at 852-53. If courts were to consider the ethnic trait as the classification, the correlation problem would disappear. See id.; see also Cutler, supra note 2, at 1173-74 (arguing for a trait-based approach to national origin discrimination claims).

For a linguistic discussion on the cultural links among language, ethnicity, and national origin, see generally NANCY FAIRES CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES (1983) (focusing on American language communities and examining the implications of linguistic pluralism); Dell H. Hymes, The Ethnography of Speaking, in READINGS IN THE SOCIOLOGY OF LANGUAGE 99 (Joshua A. Fishman ed., 1968) (discussing language and linguistics as an anthropological tool); Matsuda, supra note 164 (focusing on foreign accent as an expression of culture).

190. See Perea II, supra note 15, at 826-27, 830 (finding courts' protection of national origin minorities based on their ethnicity and language to be inadequate).

191. See Perea III, supra note 66, at 290-92 (discussing the impact of these rules on non-native English speakers).

192. See Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (discussing the illogical nature of the Ninth Circuit's "ability to comply" test).
a protected group. Courts applying disparate treatment analysis would therefore find that English-only rules, by their nature, treat groups disparately; thus, the rules themselves should create an inference of discrimination, as explained in the EEOC Guideline.

A. Disparate Impact Analysis: Recognizing the Link Between Language and National Origin and Testing for Actual Adverse Impact

Title VII provides no interpretive language when it declares that employers may not discriminate on the basis of “national origin.” The EEOC, however, equates national origin discrimination with discrimination based on “physical, cultural or linguistic characteristics of a national origin group.” In analyzing English-only rules as national origin discrimination, courts should apply the EEOC’s broader definition.

Many legal, linguistic, and other scholars have emphasized the cultural importance of language. For example, one scholar equates national origin with the expression of ethnicity, stating that a fundamental aspect of ethnicity is primary language. He explains that sociologists and linguists agree on the interdependence of language and ethnic identity. In

193. Language in Fifth and Ninth Circuit decisions proves that courts often do not equate language with national origin. See Gloor, 618 F.2d at 268 (stating that “[n]either [Title VII] nor common understanding equates national origin with the language that one chooses to speak”); cf. Garcia v. Spun Steak Co., 998 F.2d 1480, 1488 (9th Cir. 1993) (refusing to protect bilinguals who can “easily comply” with English-only rules).

194. See 29 C.F.R. § 1606.7(a) (1997) (stating that the EEOC will presume that English-only rules violate Title VII).

195. See 42 U.S.C. § 2000e-2a (1994) (outlawing national origin discrimination without further explanation); see also supra notes 18-19 and accompanying text (discussing the paucity of Title VII’s legislative history regarding national origin).

196. 29 C.F.R. § 1606.1 (1997); see also supra notes 21-23 and accompanying text (describing EEOC guidelines on national origin discrimination).

197. See Perea II, supra note 15, at 830-31 (arguing for the EEOC's broad interpretation of national origin). Indeed, Perea observes that given the Supreme Court's strict construction of civil rights statutes, the solution to expanding the courts' view of national origin is to amend Title VII to include a provision outlawing discrimination based on ethnic traits. See id. at 831.

198. See supra note 189 and accompanying text (citing both legal and linguistic scholars discussing the connection between language and ethnic identity).

199. See Perea III, supra note 66, at 276 (arguing for this correlation, but acknowledging that social attitudes deny such a close correlation between language and ethnicity).

200. See id. at 276-78 (noting this concept and emphasizing that in American history, language differences have provided a means for discriminating against cultural minorities). Perea observes that Hispanic culture, for example, is apparent in the language of Spanish speakers. See id. at 277-78; see also Joshua A. Fishman, The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society, in 1 ADVANCES IN THE SOCIOLOGY OF LANGUAGE 217, 251 (Joshua A. Fishman ed., 1971) (stating that Spanish language, to those bilingual in Spanish and a second language, is associated specifically
addition, legal scholars have observed that language provides a means for practicing national origin discrimination.

The fact that the plaintiffs in the cases decided by the Ninth Circuit have been bilingual should not have affected the court's disparate impact analysis. Bilingualism does not change the importance of ethnic identity, and bilingual employees suffer equally the psychological and sociological effects of being prohibited from speaking their native language. Disparate impact analysis is certainly appropriate with respect to English-only rules, as long as courts examine the actual impact of the rules on those of foreign origin.


Disparate treatment may be an equally appropriate analysis for English-only cases. English-only rules treat non-native English-speakers negatively by their terms, and courts historically have analyzed such policies under disparate treatment theory. The adverse effect on employ-
ees whose primary language is not English unquestionably implicates those employees' right to be free from discrimination based on their national origin.\footnote{207}

Using disparate treatment theory to address employer actions exclusively affecting one group would not be unprecedented.\footnote{208} For example, in order to permit continued application of Title VII in light of changing social conditions, the courts, as well as the EEOC, have accepted plaintiffs' arguments that discrimination based on pregnancy constitutes discrimination on the basis of sex.\footnote{209} Overruling the Supreme Court's decision in \textit{General Electric v. Gilbert},\footnote{210} Congress amended Title VII in 1978 to include pregnancy as a prohibited basis for discrimination.\footnote{211} Congress recognized the inextricable relationship between pregnancy and gender, and thus expanded Title VII's protection to include protection of pregnancy, a trait uniquely held by women.\footnote{212}

Similarly, the inextricable connection between national origin and language demands that courts expand Title VII's protection to include non-native English-speakers.\footnote{213} Changing times and increasing immigration demand that the courts and Congress hear the voices of non-native English-speakers and provide for their protection in the workplace.\footnote{214} By

\footnote{207} See Yu Cong Eng v. Trinidad, 271 U.S. 500, 514-515, 528 (1926) (finding that a law mandating the language in which merchants had to keep their books had an adverse effect solely on Chinese merchants, denying them equal protection of the laws).

\footnote{208} Cf. Helper, \textit{supra} note 66, at 413-14 (pointing out that the Supreme Court recognizes disparate treatment claims for Title VII protection of victims of sexual harassment as victims of sex discrimination).

\footnote{209} See id. at 413, 419-21.

\footnote{210} 429 U.S. 125, 145-46 (1976) (holding that an employment benefit plan that discriminated on the basis of pregnancy did not discriminate on the basis of sex so as to violate Title VII).

\footnote{211} See 42 U.S.C. § 2000e(k) (1994). Title VII now provides, in pertinent part, that: [t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . .

\textit{Id.}

\footnote{212} See Gilbert, 429 U.S. at 161-62 (Stevens, J., dissenting) (observing that the benefit plan at issue discriminated against women by definition, in light of the fact that the capacity to become pregnant distinguishes women from men).

\footnote{213} See Perea III, \textit{supra} note 66, at 279 (advocating Title VII coverage of language discrimination due to the close tie between primary language and ethnicity).

\footnote{214} See Perea II, \textit{supra} note 15, at 809 (advocating a re-examination of Title VII's adequacy in light of present demographic and ethnographic developments). Perea asserts that Title VII jurisprudence dramatically misrepresents American demographics: By the year 2000, non-whites, women and immigrants together will make up more than five-sixths (eighty-three percent) of net additions to the workforce, compared to fifty percent in 1987. Non-whites will make up almost twenty-nine
changing the definition of national origin to incorporate language, the courts would parallel for English-only plaintiffs the protection Congress granted to pregnant women when it included pregnancy in the scope of Title VII protection based on sex. Plaintiffs could argue successfully that English-only rules discriminate based on disparate treatment theory if they asserted that language is so closely linked to national origin that English-only rules exclusively affect non-native English-speakers.

V. CONCLUSION

With rising levels of immigration in the United States, it is not surprising that employers are instituting English-only rules in the workplace. It is also not surprising that the employees affected by such rules have sensed discriminatory animus underlying the rules and have brought their complaints before the courts. The few judicial decisions, along with misinterpreted guidance from the EEOC, evince a need for courts to understand better the nature of the discrimination at issue. Courts must view English-only rules as they affect people whose primary language is not English. If courts grasp the logical links among language, culture, ethnicity, and national origin, they will appreciate the nature of the impact that factors into disparate impact analysis. Alternatively, courts accepting the intertwined nature of language, culture, ethnicity, and national origin would comprehend that English-only rules exclusively affect non-native English-speakers. Thus, the courts could readily apply disparate treatment analysis. Regardless of the analysis used in English-only cases, courts will succeed in protecting plaintiffs' civil rights based on national origin only if they comprehend the importance of language.

percent of new entrants into the labor force, twice their current share, between now and 2000. White males will comprise only fifteen percent of new additions during the same time period. Latinos will be America's largest minority group, constituting approximately ten percent of the nation's labor force.

Id. (citations omitted). Just as the law recognizes women as a significant presence in the workforce and thus protects them on the basis of pregnancy, a characteristic linked only to women, so should the law protect language under the rubric of national origin, as people of foreign national origin grow to hold a prominent place in the workforce. See Perea III, supra note 66, at 293-94 (drawing the parallel between pregnancy and language in this context).

215. See Perea III, supra note 66, at 293-94 (arguing that pregnancy is a protected characteristic associated exclusively with women that parallels language as a characteristic associated almost exclusively with foreign national origin).

216. See id. at 294 (stating that "Title VII requires treating characteristics that are closely correlated with a protected characteristic the same as the explicitly protected characteristic when such characteristics are used as the basis for discrimination that results in an exclusive adverse effect upon a protected group.").