English Only Rules in the Workplace

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INTRODUCTION

- What are English-Only Rules?

- Goals of the Webinar
  - To help you understand when English-Only Rules are Legal.
  - To give you information to help defeat an EEOC lawsuit.

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The LAW on English-Only Rules
Garcia v. Gloor

- *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).
  - the Fifth Circuit said that where the employer's workforce was bilingual, the Hispanic employee's Title VII rights weren't offended by an English only rule.
  - In so doing, it rejected the employee's contention that he was denied the privilege in his employment of speaking the language in which he was most comfortable and that this was national origin discrimination because national origin influenced his language preference.
  - The court reasoned that there was no privilege of employment involved here and that there is no disparate impact if the rule is one that the plaintiff could have observed, but chose not to.

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The LAW on English-Only Rules
Garcia v. Gloor

- Despite its holding, *Garcia v. Gloor* said a number of things that should have comforted those attacking English-only rules.
  - "We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification. "
  - "Difference in language and other cultural attributes may not be used as a fulcrum for discrimination. . . [and] [i]n some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin."

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The LAW on English-Only Rules EEOC Issues Guidelines

- The EEOC Issues Guidelines in Response to *Gloor* (29 CFR § 1606)
  - The Guidelines clearly state the EEOC's view -- national origin discrimination could be the result of "a denial of equal employment opportunity because of linguistic characteristics of a national origin group."
  - The Guideline that applies to English only rules when they require English at all times in the workplace.
    - EEOC presumes – conclusively – that such rule violates Title VII.
  - The Guideline that applies to rules that apply only at certain times.
    - EEOC presumes that these rules are illegal – that they had a substantial negative effect on the terms, conditions and privileges of one's employment, but the employer can rebut the presumption if it could show that the rule was "justified by business necessity."

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The LAW on English-Only Rules
Garcia v. Spun Steak

- *Garcia v. Spun Steak,* 982 F.2d 1480 (9th Cir. 1992) addresses level of deference to EEOC guideline
  - 9th Circuit rejects the EEOC guideline because both Supreme Court case law and the recent amendment to Title VII made certain that a plaintiff in a disparate impact case must actually prove the essential element of a prima facie case – that the rule has a ***substantial, adverse impact*** on the terms, conditions or privileges of the plaintiff's employment.

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The LAW on English-Only Rules
Garcia v. Spun Steak

- The *Spun Steak* court then concluded that the plaintiff failed to prove substantial, adverse impact because as in *Gloor,* the employees, save for one, were bilingual.
  - The Court stated: "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. "

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The LAW on English-Only Rules
Garcia v. Spun Steak

- *Spun Steak* also explicitly rejected the the improved attempt to prove that even bilingual employees suffer a disparate impact on account of their national origin from English only rules.
    - » The argument was that bilingual people whose native language is, say, Spanish, may involuntarily use a Spanish word or two, or even lapse into Spanish during a conversation because they are uncomfortable with the English expression – and hence, these employees are subject to discipline not because of choice, but because of something they can't control.

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The LAW on English-Only Rules
Garcia v. Spun Steak

- *Spun Steak* also held out some hope for non-English speakers.
  - It held that an English only rule might well have a sufficiently adverse impact on a non-English speaker in terms of being deprived of the privilege of speaking while at work.

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The LAW on English-Only Rules Decisions Since *Spun Steak*

- Some cases fully subscribe to *Spun Steak* - rejecting the EEOC Guidelines and concluding that English only policies can't have an adverse impact on bilingual employees.
  - *Long v. First Union Corp.*,894 F. Supp. 933 (E.D.Va.1995), affirmed, *Long v. First Union Corp. of Virginia*, 86 F.3d 1151 (4th Cir. 1996).

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The LAW on English-Only Rules Decisions Since *Spun Steak*

- Two District Court cases agree with the "no adverse impact" conclusion that the *Spun Steak* court reached, but essentially ignore the EEOC guidelines.
  - *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997).
  - *Navarette v. Nike Inc.*, 2007 WL 2890976, at *7 (D. Or. Sept. 28, 2007).

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The LAW on English-Only Rules Decisions Since *Spun Steak*

- Several District Court cases reject the EEOC Guideline, but leave open the possibility that an English only rule could have an adverse impact on bilingual speakers.
  - *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730 (E.D.Pa.1998).
  - *Cosme v. Salvation Army*, 284 F.Supp.2d 229 (D.Mass.2003).
  - *EEOC v. Beauty Enterprises, Inc.*, 2005 WL 2764822 (D. Conn. 2005).

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The LAW on English-Only Rules Decisions Since *Spun Steak*

- Other cases give some deference to the Guidelines and assume, but do not explicitly decide, that adverse impact may be presumed, but find that the employer had a legitimate business reason for the English-only rule and that the employee failed to offer a less discriminatory alternative. For example,
  - *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 414, 416-17 (S.D.N.Y. Sept. 13, 2005).
  - *Barber v. Lovelace Sandia Health Systems*, 409 F. Supp.2d 1313 (D. N.M. Dec. 31, 2005).
  - *Gonzalo v. All Is. Trans.*, 2007 WL 642959 (E.D.N.Y. Feb. 26, 2007).
  - *Pacheco v. New York Presbyterian Hospital*, 593 F. Supp.2d 599 (Jan. 9, 2009).

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The LAW on English-Only Rules Decisions Since *Spun Steak*

- Only three cases explicitly accept – defer to – the EEOC Guidelines, presume adverse impact and either found the rules illegal or suggested that this could be the result at trial.

Two are district court cases:

- *EEOC v. Synchro-Start Prods., Inc.*, 29 F.Supp.2d 911 (N.D.Ill.1999).
- *EEOC v. Premier Operator Servs.*, 113 F.Supp.2d 1066 (N.D.Tex.2000).

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The LAW on English-Only Rules
Maldonado v. City of Altus

- *Maldonado v. City of Altus,* 433 F.3rd 1294, 1307 (10th Cir. 2006, abrogated in part on other grounds, *Burlington N. & Santa Fe Ry. Co. v. White*, __U.S. --, 126 S.Ct. 2405, 2414-15, 165 L.Ed.2d 345 (2006).
  - The only other Circuit Court case since *Spun Steak* to reject the *Spun Steak* holding and defer to the EEOC guidelines.
  - The City of Altus had a sweeping English-only policy for all its employees for all work related and business communications during the work day.
  - The plaintiffs charged that this created a hostile work environment for Hispanic employees.

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The LAW on English-Only Rules
Maldonado v. City of Altus

- The Tenth Circuit reversed the district court's grant of summary judgment for the City on both the disparate impact and disparate treatment claims.

- The Court rested its decision largely on the Guidelines, finding that they were "entitled to respect, not as interpretations of the governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference."

- The Tenth Circuit clearly believes that an English only policy could constitute national origin discrimination and that the EEOC guidelines provide at least persuasive evidence for the court to consider."

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The LAW on English-Only Rules
Montes v. Vail Clinic

- Subsequent to *Maldonado*, the 10th Circuit released another opinion in 2007, focusing on a more narrowly tailored English-only rule challenged as national origin discrimination on a hostile environment theory.

- In *Montes v. Vail Clinic*, 497 F.3d 1160 (10th Cir. 2007), the Court acknowledged the deference due the EEOC guidelines, but then contrary to the suggestions in *Maldonado,* it found the policy, which prevented bilingual cleaning employees from speaking Spanish only in surgical operating rooms, insufficient to support a hostile environment claim.

- It also found that the rule was justified by business necessity – that clear and precise communication between cleaning staff and medical staff was essential for the proper functioning of the operating rooms."

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Reflections on Litigating Against the EEOC in Defense of English Only Rules

- The EEOC will to try to prove that the workers aren't really bilingual, that they can't communicate in two languages easily and naturally, that their English is pretty limited.
  - The EEOC will insist that the employees testify through interpreters, both at depositions and at trial, and will try to establish through their testimony and demeanor that their English is limited.
  - It may even have an expert test their English language ability and testify to his or her findings.
  - Defense counsel's job is to go through the kind of things the workers have to communicate with each other on the job to perform the job and show that the workers have the ability to communicate these things naturally and easily in English and at the same time, go through the kind of things the workers do in every day life where they are exposed to and/or use English.

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Reflections on Litigating Against the EEOC in Defense of English Only Rules

- The EEOC will try to show substantial and adverse impact by showing that the rule causes stigmatization and other related harmful psychological or emotional effects.
  - Assuming this evidence is admitted or you contest its admissibility, the defense lawyer can argue that this isn't the type of impact that concerns Title VII, that Title VII was not intended to protect an employee's feelings, that the test here is whether the rule has a substantial and adverse impact on some term, condition or privilege of employment – and feeling good (or at least not badly) about one's self is not a term, condition or privilege of employment.

  - Then, defense counsel should argue for the term, condition or privilege at issue and then present evidence and argument to show that the rule doesn't affect it adversely.

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Reflections on Litigating Against the EEOC in Defense of English Only Rules

- The EEOC will try to prove the "blow to self esteem" effect.
  - The EEOC has a couple of expert socio-linguists who come in, read the employees' depositions, interview them and the expert says based on her experience, these feelings are natural and common in people similarly situated.
  - I attempted to attack this in my case through a *Daubert* motion, arguing that this testimony wouldn't be helpful to a jury because all this is common sense, not expertise. Unfortunately, I lost.
  - My Plan B was to discredit the expert by showing that she was just an advocate with a big time point of view and all she was doing was listening to the same evidence the jury heard and drawing conclusions that the jurors were capable of drawing for themselves. I never got to make this argument because the case settled.

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Reflections on Litigating Against the EEOC in Defense of English Only Rules

- The EEOC will try to argue that non-English speakers slipping into their own language is a common phenomenon and is involuntary; hence, contrary to the *Gloor* and *Spun Steak* courts' conclusions, the case is not about the employer's right to deny employees the ability to choose the language in which they'll converse, it's about punishment for involuntary conduct.
  - The EEOC will try to prove the factual predicate for the argument with the same socio-linguistic experts. They call the phenomenon "code-switching," and indeed, code-switching is a recognized linguistic phenomenon with a rather significant body of literature identifying and discussing it.
  - The only available defense to this is to show that the employer doesn't discipline employees for occasional use of a non-English word or phrase or even some minor lapsing into a language other than English.

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Questions?

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