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Overreaching English-Only Policies Spell Trouble For Employers

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On May 12, 2011, eight Hispanic employees of the City of Rochester filed an action against the City, among other defendants, for implementing a sweeping English-only policy that prohibited Spanish to be spoken at all times, including breaks and whether it was within or outside the presence of non-Spanish speaking employees.¹ According to the complaint, the employees' manager told them that "if you want to speak Spanish, do it at home and not at the workplace."²

Rochester is a thriving economic metropolitan city home to heavy-hitting corporations such as Xerox, Kodak, GM, and Bausch & Lomb. According to the 2010 census, it is the third largest city in New York, with a population of approximately 211,000 people, 16.4% of which identify themselves as Hispanic.³ Therefore, hearing a co-worker speak Spanish in the workplace should be not only commonplace but expected. Employers should realize that these overreaching policies are illegal, bad for employee

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Associational Disability – Overlooked and Underutilized?

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The Americans with Disabilities Act has received renewed attention lately and rightfully so. Enacted on September 25, 2008, the ADA Amendments Act of 2008 ("ADAAA") made significant changes to the definition of "disability" in an effort to reinstate the Act's broad scope of protection, and in doing so, rejected the Supreme Court's narrow interpretations of the term. The final EEOC implementing regulations were approved by a bipartisan vote and published on March 25, 2011; they went into effect on May 24, 2011. The ADAAA and its implementing regulations shift the focus of ADA claims back to its original statutory intent: whether disability discrimination actually took place, rather than whether an individual's disability fits within the narrow confines of the Court's definition.

As attorneys begin to understand and appreciate the impact of the ADAAA for their disabled clients, they should also keep in mind its impact on nondisabled clients who have relationships or associations with disabled individuals. The often overlooked¹ "associational disability" provision of the ADA gives nondisabled employees a cause of action where an employer "exclud[es] or otherwise den[ies] equal jobs or benefits to a qualified individual because of the

1 Michelle Travis, *Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities*, 76 Tenn. L. Rev. 311, 369 (Winter 2009) (describing the prohibition against associational discrimination as "little known" and collecting cases).

known disability of an individual with whom the qualified individual is known to have a relationship or association."² The newly expansive interpretation of "disability" applies with equal force to such claims.

The associational disability provision is broad. It covers a wide range of associations beyond immediate family and spousal relationships, described in the regulations as "family, business, social or other relationship[s]."³ It does not require that the nondisabled employee be related to the disabled individual by blood, marriage, adoption, or guardianship to be protected.⁴ Significantly, individuals in lesbian and gay partnerships are protected,⁵ as are individuals in less formal social relationships, including both romantic relationships and friendships.⁶

Although "[t]he paradigmatic case is that of the parent of a disabled child, whose employer may fear that the child's disability may compromise the employee's ability to perform his or her job," this provision may also provide essential

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2 42 U.S.C. § 12112(b)(4).

3 29 C.F.R. § 1630.8 (2008).

4 Travis, *supra* n. 1, at 368 n.344 (citing H.R. Rep. No. 101-484(III), at 38-39 (1990), reprinted in 1990 U.S.C.C.A.N., 445, 461-62 (rejecting an amendment that would have restricted the ADA's association provision only to nondisabled employees related to a disabled individual by blood, marriage, adoption, or guardianship)).

5 *Id.* at 370, n.352.

6 *Id.* at 370, n.353.

morale, contradictory to diversity initiatives, and bad business overall.

English-only policies have long been criticized and targeted by the Equal Employment Opportunity Commission. In addition to Title VII of the Civil Rights Act of 1964, English-only policies may also violate other statutes such as Sections 1983 and 1981 of 42 U.S.C., as well as state and city laws.⁴ Although Title VII does not provide that language is a protected category, the EEOC makes the obvious connection of language and national origin, finding that language is an "essential national origin characteristic," and therefore, English-only policies should be closely scrutinized for compliance with Title VII's prohibitions against national origin discrimination.⁵ The Supreme Court has also noted that language "elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn," which "all too often result from or initiate racial hostility."⁶

Although the EEOC's guidelines provides that a blanket English-only policy *per se* satisfies the plaintiff's burden to show a *prima facie* case of discrimination, courts in the Second Circuit have not adopted this standard.⁷ Rather, courts in this circuit have held that an English-only policy may be a basis for a hostile work environment claim based on national origin discrimination if the employee shows (1) that the employer's policy had a significant and adverse impact on the employee; and (2) the employer's justified business reason for the policy is pretextual.⁸

A conclusory allegation that an English-only policy has created a hostile work environment is insufficient to establish a hostile work environment claim.⁹ However, courts will consider an English-only policy that unreasonably restricts an employee's ability to speak his native language as evidence of harassment.¹⁰ Thus, a court will be less likely to grant an employer's motion for summary judgment where a restrictive English-only policy is accompanied by other indicia of discrimination, such as verbal harassment, excessive scrutiny, or a failure to explain the language poli-

cy to employees.¹¹

English-Only Policy Must Result in an Adverse Employment Action

In order to prevail on a discrimination claim, an employee still must show that an employer's English-only policy resulted in an adverse employment action. As with any other discrimination action brought under Title VII, an "adverse employment action" in an English-only policy claim is a "materially adverse change in the terms and conditions of employment . . . more disruptive than a mere inconvenience or an alteration of job responsibilities."¹² Where the employee is seeking to prove a hostile work environment claim, the employee must

show that the workplace is "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."¹³

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Disciplinary write-ups may constitute adverse employment actions "if they affect ultimate employment decisions such as promotions, wages or termination."¹⁴ Although threats of disciplinary action and excessive monitoring will not in and of themselves constitute adverse employment actions, they could also support an employee's hostile work environment claim if they are "part of a broader campaign of harassment and retaliation."¹⁵

English-Only Policies Must Be Supported by a Legitimate Business Justification

An employer must show that the Eng-

lish-only policy is consistent with business necessity and that it is job-related in order to shift the burden back to the employee. An employer "cannot satisfy this burden simply by demonstrating the English-only rule is convenient or beneficial to its business. Instead, [the employer] must show that the asserted business necessity is vital to the business."¹⁶ Limited English-only policies have been upheld where their purpose was to "facilitate[e] customer relations" or "to promote communication among employees and supervisors."¹⁷ The EEOC's Compliance Manual further provides that an English-only policy may be justified by a business necessity

Selective Enforcement of an English-only Policy

If the employer provides a legitimate business reason for the policy, an employee may still prevail if the employee can show that a discriminatory reason motivated the employer or the employer's reason is not credible. Courts will be quick to find an English-only policy to be a pretext for discrimination if an

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employer does not enforce the policy with an even hand. For example, a New York district court denied an employer's summary judgment motion where an employee alleged that his employer subjected him to a hostile work environment because his supervisor forbade him to speak Russian during personal phone calls while allowing other employees to speak Spanish during working hours.²⁰ The court found that if such a policy existed that "specifically targeted plaintiff and his native language with respect to personal conversations, such evidence could be used to support the existence of a hostile work environment based upon his national origin."²¹

English-Only Policies Should not Apply To Off-Duty Conduct

Courts have upheld English-only policies that required employees to speak only English during business hours and while they were in the presence of customers.²² However, where a bilingual employee is prohibited from speaking a foreign language at all times, including during personal phone calls and during lunch, a court is more likely to find that such a policy results in national origin discrimination.²³ Summary judgment for the employer may be avoided by evidence such as affidavits from co-workers supporting the plaintiff's claim that such a policy was applied during off-duty hours.²⁴

Other Evidence of National Origin Discrimination

Other evidence of national origin discrimination can be helpful to prove that an employer's proffered reason for an English-only policy is a pretext for discrimination. In *Maldonado v. City of Altus*, the plaintiffs alleged that an English-only policy created a hostile work environment for Hispanic workers.²⁵ In reversing the District Court's grant of summary judgment for the defendant, the Tenth Circuit Court of Appeals noted the extensive allegations of taunting, harassment, and racial jokes that resulted from the policy.²⁶ Likewise in *Levitant v. City of New York Human Resources*, the court denied an employer's summary judgment motion on a hostile work en-

vironment claim where a restrictive and selectively enforced English-only policy was accompanied by insults and excessive monitoring by the employer.²⁷ The court noted that "[t]hrough the alleged excessive monitoring and the alleged insults referring to plaintiff's racial and/or national origin (if credited) might not be sufficiently pervasive or severe to constitute a hostile work environment if viewed in isolation, there is also evidence that plaintiff was given a directive forbidding him from speaking his native language in personal conversations while others were permitted to do so."²⁸ Just as other evidence of national origin discrimination may be very helpful in showing that the employer's proffered justification was pretext, the absence of any such evidence may be a problem to a plaintiff trying to avoid summary judgment.²⁹

Courts Will Consider Whether the Employee is Bilingual and Hired to Speak the Foreign Language for Business Purposes.

Courts have been more accepting of English-only policies where the affected employees are bilingual and have little trouble communicating without violating the policy.³⁰ Where an English-only policy is enforced against employees who are monolingual in their native tongue or who have difficulty communicating in English, a court is more likely to conclude that the employer's justification for the policy is pretextual. One court noted that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth."³¹ However, where the employee has little difficulty communicating in English, this factor will tend to negate a finding of pretext.

Courts are hesitant to find pretext where the employee is required, as part of his job duties, to speak the foreign language at issue to customers. Where the employer has a hiring preference for bilingual employees³² or where "an employee has been asked or required to speak Spanish on the job"³³ may weigh against an inference of discrimination when evaluating a limited English-only policy.

Conclusion

Ultimately, there is no bright line rule to determine whether an English-only policy violates anti-discrimination laws. Rather, courts balance a variety of factors when evaluating these types of claims. These factors range from the purpose of the policy to its application and effects in the workplace. Employers should be wary of applying overreaching policies that may cause hostility and tension among its workforce. The Supreme Court noted the powerful influence of language when it stated that "just as shared language can serve to foster community, language differences can be a source of division."³⁴

Endnotes

- 1 Rodriguez v. City of Rochester, No. 6:11-cv-06256-MAT (W.D.N.Y. 2011).
- 2 *Id.*
- 3 Racial Demographics of Area Towns, RocDocs, <http://rocdocs.democratandchronicle.com/database/racial-demographics-area-towns> (last visited May 23, 2011).
- 4 See Pacheco v. New York Presbyterian Hosp., 593 F. Supp. 2d 599, 604 (S.D.N.Y. 2009) (action alleging violations of Title VII, Section 1981, and New York State and City Human Rights Laws).
- 5 EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7 (Speak English Only Rules) (1980).
- 6 Hernandez v. New York, 500 U.S. 352, 371 (1991).
- 7 See Pacheco, 593 F. Supp. 2d at 613.
- 8 See Pacheco, 593 F. Supp. 2d at 611-612 (granting summary judgment for employer where plaintiff failed to offer any evidence to disprove employer's legitimate, non-discriminatory business reason for English-only practice); Perez v. New York & Presbyterian Hosp., No. 05 CIV5749 LBS, 2009 WL 3634038 (S.D.N.Y. Nov. 3, 2009); see also Roman v. Cornell Univ., 53 F. Supp. 2d 223, 236 (N.D.N.Y. 1999) ("A speak-English instruction may form the basis for an inference of national origin discrimination"); EEOC v. Beauty Enters., No. 3:01CV378(AHN), 2005 WL 2764822, at * 2 (D. Conn. Oct. 25, 2005) (jury instructions should provide that charging parties "must prove that [the employer's] English-only rule has a significant and adverse impact on Hispanic employees in order to prove a prima facie case").
- 9 Pacheco, 593 F. Supp. 2d at 623.
- 10 See Levitant v. City of New York Human Resources Admin., 625 F. Supp. 2d 85, 100 (E.D.N.Y. 2008).
- 11 See e.g., Levitant, 625 F. Supp. 2d at 100 (employer's excessive monitoring in conjunction with prohibition of employee's native language in private conversations was sufficient to raise genuine issues of material fact); see also Maldonado v. City of Altus, 433 F.3d 1294, 1308 (10th Cir. 2006) (employer's adoption of English-only policy without consulting with Hispanic employees is evidence of intent to create hostile work environment), *overruled on other grounds*, Burlington N. & Santa Fe Ry. Co. v. White, 548

satory and punitive damages, changing to an opt-out class action rule, increasing anti-retaliation protections, and requiring employers to report wage data to the EEOC.

The PFA would also amend the EPA's definition of "establishment" but not that of "equal work." The current definition of "establishment" ("the same physical office or facility") would be broadened to include "all workplaces located in the same county or political subdivision of a State." With the change, for example, a female bank teller could compare her salary to that of a male bank teller working at a branch across town. Since the PFA leaves the "equal work" requirement unaltered, a female vice president at that bank would still, in all likelihood, be unable to compare her work to that of male vice presidents in different departments (regardless of branch).

The PFA would amend the fourth affirmative defense to permit differential pay based on "a *bona fide* factor other than sex, such as education, training or experience", and then *only* where an employer can show the factor was: (1) not based on a sex-based differential in compensation; (2) job-related to the position; and (3) consistent with business necessity. This would end the cir-

cuit split over business necessity and job-relatedness. It could also increase scrutiny of employers' conclusory salary-matching justifications, requiring them to demonstrate that the basis for the differential (i.e. the market rate) was not itself tainted by sex discrimination. The House's Committee Report recommends employers do this by providing evidence that women's earnings in the given position are not frequently or consistently lower than men's.

Other Models

The PFA's success is uncertain; it failed to achieve cloture in the Senate during last November's lame duck session, but was recently reintroduced. Even if success were assured, are there other avenues that would help to close the pay gap?

The Gender Discrimination Committee also explored other models for addressing pay equity and other legislative efforts, such as the proposed New York State Fair Pay Act, (which passed in the Assembly and is currently being considered by the NYS Senate Finance Committee). New York's Act is designed to address pay gaps for minorities as well as for women. It would cover "equivalent" as opposed to "equal" jobs and bar the use of "market rates" as a *bona fide* factor for paying different wages.

Recommendations

The Committee reached consensus concerning two key avenues for legislative reform (in addition to those proposed by the PFA). First, we support any reform that would increase the transparency of compensation data: victims of pay discrimination cannot address their predicament where they do not know comparators' salaries. Second, we support the liberalization of the "equal work" rule to a "comparable work" or "equivalent work" standard that would employ a broader comparison methodology and apply a totality of circumstances test, based on the particular situation. Considerations might include: (1) technical or specialized knowledge; (2) level of education; (3) managerial skills and experience; (4) human relations skills and experience; (5) capital management skills and experience; (6) physical and/or mental effort; (7) exposure to hazardous working conditions; and (8) whether the requisite level of knowledge or skill may be acquired on the job or require special training.

Finally, the Committee urges advocates to contact their elected representatives, support legislative initiatives, and share ideas for change. We cannot afford to wait another 50 years to effect real progress. ■

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U.S. 53 (2006).

12 Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (internal citations and quotations omitted).

13 See Levitant, 625 F. Supp. 2d at 97 (citing Howley v. Town of Stratford, 217 F.3d 141, 153 (2d Cir. 2000)).

14 Knight v. City of New York, 303 F. Supp. 2d 485, 497 (S.D.N.Y. 2004) *aff'd*, 147 F. App'x. 221 (2d Cir. 2005).

15 See Levitant, 625 F. Supp. 2d at 98-100 (supervisor threatened to write up employee when he witnessed employee speaking Russian during personal telephone calls).

16 EEOC v. Beauty Enters., 2005 WL 2764822, at * 3 (citing Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97 (2d Cir. 2003)).

17 Pacheco, 593 F. Supp. 2d at 614-615 (collecting cases).

18 EEOC Compliance Manual § 13-V(C) (1) ("Application of Title VII to English-Only Rules") (Dec. 2002).

19 Perez, 2009 WL 3634038 at *14 (internal citations and quotations omitted).

20 Levitant, 625 F. Supp. 2d 85 (denying employer's summary judgment motion to dismiss plaintiff's hostile work environment claim).

21 *Id.* at 99-100; see also Velasquez v. Goldwater Mem'l Hosp., 88 F. Supp. 2d 257, 263 (S.D.N.Y. 2000) ("if plaintiff were able to present evidence that other employees were permitted to speak in, for example, Chinese or Portugese, but not Spanish, such evidence could support an inference of intentional discrimination on the basis of national origin").

22 EEOC v. Sephora USA, LLC, 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

23 See Levitant, 625 F. Supp. 2d at 101 (denying employer's summary judgment motion to dismiss plaintiff's hostile work environment claim); EEOC v. Premier Operator Servs., 113 F. Supp. 2d 1066, 1069 (N.D. Tex.2000) (employer prohibited employees from speaking Spanish at all times, including lunch and anywhere inside the building).

24 Perez, 2009 WL 3634038 at *1, 13.

25 433 F.3d 1294, 1301 (10th Cir. 2006).

26 *Id.*

27 625 F. Supp. 2d at 101.

28 625 F. Supp. 2d at 101.

29 Perez, 2009 WL 3634038 at *14 ("Circumstantial evidence of discriminatory intent is lacking. Plaintiff's evidence of racial slurs and jokes is based solely on his own allegations and has not been substantiated by a third party's affidavit; nor do his allegations even indicate that jokes and slurs were common occurrences . . .").

30 Pacheco, 593 F. Supp. 2d at 613; Perez, 2009 WL 3634038 at *14 (citing Pacheco, 593 F. Supp. 2d at 613).

31 Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).

32 *Id.*

33 *Id.* (citing Long v. First Union Corp. of Virginia, 894 F. Supp. 933, 942 (E.D. Va. 1995) *aff'd*, 86 F.3d 1151 (4th Cir. 1996)).

3 Hernandez v. New York, 500 U.S. 352, 371 (1991); see also Pacheco, 593 F. Supp. 2d at 612 (citing Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (noting that "[l]anguage may be used as a covert basis for national origin discrimination").