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Language policies trigger lawsuits

Tresa Baldas / Staff reporter

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While the debate over immigration reform heats up in Washington, English-only policies in the workplace are sparking numerous legal challenges in the courts.

Labor and employment attorneys say that, in recent years, a growing number of businesses have created English-only policies, triggering a backlash of discrimination lawsuits by immigrant workers.

The Equal Employment Opportunity Commission (EEOC) also has reported a surge in discrimination charges stemming from English-only policies during the last decade, from 30 in 1996 to more than 120 in 2006.

In Boston, the EEOC is suing the Salvation Army for allegedly discriminating against two Hispanic employees by requiring them to comply with an English-only policy and imposing an English fluency requirement. *EEOC v. Salvation Army*, No. 07-10620 (D. Mass).

In New York, a federal court recently ruled in favor of an English-only policy at a Long Island taxi company, holding that the rule — imposed only at the main dispatch center — was a necessary business decision to avoid miscommunication. *Gonzalo v. All Island Transportation*, No. 28:402 (E.D.N.Y.).

Also in New York, a geriatric center recently agreed to a \$900,000 settlement of a suit claiming that it barred Haitian employees from speaking in Créole while allowing other foreign languages to be spoken. *EEOC v. Flushing Manor Geriatric Center Inc.*, No. 05-4601 (E.D.N.Y.).

And in Atlanta, Oglethorpe University, a private school, recently agreed to settle a lawsuit filed by three Latino housekeepers who claimed they were discriminated against because of a policy that required employees to speak only English to supervisors and colleagues. *EEOC v. Oglethorpe University*, No. 1:06-CV-0711-ODE (N.D. Ga.).

'Target on your back'

"Employers seem more and more willing — in the climate we have today — to make these kinds of choices and risk the legal problems associated with English-only policies. They think its appropriate to have English-only policies," said Gregg Lemley, a partner in the St. Louis office of Bryan Cave who in recent years has helped a number of employers craft "tailored" English-only policies.

Lemley is concerned that employers are having "a sort of knee-jerk reaction" to the immigration movement and implementing poorly crafted English-only rules that are creating legal risks. For example, he said, rules that require people to speak only English even on lunch breaks, or anywhere in a facility, could be too stringent and trigger a lawsuit.

Aaron Gelb, a shareholder at Chicago's Vedder, Price, Kaufman & Kammholz who has successfully defended a number of English-only policies before the EEOC, said his clients are well aware of the legal risks that language rules carry.

"The first thing we always tell clients is, 'You're going to have a target on your back if you do this,' " he said, referring to the EEOC.

Employees win in 10th Circuit

Indeed, employers should also be wary of creating a hostile environment with an English-only policy, said attorney Mark E. Hammons, who successfully argued that point in a key English-only lawsuit before the 10th U.S. Circuit Court of Appeals last year. *Moldonado v. City of Altus*, 433 F. 3d 1294 (10th Cir. 2006).

Hammons of Hammons Gowens & Associates in Oklahoma City represented a group of bilingual Hispanic employees who claimed that an English-only policy in the city of Altus, Okla., created a hostile work environment.

The plaintiffs in *Moldonado* alleged that the rule was enforced throughout the entire day, covering breaks, lunch breaks and private conversations.

The 10th Circuit ruled in their favor, finding that "the less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language."

The 10th Circuit ruling marked a split from a 1993 9th Circuit ruling in which the court held that bilingual employees were not adversely affected by an English-only rule. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (1993).

In the *Moldonado* case, the 10th Circuit rejected the argument that a bilingual person could not be offended and ruled that an English-only policy might violate discrimination laws.

Hammons believes the 10th Circuit ruling will make it tougher for employers to implement and justify English-only policies, particularly when one can prove that the rule is pervasive, as he did in his case.

"There's nothing more pervasive than a policy that controls you throughout the work day," Hammons said. "So if you have a policy that is inherently demeaning — as language policies tend to be — then you've automatically made a showing of pervasiveness on a hostile environment."

Hammons charged that "[m]ost language restrictions are based on bigotry. They are not really designed to serve the interest of the public. It is one group of people saying, 'I don't want to hear that language,' " he said.

Business justifications

Not necessarily, countered attorney Sarah Kelly of Philadelphia's Cozen O'Connor, who argued that English-only policies can be warranted in situations in which foreign languages make store customers or hospital patients feel uncomfortable.

"Customers don't like to feel like they're being talked about," Kelly said. "I think [an English-only rule] has more justification in a customer or health care setting where you want to make sure that the individuals who are being serviced by your business or organization are not made to feel uncomfortable."

Several years ago, Kelly defended a large retailer in an EEOC case involving two Hispanic cashiers who were disciplined for speaking Spanish in front of a customer who complained, saying she thought they were talking about her.

The store had an English-only policy with respect to areas where customers were present.

The two disciplined employees filed a discrimination complaint with the EEOC, but Kelly said the charges were eventually dropped after she successfully defended the policy, arguing a company has a right to satisfy its customers and maintain a friendly environment.

"If your defense is going to be business necessity, you probably want to have a rational logical exception, so that it's not an exclusive English-only policy," said Kelly, noting that employers should allow employees to speak a foreign language to customers or patients who don't speak English.

But given the legal risks of English-only rules, Kelly noted, most businesses try to steer clear of language policies.

But if businesses do enforce English-only rules, how do employers safeguard themselves against potential lawsuits?

"English-only rules, when applied at all times, are presumed to violate Title VII [of the Civil Rights Act of 1964] and will be closely scrutinized," said EEOC spokesman David Grinberg.

"However, limited English-only rules that apply only at certain times may be lawful if the employer can show they

are justified by business necessity," Grinberg said.

According to the EEOC, examples of justifiable English-only rules include:

- Policies that are needed to promote the safe or efficient operation of the employer's business.
- Communication with customers, coworkers, supervisors who only speak English.
- Emergencies in which workers must speak a common language for safety reasons.
- Cooperative assignments in which the use of a common language is needed for efficiency.

"The key is business necessity. If you could point to some business necessity that justifies the policy, that's really the hook," said labor and employment attorney Marc Scheiner, who in recent years has had several clients express an interest in adopting English-only policies.

Scheiner noted, however, that none of his clients has actually implemented such a policy. That's because when he asks them the initial question — "Why do you need this policy?" — they can't come up with a justifiable answer, said Scheiner of Wolf, Block, Schorr and Solis-Cohen in Philadelphia.

"I don't talk employers out of it, but I think once I ask the initial question, and tell them how the EEOC views these policies, I think oftentimes employers will realize that they may not have a business necessity," Scheiner said.