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Employment Law - The Limits of Deference: The Ninth Circuit Rejects EEOC Guidelines On English-Only Rules In The Workplace - Garcia v. Spun Steak

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EMPLOYMENT LAW

THE LIMITS OF DEFERENCE: THE NINTH CIRCUIT REJECTS EEOC GUIDELINES ON ENGLISH-ONLY RULES IN THE WORKPLACE - *GARCIA v. SPUN STEAK*

I. INTRODUCTION

In *Garcia v. Spun Steak Co*,[1] the United States Court of Appeals for the Ninth Circuit upheld an employer's use of a rule which required employees to speak only English while on the job. The court concluded that Spun Steak Company's English-only rule did not violate § 703(a)(1) of the 1964 Civil Rights Act as amended (hereinafter "Title VII")[2] by discriminating against bilingual Hispanic employees on the basis of national origin. In rendering its decision, the Ninth Circuit rejected employees' use of § 1606.7 of the Equal Employment Opportunity Commission[3] ("EEOC") guidelines, which would have placed the initial burden on Spun Steak Company to

1. Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (per O'Scannlain, J., joined by Noonan, J.; Boochever, J., concurring in part, dissenting in part); *reh'g en banc denied*, 13 F.3d 296 (9th Cir. 1993) (Reinhardt, J., dissenting), *cert. denied*, 114 S. Ct. 2726 (1994).

2. Throughout this article, the term "Civil Rights Act of 1964" and "Title VII" refers to the 1964 Civil Rights Act, as amended as it existed prior to the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

3. The EEOC is one of the administrative agencies charged with enforcing Title VII. 42 U.S.C. § 2000e-4 (1988); *see* Griggs v. Duke Power, 401 U.S. 424, 433-34 (1971); *see also* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3258-3372 (1978) (discussing the legislative background for the enforcement and administration of Title VII) [hereinafter "LEGISLATIVE HISTORY OF TITLES VII AND XI"].

justify its rule. Instead, the court placed the initial burden on the employees to establish a prime facie case of discrimination by showing that the rule created a significant adverse impact. *Spun Steak* represents a return to the Ninth Circuit's earlier approach of requiring an employee challenging an English-only rule to establish a prima facie case.[4]

This comment will show that the court's holding in *Spun Steak*, while consistent with Congressional intent and prior judicial policy, failed to provide the most compelling reason for rejecting the EEOC guideline, namely that the guideline violates both judicial policy and the plain language of the Civil Rights Act of 1991, both of which require a plaintiff to establish a prima facie case.[5] This comment will then show that the court's decision in *Spun Steak* failed to provide the necessary guidance to lower courts.[6] Finally, this comment will show that by adopting an alternative approach that classifies English-only rules as facially discriminatory, courts would ease the burden on a plaintiff establishing a prima facie case without encountering the problems inherent in the EEOC's guideline.[7]

II. FACTS AND PROCEDURAL HISTORY

Spun Steak Company is a small California corporation that produces poultry and meat products for wholesale distribution.[8] The company employs twenty-four Spanish-speaking workers, most of whom are Hispanic.[9] Several non Spanish-speaking employees complained that some Spanish-speaking

4. *See, e.g.*, Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) (holding that a bilingual disc jockey who was fired for violating a radio station's on-air English-only policy had failed to establish a prima facie case of disparate impact); *c.f.* Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) (finding that the mere existence of an English-only rule had a discriminatory impact on Hispanic employees). *See infra* notes 70-79 and accompanying text for a full discussion of *Jurado*. *See also* notes 80-94, *infra*, and accompanying text for a discussion of *Gutierrez*.

5. *See infra* notes 146-164 and accompanying text.

6. *See infra* notes 165-168 and accompanying text.

7. *See infra* notes 169-186 and accompanying text.

8. Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir. 1993).

9. *Id.* Approximately two-thirds of the company's employees are production line workers who remove poultry and other meat products from a conveyor belt and then package them for resale. *Id.*

employees made derogatory remarks in Spanish.[10] The president of the company, Kenneth Bertelson, decided that an English-only rule would enhance worker safety[11] and dispel the hostile atmosphere which apparently existed.[12] An English-only rule was enacted in September or October 1990.[13] In November 1990, Garcia and Buitrago were warned against speaking Spanish on the job.[14] Thereafter, they were separated from one another on the production line for conversing in Spanish.[15]

Garcia and Buitrago (hereinafter "Plaintiffs") challenged the company's rule[16] by filing suit in the United States District Court for the Northern District of California.[17] Plaintiffs[18] alleged that Spun Steak's English-only rule violated

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10. *Id.* Plaintiffs Garcia and Buitrago are fully bilingual, speaking both Spanish and English. *Id.*

11. Appellees disputed this assertion, claiming that the safety of the workers was never an issue but only a post-hoc justification for the rule. *See* Appellees' Answering Brief at 5, Garcia v. Spun Steak, 998 F.2d 1480 (9th Cir. 1993) (No. 91-16733).

12. *Spun Steak*, 998 F.2d at 1483. Spun Steak received complaints that Garcia and Buitrago made derogatory remarks in Spanish about African-American and Chinese-American employees. *Id.*

13. *See id.* The text of the rule reads:

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

Id. In addition to this policy, the company adopted a rule that forbade offensive racial, sexual or personal remarks of any kind. *Id.*

14. *Id.* It was not clear from the record whether the company strictly enforced its rule. *Id.* According to Garcia and Buitrago, some workers continued to speak Spanish without incident. *Id.* The company issued written exceptions to the rule allowing its clean-up crew, a foreman, and certain workers at the discretion of that foreman to speak Spanish. *Id.* It appears that only bilingual and multilingual speakers were affected by this rule. *See id.*

15. *See id.*

16. *Id.* at 1483-84.

17. *Id.* at 1484. First, Garcia and Buitrago filed a charges with the EEOC. *Id.* at 1483. The EEOC conducted an investigation and determined that plaintiffs had reasonable cause to believe that the company's rule violated Title VII § 703(a)(1) of the 1964 Civil Rights Act. *Id.* at 1483-84. Thereafter, plaintiffs filed this lawsuit. *Id.* at 1483.

18. Local 115 (United Food and Commercial Workers International Union, AFL-CIO) was also a named plaintiff, representing collectively the Spanish-speaking employees. *See Spun Steak*, 998 F.2d at 1484. The Ninth Circuit held that

Title VII by discriminating against them on the basis of national origin.[19] On cross motions for summary judgment, the district court granted plaintiffs' motion and denied the company's motion, finding that the rule disparately impacted Hispanic workers without sufficient business justification.[20] Spun Steak appealed to the Court of Appeals for the Ninth Circuit.[21]

III. BACKGROUND

A. NATIONAL ORIGIN UNDER TITLE VII

Title VII of the Civil Rights Act of 1964[22] prohibits employers from discriminating against employees on the basis of "national origin."[23] Title VII does not itself provide a definition of the term "national origin."[24] However, the United States Supreme Court, in *Espinoza v. Farah Manufacturing Co.*,[25] defined national origin as the country from where a person was born or the country from which his or her ancestors came.[26]

Local 115 had standing to bring suit on behalf of its members. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. 42 U.S.C. § 2000e-2000e-17 (1988 & Supp. III 1991).

23. Section 703(a) of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would 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.

42 U.S.C. § 2000e-2(a).

24. *See* 42 U.S.C. § 2000e (Civil Rights Act of 1964 definitions).

25. 414 U.S. 86 (1973).

26. *Id.* at 88. The Court noted that the legislative history supported this construction. *Id.* at 88-89. (quoting Congressman Roosevelt's statement that national origin, "means the country from which you or your forebears came from." *Id.* at 89. (citing 110 Cong. Rec. 2549 (1964), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI, *supra* note 3, at 3179-80 (1978)).

The Court also noted that the deletion of the word "ancestry" from the final

In 1980, the EEOC revised its "Guidelines on Discrimination Because of National Origin."[27] The EEOC guidelines define national origin broadly as including an individual's, or his or her ancestor's, place of origin; or the physical, cultural, or linguistic characteristics of that individual.[28]

Courts have been willing to include linguistic characteristics such as a person's accent under the auspices of Title VII.[29] However, courts have been more reluctant to include language itself as an identifying trait of national origin.[30]

B. THEORIES OF LIABILITY

Under Title VII a plaintiff may proceed under two theories of liability: disparate impact theory or the disparate treatment theory.[31] While disparate treatment theory requires proof of discriminatory intent, disparate impact theory does not require proof of such intent.[32]

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version of § 703 was not meant to be a material change, suggesting the terms "ancestry" and "national origin" were considered synonymous. *Id.* (citing H.R. REP. NO. 914, 88th Cong., 1st Sess., 87 (1963)).

27. 29 C.F.R. § 16.06.1 (1980). The EEOC guidelines were originally adopted in 1970 in response to charges filed by individuals alleging that they were denied equal employment opportunity because their last names were associated with persons, schools, churches, and other lawful organizations identified with certain national origin groups. *Id.*

28. 29 C.F.R. § 1606.1 (1993). The guidelines state that the EEOC "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."

29. *See, e.g.*, Fragrante v. City of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) (stating that accent and national origin are inextricably intertwined in many cases), *cert. denied*, 494 U.S. 1081 (1989); Berke v. Ohio Dept. of Public Welfare, 30 Fair Empl. Prac. Cas. (BNA) 387 (S.D. Ohio 1978) (stating that it is reasonable to assume that a person speaking with an accent has a national origin other than that of the United States), *aff'd*, 628 F.2d 980 (6th Cir. 1980).

30. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (refusing to equate the language a bilingual person chooses to use with national origin), *cert. denied*, 449 U.S. 1113 (1981).

31. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1987). *See also* § 1606.2 of the EEOC guidelines which provide in part: "[t]he Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination." 29 C.F.R. § 1606.2 (1993).

32. *Watson*, 487 U.S. at 988.

1. *Disparate Impact*

The United States Supreme Court first advanced the disparate impact theory in *Griggs v. Duke Power Co.*[33] Disparate impact claims arise when facially neutral employment practices[34] affect a group protected under Title VII more harshly than another group and cannot be justified by business necessity.[35] Whether or not an employer intended to discriminate is irrelevant under the disparate impact theory.[36] In order to establish a prima facie case, the plaintiff must show that a particular facially neutral employment policy or practice has a significant discriminatory impact on the protected group to which the plaintiff belongs.[37] In a typical disparate impact

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33. 401 U.S. 424 (1971).

34. Courts generally have defined the meaning of neutrality broadly, to include all employment policies and practices that do not specifically mention a class covered by Title VII. *See* STEPHEN SHULMAN & CHARLES ABERNATHY, THE LAW OF EQUAL OPPORTUNITY EMPLOYMENT, 2-12 to 2-14 (1990) (describing the various selection criteria and employment requirements the courts have analyzed using the *Griggs* analysis).

Courts generally have been willing to define English-only rules as facially neutral. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (equating an English-only rule with a rule barring employees from smoking), *cert. denied* 449 U.S. 1113 (1981). This view has been subject to criticism. One commentator has stated that the full impact of an English-only rule will fall exclusively on members of protected groups whose primary language is not English. Juan F. Perea, *English-only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265, 289-90 (1990) (citing Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 298-99 (1971)). Perea argues that an English-only rule should not be described as "facially neutral," but instead be the "functional equivalent" of national origin discrimination. *Id.* at 289-90.

35. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977). By definition, disparate impact cases are concerned with discrimination against a group or class of persons. *See generally* SHULMAN & ABERNATHY, *supra* note 34, at 2-11 to 2-12.

36. *See Griggs*, 401 U.S. at 432. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built in headwinds' for minority groups . . . ." *Id.*

37. Connecticut v. Teal, 457 U.S. 440, 446 (1982). The Civil Rights Act of 1991 codified the burden placed on a plaintiff to make the prima facie case of disparate impact. Section 703 of the Civil Rights Act of 1964 was amended to provide that:

> With respect to demonstrating that a particular employment practice causes a disparate impact . . . the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision

claim, the plaintiff will use comparative statistics[38] to show that the employment policy adversely affected the protected class. Generally, courts determine what constitutes significant discriminatory impact on a case-by-case basis.[39]

Once the plaintiff has established a prima facie case of discrimination, the burden of production[40] shifts to the defen-

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making process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. III 1991).

38. For a discussion of the role statistics play in virtually all disparate impact cases, see generally, BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1331-1391 (2nd ed. 1983). *See also* CHARLES A. SULLIVAN ET AL., 1 EMPLOYMENT DISCRIMINATION LAW 166-81 (2nd ed. 1988) (examining the various mathematical models used in disparate impact claims).

39. *See* SCHLEI & GROSSMAN *supra* note 38, at 98-99. *See also* Watson v. Fort Worth Bank, 487 U.S. 977, 996 n.3 (1988) "At least at this stage of the law's development we believe that such a case-by-case approach properly reflects our recognition that statistics 'come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.'" *Id.* (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977)) (ellipses in original).

40. Under the Civil Rights Act of 1991, both the burdens of production and persuasion shift to the defendant. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

Section 105 of the Civil Rights Act of 1991 amends § 703 of Title VII to provide:

> An unlawful employment practice based on disparate impact is established under this title only if-
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> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged business practice is job related for the position in question and consistent with business necessity; or
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> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e(2)(k)(1)(A) (Supp. III 1991). "Demonstrate" is defined as meeting both the burdens of production and persuasion. 42 U.S.C. § 2000e(m) (Supp. III 1991).

It is not clear whether the court in *Spun Steak* followed the law as it existed prior to, or subsequent to, the Civil Rights Act of 1991. The effective date of the Civil Rights Act of 1991 was November 21, 1991. *See* 42 U.S.C. §§ 2000e-2(k)-(n). However, the Act was silent as to whether it was to apply to cases pending before the courts on that date. *See generally* CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION xix-xxxiii (2nd ed. supp. 1992) (discussing the evidence for and against the application of the Civil Rights Act of 1991 to pending cases). The plaintiffs filed charges of discrimination against Spun Steak with the EEOC

dant to demonstrate a business necessity for the challenged employment practice.[41] Title VII does not define "business necessity." The federal courts have applied a number of different interpretations to "business necessity" or "job relatedness."[42]

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on May 6 1991. *Spun Steak*, 998 F.2d at 1483. Both Parties filed cross-motions for summary judgement on September 6, 1991. *Id.* at 1484. The district court filed its decision in favor of the plaintiffs on October 23, 1991. Garcia v. Spun Steak, C-91-1941 RHS, 1991 U.S. Dist. LEXIS 16484 (N.D. Cal. Oct. 23, 1991).

In two recent decisions the Supreme Court ruled that provisions of the Civil Rights Act of 1991 do not apply retroactively. In Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994), the Court held that § 102 of the Civil Rights Act of 1991, dealing with remedies in cases of intentional discrimination, did not apply to cases arising before its enactment. *Id.* at 1505-08. In Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994), the Court held that § 101 of the Civil Rights Act of 1991, defining the term "make and enforce contracts," did not apply retroactively. *Id.* at 1518-20.

While neither case dealt with the particular provisions that would be applicable in a disparate impact action, the cases do indicate that the 1964 Civil Rights Act as it existed prior to the passage of the 1991 amendments is the controlling law in *Spun Steak*. If the Civil Rights Act of 1991 does not apply to *Spun Steak*, then the controlling law would be Ward's Cove Packing Co. v. Antonio, 490 U.S. 642 (1989). Here, only the burden of producing evidence shifts to the defendant. *Id.* at 659-60. Whether the burden that shifts to the employer is the burden of persuasion or merely the burden of producing evidence was open to interpretation before Watson v. Fort Worth Bank, 487 U.S. 977 (1988) (plurality opinion) (stating that the burden that shifts is the burden of production). This view was later adopted by the majority of the Court in *Ward's Cove*, 490 U.S. at 659-60. Prior to *Watson*, the nature of the burden in a disparate impact case was an open question. *See* SCHLEI & GROSSMAN, *supra note* 38, at 1328-29 (discussing the pre-*Watson* analysis). *See generally* Samuel R. Zuck, *Shifting Burdens of Proof Under Disparate Impact Analysis: Conflict and Problems of Characterization*, 27 DUQ. L. REV. 535 (1989).

41. *See Teal*, 457 U.S. at 446-47. The respondent may either attack the plaintiff's showing of disparate impact or show that the employment practice is justified by business necessity. SHULMAN & ABERNATHY, *supra* note 34, at 43-44.

42. *See, e.g.*, *Griggs*, 401 U.S. at 431-32 ("manifest relationship;" "demonstrable relationship"); Dothard v. Rawlingson, 433 U.S. 321, 332 n.14 (1977) ("A discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge"); *see generally* SCHLEI, *supra* note 38, at 1328-30 n.141 (listing various Supreme Court and circuit court cases and their respective interpretations of business necessity). *See also* Marcus B. Chandler, Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979) (discussing lower courts interpretation of the Griggs standard). Chandler argues that "[t]he theoretical underpinnings of the business necessity defense, the legislative history of Title VII, and the Supreme Court's interpretations of that history all suggest that business necessity means nothing more than legitimate business purpose." *Id.* at 933. *Cf. Watson*, 487 U.S. at 998 (holding that the defendant met its burden of producing evidence that its employment practices are based on legitimate business reasons).

Finally, once a defendant has satisfied his burden of demonstrating business necessity, the plaintiff must be afforded an opportunity to show that other employment practices, without similar discriminatory effects, would serve the employer's legitimate business interest.[43] Such a showing would demonstrate that the employer's practice was merely a "pretext" for discrimination.[44]

2. *Disparate Treatment*

Disparate treatment claims arise when, the employer treats some people less favorably than others because of their race, color, religion, sex, or national origin.[45] In disparate treatment claims proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[46]

In *McDonnell Douglas Corp. v. Green*,[47] the Supreme Court established the order of proof in a disparate treatment claim. First, the plaintiff bears the initial burden of establishing a prima facie case of discrimination.[48] The plaintiff need only produce evidence to raise an inference of discrimination.[49] Once the plaintiff has established a prima facie case,

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43. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

44. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804-05).

45. *International Bhd. of Teamsters*, 431 U.S. 324, 335 n.15 (1977).

46. *Id.*

47. 411 U.S. 792 (1973).

48. *Id.* at 802. The Court in *McDonnell Douglas* set out a four part test for indirectly making out a prima facie case of racial discrimination. The plaintiff must show:

> (i) that he belongs to a racial minority, (ii) that he applied and was qualified for a job which the employer was seeking applicants, (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. The Court elaborated: "The facts necessarily will vary in Title VII cases, and the specifications above the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

See generally SCHLEI & GROSSMAN, *supra* note 38, at 13-22 (discussion of the disparate treatment theory).

49. *McDonnell Douglas*, 411 U.S. at 802.

the burden of production shifts to the defendant to articulate either a legitimate non-discriminatory reason[50] or a bona fide occupational qualification for the discriminatory treatment.[51] Once the defendant has satisfied this burden, the plaintiff must be afforded an opportunity to show that the defendant's stated reason was a pretext for a discriminatory motive.[52] Most cases are decided at the pretext stage.[53] The plaintiff may show pretext through direct evidence of the defendant's motive, or the court may infer discriminatory intent through plaintiff's use of statistical or comparative evidence.[54]

C. ENGLISH-ONLY RULES IN THE WORKPLACE

In December of 1980, the EEOC promulgated its current national origin guidelines on the subject of English-only rules in the workplace.[55] Section 1606.7 of the EEOC's guidelines

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50. *Id. See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Court in *Burdine* held that "[t]he ultimate burden of persuading the trier of fact that the defendant discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253.

51. Section 703(e) of Title VII provides in pertinent part:

> [I]t shall not be unlawful employment practice for an employer . . . to admit or employ any individual . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e).

52. *McDonnell Douglas*, 411 U.S. at 804.

53. SCHLEI & GROSSMAN, *supra* note 38, at 14.

54. *Id.* at 14-15.

55. 29 C.F.R. § 1606.7 (1980). The EEOC stated that it "is revising its *Guidelines on Discrimination Because of National Origin* to clarify them and to specifically inform the public of unlawful employment practices which discriminate on the basis of national origin." Section 1606.7 provides:

> A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore,

creates a rebuttable presumption that English-only rules in the workplace violate Title VII.[56] English-only rules are upheld only if employers can show a business necessity justifying the enactment of such rules.[57] Therefore, under the EEOC's scheme, a plaintiff need only show the existence of an English only rule in order to establish a prima facie case of discrimination.

1. *Fifth Circuit Case Law: Garcia v. Gloor*

Section 1606.7 was promulgated by the EEOC partly in response to a Fifth Circuit Court of Appeals opinion upholding the validity of an English-only rule in the workplace.[58] In

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> the Commission will presume that such a rule violates Title VII and will closely scrutinize it. . . . An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity. . . . It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule . . . .

29 C.F.R. § 1606.7 (1980)

56. 29 C.F.R. § 1606.7(a).

57. 29 C.F.R. § 1606.7(b). According to the EEOC, an example of business necessity might be "where safety requires that all communications be in English so that everyone can closely follow a particular task, such as, surgery or drilling of oil wells or where a salesperson is attending to English-speaking customers." 45 Fed. Reg. 85,635 (1980).

58. 45 Fed. Reg. 85,635. According to the EEOC:

> As the Court noted in Garcia v. Gloor, 616 F.2d 264, 266 n.1 (5th Cir. 1980), the Commission's previous Guidelines did not give any standards for testing employer rules which prohibit the use of languages other than English. The purpose of § 1606.7 is to provide this guidance. The Commission's concern is to prevent employers from imposing speak English-only rules, as arbitrary and oppressive terms and conditions of employment, on people who come from non English-speaking backgrounds in order to deprive them of an equal employment opportunity for jobs they are otherwise fully qualified to perform.

Id.

For a discussion on the history of EEOC guidelines dealing with English-only rules and the history of English-only rules case law, see Robert R. Oliva,

Garcia v. Gloor,[59] the Fifth Circuit addressed the issue of whether a lumber company violated Title VII by discharging a bilingual employee for disregarding its English-only rule.

Gloor Lumber and Supply Company enacted a rule requiring its employees to speak English unless the employees were assisting non English-speaking customers.[60] Gloor Lumber discharged Hector Garcia, a bilingual salesperson of Mexican-American descent, for violating the rule after he responded to a question from another employee in Spanish.[61] Garcia sued claiming that the rule disparately impacted Spanish-speaking employees by denying them a privilege of employment enjoyed by English-speaking employees, namely speaking in the language that is most comfortable to them.[62]

The district court ruled in favor of the employer.[63] On appeal, the Fifth Circuit upheld the employer's use of the English-only rule, stating that "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."[64] The court compared the English-only rule to a rule that prohibits smoking in the workplace.[65] The court stated that "[Title VII] would not condemn that rule merely because it is shown that most of the employees of one race smoke, most of the employees of another do not and it is more likely that a member of the race more addicted to tobacco would be disciplined."[66]

In analyzing whether Title VII prohibits English-only rules

English-Only Rules In The Workplace: The Ninth Circuit Attempts to Redefine The Parameters, 7 N.Y.L. SCH. J. HUM. RTS. 99 (1990) (discussing the evolution of English-only rules administrative law, case law and administrative promulgations).

59. 618 F.2d 264 (5th Cir. 1980), *cert denied*, 449 U.S. 1113 (1981).

60. *Gloor*, 618 F.2d at 266. Several employees who only spoke Spanish were exempt from the policy. *See id.*

61. *Id.* The court noted that while Garcia was not discharged merely for violating the English-only rule, "[t]he record would support a finding that Mr. Garcia's use of Spanish was a significant factor and therefore, rather than remand for a determination by the trial court, we will assume for present purposes that it was." *Id.* at 268.

62. *See id.*

63. *Id.* at 266.

64. *Id.* at 270.

65. *Id.*

66. *Gloor*, 618 F.2d at 270.

in the workplace, the *Gloor* court noted that no EEOC guideline addressed the matter.[67] The *Gloor* court upheld the employer's rule and the decision to discharge Garcia for violating the rule.[68] The EEOC responded by promulgating § 1606.7.[69]

2. *Ninth Circuit Case Law*

In 1987, seven years after the *Gloor* case, the Ninth Circuit, in *Jurado v. Eleven-Fifty Corp.*,[70] addressed the issue of whether an employer violated Title VII by discharging an employee for speaking Spanish.[71] In that case, the program director of a local radio station requested that a bilingual disc jockey, Valentine Jurado, use some Spanish while broadcasting on the air.[72] A consultant for the radio station determined that

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67. *Id.* at 268 n.1. The Fifth Circuit stated:

> While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin, . . . it has adopted neither a regulation stating a standard for testing such language nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

Id.

68. *Id.* at 272. ("We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person fully capable of speaking English . . . .").

69. 29 C.F.R. § 1606 (1993). Whether and to what extent this guideline is consistent with the *Gloor* court's analysis is not entirely clear. The EEOC states that § 1606.7 is consistent with *Gloor*.

> Section 1606.7 does not conflict with the Gloor decision. Gloor did not involve a speak English-only rule which was applied at all times. Neither did the facts in Gloor involve a bilingual employee whose primary language was not English. In the Court's view, Mr. Garcia, who spoke both English and Spanish, failed to prove that Spanish was his primary language.

45 Fed. Reg. 85,635 (1980). The Fifth Circuit has not addressed the issues presented in *Gloor* since the promulgation of § 1606.7.

70. 813 F.2d 1406 (9th Cir. 1987).

71. *See Jurado*, 813 F.2d 1408-09. Jurado advanced both disparate treatment and disparate impact theories to support his claim. *See id.* at 1409 for the court's discussion of Jurado's disparate treatment claim; *see also id.* at 1412 for the court's discussion of Jurado's disparate impact claim.

72. *Id.* at 1408.

Jurado's use of Spanish on the air did not achieve the goals set out by management (i.e., to increase the target audience) and that Jurado's use of Spanish on the air confused some listeners.[73] A new program director told Jurado to stop using Spanish on the air.[74] Jurado sued, claiming, among other things, that the radio station discriminated against him on the basis of national origin by discharging him when he refused to comply with the order.[75] The district court granted the radio station's motion for summary judgment.[76]

On appeal, the Ninth Circuit affirmed the district court's dismissal of Jurado's disparate impact claim by stating that "[t]he district court found Jurado's only basis for a disparate impact claim was the English-only order somehow disproportionately disadvantaged Hispanics. The court found this theory was without merit as applied to Jurado because Jurado was fluently bilingual and could easily conform to the order."[77] The court cited *Garcia v. Gloor* for support.[78]

Given the court's use of *Gloor* in *Jurado*, it appeared that the Ninth Circuit had adopted the Fifth Circuit's rationale for upholding English-only rules in the workplace.[79] However, in 1988, the Ninth Circuit, in *Gutierrez v. Municipal Court*,[80] began moving away from the *Gloor* rationale and towards the rationale adopted in the EEOC guidelines.

In *Gutierrez*, which was subsequently vacated as moot by the Supreme Court,[81] the Ninth Circuit addressed the issue of

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73. *Id.*

74. *Id.*

75. *See id.* at 1408-09. Jurado's disparate treatment claim had several bases. One basis for was that the radio station permitted a white disc jockey, Rick Dees, to use Spanish on the air while prohibiting Jurado from doing the same. *Id.* at 1410. Another basis was a comment that the consultant made when suggesting that Jurado's bilingual format be eliminated suggesting the program was "preoccupied with ethnicity to a frightening degree." *Id.*

76. *Jurado*, 813 F.2d at 1409.

77. *Id.* at 1412.

78. *Id.*

79. *See id.*

80. 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

81. *Gutierrez*, 490 U.S. at 1016. Plaintiff, Alva Gutierrez, had left her job with the county clerk and had settled out of court for $85,000 in damages, attorney fees and other costs. L.A. TIMES, Feb. 8, 1989, at B2. Judges for the Municipal

whether an English-only rule instituted by the Municipal Court violated Title VII by discriminating against its Hispanic employees on the basis of national origin.[82] In that case, the Municipal Court promulgated an English-only rule forbidding "employees to speak any language other than English except when acting as translators."[83] Gutierrez, a bilingual translator who worked for the court, sued for injunctive relief.[84] The district court granted Gutierrez's request for a preliminary injunction.[85]

On appeal, the Ninth Circuit affirmed the district court's order enjoining the Municipal Court from enforcing the rule.[86] The court began by noting that "the cultural identity of certain minority groups is tied to the use of their primary tongue, . . . "[87] and that "[t]he mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin."[88] The court then expressed its concern that "because language and accents are identifying characteristics, rules which have a negative effect on bilinguals, individuals with accents, or non-English speakers, may be mere pretexts for intentional national origin discrimination."[89]

Court then appealed to the United States Supreme Court, petitioning that the case should be vacated on procedural grounds. L.A. TIMES, Mar. 16, 1989, at B2.

82. *Gutierrez*, 838 F.2d 1031. Gutierrez advanced both a disparate treatment and a disparate impact theory to support her claim. *Id.* at 1036-37.

83. *Id.* at 1036. The text of the rule provided that "[t]he English language shall be spoken by all court employees during regular work hours while attending to assigned work duties, unless an employee is translating for the non-English-speaking public. This rule does not apply to employees while on their lunch hour or work breaks." *Id.* at 1037. The municipal court claimed that it adopted this rule in order to promote racial harmony, to prevent disruption, to facilitate supervision, and to uphold a policy expressed in an amendment to the California Constitution that declared English the official language of state business. *Id.* at 1042-43. *See* Cal. Const. art III, § 6.

84. *Id.* at 1036. In addition to injunctive relief, Gutierrez requested monetary damages and attorney's fees. *Id.*

85. *Id.*

86. *Id.* at 1045.

87. *Gutierrez*, 838 F.2d at 1039. (citing James Harvey Domengeaux, Comment, *Native Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1165-67 (1986)).

88. *Id.* (citing Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 361-69, 376-77 (1986))

89. *Id.* (citing McArthur, *Worried About Something Else*, 60 INT'L J. SOC. LANGUAGE 87, 90-91 (1986)).

After citing the EEOC guideline, the court agreed "that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized."[90] The court further stated that the EEOC guidelines, "by requiring that a business necessity be shown before a limited English-only rule may be enforced, properly balance the individual's interest in speaking his primary language and any possible need of the employer to ensure that in particular circumstances only English shall be spoken."[91] The court adopted the EEOC's business necessity test as "the proper standard for determining the validity of limited English-only rules."[92]

However, in adopting the EEOC's business necessity test, the *Gutierrez* court was forced to recharacterize *Jurado* by stating that "[t]he *Jurado* rule was considerably more restricted than and bore little or no resemblance, either in purpose or effect, to the edict of the Municipal Court judges. The *Jurado* rule was clearly a reasonable one that met *the business necessity test* . . . ."[93] Thus, *Jurado*, according to the *Gutierrez* court, became a case where the employer met its burden of showing business necessity.[94]

Although the Supreme Court vacated *Gutierrez* as moot, *Gutierrez* still represented the Ninth Circuit's last word on

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90. *Id.* at 1040.

91. *Id.*

92. *Id.*

93. *Gutierrez*, 838 F.2d at 1041 (emphasis in original).

94. *Id.* Judge Kozinski, dissenting from the denial of rehearing *Gutierrez en banc*, wrote:

> Faced with the insuperable problem of *Jurado*, the *Gutierrez* panel deftly recharacterized it as a case where the English-only rule 'met *the business necessity test*,' 838 F.2d at 1041 . . . . *Jurado*, of course, said no such thing. Close examination of the two short paragraphs quoted [where the court dealt with the disparate impact claim in *Jurado*] reveals that the words 'business necessity' did not find their way into Jurado's discussion of the issue. To the contrary, *Jurado* relied exclusively on *Garcia v. Gloor*, [618 F.2d 264 (5th Cir. 1980)] which *rejected* the business necessity test. In ham-handed fashion, the *Gutierrez* panel throws *Jurado*'s rationale out the window and substitutes its own.

Gutierrez v. Municipal Court, 861 F.2d 1187, 1190 (9th Cir. 1988) (denial of rehearing *en banc*) (Kozinski, J., dissenting) (emphasis in original) (citation added).

English-only rules in the workplace. When the district court's decision in *Spun Steak* was appealed, the question was whether the panel would follow the *Gutierrez* court's rationale or the *Jurado* court's rationale.

IV. THE COURT'S ANALYSIS

A. THE MAJORITY

The majority first addressed the threshold issue of whether disparate impact claims may be brought under § 703(a)(1), concluding that such claims may be brought under § 703(a)(1). The court next addressed whether plaintiffs established a prima facie case. Finally, the court examined three arguments advanced by the plaintiffs and concluded that plaintiffs failed to establish a prima facie case.[95]

1. *Whether Disparate Impact Claims May Be Brought Under § 703(a)(1)*

The Ninth Circuit in *Spun Steak* first considered whether a disparate impact claim[96] could be brought under Title VII § 703(a)(1) of the 1964 Civil Rights Act as amended.[97] The court

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95. Garcia v. Spun Steak, 998 F.2d 1480, 1490 (9th Cir. 1993), *reh'g en banc denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied* 114 S.Ct. 2726 (1994).

96. *See supra* notes 28-38 and accompanying text for a discussion on disparate impact.

97. *Spun Steak*, 998 F.2d at 1485. See *supra* note 40 for the text of § 703(a). The court noted that traditionally a disparate impact claim is brought under Title VII section 703(a)(2) of the 1964 Civil Rights Act. *Id.* This is chiefly due to the language of the statute. The court stated:

> [T]he cases in which we have concluded that plaintiff has proved discrimination based on a disparate impact theory have all involved plaintiffs who claimed that they were denied employment opportunities as the result of artificial, arbitrary, and unnecessary barriers that excluded members of a protected group from being hired or promoted.

Id.

Since "employment opportunities" is language that is extracted from section 703(a)(2), such claims were logically thought to arise under this section. *Id.* Garcia and Buitrago argued that the English-only rule imposed a burdensome term or condition on their employment and also denied them a privilege accorded to other employees, namely monolingual speakers of English. *Id.* The court reasoned that terms and conditions of employment does not fall within the ambit of section 703(a)(2), but rather within the ambit of section 703(a)(1). *Id.*

noted that neither the Ninth Circuit nor the Supreme Court had expressly considered this issue.[98] The Ninth Circuit held that a disparate impact claim could be brought under § 703(a)(1), stating that there is "no reason to restrict the application of the disparate impact theory to the denial of employment opportunities under § 703(a)(2)."[99] Since the issue of whether a disparate impact claim can be brought under § 703(a)(1) involves statutory interpretation, the Ninth Circuit partially justified its holding by noting that "[t]he Supreme Court has instructed that the language of § 703(a)(1) is to be interpreted broadly."[100]

Next, the court examined whether the language of § 703(a)(1) could support a disparate impact claim.[101] The court cited *Lynch v. Freeman*,[102] a Sixth Circuit decision, to support its determination that disparate impact claims could be sustained under § 703(a)(1).[103]

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98. *Id.* The court was in error; the Ninth Circuit had previously decided whether a disparate impact claim may be brought under section 703(a)(1). In May 1983, the court decided Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). The Ninth Circuit held that "[t]his is an unusual *disparate impact* case because it alleges a violation of § 703(a)(1) of the Act: discrimination with respect to 'compensations, terms, conditions, or privileges of employment.'" *Wambheim*, 705 F.2d at 1494 (citing 42 U.S.C. § 2000e-2(a)(1)) (emphasis added). The Ninth Circuit concluded that the disparate impact analysis was appropriate. *Wambheim*, 705 F.2d at 1494.

99. *Spun Steak*, 998 F.2d at 1485.

100. *Id.* The Ninth Circuit drew this inference from a statement that the Supreme Court made in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a sexual harassment case which involved the issue of whether a victim of sexual harassment who filed a claim pursuant to Title VII § 703(a)(1) could recover for psychological damages. The Court reasoned that remuneration under Title VII was not limited to economic damages since "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment.'" *Id.* at 64.

101. *Spun Steak*, 998 F.2d at 1485.

102. 817 F.2d 380 (6th Cir. 1987). In *Lynch*, a female construction worker, who was terminated from her job, sued her employer contending, among other things, that his failure to provide properly sanitized toilet facilities discriminated against her by creating work conditions that adversely impacted female employees. *Id.* at 386-87. The employer contended that any claim involving discrimination with respect to work conditions falls within the language of § 703(a)(1), which requires discriminatory intent to be shown. *Id.* The Sixth Circuit upheld the female worker's disparate impact claim. *Id.* at 389.

103. *Spun Steak*, 998 F.2d at 1485-86 (citing *Lynch*, 817 F.2d 380) ("We are 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

2. *Prima Facie Case*

The Ninth Circuit next considered whether the Spanish-speaking employees established their prima facie case.[104] The court stated that under disparate impact analysis, a plaintiff must "do more than merely raise an inference of discrimination before the burden shifts."[105] The court noted that in a typical disparate impact case, the plaintiff "proves discriminatory impact by showing statistical disparities between the number of protected class members in the qualified applicant group and those in the relevant segment of the workforce."[106] However, the court recognized that when the "alleged disparate impact is on the conditions, terms or privileges of employment . . . determining whether the protected group has been adversely affected may depend on subjective factors not easily quantified."[107] The court concluded that although proving the alleged impact may be more difficult under these circumstances, this fact "does not relieve the plaintiff of the burden of proving disparate impact."[108] The mere assertion that the English-only rule harms members of the protected group is insufficient.[109]

In addition, the majority fashioned a four-part test to determine whether a plaintiff has established a prima facie case. The test provides that in order to establish a prima facie case a plaintiff must demonstrate: (1) the existence of adverse effects of the policy; (2) that the impact of the policy is on terms, conditions, or privileges of employment of the protected class; (3) that the adverse effects are significant; and (4) that the employee population in general is not affected by the policy to the same degree.[110]

The Spanish-speaking employees advanced three argu-

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privileges' of the employment of a protected group under section 703(a)(1).").

104. *Id.* at 1486.

105. *Id.*

106. *Id.* The court noted that while such statistics are difficult to gather, at least the evidence of discrimination is quantifiable. *Id.*

107. *Id.*

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

109. *Id.*

110. *Id.*

ments in order to establish their prima facie case, each of which the court examined and rejected in turn. First, the Spanish-speaking employees argued that the rule denied them the "ability to express their cultural heritage on the job."[111] Second, they argued that the rule denied them "a privilege of employment that is enjoyed by monolingual speakers of English."[112] Third, they argued that the rule "create[d] an atmosphere of inferiority, isolation, and intimidation."[113]

The court quickly dismissed the first argument by noting that Title VII "does not protect the ability of workers to express their cultural heritage at the workplace.[114] Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges."[115]

The court dismissed the second argument by noting that while the ability to converse on the job is a privilege of employment,[116] the very nature of a privilege is that it is defined at the discretion of the employer.[117] The employer may define the privilege either broadly or narrowly.[118] Where the employer chooses to define the privilege narrowly by enacting an English-only rule, employees who are bilingual cannot be adversely impacted since the language that they use at a particular time is, by definition, a matter of choice.[119] Thus, the court reasoned that while the rule may inconvenience some bilingual employees, Title VII was not meant to protect against policies that merely inconvenience members of a protected class.[120] Rather, "Title VII protects against only those policies that have a *significant* impact."[121] However, the court ob-

111. *Id.* at 1486-87.
112. *Id.* at 1487.
113. *Spun Steak*, 998 F.2d at 1487.
114. *Id.*
115. *Id.*
116. *Id.* The court noted that such a privilege may be a significant privilege for workers who work on the assembly-line. *Id.*
117. *Spun Steak*, 998 F.2d at 1487.
118. *Id.* For example, an employer may "proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity." *Id.*
119. *Id.*
120. *Id.* at 1487-88.
121. *Spun Steak*, 998 F.2d at 1488 (emphasis in original).

served that the very existence of an English-only rule might have an adverse impact on a speaker who could not speak English.[122]

The Ninth Circuit addressed the third argument by noting that the Supreme Court of the United States, in *Meritor Savings Bank v. Vinson*,[123] held that "an abusive work environment may, in some circumstances, amount to a condition of employment . . . ."[124] However, the Ninth Circuit characterized *Meritor* as stating that the hostile work environment "must be pervasive before an employee has a Title VII claim under a hostile environment theory."[125] Although the Spanish-speaking employees urged the court to adopt a per se rule that English-only rules will always create a hostile work environment, the Ninth Circuit declined to do so.[126] Rather, the court viewed the inquiry as a question of fact "for which a per se rule is particularly inappropriate."[127] Any inquiry "must look to the totality of the circumstances in the particular factual context in which the claim arises."[128] The court noted that conclusory statements that the rule has contributed to an atmosphere of isolation, inferiority and intimidation are not

122. *Id.* The court remanded the case as to one employee who could not speak any English in order to determine whether the existence of the rule adversely impacted her. *Id.* at 1490. The court stated that this is a question of fact for which summary judgment is inappropriate. *Id.*

123. 477 U.S. 57 (1986).

124. *Spun Steak*, 998 F.2d at 1488 (citing *Meritor*, 477 U.S. at 66). Section 703(a)(1) of the Civil Rights act of 1964 forbids an employer from discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment. 42 U.S.C. § 2000e-2(a)(1).

In *Meritor*, the Supreme Court addressed the issue of whether an employee may bring a claim arising under Title VII § 703(a)(1) for sexual harassment where an employer's conduct amounts to a work condition by creating a hostile and offensive environment with which the employee must contend. *Meritor*, 477 U.S. at 66. In that case, a bank employee sued her employer contending that unwelcome sexual advances, requests for sexual favors and verbal suggestions created an offensive environment that amounted to a condition of employment for purposes of Title VII. *Id.* at 60. The Court held that such conduct where the purpose or effect of it creates an intimidating, hostile, or offensive working environment, may properly be the basis of a Title VII § 703(a)(1) claim. *See id.* at 66.

125. *Spun Steak*, 998 F.2d at 1489.

126. *Id.* The Spanish-speaking employees relied on EEOC guideline section 1606.7(a) for their support. *Id. See supra* note 55 for the text of this guideline.

127. *Id.*

128. *Id.*

sufficient.[129] Since the Spanish-speaking employees offered no evidence apart from conclusory statements to show that the policy created a hostile work environment, the court ruled that they did not establish a prima facie case.[130]

In so ruling, the Ninth Circuit rejected the employees' use of an EEOC Guideline that enables a plaintiff to establish a prima facie case merely by showing the existence of an English-only rule.[131] Although the court noted that the guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[132] the majority added that "we are not bound by the guidelines."[133] Further, the court stated that it would not defer to "an administrative construction of a statute where there are 'compelling indications that it is wrong.'"[134]

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129. *Id.*

130. *See Spun Steak*, 998 F.2d at 1489. According to the court, "the bilingual employees have not raised a genuine issue of material fact that the effect is so pronounced as to amount to a hostile environment." *Id.*

131. *Id.*

132. *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

133. *Id.* (citing Espinoza v. Farah Mfg. Co. 414 U.S. 86, 94 (1973)).

134. *Id.* (quoting *Espinoza*, 414 U.S. at 94-95).

In its decisions, the United States Supreme Court has enumerated a number of factors which are relevant in determining whether to defer to EEOC guidelines. First, the court looks to the language of the statute to determine whether the guideline is in accord. *Espinoza*, 414 U.S. at 88 ("[T]he plain language of the statute supports the result reached by the Court of Appeals [refusing to defer to EEOC guidelines]."). Second, the court examines legislative history to further interpret the language of the statute. *Griggs*, 401 U.S. at 434 (finding the 1964 Civil Rights Act and its legislative history supporting the EEOC's construction of section 703(h)); *Espinoza*, 414 U.S. at 88-89 ("The statute's legislative history, though quite meager, supports [the EEOC's] construction.").

Third, the courts may, if necessary, examine whether the guideline is consistent with historical and current federal policy. *Espinoza*, 414 U.S. at 89-91.

Fourth, courts can examine the guidelines' consistency with prior and subsequent case law. *See* Gutierrez v.Municipal Court, 838 F.2d 1031, 1049 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). The *Gutierrez* court found that the EEOC guidelines regarding English-only rules conflicted with the prior case of Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied* 449 U.S. 133 (1981). As such the *Gutierrez* court found that the EEOC guidelines did not constitute established law. *Gutierrez*, 838 F.2d at 1049. The court stated:

> We need not decide in this case, whether, in the absence of decisional law, EEOC guidelines and decisions can constitute clearly established law. Here, judicial precedent existed and it appears to have been inconsistent, at least in part, with the guidelines. If the contrary judicial precedent had been issued subsequent to the guidelines, there

According to the Ninth Circuit, nothing in the plain language of Title VII § 703(a)(1) supported the EEOC interpretation of the statute.[135] The majority justified its conclusion by stating that the enactment of the statute could not have been accomplished without the "substantial support from legislators in both Houses who traditionally resisted federal regulation of private business."[136] Finally, the court noted that "Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer, . . . the Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer."[137] Thus, the Ninth Circuit concluded, the Guideline "contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof."[138]

> is no question that we would hold that the guidelines do not 'clearly establish' the law. Although the answer is not as certain when the guidelines are issued *after* a decision, where that decision has been rendered by a federal circuit court and the subsequently issued guidelines remain largely untested, we think it appropriate to reach the same conclusion. Thus, we hold that in the case before us the EEOC guidelines did not serve to clearly establish the law regarding the validity of English-only rules.

Id. (emphasis in original).

Finally, the court may also look to the process by which the EEOC passed its guidelines, examining "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (cited with approval in General Electric v. Gilbert, 429 U.S. 125, 141-42 (1976)); *see* EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991).

In *Gilbert*, the Court found that the EEOC guideline did not fare well under the *Skidmore* standards. One factor used in the Court's analysis was that the guideline was not a contemporaneous interpretation of Title VII, but was instead promulgated in 1972, eight years after the passage of the 1964 Civil Rights Act. *Gilbert*, 429 U.S. at 142.

135. *Spun Steak*, 998 F.2d at 1489.

136. *Id.* (quoting United Steelworkers of Am., AFL-CIO v. Weber, 443 U.S. 193 (1979)). The court further justified this policy argument by stating that "[i]nternal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." *Id.* at 1490 (quoting H.R. REP. NO. 914, 88 Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2516) (Statement of William M. McCulloch) (quoted in part in *Steelworkers*, 443 U.S. at 206).

137. *Spun Steak*, 998 F.2d at 1490.

138. *Id.*

B. THE DISSENT

Judge Boochever disagreed with the majority's rejection of the EEOC Guideline,[139] and would have deferred to the EEOC's expertise in construing the Act.[140] The dissent noted that although an EEOC guideline "[is] entitled to somewhat less weight than those promulgated by an agency with Congressionally delegated rulemaking authority,"[141] it is nevertheless "entitled to 'great deference' in the absence of 'compelling indications that it is wrong.'"[142] Here, Judge Boochever found no such compelling indications.[143] Judge Boochever would have deferred to the EEOC guideline and upheld the district court's determination that plaintiffs had established their prima facie case.[144] In addition, Judge Boochever would have remanded the case to establish whether the company had a business justification for instituting the English-only rule.[145]

V. CRITIQUE

This critique will (1) show that the EEOC Guideline relied upon by plaintiffs is inconsistent with congressional intent and judicial policy; (2) show that the court's opinion in *Spun Steak* failed to provide the guidance necessary to assist lower courts in determining how plaintiffs may establish their prima facie

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139. Garcia v. Spun Steak, 998 F.2d 1480 (9th Cir. 1993) (Boochever, J., dissenting in part).

140. *Id.* In fact, the dissent noted that the difficulty of establishing a prima facie case by using subjective factors alone and without making conclusory statements would be very difficult. *Id.* Boochever stated that this "may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy, such as the safety reasons advanced in this case." *Id.*

141. *Id.* (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976)).

142. *Id.* at 1490-91 (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973)).

143. *Id.* at 1491. Judge Boochever found that the lack of directly supporting language in either § 703(a)(1) or the legislative history of Title VII, relied on by the majority, did not make the guideline inconsistent with congressional intent. *Id.*

144. *Spun Steak,* 998 F.2d at 1491.

145. Id. However, unlike the district court, the dissent thought that whether the company had sufficient business justification for establishing the policy provided triable issues of fact, making a motion for summary judgment inappropriate. *Id.*

case; and (3) advance an alternate approach whereby English-only rules would be classified as facially discriminatory, allowing claims of discrimination to be brought under the disparate treatment theory.

A. THE EEOC GUIDELINES ARE INCONSISTENT WITH JUDICIAL POLICY AND CONGRESSIONAL INTENT

In *Spun Steak*,[146] a divided panel held that the EEOC guideline relied upon by the plaintiffs was inconsistent with Title VII.[147] While the court relied upon the plain language[148] and legislative history[149] of § 703(a) in reaching its decision, it virtually ignored the most compelling reason for rejecting the guideline, namely, that the guideline violates both the judicial policy of requiring a plaintiff to establish a prima facie case and the plain language of the Civil Rights Act of 1991.[150]

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146. Garcia v. Spun Steak, 998 F.2d 1480 (9th Cir. 1993), *reh'g en banc denied*, 13 F.3d 296 (9th Cir. 1993) (Reinhardt, J., dissenting), *cert. denied*, 114 S.Ct. 2726 (1994).

147. *Spun Steak*, 998 F.2d at 1489-90. Judge Boochever, dissenting in part, would have deferred to the EEOC guideline, finding no compelling indications that the guideline was wrong. *Id.* at 1490-91.

148. *Id.* at 1489.

149. *Id.* at 1489-90. Judge Reinhardt, dissenting from the decision to deny a rehearing of *Spun Steak* en banc, attacked the majority's rejection of the Guideline. Reinhardt stated: "[t]hough acknowledging that only 'compelling indications' that the Guideline was erroneous would justify rejecting it, the majority makes only a token effort to abide by this standard, dedicating less than a page describing its 'compelling' reasons for invalidating the Guideline." *Spun Steak*, 13 F.3d at 299. Judge Reinhardt added that:

> the *Spun Steak* majority cites as a reason for its decision the absence of legislative history regarding Title VII's applicability to English-only rules. 998 F.2d at 1490. With this argument, the majority elevates legislative history to a new height. Those who believe that even affirmative legislative history is, in general, not compelling maybe surprised to learn that its absence can be so crucial as to constitute a basis for invalidating an agency rule. *See, e.g., United States v. Thompson/Center Arms Co.* . . . (Scalia, J., concurring in judgment) (describing legislative history as 'that last hope of lost interpretative causes, that St. Jude of the hagiology of statutory construction').

Id. at 300.

150. Although the majority asserted that adopting the EEOC's position would contravene the general policy that plaintiffs must establish their prima facie cases, the court marshalled little support to prove its proposition. The court stated that Supreme Court's policy of requiring plaintiffs to establish a prima facie case of

Since the Supreme Court first fashioned the disparate impact theory in *Griggs v. Duke Power Co.*[151] in 1971, federal courts, including the Ninth Circuit prior to *Gutierrez v. Municipal Court*,[152] have required plaintiffs to prove significant adverse impact before the burden shifts to the defendant to demonstrate business justification.[153] Thus, the EEOC's burden-shifting scheme under § 1606.7 of the guidelines[154] could be construed as an executive agency's attempt to reshape judicial policy.

Moreover, the EEOC guideline appears to contradict Congress' most recent enunciation of its policy concerning prima facie cases in disparate impact claims. Congress enacted the Civil Rights Act of 1991,[155] in part, to reverse several Supreme Court decisions that had narrowed the scope of civil rights protections,[156] particularly several aspects of the Supreme Court's decision in *Ward's Cove Packing Co. v. Antonio*.[157] However, the Act also codified the standard set out in *Ward's Cove* for a plaintiff to establish a prima facie case.[158]

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discriminatory impact stemmed from Congress' desire to strike a balance between preventing discrimination and preserving the independence of the employer. *Spun Steak*, 998 F.2d at 1490. Beyond quoting *Steelworkers*, 443 U.S. at 266, a case decided eight years after *Griggs*, the Ninth Circuit provided no support for their statement that this "balance" was the reason for the policy that plaintiffs establish a prima facie case.

151. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

152. 861 F.2d 1040 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

153. For example, in Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987), the Ninth Circuit dismissed Jurado's disparate impact claim for failure to establish a prima facie case. *Id.* at 1412. *See supra* notes 70-79 and accompanying text for discussion of the facts and holding of *Jurado*.

154. *See supra* note 55 for the text of § 1606.7.

155. Pub. L. No. 102-166, 105 Stat. 1071 (1991)

156. Civil Rights Act of 1991 § 2(4). *See generally*, Donald O. Johnson, Comment, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469 (1992) (discussing recent Supreme Court decisions and Congress' response in enacting the Civil Rights Act of 1991).

157. 490 U.S. 642 (1989) ("[T]he employer carries the burden of producing evidence of a business justification for his employment practice."). *Id.* at 659. The Civil Rights Act of 1991 alters the defendant's burden from that in *Ward's Cove*. The Act requires the defendant to demonstrate that the challenged business practice is job related for the position in question and consistent with business necessity. Civil Rights Act of 1991 § 105 (codified as 42 U.S.C. § 2000e-2(k)(1)(A)(i)). The Act defines "demonstrate" as meeting "the burdens of production and persuasion." Civil Rights Act of 1991 § 104 (codified as 42 U.S.C. § 2000e(m)).

158. Civil Rights Act of 1991 § 105 (codified as 42 U.S.C. § 2000e-2(k)(1)(B)(i)). The court in *Ward's Cove* held that "[a]s a general matter, a plaintiff must demon-

The pertinent part of § 105 reads: "With respect to demonstrating that a particular employment practice causes a disparate impact . . . the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact . . . ."[159] According to the 1991 Act, "demonstrate" means to carry both the burdens of production and persuasion.[160]

The EEOC guidelines, however, place the initial burden on the employer to demonstrate business necessity before enacting an English-only rule.[161] Under the guideline, the employee need only prove the existence of an English-only rule before the burden shifts;[162] the plaintiff need not persuade the court that the English-only rule has adversely impacted a member or members of the protected group since such rules are presumed to create an adverse impact.[163] Thus, the guideline appears to violate the plain language of the 1991 Civil Rights Act by bypassing the Act's requirement that a plaintiff meet his burdens of production and persuasion in a disparate impact claim before the burden shifts to the employer. It would therefore be reasonable to conclude that the guideline in question in *Spun Steak* would be rejected under the 1991 Civil Rights Act.[164]

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strate that it is the application of a specific or particular employment practice that is under attack." *Ward's Cove*, 490 U.S. at 657. The Court added that the burden of persuasion remains with the disparate impact plaintiff, and "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." Id. at 659 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988)) (emphasis in *Ward's Cove*).

159. Civil Rights Act of 1991 § 105 (codified as 42 U.S.C. § 2000e-2(k)(1)(B)(i)).

160. 42 U.S.C. § 2000e(m) (1991).

161. *See supra* note 55 for the text to 29 C.F.R. § 1606.7.

162. 29 C.F.R. § 1606.7(a).

163. *Id.*

164. With regard to Title VII as it existed prior to the passage of the Civil Rights Act of 1991, the codification of the *Ward's Cove* standard can be viewed as Congressional approval of the way the Court has handled this aspect of disparate impact claims. Since the guideline at issue runs counter to the policies set forth by both the Supreme Court and by Congress, the majority in *Spun Steak* could rightly have found "compelling indications" that the guideline was wrong.

B. *SPUN STEAK* FAILED TO PROVIDE GUIDANCE TO LOWER COURTS

In *Spun Steak*, the court focused on whether the English-only rule had an adverse impact on employees; and if so, whether that impact was significant.[165] The court concluded that an English-only rule, in and of itself, does not create a significant adverse impact on bilingual employees.[166] The court, however, distinguished bilingual employees from non-English speaking employees by stating that "'to a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,' an English-only rule might well have an adverse impact."[167] Therefore, the classification of employees as bilingual or other than bilingual, becomes important because the way a court classifies an employee is likely to affect whether or not a court will find that the rule has significantly impacted that employee. According to the majority's view, the question turns on the facility that the employee has with the English language.[168] The more proficient an employee is in English, the less impact an English-only rule will have on that employee since his ability to exercise his privilege is not as drastically curtailed.

However, the Ninth Circuit provided no guidance on how an employee's facility with English might be judged. It is not clear, for example, whether proficiency in English is a fluid concept that may change with the particular work environment

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165. Garcia v. Spun Steak Co., 998 F.2d 1480, 1488 (9th Cir. 1993).

166. *Id.* The court stated:

> Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a *significant* impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity.

Id.(emphasis in original); *cf.* Cox v. American Cast Pipe Co., 784 F.2d 1546, 1561 (11th Cir. 1986) ("Title VII gives us no license to decide that any injury, however insignificant, may be regarded as *de minimis*. As appellant argues, '[w]hat is small in principal is often large in principle.'") (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968) (footnote omitted)), *cert. denied,* 479 U.S. 883 (1986).

167. *Spun Steak*, 998 F.2d at 1488.

168. *Id.*

or whether it is an absolute standard that must be met regardless of the work environment. Moreover, if it is an absolute standard, the court has not stated what level of proficiency meets that standard. Such unanswered questions are likely to lead to further litigation.

C. AN ALTERNATIVE APPROACH

Professor Juan F. Perea[169] has observed that most courts, when confronted with whether an English-only rule violates Title VII, have proceeded under the assumption that such rules are facially neutral.[170] In fact, no reported decision has examined the validity of an English-only rule has even analyzed this assumption, let alone questioned it.[171] However, according to Perea, this assumption has only "superficial appeal."[172] Facially discriminatory policies are policies that on their face explicitly treat people differently based upon some prohibited classification such as race, color, religion, sex or national origin.[173] Perea argues that English-only rules differ "in kind from the facially neutral rules usually analyzed under the disparate impact model," because the effects of English-only rules fall exclusively on members in the protected group while the effects of facially neutral rules falls on members both inside and outside the protected group.[174] Perea argues that such exclusive adverse effects coupled with the close correlation between primary language and national origin provides a strong argument for challenging English-only rules under a disparate treatment theory, not a disparate impact theory.[175]

Professor Perea has analogized English-only rules to employment practices that discriminate on the basis of pregnan-

169. Juan F. Perea, *English-only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265 (1990).

170. Perea, *supra* note 169, at 289.

171. *Id.* Perea notes that no one, including the EEOC and the litigants in *Gloor* or *Gutierrez* has challenged the assumption that English-only policies are facially neutral. *Id.*

172. *Id.*

173. *See* De La Cruz v. Tormey, 582 F.2d 45, 49-50 (9th Cir. 1978).

174. Perea, *supra* note 169, at 289.

175. *See id.* at 292-93.

cy.[176] Prior to the passage of the Pregnancy Discrimination Act (hereinafter "PDA") in 1978,[177] the United States Supreme Court, in *General Electric v. Gilbert*,[178] had ruled that policies which differentiated among employees because of pregnancy were facially neutral and did not discriminate on the basis of sex.[179] Congress amended Title VII by enacting the PDA which included pregnancy, childbirth, and related conditions under the definition of discrimination on the basis of sex.[180] Congress adopted the views of several of the dissenting Justices in *Gilbert*.[181]

According to Perea, "a correct interpretation of Title VII requires treating characteristics that are closely correlated with a protected characteristic the same as the explicitly protected characteristic when such characteristics are used as the basis of discrimination that results in an exclusive adverse effect upon a protected group."[182] The inevitable conclusion, as Perea notes, is that "[j]ust as . . . discrimination because of pregnancy is the same as discrimination because of sex, so . . .

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176. *Id.* at 293-94.

177. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as 42 U.S.C. § 2000e(k) (1988)).

178. 429 U.S. 125 (1976).

179. *See id.* at 136.

180. Section 701(k) of Title VII provides the following:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1988).

181. H.R. No. 948, 95th Cong., 2d Sess. 2. (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750.

In *Gilbert*, Justice Brennan stated, "Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at a minimum, strongly 'sex related.'" *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting) (citation omitted).

Justice Stevens stated that "the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on the basis of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62 (Stevens, J., dissenting) (footnote omitted).

182. Perea, *supra* note 169, at 294.

discrimination because of primary language . . . is the same as discrimination because of national origin."[183]

Perea's theory is not without problems. Pregnancy correlates completely with gender; only women can become pregnant. However, language is only "closely correlated" to national origin.[184] Just how "closely correlated" a primary language is to national origin is likely to be a matter of dispute.[185]

Perea's approach, however, has several distinct advantages. First, Perea's approach would allow a plaintiff to establish a prima facie case merely by showing the existence of an English-only rule, thereby avoiding the necessity of using subjective factors to establish a prima facie case of disparate impact. Second, by classifying English-only rules as per se discriminatory, and allowing them to be analyzed under the disparate treatment theory, the problems inherent in the EEOC's burden-shifting scheme are avoided. Third, Perea's approach is also consistent with both judicial policy and Congressional intent. Finally, since future claims against employers will be subject to the terms of the Civil Rights Act of 1991,[186] Perea's theory provides a better balance between the interests of employers and employees. Under Perea's approach, an employee need only prove the existence of an English-only rule to establish a prima facie case. The employer's burden under Perea's approach is also lessened since the employer need only produce evidence of a legitimate non-discriminatory alternative.

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183. *See id.*

184. *Id.* at 293.

185. The Ninth Circuit has not explicitly equated primary language with national origin. The majority in *Spun Steak* did state that "[i]t cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity." *Spun Steak*, 998 F.2d at 1487. However, the majority also stated that it was impressed with the *Gloor* court's analysis. *Id.* at 1489. The *Gloor* court noted "[n]either . . . [Title VII] nor common understanding equates national origin with the language that one chooses to speak." *Gloor*, 618 F.2d at 268.

186. *See supra* notes 155-160 and accompanying text for a discussion of the changes the Civil Rights Act of 1991 has made regarding disparate impact claims.

VI. CONCLUSION

Although the Ninth Circuit in *Spun Steak* properly rejected the EEOC's guideline, it failed to provide the most compelling reason for doing so. The guideline's burden-shifting scheme is inconsistent with case law dating back to *Griggs* which mandates that a plaintiff must establish a prima facie case of disparate impact. Moreover, the court failed to question the implicit assumption that English-only rules are facially neutral. By adopting Perea's approach to English-only rules, the court would simplify any actions challenging an employer's English-only rule by analyzing such challenges under the disparate treatment approach. The plaintiff's burden would be lessened to establish a prima facie case, and the burden that would shift to the employer would only be that of production, not production and persuasion.

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