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Garcia v. Spun Steak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism

Edward M. Chen†

The increasing number of Asian Pacific Islander and Latino immigrants to the United States has fueled the recent swell of litigation over language rights in the workplace. Under Title VII of the Civil Rights Act of 1964, language-based discrimination—including accent discrimination and rules prohibiting the use of non-English languages in the workplace—is a form of national origin discrimination. This Casenote examines Garcia v. Spun Steak Co., a 1993 Ninth Circuit decision which rejected the plaintiffs’ claims that the company’s Speak-English-Only rule had a disproportionately adverse effect on its Latino employees. The author finds that the Ninth Circuit’s ruling displayed insensitivity to the unique nexus between language and national origin identity. Speak-English-Only rules have a disparate impact on language minorities because they suppress a core aspect of ethnic identity, impair communication, and create an atmosphere of inferiority, isolation and intimidation. Furthermore, the author explains that the court improperly rejected the Equal Employment Opportunity Commission Guidelines which presume such rules have a disparate impact on nonnative English speakers. Finally, the author concludes that the Garcia decision has grave implications for cultural and linguistic pluralism in the United States.

I. INTRODUCTION

At Pomona Valley Community Hospital, Adelaida Dimaranan, a Filipina nurse who speaks both Tagalog and English, was told that she could not speak Tagalog on the job, even during her breaks, in the cafeteria, or on the phone. When Dimaranan refused to comply with this rule, she was demoted to a lower-paying position.¹

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Along with the Employment Law Center and the law firm of Coblentz, Cahan, McCabe & Breyer, Mr. Chen represents the plaintiffs in Garcia v. Spun Steak Co., discussed herein.

¹ Dimaranan v. Pomona Valley Hosp. Medical Ctr., 775 F. Supp. 338 (C.D. Cal. 1991) (finding that defendant’s “no Tagalog” rule was not motivated by an intent to discriminate on the basis of national origin and that the rule could not be said to have a disparate impact because it was not in the first instance facially neutral). See also Sarah Henry, Fighting Words, L.A. TIMES MAG., June 10, 1990, at 10, 10.
Jordania Reed, a native of the Dominican Republic, was fired from her job as a nurse’s aid at a convalescent hospital because she was caught speaking Spanish with a co-worker.2

Rene Zamora-Baca, an immigrant from El Salvador who worked as a food server at the University of California Medical Center, was reprimanded by a supervisor for giving directions in Spanish to an elderly Spanish-speaking co-worker.3

Perfecto Estrada and four other Filipino Americans who all worked as security guards were removed from their swing and graveyard shifts at a federal facility because a federal official complained about their accent.4

The EEOC brought a discrimination charge against Eiki International on behalf of an Indian-born employee who was dismissed from his job as credit manager because his accent was allegedly a “detriment to the company’s image.”5

Employment discrimination on the basis of language is on the rise. The Equal Employment Opportunity Commission reports that in 1992, 14,394 complaints of national origin discrimination (under which language-based discrimination falls) were filed, a 30% increase from the 11,114 filed in 1989.6 Civil rights organizations, such as the American Civil Liberties Union, the Mexican American Legal Defense and Education Fund, the Asian Pacific American Legal Center of Los Angeles, the Employment Law Center of the Legal Aid Society of San Francisco, and the Asian Law Caucus, have received complaints primarily from Asian Pacific Islander and Latino job applicants and employees. These complainants have charged universities, convalescent hospitals, department stores, federal and local government agencies, the U.S. Postal Service, banks, insurance companies, non-profit charitable organizations, and even the fast food chain Taco Bell7 with prohibiting workers from speaking to their co-workers in

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2. Reed v. Driftwood Convalescent Hosp., EEOC Charge No. 377-92-0509, June 18, 1992. This pending EEOC investigation of discrimination charges was brought against a private convalescent hospital and the California Department of Health Services for encouraging the discriminatory practice.
3. EEOC Charge No. 370-88-0851, June 28, 1988. This complaint was resolved on June 27, 1989, when the parties signed a conciliation agreement in which the University of California, San Francisco, agreed to adopt a “Policy on Nondiscrimination Regarding Language Spoken in the Workplace,” reaffirm its nondiscrimination policy, conduct mandatory training of managers and supervisors on the policy against Speak-English-Only rules, and hold cultural sensitivity training sessions in units where there recently had been a Speak-English-Only policy. See Henry, supra note 1, at 18.
7. Everett Messick, Restaurant Chain Hailed for Language-Rights Policy, CALIFORNIA, Sept. 25, 1992, at 1C (discussing the fast food chain’s response after two employees filed claims with the EEOC because they were fired for speaking Spanish on the job).
any language other than English and with discriminating against those with foreign accents.  

The rise in language discrimination in the workplace is an outgrowth of two factors: changing demographics and a recessionary economy conducive to racist and nativist fears. Immigration and population patterns are changing the face and sound of America’s workplace, particularly in states such as California. Latino and Asian Pacific Islander immigrant populations have grown rapidly in recent years. According to the 1990 Census, one out of three California residents speaks a foreign language at home. The 1990 Census also reported a significant growth in the number of U.S. residents aged five or older who spoke a language other than English in the home since 1980: 17,340,000 Spanish speakers (56.0% increase); 1,319,000 speakers of Chinese languages (109.2% increase); 899,000 speakers of Filipino languages (89.5% increase); 644,000 speakers of Asian Indian languages (164.8% increase); 626,000 Korean speakers (135.3% increase); and 713,000 speakers of Vietnamese, Thai, and Laotian languages (154.6% increase).

The prolonged national economic recession has also spurred a fevered backlash against immigrants. Asian Pacific Islander and Latino immigrants are perceived as taking away jobs from “Americans” in basic industries. This anti-immigrant movement is further fueled by elected officials who blame immigrants for current economic conditions and call for restric-

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8. These complaints have been received by or reported to the author since 1988 as staff counsel to the American Civil Liberties Union Foundation of Northern California.

9. Although the U.S. Bureau of Census uses the racial categories “Hispanic” and “Asian or Pacific Islander,” for purposes of this Casenote I prefer to use the terms “Latino” and “Asian Pacific Islander.”

Between 1980 and 1990, the number of immigrants of Hispanic origin grew from 14,608,673 to 22,354,059, a 53% increase, and the number of Asian or Pacific Islander immigrants grew from 3,773,223 to 7,273,662, a 107.8% increase. Bureau of Census, U.S. Dep’t Com. News at Table 1 (1991).


12. Immigrant leaders have agreed that the “reasons for the anti-Asian problems include cultural differences, the past economic recession and trade imbalances with Japan, along with what some describe as a pre-existing latent racism.” Penelope McMillan, Immigrant Leaders See Racist Trend in LA., L.A. TIMES, Feb. 4, 1985, at B1. Eugene Memell, executive director of the Los Angeles County Commission on Human Relations, a group that has been monitoring anti-Asian violence nationwide, stated, “Some people think it’s because of the recession in basic industries; some think it’s just a rise in bigotry. But nobody doubts it’s happening.” Marc Kaufman, Nationwide, a Growing Tide of Anti-Asian Violence, PHILA. INQUIRER, Sept. 23, 1984, at D1. California also provides an interesting case study in the intersection between a recessionary economy and perceptions of immigrants at the state level. See Ronald Bronstein & Richard Simon, California Is Pulling in Welcome Mat, L.A. TIMES, Nov. 14, 1993, at A1 (discussing how public attitudes toward immigrants vary according to economic conditions of the state such that as the state’s economy worsens, resentment and hostility against immigrants rise).

13. For example, immigration restrictionists, such as the Federation for American Immigration Reform, argue that the U.S. economy cannot absorb current immigration levels from Mexico and other Third World countries. See Antonio J. Califia, Declaring English the Official Language: Prejudice Spoken Here, 24 HARV. C.R.-C.L. L. REV. 293, 298-99 (1989).
tionist measures, and by a growing sentiment that new immigrants pose a threat to the stability of America's language and culture.

This Casenote focuses on one flash point in the workplace symbolic of the tension gripping our society—Speak-English-Only rules which prohibit workers from conversing with their co-workers in their native language. Continued ethnic and linguistic diversity among American workers makes this issue increasingly relevant. For language minorities, Speak-English-Only rules can be oppressive and demeaning because they limit a worker's speech to a more restrictive second language. Furthermore, they suppress an essential aspect of the employees' ethnicity and implicitly denigrate the cultural heritage of nonnative English speakers.

Native English speakers often view co-workers and employees who speak foreign languages with fear and suspicion. They may suspect that "they must be talking about me" or harbor deeper subconscious fears of surrendering control to a foreign culture and language. Bilingualism is frequently characterized as a bar to a "unified nation," and immigrants who demand to communicate in their own language are regarded as "selfish" or "segregationist." At issue is how civil rights litigation and legislation—in particular, Title VII of the 1964 Civil Rights Act—resolve conflicts over language

14. California Governor Pete Wilson, citing illegal immigration as causing many of the problems facing California, has proposed restrictionist measures that would deny citizenship to U.S.-born children of undocumented immigrants and bar undocumented immigrants from receiving health, education and other social services. In an open letter to the White House on behalf of the people of California, Wilson wrote, "We do not exaggerate when we say that illegal immigration is eroding the quality of life for legal residents of California, is threatening the quality of education that we can provide our children, [and is threatening] the quality of care to our needy and blind, elderly and disabled." Bill Stall & Patrick J. McDonnell, Wilson Urges Stiff Penalties to Deter Illegal Immigrants, L.A. Times, Aug. 10, 1993, at A1, A16. See also Bennett Roth, Calif. Governor Rips Immigration Policy, House chron., Dec. 21, 1993, at A5 (reporting Wilson's proposal that Congress should increase border patrols and should stop mandating that states pay for social programs for undocumented immigrants).

15. See also Henry, supra note 1, at 10 (discussing the opposing forces between official-English advocates and those fighting employers' Speak-English-Only rules); Califa, supra note 13, at 299-300, 326-29 (describing nativist agenda and fears underlying leadership of English-Only movement).

16. This article uses "Speak-English-Only" as opposed to "English-Only" in describing these restrictive workplace rules because the term more accurately and completely describes the coercive nature of these rules.

17. Speaking a common language may also hark back to a more demographically homogeneous and harmonious time. A businessman proposing a plan that would require English to be used on all business signs in Garden Grove, California, stated: "Nobody can understand these signs but Koreans. English is what has kept us together. These are selfish immigrants who want to stay separate." Ray Perez, A City Is Divided by Its Languages, L.A. Times, Apr. 10, 1987, at A1. English then is the country's "social glue." Former Governor Richard Lamm of Colorado, an English-only advocate, testified before a congressional hearing that "[w]e should be color-blind but not linguistically deaf .... We should be a rainbow but not a cacophony." Jay Carney, English Spoken Here, O.K.?, Time, Aug. 25, 1986, at 27. See also B. Piatt, Toward Domestic Recognition of a Human Right to Language, 23 Hous. L. Rev. 885, 894-95 (1986) (contending that fear underlies monolinguals' refusal to accept the right of others to use languages other than English).

This Casenote examines the leading case on the subject, *Garcia v. Spun Steak Co.*, in which a panel of Ninth Circuit judges rejected a challenge to a Speak-English-Only rule. The two-to-one decision held that Speak-English-Only rules, as applied to bilingual employees, generally do not constitute a prima facie case of discrimination under Title VII. The Ninth Circuit's decision adopts a legal analysis that considerably weakens the scope and strength of Title VII and displays remarkable insensitivity to language rights and the invidiousness of linguistic discrimination generally.

The *Garcia* case has important social and legal implications. Although it involves Latino employees, the case has universal ramifications affecting all bilingual workers, including Asian Pacific Islanders. Not only does *Garcia* withdraw Title VII's protection against an insidious form of discrimination, but its likely effect is to place the imprimatur of the federal courts upon the English-Only movement generally, which views linguistic diversity as a threat rather than a resource to American society.

Opponents of laws establishing English as the official language have warned that such laws are subtle masks against blatant racism, and will breed "intolerance, divisiveness and bigotry." A similar warning must be given for Speak-English-Only rules, because they too represent an invasive encroachment into national origin protection. The decision in *Garcia* is a setback for language rights advocates. It is a clarion call for all civil rights groups to recognize and respond to language rights issues in the workplace.

Part II of this Casenote discusses the facts underlying the controversy in *Garcia*. Part III sets forth the legal theories and evidence advanced by the plaintiffs in challenging Spun Steak Company's Speak-English-Only rule. Part IV explains the Ninth Circuit's holding rejecting plaintiffs'
claims and critiques its reasoning. Finally, Part V of this Casenote shows that the decision has ominous implications both legally, as a matter of Title VII jurisprudence, and socially, as a bellwether in the struggle over cultural diversity and pluralism.

II.

**GARCIA v. SPUN STEAK CO.: THE FACTS**

Spun Steak Company ("Spun") is a meat-processing plant located in San Francisco, California, where meat products are ground, processed, and then packed along a production line. Most of the work at Spun is done on the production line, where workers must stand at a conveyor belt, remove meat products from the belt and pack the meat into cases or trays for sale to retail stores and restaurants. Workers in the production process have no contact with the public, and their work is done individually rather than in teams.

A. *The Use of Spanish and Its Importance to Employees at Spun Steak*

Historically, the majority of Spun's approximately thirty workers have been Spanish-speaking, and virtually all of the Spanish speakers are Latino. Spun has never required job applicants to speak or understand English as a condition of employment. Indeed, some of their current employees speak only Spanish, many are bilingual in Spanish and English, and most are more proficient in Spanish.

In the past, Spun employees spoke Spanish freely to their co-workers during business hours. The company concedes that no employee has ever been injured at its plant because Spanish was spoken, nor is there any documented record that employees' speaking of Spanish decreases worker productivity.

The use of the Spanish language by Spun's Latino workers has both practical and symbolic meaning to them. Maricela Buitrago, a production line worker at Spun for nearly ten years, explained the significance of her native Spanish language: "I am of Salvadoran national origin. My primary language is Spanish. I am able to converse in English as well; however, I am more proficient in Spanish. The ability to speak Spanish is an important part of my ethnic and cultural identity." Priscilla Garcia, a production

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24. *Garcia*, 998 F.2d at 1483.


line worker for nineteen years, explained that although her primary language is English, Spanish was the dominant language used in her household while she was growing up: "The ability to speak Spanish is an important part of my cultural identity." Moreover, because of the prevalence of Spanish speakers with varying degrees of English proficiency at work, "[d]epending upon the people with whom [Garcia was] working, [she would] either use English or Spanish, whichever [was] more efficient, to communicate with them . . ." Garcia also noted that most of the casual conversation not related to work occurred in both English and Spanish.

B. The Plant-Wide Speak-English-Only Rule

On September 28, 1990, after permitting workers to speak their native language for more than thirty years, Spun imposed a plant-wide company policy requiring all of its workers to speak only English while at work. This written policy stated:

We have also been advised that some employees have been speaking Spanish during their performance of work. We can certainly appreciate why our employees who speak Spanish are proud of that ability and the culture associated with it. However, many of our employees do not speak Spanish and the use of Spanish during work could lead to inefficiencies or even injury, quite apart from its potential for leading other employees to believe that they are being harassed, insulted, or their status belittled. For these reasons, it 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 or hurt feelings.

The rule was imposed reportedly because several employees had accused two of the workers, Garcia and Buitrago, of making offensive remarks about them in Spanish, as well as in English. Consequently, in addition to
the Speak-English-Only rule, Spun issued a policy prohibiting the use of
offensive speech at work in any language.33

This rule against offensive language proved effective. No incidents
have been reported since the rule's issuance.34 Moreover, Spun physically
separated Garcia and Buitrago in their work assignments, thus minimizing
conversation between them while on duty. Despite the effectiveness of
these measures, Spun insisted on implementing and enforcing the Speak-
English-Only rule, a rule which applied to all conversations by all employ-
ees regardless of the content of the conversation.

C. Enforcement of the Speak-English-Only Rule

Garcia and Buitrago, joined by their union, objected to the Speak-
English-Only rule,35 but to no avail. Over the next several months, they
were formally reprimanded on several occasions for speaking Spanish to
other co-workers. Buitrago described an instance when the rule was
enforced:

On November 30, 1990, a production problem occurred further
up the line. When the steaks reached our area, they were stuck
together and could not be packaged in that form. My co-workers
and I discussed the problem in Spanish. At that time, Kenneth
Bertelsen [one of the owners] yelled at me in front of my co-work-
ers and chastised me for using Spanish. When I complained that his
treatment was unfair, he jabbed at me with his finger and told me,
"go back to your own country" if I wanted to speak Spanish.36

The incident caused Buitrago great stress and made her fear that she would
lose her job and be unable to care for her children, for whom she is the sole
source of support.37

Garcia described another incident:

On June 5, 1991, the day prior to the EEOC's scheduled visit,
Kenneth Bertelsen reprimanded me for using Spanish in a casual
conversation with a co-worker, Connie Salazar, whose English abil-
ity is very limited. He yelled at me that "[t]his is my house, and I
only want English here," causing me to feel nervous and stressed.
Also on that day, he yelled at Connie Salazar, in my presence,
claiming that I was "leading her around by the nose and encouraging
her to speak Spanish." These unjust accusations further upset me.
As a result of these incidents, I felt unable to work and informed

33. See Bertelsen Letter, supra note 31.
34. See Bertelsen Deposition, supra note 25, at 39:11-40:11.
35. See Complaint for Monetary, Injunctive and Declaratory Relief for Employment
Discrimination [hereinafter Complaint] at ¶ 15, 16 & Exhibit C (Letter from Ralph Huber, President,
reh'g denied, 13 F.3d 296 (9th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3555 (Jan. 27, 1994).
36. Buitrago Declaration, supra note 27, at ¶ 15.
37. Id. at ¶ 19.
him that I could not finish the day. He refused to acknowledge my stress related condition and said I was walking off the job. Unable to perform my job, I went straight home to recover. 38 Garcia has not been back to work since.

III.
THE LEGAL CASE: PLAINTIFFS’ TITLE VII THEORY

On May 6, 1991, Garcia, Buitrago and Local 115 of the United Food and Commercial Workers International Union, AFL-CIO, filed charges of national origin discrimination with the Equal Employment Opportunity Commission. After its investigation, the EEOC found there was reasonable cause to believe that Spun’s Speak-English-Only policy and retaliatory actions against Garcia and Buitrago violated Title VII of the Civil Rights Act of 1964. 39 Spun refused to conciliate the charges. Garcia, Buitrago and Local 115 then filed a complaint 40 in the U.S. District Court alleging, inter alia, that Spun’s Speak-English-Only policy constituted national origin discrimination in violation of Title VII of the Civil Rights Act of 1964.

Title VII affords plaintiffs two theories to demonstrate unlawful discrimination: disparate treatment and disparate impact. 42 Under disparate treatment analysis, intentional discrimination on the basis of a prohibited criterion may be proven by evidence that persons of one race, color, religion, sex, or national origin who are otherwise similarly situated are treated differently from persons of another group. 43 Under disparate impact theory, liability under Title VII may be established even in the absence of intentional discrimination or racial animus. Disparate impact results from “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”

40. Complaint, supra note 35. The complaint, which was filed on June 26, 1991, prior to the issuance of the EEOC’s determination to seek a temporary restraining order and preliminary injunction against Spun’s alleged retaliatory harassment of Garcia and Buitrago, also alleged various pendent state tort law claims, including a claim of employment discrimination on the basis of national origin under cognate provisions of California state law. Id. at 2, 8-10. The District Court refused to assert pendent jurisdiction over the state tort claims. Garcia v. Spun Steak Co., 62 Empl. Prac. Dec. (CCH) ¶ 42,411 (N.D. Cal. 1991).
41. Section 703(a)(1) of Title VII provides:
(a) It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .
42. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1987) (establishing that disparate impact theory may be applied to Title VII claims).
43. See id.
The plaintiffs in *Garcia* challenged Spun’s policy as having a disparate impact on Latino workers. Thus, they needed to establish a prima facie case of discrimination by showing that an employment practice or policy had a disproportionately adverse impact upon them as a protected class of workers.\(^4\) Spun would then be required to justify the policy.

Adverse impact may be demonstrated with respect to terms and conditions of employment by establishing that there was a hostile or abusive work environment. Such burdens placed upon language minority workers may constitute actionable discrimination even if the affected employees are not denied employment, equal pay, or some tangible benefit. As the Supreme Court recently held in *Harris v. Forklift Systems*:\(^4\)

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” As we made clear in *Meritor Savings Bank v. Vinson*, this language “is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment,” which includes requiring people to work in a discriminatorily hostile or abusive environment.\(^4\)

The *Garcia* plaintiffs alleged that Spun’s Speak-English-Only rule fit precisely within this spectrum of proscribed conduct. Plaintiffs first established the relationship between language and the protected status of national origin. They then alleged that Speak-English-Only rules, such as the rule enacted at Spun, have a disparate impact upon national origin minorities. Finally, plaintiffs argued that Spun failed to show the requisite business necessity to validate their policy.

A. **Language-based Discrimination as a Form of National Origin Discrimination**

Unlike facially neutral devices such as a minimum height requirement or a standardized test which may have a disparate impact upon a protected class, Speak-English-Only rules impact national origin minorities almost exclusively.\(^4\) Just as skin color and surname often identify one’s racial identity, one’s primary language and accent commonly identify national origin. Numerous courts have employed language as such an identifier.\(^4\)

\(^4\) Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1970) (“What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”).


\(^4\) Id. at 370 (citations omitted).


\(^4\) E.g., Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954) (“just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this
Moreover, "there is an obvious statistical correlation between a language and its corresponding national origin group." For instance, Latinos comprise 97% of the individuals in the United States who usually speak Spanish, and it is estimated that at least 64% of Latinos in the United States are bilingual.

For Asian Pacific Islanders the correlation between language and national origin is also very high. As of 1989, 72.5% of Chinese Americans speak a language other than English at home. Comparable figures for other Asian Pacific Islander groups exist for Cambodians (81.9%), Vietnamese (80.7%), Laotians (77.4%), Thai (72.5%), Koreans (69.7%), Filipinos (59.9%), Indians (55.3%), and Japanese (40.5%). Indeed, in one respect, the relationship between language and ethnicity is more specific for Asian Pacific Islanders than for Latinos. Given the myriad of Asian languages, each peculiar to a particular country of origin, language is an integral part of an Asian Pacific Islander's specific national origin identity.

While Title VII does not explicitly address language discrimination, the EEOC and the federal courts generally agree that discrimination on the basis of one's linguistic characteristics may constitute national origin discrimination. In its Guidelines on Discrimination Because of National Origin, amended in 1980, the EEOC declared:

The Commission defines national origin discrimination broadly as including, but not limited to, 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.

The Commission recognized that "the primary language of an individual is often an essential national origin characteristic." Numerous courts have
agreed that statutes or constitutional provisions barring national origin discrimination may include language-based discrimination.\(^{58}\)

### B. The Disparate Impact of Speak-English-Only Rules

While the relationship between national origin and language in general is well recognized, the more specific question in Garcia was whether Speak-English-Only rules have a disparate impact cognizable under Title VII. The EEOC Guidelines on Discrimination Because of National Origin in effect presume such a disparate impact. Section 1606.7 provides in pertinent part:

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.\(^{59}\)

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.\(^{60}\)

By requiring employers to demonstrate business necessity for Speak-English-Only rules, the EEOC Guidelines relieve affected employees from the burden of establishing a prima facie case of disparate impact on a case-

\(^{58}\) See, e.g., Lau v. Nichols, 414 U.S. 563 (1974) (holding that failure to provide educational assistance to non-English-speaking students constituted national origin discrimination under Title VI of the Civil Rights Act of 1964); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) (invalidating ordinance requiring that accounting records of businesses be kept in English, Spanish, or local dialects of the Philippines, thereby excluding the use of Chinese); Fragante v. City and County of Honolulu, 888 F.2d 591 (9th Cir. 1989) (holding accent discrimination may be actionable as national origin discrimination under Title VII, citing EEOC guidelines with approval), cert. denied, 494 U.S. 1081 (1990); Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (finding that adverse employment decision based on accent constitutes national origin discrimination); Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980 (6th Cir. 1980) (per curiam) (holding that refusal to hire woman with Polish accent violated Title VII); Smothers v. Benitez, 806 F. Supp. 299 (D.P.R. 1992) (discussing equal protection analysis of language based discrimination); Asian Am. Business Group v. City of Pomona, 716 F. Supp. 1328 (C.D. Cal. 1989) (holding that ordinance restricting use of foreign languages on business signs "overtly discriminates on the basis of national origin"); Saucedo v. Brothers Wells Serv., Inc., 464 F. Supp. 919 (S.D. Tex. 1979) (holding that Speak-English-Only rule violated Title VII because defendant could not show business necessity and uniform enforcement); Hernandez v. Erlenbusch, 368 F. Supp. 752 (D. Or. 1973) (deciding that a tavern's rule against speaking foreign languages amounted to racial discrimination against Mexican Americans).

\(^{59}\) 29 C.F.R. § 1606.7(a) (1993).

\(^{60}\) Id. § 1606.7(b) (1993).
by-case basis and places the burden on employers to justify the rule.\textsuperscript{61} The plaintiffs in \textit{Garcia} relied upon the EEOC Guidelines in establishing their prima facie case.

The plaintiffs additionally argued that even without the presumption created by the EEOC Guidelines, Spun's Speak-English-Only rule has two adverse affects on Latino workers: first, the rule suppresses their cultural heritage and, second, it impairs their ability to communicate.

First, the plaintiffs argued that a "person's primary language is an important part of and flows from his/her national origin," and that choice of language is "an expression of culture."\textsuperscript{62} The cultural identity of many minority groups is tied to the use of their primary tongue.\textsuperscript{63} The centrality of language to ethnic identity is classically described by Joshua Fishman:

By its very nature language is the quintessential symbol, the symbol par excellence . . . . [I]t is more likely than most symbols of ethnicity to become the symbol of ethnicity. Language is the recorder of paternity, the expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious . . . in and of itself . . . . The link between language and ethnicity is thus one of sanctity-by-assocation . . . . Anything can become symbolic of ethnicity . . . but since language is the prime symbol system to begin with and since it is commonly relied upon so heavily (even if not exclusively) to enact, celebrate, and 'call forth' all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed . . . . [I]Indeed, it becomes a prime ethnic value in and of itself.\textsuperscript{64}

Similarly, the Ninth Circuit has previously noted:

Although an individual may learn English, and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity . . . . The primary language

\begin{thebibliography}{99}
\bibitem{61} It appears that the presumption of a disparate impact applies most forcefully to persons whose primary language is not English. The EEOC's comments accompanying the amended 1980 Guidelines cite a U.S. Bureau of Census survey identifying persons with "non-English language backgrounds as persons whose mother tongue is not English, who normally use languages other than English, or who live in households where languages other than English are spoken." 45 Fed. Reg. 85,634 (1980). The Commission cited broad Speak-English-Only rules as an example of employment practices that "[discriminate] against persons whose primary language is not English." In its comments, the Commission distinguished an earlier Fifth Circuit decision, Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981), which had held that a Speak-English-Only rule did not have a discriminatory effect as applied to the bilingual employee plaintiff in that case. The Commission noted that Section 1606.7 of its Guidelines does not conflict with \textit{Gloor} because \textit{Gloor} did not "involve a bilingual employee whose primary language was not English. In the court's view, Mr. Garcia, who spoke both English and Spanish, failed to prove that Spanish was his primary language." 45 Fed. Reg. 85,635 (1980).

\bibitem{62} \textit{Asian Am. Business Group}, 716 F. Supp. at 1330.

\bibitem{63} See \textit{Domengeaux}, \textit{supra} note 49, at 1165-67.

\end{thebibliography}
not only conveys concepts, but is itself an affirmation of that culture.

Suppressing the native language of minority workers invariably denies and degrades their ethnic heritage. As one commentator observed: “Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity.”

The plaintiffs’ expert, Dr. Guadalupe Valdés, then Professor of Education at the Graduate School of Education at the University of California, Berkeley, described in a declaration the particular importance of language to ethnic and cultural identity within the Latino community:

For the majority of Hispanic-Americans, including Mexican-Americans, language is one of the most salient and important parts of their ethnic and cultural identity. Studies of the relationship between Spanish language and ethnic identity among Hispanics have clearly shown that Hispanics view language as an intrinsic aspect of their ethnicity. Denying individuals from those communities the right to use their primary language or the native language of their ancestors deprives them of their right to affirm their culture and express their identity, and inevitably demeans their ethnic heritage.

In addition to suppressing a salient aspect of ethnicity, Speak-English-Only rules more generally inhibit the expression of personality. As one

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68. A noted language scholar has described this process of identification:

A person’s sense of identity is usually bound up closely with his mother tongue or first language. A Danish linguist who was fluent in English was asked why he continued to speak Danish, since English is so much more widely used. His initial reaction was to feel almost insulted by the question. But when he was assured that the questioner was sincere, he answered, ‘My language is me. Danish is the language through which I learned to know about the world; through which I learned my deepest values at my mother’s knee. I will always feel
Ninth Circuit judge observed, Speak-English-Only rules "not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." According to scholars, "The conception of human dignity is fundamentally linked to the life of the mind which in turn is closely linked to language as a basic means of communication. Language is a rudiment of consciousness and close to the core of personality; deprivations in relation to language deeply affect identity." Psychological research indicates that "[F]luent bilinguals often report different personalities in their two languages, and studies have suggested that bilinguals show different responses in projective psychological tests... depending on which language is used."

As a second point, the Garcia plaintiffs argued that Speak-English-Only rules impair communication between workers who prefer to converse in their native tongue. In this regard, it is crucial to note that there are relative degrees of bilingualism. At Spun, as is commonly the case, bilingualism exists on a continuum; several employees speak practically no English; others have limited English proficiency; however, few are fluent in both English and Spanish. For those who are not fully fluent in English, Speak-English-Only rules stifle their ability to express themselves most at home in Danish, react most deeply through Danish, be able to express myself most fluently in Danish.'

Barbara F. Grimes, Language Attitudes: Identity, Distinctiveness, Survival in the Vaupes, 6 J. Multilingual & Multicultural Dev. 389, 390 (1985); see also Nancy F. Conklin & Margaret A. Lourie, A Host of Tongues: Language Communities in the United States 279 (1983) ("[F]or many Americans, speech is an indicator of cultural identity second in importance only to physical appearance. Further, accent, language choice, verbal style, choice of words, phrases, and gestures act as a primary vehicle for creative expression by individuals and groups.").

In a very similar context, Mari Matsuda, a noted critical legal studies scholar, has argued:

Self-worth, identity, integrity, and autonomy are the words academics use to express an idea that infuses the core of our Constitution and creed: people have a right to be what they are. The popular notion of the Constitution distills to that idea—"it's a free country," children yell back at bossy elders. This core notion of individual freedom is understood by millions of Americans who could not recite a line from the Bill of Rights. The way we talk, whether it is a life choice or an immutable characteristic, is akin to other attributes of the self that the law protects. In privacy law, due process law, protection against cruel and unusual punishment, and freedom from inquisition, we say the state cannot intrude upon the core of you, cannot take away your sacred places of the self. A citizen's accent, I would argue, resides in one of those places.


69. Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from refusal to rehear en banc) [hereinafter Reinhardt Dissent].


It is hardly a novel proposition that personalities depend in part upon native language. As one scholar has noted, "Most children are introduced into this world and have the world interpreted to them through a single language, their mother tongue. Personality is formed to a considerable extent, if not altogether in all critical respects, under that influence." Henry L. Bretton, Political Science, Language, and Politics, in LANGUAGE AND POLITICS 431, 440 (William M. O'Barr & Jean F. O'Barr eds., 1976).
pletely by confining them to their second language. It deprives them of the oppor-
tunity to speak "their primary language or the language they speak most
comfortably," an opportunity afforded to English speakers in the
workplace. 72

Speak-English-Only rules also burden employees who are fully bilin-
gual because many bilinguals communicate with each other by using both
languages without consciously realizing that they are switching back and
forth between two languages. 73 Dr. Valdés described in her declaration
how these rules impair communication:

Recent work on the alternating use of two languages by Hispanic
bilinguals has made clear that both English and Spanish together
make up the linguistic repertoire of these speakers. Hispanic
bilinguals, for example, will often switch between languages at the
word, phrase, clause and sentence levels to bring across a series of
different types of meanings. A switch into Spanish, for example, by
a Hispanic bilingual who is speaking English to another bilingual of
the same background, may signal greater solidarity, intimacy, or ref-
erence to values associated with the ethnic language. A switch may
occur along with a shift in their role relationship with regard to one
another, or a change in topic or characteristics of the setting. A
switch might also serve, however, as a simple metaphoric device by
means of which a speaker gives emphasis to a particular segment of
his or her utterance. Of course, a shift may also occur where a bilin-
gual is unable to find the proper words in one language to com-
pletely or accurately express a thought or idea.

The switching between languages is referred to as "code
switching" by socio linguists. As in the case of other bilinguals,
Hispanic bilinguals are often not conscious of the fact that they are
switching languages. Often the language used in a particular con-
text is spontaneous and the product of the subconscious. Often,
bilinguals have no recollection of the fact that they switched, nor
will they be able to bring to the level of awareness how they used a
particular language switch to put across particular nuances or
meanings. . .

Research has also shown that bilingual individuals establish
relationships with others in which they customarily speak in either
language A or language B, or a combination of both languages A
and B. Once a relationship has been established and two individuals
speak to each other customarily in language A, it is very difficult, if
not impossible, for them to use another language for their normal

72. 29 C.F.R. § 1606.7(a) (1993).
73. Linguistic studies conducted in an Asian-language speaking context revealed similar findings.
See Chui-Lim Tsang, Code-Switching Strategies in Bilingual Instructional Settings, in ASIAN AND
PACIFIC AMERICAN PERSPECTIVES IN BILINGUAL EDUCATION 197 (Mae Chu-Chang ed., 1983) (finding
that the motivations behind code-switching between standard Cantonese and English correspond to the
sociolinguistic motivations behind code-switching between Spanish and English).
interaction. They cannot “read” each other’s subtle “between-the-lines” meanings in a language they do not speak regularly to each other. Although they may be able to momentarily carry on a conversation in language B in front of others, they will invariably revert to language A spontaneously for the highest degree of comfort and efficiency in communication.

Complying with an English-Only workplace rule, therefore, is not a simple, voluntary “choice” for bilinguals.74

Dr. Valdés’ description of the subtle complexities of bilingualism is consistent with the Supreme Court’s recent observation that “people proficient in two languages may not at times think in one language to the exclusion of the other.”75 Unlike native English speakers, nonnative speakers “must consciously and continuously monitor their speech,” or be subject to reprimand, discipline or even dismissal.76

Moreover, the expressive value of the use of one language by bilinguals is also impaired by Speak-English-Only rules. As the Supreme Court observed: “Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer.”77


75. Hernandez v. New York, 500 U.S. 352, 412 (1991). In addition to being a mode of communication, language is a form of expression in and of itself:

“Language is not merely a means of interpersonal communication and influence. It is not merely a carrier of content, whether latent, or manifest. Language itself is content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.”

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, 219 (1971). Various languages within a given community often serve distinct functions. Fishman points out that “[w]hereas one set of behaviors, attitudes and values supported, and was expressed in one language, another set of behaviors, attitudes and values supported and was expressed in the other.” Id. at 287.

76. Mealey, supra note 19, at 426.

77. Hernandez, 500 U.S. at 412. It should also be noted that language translations are imperfect. “Language shapes the perception of such concepts as ‘time’, ‘space’, and ‘matter’. . . . Languages contain vocabularies that differ vastly in nature. One language may ignore distinctions made in another language.” Mealey, supra note 19, at 428 n.238 (citations omitted).
In sum, Speak-English-Only rules impose practical and psychological burdens upon minorities whose primary language is other than English by suppressing one of the most salient aspects of their ethnicity, inhibiting their communication and relationships, and altering their personalities. Not only do these burdens constitute discriminatory "terms and conditions" of employment not suffered by native English speakers, but the cumulative effect of these practical and psychic burdens is to create a hostile and discriminatory working environment.

C. **The Lack of Business Necessity for Spun's Speak-English-Only Rule**

The plaintiffs in *Garcia* argued that Spun, upon issuing a rule with disparate impact, failed to establish a business necessity for that rule.\(^78\) Spun responded that the rule was necessary for safety reasons and to prevent Spanish speakers from abusing other employees. However, it was unnecessary to impose a plant-wide rule to prevent Spanish speakers from making offensive remarks, especially given that allegations of the misuse of Spanish—vehemently denied by Garcia and Buitrago—were confined to only those two employees. The Speak-English-Only rule is overbroad and sweeps in the vast majority of Spanish-speaking employees against whom no accusations had been made, much less proven. Moreover, the alleged problem was preempted by the implementation of a rule prohibiting the use of offensive language against co-workers, a rule that applies regardless of whether the offensive remarks are made in English or Spanish.\(^79\)

Spun also asserted that the Speak-English-Only rule was necessary for safety reasons, given the operation of grinding machines and other heavy

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\(^78\). The applicability of the "business necessity" test, embodied in the EEOC English-Only Guideline and derived from *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that a challenged employment practice having disparate impact on minorities must be related to job performance to remain valid), and its progeny, was subject to some uncertainty in view of the Supreme Court's decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), which made a legitimate "business justification" rather than "business necessity" the defense under disparate impact analysis. *Id.* at 658-61 (holding that requiring a "business justification" means considering the justifications an employer offers for the practice and also the availability of alternative practices which achieve the same business ends but with a less severe racial impact). Subsequent to *Wards Cove* and during this litigation, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 1071, overturning *Wards Cove* and reinstating the "business necessity" test as it existed prior to *Wards Cove*. *Id.* at § 105, 105 Stat. 1074-75. The Ninth Circuit has ruled that the 1991 Civil Rights Act applies retrospectively. *E.g.*, *Estate of Reynolds v. Martin*, 983 F.2d 470 (9th Cir. 1993); *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1555 (9th Cir. 1992) vacated in part, 984 F.2d 345 (9th Cir. 1993). The issue of the retroactivity of the Act is now before the Supreme Court. See *Landgraf v. U.S.I. Film Indus.*, 988 F.2d 427 (5th Cir. 1993), *cert. granted*, 113 S. Ct. 1250 (1993); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993). Even if the 1991 Civil Rights Act would not be retroactively applied, the *Garcia* plaintiffs argued that under *Wards Cove*, the defendant has the burden of producing "objective evidence" of "how the [challenged practice] 'serves in a significant way' the identified goal." *Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 804 (3d Cir. 1991) (quoting *Mack Player, Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Antonio*, 17 FLA. ST. U. L. REV. 1, 32 (1989)). Merely identifying an "abstractly rational" justification does not suffice. *Id.* Plaintiffs argued that under either *Wards Cove* or the 1991 Civil Rights Act, Spun failed to adequately justified its sweeping Speak-English-Only rule.

machinery in the production process. However, production workers did not work in teams; rather, they worked individually on specific tasks. Official communications were rarely necessary. Spun presented no convincing reason why casual conversations in Spanish presented a greater risk to safety than casual conversations in English. Indeed, casual conversations conducted in Spanish, the primary language of most of the employees, may create less risk of injury than ones conducted in English. To the extent that safety depends on effective and efficient communication between employees, it makes far greater sense for workers to communicate with each other in their primary language rather than a restrictive secondary language.

IV.
THE NINTH CIRCUIT'S DECISION

The Holding Below

The District Court granted summary judgment to the plaintiffs, finding that Spun's plant-wide Speak-English-Only policy had a discriminatory impact upon Latino workers and could not be justified by business necessity. The District Court described the Speak-English-Only rule as overbroad and unnecessary, likening it to "hitting a flea with a sledgehammer." Spun appealed both the grant of summary judgment to the plaintiffs as well as the District Court's denial of its motion for summary judgment to the Ninth Circuit.

The Issue on Appeal

The Ninth Circuit initially had to decide upon the applicability of disparate impact theory on claims brought under section 703(a)(1) of Title VII, which pertains to discrimination affecting an employee's "terms, conditions, or privileges of employment." However, the critical issue on appeal, as framed by the Ninth Circuit, was "whether [Spun's Speak-English-Only] policy causes any adverse effects at all, and if it does, whether the effects are significant." The court addressed three bases underlying the plaintiffs' argument that Spun's Speak-English-Only policy adversely affected them: "(1) it denies them the ability to express their cultural heritage on the job; (2) it denies them a privilege of employment that is enjoyed by monolingual speakers of English; and (3) it creates an atmosphere of inferiority, isolation, and intimidation."
The Ninth Circuit's Holding

In a two-to-one decision, the majority of the Ninth Circuit panel reversed the District Court's grant of summary judgment, finding that as a matter of law, Spun's Speak-English-Only rule did not have a disparate impact on its bilingual employees.

The court initially acknowledged the applicability of Section 703(a)(1) of Title VII to Speak-English-Only policies, recognizing that the plaintiffs' claim asserted discrimination with respect to "terms, conditions, or privileges of employment." The court held that although virtually all prior disparate impact cases have been based upon Section 703(a)(2) of Title VII, which pertains to the deprivation of employment opportunities, disparate impact theory could be applied to challenges to a practice or policy that has a significant adverse impact on the "terms, conditions, or privileges" of employment under Section 703(a)(1).

After deciding that disparate impact theory applied, the Ninth Circuit turned to the primary issue in this case: whether or not Spun's Speak-English-Only rule had a significant adverse effect on the plaintiffs. The court conceded that if Spun's Speak-English-Only policy did cause any adverse effects, those effects would be suffered disproportionately by those of Latino origin because the vast majority of Spun's employees who speak a language other than English are Latino. However, the court rejected the plaintiffs' arguments, and held that the policy in this case did not have "significant" adverse effects upon bilingual Latino employees.

Finally, the Ninth Circuit rejected the EEOC's Guidelines on Speak-English-Only rules. The court declared that nothing in the language of Title VII supported the EEOC's position that a complainant with a disparate impact cause of action can establish a prima facie case simply by showing that a Speak-English-Only policy exists.

What follows is a critical analysis of the Ninth Circuit's rejection of the arguments used to prove that Spun's Speak-English-Only rule had a disparate impact: suppression of cultural heritage; impairment of expression and communication; and the creation of an atmosphere of inferiority, intimidation and isolation. This Part concludes with a discussion of why the court should have followed the EEOC Guidelines on Speak-English-Only policies in the workplace.

84. Id. at 1486.
85. Section 703(a)(2) of Title VII provides:
(a) It shall be an unlawful employment practice for an employer—
(2) to limit, segregate, or classify his employees or applicants for employment in any
way which would deprive or tend to deprive any individual of employment opportunities or
otherwise adversely affect his status as an employee, because of such individual's race, color,
religion, sex, or national origin.
86. Garcia, 998 F.2d at 1485-86.
87. Id. at 1488.
88. See supra note 59 and accompanying text.
89. Garcia, 998 F.2d at 1489.
A. Suppression of Cultural Heritage

The court rejected plaintiffs’ argument that Speak-English-Only rules have a disparate impact upon national origin minorities by suppressing the expression of their cultural heritage.\(^{90}\)

It cannot be gainsaid that an individual’s primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges.\(^{91}\)

In so holding, the court failed to comprehend the nature of the plaintiffs’ claim. The plaintiffs did not assert that they had a substantive right to express their cultural heritage while at work. Rather, they claimed that a Speak-English-Only rule affirmatively suppresses an essential aspect of their identity, and thereby has pernicious consequences for national origin minorities. The Ninth Circuit’s decision confused substantive rights and discrimination theory. For instance, although workers may not have an independent right to express their cultural heritage, a rule prohibiting workers from using their ethnic given names and requiring them instead to assume an Anglicized name while at work would have a disproportionately adverse effect on protected minorities. Although workers may not have a substantive right to wear their hair in any particular style, a rule prohibiting Afro hairstyles could disproportionately impact African American workers. What is at stake is not an affirmative right to express one’s cultural heritage but the right to be free from a practice that demeans or diminishes one’s cultural heritage and thereby has a particularized discriminatory effect.

The Ninth Circuit panel’s decision also reflected an insensitivity to language rights. While the panel purported to recognize the importance of language to national origin identity, its recognition was disingenuous. The court stated:

> It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.\(^{92}\)

Evidently, the Ninth Circuit panel believed that the use of one’s primary language has no significance or value different from any “other types of self-expression.”\(^{93}\)

\(^{90}\) See supra text accompanying notes 62-71.

\(^{91}\) Garcia, 998 F.2d at 1487.

\(^{92}\) Id.

\(^{93}\) Id. But see supra text accompanying notes 62-71 and accompanying text. The panel’s cavalier dismissal of the importance of language to racial and ethnic minorities is also at odds with human rights standards held by the international community. Article 27 of the International Covenant on Civil and Political Rights states: “In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other
B. Impairment of Expression and Communication

The Ninth Circuit rejected a second basis of disparate impact: impairment of expression and communication by those whose primary language is not English. The court gave two reasons for the rejection. First, the court reasoned that bilingual employees who have some English proficiency “can readily comply with the [Speak-English-Only] rule and still enjoy the privilege of speaking on the job,” particularly when the privilege is defined at its narrowest (as merely the ability to speak on the job). Second, borrowing from a Fifth Circuit’s decision rejecting a challenge to a Speak-English-Only policy, the court held that “there is no disparate impact’ with respect to a privilege of employment ‘if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.” The court found that the Speak-English-Only rule “merely inconvenience[d]” bilingual employees and did not impose a “significant impact.”

Once again, the Ninth Circuit panel’s reasoning was fundamentally flawed. Under the court’s first rationale, disparities in working conditions between native and nonnative English speakers vanish when an employer chooses to adopt a narrow construction of the breadth of the “privilege” affected. The panel’s facile observation that all Spun employees retain the privilege to speak on the job evaded the fundamental point that Speak-English-Only rules allow native English speakers to use their primary language without restriction while prohibiting nonnative English speakers from conversing in their primary language. Surely, the reach of Title VII cannot turn on a court’s blind deference to an employer’s unilateral and self-serving definition of what constitutes a “privilege of employment.”

Furthermore, the Ninth Circuit panel treated English fluency as an either/or condition and assumed that bilingual individuals may easily comply with Speak-English-Only rules. But the English proficiency of many bilingual workers is limited; many are far more fluent in their primary language. Thus, the court’s conclusion that the rule constitutes a mere “inconvenience” and simply requires an employee “to catch himself or herself from occasionally slipping into Spanish” ignored both the substantial imposition placed upon bilingual workers with limited English proficiency,


94. For a discussion of the plaintiffs’ reasoning behind this argument, see supra notes text accompanying 72-77.
96. Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).
97. 998 F.2d at 1487 (quoting Garcia v. Gloor, 618 F.2d at 270).
98. Id. at 1488.
99. The panel’s definition of the “privilege” afforded by Spun as “merely the ability to speak on the job,” id. at 1487, was contrived. Spun never defined the privilege in this way, either to its workers or in the course of this litigation.
100. Id. at 1488.
and the centrality of bilingualism to the communication and relationships between bilingual speakers.\footnote{See supra text accompanying note 74.}

Most importantly, by making the practical ability to comply with an objectionable rule the touchstone for finding significant adverse effects, the court substantially diminished the reach of Title VII law. The ability to comply with an objectionable rule has never been dispositive under Title VII. For example, a rule requiring a female employee to wear sexually revealing clothes violates Title VII even though, as a practical matter, she can comply with the rule.\footnote{EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (finding sexual discrimination where employer required employee to wear a sexually revealing uniform knowing that it would subject the employee to sexual harassment). See also Carroll v. Talman Fed. Sav. & Loan Ass’n, 604 F.2d 1028 (7th Cir. 1979) (holding that defendant’s policy requiring only female employees to wear uniforms while male employees could wear normal business attire violated Title VII’s prohibition against sex discrimination), cert. denied, 445 U.S. 929 (1980).}

Similarly, no one would question seriously that rules prohibiting African American employees from congregating around the water cooler, requiring Asian Pacific Islander workers to eat in a segregated area of the cafeteria, or barring the use of ethnic given names, the joining of ethnic organizations, and the wearing of religious apparel, would be immune from Title VII simply because the worker can comply with such rules as a practical matter. Irrespective of one’s ability to comply, the central question under Title VII is whether the rule has a discriminatory effect.

Judge Reinhardt’s dissent from the Ninth Circuit’s refusal to rehear the case \textit{en banc} is germane to this point.

This analysis demonstrates a remarkable insensitivity to the facts and history of discrimination. Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences. Some of the most objectionable discriminatory rules are the least obtrusive in terms of one’s ability to comply: being required to sit in the back of a bus, for example; or being relegated during one’s law school career to a portion of the classroom dedicated to one’s exclusive use.\footnote{Reinhardt Dissent, supra note 69, at *3 (citations omitted).}

In refusing to recognize that Spun’s Speak-English-Only rule imposes a burden on communication, the Ninth Circuit not only proceeded upon a facile view of bilingualism but also embraced a broad principle that could significantly undermine anti-discrimination theory.

\section*{C. An Atmosphere of Inferiority, Isolation and Intimidation}

The Ninth Circuit panel then rejected plaintiffs’ claim that the Speak-English-Only policy created an atmosphere of inferiority, isolation, and
intimidation. In so holding, the court not only rejected the plaintiffs' show-
ing in this case, but also Section 1606.7 of the EEOC's Guidelines.\textsuperscript{104}

The panel reasoned that there can be no \textit{per se} rule that Speak-English-
Only policies “always infect the working environment to such a degree as

to amount to a hostile or abusive work environment.”\textsuperscript{105} The court held that

whether there is a hostile or abusive work environment sufficient to consti-
tute a Title VII violation is inherently a factual question that must be deter-

mined on a case-by-case basis.\textsuperscript{106}

Additionally, the court found that the plaintiffs presented no evidence

other than conclusory statements that Spun’s policy contributed to an

atmosphere of “isolation, inferiority, or intimidation.”\textsuperscript{107} It noted that bilin-
gual employees are able to comply with the rule and found no evidence of

racial animosity towards Latino workers. Indeed, “there is substantial evi-
dence in the record demonstrating that the policy was enacted to prevent the

employees from intentionally using their fluency in Spanish to isolate and
to intimidate members of other ethnic groups.”\textsuperscript{108} The court thus found that

the plaintiffs had failed to raise even a genuine issue of material fact as to

whether there was a hostile work environment.\textsuperscript{109}

The court did concede that a Speak-English-Only rule might create an

atmosphere of “isolation, inferiority, or intimidation” in some future

case.\textsuperscript{110} However, the Ninth Circuit apparently erected an insurmountably

rigorous standard to establish such a case:

We do not foreclose the prospect that in some circumstances

[Speak-English-Only] rules can exacerbate existing tensions, or,

when combined with other discriminatory behavior, contribute to an

overall environment of discrimination. Likewise, we can envision a

case in which such rules are enforced in such a draconian manner

that the enforcement itself amounts to harassment.\textsuperscript{111}

The Ninth Circuit’s refusal to find a triable issue of fact concerning the

existence of a discriminatory working environment is erroneous both as a

matter of law and fact. First, by accepting the employer’s asserted purpose

of the rule—preventing the misuse of Spanish to intimidate other employ-

ces—in a factually contested dispute, the panel ignored the standard of

proof applied to summary judgment.\textsuperscript{112} Second, the court confused the

threshold inquiry of disparate impact with the second stage inquiry into the

\begin{itemize}
  \item \textsuperscript{104} The Ninth Circuit’s rejection of the EEOC Guidelines on Speak-English-Only rules is
discussed in Part IV.D.
  \item \textsuperscript{105} Garcia v. Spun Steak Co., 598 F.2d 1480, 1489 (9th Cir. 1979), reh’g denied, 13 F.3d 296 (9th
  \item \textsuperscript{106} Id.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} The standard of review is not whether there is “substantial evidence” supporting the party to
whom summary judgment is granted, but whether the evidence, viewed favorably to the non-moving
party, establishes a triable issue of fact. Plaintiffs firmly denied making derogatory statements.
\end{itemize}
legitimacy of the employer's business justification for the rule.\textsuperscript{113} Finally, the virtually unattainable legal standard established by the court for proving a hostile work environment mistakenly relied on language quoted from Meritor Savings Bank v. Vinson,\textsuperscript{114} which in turn quoted Rogers v. EEOC:\textsuperscript{115}

\[ \text{The phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.} \textsuperscript{116} \]

But as the Supreme Court recently held in Harris v. Forklift Systems,\textsuperscript{117} Meritor and Rogers "merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable."\textsuperscript{118} All that is required is conduct severe or pervasive enough such that the working "environment would reasonably be perceived, and is perceived, as hostile or abusive."\textsuperscript{119}

The plaintiffs in Garcia testified as to the intimidating manner in which the Speak-English-Only rule was enforced and the oppressive effect of the rule upon the plaintiffs' psychological and emotional well-being.\textsuperscript{120} The plaintiffs also submitted uncontroverted expert testimony as to the likely impact of such rules upon national origin minorities.\textsuperscript{121} Yet, the panel found the evidence failed to raise even a triable issue of fact.

The gravamen of the Ninth Circuit's grant of summary judgment is that absent extraordinary circumstances, such as proof that a Speak-English-Only rule is accompanied by a pattern of other racial harassment, such rules are not discriminatory as a matter of law. The holding effectively removes Speak-English-Only rules from judicial scrutiny.

\section*{D. The Ninth Circuit's Rejection of the EEOC Guidelines}

Finally, the court rejected the EEOC's Guidelines regarding Speak-English-Only policies. The Guidelines presume that a Speak-English-Only

\begin{itemize}
\item \textsuperscript{113} Under disparate impact analysis, the establishment of the plaintiff's prima facie case is independent from the employer's justification for the challenged practice. Connecticut v. Teal, 457 U.S. 440, 446-47 (1982). In Garcia, the Ninth Circuit appears to have collapsed the two stage analysis. See Garcia v. Spun Steak Co., 998 F.2d 1480, 1486-90 (1993) (discussing, as part of the determination of whether plaintiffs had established a prima facie case, the legitimacy of Spun's Speak-English-Only policy rather than the policy's impact on Spanish-speaking workers), reh'g denied, 13 F.3d 296 (9th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3555 (Jan. 27, 1994).
\item \textsuperscript{114} 477 U.S. 57, 66 (1986).
\item \textsuperscript{115} 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).
\item \textsuperscript{116} Garcia, 998 F.2d at 1488 (quoting Meritor, 477 U.S. at 66).
\item \textsuperscript{117} 114 S. Ct. 367 (1993).
\item \textsuperscript{118} Id. at 371.
\item \textsuperscript{119} Id. (citations omitted).
\item \textsuperscript{120} See supra text accompanying notes 36-38.
\item \textsuperscript{121} See supra text accompanying notes 67 and 74.
\end{itemize}
rule, when applied at all times, has a disparate impact on those who have a primary language other than English. While superficially acknowledging the rule that courts normally defer to the expertise and judgment of the EEOC, the court declared that deference is not afforded to “an administrative construction of a statute where there are ‘compelling indications that it is wrong.’” According to the court, there were several such “compelling indications” in this case.

1. The Court’s Misplaced Reliance on Garcia v. Gloor

First, the court mistakenly relied upon the Fifth Circuit’s decision in Garcia v. Gloor, which held that a Speak-English-Only rule was not discriminatory as applied to a bilingual employee who was capable of complying with the rule. However, Garcia v. Gloor was decided before the EEOC Guidelines on Speak-English-Only rules were added in 1980. The Fifth Circuit in Gloor even noted the absence of guidelines to which they could defer at the outset of their opinion.

In following Gloor, the Ninth Circuit ignored the EEOC’s view that Gloor was limited to the situation in which the complainant had failed to demonstrate that his primary language was Spanish. Spanish, however, is the primary language of most of the Latino workers at Spun.

2. The Court’s Fallacy in Finding No Legislative History

Second, the Ninth Circuit found no legislative history supporting the EEOC’s presumption that Speak-English-Only policies are discriminatory. But as Judge Boochever correctly observed in his dissent, “[t]he lack of . . . the legislative history of Title VII . . . does not . . . make the guideline ‘inconsistent with an obvious congressional intent not to reach the employment practice in question.’” It is precisely when legislative history is lacking that deference to the enforcing agency’s interpretation is necessary and appropriate.

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122. See supra text accompanying notes 56-61.
124. 618 F.2d 264, 270 (5th Cir. 1980).
126. “Indeed, nowhere in the legislative history is there a discussion of English-only policies at all.” Garcia, 998 F.2d at 1490.
127. Id. at 1491 (Boochever, J., dissenting) (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973)).
128. State of Wash. Dep’t of Ecology v. United States Envtl. Protection Agency, 752 F.2d 1465, 1469 (9th Cir. 1985) (“When a statute is silent or unclear with respect to a particular issue, we must defer to the reasonable interpretation of the agency responsible for administering the statute.”); Chevron
Contemporaneous legislative history, however, does support the Guidelines. After the EEOC added section 1606.7 to its Guidelines in 1980, Congress substantially amended Title VII in 1991 by enacting the Civil Rights Act of 1991.\textsuperscript{130} In doing so, Congress did not seek to overrule the Guidelines on Speak-English-Only rules.\textsuperscript{131} Indeed, there is evidence that in enacting the Civil Rights Act of 1991, Congress consciously endorsed section 1606.7. During the congressional debate, Senator DeConcini expressed concern about "an increasing problem with nonjob related [sic] discipline and termination of people for speaking languages other than English in the workplace."\textsuperscript{132} In response, Senator Kennedy, co-author of the Civil Rights Act of 1991, assured Senator DeConcini that the EEOC's Guidelines addressed the situation, confirmed that section 1606.7 "has worked well during the past 11 years it has been in effect," and opined that it was consistent with Title VII as amended by the 1991 legislation.\textsuperscript{133}

Rather than relying on anything specific in the legislative history of Title VII, the Ninth Circuit simply made a general observation that "Congress intended a balance be struck in preventing discrimination and preserving the independence of the employer," and cited a single representative's general remarks made on the House floor.\textsuperscript{134} The court then made an unwarranted leap to the holding that the EEOC Guidelines, by creating a presumption that Speak-English-Only rules have a disparate impact upon national origin minorities, contravened that balance. Such reliance upon standardless generalities about legislative history in rejecting an administrative interpretation was tantamount to a judicial fiat.

3. The Court's Failure to Examine the Factors that Inform Deference to the EEOC

In rejecting the Guidelines, the panel in Garcia ignored specific factors the Supreme Court has identified as relevant in evaluating administrative interpretations by the EEOC. There currently exists some ambiguity regarding the degree of deference courts must give to EEOC administrative


\textsuperscript{131} "[D]eference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." United States v. Rutherford, 442 U.S. 544, 554 (1979) (holding that nothing in the legislative history of the Food, Drug, and Cosmetic Act demonstrates a Congressional intent not to apply the same safety standards it has already established to new drugs for terminally ill cancer patients), cert. denied, 449 U.S. 937 (1980).


\textsuperscript{133} Id. (remarks of Sen. Kennedy).

interpretations. This ambiguity can be seen in the Court's two most recent opinions on the subject, *EEOC v. Commercial Office Products Co.* 135 and *EEOC v. Arabian American Oil Co. (ARAMCO)* 136 Under either case, however, the Ninth Circuit erred in refusing to apply the EEOC interpretation to *Garcia*.

Under *Commercial Office Products*, the EEOC Guidelines are a "reasonable" interpretation of the ambiguous language of Title VII which does not define in any specific way the spectrum of national origin discrimination prohibited. 137 Title VII did not incorporate any previously accepted definition of the term "national origin;" the term was used infrequently prior to the adoption of Title VII. 138 However, as noted above, courts and commentators have interpreted statutory and constitutional provisions barring national origin discrimination as reaching language discrimination in general; and in other contexts, laws and policies which repress native languages have been found specifically to be unlawful. 139

Under *ARAMCO*, deference to the EEOC's interpretations depends upon "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 140 In *Garcia*, all these factors are present. First, the Commission thoroughly considered the matter of language discrimination and Speak-English-Only rules before promulgating section 1606.7 in 1980. The amended Guidelines were issued after the EEOC solicited and considered public comment, much of which was directed specifically at section 1606.7. 141 The thoroughness of the EEOC's consideration of those Guidelines is further evidenced by the

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135. 486 U.S. 107, 115 (1988) ("EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference.").

136. 499 U.S. 244, 257 (1991) (stating that deference to EEOC interpretation depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" (citation omitted)). Although this case's holding that Title VII does not regulate employment practices of U.S. firms abroad has been legislatively overruled by section 109 of the 1991 Civil Rights Act, the proposition in *ARAMCO* cited here remains valid.

137. Congress left the term "national origin" undefined: "[t]he only direct definition given the phrase 'national origin' is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: 'It means the country from which you or your forebears came ...'" Espinoza v. Farah Mfg. Co., 414 U.S. 86, 89 (1973) (quoting 110 Cong. Rec. H2549 (1964)).


140. *ARAMCO*, 499 U.S. at 257.

comprehensive compliance manual compiled by the EEOC in implementing it.\footnote{142}

Second, the validity of the Guidelines' reasoning is evidenced by the multiplicity of harms described above which are imposed upon national origin minorities by Speak-English-Only rules. In view of their pernicious and coercive effect, it certainly was reasonable for the EEOC to conclude that such rules tend to create "an atmosphere of inferiority, isolation and intimidation."\footnote{143} In any event, regardless of one's view about the socio-linguistic evidence on the matter, it is undeniable that, at a minimum, Speak-English-Only rules disproportionately deprive national origin minorities an employment opportunity afforded to all others: the opportunity to converse in their "primary language or the language they speak most comfortably."\footnote{144}

Finally, the Guidelines are consistent with earlier and later pronouncements. Since the passage of Title VII, the EEOC has taken the position in its administrative decisions and in its Compliance Manual, that Speak-English-Only rules have a discriminatory impact on national origin minorities and thus must be justified by business necessity.\footnote{145}

The Ninth Circuit's rejection of the EEOC Guidelines was especially inappropriate as a matter of policy. Given the discrimination inherent in Speak-English-Only rules, individualized proof of specific facts should be unnecessary.

Moreover, claims that such rules have disparate impact on language minorities, while seemingly self-evident, are difficult to prove on a case-by-case basis as a factual matter. These claims turn more on subjective factors and expert opinion rather than factors that can be objectively verified through statistical analysis. An institutionalized practice such as the Speak-English-Only policy at Spun is inherently pervasive, applying to virtually all employees whose primary language is not English. As discussed above, such a blanket rule, by its very operation, suppresses an essential aspect of minority employees' ethnicity and national origin. It also interferes directly with their daily communications and relationships with co-workers.

\footnote{142} See 2 EEOC Compl. Man. (CCH) ¶ 4001-35 (detailing procedures on how to investigate Speak-English-Only policies and discussing theories of discrimination and language rights issues in the section entitled, "Speak-English-Only Rules and Other Language Policies").
\footnote{143} 29 C.F.R. § 1605.7(a) (1993).
\footnote{144} Id.
\footnote{145} In an unreported decision in 1967, the Commission found that such rules clearly constitute a form of national origin discrimination. \textit{Babara L. Schleki \& Paul Grossman, Employment Discrimination Law} 253 n.19 (1976) (describing EEOC Dec. AU7-2-88 (1967)). In a subsequent reported decision, the Commission found a Speak-English-Only rule "has the obvious and clear effect of denying Respondent's Spanish surnamed American employees (as well as other minority groups . . .) a term, condition, or privilege of employment enjoyed by other employees: to converse in a familiar language with which they are most comfortable," and thus violates Title VII unless a business necessity is shown for the policy. EEOC Dec. 71-446, 1970 EEOC LEXIS 67, at *7 (Nov. 5, 1970). Succeeding decisions reaffirmed the Commission's position that Speak-English-Only rules have a discriminatory impact upon national origin minority workers. See EEOC Dec. 72-281, 1971 EEOC LEXIS 8, at *1 (Aug. 9, 1971); EEOC Dec. 73-0479 (CCH) ¶ 6381 (EEOC 1973).
plant-wide Speak-English-Only rule is "sweeping in nature and has a direct
effect on the general atmosphere and environment of the work
place." 146

As Judge Boochever pointed out in his dissent from the panel opinion:
It is hard to envision how the burden of proving such an effect will
be met other than by conclusory self-serving statements of the
Spanish-speaking employees or possibly by expert testimony of psy-
chologists. The difficulty of meeting such a burden may well have
been one of the reasons for the promulgation of the guideline. On
the other hand, it should not be difficult for an employer to give
specific reasons for the policy, such as the safety reasons advanced
in this case. 147

Proving actionable harassment based on the conduct of individual supervi-
sors or co-workers is far more fact-intensive than establishing the intimidat-
ing effect of a company-wide rule which only disadvantages a protected
class of employees. Thus, the presumption of discriminatory impact out-
lined in the EEOC Guidelines may be the only viable means to prove dis-
crimination in most cases.

V.
CONCLUSION: THE IMPLICATIONS OF GARCIA V. SPUN STEAK CO.

By refusing to find disparate impact except in extreme cases, the Ninth
Circuit's decision effectively bars at the courthouse door national origin
minorities who attempt to challenge Speak-English-Only rules. Garcia
threatens the viability of all challenges to this increasingly prevalent form
of language discrimination. For example, in a recent claim brought by
Filipino Americans and other health care workers against a chain of conva-
lescent hospitals in the San Francisco Bay Area, 148 the hospital's manage-
ment cited the Garcia decision to support its explicit Speak-English-Only
policy which bars all workers from speaking languages other than English
except in the employee break room. 149

Under Garcia, employers are not even required to articulate, much less
prove, a legitimate business justification for a Speak-English-Only rule.

146. Gutierrez v. Municipal Court, 838 F.2d 1031, 1041 (9th Cir. 1988).
147. Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir. 1993) (Boochever, J., dissenting),
reh'g denied, 13 F.3d. 296 (9th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3555 (Jan. 27, 1994).
149. A letter to the field representative for Local 250 Hospital and Health Care Workers Union
from counsel for Hillhaven Convalescent Hospital stated:
[F]ederal law does not support a claim that [Hillhaven's Speak-English-Only policy] is
discriminatory. In fact, a number of recent federal court decisions . . . have specifically held
that such policies do not violate Title VII of the Civil Rights Act, and are not discriminatory.
Furthermore, in [Garcia] . . . the [Ninth Circuit] specifically repudiated the position
advanced by the [EEOC] on this issue. . . . It is the position of Hillhaven, as supported by the
Garcia decision, that the EEOC has incorrectly interpreted the law, and that the facility's
language policy does not discriminate against employees under Title VII.
Letter from Geralyn A. Kidem, Senior Associate Counsel, and Michael Manning, Director of Labor
Relations, The Hillhaven Corporation, to Nancy Herrera-Barrett, field representative, Local 250
Hospital and Health Care Workers Union 1-2 (July 26, 1993) (on file with author).
Thus, even tenuous justifications would presumably survive without any scrutiny whatsoever. For example, an employer could say that a Speak-English-Only rule is needed because the sound of the Spanish language “cheapens” the company’s image.

In some instances, Speak-English-Only rules may be legitimate, as in situations where employees are serving English-speaking customers or when a team of workers are working on a common task such as on an oil rig. More often, however, the justifications commonly advanced by employers—customer preference and preserving workplace morale—are insufficient and founded on baseless cultural stereotypes. Some employers rely upon customer preference, stating that customers prefer to hear English rather than foreign languages. However, such a justification effectively caters to customer prejudice and cannot be tolerated under anti-discrimination principles.150

The second common defense for imposing Speak-English-Only rules is to preserve employee morale. If anything, Speak-English-Only rules are actually counterproductive. They increase, rather than mitigate, intergroup tensions in the workplace. Michael Adams, Assistant Vice Chancellor of Affirmative Action/Equal Opportunity at the University of California, San Francisco, described this irony:

[M]orale problems which stem from employee conflicts, particularly when they occur along racial and cultural lines, are best addressed by positive and constructive steps that build trust and mutual respect, such as mediation, increased cross-cultural awareness, and opening lines of communications to permit employees to discuss their fears and suspicions. This is far more effective than suppressing the rights of one particular segment of the workforce . . . .

In the context of a workplace, where foreign languages are spoken and some employees suspect they are being spoken about, the implementation of [a Speak-English-Only] rule can be counterproductive; . . . [such a rule] is likely to confirm and validate the fears and suspicions of the English speaking employees. This can result in English speaking employees harboring even greater distrust of employees who speak foreign languages while at the same time making foreign language speaking employees resentful for being unfairly punished when they have done nothing wrong. It may also

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150. See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984). In Palmore, the Supreme Court refused to accept the potential societal prejudices that a child being raised in a mixed-race family might experience as a reason for withholding custody from the child’s mother. Chief Justice Burger, writing for the unanimous Court, declared:

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

Id. at 434.
be perceived as an insult to their culture or ethnicity. Thus, rather than enhancing employee morale, imposition of [a Speak-English-Only] rule is likely to impair morale and create greater tension. Even worse, because of the punitive atmosphere created by such a policy, those tensions are likely to fester since they are not openly addressed and resolved.\(^{151}\)

Thus, catering to English-speaking employees who suspect that they are being talked about when co-workers speak in another language merely validates these other workers' innate and irrational distrust of foreign language speakers. Even where there is a factual basis for such suspicions, the implementation of a sweeping Speak-English-Only rule is generally unnecessary, as the facts of \textit{Garcia} demonstrate.

The \textit{Garcia} decision has disturbing ramifications beyond the specific context of Speak-English-Only workplace rules. The court's analysis, if carried to its logical end, considerably weakens Title VII. First, the Ninth Circuit's holding that Title VII does not reach discriminatory practices so long as an employee can comply as a practical matter with the practices could place a wide range of objectionable and demeaning conditions of employment beyond Title VII's reach. Second, the court's demanding standard for proving a hostile work environment, even in cases involving an institutionalized discriminatory practice, imposes an unreasonable and virtually insurmountable burden on many Title VII plaintiffs. Third, the court's holding, which effectively bars the EEOC from ever presuming a particular practice has a discriminatory impact, unnecessarily burdens the enforcement of Title VII. As Judge Reinhardt aptly observed:

In effect, the majority holds that the agency is without authority to determine that Speak-English-Only rules and similar discriminatory practices are invalid generally. The majority apparently believes that the question of the validity of a widespread discriminatory practice must be decided over and over again on a case-by-case basis in a private lawsuit each time a new employer adopts it. The majority's remarkably narrow view of the EEOC's authority is reminiscent of courts of the 1930s which refused to accept agency findings regarding labor and food standards. It is a particularly odd view for the 1990s given the broad authority that courts have allowed agencies to exercise in recent years.\(^{152}\)


\(^{152}\) Reinhardt Dissent, \textit{supra} note 69, at *5. Judge Reinhardt also noted:

\textit{Under the majority's unique approach, an EEOC guideline stating, for example, that rules requiring employees to be at least six-feet tall are presumed to have a disparate impact on women would be held invalid even though the Supreme Court had held that height and weight requirements have a disparate impact on women and the factual and statistical issue is the same in all cases.}

\textit{Id. at 300 n.7.}
Perhaps most troubling, the Ninth Circuit's decision could lend validity to nativism and language discrimination generally. As noted at the outset, the increasing prevalence of Speak-English-Only workplace rules has not occurred in a social vacuum. These workplace rules resonate with a larger English-Only philosophy which espouses the view that the primacy of the English language in the United States is being threatened by immigrants who, unlike the immigrants of the early 1900s, are more resistant to assimilation and slow to learn the English language.\footnote{153. \textit{But see} Mealey, \textit{supra} note 19, at 392 n.21 ("'IThere is little evidence that Spanish speakers cling to their language any more fervently than did previous groups of immigrants.' Studies show that Spanish speaking families in Miami are learning English as fast as previous immigrant groups." (citations omitted)).} The distrust of foreign language-speaking workers (who typically are Latino and Asian Pacific Islander) commonly engendered in Speak-English-Only workplace rules, parallels society's increasing discomfort with the new generation of immigrants from Asia and Latin America. There is growing public sentiment that language and ethnic diversity is a threat to the nation's social and cultural status.\footnote{154. \textit{See generally} Califa, \textit{supra} note 13 (discussing the history and xenophobic context of the English-as-the-official-language movement and arguing that a proposed federal English-Only law would violate the equal protection clause of the Fourteenth Amendment).} \textit{Garcia} is likely to lend an imprimatur to intolerance of foreign languages and those who speak them.\footnote{155. In an analogous context, a commentator has opined that "English only policies only encourage hostility toward immigrants and increase intolerance toward citizens, especially Asians and Latinos, whose first language is not English." Mary Nichols, \textit{The English-Only Movement Legitimizes Attacks on Brotherhood and Tolerance}, \textit{L.A. Times}, Feb. 19, 1989, at El, E5.} In its most basic terms, the message transmitted to the streets and corporate suites from this decision is that it is permissible to suppress non-English languages.

Ultimately, by sanctioning the repression of diverse languages, the \textit{Garcia} decision embodies a vision of American society marked by coerced conformity rather than cultural pluralism. The essence of the decision is that minority workers may be forced to discard their national origin identity in order to work.

To tell the minority group member that he must discard the characteristic manifestations of his national identity in order to have a truly equal and fair opportunity to compete for a job is to tell him that his identity has no place in American society. Indeed, it is to exclude him from that society as long as he retains his ethnic identity.\footnote{156. Cutler, \textit{supra} note 49, at 1177-78.} No one should be compelled to pay such a price simply to earn a livelihood in America.

The Ninth Circuit's decision could not have come at a worse time. It is delivered in an environment of growing anti-immigrant backlash and in a society that increasingly fears and distrusts rather than values and celebrates ethnic and linguistic diversity. The Ninth Circuit's decision can only exacerbate that fear and distrust. Advocates on both sides of the English-only battle have used English-as-the-official-language measures and Speak-
English-Only rules as the battleground for national solidarity. The Los Altos, California resolution declaring English the official language stated in part that "a common language is necessary to preserve the basic internal unity required for political stability and cohesion." However, those who support ethnic and linguistic pluralism offer an alternative vision: "[t]he bond that unites our nation is not linguistic or ethnic homogeneity but a shared commitment to democracy, liberty and equality." In a distressing blow to civil rights, the Garcia decision rejected a template for democracy that embraces societal and workplace pluralism and implicitly adopted one that can only breed intolerance.

157. Brandon Bailey, English the Official Language of Los Altos, SAN JOSE MERCURY NEWS, Dec. 18, 1985, at 1B.
158. English Only, ACLU BRIEFING PAPER No. 6 (ACLU, New York, N.Y.) at 2.