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LANGUAGE DISCRIMINATION UNDER TITLE VII: THE SILENT RIGHT OF NATIONAL ORIGIN DISCRIMINATION

INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] was enacted by Congress as a comprehensive proscription of private acts of employment discrimination.[2] As amended by the Equal Employment

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1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17 (1976).

2. 42 U.S.C. § 2000e-2(a) (1976) prohibits all forms of discrimination in employment:

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

Essentially, these same prohibitions apply to employment agencies and labor organizations. 42 U.S.C. §§ 2000e-2(b), (c) (1976). It is also unlawful to discriminate in these categories with respect to admission or employment in any program established to provide apprenticeship or other training. 42 U.S.C. § 2000e-2(d) (1976). *See* 3 ALI-ABA COURSE MATERIALS 113, 114 (1978).

Originally, Title VII was viewed by Congress solely as a prohibition against overt discriminatory practices (disparate treatment) based on race, color, religion, sex, or national origin. In S. REP. NO. 1137, 91st Cong., 2d Sess. 4 (1970), the Senate Committee on Labor and Public Welfare commented:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization * * * Employment discrimination, as viewed today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the system in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority in lines of progression, perpetuation of the present effects of pre-Act discriminatory practices through various institutional devices, and testing and validation requirements.

See also Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968).

For an excellent discussion of the historical and legislative background of Title VII, *see* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 1-11 (1968) [hereinafter cited as HISTORY OF CRA OF 1964]. The debate surrounding the passage of Title VII was often bitter and provides inadequate legislative history. The bill submitted to a House-Senate Conference Com-

Opportunity Act of 1972,[3] Title VII now encompasses virtually all state and local government employees as well as previously exempt employees of educational institutions.[4] The broad substantive provisions of Title VII prohibit all discrimination based upon race, color, religion, sex, or national origin,[5] including refusals to hire and attempts to segregate or classify protected employees.[6] Also, discriminatory practices in compensation, terms, conditions, or privileges of employment are forbidden.[7]

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mittee was debated on the Senate floor without prior Senate Committee hearings and reports. Also, southern Congressmen, in an attempt to defeat the entire bill, added the sex discrimination prohibition as a "joke." *See* Vaas, *Title VII Legislative History*, 7 B.C. IND. AND COM. L. REV. 431, 441-42 (1965).

3. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e—2000e-17 (1976 & Supp. 1979). In the original Civil Rights Act of 1964, an individual was given the dual role of private litigant and public attorney general charged with the duty of enforcement of the Act. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Through the EEO Act of 1972, the EEOC was given limited power of enforcement to initiate an action in federal court. Note, *Procedural Developments under Title VII: Protection for Both Parties?*, 27 CASE W. RES. L. REV. 371, 373-74 (1976). Now, an individual as well as the EEOC may file a discrimination claim under Title VII. Although Congress suggested that private actions be discouraged after the passage of the EEOA, they are not prohibited. 118 CONG. REC. 7565 (1972). Before a Title VII action can be filed in federal court, however, certain procedural prerequisites must be fulfilled. 42 U.S.C. §§ 2000e-5(e), (f) (1976). For a concise chronological listing of these statutory requirements, *see* G. COOPER, H. RABB & H. RUBIN, FAIR EMPLOYMENT LITIGATION 53-55 (1975) [hereinafter cited as COOPER]. *See generally* Note, *Procedural Developments Under Title VII: Protection for Both Parties?*, 27 CASE W. RES. L. REV. 371, 375-410 (1976) (discussing the similarities and differences between a private suit and an EEOC suit).

4. As originally enacted, Title VII covered private employers, employment agencies and labor organizations. Exempt from Title VII were the United States and its own corporations, state and local governments, tax-exempt private clubs, Indian tribes, and agencies of the District of Columbia government. The EEO Act of 1972 expanded coverage to state and local governments, educational institutions, and certain sectors of the federal government. *See* U.S. SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1972); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972). *See generally* A. SMITH, EMPLOYMENT DISCRIMINATION LAW 327-28 (1978) [hereinafter cited as SMITH].

5. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (race or color); Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) (sex); Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) (national origin); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972) (religion).

6. *See, e.g.*, Ochoa v. Monsanto Co., 335 F. Supp. 53 (S.D. Tex. 1971) (failure to hire due to national origin discrimination).

7. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requirement of high school education or passing a standardized intelligence test as a condition of employment in or transfer to jobs found discriminatory on basis of race); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (seniority and transfer system discriminatory against blacks).

The procedural systems of the amended Act authorize the Equal Employment Opportunity Commission (EEOC) to process complaints and, if necessary, file suits against defendants in federal court. In addition, Title VII may be used by aggrieved persons or classes[8] in private suits to enforce fair employment.[9]

8. Title VII allows an individual to bring an action based on a personalized grievance. It also allows an individual to file suit on behalf of a protected class. Most courts agree that the discriminatory allegations of an individual action differ from a class action. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *But cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (both the disparate treatment and the disparate impact theories may be applied to a particular set of facts simultaneously). *See generally* Hsia, *The Effects Test: New Directions*, 17 SANTA CLARA L. REV. 777, 778-79 (1977) (differentiating between individual and class actions); Nelson & Ward, *Burdens of Proof Under Employment Discrimination Legislation*, 6 J.C. & U.L. 301, 306, 308-09 (1980) (discussing class and individual actions in both the disparate treatment and disparate impact theories).

9. Title VII is only one of several remedial measures available to combat employment discrimination. 42 U.S.C. § 1981 (1976) requires that "all persons" be treated the same as "white citizens." Thus, one complaining of racial discrimination has a choice of remedies under Title VII or § 1981. Establishment of a § 1981 claim is not dependent on Title VII, although the injunctive and monetary relief is quite similar. Most notably, § 1981 may preserve a racial discrimination claim which might be lost under Title VII for various procedural reasons. Although § 1981 seems to encompass only racial discrimination cases, it has been applied to aliens, Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974), and to national origin groups, such as Puerto Ricans and other Hispanics, Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981), Miranda v. Clothing Workers, Local 208, 8 Empl. Prac. Dec. (CCH) ¶ 9601 (D.C.N.J. 1974). *See* Annot., 43 A.L.R. FED. 103 (1979) (applicability of § 1981 to national origin employment discrimination cases). *But see* Annot., 23 A.L.R. FED. 895 (1975) (exhaustion of remedies under Title VII as prerequisite to maintenance of a claim under § 1981 for employment discrimination).

The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), prohibits discrimination in wages and pay rates on the basis of sex absent one of the four mentioned exceptions: seniority, merit, piecework, or other non-sex-related system. This Act is independent of a Title VII claim and need not follow the same procedures. *See, e.g.*, Spray v. Kellos-Sims Crane Rental, Inc., 507 F. Supp. 745 (S.D. Ga. 1981) (female employee did not prevail on Title VII discharge claims, yet received back wages on sex discrimination suit under Equal Pay Act).

Under the National Labor Relations Act, 29 U.S.C. §§ 141-97 (1976 & Supp. 1978), a breach of the duty of fair representation is an unfair labor practice. This cause of action may be used as an ancillary claim in certain situations. If possible, this remedy should be pleaded along with Title VII and § 1981, since it is easier to recover punitive damages if the employee can prove a wilful breach of duty.

The President's Executive Order 11246, 3 C.F.R. § 339 (1964-65 Compilation), mandates fair employment by government contractors and sub-contractors. This can be used if no other resolution is possible. Unfortunately, the individual has no control over these administrative proceedings.

42 U.S.C. § 1983 (1976) can be used (without prior exhaustion of Title VII remedies) when the discriminatory activity can be classified as "state action." Public agencies and private organizations (only if state control is shown) are subject to this statute which directly enforces the rights of an individual under the fourteenth amendment of the United States Constitu-

Since this comment will focus on lawsuits based on language discrimination, a brief overview of the cause of action and its current limitations is necessary.

Private Actions Under Title VII

An aggrieved employee who brings an action under Title VII has the initial burden of proof regardless of which form of discrimination is alleged.[10] He must demonstrate that (1) an employer,[11] (2) discriminated against a protected class,[12] (3) within a prohibited category recognized under title VII,[13] and (4) there was a connection between the protected class and the prohibited category.[14] These four requirements may be statistically established in three ways. First, the employee may present overall data showing under-employment of a protected class.[15] Second, the employee may use evidence of specific prac-

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tion. Also, since the fourteenth amendment bars all arbitrary classifications and actions, § 1983 is somewhat broader than Title VII. *See generally*, Parrat v. Taylor, 451 U.S. 527 (1981); Comment, *Statutorily Based Federal Rights: A New Role for Section 1983*, 14 J. MAR. L. REV. 547 (1981).

Most states (except those in the deep South) have enacted state employment antidiscrimination laws. The aggrieved must first seek relief from the appropriate state agencies before filing a Title VII complaint with the EEOC.

For a general explanation of these alternative remedies, *see* COOPER, *supra* note 3, at 38-52; Connolly & Connolly, *Equal Employment Opportunities: Case Law Overview*, 29 MERCER L. REV. 677, 679-82 (1978) (brief capsule description of each remedy); Ward, *Diagnosing an Employment Civil Rights Claim*, 6 J.C. & U.L. 279, 279-84 (1980) (evaluations of relations between the various remedies).

10. COOPER, *supra* note 3, at 224; B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 266-67 (1976) [hereinafter cited as SCHLEI].

11. Under Title VII, an action may be brought against an employer, an employment agency, or a labor organization. 42 U.S.C. § 2000e (1976 & Supp. 1979).

12. The protected classes or "basis" are the categories of race, color, religion, sex, or national origin. Victims of reprisal (any action taken by one either in spite or as retaliation for an assumed or real wrong by another) comprise an additional protected category. 42 U.S.C. §§ 2000e-2, 3 (1976).

13. The prohibited category, the "issue" under Title VII, may be: hire, discharge, compensation, terms, conditions, or privileges of employment (§ 2000e-2(a)(1)); limitation, segregation, or classification of employees or applicants (§ 2000e-2(a)(2)); failure to refer (§ 2000e-2(b)); exclusion or expulsion from membership (§ 2000e-2(c)(1)); limitation, segregation, or classification of membership or applicants for membership (§ 2000e-2(c)(2)); causing an employer to discriminate (§ 2000e-2(c)(3)); retaliation (§ 2000e-3(a)); or printing or publishing a discriminatory employment notice or advertisement (§ 2000e-3(b)).

14. The correlation or "causal nexus" between the protected class and the prohibited category is the most difficult and important element of proof. *See, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (aliens not within protected class of national origin solely because of citizenship status).

15. *E.g.*, EEOC Dec. YAU 9-048, 2 Fair Empl. Prac. Cas. (BNA) 78 (June 30, 1969) (only minority group employee in employer's branch printing facil-

tices which contribute to or result in the discriminatory situation.[16] Finally, the employee may use evidence that individual plaintiffs (or other class members) are qualified to perform the job in question.[17] While proof of any one situation may be sufficient, a showing of all three elements would greatly strengthen the employee's case.[18]

The employee may establish his *prima facie* case[19] either through proof of overt discriminatory acts or practices (the "disparate treatment" theory), or through proof of discriminatory effect (the "disparate impact" theory). In the latter case, the employee must show that a policy or practice, though neutral on its face, has a discriminatory impact as applied.[20] Once a *prima*

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ity). Overall data raises basic questions about the employer's practices. This proof, however, leaves the employer great latitude to rebut by showing any of a multitide of reasons why the group in question is not proportionately represented. *See* COOPER, *supra* note 3, at 83-85.

16. *E.g.*, EEOC Dec. CL 68-12-431EU, 2 Fair Empl. Prac. Cas. (BNA) 295 (undated) (Polish employee brunt of "Polish" jokes as well as physical acts of torment). The identification of specific discriminatory practices buttresses the plaintiff's case by pointing to narrow, identifiable policies. This vastly reduces the employer's freedom to defend by forcing him to rebut specific claims and justify by a BFOQ or business necessity defense the specified actions. *See infra* notes 68-80, 100-119 and accompanying text.

17. *E.g.*, EEOC Dec. AL-1-155, 1 Fair Empl. Prac. Cas. (BNA) 921 (May 19, 1969) (aggrieved party who was turned down before even filling out a written examination for a retail clerk position was shown to possess extensive experience as a wholesale and retail clerk comparable to employer's present employees). The showing that the individual is qualified may often be more important for its psychologically persuasive value than any direct legal support. In some situations, however, this may be a determinative aspect. *See* COOPER, *supra* note 3, at 64.

18. Surprisingly, there has been much literary conflict as to what methods should be used for an employment discrimination claim. Some critics support statistical tests and comparisons to labor pools, while others believe that the analytical techniques are not responsive to the relevant legal question. *Compare* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977) *with* Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 IND. L.J. 493 (1980), *and* Shoben, *In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn*, 55 IND. L.J. 515 (1980) *with* Cohn, *Statistical Laws and the Use of Statistics in Law: A Rejoinder to Professor Shoben*, 55 IND. L.J. 537 (1980).

19. The phrase "*prima facie* case" may denote not only the establishment of a mandatory but rebuttable presumption, but also may be used by the courts to describe the employee's burden of producing sufficient evidence to permit the trier of fact to infer the fact at issue. 9 WIGMORE, EVIDENCE § 2494 (3d ed. 1940). In a Title VII context, the *prima facie* case establishes a mandatory but rebuttable presumption. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

20. *E.g.*, Kirkland v. New York Dept. of Corr. Serv., 520 F.2d 420 (2d Cir. 1975) (discriminatory promotional examination for correctional officers); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied sub nom.*, Director of Civil Serv. v. Boston Chapter NAACP, Inc., 421 U.S. 910 (1975) (state Civil Service Commission's written fire-fighter examination sufficient evidence of discrimination against Spanish-surnamed ap-

facie case has been established, the burden of proof then shifts to the employer.

Rebutting The Prima Facie Case

Although several means of rebuttal are available to the employer, two are of special relevance to the ensuing discussion. One is statutory and the other judicially created.[21] The first rebuttal is used whenever the plaintiff alleges disparate treatment, the second when the allegation is disparate impact.[22] Under Title VII, an employer may show that the disparate treatment alleged is the result of a bona fide occupational qualification (BFOQ). A BFOQ is that which is reasonably necessary to conduct the normal operation of a specific business.[23] This permits classification or refusal of employment on the basis of religion, sex, or national origin (but not race or color) in certain narrow circumstances.[24] The employer's burden is not to disprove the existence of discrimination, but to articulate some legitimate, nondiscriminatory reason for the employment

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plicants); Roman v. Reynolds Metals Co., 368 F. Supp. 47 (S.D. Tex. 1973) (disparate impact because of high school diploma requirement).

21. For the statutory exception of the Bona Fide Occupational Qualification (BFOQ), *see infra* notes 68-80 and accompanying text. For the judicially created business necessity defense, *see infra* notes 100-119 and accompanying text.

22. It is generally agreed that the BFOQ exception is limited to the rebuttal of an overt discrimination claim while the business necessity defense covers covert discriminatory action. Since the BFOQ exception is more difficult to establish than business necessity, an employer who demonstrates a business necessity in a neutral practice case will prevail, thus making the BFOQ redundant. Conversely, an employer who cannot even show business necessity certainly cannot conform to the stricter standards of a BFOQ exception. *See* COOPER, *supra* note 3, at 269-70. *See generally* McGrew & Johnson, *How to Defend an Employment Discrimination Case*, 25 PRAC. LAW. 13 (1979).

Other defenses may be available to combat a discrimination allegation. The employer may defend on evidence of merit, seniority, security standards, or good faith reliance. *See* Connolly & Connolly, *Equal Employment Opportunities: Case Law Overview*, 29 MERCER L. REV. 677 (1978).

23. 42 U.S.C. § 2000e-2(e)(1) (1976) provides that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . 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 enterprise.

See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

24. 29 C.F.R. § 1606.1 (1980) contains the guidelines on national origin discrimination. The bona fide occupational qualification exception (BFOQ) seeks to justify *overt* discrimination against or exclusion of a protected class. This logically calls for a strict standard of justification. *See supra* note 22 for a comparison of the BFOQ exception and the business necessity defense. *See generally* COOPER, *supra* note 3, at 269-70; SCHLEI, *supra* note 10, at 266-67.

practice.[25] Thus, the employer presenting a BFOQ exception has the burden of producing evidence in justification of his action.

As an analogy to proving a BFOQ, the courts have formulated the business necessity defense to counter claims of disparate impact. There must be a substantial correlation between the alleged discriminatory practice and the successful performance of the job to which it is related.[26] In addition, the employer must show that the practice is necessary to the safe and efficient operation of his business.[27]

Proving the Defense is Only a Pretext for Discrimination

After the defendant has proffered his legitimate, nondiscriminatory reasons for the practice in question, the plaintiff is given the opportunity to show that the defendant's reason is merely a *pretext* for unlawful discrimination. This final shifting of the burden of proof to the plaintiff gives him an opportunity to demonstrate that the employer's proffered reason was not the

25. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. v. Waters, 438 U.S. 567 (1978).

26. The defense of business necessity requires that the alleged discriminatory selection procedures be related to job performance. Originally, an employer only had to show that an alleged discriminatory practice bore a "demonstrable relationship to successful performance of the jobs for which it was used." Griggs v. Duke Power Co., 401 U.S.424, 431 (1971) (black employees charged that employer discriminated by his education requirements for hiring or transferring; Court found the practice discriminatory because it failed the job-related test and thus was not justified as a business necessity). *See also* United States v. Bethlehem Steel Co., 446 F.2d 652, 662 (2d Cir. 1971) ("necessity connotes an irresistible demand . . . [where] legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued"); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (inconvenience, additional expense, or a certain amount of disruption do not add up to business necessity). *But see* Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) (court applied a balancing test under which costs involved in alleviating the discrimination prevailed over the detrimental impact on the plaintiff). *See* M. MINER & J. MINER, EMPLOYEE SELECTION WITHIN THE LAW 23-25 (1979) (narrow definition by courts of the concept of business necessity) [hereinafter cited as MINER]; SCHLEI, *supra* note 10, at 146 (discussion of business necessity as a concept involving the degree of business utility). *But see* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974) (general discussion and criticism of the business necessity defense).

27. Presently there are two elements of the business necessity defense. First, there must be proof of job-relatedness. Second, the court must consider whether a discriminatory but job-related practice is necessary to the safe and efficient operation of that business. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). *See* COOPER, *supra* note 3, at 131. *See generally* Annot., 36 A.L.R. FED. 9 (1978) (business necessity under Title VII).

true reason for the employment decision.[28] The plaintiff may succeed in showing a pretext either by directly persuading the court that a discriminatory reason motivated the employer or by indirectly showing that the employer's explanation is unworthy of credence.[29] Thus, the ultimate burden of persuading the court that the plaintiff was the victim of discrimination logically rests with the plaintiff.[30]

Proving Discrimination Based On National Origin

This system of proof, defense, and rebuttal is directly applicable to allegations of national origin discrimination. Violations have been found in facially-discriminatory practices[31] as well as

28. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons given by the defendant were not its true reasons, but were a pretext for discrimination); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) (respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for unlawful discrimination).

29. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). *See* Nelson & Ward, *Burdens of Proof Under Employment Discrimination Legislation*, 6 J.C. & U.L. 301, 304-06 (1980) (elaborating on the employee's showing of pretext in disparate treatment cases); Ward, *Diagnosing an Employment Civil Rights Claim*, 6 J.C. & U.L. 279, 287-90 (1980) (the "real battleground" in disparate treatment cases is pretext).

30. Many courts follow this three-step formula for delegating burdens of proof in employment discrimination actions. First, the plaintiff bears the initial burden of establishing a *prima facie* case. Second, the defendant may rebut by showing that the employment practice has a manifest relationship to the job. Finally, the plaintiff has the burden of showing that a less discriminatory alternative was available to the defendant. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Albemarle Paper v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); R. PEREZ, DEALING WITH EMPLOYMENT DISCRIMINATION 47-48 (1978) [hereinafter cited as PEREZ].

31. *See* Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975) (failure to promote Mexican-American employee); Marquez v. Omaha Dist. Sales Office, Ford Motor Car Co., 440 F.2d 1157 (8th Cir. 1971) (same situation); Ponce v. City of Tulare, 6 Empl. Prac. Dec. (CCH) ¶ 8830 (Cal. Super Ct. 1973) (blatant national origin discrimination enjoined). *Cf.* Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69 (5th Cir. 1974) (discharge of driver for poor driving record held valid, but union and company violated Title VII by prohibiting transfer of Mexican-American and black city drivers to road-driving jobs); Ochoa v. Monsanto Co., 335 F. Supp. 53 (S.D. Tex. 1971), *aff'd per curiam*, 473 F.2d 318 (5th Cir. 1973) (evidence failed to establish denial of employment to Mexican-American applicants); Maldonado v. Yellow Freight Sys., Inc., 10 Fair Empl. Prac. Cas. (BNA) 1290 (C.D. Cal. 1975) (rejection of applicant for driver's position not discriminatory where applicant lacked requisite qualifications); Esponilla v. Trans-World Airlines, Inc., 7 Fair Empl. Prac. Cas. (BNA) 1102 (N.D. Cal. 1974) (discharge for fighting).

in neutral practices which have a discriminatory impact on specific national origin groups.[32] The courts, however, have generally not addressed certain unique facets of national origin discrimination. Although Title VII prohibits discrimination on the basis of "national origin," the Act does not define the term.[33] It is apparent that Congress meant to include members of all national groups and groups of persons of common ancestry, heritage or background.[34] The United States Supreme Court stated that national origin "on its face refers to the country where a person was born or, more broadly, the country from which his or her ancestors came."[35]

The protective scope of Title VII, however, extends beyond the immediate characteristics which identify a particular national origin group. This protection includes individual characteristics generally associated with the protected class through

32. *See* Kirkland v. Department of Correctional Serv., 520 F.2d 420 (2d Cir. 1975), *cert. denied sub nom.*, Kirkland v. New York Dept. of Corr. Serv., 429 U.S. 823 (1976) (promotional examination for correctional officers found discriminatory); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied sub nom.*, Director of Civil Serv. v. Boston Chapter, NAACP, Inc., 421 U.S. 910 (1975) (state Civil Service Commission's written fire-fighter examination discriminatory against Spanish-surnamed applicants); Roman v. Reynolds Metals Co., 368 F. Supp. 47 (S.D. Tex. 1973) (disparate impact of high school diploma requirement); United States v. Inspiration Consol. Copper Co., 6 Fair Empl. Prac. Cas. (BNA) 939 (D. Ariz. 1973) (high school diploma requirement and general aptitude test suspended because of unjustified discriminatory impact on Mexican-Americans and Indians). *See also* Cirino v. Walsh, 66 Misc. 2d 450, 321 N.Y.S.2d 493 (1971) (discriminatory to find unwed Puerto Rican mother of eight children unqualified for position of school crossing guard for lack of good character where rationale was based on greater incidence of illegitimate births among Puerto Ricans).

33. "National origin" has not been defined in Title VII, federal statutes, or orders relating to employment discrimination. It is generally held to mean "the country of a person's ancestry, rather than race or color. It also is related in the cases to matters of alienage." H. ANDERSON, PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY 47 (1978). Although no definition is contained in the *EEOC Guidelines on Discrimination Because of National Origin*, 29 C.F.R. § 1606.1 (1980), the EEOC's *Suggested National Origin Guidelines* (July 24, 1968) (unpublished), proposes the following definition: "Discrimination based on national origin shall be defined broadly to mean: (1) discrimination based on the country from where an individual or his forebears come, (2) discrimination against an individual who possesses the cultural or linguistic characteristics common to an ethnic national group." *See also* SMITH, *supra* note 4, at 64-68 (discussing identifiable ethnic groups and special problems of persons of Hispanic origin).

34. Representative Roosevelt (D. Cal.), in explaining that "Anglo-Saxon" was too broad a term to use in specifying national origin, stated "that 'national origin' means national. It means the country from which you or your forebears come from." HISTORY OF CRA OF 1964, *supra* note 2, at 3179-80. Congressman Dent (D., Pa.) added: "National origin, of course, has nothing to do with color, religion or the race of an individual." *Id.*, at 3180. *See* SCHLEI, *supra* note 10, at 246.

35. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

religion and religious practices, ethnic stereotypes, membership in associations, and dietary habits, irrespective of that individual's ethnic origin.[36] Thus, one might conceivably argue that restrictive language requirements in employment would constitute unlawful national origin discrimination.[37] Neither the statute nor common understanding, however, equate national origin with the language that one chooses to speak.[38] Language requirements in employment, even if facially neutral, may be discriminatory due to a disproportionately negative impact on a protected group.

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36. *See* SCHLEI, *supra* note 10, at 247.

37. 29 C.F.R. § 1606.1(b) (1980), stating the guidelines of national origin discrimination, warns that "use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed," may be covert discrimination based on national origin. Thus, in some circumstances, such as where English is not required to perform the requisite task, a bias towards English would be taken as discriminatory on the basis of national origin. *See* EEOC Dec. 71-446, 2 Fair Empl. Prac. Cas. (BNA) 1127 (Nov. 5, 1970) (employer violated Title VII by requiring rule restricting Spanish-surnamed American employees from speaking Spanish on employer's premises although there was no business necessity for the rule).

38. Garcia v. Gloor, 618 F.2d 264, 268, *reh'g denied en banc*, 625 F.2d 1016 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *But cf.* McDougal, Lasswell & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, 1976 S. ILL. L.J. 151 (1976). The concept of human dignity in international situations is fundamentally linked to the life of the mind which in turn is closely linked to one's language. Language goes to the core of one's personality, and deprivations in relation to language deeply affect identity, a prime characteristic of that individual's group or class. *Id.* at 151-52. Further, in projecting the norm of nondiscrimination with respect to language restrictions, the United Nations charter has consistently enumerated "language" with "race, sex, religion" as an impermissible ground of differentiation. *Id.* at 163. In addition, the European and American Conventions on Human Rights both expressly forbid discrimination on the basis of language. *Id.* at 167.

The right to use a specific language, however, is a civil liberty without firm foundation in English common law. There appears to be little evidence of concern for language rights. Devine, *Language Rights in Canada and Quebec's Official Language Act*, 35 U. TORONTO FACULTY L. REV. 114 (1977). *See also* Bujold, *Official Languages in Canada: A Review of the Constitutional Issues*, 26 U. NEW BRUNSWICK L.J. 47 (1977). Canada now has arrived at the point where it has two official languages, French and English. The legislation establishing this is constitutionally valid, but is by no means constitutionally entrenched. *Id.* at 63. Entrenched rights, however, are only *legally* entrenched rights, not social custom. While statutory law is based on constitutional grounds, ordinary law follows and eventually conforms to long-standing custom. While this reformation requires a period of time to conform to social custom, it "does not occur with vertiginous alacrity." Muldoon, *Entrenched Language Rights*, 8 MANITOBA L.J. 629 (1978). The United States, even though it also derives its laws from English common law, has not developed into a dual language country like Canada. If it does, it will first have to traverse a minefield of ephemeral social whims and policies.

This comment will document the various instances where a language requirement for employment, especially an "English only" work rule, may be either statutorily upheld or stricken as violative of Title VII. First, a workable definition must be established for the elusive term "discrimination" under Title VII. Second, this comment will decipher the language categories pertinent to disparate treatment and disparate impact analysis with their corresponding defenses in order to facilitate comprehension of this unexamined field of employment discrimination. The complexity of actions brought under Title VII has forced courts to articulate varying methods for the presentation and analysis of proof proffered by the parties. Understandably, but unfortunately, these methods of analysis have differed greatly from court to court, creating substantial uncertainty among litigants and members of the legal profession.

TITLE VII ENFORCEMENT: UNDER WHAT DEFINITION OF "DISCRIMINATION"?

What is discrimination? A common definition may be a "prejudicial outlook, action, or treatment."[39] Although this is an accurate statement in ordinary contexts, it does not aid the lawyer or judge with the term's legal complexities in relation to employment discrimination. Every rule, regulation or restriction is discriminatory in some respect. This does not make that practice unlawful.[40] A more precise legal definition, however, must be formulated. Courts have had numerous opportunities to rule on various employment practices in many situations; not surprisingly, many rulings are in conflict.

Prior to Title VII, the courts looked at the motives or intent behind the employment practice in question. If the employer had an evil intent not to hire persons because of their race, color, religion, national origin, or sex, then the practice was discriminatory and therefore unlawful. This "evil motive" standard required a showing of an "intentional act practiced on an indi-

39. WEBSTER'S NEW COLLEGIATE DICTIONARY 326 (1976). Discrimination is a "[f]ailure to treat everyone alike according to the standards and rule of action prescribed, that is, unreasonable and arbitrary action." BALLANTINE'S LAW DICTIONARY 355 (3d ed. 1969). In general, discrimination is "a failure to treat all equally; favoritism." BLACK'S LAW DICTIONARY 553 (4th ed. 1968).

40. Discrimination is "making differences and distinctions. Discrimination (treating people differently, or disparately) is not unlawful unless the form of discrimination is constitutionally or statutorily forbidden." SCHLEI, *supra* note 10, at 15. *Cf.* Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. App. 1979) (contract terminable at will permits discharge on any basis at any time in absence of statute or contract term to the contrary).

vidual because of membership in a disfavored group."[41] With the enactment of Title VII, it soon became clear that an employer's evil motive was extremely difficult to prove. Thus, there were few judgements for the plaintiffs in the first few years that Title VII was in effect.[42]

Title VII did, however, broaden the definition of discrimination to encompass the employee who was not treated equally with all other employees similarly situated. To rebut this "disparate treatment", a showing of equal treatment among all employees was required.[43] The "evil motive" and "disparate treatment" methods, however, were ineffective in securing employment opportunities where, although objective standards were used, disparity in effect resulted among members of the protected groups. Thus, Title VII was still of little value where a facially neutral practice had a discriminatory impact on blacks and other minorities.[44]

To assure implementation of the congressional purpose underlying Title VII, the definition of discrimination had to be expanded. The courts sought to eliminate those discriminatory practices which unnecessarily stratified job environments to the disadvantage of a protected class.[45] The United States Supreme Court, in *Griggs v. Duke Power Co.*,[46] formulated the adverse or "disparate impact" test for discrimination.[47] Practices neutral on their face could not be maintained if they operated to "freeze" the status quo of prior discriminatory practices.[48] Proof of evil motive was not necessary; *Griggs* required only a showing that the practices resulted in an adverse impact upon a protected class. The Court concluded that even in the absence of discriminatory intent, facially neutral practices which acted as "built-in-headwinds" against equal employment opportunity would not be tolerated.[49]

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41. Sullivan & Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?*, 27 S.C.L. REV. 1, 2 (1975).

42. MINER, *supra* note 26, at 6; PEREZ, *supra* note 30, at 49-51.

43. Sullivan & Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?*, 27 S.C.L. REV. 1, 3 (1975). *See* PEREZ, *supra* note 30, at 51-52. *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (although most emphasis is placed on protecting minorities and women, this does not suggest that white males are not protected from racial or gender discrimination).

44. MINER, *supra* note 26, at 7.

45. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

46. 401 U.S. 424 (1971).

47. See PEREZ, *supra* note 30, at 52-56.

48. 401 U.S. at 430.

49. *Id.* at 432.

The disparate impact theory of discrimination articulated in *Griggs* has had major ramifications in Title VII litigation.[50] Employers must now evaluate their employment practices in a different light: if the practice results in reduced opportunities for certain groups, there is "discrimination," absent a justifiable defense. Whether discrimination is defined as evil motive, disparate treatment, or disparate impact, the proof substantiating any of these theories will be sufficient to make out a *prima facie* case under Title VII.[51]

DISPARATE TREATMENT AND THE BFOQ EXCEPTION

Proof of Disparate Treatment

Under disparate treatment analysis, the employer is accused of treating some people less favorably than others because of their class characteristics. The main focus is whether the employer had a discriminatory motive in his employment decision. Although the focus is on discriminatory motive, technically the employee is *not* required to prove intent. Rather, he must prove that certain factors exist which would lead to an inference that the employer's action was illegally motivated.[52] The courts have recognized that "direct evidence of discrimination . . . is virtually impossible to produce."[53] Hence, comparative evidence, based on the treatment of "similarly situated"[54]

50. *See* Hsia, *The Effects Test: New Directions*, 17 SANTA CLARA L. REV. 777 (1977) (judicial and legislative authorities are initiating the theory of disparate impact to combat discrimination in such areas as credit and housing); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345 (1980) (courts and administrative agencies have expanded the application of disparate impact to types of employment discrimination covered by Title VII and to discrimination outside the area of employment).

51. In present day litigation, the evil motive theory is incorporated into disparate treatment allegations. Blatantly discriminatory treatment usually signals an employer's evil motive or purpose. Thus, the only two theories presently argued in discrimination actions are disparate treatment and disparate impact.

52. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). *See* Nelson & Ward, *Burdens of Proof Under Employment Discrimination Legislation*, 6 J.C. & U.L. 301, 302 (1980). *Cf.* Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981) (court stated in dicta that discriminatory intent is required in Title VII disparate treatment claims, but did not elaborate as to what is meant by "intent").

53. Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399 (D. Or. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974).

54. "Similarly situated" generally means that the individuals who are being compared are so situated that it is reasonable to believe that they would receive the same treatment in the context of a given employment decision. *See* EEOC Interpretive Manual § 132.5(c) for a more complete discussion of comparative evidence. *See generally* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463

persons, is sufficient to establish the plaintiff's *prima facie* case.[55]

The employee's burden of establishing a *prima facie* case, therefore, is not onerous. He must prove by a preponderance of the evidence that he was discriminated against under circumstances which give rise to an inference of unlawful disparate treatment.[56] The *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[57] If an individual from a given ethnic group receives different treatment than similarly situated persons of other national origins or ethnic backgrounds, it is reasonable to infer that national origin was a factor in the disparate treatment.[58]

A common disparate treatment case involves disciplinary and discharge issues. In a discharge case, similarly situated employees are compared to the plaintiff with respect to incidence of discharge, disciplinary acts constituting issuance of warnings or other reprimands, and opportunities afforded the individual to justify his action. Although very few cases involving overt language discrimination have been litigated, discrimination against individuals solely because of a Spanish-speaking back-

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(1973); Case Note, *Disparate Impact and Disparate Treatment: The Prima Facie Case Under Title VII*, 32 ARK. L. REV. 571 (1978).

55. *See supra* notes 10-20 and accompanying text.

56. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), described an appropriate model for 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 for 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 applicants from persons of complainant's qualifications.

Id. at 802. The Court stated that this was not an inflexible standard. The facts necessarily will vary in Title VII cases, and so an exacting universal standard cannot be formulated for every diverse fact situation. *Id.* at 802 n.13. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (importance lies not in the specification of discrete elements of proof required, but in the recognition of the general principle that any plaintiff under Title VII must carry the initial burden of offering evidence adequate to create an inference that a practice was based on a discriminatory criterion illegal under the Act).

57. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

58. Employer action does not violate Title VII merely because a prohibited reason plays some part in the employer's decision. There may be a valid justification for implementing that policy. *See* Rogers v. EEOC, 551 F.2d 456 (D.C. Cir. 1977). Yet, the proscribed action need not be the sole basis for the action in order to condemn it. Garcia v. Gloor, 618 F.2d 264, 268, *reh'g denied en banc*, 625 F.2d 1016 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

ground clearly fall within the boundaries of Title VII.[59] Differences in language and other cultural characteristics may not be used as a "fulcrum for discrimination."[60] For example, in one EEOC case, an employer violated Title VII by discharging a Spanish-surnamed American for allegedly poor work attributed to his language difficulty.[61] When the employee was hired in 1966, he was the only minority-group employee in the employer's compositor-typesetter branch printing facility. He was fired in 1968 for incompetency due to "the language problem that existed between his not being able to speak, read, and understand the English language very well."[62] The Commission cited the employee's 16 years experience in typesetting, 15 years as compositor-typesetter, to demonstrate that the employee possessed the requisite ability to communicate well in English.

Another example of blatant discriminatory treatment relating to language and national origin is *Saucedo v. Brothers Well Service, Inc.*[63] A Mexican-American employee was discharged for speaking two words of Spanish on the job in violation of an "English-only" rule. The foreman in the same incident, however, was not fired even though he was guilty of a more serious breach of conduct, fighting. The employer not only tolerated the incident in question, but permitted and impliedly approved of the foreman's manifest discriminatory conduct.[64] The court recognized that the foreman's misconduct was much more serious than the employee's use of a Spanish phrase. Since the employer retained the foreman while discharging the employee,

59. Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 8 (E.D. Pa. 1975) (discrimination solely because of a Spanish-speaking background clearly falls within the proscription of Title VII). *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92 n.5 (1973) (no suggestion in the complaint that the company refused to hire aliens of Mexican or Spanish-speaking background while hiring those of other national origins).

60. Garcia v. Gloor, 618 F.2d 264, 270, *reh'g denied en banc*, 625 F.2d 1016 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

61. EEOC Dec. YAU 9-048, 2 Fair Empl. Prac. Cas. (BNA) 78 (June 30, 1969). The digests of recent decisions by the EEOC are not printed in full since the statute bars identification of parties to proceedings before the Commission.

62. *Id.* at 78.

63. 464 F. Supp. 919 (S.D. Tex. 1979).

64. After Mr. Saucedo inadvertently spoke two words of Spanish to another employee, the foreman promptly told Saucedo that he had just "resigned" by violating the English-only rule. The other employee objected to this and the foreman struck the other employee several times with his fists. The employer impliedly approved of his foreman's conduct since the foreman was neither discharged nor reprimanded for the assault. The employer took no action because qualified foremen were hard to find. *Id.* at 920-22.

the court held that the employer breached his obligation to avoid treating employees discriminatorily.[65]

The key to recognizing disparate treatment, demonstrated by *Saucedo* and the EEOC decision, is discovering unequal treatment. Once the employee shows disparate treatment between members of his national origin group and others similarly situated, there is a reasonable inference that national origin was a factor in the employer's decision.[66] As cautioned earlier, proof in support of one's allegations is extremely difficult to produce. Thus, an individual may in the alternative have to allege a discriminatory impact to substantiate his language discrimination claim.[67]

The BFOQ Exception

If an employee, in fact, produces evidence sufficient to make a *prima facie* case of disparate treatment, the employer can defend by showing a BFOQ. This exception encompasses discrimination based on religion, sex, or national origin.[68] If the employment practice prohibits employment of non-native English speakers, it facially discriminates on the basis of national origin.[69] The BFOQ exception, however, allows an employer to institute rules reasonably necessary for the normal operation of that particular business.[70] The proof rests on special character-

65. *Id.* at 922. Although the court distinctly characterized the action as one of unequal treatment, it further stated that a rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees. It is not clear whether this was meant as dicta or whether the court was confusing the terms of disparate treatment and disparate impact.

66. *See* COOPER, *supra* note 3, at 83 (common for courts to treat statistics on overall data as sufficient in themselves to make out *prima facie* case). *Cf.* Hernandez v. Erlenbusch, 368 F. Supp. 752 (D. Or. 1973) (where tavern owner mandated his employees to enforce an English-only rule against all patrons, there was patent discrimination against the Mexican-Americans who constituted about one-fourth of the tavern's trade).

67. *See infra* notes 81-99 and accompanying text.

68. This exception does not refer to race or color discrimination because no rational reason can be given for discriminatory practices against people of different races or colors. R. White, *An Overview of Title VII*, 3 ALI-ABA COURSE MATERIALS 113, 115 (1978).

69. The BFOQ exception only applies when the questionable practice is a rule prohibiting non-native English speakers. This is the only instance where the practice on its face discriminates on the basis of national origin. If the rule discriminates on the basis of the language spoken, the rule on its face does not discriminate on the basis of national origin. This rule may have a disparate effect on that protected class and may be rebutted by the business necessity defense. *See infra* notes 100-119 and accompanying text.

70. 42 U.S.C. § 2000e-2(e)(1) (1976) ("national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). The proof of this exception, however, is not automatic upon allegation by the defendant. *See supra* notes 21-25 and accompanying text.

istics attributable to a select group, not just related aspects somewhat peculiar to that class.[71]

Blatant, overt discriminatory practices logically call for a narrow standard of justification. The EEOC has issued guidelines which narrowly construe the BFOQ exception.[72] The courts have also expressed the desire to sharply limit the scope of this exception. The burden of proof, however, is not so confined. The employer need not persuade the court that the practices were actually motivated by the proffered reasons.[73] It is sufficient if the evidence raises a "genuine issue of fact" as to whether there was a discriminatory purpose.[74] The evidence need only set forth nondiscriminatory reasons for that employment decision. Thus, the employer's burden is not to disprove the existence of discrimination, but to articulate some legitimate, nondiscriminatory reason for the practice in question.[75] This rebuts the employee's *prima facie* case by presenting a legitimate reason for the action and framing the factual issue with sufficient clarity for a full and fair adjudication.[76]

The BFOQ exception has been narrowly construed in other discrimination actions.[77] Not only must the employer show a job-related characteristic necessary to the position, but also that essentially all members of that particular national origin group possess the qualifying or disqualifying characteristics, and that those characteristics are attributable only to that group while excluding all others.[78] Legislative history, however, might indi-

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71. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (D.C. Cal. 1968) (hours and weights legislation regulating employment for women did not create BFOQ).

72. 29 C.F.R. § 1606.1 (1980).

73. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). *See* Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978) (burden satisfied when employer explains what he has done, or produces evidence of legitimate nondiscriminatory reasons).

74. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). Some evidence must be presented; defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel. *Id.* at 255 n.9.

75. The employer does not really have a burden of proof in rebuttal, but rather a burden of producing evidence in justification of its action, *i.e.*, a nondiscriminatory reason. Nelson & Ward, *Burdens of Proof Under Employment Discrimination Legislation*, 6 J.C. & U.L. 301, 304 (1980).

76. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).

77. *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (stating EEOC guidelines for narrow construction in sex discrimination).

78. *See infra* notes 101-06 and accompanying text. Congressman Dent explained that a BFOQ exception is valid for an employer who runs a French or Italian restaurant which advertises to hire exclusively French or Italian chefs. This same exception, however, could not be applied to dish-

cate a less rigid construction with respect to national origin discrimination.[79] An employer arguably may utilize the BFOQ exception when English is necessary to the practice in question.[80] This contention, however, should be scrutinized in light of the BFOQ's strict judicial interpretation. So limited, the BFOQ exception is more practical in theory than in reality.

DISPARATE IMPACT AND THE BUSINESS NECESSITY DEFENSE

Proof of Disparate Impact

Disparate treatment analysis did not alleviate all the discriminatory wrongs to which an employer, intentionally or unwittingly, subjected his employees. Disparate impact analysis was thus formulated to combat this evil. Unlike disparate treatment, disparate impact challenges specific employment practices that are facially neutral in their treatment of employees, but that by their adverse effect, discriminate against a protected individual or class.[81] In disparate impact analysis, proof of the employer's discriminatory motive or intent is not required.[82] The origin of disparate impact analysis is generally attributed to *Griggs v. Duke Power Co.*,[83] the most important Supreme Court decision in employment discrimination law.[84]

In *Griggs*, black employees brought an action, pursuant to Title VII, challenging the employer's requirement of a high

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washers employed at those restaurants. HISTORY OF CRA OF 1964, *supra* note 2, at 3180.

79. SCHLEI, *supra* note 10, at 267.

80. *Cf.* EEOC Dec. YAU 9-048, 2 Fair Empl. Prac. Cas. (BNA) 78 (June 30, 1969) (although fluency in proper English necessary for job as typesetter-compositor, the fired Spanish-surnamed employee had extensive experience and requisite skill for the job in question).

81. *See, e.g.*, Vulcan Soc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973) (written exam for fire department); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (merit system examination for police department appointments and promotions); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972) (examination for supervisory positions in school system); Padilla v. Stringer, 395 F. Supp. 495 (D.C.N.M. 1974) (high school education required for zoo keeper).

82. International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430, 432 (1971).

83. 401 U.S. 424 (1971).

84. Actually, the *Griggs* decision was preceded by a lower court decision finding violations of Title VII on a theory similarly relied on in *Griggs*. *See* Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (uniform application of company policy not to hire individuals who have been arrested a substantial number of times violated Title VII since blacks are arrested more often than whites; further, business necessity, defined as a practice or policy essential to safe and efficient operation of the business, was not shown).

school diploma or an acceptable score on intelligence tests as a condition of employment in or transfer to jobs in the plant. These requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs. The United States Supreme Court stated that Congress did not intend Title VII to guarantee a job to every member of a protected class regardless of his qualifications. Instead, Congress prohibited arbitrary, artificial, and unnecessary barriers to employment when the barriers operated invidiously to discriminate on the basis of an impermissible classification.[85]

Thus, *Griggs* established that Title VII proscribes not only overt discrimination, but also practices that are neutral in form yet discriminatory in operation. Good intent or absence of a discriminatory purpose is no defense if the practices or procedures operate as "built-in-headwinds" for groups and are not related to job capability.[86] The touchstone here is disparate impact unrebutted by a showing of business necessity.[87] The Court concluded that Title VII does not preclude the use of testing or measuring procedures unless their controlling force is not reasonably related to safe and efficient job performance. These principles have been broadly applied in many contexts of employment discrimination law, including those where national origin is the basis for discrimination.

In *Frontera v. Sindell*,[88] for example, the plaintiff of Spanish ancestry claimed he failed to pass a carpenter's examination for a city position because the exam was administered in English and not in Spanish.[89] Although it was proved that the test had a disparate impact on Spanish-speaking applicants, the court found that Frontera's civil rights were not violated. The court applied a balancing test of discriminatory impact against the offsetting business necessity of the situation,[90] and indicated that a

85. 401 U.S. 424, 430-31 (1971).

86. *Id.* at 432.

87. Although *Griggs* does not elaborate on the difference between the terms "job related" and "business necessity," the terms are frequently used interchangeably by lower courts. SCHLEI, *supra* note 10, at 133.

88. 522 F.2d 1215 (6th Cir. 1975).

89. The plaintiff alleged violation of his constitutional rights under the 14th amendment, and of his civil rights under 42 U.S.C. §§ 1981, 1983, and 1985. *See supra* note 9. Although the suit was not brought under Title VII, the facts are analogous to the present discussion.

90. The *Frontera* court supported this proposition by citing Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973), which held that the additional burdens imposed on one's resources in a single language claim can only be supported by the conclusion of reasonableness. *See also* Chung v. Morehouse College, 11 Fair Empl. Prac. Cas. (BNA) 1084 (N.D. Ga. 1975) (Chung's English, as well as his teaching skills, held insufficient to justify his retention on Morehouse faculty).

less rigid business necessity burden might be appropriate in language cases.[91]

Similarly, the EEOC has held that fluency in English as a condition of employment is a "test" within the meaning of *Griggs*.[92] The prohibitions on speaking any language other than English may create an unlawful disparate impact on a protected ethnic group.[93] In one EEOC case, an employer violated Title VII by promulgating a rule restricting Spanish-surnamed American employees from speaking Spanish on the employer's premises.[94] The "English-only" work rule was in force both during working and nonworking hours. This restriction was imposed because the supervisors understood no Spanish; however, no genuine business need was demonstrated. The EEOC stated that "[i]t is now well settled that conversation, including social conversation, at work both during working and non-working time, is a term or condition of employment" within the ambits of Title VII.[95] The Commission held that it is a term, condition, or privilege of employment for Spanish-surnamed Americans to speak Spanish at work. The EEOC qualified its position, however, by stating that there may be occasions when business necessity would permit an employer to prohibit employees from speaking languages not understood by supervisors at their work stations during working hours. The Commission concluded that it would be difficult, if not impossible, to conceive of a situation when business necessity would permit a ban on the use of such

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91. 522 F.2d at 1219-20.

92. Within the meaning of the EEOC guidelines, an application for a job or a discharge from a job is a "test" because it seeks "specific qualifying or disqualifying personal history or background . . . [or] specific educational or work history." 29 C.F.R. § 1607.2 (1976). *See, e.g.*, EEOC Dec. YAU 9-048, 2 Fair Empl. Prac. CAs. (BNA) 78 (June 30, 1969) (employer violated Title VII when he discharged Spanish-surnamed American for allegedly poor work as a result of inability to communicate fluently in English); EEOC Dec. AL 68-1-155E, 1 Fair Empl. Prac. Cas. (BNA) 921 (May 19, 1969) (employer violated Title VII by refusing to consider Spanish-surnamed Americans for employment as a retail sales manager on the basis of a noticeable accent).

93. EEOC Dec. 72-0281 (Aug. 9, 1971) (forbidding barbers to speak Spanish at work held unlawful); EEOC Dec. 71-446, 2 Fair Empl. Prac. Cas. (BNA) 1127 (Nov. 5, 1970) (rule forbidding employee to speak Spanish on work premises both during work and break time violated Title VII absent sufficient business necessity); EEOC Dec. Au7-88 (1967) (unreported) (absolute prohibition to speak one's native or mother tongue, without justification, was clearly discrimination on the basis of national origin).

94. 94 EEOC Dec. 71-446, 2 Fair Empl. Prac. Cas. (BNA) 1127 (Nov. 5, 1970).

95. *Id.* at 1127.

languages during nonworking time.[96] A language rule during nonworking hours would clearly be discriminatory.[97]

Once a plaintiff proves that a facially neutral practice, *e.g.*, an English-only work rule, is in fact discriminatory in its adverse effect on a protected class, the plaintiff has made out a *prima facie* case of disparate impact. Subjective intent of the employer, whether in good faith or not, is irrelevant to the case. It is only by the sufficient showing of a business necessity that the employer will be able to rebut this presumption.

Thus, the plaintiff can prove his allegations either by disparate treatment, which focuses on intent, or disparate impact, which focuses on effect without regard to purpose or motive. Although the main difference between these two theories involves "intent," this difference may not be as critical as one might assume.[98] Indeed, the added element of intent in disparate treatment is so closely related to the impact element that the statistical showing of impact alone, if great enough, may be sufficient to establish the intent element for a *prima facie* case.[99] No matter what conclusion is drawn on intent, the plaintiff has two viable theories for substantiating his claim.

The Business Necessity Defense

Once the employee establishes a *prima facie* case of disparate impact, the employer may rebut by an adequate showing of business necessity.[100] The burden of proof of this affirmative defense logically rests with the employer.[101] There are two ele-

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96. *Id.* at 1128. *See* Republic Aluminum Co. v. NLRB, 394 F.2d 405 (5th Cir. 1968) (long established distinction between working and nonworking time with respect to employer prohibitions).

The EEOC agreed with the opinion of the Attorney General of the State of New Mexico in holding that a rule requiring employees to speak only English during working hours constituted an unlawful employment practice under the state's Human Rights Act. 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 n.3 (Nov. 5, 1970).

97. This language rule would not be discriminatory on its face, but would have a disparate impact on that protected group. There is, however, no justification of business necessity when rules of this type are implemented. *See infra* notes 100-119 and accompanying text.

98. Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

99. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

100. DeLaurier v. San Diego Unified School Dist., 588 F.2d 674, 678 (9th Cir. 1978) (business necessity defense is designed to allow a discriminatory practice only if the business cannot continue without the practice); MINER, *supra* note 26, at 23 (the defense has been interpreted to mean that selection procedures must be related to job performance).

101. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (the burden on the employer arises after the employee has sufficiently made out his

ments of business necessity. First, proof of a job-related characteristic, *i.e.*, that the policies instituted are rationally designed to select potentially successful employees. Mere good faith speculation will not suffice in establishing job relatedness;[102] rigorous documentation through the use of standards is required.[103] Second, the discriminatory but job-related practice must be necessary to the safe and efficient operation of that business.[104] If another, less discriminatory, practice can be efficiently utilized, then the employer's existing practice is obviously not essential and, therefore, not justified.[105] Most cases of national-origin discrimination fall within the first element,[106] but one recently decided case focuses on the importance of the second element—safe and efficient operation.

The second element of business necessity was aptly demonstrated in *Garcia v. Gloor*.[107] A Mexican-American bilingual challenged his former employer's rule prohibiting employees

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prima facie case; the burden is that of proving job-relatedness); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (the defendant has the burden of showing that the practice bears "a demonstrable relationship to successful performance of the jobs for which it was used").

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

103. 29 C.F.R. § 1607.14 (1980) (guidelines on employment selection procedures).

104. Although most courts adhere to the concept of business necessity, some have altered the burden of proof. *See* United States v. N.L. Indus. Inc., 479 F.2d 354, 364-66 (8th Cir. 1973) (must meet the requirements of a compelling business necessity); Bing v. Roadway Express Inc., 444 F.2d 687, 690-91 (5th Cir. 1971) (business necessity must be compelling).

105. The less discriminatory alternative (LDA) of disparate impact analysis is analogous to a showing of pretext in disparate treatment analysis. *See supra* notes 28-30 and accompanying text. Some lower courts have held that a showing of an LDA conclusively condemns the challenged practice under Title VII. They hold that disparate impact is only justifiable by business necessity. Where an LDA exists, however, the impact is not necessary to the function of the relevant business. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972). The Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), however, suggested a different role for the demonstration of the existence of an LDA. There the Court noted that the showing of an LDA "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." *See* Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345, 351-52 (1980) (discussing the conclusive versus the evidentiary presumption of the LDA approach).

106. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). Black employees challenged the requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to jobs at the plant. The requirements were not directed at or intended to measure ability to learn to perform a particular job or category of jobs.

107. 618 F.2d 264, *reh'g denied en banc*, 625 F.2d 1016 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

engaged in sales work from speaking Spanish on the job.[108] Unlike previous EEOC decisions, this rule pertained only to working hours;[109] Garcia was free to speak the language of his choice during work breaks. The court stated that no existing authority gives a person a right to speak any language he prefers while at work.[110] Unless imposed by statute, the rules of the workplace are made by the employer. Although the refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without fluency in that language, an employer who hires a bilingual person does not give that individual a choice of language.[111] Garcia, however, was unique in some aspects. He was specifically hired as a salesman because he was bilingual. If he was aiding a Spanish-speaking customer, he was obligated to use Spanish; if aiding an English-speaking customer, he was ordered to speak English. This English-only rule went further, however; it restricted his preference while he was on the job and not serving a customer. The employer justified his practice by citing the numerous complaints received by irate customers who, while in the employer's store, were greatly disturbed by the Spanish language they could not understand. Reasoning that the main business purpose of a retail sales store is the satisfaction of its customers, the court concluded that the English-only rule was instituted for the safe and efficient operation of that business.[112]

Since this bilingual situation posed a unique dilemma in language discrimination cases, the *Garcia* court further hypothesized what the result would be if, as contended by Mr. Garcia,

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108. Mr. Garcia contended that if an employee whose most familiar language is not English is denied the right to converse in that language, this necessarily discriminates against him on the basis of national origin because national origin determines or influences his language preferences. He felt that speaking Spanish was inherent in his ancestral national origin and that denial of his preferences, so important and integrated to his self-identity, was statutorily forbidden. *Id.* at 268, 271. *See also* Riley, *The Official Language Act of Quebec*, 7 MANITOBA L.J. 93 (1976). "Changing one's language has far-reaching consequences for the individual which go beyond the mere alteration of the sounds one uses to express oneself and one's ideas. The ideas and the 'self' are altered by the means used to describe them." *Id.* at 107.

109. *Cf.* EEOC Dec. 71-446, 2 Fair Empl. Prac. Cas. (BNA) 1127 (Nov. 5, 1970) ("English-only" rule while on employer's premises; rule in effect during both work and break hours).

110. While the EEOC has considered specific situations where a policy prohibiting speaking Spanish in normal interoffice contacts discriminates on the basis of national origin, Empl. Prac. Guide (CCH) ¶ 6293 (1972), Empl. Prac. Guide (CCH) ¶ 6173 (1972), the Commission has not adopted a standard or general policy prohibiting this action.

111. Garcia v. Gloor, 618 F.2d 264, 268-69, *reh'g denied en banc*, 625 F.2d 1016 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

112. *Id.* at 267-69.

there was no genuine business necessity. The court stated that the Act does not prohibit all arbitrary employment practices,[113] but rather is directed only at specific impermissible bases of discrimination such as national origin.[114] National origin, however, must not be confused with ethnic or socio-cultural traits.[115] The court held that this English-only rule was not discriminatory in impact. There is no disparate impact if the rule can be easily followed and nonobservance by the employee is a matter of personal preference.[116] The courts will not tell the employer how to run his business by imposing prohibitions on all arbitrary rules and practices.[117] Those practices which are discriminatory will be prohibited; all others are a matter of employer preference.[118]

Unless a business necessity is amply demonstrated, an employer cannot discriminate against an individual whose main or only language is not English. The employer would, in effect, discriminate on the basis of national origin, which is prohibited by Title VII. This rule, however, does not apply to a bilingual employee whose fluency in several languages imposes no undue burden when he is mandated to use one language or the other. A bilingual is not granted special privileges of language preference solely because of his linguistic ability.[119] To the contrary, he is afforded the same rights as an English- or Spanish-speaking citizen when the situation so dictates. The English-only

113. *Id.* at 269. *Cf.* NLRB v. Knuth Bros., Inc., 537 F.2d 950, 954 (7th Cir. 1976) (employer may discharge employee for no reason at all so long as the motivation is not violative of the NLRA).

114. *See generally* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

115. *See, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (citizenship or alienage); Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (poverty); Balderas v. La Casita Farms, Inc., 500 F.2d 195 (5th Cir. 1974) (activity not connected with national origin, such as labor agitation).

116. 618 F.2d at 270. *See* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (hiring policy that distinguishes on a ground not impermissible, such as grooming codes or hair length, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity).

117. 618 F.2d at 271. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (judges who have neither business experience nor problem of payroll do not have power to prohibit employer's business decisions by imposing a less restrictive policy).

118. The *Garcia* court held that, for a person who speaks only one language, that may well equate with national origin. A bilingual, however, elects to speak a language as a matter of choice. That preference does not fall under the auspices of a national origin category. 618 F.2d at 270.

119. *See also*, Riley, *The Official Language Act of Quebec*, 7 MANITOBA L.J. 93, 105 (1976) (Act establishing French as Quebec's official language and mandating public entities within that province to communicate with each other and the general public in French while permitting bilingualism).

rule, as applied to a bilingual, does not violate any civil right under Title VII.

CONCLUSION

Title VII functions as a comprehensive prohibition on practices of employment discrimination. It prohibits all employment discrimination based upon race, color, religion, sex or national origin. It covers both overt and covert discriminatory practices. The disparate treatment theory allows the victim to substantiate his allegations of unequal treatment which are facially biased. The employer can defend by showing a bona fide occupational qualification exception. If the practice is one which is reasonably necessary for the normal operation of that particular business, then the practice is held lawful. The disparate impact theory, on the other hand, enables an individual to show that a facially-neutral practice is discriminatory by its adverse impact on a select class. A showing of business necessity, a job-related practice necessary to the safe and efficient operation of that business, will adequately rebut the plaintiff's claim.

It is generally conceded that national origin falls within these two theories. Discrimination based on language restrictions, however, is not expressly prohibited. Although language cannot be directly equated with national origin, an individual who cannot speak English fluently can avail himself of either discriminatory theory as long as a BFOQ or business necessity defense is not amply demonstrated. The English-only rule is blatantly biased against the individual based on his national origin. Similarly, an English-only rule enforced during nonworking hours is also violative of Title VII.

In the situation of a bilingual employee, however, these canons are slightly altered. An employer still has no right to mandate use of only English during nonworking hours. On the job, however, the employer has the option of ordering the bilingual employee to speak only English. The employer has the privilege to make and enforce his own rules and regulations. An English-only rule during work hours does not impose an undue burden on a bilingual employee who is fluent in more than one language. An employee cannot claim extra rights solely on his bilingual capabilities. Thus, an employer can regulate the use of foreign languages during work hours in relation to any bilingual employees, regardless of the employer's subjective motive or intent.

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