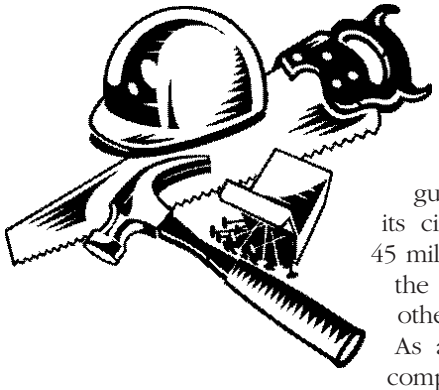
MICHAEL NEWMAN AND FAITH ISENHATH

Parlez–Vous Discrimination?

Both American society in general and, specifically, American workplaces are in the midst of significant changes in several areas, one of which involves integrating higher numbers of international employees into the workforce. In 2000, approximately one in 10 Americans was foreign-born—an increase from one in 20 in 1970.[1] America's Asian and Hispanic populations have increased substantially in recent years, and immigration has also expanded diversity in other population groups.[2] Simultaneously, the U.S. workforce has witnessed a corresponding increase in diversity.[3] This column addresses the communication issues that arise in the workplace as a result of this increased diversity.

In 1999, immigrant workers numbered 15.7 million, accounting for 12 percent of all workers in the United States.[4] Between 1990 and 1998, 12.7 million new jobs were created in the United States, and 38 percent (5.1 million) were filled by international workers.[5] This increase in workforce diversity, which continues today, has benefited American employers in a variety of ways. Employers are currently able to "draw talent and ideas from all segments of the population," and they may gain a "competitive advantage in the increasingly global economy."[6] However, in addition to these benefits, an increasingly diverse workforce can create complications for employers who are not adequately prepared for such change. In fact, at least one study has reported that "employers are realizing that 'harmony—and therefore the efficiency and effectiveness—of the workplace requires greater sensitivity to cultural differences.'"[7]



As the country's national and ethnic diversity grows, so does the number of languages and dialects spoken by its citizens. In 2000, approximately 45 million Americans (17.5 percent of the population) spoke a language other than English in the home.[8] As a result, one potential area of complexity in the workplace involves communication—between employer and employee, between customers and employee, and among employees—which can become more problematic in light of the language barrier. Various employers have attempted to address this situation with a range of potential remedies. In addition, within the context of Title VII of the Civil Rights Act of 1964, the U.S. court system and the Equal Employment Opportunity Commission (EEOC) have begun to set forth guidelines for employers to follow with regard to the linguistic characteristics of their workforces. Specifically, administering pre-employment tests to determine language capability and English proficiency or establishing English-only rules for the workplace are areas of concern.

Title VII prohibits employer actions that have the purpose or effect of discriminating against employees because of their national origin. As an initial matter, Title VII prohibits disparate treatment—that is, intentional discrimination by an employer against an employee because of his or her national origin.[9] However, the statute also prohibits employment practices that have an adverse impact—that is, actions that unfairly disadvantage one protected class of employees. Accordingly, with respect to an employer's pre-employment selection procedures, Title VII bars "[t]he use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex or ethnic group," unless certain standards are met.[10] Therefore, if an employer administers an English proficiency test as part of a job candidate's application process and that test disproportionately excludes applicants of certain backgrounds from consideration for employment, the employer may very well need to undergo an "adverse impact" analysis under Title VII.

The seminal case on adverse impact analysis of preselection employment criteria is *Griggs v. Duke Power Co.*,[11] which the U.S. Supreme Court decided in 1971. In *Griggs*, an employer who had previously allowed African-Americans to work in only one of its five divisions (the ones that had the lowest salaries), instituted two successive policies with respect to required qualifications for employment in the other four divisions. First, the employer instituted a policy requiring that all applicants possess a high school diploma. Second, the employer added a further requirement (on the day Title VII became effective) that provided that, in order to qualify for employment in the divisions previously off-limits to African-American employees, applicants had to achieve a satisfactory score on two professionally prepared aptitude tests (the standards were, in effect, more stringent than that set forth by the requirement to have a high school diploma).

In finding that the employer had engaged in illegal discrimination, the Supreme Court held that "[t]

he [a]ct proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity.* If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."[12] Therefore, because "neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used," the employer's new policies were inappropriate. In other words, because the two policies had an adverse impact on a disproportionate number of African-American applicants in comparison to Caucasian applicants, the applicable question was whether the policies were justified by business necessity—to which the Court's answer was a resounding "No."

As the Court stated, "Nothing in the [a]ct precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." Accordingly, in order to avoid falling afoul of Title VII's prohibition on employment practices that have an adverse impact on members of a protected group, employers should exercise caution when contemplating testing applicants for English proficiency and only do so when a clear business necessity for the qualification requirement can be demonstrated. Furthermore, employees should be aware of their rights in this arena as well.

Another area that is similar to pre-selection procedures under *Griggs* involves employers' policies mandating English proficiency or an English-only workplace, which will be subject to scrutiny under Title VII's disparate treatment and adverse impact analyses. Accordingly, employer actions that intentionally discriminate against employees because of their country of origin or have a disproportionate impact on such employees may well be inappropriate. In addition, the government has propounded specific rules and guidance for this type of employer policy. According to the EEOC's Compliance Manual, "[e]mployers sometimes have legitimate business reasons for basing employment decisions on linguistic characteristics." However, given that linguistic characteristics are often closely associated with national origin, "employers should ensure that the business reason for reliance on a linguistic characteristic justifies any burdens placed on individuals because of their national origin."

With respect to English-only rules in the workplace, "[a] rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. … Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it."[13] However, that rule applies only to broad English-only policies that purport to restrict employees' use of their native tongue at all times that they are on the employer's premises. The EEOC has provided that narrower English-only rules—those that are related to specific circumstances in the workplace—can pass muster if sufficiently justified by business necessity, such as (1) to communicate with customers, coworkers, or supervisors who speak only English; (2) to be used in emergencies or other situations when a common language must be used to promote safety; (3) to provide for cooperative work environments in which a common language is necessary to promote efficiency; and (4) to enable a supervisor who speaks only English to monitor the performance of an employee whose job duties require communication with coworkers or customers.[14] In these situations or in similar ones, an employer may lawfully implement a narrowly crafted rule requiring spoken English in the workplace. Employers can get into trouble, however, when the rule is too broad, perhaps appearing to cover speech that is not related to work or casual speech between employees.

English fluency requirements in the workplace are treated similarly under Title VII. The EEOC, in particular, recognizes that "an individual's lack of proficiency in English may interfere with job performance in some circumstances." However, the EEOC also states that "the employer should not require a greater degree of

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fluency than is necessary for the relevant position." In other words, the lawfulness of an English fluency requirement will depend significantly on the totality of the circumstances in which it is imposed. Accordingly, employers and employees alike should carefully consider the specific facts when assessing the propriety of such a policy.

The analysis of English proficiency requirements is very fact-specific, and a recent decision on the subject by the District of Columbia Court of Appeals is instructive on the issue. In *Esteños v. PAHO/WHO Federal Credit Union*,[15] the court held that the District of Columbia's Human Rights Act "allow[s] an employee to initially raise a claim of national origin discrimination on evidence of an English proficiency requirement." The plaintiff in Esteños was a Peruvian national, who was employed as an office clerk for the employees' credit union for the UN-affiliated Pan American Health Organization (PAHO) and World Health Organization (WHO). When he was hired, Esteños had only a rudimentary grasp of the English language. However, he claimed that his job interview was conducted entirely in Spanish by two bilingual company representatives, and that he was not told that fluency in English was required for the position for which he was applying.

A few months after Esteños was hired, a new chief executive officer (who did not speak Spanish) took over, and he terminated the plaintiff's employment "due to [his] inability to fulfill the requirements of the position." When the plaintiff subsequently filed a charge with the EEOC, the PAHO/WHO Federal Credit Union confirmed that it had fired Esteños because of his lack of English proficiency, stating that "his deficiency made it impossible for Mr. Esteños to communicate with [customers] and to understand and communicate with some staff members."

In analyzing the case, the court stated that the District of Columbia's Human Rights Act is broader in its scope than Title VII. However, the analysis used by the court was virtually identical to the analysis that federal law requires. The court recognized that, even if an English proficiency requirement has an adverse impact on a protected class of employees, such a rule may still be lawful if it is closely related to a business necessity. Yet, given that this inquiry is heavily dependent on individual facts and circumstances, summary judgment was found to be an inappropriate step at which to resolve this particular case.

The court held that further discussion was necessary to determine "whether English proficiency was in fact a necessary requirement for this particular office clerk position … and, second, the level of Esteños' actual proficiency in English at that time." In addition, the district court held that "[a]lthough there may be certain situations where an employer's need to communicate with a subordinate employee may require that the latter be able to speak the supervisor's language … there is evidence disputing that such was the case here, given the favorable evaluation of Mr. Esteños' performance of his duties as office clerk and [the previous CEO]'s testimony that the CEO had no need to communicate verbally with the office clerk."

Accordingly, without substantial effort, employers and employees should be able to work together to both reap the benefits of an increasingly multicultural and diverse workplace and address any complications that may arise as a result of the changing workforce. Even though Title VII prohibits employers' conduct that discriminates against employees as a result of their national origin, employers may still adopt reasonable rules and regulations designed to promote efficiency, effectiveness, and cooperation as long as such rules are consistent with a legitimate business purpose. However, it is important for both employers and employees to be aware of the limits on such rules imposed by Title VII in such cases as *Griggs* and *Esteños*. **TFL**

Michael Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm, Dinsmore & Shohl LLP, where he serves as chair of the Labor and Employment Appellate Practice Group. He is an FBA vice president of the Sixth Circuit. Faith Isenhath is an associate at Dinsmore & Shohl, where she also practices labor and employment law. She is a member of the FBA Cincinnati-Northern Kentucky Chapter. They may be reached at michael.newman@dinslaw.com and faith.isenhath@dinslaw.com, respectively.

Endnotes

[1]U.S. Census Bureau, "Profile of the Foreign-Born Population in the United States: 2000," at 9 (2001), available at www.census.gov/prod/2002pubs/p23-206.pdf.

[2]U.S. Census Bureau, "Profile of General Demographic Characteristics," Table DP-1, available at www.censtats.census.gov/data/US/01000.pdf.

[3]Equal Employment Opportunity Commission Compliance Manual, Section 13: National Origin Discrimination (Dec. 2, 2002).

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* 41 (1995), available at www.dol.gov/asp/programs/history/reich/reports/ceiling.pdf.

[8]EEOC Compliance Manual, *supra*, note 3.

[9]42 U.S.C. § 2000e-2 (2008).

[10]29 C.F.R. § 1607.3(A).

[11]401 U.S. 424 (1971).

[12]*Id.* (emphasis added).

[13]29 C.F.R. § 1606.7(a).

[14]EEOC Compliance Manual, *supra*, note 3.

[15]D.C. No. 04-CV-1083 (July 3, 2008).