

**AMERICA'S MELTING POT: LANGUAGE NOT INCLUDED. U.S.
WORKPLACE LANGUAGE DISCRIMINATION AND
THE EUROPEAN UNION APPROACH
AS A MODEL FRAMEWORK**

INTRODUCTION

America has long struggled with its identity as a melting pot of many peoples.¹ Americans recognize multiculturalism as a great strength of their country and embrace differences among individuals on the whole.² Coexisting with this appreciation of differences is a long history of the use of language as a tool of subjugation. This springs largely from the majority's fear of domination by the very minority groups that comprise our valued diversity.³ English-only rules in the workplace are a recent example of this tension between viewing multicultural characteristics as strengths and simultaneously feeling compelled to dominate expressions of minority characteristics.

1. See generally, e.g., Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N. C.L. REV. 303 (1986) (exploring the struggle between America's history of multiculturalism and the compulsion of the majority to dominate cultural minorities). Karst includes a section on language as both defining a cultural group and also providing a vehicle for discrimination. *Id.* at 351-58. See also Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1179 (1985) ("Of course, this pluralistic vision clashes with the pervasive image of the American melting pot.") The melting pot "envision[s] the assimilation of all newcomers into a singular American identity, from which cultural and ethnic differences have disappeared." *Id.* "A tension between the two ideas—cultural pluralism on the one hand and assimilation on the other—is an inevitable outgrowth of the integrative efforts of a minority ethnic group that seeks also to preserve its distinct cultural identity." *Id.*

2. See Karst, *supra* note 1, at 377. See also *Gutierrez v. Mun. Ct. of the Se. Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1038 (9th Cir. 1988) (citing Karst, *supra* note 1, at 361-69, 376-77).

3. See generally Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849 (1995) (providing a history of language in America and presenting examples of attempts to dominate minority groups through language restrictions, including the movement for official English and English-only workplace rules).

This Comment compares the current U.S. approach to English-only rules⁴ to the European Union (EU) approach to workplace language discrimination and offers the EU method as a model framework which the United States should use to improve and modernize its approach. In the United States, language has yet to attain the status of a protected class under Title VII of the Civil Rights Act,⁵ although a compelling argument has been made for language inclusion under the protected class of national origin.⁶ In contrast, the European Union expressly protects language from discrimination and defines language as it does race or sex, as a class of its own.⁷

Part I of this Comment presents an overview of the nature of English-only rules and outlines the basic law governing English-only workplace rules in the United States: namely, Title VII of the Civil Rights Act.⁸ Part II compares four areas in which the U.S. law and the EU law diverge in both theory and application of the law to language restrictions in the workplace: (1) the view of language as a characteristic protected from discrimination, (2) the types of claims allowed in challenging English-only rules, (3) the burdens of proof in the United States and the European Union, and (4) the arguable mutability of language as disqualifying it from protection. Presenting these U.S. issues in contrast with those of the European Union shows that the European Union provides a framework that can more adequately address language discrimination. Finally, Part III details the full framework of the EU approach to language generally and language restrictions in the workplace. Through this more in-depth

4. An "English-only rule" is a workplace rule that requires employees speak only English either all of the time or part of the time. 29 C.F.R. § 1606.7 (2007).

5. 42 U.S.C.A. § 2000e-2a (West 2007).

6. See, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1298 (10th Cir. 2006); *Gutierrez*, 838 F.2d at 1036-38; *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000); *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 911-12 (N.D. Ill. 1999).

7. "[T]he term 'racism' should be understood in a broad sense . . . these concepts, which vary over time, nowadays cover . . . race, colour, religion, language, nationality and national and ethnic origin." European Comm'n Against Racism & Intolerance, *ECRI General Policy Recommendation No. 7: National Legislation to Combat Racism and Racial Discrimination 12* (2002) [hereinafter *The Recommendation*], available at http://www.coe.int/t/e/human_rights/ecri/4-Publications/ (follow "RECOMMEN- DATION N° 7" hyperlink).

8. 42 U.S.C.A. § 2000e (West 2007).

examination of recent EU language discrimination legislation, it is apparent that the European Union views multilingualism in the workplace as a strength,⁹ much to its benefit in a global world. Part III then argues that the EU approach is a model framework which the United States should consider in settling the still unresolved issue of U.S. English-only rules.¹⁰

I. U.S. LAW ON ENGLISH-ONLY WORKPLACE RULES

A. *What is an English-Only Rule?*

An English-only rule is a rule made by an employer that restricts the employees' use of any language other than English while at work.¹¹ The rules can vary in their effect upon an employee depending upon the scope of the rule and the employee's proficiency in English.¹² For example, some English-only rules prohibit the use of other languages while the employee engages in specific tasks, such as interacting with customers or speaking in areas where customers are often present.¹³ On the other hand, some rules require an employee

9. See, e.g., The Official Site of the European Union, *Language Learning*, <http://europa.eu/languages/en/chapter/14> (last visited Nov. 4, 2007). "The European Union actively encourages its citizens to learn other European languages, both for reasons of professional and personal mobility . . ." *Id.* See also The Official Site of the European Union, *Linguistic Diversity: Policies*, <http://europa.eu/languages/en/chapter/18> (last visited Dec. 1, 2007). "[T]he Commission has set a target of "Mother tongue-plus-two" for its policy on language skills." *Id.*

10. The Supreme Court has not yet ruled on whether English-only rules discriminate based on national origin. See *Mun. Ct. of the Se. Judicial Dist., County of Los Angeles v. Gutierrez*, 490 U.S. 1016 (1989). The Supreme Court granted certiorari in *Gutierrez*, but the appeal was dismissed as moot. *Id.*

11. E.g., *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980). Employees were permitted to speak Spanish while on the sales floor only when assisting a Spanish-speaking customer. *Id.* The employees were not permitted to speak Spanish to each other while on the sales floor, regardless of the primary languages of the employees. *Id.* Spanish was permitted to be spoken in parts of the store which customers did not routinely visit. *Id.*

12. Compare *Gloor*, 618 F.2d 264 (fully bilingual employees), with *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999) (employees with varying degrees of English proficiency).

13. See *Gloor* 618 F.2d at 266 (reviewing a rule allowing employees to speak Spanish at all times, except while on the sales floor, at which time English is the only permitted language). The rule did not apply during breaks or in places where

speak only English at all times, including in personal conversations, while on breaks, and during phone conversations with family members.¹⁴

In some instances, the employer specifically requires or prefers bilingual proficiency and subsequently enacts English-only rules.¹⁵ This contradictory behavior especially blurs any rationale behind the rules. In *EEOC v. Premier Operator Services*,¹⁶ for example, the employer recruited and hired “based or conditioned upon [an applicant’s] bilingual ability” and viewed the ability to speak Spanish as “an asset in conducting its business.”¹⁷ Subsequently, however, the employer enacted an English-only rule of the most comprehensive nature.¹⁸ The rule required employees to speak only English at all times (except when assisting a Spanish-speaking customer) including during breaks, lunch hours, during free time, and during personal telephone calls.¹⁹ Equally perplexing is the employer who does not require English speaking ability or even English comprehension as a job requirement and subsequently enacts an English-only rule which requires the use of only English for employees who speak no English at all.²⁰

customers did not regularly visit. *Id.* Most of the employees in *Gloor* were bilingual, but some spoke no English at all. *Id.* Garcia was discharged for violating the English-only rule when a Spanish-speaking employee asked Garcia for an item, and Garcia replied to the co-worker in Spanish while on the sales floor. *Id.*

14. *See, e.g., EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000). Bilingual employees were not permitted to use anything but English at all times while at work, except when assisting a Spanish-speaking customer. *Id.* at 1069. The rule applied during breaks and during phone calls home. *Id.* The employer “admits that it went as far as to plan installation of a public telephone outside of the building, so that Hispanic employees would have to go outside to make personal phone calls during which they might speak Spanish.” *Id.*

15. *E.g., Velasquez v. Goldwater Memorial Hospital*, 88 F. Supp. 2d 257, 260 (S.D.N.Y. 2000); *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1068 (N.D. Tex. 2000).

16. *Premier Operator Servs.*, 113 F. Supp. 2d at 1068.

17. *Id.*

18. *See id.* at 1069.

19. *Id.*

20. *See Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993). The company never required either the speaking or comprehension of English of its employees as a condition of employment but enacted an English-only rule when monolingual English speakers complained that Spanish was being used to harass

In *Maldonado v. City of Altus*,²¹ a Hispanic employee commented on the employer's English-only policy, illustrating the constant pressure a bilingual speaker might experience when subject to such a rule:

The English-only policy affects my work everyday. It reminds me every day that I am second-class and subject to rules for my employment that the Anglo employees are not subject to. I feel that this rule is hanging over my head and can be used against me at any point when the city wants to have something to write me [up] for.²²

B. Title VII

Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate in the workplace based upon race, color, religion, sex, or national origin.²³ The statute provides as follows:

It shall be 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; or 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.²⁴

It is not insignificant that the language of Title VII goes beyond what could be considered ordinary workplace discrimination; that is, the refusal to hire or promote an individual on the basis of some characteristic.²⁵ Instead, Title VII goes further to designate other

them. *Id.* The company allowed an exception to the English-only rule for at least one employee who spoke only Spanish. *Id.*

21. *Maldonado v. City of Altus*, 433 F.3d 1294, 1298 (10th Cir. 2006).

22. *Id.* at 1301.

23. 42 U.S.C.A. § 2000e-2a (West 2007).

24. *Id.*

25. The language of Title VII also prohibits anything that "limit[s], segregate[s], or classif[ies] . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities

kinds of treatment as discriminatory, including a “segregation or classification” of an employee, and the “terms, conditions or privileges” of employment.²⁶ This is especially relevant in English-only cases because in most instances these more subtle changes in employment take place when individuals are subject to the rules.²⁷

English-only rules generally have been challenged in an employment discrimination context under Title VII’s protected class of national origin,²⁸ but claims are also cognizable under the protected class of race,²⁹ under the Civil Rights Act of 1866, section 1981,³⁰ and as Constitutional violations.³¹ Generally, the allegation from employees subject to English-only rules is that compliance is more

or otherwise adversely affect his status as an employee” 42 U.S.C.A. § 2000e-2a(2) (West 2007).

26. *Id.* In *Spun Steak*, the court stated in regards to an English-only case that it was “satisfied that a disparate impact claim may be based upon a challenge to a practice or policy that has a significant adverse impact on the ‘terms, conditions, or privileges’ of the employment of a protected group” 998 F.2d 1480, 1485-86 (9th Cir. 1993).

27. “The conditions of work encompass the workplace atmosphere as well as the more tangible elements of the job.” *Maldonado v. City of Altus*, 433 F.3d 1294, 1303 (10th Cir. 2006). “Plaintiffs allege that the defendant . . . ha[s] discriminated against . . . them on the basis of their national origin with respect to the terms, conditions, and privileges of employment, and created a hostile work environment” *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 939 (E.D. Va. 1995). One of the most recent English-only cases, *Maldonado v. City of Altus*, went so far as to recognize that the mere existence of an English-only policy in itself may negatively affect the conditions of employment in a discriminatory way, regardless of whether the actual effects in a particular employment setting are felt by a protected class. 433 F.3d 1294, 1304-05 (10th Cir. 2006).

28. *E.g.*, *Maldonado*, 433 F.3d at 1298; *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993); *Gutierrez v. Mun. Ct. of the Se. Judicial Dist., Los Angeles County*, 838 F.2d. 1031, 1036 (9th Cir. 1988); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1408 (9th Cir. 1987); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980); *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1068 (N.D. Tex. 2000); *Velasquez v. Goldwater Mem’l Hosp.*, 88 F. Supp. 2d 257, 259 (S.D.N.Y. 2000); *EEOC v. Synchro Start Prods., Inc.*, 29 F. Supp. 2d 911, 911(N.D. Ill. 1999).

29. *E.g.*, *Maldonado*, 433 F.3d at 1298; *Gutierrez* 838 F.2d at 1036.

30. *E.g.*, *Maldonado*, 433 F.3d at 1298; *Gutierrez*, 838 F.2d at 1036; *Jurado*, 813 F.2d. at 1408; *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 937 (E.D. Va. 1995).

31. *E.g.*, *Maldonado*, 433 F.2d. at 1036; *Gutierrez*, 838 F.2d at 1036.

difficult for bilingual employees than it is for a monolingual English speaker, and therefore, the bilingual worker will run a higher risk of exposure to the employer's disciplinary measures for breaking the rule.³² The ability to speak a language other than English often exists because an individual is born, or has ancestors that were born, outside this country.³³ Therefore, according to the argument for including language as an aspect of national origin, the heavier burden experienced by the non-native English speaker is due to his or her national origin.³⁴

32. See, e.g., *Premier Operator Servs.*, 113 F. Supp. 2d at 1068. In *EEOC v. Premier Operator Services*, the Equal Employment Opportunity Commission (EEOC) charged, and the court agreed, that workers whose primary language was Spanish were discriminated against under the disparate impact analysis because "employees at Premier who did not speak Spanish, and who were not of Hispanic national origin, were not subject to the same oppressive monitoring or potential discipline and discharge as were the Hispanic employees." *Id.* at 1075. In *Garcia v. Gloor*, the court described the plaintiffs' argument, stating "that the rule is discriminatory in impact, even if that result was not intentional, because it was likely to be violated only by Hispanic-Americans and that, therefore, they have a higher risk of incurring penalties." *Gloor*, 618 F. 2d at 270.

33. Or, it at least is a likely corollary. Census information for 2005 shows that of the 35,689,842 foreign born individuals in America, 84.1% have the ability to speak another language or speak another language in the home. U.S. Census Bureau, *Characteristics of a Foreign Born Population*, (2006), www.census.gov (follow "American Fact Finder" hyperlink; then follow "People" hyperlink; then follow "Origins and Language" hyperlink; then follow "Characteristics of Foreign Born Population" hyperlink) [hereinafter Census Information]. It is difficult to imagine a condition that contributes *more* to determining what an individual's first and primary language will be than one's national origin. It is arguable that the language spoken in the home could be a stronger determinative factor of first language, but this condition is determined by one's ancestors' national origin, and so origin is still implicated here. To address this, the EEOC includes in its guidelines that one's "ancestors'" place of national origin should be included in determining an employee's national origin. 29 C.F.R. § 1606.7 (2007).

34. Some of the most compelling evidence for the existence of a burden for non-native English speakers comes out of the psycho-linguistic research presented in *EEOC v. Premier Operator Services, Inc.* See *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d at 1070; *infra* Part II.D.

II. A COMPARISON OF THE UNITED STATES AND THE EUROPEAN UNION

A. *Should Language Rules be Interpreted as Discrimination Based on National Origin?*1. *The U.S. Approach*

Central to the issue of Title VII application in the English-only context is whether language should be considered a characteristic that reflects national origin in a way that requires protection.³⁵ The legislative history on the meaning of national origin is scant,³⁶ but arguments have been made, even before the first English-only case was decided, that language is an integral part of national origin.³⁷ Domestic courts³⁸ and the Equal Employment Opportunity Commission (EEOC) have defined national origin in two different ways, and courts defer to the guidelines to varying degrees, leaving

35. "Language" is not expressly stated as a protected characteristic under Title VII. 42 U.S.C.A. § 2000e-2 (West 2007). The EEOC guidelines help plaintiffs argue that language should be considered integral to national origin because the guidelines expressly categorize "linguistic characteristics" as a protected characteristic of national origin. 29 C.F.R. §1606.1 (2007). See generally Mark Colon, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227, 246-49 (2002) (arguing that language does implicate national origin).

36. See generally, e.g., Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 817-22 (1994) (discussing the problem of scant legislative history on the term national origin in Title VII).

37. "[L]anguage is more likely than most symbols of ethnicity to become the symbol of ethnicity. [I]t is the recorder of paternity, expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed equally precious . . . in and of itself." James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 127 (2004) (citing Joshua A. Fishman, *Language and Ethnicity*, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS, 15, 25 (Howard Giles ed., 1977)).

38. The Supreme Court has yet to rule on whether national origin should encompass language. See generally Rosanna McCalips, *What Recent Court Cases Indicate about English-Only Rules in the Workplace: A Critical Look at the Need for a Supreme Court Ruling on the Issue*, 4 U. PA. J. LAB. & EMP. L. 417, 432-38 (2002) (discussing the Supreme Court's dictum addressing the English-only rules).

much confusion in finding what national origin means, and more importantly, what it should mean.³⁹

The most quoted judicial definition of national origin is provided in *Espinoza v. Farah Manufacturing Co., Inc.*,⁴⁰ in which the U. S. Supreme Court used a plain language interpretation of Title VII to define national origin merely as “refer[ing] to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”⁴¹ On the other hand, the EEOC, as the governing administrative body for Title VII,⁴² has interpreted national origin in a much different way than have the courts.⁴³

The EEOC has set out two important guidelines in interpreting English-only rules: the definition of national origin⁴⁴ and the presumption of discrimination guideline.⁴⁵ The EEOC defines national origin as “including, but not limited to, the denial of equal

39. The different definitions create confusion because the EEOC guidelines are “entitled to great deference.” 42 U.S.C.A. § 2000e-12(15) (West 2007). But, courts have found ways to refuse deference. The Court in *Spun Steak* refused to defer to the EEOC guidelines when the employees in the case were bilingual. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487-89 (9th Cir. 1993). Also, some courts in English-only cases have specifically proscribed deference to the guidelines. *E.g.*, *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000); *EEOC v. Synchro Start Prods., Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999). Further, the United States Supreme Court has proscribed deference to EEOC guidelines in *other* kinds of employment discrimination cases, for example in *Griggs v. Duke Power Company*, but has yet to rule whether deference is required in the specific case of an English-only employment discrimination case. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

40. *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973).

41. *Id.* at 88. In *Espinoza*, the Supreme Court ruled that Title VII does not protect against discrimination on the basis of citizenship. *Id.* In so doing, the Supreme Court established this definition of national origin to distinguish it from one’s citizenship. *Id.*

42. 42 U.S.C.A. §2000e-4(g)(5) (West 2007); 42 U.S.C.A. §2000e-12(a) (West 2007).

43. *See generally, e.g.*, Perea, *supra* note 36, at 821-32 (comparing different courts’ interpretation of “national origin”); Amy Crowe, *May I Speak? Issues Raised by Employer’s English-Only Policies*, 30 J. CORP. L. 593, 598-602 (2005) (providing an analysis of decisions in which courts have or have not deferred to the EEOC guidelines). *See generally, e.g.*, Mark L. Adams, *supra* note 3, at 889-96 (discussing two important federal circuit cases ruling on English-only issues).

44. 29 C.F.R. §1606.1 (2007).

45. *Id.* §1606.7.

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."⁴⁶ This definition's import is clearly in contrast with the Supreme Court's definition; it expressly states language as a protected characteristic, while the Supreme Court's definition makes no mention of language.⁴⁷

Secondly, the EEOC has issued specific guidelines interpreting when English-only rules should be presumed discriminatory,⁴⁸ distinguishing English-only rules that are applied at all times and those applied only part of the time.⁴⁹ Employment practices that require employees to speak English at all times while at work are presumed to be discriminatory because the rule "disadvantages an individual's employment opportunities on the basis of national origin,"⁵⁰ and "may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment."⁵¹ In the case of an English-only rule applied only at certain times, the EEOC requires a business necessity to justify the rule in order to escape liability for discrimination.⁵² If the courts uniformly deferred to these guidelines, interpretation of language as implicating national origin would be easy to resolve.⁵³ Unfortunately, however, the courts do not always give deference to the guidelines, which has created confusing and non-uniform results.⁵⁴

46. 29 C.F.R. §1606.1 (2007).

47. *Id.*; *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

48. 29 C.F.R. §1606.7 (2007).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. In cases where the rule applies at all times, the plaintiff only needs to show the existence of the rule to meet his burden of proof, as a rule applied at all times is presumed discriminatory. 29 C.F.R. §1606.7(a) (2007). When the rule is applied only part of the time, the employer is still required to show a business necessity to prevail. 29 C.F.R. §1606.7(b) (2007). So, in either case, the plaintiff only needs to show the existence of the rule to meet his burden of proof. *Id.*

54. *Compare Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489-91 (9th Cir. 1993) (rejecting the EEOC guidelines and finding the plaintiffs had not made out a

The reasons courts give for rejecting the EEOC guidelines are not compelling and should be abandoned in favor of deference to the guidelines.⁵⁵ In *Garcia v. Spun Steak Co.*,⁵⁶ the court defended its rejection of the guidelines by relying on *Espinoza v. Farah Manufacturing Co., Inc.*,⁵⁷ in which the Supreme Court refused to defer to EEOC guidelines⁵⁸ because of “compelling indications that it is wrong,” based on interpretation of the congressional record of Title VII.⁵⁹ The court in *Spun Steak*, also relying on congressional records, rejected the EEOC guidelines based on a finding that the Title VII congressional record lacked indication that there should be any presumptions of discrimination in disparate impact cases in general and that the record further lacked any discussion of English-only rules at all.⁶⁰

prima facie case for discrimination) *with* EEOC v. Synchro Start Prods., Inc., 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999) (finding the guidelines persuasive and that a valid Title VII claim had been made) *and* EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1073-75 (N.D. Tex. 2000) (deferring to the guidelines and finding that the defendants’ employees who were not of Hispanic origin were not subject to the same potential discipline as employees who were of Hispanic origin). See generally Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533 (1999) (discussing different models of deference afforded the EEOC in Title VII and providing other types of cases in which the EEOC has been given authority to issue guidelines). Wern shows that, even historically, the level of deference required to be given to the EEOC has been unclear. *Id.* at 1552-56.

55. For an argument in favor of deference to the EEOC guidelines, see generally, for example, Colon, *supra* note 35, at 256-60.

56. *Spun Steak*, 998 F.2d at 1487-89. *Spun Steak* is one of two appellate court cases deciding the discriminatory effect of an English-only rule. The only other case, *Garcia v. Gloor*, 618 F.2d 264 (1980), was decided before the English-only guidelines were enacted by the EEOC.

57. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

58. The court in *Farah* refused to defer to the guidelines in order to rule that a person’s “citizenship” and a person’s “national origin” are not synonymous in the employment discrimination context. *Id.* at 93-94. The Court found that nothing in the congressional record of Title VII supported equating “national origin” with “citizenship,” and so refusal to defer was appropriate. *Id.* The Court ultimately ruled that workplace discrimination based on citizenship is not discrimination that falls under the protection of Title VII. *Id.*

59. *Id.*

60. *Spun Steak*, 998 F.2d at 1489-90.

This is not a compelling argument for two reasons. First, concepts of national origin are not static, they change with the times,⁶¹ and it is likely that Congress had not considered the effect of an English-only rule, since the issue of English-only rules had not received much attention, if any at all.⁶² A lack of discussion on a subject cannot show intent of any sort when the issue had not yet been raised in a Title VII context.⁶³ Second, the Supreme Court has stated, in interpretation of administrative agency authority generally, that when “Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless arbitrary, capricious, or manifestly contrary to the statute.”⁶⁴ Therefore, since Congress has left this “gap” in addressing English-only rules, the EEOC should have the authority to enact regulations that are given deference on the subject of English-only rules.⁶⁵ Further, Congress expressly addressed the effectiveness of the guidelines in legislative debate for the Civil Rights Act of 1991, but did not make changes to them, therefore impliedly accepting the EEOC guidelines.⁶⁶ In the face of these

61. Crowe, *supra* note 43, at 604.

62. *See generally* Perea, *supra* note 36, at 817-22 (showing there is scant record of any discussion on national origin claims in general, much less any discussion on English-only rules). Title VII was enacted in 1964. 42 U.S.C.A. § 2000e (West 2007). *Garcia v. Gloor*, the first appellate case dealing with English-only rules, was not heard until 1980. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

63. “It would be impossible for Congress to predict the multitude of discriminatory policies that employers might adopt and the many protected groups that these policies might adversely affect.” Crowe, *supra* note 43, at 604.

64. *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

65. *See id.*

66. The legislative debate included the following:

Mr. DeConcini: These regulations reflect the fact that the primary language of an individual is often an essential national origin characteristic. Does the Senator agree that these regulations found in 29 C.F.R. 16067.7 [sic] provide a sound and effective method for dealing with this problem? Mr. Kennedy: Yes, I agree that this regulation has worked well during the past 11 years it has been in effect. Mr. DeConcini: Does the substitute to S. 1745 in any way adversely affect the EEOC regulation on language use in the workplace. Mr. Kennedy: No, it does not. Mr. DeConcini:

compelling reasons to defer to the EEOC's guidelines, it is evident that rejection of them is inappropriate.⁶⁷

The EEOC's definition includes more characteristics, specifically language,⁶⁸ into the class of national origin than does the definition given in *Espinoza*, indicating that the EEOC considers language to be entwined closely with one's national origin.⁶⁹ On the other hand, the Supreme Court's definition looks solely to the geographical location of one's birth to determine national origin and fails to make any connection between characteristics that contribute to one's national origin and the geographical location of one's birth.⁷⁰ Therefore, the question becomes whether the traits to be protected from discrimination, or, more importantly, the traits which *should* be protected from discrimination, are culturally based characteristics such as language or merely such traits as the geographic location of one's place of birth.⁷¹

Therefore, if S. 1745 is passed and signed into law by the President, the EEOC regulations would be consistent with [T]itle VII as amended by S. 1745. Mr. Kennedy: That is correct.

137 CONG. REC. 15,489 (1991), *quoted in* Leonard, *supra* note 37, at 105-06.

67. The EEOC guidelines should be followed unless some court can find the EEOC guidelines to be "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. It is clear that the guidelines could not reasonably be interpreted to be any of these things, as they are in line with the goal of Title VII. 42 U.S.C.A. § 2000e (West 2007). Congress "considered the policy against discrimination to be of the 'highest priority,'" so guidelines that help to end discrimination by lightening a plaintiff's burden in a discrimination case comport with congressional intent. Crowe, *supra* note 43, at 604.

68. 29 C.F.R. §1606.1 (2007).

69. *Id.*

70. *E.g.*, *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 88 (1973). *See also* Perea, *supra* note 36, at 823-25 (characterizing *Farah's* definition as "overly-narrow" and "pro-assimilation," and postulating that one of the problems with the definition is that it is the only one handed down from the Supreme Court in thirty years).

71. It seems that Title VII attempts to protect cultural characteristics, but its interpretation fails at meeting this end. *See generally* Perea, *supra* note 36, at 809-10. Perea discusses the inadequacy of Title VII in protecting against discrimination due to ethnically-related traits. *Id.* Perea also discusses the problem of scant legislative history on the definition of national origin. *Id.* at 817-23. *See generally* Eugenio Abellera Cruz, *Unprotected Identities: Recognizing Cultural Ethnic Divergence in Interpreting Title VII's 'National Origin' Classification*, 9 HASTINGS WOMEN'S L.J. 161 (1998) (arguing that defining national origin based solely on

2. *Why Consider the EU Approach?*

Consideration of the EU approach could help guide this discrepancy in the direction of language inclusion under national origin as the European Union views language as a characteristic that should be protected from discrimination. The European Union has an official policy of multilingualism, encouraging individuals to learn multiple languages for the purpose of professional use.⁷² Complementing this policy are express provisions in both the European Union's Charter of Fundamental Rights⁷³ and The Recommendation on National Legislation to Combat Racism and Racial Discrimination⁷⁴ that expressly name "language" as its own specifically protected class.⁷⁵ With these in place, the European Union can see past the arbitrary limitation of geography of national origin and view language in itself as a characteristic of an individual that deserves protection from discrimination.⁷⁶

B. Types of Claims Brought for Workplace Discrimination in the United States and the European Union

1. U.S. Claims

In the United States, there are two types of claims that can be brought against an employer for discrimination: disparate treatment claims and disparate impact claims.⁷⁷ Disparate treatment claims

one's geographical history does not reflect ethnicity and that national origin should be interpreted to incorporate cultural attributes).

72. The Official Site of the European Union, <http://europa.eu/languages/en/home> (last visited Sept. 13, 2007); The Official Site of the European Union, *Language Learning*, <http://europa.eu/languages/en/chapter/14> (last visited Nov. 4, 2007).

73. Charter on Fundamental Rights of the European Union, Eur. Parl.-Council of Eur. Union-Eur. Comm'n, Dec. 18, 2000, art. 21, 2000 O.J. (C 364) 1, art. 21 [hereinafter Charter on Fundamental Rights].

74. The Recommendation, *supra* note 7, § I(1)(b).

75. *Id.*; Charter on Fundamental Rights, *supra* note 73.

76. *See id.*

77. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); *see, e.g., Wilson v. Sw. Airlines, Co.*, 517 F. Supp.

require the plaintiff to prove that the employer had the actual intent to discriminate against the employee on the basis of one of the protected classes under Title VII.⁷⁸ For example, in *Wilson v. Southwest Airlines, Co.*,⁷⁹ the employer airline enacted a policy that only females would be hired for the position of flight attendant.⁸⁰ This policy is considered one of disparate treatment because “gender” is an expressly protected class,⁸¹ and the employer’s policy explicitly and intentionally speaks to excluding one gender from an employment opportunity.⁸²

On the other hand, employees claiming national origin discrimination for English-only rules usually bring their Title VII claims under the disparate impact theory.⁸³ In a disparate impact case, the employer’s policy is facially neutral; that is, it does not explicitly

292, 293 (N.D. Tex. 1981) (finding disparate treatment in intentional discriminatory employment policies when defendant purposely discriminated against males in the hiring of flight attendants).

78. *Antonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1125 (9th Cir. 1985).

79. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

80. *Id.* at 293. In fact, Southwest conceded that its policy intentionally excluded males. *Id.* The issue in *Wilson* was whether Southwest’s policy qualified as a “bona fide occupational qualification” [BFOQ] defense, which would have the effect of allowing the employer to continue its discriminatory practice. *Id.* The court in *Wilson* ruled that being female was not a BFOQ for the position of flight attendant, since much of the reasoning that Southwest provided in arguing for its female-only policy was based on Southwest’s postulated customer preference, and Southwest could show no proof that revenue loss would actually result from hiring males. *Id.* at 304.

81. 42 U.S.C.A. §2000e-2a (West 2007).

82. *Wilson*, 517 F. Supp. at 293.

83. *E.g.*, *Gutierrez v. Mun. Ct. of the Se. Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1038-39 (9th Cir. 1988). The court in *Gutierrez* reasoned that plaintiffs had established a “likelihood of success” on a disparate impact claim. *Id.* at 1045; *see also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993) (disparate impact claims even when the discrimination is not a result of intentional discrimination). *But see Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) (disparate impact and disparate treatment claims challenging an English-only rule); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 939-42 (E.D. Va. 1995) (disparate treatment and disparate impact claims challenging an English-only rule); Raechel L. Adams, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 CATH. U.L. REV. 1327, 1360-62 (1998). Adams argues that both disparate impact and disparate treatment can be useful in analyzing English-only claims. *Id.*

name or apply to a protected class.⁸⁴ But, when the practice is applied to the facially neutral characteristic, it has the effect of impacting a protected class in a more negative, disparate way, even when applied uniformly to all employees.⁸⁵ English-only rules do not explicitly apply to the protected class of national origin, but they apply to language which is a characteristic that correlates in a special way with national origin.⁸⁶ It is more difficult for people born outside the United States, who speak a language in addition to English, to comply with an English-only rule than it is for people born in the United States who speak only English.⁸⁷ Therefore, these rules impact a high percentage of individuals whose national origins are other than American⁸⁸ in a disparate way even though the rule is applied to every worker in the same manner.⁸⁹ Since language is not a protected class,

84. "The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

85. "While English-only rules may be seen as facially neutral, they disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees." *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).

86. *See* Census Information, *supra* note 33.

87. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070. Expert witness testimony provided that bilingual individuals unconsciously switch between languages, and at times it may be impossible to control this phenomenon. *Id.* Therefore, a person who is bilingual will be at risk for this uncontrollable lapsing into his first language, while the English speaker is at no such risk. *Id.* This poses an additional risk for bilingual employees but not monolingual English speakers. *Id.*

88. *See* Census Information, *supra* note 33.

89. *Id.* It is important to emphasize that there must be a correlation between the characteristic (if it is not one explicitly stated in Title VII) and a protected class for an argument to be made that the characteristic should be protected. *Id.* For example, if an employer required its employees to be able to lift fifty pounds, the employees who could not lift the weight would not have a disparate impact claim *unless* their weakness correlated with being a member of a protected class. "Weakness," in itself, is not a protected characteristic, *see* 42 U.S.C.A. § 2000e-2(a) (West 2007), and so the employees would have to show a correlation between being weaker and being a member of a protected class (female, for example). This kind of corollary showing is illustrated in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), where the female plaintiff did not meet the minimum height and weight requirements for a correctional counselor trainee position. 433 U.S. at 323. The

a court must accept this correlation for a plaintiff to prevail, and thus, there is an extra step of convincing the court of the correlation for a *prima facie* case of discrimination.⁹⁰

2. *EU Claims*

In contrast to the U.S. approach, the EU approach allows a plaintiff to easily bring a claim for an English-only rule under either theory.⁹¹ This broadens a plaintiff's options and removes the requirement of a correlation argument, thereby lightening the plaintiff's burden.⁹² The European Union's statutory framework defines direct discrimination as "any differential treatment based on a ground such as race, colour, [or] language."⁹³ Since language as a protected class appears directly in the EU direct discrimination framework, the plaintiff is relieved of the extra step of arguing a

plaintiff made a statistical showing that the requirements had a significant effect of excluding females at a higher rate than males. *Id.* at 329-30. Therefore, the requirement was determined to be sex discrimination based on the correlation of the requirement and the protected class of sex. *Id.* at 331.

90. The correlation between national origin and language must be argued in order to make a claim under Title VII. *See* 42 U.S.C.A. § 2000e-2a (West 2007). In fact, since language in itself is not included as a protected class, "scholars and advocates must always argue that traits such as accent and language are highly correlated with different national origins and therefore merit protection under Title VII." Perea, *supra* note 36, at 851; Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (1993).

91. The European Union names the two types of discrimination "direct" and "indirect" discrimination. Council Directive 2000/43, art. 2, 2000 O.J. (L 180) 22 (EC) [hereinafter *The Race Directive*]. Domestic courts name the two types "disparate treatment," which is similar to the European Union's "direct" discrimination and "disparate impact," which is similar to the European Union's "indirect" discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

92. The European Union's direct discrimination statutory framework states that a claim can be brought when "one person is treated less favourably than another is" *The Race Directive*, *supra* note 91. This broad language, combined with *The Recommendation's* inclusion of "language" explicitly as a protected class, indicates that a plaintiff in an English-only case could bring a cause of action for direct discrimination if a policy was enacted that addressed language. *The Recommendation*, *supra* note 7, § 11(b).

93. *The Recommendation*, *supra* note 7, § 11(b).

correlation between language and a protected class.⁹⁴ The explicit recognition of language as a protected class indicates that the European Union considers language by itself a defining characteristic of an individual.

C. Differences in the Burdens of Proof

1. The U.S. Scheme

The burden of proof scheme requires the plaintiff to establish a prima facie case of Title VII discrimination⁹⁵ by showing a facially-neutral employment practice that has a “significantly discriminatory” impact on a group of employees protected under Title VII.⁹⁶ This showing of significantly discriminatory impact has proven to be a difficult burden of proof for plaintiffs in English-only cases to meet because it has traditionally required a showing of the disparate effect of the employment policy in a statistically significant way.⁹⁷ This a difficult burden for plaintiffs in English-only cases to meet because the employment cases are more often about discrimination that affects

94. This is especially relevant because Title VII protects other characteristics that define a person, such as race or sex, but not language. 42 U.S.C.A. § 2000e-2a (West 2007). The difference in approach reflects the two contrasting perspectives; the U.S. has a perspective that language is not considered a defining characteristic, and the European Union takes the opposite stance. *See supra* note 92. Strong arguments have been made that would support the EU approach over the U.S. approach. *See, e.g.,* EEOC v. Premier Operator Servs, Inc., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000); Adams, *supra* note 3, at 903-07; Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 GEO. IMMIGR. L.J. 747, 766 (1997).

95. *Antonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1131 (9th Cir. 1985).

96. *Id.*; *Connecticut v. Teal*, 457 U.S. 440, 447-48 (1982).

97. Title VII does not address any proportional disparity requirement. *See* 42 U.S.C.A. § 2000e (West 2007). However, the EEOC has adopted, and the Supreme Court has applied, an eighty percent rule to use in disparate impact cases. *Teal*, 457 U.S. 440, 444 n.4 (citing EEOC guidelines 29 CFR §1607.4(d) (1981)). They “provide that a selection rate that is less than [eighty percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact.” *Id.* The most recent appellate decision on English-only rules required this statistical showing by the plaintiff. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993).

the terms, conditions, or privileges of employment⁹⁸ rather than discrimination which results in more concrete effects such as not being promoted or hired for the job. While statistics regarding concrete effects of discrimination are relatively easy to produce,⁹⁹ it is more difficult to show the way a practice affects the more subtle conditions of an individual's employment because these are subjective aspects that do not easily lend themselves to statistical quantification.¹⁰⁰ As acknowledged in *Spun Steak*,¹⁰¹ “[w]hile such statistics are often difficult to compile, whether the protected group has been disadvantaged turns on quantifiable data [and] may depend on subjective factors not easily quantified.”¹⁰² Justice Boochever, in his dissent in *Spun Steak*, disagreed with the court's requirement of statistical proof of subjective factors.¹⁰³ He explained the difficulty of proving impact:

[P]roof of such an effect of English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline.¹⁰⁴

98. *E.g.*, *Gutierrez v. Mun. Ct. of the Se. Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1036 (9th Cir. 1988). “Gutierrez contends that the municipal court rule constitutes racial and national origin discrimination with respect to a term or condition of employment” *Id.* at 1036.

99. *See, e.g.*, *Teal*, 457 U.S. at 444 (setting out the direct evidence which showed that pass rates of various ethnic groups of a test establishing the pool of applicants for promotions correlated with the test-takers' ethnicity).

100. *Spun Steak*, 998 F.2d at 1486.

101. *Id.*

102. *Id.* at 1486.

103. *Id.* at 1490 (Boochever, J., dissenting).

104. *Id.* The “guideline” to which Judge Boochever refers is the EEOC's guideline that declares an English-only rule applied at all times to be presumptively discriminatory. 29 C.F.R. § 1606.7(a) (2007). This presumption removes the need for a statistical showing of disparity, thereby lightening the plaintiff's prima facie burden of proof. *Spun Steak*, 998 F.2d at 1490. Courts, however, sometimes do not defer to the guidelines, and the EEOC's attempt to alleviate the plaintiff's burden is thus often unsuccessful. *E.g.*, *Spun Steak*, 998 F.2d at 1489; *Long v. First Union*

2. *The EU Approach and a Possible U.S. Trend*

The EU approach, on the other hand, is significantly more plaintiff-friendly in the prima facie burden of proof stage because it does not require a statistical showing of a discriminatory effect.¹⁰⁵ In this way, the EU approach seems to reflect Judge Boochever's and the EEOC's recognition that the process of presenting evidence of discrimination does not easily lend itself to subjective factors affected by English-only rules.¹⁰⁶ Plaintiffs in English-only cases have had difficulty surviving the prima facie burden of proof stage, at least partially because of this "exceedingly high" burden of proof in showing discrimination in their "terms, conditions, and privileges" of employment.¹⁰⁷ The EEOC guidelines¹⁰⁸ attempt to alleviate the plaintiff's burden, and if given deference, would align the approach to language rules with the EU approach in removing the necessity for statistical evidence of disparity. In U.S. courts, however, varying degrees of deference to the guidelines have produced mixed results in actually alleviating the burden.¹⁰⁹

Some more recent U.S. cases, however, seem to show that the courts may be moving in the direction of recognizing English-only rules as discriminatory, but the decisions provide a different rationale for this recognition.¹¹⁰ The criticism of English-only rules in these

Corp. of Va., 894 F. Supp. 933, 940 (E.D. Va. 1995). *But see* EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).

105. See Elspeth Guild, *The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations*, 29 INDUS. L.J. 416, 420 (2000).

106. 29 C.F.R. § 1606.7(a) (2007); *Spun Steak*, 998 F.2d at 1490.

107. Colon, *supra* note 35, at 256.

108. 29 C.F.R. §1606.7 (2007).

109. Compare *Spun Steak*, 998 F.2d 1480, 1487-89 (9th Cir. 1993) (rejecting the guidelines) with EEOC v. Synchro Start Prods., Inc., 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999) (deferring to the guidelines) and EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (emphasizing the need to defer to the guidelines).

110. *E.g.*, *Premier Operator Servs.*, 113 F. Supp. 2d at 1075 ("Employees at Premier who did not speak Spanish, and who were not of Hispanic national origin, were not subject to the same oppressive monitoring or potential discipline and discharge as were the Hispanic employees."); *Maldonado v. City of Altus*, 433 F.3d 1294, 1305 (10th Cir. 2006) ("The policy itself, and not just the effect of the policy in evoking hostility by co-workers, may create or contribute to the hostility of the work environment.").

cases as discriminatory is in response to psycho-linguistic studies which show that language use in bilingual individuals is at least to some extent out of the control of the speaker; that is, the language one speaks is not a mutable characteristic.¹¹¹ This approach, if it becomes a trend, would undoubtedly assist U.S. employees in their burden of proof regarding English-only cases¹¹² and align the U.S. approach closer with that of the European Union, albeit on a different theory.¹¹³ However, if this approach does not become a trend, plaintiffs will continue to face a difficult burden of proof in their establishment of a prima facie case.

D. Should the Arguable Mutability of Language Disqualify It From Protection?

1. The U.S. Employer's Mutability Argument

Although the plaintiff's burden of proof stage can be difficult, if it is survived, the employer may still escape liability by showing a business necessity for the English-only rule.¹¹⁴ In order for a business

111. *E.g.*, Crowe, *supra* note 43, at 600. This psycho-linguistic evidence, showing that language use is not a matter of choice, was relied upon heavily by the *Premier Operator* court in its ruling that the English-only rule set forth had a disparate impact on bilingual employees. *Premier Operator Servs.*, 113 F. Supp. 2d at 1069.

112. In the two appellate court cases, each court, in order to hold no disparate impact, relied on the theory that what language a bilingual employee speaks is entirely a matter of choice. *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) ("Mr. Garcia was fully bilingual [and] [h]e chose deliberately to speak Spanish instead of English . . ."); *Spun Steak*, 998 F.2d at 1487 (citing *Gloor*, 618 F.2d at 270) ("There is no disparate impact . . . if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference."). If, as in *Premier Operator Services*, evidence is presented showing bilingual employees do not have a choice in language use, then the theory in *Gloor* and *Garcia* can be successfully challenged by plaintiff employees. *See Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1070 (2000).

113. If a trend were to develop, the United States would view language as a protected class because it is not mutable. The European Union, however, protects language as intrinsically valuable. *See* The Official Site of the European Union, *Language Learning* (2006), <http://europa.eu/languages/en/chapter/14> (last visited Dec. 1, 2007).

114. In *Gloor*, the employer gave the following business justifications for the firing of Garcia:

necessity to relieve the employer of liability, the necessity identified for the English-only rule must be that the speaking of only English is either required for the employee to perform his or her job efficiently or necessary for some safety-related reason.¹¹⁵ It is clear that there are important and legitimate reasons for an English-only rule which fall within the parameters of an acceptable business necessity.¹¹⁶ These legitimate reasons usually center on safety in the workplace or the necessity of providing a particular service in the language of a customer or customer base.¹¹⁷ The validity of these kinds of business justifications is not disputed here because, according to the Supreme Court, they are “necessary to safe and efficient job performance.”¹¹⁸ These types of business justifications meet the test for a valid business necessity and permit an employer to implement rules that may be discriminatory in their impact.¹¹⁹

English-speaking customers objected to the communications between employees that they could not understand; pamphlets and trade literature were in English, and were not available in Spanish If employees . . . were required to speak English on the job at all times . . . they would improve their English; and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates.

Gloor, 618 F.2d at 267. The court found these reasons to be the motivation for firing Garcia when he spoke Spanish while at work. *Id.*

115. *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977).

116. For example, a rule requiring the use of only English while operating heavy and dangerous machinery meets the test of a safety-oriented rule because all employees must be able to understand communications in order to avoid injury. *See Spun Steak*, 998 F.2d at 1483 (explaining that non-Spanish speakers were distracted by employees speaking Spanish while operating machinery).

117. *E.g.*, *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1408 (9th Cir. 1987) (discussing how listeners of a radio station with a listener base of primarily English-speakers were confused when the radio announcer spoke in Spanish). A customer base of both monolingual English and monolingual Spanish speakers was a business justification for allowing Spanish to be spoken only when speaking with Spanish speaking customers. *Gloor*, 618 F.2d at 266.

118. *Dothard*, 433 U.S. at 331-32. In *Dothard*, a business necessity of “strength” was rejected as a defense of a height and weight requirement for employment as a correctional counselor because the employer could not show any evidence correlating the requirements of height and weight with the necessity of strength to be an effective counselor. *Id.*

119. *Id.*

On the other hand, many reasons given by employers to defend their English-only rules have fallen short of what is required of a business necessity.¹²⁰ The veiled threat behind English-only rules is that employers can set forth business necessities that appear to justify the language restriction, when in reality the rule is a disguise for intentional discrimination.¹²¹ Therefore, it is important to scrutinize business necessities for legitimacy to avoid this effect.

Some employers defend their rule by arguing it does not burden the employee whose first language is not English, provided the employee is bilingual to some degree, because language is a mutable characteristic; one may simply choose between speaking either language.¹²² However, this argument should not relieve employers of

120. The most often used business necessity is that English-only rules are necessary for workplace harmony. *Gutierrez v. Mun. Ct. of the Se. Judicial Dist.*, Los Angeles County, 838 F.2d 1031, 1042-43 (9th Cir. 1988); *Long v. First Union Corp.*, 894 F. Supp. 933, 939 (E.D. Va. 1995); *Garcia v. Spun Steak*, 998 F.2d 1480, 1483. However, workplace harmony fails to satisfy either safety or efficiency-related goals. "Even if there were evidence that a regulation mandating the use of English during working hours would calm some employees' fears and thereby reduce racial tension to some extent, this reason would not constitute a business necessity . . ." *Gutierrez*, 838 F.2d at 1043. In some instances, courts have found that an English-only rule enacted for the purpose of workplace harmony actually increased tension and disharmony in the work environment. *See, e.g., EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000). "[T]he evidence shows that the policy served to create a disruption in the work place and feelings of alienation and inadequacy by Hispanic employees who had up to that time been proven performers in the company." *Premier Operator Servs.*, 113 F. Supp. 2d at 1070. *See generally* Christina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. U.L. REV. 1689 (2006) (contending that rules that restrict employees do not promote solidarity at all in the workplace and arguing that workplace discrimination has a social impact as well as an individual one).

121. *See Gutierrez*, 838 F.2d at 1038-39 (presenting *Gutierrez's* argument that the English-only rule was a pretext for intentional discrimination). *See also* Knapp, *supra* note 94, at 753 ("Employers may advance a seemingly credible business necessity argument when, in fact, running deeper is the desire to discriminate on the basis of national origin.").

122. *E.g., Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980); *Garcia v. Spun Steak*, 998 F.2d 1480, 1487-88 (9th Cir. 1993). *See also* Colon, *supra* note 35, at 238-39 (explaining the mutability finding in *Gloor*); Rodriguez, *supra* note 120, at 1728-29 ("[B]ecause an employee (at least a nominally bilingual one) has control over the language she speaks, an employer's rule prohibiting that employee from speaking non-English does not fall within the category of employment practices Congress intended Title VII to prohibit.").

liability because the bilingual speaker still experiences a burden which a monolingual English speaker does not.¹²³ This is because the bilingual speaker always runs the risk of inadvertently slipping into his native language, while the monolingual English speaker never runs this risk.¹²⁴ This difference affects the individual's working environment in a negative way because an employee's exposure to an employer's discipline and reprimands for violations of the English-only rule is more likely.¹²⁵

The court in *Garcia v. Gloor* first presented an example of this defense emphasizing that the plaintiff was "fully bilingual."¹²⁶ He chose deliberately to speak Spanish instead of English"¹²⁷ However, in *Dothard v. Rawlinson*,¹²⁸ the Supreme Court ruled that a weight requirement that effectively disqualified a higher percentage of female applicants from prison correctional counselor positions was prohibitively discriminatory under Title VII.¹²⁹ Thus, the Supreme Court acknowledged that a policy requiring a characteristic (albeit mutable, and arguably at the discretion of the employee) that correlated highly with a protected class, can be sufficient basis for finding discrimination based on that protected class.¹³⁰

The same argument can be made for language and national origin.¹³¹ Although one arguably has some control over language,¹³²

123. New evidence suggests that, at times, the language one speaks is outside the conscious control of the speaker. *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000).

124. Colon, *supra* note 35, at 250-51.

125. *Premier Operator Services*, 113 F. Supp. 2d at 1075.

126. *Gloor*, 618 F.2d at 268.

127. *Id.* The *Gloor* court focuses on the element of choice in controlling one's language, relying on language as a mutable characteristic. *Id.*

128. *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).

129. *Id.* at 329-31. The Court found that a height and weight requirement excluded disproportionately more female applicants than male applicants and found that these requirements (although the weight requirement is at least somewhat mutable) were sufficiently discriminatory to bring a Title VII cause of action for the protected class of sex. *Id.*

130. *Id.*

131. For further discussion on the argument that mutability does not exclude a characteristic from qualification as a protected characteristic and more examples of mutable characteristics that have been determined to have been the basis for discrimination, see Aileen Maria Ugalde, "*No Se Habla Espanol*": *English-Only*

bilingualism nevertheless correlates highly with the fact that a person is of a national origin other than American.¹³³ Under a *Dothard*-type analysis, this high correlation means that the mutability of language does not disqualify it as a protected class of Title VII.¹³⁴ Instead, since language correlates with national origin,¹³⁵ a strong argument can be made that language should be a protected characteristic of Title VII, albeit a mutable one.¹³⁶ However, without a Supreme Court decision on the issue, the mutability argument remains unsettled, and with it, the application of Title VII to English-only rules overall.

2. Mutability: The EU Approach

The mutability problem does not exist in the EU approach because both immutable and mutable characteristics are considered so entwined with national origin to deserve protection from discrimination. The European Union adopts a “distinct community” test in deciding whether a characteristic should be considered part of one’s national origin.¹³⁷ Under the test, an individual can show that the characteristic in question is a defining trait of an ethnic group by showing that the characteristic is common within the ethnic community.¹³⁸ It is unnecessary to account for the characteristic’s mutability in this test, and so it would not be relevant in determining whether language should count as part of national origin.¹³⁹ The “distinct community” test, therefore, is less strict than the immutability test used by some domestic courts.¹⁴⁰ It is illustrative of the expansiveness of the EU approach, which considers even mutable characteristics that are shared with a defined group as so tied to

Rules in the Workplace, 44 U. MIAMI L. REV. 1209, 1234-38 (1989).

132. For an argument that language is mutable and within the control of the speaker, see generally Leonard, *supra* note 37, at 117-21. *But see* EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000).

133. *See* Census Information, *supra* note 33.

134. *See* Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977).

135. Census Information, *supra* note 33.

136. *See* Dothard, 433 U.S. at 329-31.

137. Guild, *supra* note 105, at 418.

138. *Id.*

139. *See id.*

140. *See, e.g.,* Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980).

ethnicity or national origin to deserve protection from discrimination.¹⁴¹

3. *More Evidence on Mutability: Recent Psycho-Linguistic Findings*

Recent psycho-linguistic information provides a strong argument for the protection of language, relying on evidence that language is in fact not wholly mutable.¹⁴² This recent¹⁴³ psycho-linguistic information presents a compelling argument that language is an immutable characteristic over which the speaker, at least on some level, has no control.¹⁴⁴ There are two new phenomena that present evidence that language is outside the control of the speaker: “code switching” and the “most recently spoken language phenomenon.”¹⁴⁵

Code switching was first introduced into English-only cases in *EEOC v. Premier Operator Services, Inc.*, as a phenomenon wherein individuals “unconsciously switch from English to their original or primary language when speaking informally with fellow members of their cultural group.”¹⁴⁶ Expert witness Susan Berk-Seligson¹⁴⁷ testified that this switching between languages is not a matter of choice for bilinguals and in some cases is “unconscious” and “virtually impossible” to control.¹⁴⁸ So, English-only rules disparately

141. Under the EU approach, one could even see traveling EU communities as deserving of protection from discrimination because one could identify a characteristic (traveling) of a community of people that would trigger inclusion of that characteristic under a group’s ethnicities. *Id.* at 418.

142. The findings of the psycho-linguistic research were first presented in an English-only context in *EEOC v. Premier Operator Services, Inc.*, 113 F. Supp. 2d 1066, 1069-70 (N.D. Tex. 2000). *See also* Colon, *supra* note 35, at 224-47; Crowe, *supra* note 43, at 602-03.

143. The psycho-linguistic research was done in the late 1990’s after both federal appellate court cases relied on the theory that language is within the control of the speaker (*Gloor and Spun Steak*), and the research was presented in *Premier Operator Services* in 2000. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070.

144. *Premier Operator Servs.*, 113 F. Supp. 2d. at 1069-70; *see also, e.g.*, Colon, *supra* note 35, at 224-56; McCalips, *supra* note 38, at 430-32 (explaining the linguistic evidence presented in *Premier Operator*).

145. *Id.* at 431; *Premier Operator Servs.*, 113 F. Supp. 2d at 1069-70.

146. *Premier Operator Servs.*, 113 F. Supp. 21 at 1070.

147. Professor of Linguistics and Hispanic Language and Culture at the University of Pittsburgh. *Id.* at 1069.

148. *Id.* at 1070.

impact bilingual speakers because bilinguals are more likely to violate the rule,¹⁴⁹ especially since in at least some situations, the ability to control language is impossible.¹⁵⁰

Code switching illustrates two things. First, language is not an entirely mutable characteristic because it is often beyond the control of the speaker.¹⁵¹ Second, an English-only rule does in fact disparately impact those who primarily speak another language since those people will be more likely to break the rule (at times without any control over it) and therefore more likely subjected to consequences imposed by the employer.¹⁵² In fact, since monolingual English speakers run no risk of inadvertently slipping into another language, not only are bilingual individuals more likely to break the rule than monolingual English speakers, they bear the *entire* burden of the rule.¹⁵³

The “most recently spoken language phenomenon”¹⁵⁴ interplays with code switching making it even more difficult for the bilingual speaker to speak only English, and thus the speaker has even less control over language choice. This phenomenon, also presented in *Premier Operator Services*, describes how bilingual speakers “will generally tend to continue to speak in the language in which they most recently spoke.”¹⁵⁵ This is especially relevant in situations where many bilingual employees work together and are permitted to speak in their native language some of the time because conversation in their first language can act as an “unconscious stimulus” to continue speaking in that language.¹⁵⁶ The *Premier Operator Services* court acknowledged the disadvantage the bilingual, Spanish-speaking employee would have in a situation were he required to assist customers in Spanish and then speak only English at all other times: “There was no comparable risk posed by the policy for the

149. Colon, *supra* note 35, at 250-51.

150. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070.

151. *Id.*

152. Colon, *supra* note 35.

153. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070; *see also, e.g.*, Colon, *supra* note 35, at 252.

154. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070; *see also, e.g.*, Colon, *supra* note 35, at 250-51; McCalips, *supra* note 38, at 431.

155. *Premier Operator Servs.*, 113 F. Supp. at 1070.

156. Colon, *supra* note 35, at 250-51.

defendant's non-Hispanic employees, particularly since they would not have the same tendency to lapse into Spanish inadvertently."¹⁵⁷

Finally, even if the above arguments are unconvincing, should society ignore the importance of language to an individual because he has the *capacity* to speak in another language?¹⁵⁸ Judge Reinhardt, in his dissent from the denial of rehearing in *Spun Steak*, illustrated that there remains an underlying reason for Title VII protection that does not necessarily become irrelevant when an individual has the capacity to comply with a particular rule:

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 objectionably 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 example¹⁵⁹

Perhaps the import of language in itself, as recognized by the European Union, is enough to require the protection of bilinguals' right to be free of adverse consequences from language use in the workplace.¹⁶⁰

157. *Premier Operator Servs.*, 113 F. Supp. 2d at 1070.

158. See generally Leonard, *supra* note 37 (arguing that language is a mutable characteristic). He acknowledges the validity of the code switching phenomenon, but argues that enacting workplace language rules will change the unconscious behavior of code switching in bilinguals. *Id.* at 122-23.

159. *Garcia v. Spun Steak Co.*, 13 F.3d 296, 298 (1993) (Reinhardt, J., dissenting).

160. See generally Rodriguez, *supra* note 120 (arguing that the consequences of English-only rules impact cultural community identities and that restricting language use ultimately impacts cultural identity on a social level). Therefore, she argues, the benefit that employers gain from the rules is outweighed by the social costs paid by some communities. *Id.* at 1711-20.

III. THE EU APPROACH AS A MODEL FRAMEWORK TO LANGUAGE DISCRIMINATION

The European Union,¹⁶¹ along with other entities around the globe,¹⁶² considers “language” as a category in itself deserving of protection from discrimination.¹⁶³ Of course, the European Union is a different place than the United States in many ways. Particularly relevant to this discussion is the multi-nationality of the European Union as compared to the United States¹⁶⁴ and the express value the European Union places on multilingualism.¹⁶⁵ But, if fear of a minority group’s possible domination is the motivation behind our English-only tendency, the European Union can serve as an example of an organization of nations where many languages exist together without domination.¹⁶⁶ The European Union is an organization in

161. Consisting of twenty-seven member states, the European Union is a “unique supranational organization.” ABA SECTION OF LABOR AND EMPLOYMENT LAW, INTERNATIONAL LABOR AND EMPLOYMENT LAWS 1-1 (William L. Keller & Timothy J. Darby, eds., BNA Books 2d ed. 2003); *see also* The Official Site of the European Union, <http://europa.eu/languages/en/home> (last visited Nov. 4, 2007).

162. Spain, Mexico, and South Africa each have enacted statutory protection for language discrimination in the workplace. ABA SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 161, at 6-73.

163. The Charter of Fundamental Rights of the European Union states as follows: “Any discrimination based on . . . language . . . shall be prohibited.” 2000 O.J. (C 364) 01. “Article 22 of the Charter of Fundamental Rights of the European Union, adopted by EU leaders in 2000, states that the Union shall respect linguistic diversity, and Article 21 prohibits discrimination based on a number of grounds, including language.” The Official Site of European Union, *Linguistic Diversity*, <http://europa.eu/languages/en/chapter/5> (last visited Nov. 4, 2007).

164. The European Union consists of twenty-seven member states. The Official Site of the European Union, *Linguistic Diversity* (2007), <http://europa.eu/languages/en/home> (last visited Nov. 4, 2007).

165. The European Union works to promote language diversity and implements official policies encouraging language diversity. *E.g.*, COMM’N OF THE EUROPEAN CMTYS, COMMISSION WORKING DOCUMENT, REPORT ON THE IMPLEMENTATION OF THE ACTION PLAN “PROMOTING LANGUAGE LEARNING AND LINGUISTIC DIVERSITY” 4 (Sept. 2007), *available at* http://ec.europa.eu/education/policies/lang/doc/com554_en.pdf (reporting a goal to build “language-friendly environment”). The Commission of European Communities found that “the promotion of language learning, linguistic diversity, and multilingualism as whole have gained significantly in political importance.” *Id.* at 5.

166. “It is [linguistic] diversity that makes the European Union what it is: not a

which language diversity functions as a source of strength rather than as a cause for fear.¹⁶⁷

Two recent developments in EU anti-discrimination law are especially relevant in this discussion: the Race Equality Directive¹⁶⁸ (The Race Directive) and the General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination¹⁶⁹ (The Recommendation). The European Union has developed a vast array of other policies and legislation in recent history with respect to discrimination.¹⁷⁰ These two pieces of legislation, however, are the most relevant in a comparison with the U.S. perspective on English-only rules in the workplace because both indicate that discrimination, including that based on language, is prohibited in the European Union.¹⁷¹

A. *The Race Directive*

The goal of The Race Directive is to provide a framework to fight discrimination on the grounds of racial or ethnic origin, both in the employment context and in society at large.¹⁷² The Race Directive is legally binding on all members of the European Union and establishes

‘melting pot’ in which differences are rendered down, but a place where diversity can be celebrated as a source of wealth.” The Official Site of the European Union, *Linguistic Diversity*, <http://europa.eu/languages/en/chapter/5> (last visited Nov. 4, 2007). In January 2007, Irish was added as the European Union’s twenty-third official language which requires EU institutions to translate legislation into many of the official languages. European Commission, *Irish Becomes European Union’s 23rd Official Language*, Dec. 27, 2006, http://ec.europa.eu/news/culture/061227_1_en.htm.

167. “[L]earning languages opens doors. For individuals, it can open the door to a better career . . . [f]or companies, multilingual staff can open the door to European and global markets.” The Official Site of the European Union, *Education and Training*, http://ec.europa.eu/education/policies/lang/languages_en.html.

168. The Race Directive, *supra* note 91.

169. The Recommendation, *supra* note 7.

170. See generally Dagmar Schiek, *A New Framework on Equal Treatment of Persons in EC Law?*, 8 EUR. L.J. 290 (2002) (discussing the Framework Directive and the Gender Equality Reform Directive policies).

171. Erica Howard, *Anti Race Discrimination Measures in Europe: An Attack on Two Fronts*, 11 EUR. L.J. 468, 469 (2005).

172. The Race Directive, *supra* note 91, art. 1; see also Howard, *supra* note 171, at 470.

a duty on each state to implement its own legislation to comply with the anti-discrimination guidelines it provides.¹⁷³ This duty is not taken lightly, as evidenced in 2004 when five member states failed to enact sufficient legislation, and the European Commission commenced litigation against them for failure to comply.¹⁷⁴

The Race Directive is similar to Title VII in that it provides the framework for fighting workplace discrimination.¹⁷⁵ However, there are two important differences between The Race Directive and Title VII, both of which indicate that The Race Directive would deem the U.S. English-only rules a prohibited form of discrimination. The first is the “distinct community” approach to defining ethnic origin used by the courts in interpreting The Race Directive.¹⁷⁶ The second is that the burden of proof for a plaintiff under The Race Directive is less severe than that of a plaintiff under Title VII, due to the influence of The Recommendation,¹⁷⁷ which expressly includes language as its own protected class.¹⁷⁸

B. “Distinct Community” Test Under The Race Directive

The “distinct community” test adopted by the courts for defining racial or ethnic origin under The Race Directive is much more flexible than the immutable characteristic approach under Title VII.¹⁷⁹ Under the “distinct community” test, an individual can identify his or her

173. *Id.* at 471.

174. *Id.* at 471 n.9.

175. See The Race Directive, *supra* note 91, arts. 1-4. Article 2 defines direct and indirect discrimination (similar to disparate treatment and disparate impact definitions in Title VII). *Id.* art. 2. Article 3 defines the scope of the provision, including its application to the “working conditions” and “social advantages.” *Id.* art. 3. Article 4 provides a defense for “occupational requirements,” similar to the business justification defense of Title VII. *Id.* art. 4.

176. Guild, *supra* note 105, at 418 (referring to *Mandla v. Dowell Lee*, [1983] 2 AC 548).

177. Howard, *supra* note 171, at 486 (using either instrument to interpret the other because both were promulgated by groups of which all Member States are members).

178. “[D]irect racial discrimination’ shall mean any differential treatment based on a ground such as race, colour, language” The Recommendation, *supra* note 7, § I(1)(b).

179. Guild, *supra* note 105, at 418.

ethnic group merely by showing that the group identified as his or her community shares common characteristics, which may be within the control of the individual.¹⁸⁰ For example, under the “distinct community” test, a traveling community could identify “traveling” as a characteristic that it shares with the members of its group, therefore making it illegal to discriminate against them for being travelers, even though the group has complete control over whether they continue to travel or not.¹⁸¹ On the other hand, the immutable characteristic approach to defining national origin used in some domestic courts does not consider mutable characteristics, such as language or traveling, as triggering protection under the class of national origin.¹⁸² So, a plaintiff bringing a claim under The Race Directive for an English-only rule would need only to show that language, regardless of its mutability, is a common characteristic shared by his community, thereby easily including language as a characteristic of national origin.¹⁸³

C. Burden of Proof Under The Race Directive

Similar to the burden of proof framework in Title VII,¹⁸⁴ The Race Directive and The Recommendation address both direct and

180. The “‘distinct community’ test . . . permits a fairly high degree of self-identification and allows the concept of ethnic origin, at least, to be defined by virtue of behavior which the individual could change.” *Id.*

181. Guild, *supra* note 105, at 418.

182. See, for example, *Garcia v. Gloor*, in which the court stated that the plaintiff was “fully bilingual.” *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980). “He chose deliberately to speak Spanish instead of English . . .” 618 F.2d at 271. *But see* EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (finding expert testimony presents psycho-linguistic information in support of language’s immutability).

183. The plaintiff’s burden is easily met because bilingual language ability correlates highly with being of foreign ancestry, and the ability is clearly a common characteristic of the national origin group of the bilingual individual. See Census Information, *supra* note 33.

184. See *supra* Part I.B. The European Union labels the two types of discrimination as “direct” and “indirect” discrimination. The Race Directive, *supra* note 91, art. 2. Domestic courts name the two types “disparate treatment, which is similar to the European Union’s “direct” discrimination, and “disparate impact,” which is similar to the European Union’s “indirect” discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

indirect discrimination.¹⁸⁵ Indirect discrimination, like disparate impact discrimination under Title VII, provides that a policy is discriminatory if it is a facially neutral requirement but more negatively impacts a protected group than it does others subject to the rule.¹⁸⁶ Some subtle differences in the language of The Recommendation's definition as compared with the U.S. definition of disparate impact shed light on the different approach that the European Union takes towards workplace discrimination. Specifically, The Recommendation states that indirect discrimination "shall mean cases where an apparently neutral factor . . . cannot be *as easily complied with*, or disadvantages, persons belonging to a group designated by a ground such as . . . language . . . national or ethnic origin"¹⁸⁷ The plaintiff need only show that it is on some level more difficult for the plaintiff to comply with the rule than it is for other employees, and this is an easier burden for the plaintiff to meet.¹⁸⁸ Under the EU approach, the U.S. courts' rationale that bilinguals do not experience a disparate impact from English-only rules falls apart because the question becomes not whether the individual *is able to* comply, but whether it is *more difficult* for the individual to comply.¹⁸⁹

185. The Race Directive, *supra* note 91, art. 2; The Recommendation, *supra* note 7, § I(1)(b)-(c).

186. The Recommendation, *supra* note 7, § I(1)(c). This definition comes from The Recommendation, but The Recommendation is authoritative on interpretation of The Race Directive. See Howard, *supra* note 171, at 486.

187. The Recommendation, *supra* note 7, § I(1)(c) (emphasis added).

188. *Id.* The Recommendation's language sets out in its definition that when compliance is merely more difficult for a protected class, the policy is considered discriminatory. *Id.* The psycho-linguistic findings presented in *Premier Operator* certainly would show that an English-only rule is not as easily complied with by a bilingual employee. *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000).

189. *E.g.*, *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (stating that the plaintiff was "fully bilingual" and that he "chose deliberately to speak Spanish instead of English"). This argument falls apart because it is less relevant that the speaker chooses to speak a particular language and more relevant that there is a higher degree of difficulty for a bilingual employee in controlling his or her language. The fact that a bilingual individual has to even face the possibility of controlling the language that he uses makes the rule more difficult for him to comply with than a native English-speaker because the English speaker will not have the additional burden of having to control which language is spoken at a particular time.

Even more important in the EU burden of proof framework is the absence of a requirement for statistical evidence of a negative impact on the protected class at issue.¹⁹⁰ It is sufficient for the plaintiff to show a “potential disadvantage” for a protected class.¹⁹¹ Although the U.S. requirement of providing statistical evidence of disparate impact was not originally applied to the kinds of subjective factors that are affected by English-only rules,¹⁹² plaintiffs are nevertheless required to provide subjective statistics that are difficult to compile in their prima facie case of discrimination.¹⁹³ Thus, the plaintiff under the EU approach is relieved of the requirement of statistical evidence of a disparity in subjective factors and bears a significantly lower burden of proof as compared to a U.S. plaintiff.¹⁹⁴

D. The Recommendation

The Recommendation is a guideline set out to propose the parameters of legislation to protect individuals from discrimination.¹⁹⁵ It is set out by the Council of Europe, a separate body from the European Union that regularly recommends anti-discrimination legislation,¹⁹⁶ of which all member States of the European Union are

With monolingual English speakers, there simply is no choice, and therefore no additional burden. *See generally* Colon, *supra* note 35, at 252 (arguing that the risk of violating English-only rules only exists for non-native English speakers).

190. Guild, *supra* note 105, at 420.

191. *Id.*

192. *E.g.*, Connecticut v. Teal, 457 U.S. 440, 444 (1982); Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 650 (1989). The first cases to deal with disparate impact addressed easily-quantifiable, disparate results, such as the number of African Americans who did not receive a promotion. *See, e.g.*, Teal, 457 U.S. at 440-41. This is in contrast to the disparate impact alleged in English-only cases, which turns mostly on cognitive, subjective results that are difficult to quantify. *See, e.g.*, EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000).

193. “While such statistics are often difficult to compile, whether the protected group has been disadvantaged turns on quantifiable data [and] may depend on subjective factors not easily quantified.” Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir. 1993).

194. *Id.*

195. The Recommendation, *supra* note 7, Explanatory Memorandum, ¶ 1.

196. *Id.* ¶ 2.

also members.¹⁹⁷ For this reason, the force of The Recommendation, although political and not legislative in nature,¹⁹⁸ has interpretive value on The Race Directive and vice versa.¹⁹⁹ While The Recommendation does not provide any basis for sanctions or legal remedy for failure to comply with its framework, the European Commission against Racism and Intolerance²⁰⁰ (ECRI) can publicly criticize governments for not complying with it in its periodic reports on each Member State.²⁰¹ The Recommendation's influence on The Race Directive adds support to prohibiting discrimination based on national origin of the people of the European Union, and specifically, prohibiting discrimination based on language.²⁰² The Recommendation is broad in identifying specific classes of protected people and characteristics.²⁰³ In fact, an open-ended scope was intended in The Recommendation so as to allow it to evolve with changing times.²⁰⁴ This flexibility solves the problem that Title VII faces of addressing issues that were not present at the time of its creation, such as English-only rules.²⁰⁵ As the promulgating entity of The Recommendation, the ECRI's goal is to take all necessary measures to combat, among other things, prejudice on the grounds of language.²⁰⁶ Therefore, it is not surprising that The Recommendation's definition of direct discrimination specifically

197. Howard, *supra* note 171, at 469.

198. *Id.* at 469.

199. *Id.* at 486.

200. The European Commission against Racism and Intolerance is the entity that makes the recommendations. See Council of Europe, European Commission against Racism, http://www.coe.int/T/e/human_rights/ecri/1-ECRI/ (last visited Nov. 4, 2007). The ECRI is a subsidiary of the Council of Europe. *Id.*

201. Howard, *supra* note 171, at 471.

202. The Recommendation, *supra* note 7, Explanatory Memorandum, ¶ 4.

203. *Id.* ¶ 6.

204. *Id.*; Howard, *supra* note 171, at 473.

205. Some U.S. courts rely on the lack of evidence of congressional intent to protect language from discrimination as a basis for rejecting EEOC guidelines and to subsequently rule that language is not protected by Title VII. See *supra* notes 61-62. English-only rules, however, had not received any significant attention when Title VII was enacted. *Id.*

206. The Recommendation, *supra* note 7, § I(1)(b); Howard, *supra* note 171, at 469.

includes “any *differential treatment* based on ground such as race, colour, [or] *language*”²⁰⁷

Two parts of this definition are important to examine. The first, and most obvious, is the actual inclusion of the word “language” in the text of the definition.²⁰⁸ Language is a protected class in and of itself, and therefore a plaintiff is not burdened with the problem, as one is under Title VII, of correlating language with another protected class.²⁰⁹ The second pertinent part of the definition is that “differential treatment”²¹⁰ is a lower standard than Title VII’s “adversely effect employment”²¹¹ standard, making it an easier burden for a plaintiff to satisfy. “Differential” means that the treatment is merely “able to cause varying results;”²¹² not necessarily in a very significantly negative manner. The use of an English-only rule in the workplace easily has the effect of causing varying results, even if it is only slightly more difficult for the bilingual speaker to speak only English than it is for the monolingual English speaker.²¹³ The bilingual speaker has more difficulty complying with the rule, and therefore the rule has a varying result from one worker to the next.²¹⁴ Under this theory, domestic courts could not rule English-only rules non-discriminatory merely because a bilingual employee is capable of compliance.²¹⁵ So, under The Recommendation’s definition, the English-only rules of U.S. employers clearly would be considered discriminatory.

207. The Recommendation, *supra* note 7, § I(1)(b) (emphasis added).

208. *Id.*

209. The correlation between language and national origin must be argued in order to bring a Title VII claim. *See supra* notes 89-90.

210. *Id.* “The meaning of the expression ‘differential treatment’ is wide and includes any distinction, exclusion, restriction, preference, or omission” The Recommendation, *supra* note 7, Explanatory Memorandum, ¶ 12.

211. 42 U.S.C.A. § 2000e-2(a)(2) (West 2007).

212. THE NEW INTERNATIONAL WEBSTER’S POCKET DICTIONARY OF THE ENGLISH LANGUAGE 163 (2001).

213. Even if a bilingual employee is capable of compliance, he still is more likely than a monolingual employee to inadvertently switch to another language, while the monolingual English speaker runs no such risk. Colon, *supra* note 35, at 250-52.

214. *Id.*

215. *See id.*

CONCLUSION

Without a Supreme Court ruling on English-only workplace rules, there is still time for the United States to consider the EU approach to language valuation. While the United States and the European Union are different entities, both in their makeup and in their languages spoken, the underlying rationale behind discrimination protection is the same: to protect the individual characteristics that society values. Language deserves protection from discrimination either as an integral aspect of national origin or, as in the European Union, as a characteristic so valued personally and professionally in a global world that it deserves unique protection. The current framework under Title VII fails to adequately address English-only claims in a way that recognizes the import of bilingualism. The European Union, on the other hand, provides a model framework to address language discrimination and dispels, as unwarranted, fears that multilingual integration will lead to societal turmoil. Consideration of the EU approach will guide the United States in resolving the issue of English-only rules, at least in some instances, as a discriminatory practice. The EU framework as a model will serve as proof that when it comes to language, there is nothing to be afraid of.

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