

Note

You're Next on the Tee, Just Remember to Speak English! Could the LPGA Really Force Players to Learn and Speak English?

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INTRODUCTION

Imagine that Eun-Hee Ji, one of over 100 international players of the Ladies Professional Golf Association (LPGA), has just held off a field of some of the best women golfers in the world to win a tournament.¹ After she signs her scorecard and receives the trophy she is asked to give the obligatory victory speech to the crowd, fellow competitors, and corporate sponsors that surround her. As one of the forty-five South Korean players on the tour, her English proficiency is minimal at best.² Although she would like the aid of an interpreter, the LPGA denies her request, forcing her to speak English at times like this. The recent English-only rule proposed by the LPGA would have made this scenario play out week after week on tour. In August 2008, in an effort to maximize the marketability of its players,³ the LPGA proposed a new rule that would require all players to speak English when dealing with the media, giving

¹ Ron Sirak, LPGA Should Have Seen the Fallout Coming From English Policy, ESPN.com, Sep. 5, 2008, http://sports.espn.go.com/golf/columns/story?columnist=sirak_ron&id=3571122. There were 121 international women golfers on the LPGA Tour from twenty-six nations during the 2008 season.

² Id. There were forty-five South Korean players on the LPGA Tour for the 2008 season making South Koreans the largest represented international group on the tour. See, Ron Sirak, Bivens Speaks Out About LPGA Tour's Controversial English Ruling, ESPN.com, Sept. 1, 2008, http://sports.espn.go.com/golf/columns/story?columnist=sirak_ron&id=3564106. Eun-Hee Ji won the Wegmans LPGA tournament in June 2008 and used a translator during the trophy presentation. The LPGA proposed the English-only rule two months later and many believe that Eun-Hee Ji's use of the translator provoked the English-only rule proposal. Id. See also, Eric Adelson, LPGA Tour's English Rule Caught Many in Korean Community by Surprise, ESPN.com, Sept. 2, 2008, http://sports.espn.go.com/golf/columns/story?columnist=adelson_eric&id=3566159. Most South Korean players have some level of English proficiency. However, many in the South Korean community are shy and too embarrassed to attempt speaking English around those who are fluent in the language. Id.

³ Larry Dorman, L.P.G.A. Sees Use of English as a Facilitator for Business Deals, N.Y. Times, Aug. 30, 2008, at SP13, LPGA Deputy Commissioner Libba Galloway stated, "[W]e think we are ensuring that our membership is better equipped to succeed by having them effectively communicate in English. We are equipping them with the necessary tools for maximizing their potential off-course earning opportunities." Id.

victory speeches, and interacting with playing partners during pro-am events, or face suspension.⁴ Significant public backlash followed the new rule, as critics targeted its discriminatory nature.⁵ In light of the public outcry over the new regulation, the LPGA announced that it would rescind those penalty provisions that would have suspended players if they could not pass an English proficiency test.⁶ However, the LPGA maintains its intention that all international players should begin to learn English and could unveil a new rule that may include fining players.⁷ While many in the sports world were outraged at the LPGA's original proposal, some stood by the rule as a necessary mechanism for the Tour's continued success.⁸

The relationship between tour members and the LPGA is much like any

⁴ Id. The LPGA's rule was announced to members of the LPGA Tour by a written memorandum. The policy was never meant to become public, but Golfweek magazine reported on the new regulation and the LPGA felt it was necessary to respond to the widespread criticism of the proposed rule. See also Ron Sirak, English Issue Reveals Clash Between Cultural Respect, Business Practicalities, ESPN.com, Aug. 27, 2008, http://sports.espn.go.com/golf/columns/story?columnist=sirak_ron&id=3555947. The LPGA revealed its intentions to require players with at least two years of experience on tour have sufficient skills in English to manage media interviews, deliver victory speeches, and speak with amateur partners in pro-am competitions.

⁵ Dorman, supra note 3. Groups criticizing the new rule included the National Council of Asian Pacific Americans and the National Korean American Service and Education Consortium. Id. See also Jim McCabe, LPGA Way Out of Bounds: English-only Policy an Abysmal Shank, The Boston Globe, Aug. 28, 2008, at C12; Mark Kriegel, Forcing English on LPGA is un-American, msn.foxsports.com, Aug. 28, 2008, at C12 (arguing that the English proficiency provision is an attempt to limit the number of South Koreans on the Tour); Mark Kriegel, Forcing English on LPGA is un-American, msn.foxsports.com, Aug. 28, 2008, (available at http://azbilingualed.org/NEWS_2008/2008b/forcing_english_on_lpga_is_unamerican.htm).

⁶ See Teresa Wantabe & Victoria Kim, Putting English on the Ball: the LPGA will Alter its Rule that Players Learn Language, L.A. Times, Sep. 6, 2008, at A1. See also, LPGA Won't Suspend Players Over English-Speaking Requirement, ESPN.com, Sep. 7, 2008, <http://sports.espn.go.com/golf/news/story?id=3570957>. The suspension of players could have far reaching legal consequences beyond English-only rule litigation. See *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973) (holding that suspension of female golfer for one year from the LPGA Tour for alleged cheating was a 'naked restraint of trade' that violated the Sherman Antitrust Act); see generally Liz Kath, *The LPGA: The Unauthorized* 119-21 (1996) (providing further background information on the *Blalock* case and the LPGA's violation of the Sherman Antitrust Act). However, an analysis of possible antitrust legal ramifications that could occur should the LPGA suspend players who cannot speak proficient English is outside the scope of this Comment.

⁷ LPGA Won't Suspend Players Over English-Speaking Requirement, ESPN.com, Sept. 7, 2008, <http://sports.espn.go.com/golf/news/story?id=3570957>.

⁸ Christine Brennan, Critics Should Take a Mulligan in Assessing LPGA Policy, USA Today, Sept. 3, 2008, at 3C. Ms. Brennan argues that the economic reality of the LPGA is very different than the PGA Tour. Id. She argues that players need to be conversant in English in order to interact with sponsors at pro-am events in an effort to guard against those sponsors removing their support for the Tour. Id.

other employer– employee relationship in the United States.⁹ If a court were to treat the dynamic between tour and player as an employer–employee relationship, it would face the decision whether to uphold the use of an English-only rule in the workplace. English-only rules in the workplace have become the subject of frequent litigation in the past twenty years, but the Supreme Court has never ruled on the legality of these regulations.¹⁰ Courts generally hold that challenges to English-only rules must either show that (1) the rule disparately impacts the employee; or (2) the rule cannot withstand the presumption of discrimination when looked at under the guidelines promulgated by the Equal Employment Opportunity Commission (EEOC).¹¹ In both cases an employer may withstand an employee’s challenge if the employer can show that the English-only rule is needed as part of a business necessity.¹² Requiring players to speak English on the LPGA Tour does not meet the business necessity standard as needed to withstand the inevitable legal challenge¹³ under Title VII

⁹ See *P.G.A. Tour, Inc. v. Martin*, 532 U.S. 661, 669 (2001) (affirming the lower court’s ruling that the PGA Tour was not a private club, but rather was a “commercial enterprise operating in the entertainment industry for the economic benefit of its members”). The *Casey Martin* case is important because any court would likely follow the Supreme Court’s holding that a professional golf tour such as the PGA Tour is not a private club; thus, the court could treat the LPGA Tour as an employer. Although the *Martin* court did not specifically find that professional golfers are employees under the ADA, it is still possible that a court could find that the LPGA player is an employee of the LPGA based on the tour’s right to control the aspects of its relationship with the LPGA player. See also discussion *infra* Part I for analysis on the tour–player relationship as one of employer–employee.

¹⁰ See generally Rosanna McCalips, Comment, What Recent Court Cases Indicate About English-Only Rules in the Workplace: A Critical Look at the Need For a Supreme Court Ruling on the Issue, 4 U. Pa. J. Lab. & Emp. L. 417, 417 (2002) (noting the need for a Supreme Court ruling on employer’s English-only rules in the workplace because of circuit splits).

¹¹ See discussion *infra* Subsection II.B.1-2. See generally Melissa Meitus, Comment, English-Only Policies in the Workplace: Disparate Impact Compared to the EEOC Guidelines, 84 Denv. U. L. Rev. 901, 913-21 (2007) (discussing the two possible approaches courts apply to claims brought against an English-only workplace rule and specifically advocating for use of the disparate impact approach).

¹² See discussion *infra* Subsection II.B.1-2. See Natalie Prescott, English Only at Work, *Por Favor*, 9 U. Pa. J. Lab. & Emp. L. 445, 466 (2007) (noting that because an employer has the right to control his business and is most familiar with the needs of the business and the customers, the business necessity exception is an essential tool for many employers).

¹³ See Calif. Lawmaker Questions LPGA Language Policy, GOLF.com, Sep. 4, 2008, http://www.golf.com/golf/tours_news/article/0,28136,1838944,00.htm. California State Senator Leland Yee sought a legal opinion to determine whether the proposed policy violated state or federal law because he was concerned about the LPGA’s enforcement of the policy at tournaments within the state of California. *Id.* Furthermore, California Assemblywoman Mary Hayashi and Assemblyman Ted Lieu, both Asian-Americans, expressed their displeasure with the rule and planned to demand that the LPGA rescind the policy. *Id.* Mr. Lieu even equated the LPGA’s rule with France requiring cyclist Lance Armstrong to pass a French test to ride in the Tour de France. *Id.* See also Patrick Whittle, *Discrimination Lawsuit in Future?*, *Newsday*, Aug. 28, 2008, at A65. The Executive Director of the New York Civil Liberties Union, Executive Director of the Asian Law Alliance, and members

when compared to previous court-approved business necessities and the treatment of international athletes by other professional sports leagues.¹⁴ This assertion is based on the belief that a court should treat the relationship between the tour player and LPGA as an employee–employer relationship so as to allow Title VII to protect the professional golfer.

Part I of this Comment explains why Title VII should protect the LPGA golfer as an employee of the LPGA. Part II examines the background of English-only rules in the workplace and shows how courts routinely hold that discrimination based on a person’s language constitutes discrimination based on national origin prohibited by Title VII. It also describes the difference between the EEOC Guidelines and a disparate impact analysis, and shows how a court would apply each test to a player’s claim. Part III explains how a business necessity can be an exception to presumed discrimination on the part of an employer. Part IV analyzes the many arguments for and against the LPGA’s rule as a business necessity and demonstrates that forcing players to speak English on the LPGA Tour could not withstand a legal challenge. Finally, Part V provides perspective on the potential rule as it pertains to the sports world by showing that this rule does not meet the business necessity test when compared to the treatment of international athletes by other professional sports leagues.

I. THE LPGA PLAYER SHOULD BE PROTECTED AS AN EMPLOYEE UNDER TITLE VII

Determining whether an individual is an employee entitled to protection under federal anti-discrimination laws is not always easy.¹⁵ The uncertainty of the worker’s proper classification is due to the fact that Title VII is vague in its definition of what constitutes an employee and employer relationship for the federal antidiscrimination statute to apply. An “employee” is simply defined as

of the Asian-American Justice Center all suggested that the LPGA’s proposed rule could be subject to a discrimination lawsuit if the tour bars golfers from participating because of their national origin. *Id.*

¹⁴ See generally *supra* note 11.

¹⁵ See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How it Ought to Stop Trying*, 22 *Berkeley J. Empl. & Lab. L.* 295, 296 (2001) (explaining that the employment laws are “frequently baffling in defining who is an ‘employee’ and what constitutes ‘employment’” because of the vague statutory language); Rodney L. Caughron & Justin Fargher, *Independent Contractor and Employee Status: What Every Employer in Sport and Recreation Should Know*, 14 *J. Legal Aspects of Sport*, 47 (2004) (noting that the classification of employees as either an employee or independent contractor can present many problems for employers due to the complexity and vagueness of the classification process); Stephanie Greene & Christine Neylon O’Brien, *Who Counts?: The United States Supreme Court Cites “Control” As the Key to Distinguishing Employers From Employees Under Federal Employment Antidiscrimination Laws*, 2003 *Colum. Bus. L. Rev.* 761, 762 (2003) (noting that the language of the antidiscrimination statutes is vague and lower courts have taken different approaches to defining an “employee” and “employer”).

“an individual employed by an employer.”¹⁶ The definition of an “employer” is equally vague and is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”¹⁷ The LPGA, specifically, is a “non-profit organization involved in every facet of the game of [women’s] golf.”¹⁸ The players who participate in LPGA tournaments earn money that provides them with their primary source of income and playing on the tour can be considered each participant’s occupation. While there are certainly persuasive arguments that a professional golfer is an independent contractor based on the nature of his or her work,¹⁹ this is ultimately an improper interpretation of a Tour golfer’s role. Employers often try to classify their workers as independent contractors in an attempt to avoid employee coverage under an antidiscrimination statute when the realities of the relationship contradict that classification.²⁰ When analyzing the relationship between the LPGA tour and its players under the right to control test—as established by the common law of agency—a strong argument arises that an LPGA player is an employee, rather than an independent contractor, and is therefore entitled to protection under Title VII.

A. The Common Law of Agency Test Will Likely Analyze the Tour–Player Relationship

Although three separate tests could apply to the tour–player relationship, it is very likely that a court hearing an LPGA player’s case would apply the common

¹⁶ 42 U.S.C.A. § 2000e(f) (West 2009) Definition of an “employee.”

¹⁷ 42 U.S.C.A. § 2000e(b) (West 2009) Definition of an “employer.”

¹⁸ See http://www.lpga.com/content_1.aspx?mid=0&pid=52.

¹⁹ See Robert W. Wood, *Independent Contractor or Employee?*, 80 N.Y. St. B.J., Jun. 2008, at 28 (June 2008) (noting that independent contractors are typically one-time workers who work for a fixed price and will often work for more than one company, business, person, or other entity). See Tanya R. Sharpe, Comment, *Casey’s Case: Taking a Slice Out of the PGA Tour’s No-Cart Policy*, 26 Fla. St. U. L. Rev. 783, 800-06 (1999) (providing an analysis of the employee and independent contractor relationship for a PGA Tour player by showing that a PGA Tour player should be considered an employee when the common law factors and the control test are applied). Ms. Sharpe argues this position despite the fact that some characteristics of the occupation of a professional golfer correlate more towards independent contractor status. *Id.* For example, professional golfers do not have a supervisor to report to on a consistent basis. *Id.* Players do not receive performance reviews. *Id.* Also, tournament players can play on other professional tours in addition to playing on the PGA Tour or LPGA Tour. *Id.*

²⁰ See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 Berkeley J. Emp. & Lab. L. 251, 262 (2006) (explaining that due to the vague nature of the “employee” definition under Title VII, many employers will often characterize their employees as independent contractors in order to prevent their employees from being covered under Title VII).

law of agency test rather than the economic-realities or hybrid test.²¹ The common law of agency test used to determine an individual's status as an employee is provided in *Nationwide Mutual Insurance Co. v. Darden*.²² In *Darden*, the Supreme Court used principles from the common law of agency to determine whether the plaintiff in the case was an employee entitled to protection under the Employment Retirement Income Security Act of 1974 (ERISA).²³ The definition of an "employee" under ERISA is exactly the same definition as that for an "employee" under Title VII.²⁴ Because many antidiscrimination statutes apply the same circular definition of an "employee" as provided in ERISA and Title VII, courts continue to apply the common law of agency test from *Darden* to all individuals claiming protection under federal antidiscrimination statutes.²⁵ The *Darden* Court applied fourteen basic factors

²¹ The three main tests that courts use to analyze whether an individual is an employee include the common law of agency test, the economic-realities test, and the hybrid test. The common law of agency test focuses on a range of factors specifically looking at the employer's "right to control" the relationship. The economic-realities test only analyzes the economic realities of the relationship by specifically analyzing whether the individual is economically dependent upon the employer. Finally, the hybrid test examines both the employer's right to control the employee and the economic realities of the relationship. Despite the varying tests, the common law of agency test is applied most often in cases dealing with Title VII. See *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 211 (1997) (agreeing with petitioner's argument that an individual who appears on an employer's payroll, but does not meet the definition of an "employee" under traditional principles of agency law, would not be covered under Title VII).

²² *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992).

²³ Justice Souter delivered the opinion for the unanimous court. He wrote that "ERISA's nominal definition of 'employee' as 'any individual employed by an employer,' 29 U.S.C. § 1002(6), is completely circular and explains nothing." He went on to explain that nothing in the rest of ERISA gave specific guidance to the term's meaning or suggested that using the traditional common law of agency would "thwart the congressional design or lead to absurd results." *Id.* at 323.

²⁴ Both Title VII, 42 U.S.C.A. § 2000e(f), and ERISA, 29 U.S.C.A. § 1002(6), define an "employee" as "any individual employed by an employer."

²⁵ See, e.g., *Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 226-29 (2d Cir. 2008) (holding that there was a genuine issue of material fact as to whether the hospital's quality assurance standards exercised the level of control necessary to make a physician an employee of the hospital when the common law factors were used to analyze the relationship between hospital and physician); *Weary v. Cochran*, 377 F.3d 522, 524-26 (6th Cir. 2004) (applying the common law factors to determine that insurance agent was not entitled to protection under the Age Discrimination in Employment Act (ADEA)); *Daggitt v. United Food & Commercial Workers Int'l Union*, 245 F.3d 981, 988-89 (8th Cir. 2001) (applying the common law factors to find that union stewards were employees of the union under Title VII); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113-14 (2d Cir. 2000) (applying the common law of agency factors from *Darden* to find that a female warehouse worker was an employee under Title VII); *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1312-14 (9th Cir. 1998) (applying common law factors to find that insurance agent was not protected by ERISA or the ADEA based on the nature of his relationship with the insurance corporation); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 259 (4th Cir. 1997) (holding that physician was independent

that courts should consider in classifying an individual as an employee when the statutory definition provides little guidance on the proper individuals covered under the statute.²⁶ Most importantly, courts should begin the analysis by specifically looking at the “hiring party’s *right to control* [emphasis added] the manner and means by which the product is accomplished.”²⁷

Among the other factors relevant to the inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.²⁸

Based on the foregoing *Darden* factors, an LPGA player could receive Title VII protection as an employee of the LPGA. For example, the LPGA decides where and when tournaments are played.²⁹ Each player is given her assigned starting time each day and must be at the first tee on time or risk penalty or disqualification.³⁰ The LPGA has the right to assign additional duties to its players and can control the instrumentalities used when playing the game.³¹ The tour prohibits the use of certain golf clubs and golf balls that are deemed “illegal” based on their performance enhancing nature.³² Finally, the LPGA

contractor and not entitled to Title VII protection after the court applied the common law factors to the hospital–physician relationship); *Mangram v. Gen. Motors Corp.*, 108 F.3d 61, 62-64 (4th Cir. 1997) (applying the common law factors to find that participant in GM’s Minority Dealership Development Program was not an employee entitled to protection under the ADEA); *Birchem v. Knights of Columbus*, 116 F.3d 310, 312-13 (8th Cir. 1997) (holding that insurance agent was an independent contractor and not entitled to protection under the Americans with Disabilities Act (ADA) after the court applied the common law factors to the relationship between the agent and the insurance company); *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994) (applying the common law factors to find an individual was an independent contractor not covered by Title VII).

²⁶ *Darden*, 503 U.S. at 323 (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)).

²⁷ *Id.* See also Myra H. Barron, *Who’s an Independent Contractor? Who’s an Employee?*, 14 *Lab. Law.* 457, 459 (1999) (providing a list of the common law of agency factors used to determine whether an individual is an “employee” protected under Title VII and explaining that the employer’s right to control the aspects of the employment relationship is most important).

²⁸ *Darden*, 503 U.S. at 323-24.

²⁹ See Sharpe, *supra* note 19, at 802. Although Ms. Sharpe cites to rules of the PGA, the LPGA acts in the same capacity as the PGA and enforces the same basic rules upon its membership.

³⁰ Rule 6.3 of the Rules of Golf, maintained by the United States Golf Association and available at <http://www.usga.org/Rule-Books/Rules-of-Golf/Rule-06>.

³¹ See Sharpe, *supra* note 19, at 803.

³² See *id.* at 803-04.

Tour is a business operating for the economic benefit of its members and the golfers on the tour are integral to this business venture.³³ Although the LPGA player's relationship with the LPGA Tour does not necessarily meet every qualification provided in the *Darden* factors, the tour's proposed desire to *control* the player's verbal expression provides the most support for the argument that a professional golfer is an employee protected under Title VII.

B. The LPGA's Control of the Player's Speech Creates an Employer–Employee Relationship

Nothing is more basic to an employee's rights than the individual right to speak any language the employee wants during the course of employment. By controlling the language that an LPGA player must speak, the LPGA is effectively exerting one of the most stifling and limiting forms of employer control. Most courts hold that the employer's right to control the "manner and means" of the employee's job activities is the most meaningful factor in determining an individual's status as an employee or independent contractor.³⁴ Thus, it is important that the LPGA's right to control the player's method of communication is examined very closely in order to find that Title VII should protect the player as an employee.

The LPGA initially proposed this rule because the organization was hoping to please corporate sponsors and increase the marketability of the tour.³⁵ While one could argue that these are noble business goals on the part of the LPGA and its management, it was the "controlling" nature of the rule that originally provided the most criticism from the public.³⁶ Thus, although many factors may be considered in determining whether the professional golfer is an employee or an independent contractor, when the LPGA changes the usual tour–player relationship in an effort to exert more control over the player's actions, it is important to question whether this defines the relationship between tour–player as employer–employee. In fact, nothing could be more blatant about the LPGA's desire to control the aspect of the tour–player relationship than its insistence that players speak a specific language at certain times during the course of the relationship. If the right to control is judged as one of the most, if not the most, important standards under the common law rule to determine an individual's classification as an employee, then courts must take a hard look at

³³ See *id.* at 804.

³⁴ See, e.g., *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 117 (2d Cir. 2000) (holding that the extent of the hiring party's control over the manner and means by which the worker completes his or her assigned tasks should be entitled to special weight in determining whether the individual is an employee under antidiscrimination statutes).

³⁵ See *supra* notes 3–4 and accompanying text.

³⁶ See *supra* notes 3, 5 and 13 and accompanying text.

whether a professional golfer is really an independent contractor when the tour mandates the language that she must speak during the course of her membership on the tour.³⁷

C. Public Policy Demands Broad Protection of Workers Under Title VII

Despite the strong arguments that an LPGA player can make for protection under Title VII, it is still possible that a court would find that the unique aspects of a professional golfer's work do not allow for easy classification as an independent contractor or as an employee. If this is the case, then it is important that Congress step in and resolve the ambiguity that permeates the definition of "employee" under Title VII. Many commentators argue that the purpose of antidiscrimination statutes is to provide as much protection as possible to as many individuals in the workforce, regardless of the specific nature of their job.³⁸ There are certainly many public policy arguments that can and should be made to protect the international player on the LPGA. Many of these women come from Asia and are thrust into the American game without truly understanding the intricacies of what it means to be an LPGA player. It would be unfortunate if the international player affected by the rule could not challenge the rule's legality based on her lack of protection under Title VII. Congress must resolve this ambiguity once and for all and allow Title VII to apply in a far greater number of "employment-like" situations. Such a rule would have numerous benefits for all individuals, even outside the world of golf.

³⁷ See *supra* notes 3-4 and accompanying text.

³⁸ See, e.g., Jeff Clement, Comment, *Lerohl v. Friends of Minnesota Sinfonia: An Out of Tune Definition of "Employee" Keeps Freelance Musicians from Being Covered by Title VII*, 3 *Depaul Bus. & Comm. L.J.* 489, 510-12 (2005) (arguing the need to amend Title VII to include independent contractors because the broad purpose of the statute is to protect the largest possible number of workers); Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 *Yale L.J.* 170, 205 (2006) (noting that independent contractors should be protected under Title VII either through changing the definition of "employee" to include an independent contractor, or by adding independent contractors as an additional category of worker covered under Title VII); Richard J. Zecchino, *Denial of Staff Privileges to Physicians: Can Hospitals Be Held Accountable?*, 5 *Mich. St. U. J. Med. & L.* 121, 136 (2001) (arguing that any statute that can eliminate or compensate the aggrieved minority for the discriminatory harms that the minority suffers should be construed as broadly as possible so as to reach all acts of discrimination); *see also* Olivia P. Dirig & Mahra Sarofsky, Note, *The Argument For Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 *Hofstra Lab. & Emp. L.J.* 709, 726-28 (2005) (arguing that Title VII should even apply so far as to protect foreign nationals on foreign soil when they work for U.S. companies due to the broad congressional intent of Title VII and valid public policy concerns over employee protections in the workplace).

II. THE HISTORY AND BASIC ELEMENTS OF ENGLISH-ONLY WORKPLACE LITIGATION

Litigation challenging English-only rules in the workplace as discriminatory under Title VII of the Civil Rights Act of 1964³⁹ is not uncommon. Circuits are split as to the correct test to apply to the challenged rule, and the United States Supreme Court has yet to hear an English-only case. Although an individual's language is not specifically enumerated as one of the characteristics of an individual protected under Title VII, courts routinely hold that discrimination based on an individual's language constitutes discrimination based on an individual's national origin.⁴⁰ The standard providing for language as a characteristic of national origin has evolved over time.⁴¹ For example, one of the earliest challenges to an English-only workplace occurred in the case of *Garcia v. Gloor* when a Mexican-American brought suit after his employer instituted a rule that prohibited the use of Spanish on the job unless the employee was speaking with a Spanish-speaking customer.⁴² The Fifth Circuit held that the employer's rule did not constitute discrimination based on national origin, becoming the first appellate circuit to uphold an English-only rule.⁴³ The court applied the disparate impact test to the facts of the case. A disparate impact occurs when an employer institutes a policy that may be neutral on its face, yet causes discrimination as measured by the impact on a person or group entitled to

³⁹ The relevant portions of Title VII are enumerated within 42 U.S.C.A. § 2000e-2(a) (2008) and specifically provide:

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.

⁴⁰ See Arthur Gutman, *EEO Law and Personnel Practices* 98 (2d ed. 2000). See also discussion *infra* Section II.A for analysis on employer's discrimination based on an employee's language implicating discrimination based on national origin under Title VII.

⁴¹ See discussion *infra* Section II.A.

⁴² 618 F.2d 264 (5th Cir. 1980) (finding that even though Title VII forbids discrimination in employment on the basis of national origin, neither the statute nor common understanding equates national origin with the language that one chooses to speak).

⁴³ *Id.* at 272 (holding that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is fully capable of speaking English); see also Lisa L. Behm, Comment, *Protecting Linguistic Minorities Under Title VII: The Need For Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 Marq. L. Rev. 569, 581 (1998) (explaining that the Fifth Circuit became the first federal appellate court to uphold an employer's English-only rule in *Gloor*).

equal opportunity.⁴⁴

In the months following the decision in *Gloor*, the EEOC⁴⁵ promulgated regulations that courts could apply when faced with English-only rule litigation.⁴⁶ The EEOC Guidelines differ quite substantially from the disparate impact analysis that courts usually apply to a challenge of an English-only rule in the workplace.⁴⁷ The major difference between the two standards is the presumption that is applied to an employer's English-only practice.⁴⁸ Following the EEOC's interpretation of English-only rules, courts still generally apply the disparate impact test to English-only workplace rules and rarely give deference to the Guidelines.⁴⁹ A majority of courts also routinely uphold English-only rules as applied to bilingual employees and numerous courts continue to find that English-only workplace rules are justified based on a business necessity.⁵⁰ A valid business necessity can be an exception to a rule in the workplace that would otherwise be discriminatory in violation of the Equal Employment Opportunity Act.⁵¹ The United States Supreme Court established the business necessity test to give employers a bypass to an otherwise discriminatory term of employment when the employment practice is related to job performance because an employer undoubtedly is most familiar with the needs of his or her business and customers.⁵² Therefore, many courts believe an employer should

⁴⁴ *Gloor*, 618 F.2d at 270.

⁴⁵ "The Equal Employment Opportunity Commission (EEOC) is the federal agency empowered to promulgate regulations in furtherance of § 2000e-2." Deborah F. Buckman, Annotation, Requirement That Employees Speak English in Workplace as Violative of Federal Constitutional and Statutory Law, 24 A.L.R. Fed. 2d 587 (2007).

⁴⁶ The *Gloor* case was decided on May 22, 1980 and the EEOC Guidelines were adopted on Dec. 29, 1980.

⁴⁷ See discussion *infra* Section II.B.

⁴⁸ See discussion *infra* Subsection II.B.1 for background on the EEOC's belief that English-only rules are automatically suspect and subject to review unless an employer can justify the rule as one of business necessity.

⁴⁹ Behm, *supra* note 41, at 591 (noting that even though the EEOC Guidelines are consistent with the congressional intent behind Title VII, courts and commentators continue to reject the EEOC's hard-line approach to workplace English-only rules). The EEOC Guidelines are merely an interpretative regulation, and as such, they are basically a statement of the EEOC's interpretation of the relevant portions of Title VII. They are not the law; rather, they may be disregarded by a court that interprets the statute differently as is common in many English-only cases. See generally Christina L. Kunz et al., *The Process of Legal Research* 322 (7th ed. 2008) (providing background on federal agency regulations and guidelines).

⁵⁰ See Buckman, *supra* note 46, at 587.

⁵¹ See discussion *infra* Part III.

⁵² See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (stating that the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation). The touchstone of the disparate impact test is business necessity. If an employment practice operates to exclude a protected group through a disparate impact and cannot be shown to be

control the policies of a business in whatever manner he or she sees fit.⁵³

The immigration debate in the country has certainly been at the forefront in recent years due to the strong controversy surrounding immigration reform and the presence of many ballot initiatives to establish English as the official language in various cities, states, and even the United States.⁵⁴ Consequently, English-only rules in the workplace continue to be introduced at an increasing rate.⁵⁵ The increasing implementation of English-only workplace rules also leads to a larger number of charges filed with the EEOC. Charges filed by employees and other civil rights organizations alleging discrimination based on English-only workplace policies increased from 32 charges filed in 1996, to around 200 charges filed in 2006.⁵⁶ After implementation, these rules also generated more and more attention as evidenced by the recent firestorm of criticism over the LPGA's proposed policy.⁵⁷ Politicians joined the public debate as well with strong viewpoints on both sides of the aisle as was made clear in a recent Republican-sponsored amendment to a concurrent budget resolution that stripped funding for the EEOC that was appropriated to fight English-only workplace policies.⁵⁸

Despite the fact that courts apply two different standards to review the legality of English-only rules and the public debate over the importance of the English language being at an all-time high, the United States Supreme Court has yet to rule on this issue. Many commentators call for the Supreme Court to determine the legality of English-only workplace rules, as well as mandate the specific approach to use in stating claims should the rules not be per se

related to job performance, the practice is prohibited. *Id.* See also Prescott, *supra* note 12, at 466 (noting that courts accept the business necessity argument in many cases).

⁵³ See Prescott, *supra* note 12, at 466.

⁵⁴ See Madeline Zavodny, *The Effects of Official English Laws on Limited-English-Proficient Workers*, 18 *J. Lab. Econ.* 427, 427 (2000); see also Valerie Barker et al., *The English-Only Movement: A Communication Analysis of Changing Perceptions of Language Vitality*, *J. Comm.*, Mar. 2001, at 3, 6 (noting that English-only legislation regarding bilingual education is continually introduced at the federal level by highly vocal English-only advocates).

⁵⁵ See Zavodny, *supra* note 54, at 428 (citing the fact that many observers believe that the adoption of English as the official language in individual states contributes to an increase in the number of workplaces with English-only rules).

⁵⁶ See Stephanie Armour, *English-only workplaces lead to discrimination suits*, *USA Today*, May 7, 2007, at B4.

⁵⁷ See Introduction *supra* pp.1-4 for a discussion of the criticism of the LPGA's proposed policy.

⁵⁸ S. Res. 70, amend. 4222, 110th Cong. (2008). The United States Senate passed a Republican-sponsored amendment to a concurrent budget resolution on March 13, 2008 that would take \$670,000 in funds that the EEOC uses to sue employers that maintain English-only policies and instead spend the money on a Department of Education program that promotes the teaching of English and civics to immigrants.

unlawful.⁵⁹ In the meantime, litigants are left with a varied standard that courts may apply when a challenge is brought against an employer's English-only workplace policy.

A. English-Only Rules as Discrimination of National Origin

In recent years, courts have been more receptive to litigants who bring claims for violations of Title VII of the Civil Rights Act of 1964 by finding that discrimination based on an individual's language constitutes discrimination of an employee's national origin.⁶⁰ However, this finding is not followed by all courts, and many commentators point out that the legislative history and original intent of the statute show a lack of purpose to allow discrimination of an individual's language to constitute discrimination based on national origin.⁶¹ Although the explicit words of Title VII make no reference to national origin as encompassing the language that one speaks, the EEOC maintains, and many courts follow, the general belief that protection from discrimination based on national origin does implicate an individual's language.⁶² "The [EEOC] defines national origin discrimination broadly, as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group."⁶³ In July 2008, the D.C. Court of Appeals interestingly held that plaintiff had established a cognizable claim of national origin discrimination under the District of Columbia Human Rights Act

⁵⁹ See *McCalips*, supra note 10, at 417 (explaining that it is necessary for the Supreme Court to step in and resolve the lawfulness of English-only rules in the workplace); see also *Prescott*, supra note 12, at 450 (explaining that it is essential for the Supreme Court to resolve the legality of English-only rules in the workplace).

⁶⁰ See L. Darnell Weeden, *The Less Than Fair Employment Practice of an English-Only Rule in the Workplace*, 7 Nev. L.J. 947, 954 (2007) (noting that courts and commentators often conclude that the national origin provision of Title VII is broad enough to grant employees protection against language based discrimination that often serves as a proxy for national origin discrimination).

⁶¹ Compare *E.E.O.C. v. Premier Operator Services, Inc.*, 113 F. Supp. 2d 1066, 1073-74, (N.D. Tex. 2000) ("While English-only rules may be seen as facially neutral, they disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees."), with *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) ("Neither [Title VII] nor common understanding equates national origin with the language that one chooses to speak."), and *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 941 (E.D. Va. 1995), aff'd, 86 F.3d 1151 (4th Cir. 1996) (unpublished table decision) (concluding that "[t]here is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job"). See generally *Prescott*, supra note 12, at 451-52 (noting that the *Long* court held that discrimination of an individual's language did not implicate national origin by upholding an employer's English-only policy).

⁶² Definition of National Origin Discrimination, 29 C.F.R. § 1606.1 (LexisNexis 2009).

⁶³ *Id.*

because both the Office of Human Rights and the District of Columbia Human Rights Commission adopted the EEOC's definition of national origin discrimination.⁶⁴ The D.C. Human Rights Act is similar in function to Title VII in that it was patterned after Title VII and also prohibits employment discrimination.⁶⁵ *Estenos* provides further evidence of a court's likely finding that challenges to English-only rules will be based on Title VII's prohibition against discrimination based on national origin as encompassing the language that one speaks.

B. Deferring to EEOC Guidelines or Disparate Impact Analysis

The circuits are currently split as to the proper test for analyzing English-only rules;⁶⁶ thus, it is important to examine both the EEOC guidelines and disparate impact approach as a court could adopt either mode of analysis should a player file a lawsuit against the LPGA.⁶⁷ Essentially, both the EEOC Guidelines and disparate impact test each provide a different way of stating claims against the discriminatory nature of an English-only rule. The two approaches that plaintiffs use to state claims against their employer's English-only workplace rules differ mostly in the burdens of proof required on the part of the employee and employer.

⁶⁴ *Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 891-92 (D.C. 2008) (quoting 4 DCMR 500.2) (“In general, the Office and the Commission adopt and incorporate by reference current regulations of the [EEOC] and shall follow general principles of Title VII . . . wherever applicable . . . unless specific guidelines state the contrary.” (quoting 4 DCMR 500.2)).

⁶⁵ See *id.* at 886.

⁶⁶ In the two most recent English-only rule cases decided by the federal circuits, the Tenth circuit became the first federal circuit to directly apply the EEOC guidelines instead of a disparate impact test, thus giving rise to a circuit split between the Ninth and Tenth circuits as to the proper test to apply. See *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007); *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006). For example, the *Maldonado* court deferred to the EEOC Guidelines even though they are not controlling upon the courts by reason of their authority, because they constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Maldonado*, 433 F.3d at 1305 (citing *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65 (1986)). Furthermore, *Maldonado* held that the EEOC Guidelines were “entitled to respect, not as interpretations of the governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if [the court] might not draw the same inference.” *Id.* at 1306. See also Robyn S. Stoter, *Discrimination & Deference: Making a Case for the EEOC’s Expertise with English-Only Rules*, 53 *Vill. L. Rev.* 595, 619-21 (2008) (noting that the *Maldonado* decision out of the Tenth Circuit gave way to a circuit split based on the Tenth Circuit’s deference to the EEOC Guidelines as opposed to the disparate impact analysis that other circuits use).

⁶⁷ A plaintiff could likely file a lawsuit against the LPGA Tour for a violation of Title VII in any federal court in the country. Therefore, it is important to examine any approach that a court might use to analyze the legality of an English-only rule.

1. EEOC Guidelines on English-only Workplace Rules

The EEOC Guidelines initially presume that a rule requiring that an employee speak English at all times is a burdensome term of employment that violates Title VII.⁶⁸ The EEOC will closely scrutinize a rule that mandates the use of English at all times because the EEOC worries that such a policy can easily result in a discriminatory work environment.⁶⁹ However, the EEOC does allow an employer to justify the use of an English-only rule that is only enforced at certain times by proving that a business necessity exists that makes the use of English in the workplace necessary during limited circumstances.⁷⁰ Therefore, the main facet of an English-only rule case is whether the employer can provide a business necessity that proves the rule is not merely being implemented for discriminatory purposes.⁷¹ The EEOC seems to place the burden on the employer to establish that the English-only rule is not a basis for workplace discrimination and is warranted by a valid business necessity because, like many presumptions in the legal world, the presumption rests on the party best able to handle it.⁷² The presumption within the EEOC Guidelines reveals that the EEOC believes it is much easier for an employer to rebut the presumption of a discriminatory employment practice by showing that the practice is actually implemented for non-discriminatory reasons, rather than forcing an employee to establish the discriminatory practice on the part of his or her employer.⁷³

⁶⁸ Guidelines on Discrimination Because of National Origin, Speak-English-only, §1606.7(a) states:

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

29 C.F.R. §1606.7 (LexisNexis 2009).

⁶⁹ *Id.* See also Margaret C. Jasper, *Employment Discrimination Law Under Title VII* 31 (1999) (explaining that the EEOC will closely scrutinize the application of an English-only workplace rule because the rule could cause employees affected by the rule to feel inferior, isolated, or intimidated in a way that could result in a discriminatory work environment).

⁷⁰ 29 C.F.R. §1606.7(b). This section states: "An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by a business necessity." *Id.*

⁷¹ Barbara Kate Repa, *Your Rights in the Workplace* 16/6 (Lisa Guerin ed., 6th ed. 2002). See discussion *infra* Part III for commentary on a few ways that employers have justified an English-only rule as a business necessity.

⁷² See McCalips, *supra* note 10, at 426 (arguing that the EEOC Guidelines relieve the plaintiff of the difficult burden of presenting evidence to prove a disparate impact by immediately placing the burden on the employer to show that the rule is needed as a business necessity).

⁷³ See *id.*

An English-only rule that is enforced at certain times during the employee's workday must be communicated to the employee with specificity in order to have any chance of being upheld.⁷⁴ Notification to employees can occur in a variety of mediums, including employee meetings, posters, and written memoranda.⁷⁵ The employer must explain to employees the exact times and locations that the English-only rule will be enforced, as well as the forms of discipline used for violations of the rule.⁷⁶ Once these qualifications are met, the analysis turns to whether the employer has a legitimate business necessity for the English-only rule.⁷⁷

2. Disparate Impact Test as Applied to an English-only Workplace Rule

In stark contrast to the EEOC Guidelines approach, the disparate impact analysis tends to be less burdensome on the employer. "Disparate impact" refers to employment practices that may be neutral in intent, but end up having a discriminatory effect on protected classes.⁷⁸ The disparate impact test as applied to a challenged English-only rule first requires that an employee show that the employer's rule significantly and adversely impacts a protected group in a way that is different than any impact it may have on the general employee population.⁷⁹ Therefore, the initial burden is on the employee to show the discriminatory effects of an employer's practice.⁸⁰ Furthermore, the disparate impact on the employee must be shown by a preponderance of the evidence to establish a prima facie case.⁸¹ If the employee is able to establish a prima facie

⁷⁴ 29 C.F.R. §1606.7(c) states:

It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

⁷⁵ Andrew J. Maikovich & Michele D. Brown, *Employment Discrimination: A Claims Manual for Employees and Managers* 70 (1989).

⁷⁶ *Id.*

⁷⁷ See 29 C.F.R. §1606.7(c). For background on the business necessity test see *supra* Part III.

⁷⁸ Farrell Bloch, *Antidiscrimination Law and Minority Employment* 50 (1994).

⁷⁹ *Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9th Cir. 1993) (holding that employees at meat packing company who were fluent in both Spanish and English failed to show that employer's requirement that the bilingual workers speak only English on the job had significant adverse effects on the terms, conditions, or privileges of their employment).

⁸⁰ See *E.E.O.C. v. Beauty Enter., Inc.* No. 3:01CV378, 2005 WL 2764822 at *3-4 (D. Conn.) (providing a good analysis of the three-step burden shifting test used in disparate impact cases).

⁸¹ *Id.*

case, the burden shifts to the employer to demonstrate that the challenged practice is job-related for the position in question and consistent with a business necessity.⁸² Once a business necessity is established by a preponderance of the evidence, the burden shifts back to the employee to prove that the employer could implement other nondiscriminatory means to satisfy the same business necessity.⁸³ Under the disparate impact approach, the onus is placed squarely on the plaintiff to prove his or her case to the judge in order to survive a likely summary judgment motion.⁸⁴ Thus, the Supreme Court's silence on the correct test to apply leaves courts with the choice of applying the non-binding EEOC Guidelines or the disparate impact test, each with a different presumption about the legality of an English-only workplace rule.⁸⁵

C. Evaluating a Player's Potential Claim Using the EEOC Guidelines and Disparate Impact Test

The circuits are currently split as to whether deference is given to the EEOC guidelines on English-only workplace rules; however, the LPGA English-only rule should be found discriminatory under either the EEOC Guidelines or disparate impact approach. Under the EEOC Guidelines test, the LPGA — as defendant in a possible lawsuit brought by a player affected by the policy — has the burden to show that the English-only policy was both communicated to the players with specificity, and also that the rule is only in effect at certain times.⁸⁶ The LPGA's proposed rule would only require that its golfers speak English at certain times, and the rule was sufficiently communicated to the players affected by the rule;⁸⁷ therefore, the analysis quickly shifts to whether the LPGA can

⁸² *Id.*

⁸³ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). See also Amy Crowe, *May I Speak? Issues Raised by Employer's English-Only Policies*, 30 J. Corp. L. 593, 595 (2005) (explaining that if the plaintiff can show non-discriminatory means that were available to the employer then the employer is presumed to have used the policy as a "pretext" for discrimination).

⁸⁴ Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 Harv. L. Rev. 896, 903 (1993) (noting that the Civil Rights Act of 1991 requires that plaintiffs establish a prima facie case of discrimination before the employer must offer a business necessity for the challenged rule).

⁸⁵ The disparate impact test places the burden squarely on the plaintiff to make a prima facie case before the burden shifts to the employer to establish a business necessity for the rule. Conversely, the EEOC Guidelines presume any English-only rule is discriminatory from the start of the litigation and quickly place the burden on the employer to establish a business necessity. Thus, the choice of test applied by the courts matters a great deal in English-only litigation. See *McCalips*, *supra* note 10, at 426 (explaining that the burden-shifting under the EEOC Guidelines is the central importance of the rule because it makes it much easier for a plaintiff to survive a motion for summary judgment and actually reach a trial on the merits in the case where an employer has not yet proffered a legitimate business reason for the policy).

⁸⁶ See discussion *supra* Subsection II.B.1.

⁸⁷ See *supra* note 4 and accompanying text.

establish a business necessity for the policy.⁸⁸

The analysis under the disparate impact approach is not as stringent as the EEOC approach, and the initial burden will rest on the player to show that the English-only policy significantly and adversely impacts a protected group.⁸⁹ The players on the tour affected by the rule would need to show that the policy impacts them in an adverse way because of the language that they speak.⁹⁰ The player or players must show, by a preponderance of the evidence, that the English-only rule impacts those that primarily speak a language other than English in an adverse manner, as compared to the rest of the LPGA players who would not be affected by the rule.⁹¹ The players challenging the rule could introduce evidence tending to show that the rule only affects those international players that have low levels of English proficiency. Consequently, this would likely lead to the rule having an adverse impact on only one segment of the tour membership. This evidence must be shown in order to satisfy a prima facie case of disparate impact in the context of national origin discrimination.⁹² If the player can establish a prima facie case, then the burden shifts to the LPGA to establish a business necessity for the English-only rule.⁹³

III. BUSINESS NECESSITY AS AN EXCEPTION TO A DISCRIMINATORY EMPLOYMENT PRACTICE

An employer has the burden of proving that the challenged English-only rule is job-related for the position and consistent with a business necessity⁹⁴ under both the EEOC guidelines and disparate impact analysis.⁹⁵ Although this business necessity test is more than thirty-five years old, it remains a vague concept in the law.⁹⁶ The test is further complicated by the fact that very few

⁸⁸ See discussion *infra* Part IV.

⁸⁹ See discussion *supra* Subsection II.B.2.

⁹⁰ See discussion *supra* Subsection II.B.2.

⁹¹ See discussion *supra* Subsection II.B.2.

⁹² See discussion *supra* Subsection II.B.2.

⁹³ See discussion *supra* Subsection II.B.2.

⁹⁴ A business necessity must not be confused with a bona fide occupational qualification (BFOQ) which courts also find is another exception to a possible discriminatory practice by an employer. See generally *The Bona Fide Occupational Qualification Exception*, 29 C.F.R. §1606.4 (1980). Speaking English at work is not generally litigated as a BFOQ and this Comment only examines speaking English in the context of a business necessity.

⁹⁵ Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 Ga. L. Rev. 387, 395-96 (1996) (noting that the Civil Rights Act of 1991 codified the business necessity language, and explaining that a valid business necessity cannot logically exist without proof that the employer's requirement is job-related to the position in question). See also Bloch, *supra* note 79, at 64 (1994).

⁹⁶ See generally Jacqueline M. Jacobsen, *Comment, English-only Rules and the Effect of the Business Necessity Defense on the Small Business Employer*, 5 J. Small & Emerging Bus. L. 265, 278 (2001).

English-only cases adjudicated in the federal court system are decided on the question of whether or not an employer has a business necessity for the English-only policy.⁹⁷ However, the United States Supreme Court provided guidance on the basic standards to meet in a business necessity test in *Griggs*⁹⁸ and *Wards Cove Packing Co. Inc., v. Atonio*.⁹⁹ The *Wards Cove* court built off the prior business necessity standard as articulated in *Griggs* and stated that what is required is a “reasoned review of the employer’s justification for his use of the challenged practice.”¹⁰⁰ One commentator even argues that employers should defend any business necessity justification under strict scrutiny.¹⁰¹ Furthermore, the *Beauty Enterprises* court stated that an asserted business necessity must be vital to the business and not merely convenient or beneficial to business operations.¹⁰² Others characterize a business necessity as requiring a specific managerial goal that is crucial to the continued viability of the employer’s business, thus requiring the employer’s regulation of employees to be crucial to the achievement of that goal.¹⁰³

The EEOC Compliance Manual¹⁰⁴ provides instructive background on proper uses of English-only rules and specifically allows employers to mandate that employees speak English in the workplace at certain times as a business necessity when the use of English is needed:

- (1) For communications with customers, coworkers, or supervisors who only speak English;
- (2) In emergencies or other situations in which workers must speak a common language to promote safety;
- (3) For cooperative work assignments in which the English-only rule is needed to promote efficiency;
- (4) To enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with coworkers or customers.¹⁰⁵

This list is not exhaustive of all possible business reasons that could justify

⁹⁷ Most English-only cases are decided on other grounds and never make it to a business necessity determination.

⁹⁸ 401 U.S. 424, 432 (1975).

⁹⁹ 490 U.S. 642, 659 (1989).

¹⁰⁰ *Id.*

¹⁰¹ See Weeden, *supra* note 61, at 966.

¹⁰² *E.E.O.C. v. Beauty Enter., Inc.* No. 3:01CV378, 2005 WL 2764822 at *3 (D. Conn. Oct. 25, 2005) (citing *Conroy v. N.Y. State Dep’t of Corr. Servs.* 333 F.3d 88, 97 (2d Cir. 2003)).

¹⁰³ See Grover, *supra* note 96, at 430.

¹⁰⁴ Equal Employment Opportunity Commission Compliance Manual, Section 13: National Origin Discrimination (Dec. 2, 2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html>.

¹⁰⁵ *Id.*

an English-only rule, but an employer can easily act without a valid business necessity if the rule strays from these general concepts and is applied too broadly.¹⁰⁶ For example, a broad rule that covers speech unrelated to work, or casual speech between employees, will likely not constitute a business necessity.¹⁰⁷ Before an employer implements an English-only rule, the employer could again seek guidance from the EEOC Compliance Manual for a list of business justifications¹⁰⁸ that can help an employer determine whether the rule is necessary. The Manual specifically provides that an employer should consider (1) evidence of safety justifications for the rule; (2) evidence of other business justifications for the rule, including the need for supervision or effective communication with customers; (3) the likely effectiveness of the rule in carrying out objectives; and (4) the English proficiency of workers affected by the rule.¹⁰⁹

Congress reaffirmed the business necessity test as articulated in *Griggs* and *Wards Cove* in the Civil Rights Act of 1991 and allows for the use of “statistical reports, validation studies, expert testimony, or prior successful experience” to prove business necessity.¹¹⁰ The Fourth Circuit provided constructive commentary on the business necessity test when it held that the business necessity test ultimately comes down to whether there is an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.¹¹¹ Any business purpose given for the proposed policy must be sufficiently compelling to diminish any discriminatory impact and the challenged practice must effectively carry out the business purpose it is alleged to serve.¹¹² Furthermore, any acceptable alternative policies or practices that would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential discriminatory impact, will greatly harm the business necessity argument made by the employer.¹¹³

¹⁰⁶ Michael Newman & Faith Isenhath, *Parlez-Vous Discrimination?*, in *Federal Lawyer*, Sep. 2008, at 14. See discussion *infra* Subsection III.B. for examples of employer’s proffered business justifications that were rejected by the court.

¹⁰⁷ *Id.*

¹⁰⁸ Business justifications are explanations provided by employers that justify managerial decisions as business necessities. Joerg Dietz & S. Douglas Pugh, *I Say Tomato, You Say Domate: Differential Reactions to English-only Workplace Policies by Persons from Immigrant and Non-immigrant Families*, 52 *J. Bus. Ethics* 365, 367 (2004).

¹⁰⁹ EEOC Compliance Manual, Section 13: National Origin Discrimination (Dec. 2, 2008), available at <http://www.eeoc.gov/policy/docs/national-origin.html>.

¹¹⁰ See Meitus, *supra* note 11, at 905 (quoting H.R. Rep. No. 102-40(I), at 28 (1991)).

¹¹¹ See Jacobsen, *supra* note 97, at 277 (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971)).

¹¹² *Id.*

¹¹³ *Id.*

A. Prior Court-Approved Examples of Business Necessity

In order to understand what types of activities constitute a business necessity it is instructive to examine the holdings in various English-only rule cases where employer policies were upheld as business necessities or struck down as discriminatory violations of Title VII. Most recently, the Tenth Circuit found that a hospital's English-only rule that prohibited housekeepers from speaking Spanish for job-related discussions while working in the operating room department was linked to a legitimate business necessity.¹¹⁴ The court found that the communication between the cleaning staff and the medical staff was essential in the operating rooms and that most of the operating room nurses did not speak Spanish. Thus, the nurses could not communicate with the Spanish-speaking employees without resort to the English-only policy.¹¹⁵ Based on these justifications proffered by the hospital, the Tenth Circuit upheld the hospital's English-only rule as one of undisputed business necessity.¹¹⁶

Similarly, in *Barber v. Lovelace Sandia Health Systems*,¹¹⁷ the court held that the defendant medical facility articulated a legitimate and non-discriminatory reason for the English-only rule because other employees complained that they felt uncomfortable when employees spoke to each other in Spanish, and one patient complained to management concerning an overheard conversation where derogatory remarks were made about a patient between Spanish-speaking co-workers.¹¹⁸ In *Gonzalez v. Salvation Army*,¹¹⁹ the court found that the employer acted with a business necessity when the employer's English-only rule was instituted to allow supervisors and employees to better understand what other employees were saying. *Gonzalez* directly touches on two of the permissive examples of business necessities in the EEOC Compliance Manual in that an English-only rule is generally permissible for communication (1) between supervisors and co-workers; and (2) among co-workers.¹²⁰

A customer preference may also be a permissible form of business necessity. In *E.E.O.C. v. Sephora USA*,¹²¹ the court found that a customer preference may be sufficiently related to job performance so as to qualify as a business

¹¹⁴ *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1171 (10th Cir. 2007).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 409 F. Supp. 2d 1313 (D. N.M. 2005).

¹¹⁸ *Id.* at 1337-38.

¹¹⁹ No. 89-1679-CIV-T-17, 1991 WL 11009376 at *3 (M.D. Fla. 1991).

¹²⁰ See *supra* notes 105-106 and accompanying text. See also *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997) (holding that employer proffered legitimate business necessity reasons for the English-only rule when the employer implemented the rule to allow employees to practice English for potential interaction with customers and also to allow management to understand and evaluate the employees).

¹²¹ 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

necessity.¹²² The court reasoned that helpfulness, politeness, and approachability are all central aspects to the job of a sales employee at a retail establishment.¹²³ The *Sephora* court upheld the English-only policy at the retail establishment as applied to “on floor” sales associates that had regular contact with employees because promoting politeness to customers is a valid business necessity for requiring retail sales employees to speak English in the customer’s presence.¹²⁴ In a case with a similar instance of customer preferences, the Ninth Circuit upheld a radio station’s English-only rule as applied to its disc jockeys when the rule was instituted to meet the marketing, ratings, and demographic concerns of the radio station.¹²⁵ The *Jurado* court found that the English-only rule was reasonably related to the radio station’s discretion over its broadcast programming and was sufficient to meet the business necessity standard.¹²⁶ It is important to note that a customer preference for speaking with someone who is proficient in English is not always permissive. The Compliance Manual for EEOC Investigators specifically lists a possible non-permissive example of an English-only rule as when “[a] retailer requires English at all times during the workday because its customers object to employees speaking [a foreign language].”¹²⁷

B. Examples of English-only Rules Implemented Without Business Necessity

An employer is often able to provide a sufficient business necessity defense for its limited English-only rule, but it is important to take a look at circumstances where the courts have struck down the employer’s proposed business justification. In *Saucedo v. Brothers Well Service, Inc.*,¹²⁸ the defendant

¹²² *Id.* at 416. While employers may often use a customer preference to show a business necessity, it is important to note that a customer preference is not always sufficiently related to job performance. For example, the Eighth Circuit rejected a customer’s preference for clean-shaven delivery men because the grooming habits of the delivery drivers were not related to the driver’s overall job performance. *Bradley v. Pizzaco of Neb. Inc.*, 7 F.3d. 795, 799 (8th Cir. 1993). Similarly, the Ninth Circuit failed to find that a customer’s preference for slim female flight attendants was sufficiently related to job performance so as to qualify as a business necessity. *Gerdon v. Cont’l Airlines Inc.*, 692 F.2d 602, 609 (9th Cir. 1982). These cases are important because many do not believe that a “customer” preference for speaking English on the LPGA Tour is sufficiently related to the job performance of a professional golfer so as to allow the LPGA to argue that speaking English on tour is a business necessity. See Subsection IV.B.2.

¹²³ *Sephora*, 419 F. Supp. 2d at 417.

¹²⁴ *Id.*

¹²⁵ *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987). The radio station instituted the policy to prevent the disc jockey from speaking “street Spanish” words as he had previously done before the radio station switched its programming format. *Id.* at 1408.

¹²⁶ *Id.* at 1411.

¹²⁷ See *Repa*, supra note 72, at 16/6.

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

company was in the business of well drilling and the employee was a Spanish speaker.¹²⁹ A supervisor told the employee that the employer did not tolerate any use of Spanish on the job.¹³⁰ The supervisor also explained that any use of Spanish on the job would be tantamount to resignation.¹³¹ After the employee spoke two words of Spanish to a co-worker, the employer fired the employee and the legal challenge to the employer's rule followed.¹³² Brothers Well Service tried to justify the English-only rule by showing that the well drilling business was inherently dangerous and that a failure of communication between employees could lead to disastrous results.¹³³ The court ruled in favor of the employee by finding that the employer's business justification for the policy was irrelevant.¹³⁴ The employee violated the rule outside of the well drilling process; thus, the court could not accept the employer's business justification for the rule.¹³⁵

A blanket English-only policy in effect at all times in the workplace is also not a legitimate use of an English-only rule. In *E.E.O.C. v. Premier Operator Services, Inc.*,¹³⁶ an employer implemented a blanket English-only policy mandating the use of English at all times while at the workplace.¹³⁷ The only exception was when the employees, who were employed as operators, assisted Spanish-speaking customers in connecting long distance telephone calls.¹³⁸ The court found that the policy was not job-related or consistent with any business necessity for the performance of job duties and functions of the position of Operator. To the contrary, the evidence was clear that speaking Spanish was a job requirement.¹³⁹ The court further dispensed with the employer's proffered justifications by finding that the employees did not have any trouble communicating with managers and supervisors, nor did the policy promote office harmony as the employer said it was meant to do.¹⁴⁰

Employers must provide sufficient evidence of the need for an English-only

¹²⁹ Id. at 920.

¹³⁰ Id. at 921.

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Id. at 922.

¹³⁵ Id. The court found that the employer did not show that it actually had an English-only rule that it uniformly enforced. Furthermore, the employer did not proffer any business necessity for a rule that would result in automatic termination of the employee. Id.

¹³⁶ 113 F. Supp. 2d 1066 (N.D. Tex. 2000).

¹³⁷ A blanket English-only policy is automatically presumed to be discriminatory under the EEOC Guidelines. See *supra* note 68.

¹³⁸ *Premier Operator Servs.*, 113 F. Supp. 2d at 1069.

¹³⁹ Id. at 1070.

¹⁴⁰ Id. at 1070-71.

rule before a court will uphold a legal challenge to the rule's implementation. In *Maldonado v. City of Altus*, the Tenth Circuit reversed the lower court's finding of summary judgment for an employer based on the employer's justifications for its English-only policy.¹⁴¹ Defendant employer gave three primary reasons for the policy including communication when using radios, other employees feeling uncomfortable around the Spanish-speaking employees, and safety concerns with a non-common language being used around heavy equipment.¹⁴² The Tenth Circuit found that a reasonable person could find that defendants failed to establish a business necessity for the rule based on the scant evidence used to prove its existence.¹⁴³ Thus, the employer was not merely able to implement the rule without valid and substantiated reasons for the rule's necessity.

The foregoing cases all show the limited instances when an employer can implement an English-only rule in the workplace. These court-approved uses of English-only rules as a business necessity are important because the LPGA would likely face many questions about its justification for its policy. Currently, courts have only approved using an English-only rule for communications between employees and supervisors, among co-workers, at a retail store where selling products to customers was central to the job of a retail employee, and in communications between a radio disc jockey and the listening audience. These narrow uses of the rule show that the business necessity defense is limited in its scope and that it is not utilized on very many occasions in English-only litigation. The cases cited also support the requirement that the employer show that speaking English is "job-related" to the position in question.

IV. IS SPEAKING ENGLISH A BUSINESS NECESSITY FOR THE LPGA?

The ultimate question under either the EEOC Guidelines or disparate impact analysis is whether the employer's English-only requirement is sufficiently job-related to the employee's position to pass as a business necessity. The emergence of international players onto the LPGA Tour clearly provided a new set of challenges in recent years, and the changing face of the LPGA Tour is something that emerged quickly and without very much warning.¹⁴⁴ Ex-LPGA Commissioner Ty Votaw was quoted in 2003 saying, "[f]ive years ago, the word Korea wasn't in anyone's business plans for the LPGA."¹⁴⁵ Fast-forward to 2009 and the international presence of players from twenty-six different countries,

¹⁴¹ 433 F.3d 1294, 1307 (10th Cir. 2006).

¹⁴² *Id.* at 1300.

¹⁴³ *Id.* at 1307.

¹⁴⁴ Eui Hang Shin & Edward Adam Nam, Culture, Gender Roles, and Sport: The Case of Korean Players on the LPGA Tour, 28 J. Sport & Soc. Issues 223, 227 (2004). Five years ago there were eighteen South Koreans on the LPGA Tour. *Id.* In 2008, there were forty-five South Koreans on Tour and 121 international players combined. See Sirak, *supra* note 1.

¹⁴⁵ Shin & Nam, *supra* note 144, at 225.

including the large number of Korean players, is very much a part of the business plan for the LPGA.¹⁴⁶ The question then becomes what policies and practices the Tour may implement to capitalize on the new and diverse LPGA Tour, while maintaining the respect for the many nationalities represented in the makeup of the tour's membership.

A. LPGA's Arguments for English-only as a Business Necessity

The LPGA will likely argue many reasons for the use of an English-only rule as a business necessity if an LPGA player affected by the rule brings a lawsuit. The LPGA will point to criticism from its own players about the negative impact that international players have on the tour.¹⁴⁷ Negative stereotyping of Asian players could also provide an argument for the LPGA's desire to make the players more approachable.¹⁴⁸ The marketability of the tour and tour players,¹⁴⁹ and the need to retain corporate sponsors provide basic financial reasons behind the necessity of the rule.¹⁵⁰ The LPGA will contend that players must converse with participants in pro-am events.¹⁵¹ Furthermore, the

¹⁴⁶ See Dorman, *supra* note 3.

¹⁴⁷ LPGA players criticized the emergence of Asian players on the Tour as early as 2003. In an interview with *Golf Magazine*, LPGA veteran Jan Stephenson stated, "[T]he Asians are killing our tour. Their lack of emotion, their refusal to speak English when they can speak English. They rarely speak. We have two-day pro-ams where people are paying a lot of money to play with us, and they (Asians) say hello and goodbye." See Stephenson to Play with Seniors, Says Asians Hurt LPGA, *USA Today*, Oct. 9, 2003, available at http://www.usatoday.com/sports/golf/champions/2003-10-09-stephenson-champions_x.htm.

¹⁴⁸ There is a belief among some that Asian players are unmarketable, dull to watch, and fail to provide excitement in the game of golf. Shin & Nam, *supra* note 145, at 224. See also Karen McBeth Chopra, *A Forgotten Minority An American Perspective: Historical and Current Discrimination Against Asians From the Indian Subcontinent*, 1995 *Det. C.L. Rev.* 1269, 1331 (1995) (noting that Asians are often negatively stereotyped as passive and incapable of handling people based on their quiet and hardworking demeanor).

¹⁴⁹ See Ron Sirak, *A Failure to Communicate*, *GolfWorld*, Sep. 5, 2008, at 16 (explaining that most people agree that the large amount of international players on the tour creates marketing problems for the LPGA).

¹⁵⁰ See John Davis, *Pro Tours Tenuously Cling to Sponsors*, *The Ariz. Republic*, Oct. 21, 2008, at D1 (noting that about 1/3 of tournament sponsorship deals are up for renewal on the LPGA Tour in 2009 and the tough financial times are making it difficult for some tournaments to find new sponsors or retain their old sponsors); Tim Lemke, *LPGA's Mandate to Talk is All About Business*, *The Wash. Times*, Sep. 4, 2008, at A01 (detailing the fact that the tour is facing the loss of corporate sponsors for at least three tournaments in the 2009 season); Robert Thompson, *LPGA is Not Racist, It's Just Misguided: Making English Compulsory Won't Boost Fortunes*, *Nat'l Post*, Aug. 28, 2008, at B12 (noting that corporate sponsors continue to pull their support for the tour, including those that sponsor major championships).

¹⁵¹ Lemke, *supra* note 150, at A01 (quoting Commissioner Bivens as saying "the players would become more marketable on their own if they spoke English when interacting with sponsors." Bivens also said that "each golfer 'plays a role in maintaining and gaining corporate sponsors for herself and

LPGA may assert that the proposed English-only rule was only to have been enforced at certain times, thus making it free from the discriminatory presumption of English-only rules enforced at all times during the employee's workday.¹⁵² The strongest argument on behalf of the LPGA's interest in enforcement of the rule is the belief that employers ought to have the power to enforce an English-only rule when employees are dealing with customers.¹⁵³ The LPGA has a strong argument that the media covering tournaments, spectators attending the tournaments, and corporate sponsors that spend large amounts of money to play in pro-am events should all be seen as customers of the LPGA and its product. If this were the case, then the courts and the EEOC could approve of an English-only rule that is implemented to promote communications for this reason alone.¹⁵⁴

The LPGA could try and analogize its situation to that of the *Sephora* case¹⁵⁵ in an attempt to show that an employee of a retail establishment is similar to an LPGA player playing in a pro-am event, speaking with the media, or giving victory speeches. The tour would hope to show that any English-only rule regulating the retail employee could likewise regulate the LPGA player, as both are dealing with customers in the course of their employment. Similarly, the *Jurado* case¹⁵⁶ shows that customer preferences may lead to a court's approval of an English-only rule and the LPGA could argue that corporate sponsors, media, and spectators all have a preference to hear players speak in English, thus causing a business necessity for the rule's implementation.

B. Speaking English Is Not an Absolute Business Necessity for the LPGA

Although the LPGA has good arguments for the implementation of the rule, the need to have LPGA players speak English does not meet the standard of a legitimate business necessity. The LPGA is unfortunate in that it has been unable to draw the type of excitement and fan involvement that the PGA Tour enjoys. Although television ratings have increased in recent years,¹⁵⁷ the LPGA

the LPGA."'). See also John Paul Newport, *How the LPGA Bungled on English*, Wall St. J., Sep. 13, 2008, at W12 (explaining that the LPGA believes players must entertain and engage sponsors and their customers on a weekly basis in large part because participants in pro-am events spend an average of \$15,000 per foursome to play with an LPGA player).

¹⁵² See discussion supra Subsection II.B.1.

¹⁵³ This is the strongest argument that the LPGA can make based on the fact that all other prior court-approved uses of business necessity would not be relevant to the LPGA's proffered reasoning for the rule. See discussion infra Subsection IV.B.1.

¹⁵⁴ See discussion supra Section III.A describing situations where a customer's preference may lead to a business necessity.

¹⁵⁵ See discussion supra Section III.A for the facts and holding of the *Sephora* case.

¹⁵⁶ See discussion supra Section III.A for the facts and holding of the *Jurado* case.

¹⁵⁷ See Andrew C. Billings, *Wie Shock: Television Commentary About Playing on the PGA and*

Tour still maintains its position as a distant second in a popularity contest with the men's tour.¹⁵⁸ This reality occurs due to many factors that have nothing to do with the amount of foreign-speaking international players on tour. For example, the lack of corporate sponsors is due more to the current financial state of many businesses, rather than as a result of the LPGA's brand or product as a whole.¹⁵⁹ While the men's tour has not yet been affected by the weak national economy, both the men's and women's tours are attempting to best position themselves to deal with a global recession.¹⁶⁰ Furthermore, the LPGA is plagued by a celebrity void based on the inability of the tour to produce a "Tiger Woods-like" American-born LPGA superstar to stir up enthusiasm for the tour.¹⁶¹ Finally, the inherent lack of interest in women's golf as compared to men's golf continues to hamper interest in the LPGA.¹⁶² These inconvenient truths all put strain on the

LPGA Tours, 19 *The How. J. Comm.* 64, 65 (2008) (noting that television ratings of LPGA tournaments increased in recent years); Dean Foust, *Don't Let That Smile Fool You; Inside Commish Carolyn Bivens' Hard-nosed Drive to Remake the LPGA*, *BusinessWeek*, Oct. 8, 2007, at 72 (noting that average viewership for LPGA tournaments is up by 14% on network TV and 47% on cable TV since the 2005 season).

¹⁵⁸ Steve DiMeglio, *Bivens Tries to Set LPGA on Solid Course; Purses on Rise, but Challenges Persist With TV, Exposure*, *USA Today*, Nov. 14, 2007, at 3C (noting that the PGA Tour has well-developed personalities and rivalries that even casual fans are familiar with). This is an area where the LPGA is lacking and continues to leave the LPGA second in a popularity contest with the PGA Tour.

¹⁵⁹ See sources cited *supra* note 151.

¹⁶⁰ See Larry Dorman, *Storms on the Horizon for the Golf Industry*, *N.Y. Times*, Nov. 19, 2008, at B11 (explaining that due to the weak national economy, the LPGA will be forced to eliminate two or three tournaments from its 2009 schedule as well as decrease the amount of prize money available to tournament players).

¹⁶¹ See Greg Boeck, *LPGA Goes For the Green*, *USA Today*, Mar. 10, 2004, at 1C (explaining that the LPGA attempted to remedy the celebrity void as early as 2002 when players were coached on the five points of celebrity including performance, relevance, passion, appearance and approachability at a three day summit during the season); Joel Boyd, *LPGA Can't Afford to be One-Woman Show*, *Chi. Sun-Times*, Mar. 11, 2004, at 141 (detailing the belief that women's golf is plagued by a celebrity void). Although, Annika Sorenstam was the tour's best player for the past decade, Sorenstam retired at the end of the 2008 season. Furthermore, up to this point, golfing phenomenon Michelle Wie focused much of her attention on trying to play on the men's tour and her presence in professional golf has yet to lead to much publicity for the LPGA. However, Wie earned her tour card for the 2009 season and will likely provide the tour with some much-needed publicity. See Rodney Page, *A Drama-Filled Year*, *St. Petersburg Times*, Dec. 18, 2008, at 2C (noting that Sorenstam announced her retirement from the game effective at the end of the 2008 season on May 13, 2008 and that Wie will play full time on the LPGA Tour in 2009).

¹⁶² See Jon Saraceno, *Interest in LPGA is Going Below Par*, *USA Today*, Mar. 23, 2007, at 2C (noting that for the large majority of golf fans, the LPGA is largely irrelevant as most golf fans are interested in watching players on the men's tour). See also Marlene A. Dixon, *Gender Differences in Perceptions and Attitudes Toward the LPGA and Its Tour Professionals: An Empirical Investigation*, 11 *Sports Marketing Q.* 45-54, (2002). In an interesting study, Ms. Dixon shows that women are more interested in the LPGA than men based on a survey of 489 men and women golfers. *Id.* Surprisingly,

LPGA's business model and forced Commissioner Bivens to propose the English-only rule.¹⁶³ Although the LPGA's business problems are unfair to LPGA officials who work very hard to ensure the continuing success of the tour, an English-only rule still must meet the business necessity threshold before the LPGA can implement the rule in an effort to enhance the LPGA's product. Ultimately, the LPGA has to prove that speaking English at limited times on the LPGA Tour is job-related to the profession of a professional LPGA tournament player.

1. The LPGA's Arguments for English as a Business Necessity Are Irreconcilable With Court-Approved Uses of English-Only Rules in the Workplace

English-only rules that are enforced only at certain times during the employee's workday are often given deference as long as they meet the business necessity standard.¹⁶⁴ Thus, one might ask why the LPGA should not survive a legal challenge to the proposed rule. The answer stems from the fact that English proficiency is generally not considered a relevant qualification to an individual's ability to participate in a professional golf tournament. If the LPGA truly wanted to avoid legal consequences should this rule have been implemented, the tour would have needed to justify the English-only rule by proving that language is in fact relevant to the occupation of a professional golfer in the United States.¹⁶⁵ Unfortunately, the tour would likely face opposition because the Commissioner's proffered reasoning for the English-only policy does not match up with previous court-approved uses of an English-only policy. At the heart of the business necessity doctrine resides this unfortunate reality for the LPGA.

The EEOC and courts really only recommend the business necessity defense in a few specific instances. The business necessity defense should not be seen as a wide-ranging doctrine protecting all reasons that employers may give for the establishment of an English-only rule. Rather, it is a limited defense approved in only a few necessary circumstances such as promoting safety and efficiency in the workplace, enabling a supervisor to monitor the performance of employees,

in May 2009, the LPGA became the first professional sports organization to encourage players to use social networking sites such as Twitter and Facebook during competition. See Bivens 'encourages' in-round updates, ESPN.com, May 28, 2009, available at <http://sports.espn.go.com/golf/news/story?id=4212597>. Commissioner Carolyn Bivens was quoted as saying, "The new media is very important to the growth of golf and we view it as a positive, and a tool to be used." *Id.* It goes without saying that the LPGA hopes to generate some excitement for its players by allowing players to "tweet" and update Facebook statuses mid-round.

¹⁶³ See Dorman, *supra* note 3.

¹⁶⁴ See *supra* note 71 and accompanying text.

¹⁶⁵ See *supra* Part III.

and for communicating with customers.¹⁶⁶ Therefore, based on the nature of the work environment at the LPGA, the tour might only try to take advantage of one argument for business necessity. For example, LPGA players do not have direct supervisors like many other employees; thus, the LPGA's rule would not enable English-speaking supervisors to better monitor the performance of foreign-speaking employees as in the *Gonzalez* and *Prado* cases.¹⁶⁷ The use of English is not needed to promote efficiency of the workforce as in *Maldonado*.¹⁶⁸ Furthermore, there is not any safety rationale that would lead to a court's approval of a rule forcing professional golfers to speak English.¹⁶⁹ Thus, the only legitimate argument that the LPGA can offer to justify the rule as originally articulated would be that speaking with corporate sponsors during pro-am events, members of the media during press conferences, and spectators during trophy presentations is similar to speaking with customers that prefer to speak with someone who understands and speaks English.

2. An LPGA Player Speaking With Corporate Sponsors, the Media, and Spectators is Not the Same as a Salesperson Speaking With Customers at a Store

There are a few main differences between the customers in *Sephora*¹⁷⁰ and the corporate sponsors, media, and fans of the LPGA. First, the customers in *Sephora* were merely attempting to buy goods that they wanted for their own personal use and they needed to interact with Sephora employees to complete the transaction.¹⁷¹ Some of the LPGA's "customers" on the other hand, will get a material return benefit from their interaction with the LPGA player. A corporation, business, charity, or other entity sponsors a tournament because of the publicity it will receive from its name being advertised throughout the course of the tournament. The media wants access to English-speaking LPGA players because it will allow journalists to ask direct questions to players without the use of interpreters. This will provide the media with better quotes for articles and interviews as the journalists would be able to speak directly with the player. The LPGA spectator likely wants players to speak English because it is always easier to relate to an athlete when the spectator and athlete share a common language. Unfortunately for the LPGA, these types of "customers" do not fit the general definition of "customer" as applied in English-only cases.¹⁷² Furthermore, the *Sephora* court found a business necessity in large part because the inherent

¹⁶⁶ See *infra* Section III.A.

¹⁶⁷ See *supra* notes 120-121 and accompanying text for a discussion of the *Gonzalez* and *Prado* cases.

¹⁶⁸ See *supra* notes 141-143 and accompanying text for a discussion of the *Maldonado* case.

¹⁶⁹ See *supra* notes 104-105 and accompanying text.

¹⁷⁰ See discussion *supra* Section III.A for the facts and holding of the *Sephora* case.

¹⁷¹ *E.E.O.C. v. Sephora USA*, 419 F. Supp. 2d 408, 410 (S.D.N.Y. 2005).

¹⁷² See discussion *supra* Part III.A.

nature of a retail sales employee is based on customer interaction that includes the selling and marketing of retail goods to the customer.¹⁷³ The *Sephora* court noted that the *central aspect* of a retail sales employee is to sell goods and that helpfulness and approachability are very important corollaries to the job of a sales employee.¹⁷⁴ This differs from the proposition that a business may always allow a customer preference to justify an English-only rule. It is doubtful that meeting with “customers” of the LPGA would ever be considered a central aspect of the occupation of a professional golfer.¹⁷⁵ A customer preference may be taken into account only if the preference is in response to the business’s inability to perform its primary function or service that it offers, and is sufficiently related to the job performance of the employee.¹⁷⁶ In contrast, it is unlikely that the LPGA’s primary function is the entertaining of corporate sponsors in pro-ams or providing media access to its players. Most would think that the primary function of the LPGA is that of operating golf tournaments as a source of competition for its members and a source of entertainment for its fans. Consequently, the job performance of a professional golfer should not correlate with her ability to speak proficiently in English. Rather, a professional golfer’s job performance is purely based on her playing ability on the golf course. The LPGA “customers” preference for English-speaking players equates with the customers in *Bradley* that wanted clean-shaven delivery men or the customers in *Gerdom* that wanted slim flight attendants; both of these cases illustrate illegitimate uses of customer preferences to show business necessity.¹⁷⁷

The LPGA will likely argue that the job of a professional golfer includes more than just hitting a ball into a cup in the least amount of shots possible. If the job of a professional golfer includes marketing the tour, meeting with the media, representing the tour in a positive manner by speaking English, playing in pro-ams with corporate sponsors, and many other factors that take the job of the LPGA player away from merely playing golf to the best of her ability, then the LPGA may have an argument that speaking English on tour is a business necessity. Thus, the major question is to what extent does the marketability of the tour and the need to retain corporate sponsors correlate with the job of a professional golfer?

Because courts look at the central aspect of the employee’s job to determine

¹⁷³ *Sephora*, 419 F. Supp. 2d at 416-17.

¹⁷⁴ *Id.*

¹⁷⁵ See The Marketing Doctor says: The LPGA Is Making A Big Mistake, <http://blog.marketingdoctor.tv/2008/08/28/lpga-brand-advisory.aspx> (Aug. 28, 2008, 12:45 p.m. CST) (arguing that the LPGA’s rule goes against the belief that excellence in sports is based on playing the game, and that the world is united by the universality of playing the game, not speaking the same language).

¹⁷⁶ *Sephora*, 419 F. Supp. 2d at 416-17 (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971)).

¹⁷⁷ See *supra* note 123 for a discussion of the *Bradley* and *Gerdom* cases.

whether the English-only rule is justified by a business necessity, the central aspect of the occupation of an LPGA tour player is really at the heart of any possible litigation.¹⁷⁸ Basic fundamental ideas of fairness should not warrant a court in finding that the central aspect of the occupation of a tour player is that of promoting the LPGA in pro-ams and speaking to the media. Although these both might be important aspects of the player's overall job on the LPGA Tour, it is unrealistic to think that any international player came to the United States to speak to the media and participate in pro-ams. Rather, the player came to the United States to test her athletic ability against the greatest collection of female golfing talent in the world.¹⁷⁹ Golfing is what the player knows, and the love of golf is likely what drove the player to become a professional golfer. When a Sephora store hires a sales associate, that employee understands that she will be expected to interact with customers during the course of her employment because any person applying for a job at a retail store understands the central aspect of the job is to sell products to customers. However, when an international player comes to the United States at a young age merely because she is good at golf, that player likely does not think that she is joining the tour to promote the LPGA and retain corporate sponsors.

V. THE SPORTS WORLD'S PERSPECTIVE: WHY THE LPGA'S POLICY IS "OUT OF BOUNDS"

The strong sense of outrage in the professional sports community over the LPGA's rule prompted many sports commentators and pundits to correctly describe the English-only rule as an overbearing and unnecessary restriction of athletes that is not job-related to the occupation of a professional golfer in a way that can be characterized as a business necessity.¹⁸⁰ The transnational migration of professional athletes from around the globe causes the emergence of race, ethnicity, class, and gender issues in the global sports industries.¹⁸¹ These issues continue to create new challenges to all professional sports leagues.¹⁸² However,

¹⁷⁸ *Sephora*, 419 F. Supp. 2d at 417.

¹⁷⁹ See Greg Stoda, LPGA Tour home to speakers of many languages, *The Palm Beach Post*, Nov. 19, 2008, http://www.palmbeachpost.com/sports/content/sports/epaper/2008/11/19/a1c_stoda_1120.html. Mr. Stoda quotes Brazilian LPGA player Angela Park as saying "[s]ome players don't have the personality to mingle with strangers. Our job is to play the best golf we can play to make our product the best it can be. That's the bottom line." *Id.* See also Kim & Watanabe, *supra* note 6, at A1 (quoting Hanbyul Lee as saying "I thought as long as my golf is good, I'd be able to use interpreters. We're here for the golf, but now we also have to worry about learning English.").

¹⁸⁰ Many sports journalists from newspapers and media outlets such as ESPN and Fox Sports all criticized the rule. See sources cited *supra* note 5.

¹⁸¹ Shin & Nam, *supra* note 144, at 223. See also Kimberly S. Miloch, *Coming to America: Immigration and the Professional Athlete*, 13 *J. Legal Aspects of Sport* 55, 55 (2003) (noting the large increase in the number of international athletes in American professional sports leagues).

¹⁸² See Shin & Nam, *supra* note 144, at 223.

all other professional sports leagues are handling the influx of international athletes that permeate their rosters and memberships in a far different manner than the LPGA.

A. The NBA, MLB, NHL and International Athletes

The National Basketball Association, Major League Baseball, and the National Hockey League have all seen a strong migration of international players to their teams' rosters in recent years.¹⁸³ For example, the NBA currently has seventy-six international players from thirty-one countries.¹⁸⁴ Many of these players come from Eastern European countries, while others such as Yao Ming and Yi Jianlian hail from China.¹⁸⁵ The NBA has never instituted an English-only policy, and in the case of Ming and Jianlian, both were allowed to use an interpreter when dealing with the media while they attempted to learn English on their own.¹⁸⁶ The National Hockey League is also full of European and Canadian players that speak languages ranging from French and Swedish to English.¹⁸⁷ The NHL has also never considered instituting an English-only policy; however, several teams do provide tutors if players express a desire to learn English.¹⁸⁸ Perhaps no professional sports league is more affected by international players than Major League Baseball. The rosters of many MLB franchises are full of Spanish-speaking players from Latin American countries such as the Dominican Republic, Cuba, Puerto Rico, and Venezuela.¹⁸⁹ In fact, nearly thirty percent of MLB players are from Latin America.¹⁹⁰ A large number of players are also from Japan, Taiwan, and South Korea.¹⁹¹ A spokesman for MLB was quoted as saying that the league has not thought of instituting an English-only policy "because it wanted its players to be comfortable in interviews and wanted to respect their cultures."¹⁹² The MLB seems to be the

¹⁸³ See Miloch, *supra* note 181, at 55.

¹⁸⁴ Larry Dorman, *Golf Tour's Rule for Women: Speak English to Stay in Play*, N.Y. Times, Aug. 27, 2008, at A1. See generally Trey Miller, Comment, *Opening the Floodgates: The Effects of Flexible Immigration Laws on International Basketball Players Seeking Employment in the NBA*, 11 Sports Law J. 195, 196-97 (2004) (noting the influx of foreign players making their way into the NBA in recent years).

¹⁸⁵ Dorman, *supra* note 184, at A1.

¹⁸⁶ Yao Ming is now fairly proficient in English and no longer needs the assistance of an interpreter. *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Arturo J. Marcano & David P. Fidler, *The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent*, 6 *Ind. J. Global Legal Stud.* 511, 520, n.34 (1999) (noting the large numbers of Latino players on Major League Baseball rosters).

¹⁹⁰ Sirak, *supra* note 150, at 16.

¹⁹¹ *Id.*

¹⁹² Dorman, *supra* note 184, at A1 (quoting Pat Courtney, a spokesman for Major League Baseball).

most proactive in their attempts to get foreign players to learn to speak English. Pursuant to the Collective Bargaining Agreement, each baseball club must provide an English as a Second Language course to all non-English speaking players if such a course is asked for by any player.¹⁹³ The league also has a former player act as the Major League Baseball Players Association's Hispanic Troubleshooter.¹⁹⁴ The job of the Hispanic Troubleshooter is to inform the Players Association of any special needs or requests that Hispanic players may have during the course of their tenure with the league.¹⁹⁵ Many teams have also increased the number of managers and coaches on staff that are proficient in Spanish, while some teams have even taken the step of hiring a person to help Latin American players interact with the media and the community.¹⁹⁶

B. The Treatment of International Players by Other Leagues Further Undermines the LPGA

Any argument made by the LPGA for the business necessity of an English-only rule would be seriously undermined when compared to other professional sports leagues' treatment of international players. The key to proving a business necessity is the justification provided by the employer that will allow the court to find that the rule should be upheld. It seems quite likely that the LPGA would have to answer tough questions from the court as to why this rule is justified and necessary for the LPGA, while the NHL, MLB, and NBA can survive without a similar rule. The LPGA could make the argument that its business is different than other sports leagues and that the tour depends on corporate sponsors to survive. While this is true in many respects, at the very heart of the matter is the fact that all professional sports leagues should be open to all those with the requisite athletic skill level, regardless of the language one chooses to speak. The central job of a professional basketball player, baseball player, and hockey player has always been playing the game to the best of the player's ability in an effort to help the player's team win. When the LPGA gets away from this central aspect of its sport, the league appears to be unjustified in its reasoning for an English-only rule. However, this does not mean that all athletic competition should be free from regulation by the league. The league should still be able to regulate the time and place of competition, the rules used in the competition, the

¹⁹³ Jason Weiss, Comment, *The Changing Face of Baseball: In an Age of Globalization, Is Baseball Still as American as Apple Pie and Chevrolet?*, 8 U. Miami Int'l & Comp. L. Rev. 123, 131 (2000).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 132. See also Thomas R. Dominczyk, Comment, *The New Melting Pot: As American Attitudes Toward Foreigners Continue to Decline, Athletes are Welcomed With Open Arms*, 8 Seton Hall J. Sports L. 165, 187 (1998) (explaining that the Texas Rangers tried to help Latino players in their transition to America by hiring Luis Mayoral from Puerto Rico to help their Latin stars interact with the media and the community).

uniforms worn by the athletes, and many other aspects that directly correlate with the athletic competition itself. Furthermore, the league may even regulate what its players wear to and from the game.¹⁹⁷ However, when a professional sports organization such as the LPGA proposes a regulation that goes outside the boundaries of what is acceptable as compared to other similarly standing leagues, it loses all credibility for any business justification offered for the proposed regulation.

CONCLUSION

The LPGA does not have a valid business necessity to allow for the implementation of a rule requiring its tour members speak English when dealing with the media, giving victory speeches, and interacting with playing partners during pro-am events. While the LPGA Tour specified many reasons for implementing this policy, none of these reasons constitute a business necessity that can survive a legal challenge under Title VII should a court view the tour player as an employee of the LPGA. Although the LPGA would like the general public to view its proposed policy as one that could easily be complied with, the reality is just the opposite. When the LPGA rule is held up to the scrutiny of a disparate impact analysis or the EEOC Guidelines it becomes clear that the rule does not advance legitimate, non-discriminatory interests that promote a business necessity. Furthermore, the rule is a strict and discriminatory regulation of international athletes unlike anything that has ever been seen in the professional sports world, which also undermines the LPGA's justification for the rule. The LPGA proposed this rule despite the fact that every other professional sports league has international players speaking a wide range of foreign languages, and some of these leagues are as popular and successful as ever. The LPGA's business model has been challenged in recent years due to a variety of factors; however, the fact that many of its star players fail to speak a proficient level of English is not one of them. The LPGA could help foster a sense of encouragement for the tour players if the desire to have all players speak English is so great. However, the Tour runs the risk of losing a battle in the legal system, as well as in the court of public opinion, should it implement such a discriminatory rule.

¹⁹⁷ See Brent D. Showalter, Technical Foul: David Stern's Excessive Use of Rule-Making Authority, 18 Marq. Sports L. Rev. 205, 210 (2008) (noting that NBA Commissioner Stern instituted a dress code policy that established what attire players could wear to and from NBA games in an effort to "soften the NBA's hip-hop image and increase the league's appeal to its fans").