IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

E.E.O.C.,

Plaintiff,

v.

AMALGAMATED SUGAR CO., INC.,

Defendant.

Civ. No. 98-0378-S-BLW

MEMORANDUM DECISION, ORDER, REASSIGNMENT TO MAGISTRATE AND CHANGE OF CASE NUMBER.

INTRODUCTION

The Court has before it a motion for summary judgment filed by defendant Amalgamated Sugar, and a motion to file a supplemental brief filed by plaintiff EEOC. The Court granted from the bench the EEOC's motion to file supplemental brief, and took under advisement Amalgamated's motion for summary judgment. The Court now finds that the motion for summary judgment should be denied, and the Court's reasoning is expressed below.

ANALYSIS

The EEOC brings this suit on behalf of four Hispanic seasonal employees of Amalgamated who were not rehired in 1996. These employees, known in this suit as the charging parties, worked as laborers, typically between September and January of each year. They had varying abilities to speak English. When they reported to Amalgamated in

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September each year for orientation, they had an interpreter to help them fill out forms.

At the end of the 1995/1996 seasonal work, Ken Baumgartner, Amalgamated's Safety Director, told the charging parties that they should be prepared the next season to take a written test in English without the assistance of an interpreter. When the next season arrived -- in September, 1996 -- the charging parties appeared at Amalgamated's orientation session. What happened next is unclear.

It appears that Amalgamated gave its workers a written test, in English, on various aspects of workplace safety. It is not clear whether the charging parties were actually given the written test, or took any portion of the test. At some point, the charging parties were told by Baumgartner that they would not be hired because they did not have the ability to take the test without an interpreter.[1]

Title VII prohibits discrimination based on national origin. *See* 42 U.S.C. § 2000e-2. The EEOC defines national origin discrimination as including "the denial of equal employment opportunity because . . . the individual has the linguistic characteristics of a national origin group." *See* 29 U.S.C. § 1606.1. Fluency-in-English requirements "may be discriminatory on the basis of national origin," according to the EEOC regulations, and hence the EEOC "will carefully investigate [such] charges . . . for both disparate treatment and adverse impact

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[1] Amalgamated's counsel represented at oral argument that an employee could take a verbal version of the test if the employee was able to speak, but not read, English. It is unclear, however, whether the verbal test option was presented to the charging parties. In a summary judgment proceeding, the Court must construe the facts in favor of the non-filing party, and thus the Court must assume that the charging parties were not presented with the verbal test option.

on the basis of national origin." *Id.* at 1606.6(b).

In this case, the EEOC's counsel informed the Court at oral argument that the EEOC was not pursuing a disparate impact claim, but was proceeding instead under two separate disparate treatment theories. First, the EEOC claims that the fluency-in-English requirement is discriminatory on its face. Second, the EEOC claims that even if the policy is not discriminatory on its face, it was applied with the intent to discriminate against Hispanics.[2] For ease of reference, the Court will refer to the first claim as the facial claim and the second claim as the applied claim.

The applied claim is governed by the well-known burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework – that shifts only the burden of production and never the burden of proof -- the EEOC must make a *prima facie* showing that (1) the charging parties belong to a protected class; (2) the charging parties were qualified for the positions; (3) the charging parties were not rehired; and (4) the positions remained open. *See id.* at 802. "The requisite degree of proof necessary to establish a *prima facie* case for Title VII . . . claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R.Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). Establishing a *prima facie* case "creates a presumption that

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[2] Amalgamated argues in its briefing that the EEOC has "expressly acknowledged that there is no evidence of any intent by the company to discriminate." *See Amalgamated's Reply Brief* at 2, n.2. In support of this conclusion, Amalgamated cites a portion of the EEOC's brief that Amalgamated interprets as waiving the disparate treatment theory based on intentional discrimination. However, Amalgamated reads too much into that statement. In the briefing and at oral argument, the EEOC has pursued its claim that Amalgamated intentionally discriminated against Hispanics.

the employer unlawfully discriminated against the employee." *Id.*

Once the *prima facie* case has been made, the burden of production shifts to Amalgamated to offer a "legitimate, nondiscriminatory reason for its employment decision." *Id.* If Amalgamated meets this burden, "the *McDonnell Douglas* presumption of unlawful discrimination simply drops out of the picture," *id.*, and the plaintiff "must produce specific, substantial evidence of pretext." *Id.* at 890.

The facial claim is analyzed differently. *See International v. Johnson Controls, Inc.*, 499 U.S. 187, 197-200 (1991). The Court in *Johnson Controls* noted that the burden shifting framework required plaintiffs "to bear the burden of persuasion on all questions," and then held that "[f]or the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." *Id.* at 198, 200 (internal quotations omitted). Accordingly, once a finding of facial discrimination has been made, the burden of proof (as opposed to the burden of production) shifts to the employer to establish that the policy is based on a "bona fide occupational qualification" (BFOQ) under 42 U.S.C. § 2000e-2(e)(1). *Id.* at 200 (stating that the employer's policy based on gender was discriminatory on its face and hence "forbidden under Title VII unless [the employer] can establish that sex is a [BFOQ]"). *Johnson Controls* observes that "[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense." *Id.* at 198.

Amalgamated seeks summary judgment on both the facial and applied disparate treatment claims. Turning first to the applied claim, the Court finds that the EEOC has made a *prima facie* case. The EEOC has established, in light of the minimal showing required to

establish a *prima facie* case on summary judgment, that (1) the charging parties are Hispanics and hence protected; (2) the charging parties were qualified for their jobs as they have worked for many years with good work records;[3] (3) the charging parties were not rehired; and (4) the positions remained open.

In response, Amalgamated has offered a legitimate business reason for the English-fluency requirement: Amalgamated's expert, William R. Briscoe, concluded that "based on the hazards" at Amalgamated's plant, "it is appropriate to require that employees working [as laborers] to have demonstrated English speaking and comprehension abilities, both written and verbal." The EEOC counters with testimony from its expert, Earnest F. Harper, that "the plaintiffs were not employed in a work environment, job, or specific task requiring an ability to read or speak English in order to ensure their safety or to adequately perform the work assigned to them." This conflicting evidence creates questions of fact, rendering summary judgment improper on this disparate treatment theory.

The Court turns next to the EEOC's facial claim. Amalgamated asserts that "[t]here is simply no authority for the EEOC's proposition that a test, administered to all applicants in an identical manner, scored in an identical manner, and with identical pass/fail cutoffs for all applicants on its face expressly classifies persons on the basis of race or gender." *See Amalgamated's Reply Brief* at 3 (emphasis in original). However, the EEOC is not

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[3] Amalgamated points to conflicting evidence on this point. However, this Court must not weigh the evidence in a summary judgment proceeding. Instead, the Court examines the evidence proferred by the EEOC and, making all inferences in favor of the EEOC as the non-moving party, determines whether that evidence amounts to a *prima facie* case.

challenging the test itself. Instead, the EEOC is challenging Amalgamated's English-fluency policy under which Amalgamated refuses to hire anyone who cannot take the test without the aid of an interpreter.

Cast in this light, Amalgamated is essentially seeking a ruling that its English-fluency program cannot, as a matter of law, be found to be discriminatory on its face. Facial discrimination occurs when the policy at issue expressly classifies persons on the basis of national origin. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The English-fluency policy classifies persons on the basis of language, not national origin. Yet the Ninth Circuit has stated that language could be a proxy for national origin: "[T]he cultural identity of certain minority groups is tied to the use of their primary tongue . . . [and] rules which have a negative effect on . . . non-English speakers may be mere pretexts for intentional national origin discrimination." *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). *See also Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995) ("since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups, or more generally, conceal nativist sentiment."), *vacated on other grounds*, 520 U.S. 43 (1997) ; *see generally, Hernandez v. New York*, 500 U.S. 352, 369 (1991) (noting that in some contexts proficiency in particular languages might be "treated as a surrogate for race"); *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) (observing that "accent and national origin are obviously inextricably intertwined in many cases," and encouraging district courts to conduct a "very searching look" at employers' claims that accents interfered with communication).

While these cases are not directly on point, they recognize that language is a proxy for national origin, and that restrictions on language could be a pretext for discrimination based on national origin.[4] Amalgamated counters that its policy cannot be facially discriminatory because the policy turns on a mutable trait or ability -- that is, the ability to speak English -- as opposed to an immutable characteristic such as race or place of birth.[5] This distinction, however, is not found in Title VII or any of the implementing regulations. Amalgamated cites no Ninth Circuit or Supreme Court authority holding that a policy is only facially discriminatory when it makes a distinction based on an immutable characteristic.[6] And the distinction would be almost impossible to apply. For example, skin color can be changed. *See Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1988) (en banc) (Norris, J.,

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[4] While the decisions vacated by the Supreme Court have no precedential value, their reasoning remains persuasive. Amalgamated cites other cases for the proposition that "language restrictions or requirements are facially neutral." *See Amalgamated Reply Brief* at 4. However, none of the cases cited by Amalgamated hold that an English-fluency policy must, as a matter of law, be deemed to be a facially neutral policy. The cases cited by Amalgamated either assume that the policy is facially neutral or make the finding without analysis. At any rate, those cases are not persuasive.

[5] Amalgamated pursued this contention during oral argument.

[6] The Fifth Circuit appears to have held that a trait related to national origin must be of an immutable nature in order to come within Title VII protections. *See Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). *Gloor* interpreted national origin as one's birthplace or the birthplace of one's ancestors, and stated that Title VII "does not support an interpretation that equates the language an employee prefers to use with his national origin." *Id.* at 270. This analysis appears directly contrary to that found in the Ninth Circuit cases of *Gutierrez* and *Yniguez*. Although both of those cases were vacated on other grounds, they give some indication that the Ninth Circuit is not willing to follow *Gloor's* immutability analysis. It should be noted that the Ninth Circuit has followed *Gloor* in holding that an English-only workplace policy did not violate the Title VII rights of a bilingual worker who had the ability to comply with the policy. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987). *Jurado* did not, however, adopt *Gloor's* immutability analysis.

concurring) (discussing the 1961 book *Black Like Me* that recounts the experiences of author John Howard Griffin who darkened his white skin and traveled throughout the South). Does this mean that an employment practice based entirely on skin color is not facially discriminatory because skin color is not immutable? That is not, and cannot be, the law.

On the other hand, it cannot be said that the mutability of the characteristic targeted by the employer's policy is completely irrelevant. In Fourteenth Amendment analysis, the more immutable the trait, the greater the chance that the policy may be found to be impinging on the rights of a "suspect class" and hence subject to stricter scrutiny. *See* Laurence H. Tribe, *American Constitutional Law,* 1616 (2d ed. 1988); *Parham v. Hughes*, 441 U.S. 347 (1979) (describing race, national origin, alienage, illegitimacy, and gender as immutable). Nevertheless "[t]he Supreme Court has never held that only classes with immutable traits can be deemed suspect." *Watkins,* 875 F.2d at 725 (Norris, J., concurring).

This Fourteenth Amendment analysis applies with equal strength to Title VII. *See Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1112-13 (9th Cir. 1991) (equating Fourteenth Amendment with Title VII). Thus, Amalgamated's policy does not have to target an immutable trait to be discriminatory on its face under Title VII.

Amalgamated asserts, however that the policy is neutral on its face because it applies to all non-English speaking persons, and does not single out any specific group like Hispanics. This argument puts a twist in the term "facially neutral." The term is most accurately defined to include policies that "operate to disqualify members of both the majority class and the protected minority class." Perea, *English-Only Rules*, U.Mich.J.L.Ref.265, 289 (1990). For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) the facially neutral statutory height

and weight requirements would disqualify at least some men as well as women. In contrast, Amalgamated's English-fluency policy will never operate to disadvantage the class of those fluent in English, but instead will operate exclusively to the detriment of non-English speakers. It is difficult to understand how a policy that operates to the exclusive disadvantage of one class could be a facially "neutral" policy. Because language may be a proxy for national origin, the Court cannot hold that a policy that adversely affects only non-English speakers is, as a matter of law, facially neutral.

The Court turns next to Amalgamated's motion to dismiss the EEOC's claim for punitive damages. To obtain punitive damages, the EEOC must show that Amalgamated discriminated on the basis of national origin "in the face of a perceived risk that its actions will violate federal law." *Kolstad v. American Dental Association*, 119 S.Ct. 2118, 2125 (1999). At first glance, this standard would appear to mean that punitive damages remain in the case so long as a claim of intentional discrimination remains. After all, it would seem that in this litigious age, any employer who intentionally discriminates against a well-defined minority certainly did so knowing that its actions would violate federal law. But in fact that may not be the case. *Kolstad* discussed specific situations where a finding of intentional discrimination would not warrant an award of punitive damages:

> In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational

qualification defense or other statutory exception to liability.

Id. at 2125.

Thus, punitive damages do not remain in the case simply because a claim of intentional discrimination remains. When an employer has raised the defenses discussed in the *Kolstad* quote above, the plaintiffs must respond with evidence sufficient to create a question of fact, or the punitive damages must be dismissed. In this case, Amalgamated has raised both the BFOQ defense, to the facial claim, and the legitimate business justification defense, to the applied claim. The EEOC has submitted testimony from its experts, discussed above, that creates issues of fact concerning those defenses. In other words, there is at least some question whether Amalgamated, in the words of *Kolstad*, "reasonably believe[d] that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability." Thus summary judgment on punitive damages is inappropriate.

For these reasons, the Court finds that the motion for summary judgment filed by Amalgamated must be denied. After oral argument on the motion, the EEOC's counsel encountered an emergency that required moving the trial date. Due to the congestion of the Court's calendar, the parties informed the Court that they had agreed to have the case transferred to Magistrate Judge Larry M. Boyle, who was available to try this case on a date more satisfactory to the parties. The Court will therefore reassign this case to Magistrate Judge Boyle, but cautions counsel that the reassignment will have no effect unless the parties sign and file the written consent form to proceed before the Magistrate Judge.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for summary judgment (docket no.20) is hereby DENIED.

IT IS FURTHER ORDERED, that this case is hereby reassigned for all purposes, including trial and post-trial matters, to United States Magistrate Judge Larry M. Boyle.

IT IS FURTHER ORDERED, that the case number be changed to the following: CV 98-0378-S-LMB.

IT IS FURTHER ORDERED, that the present trial date before this Court of January 24, 2000, is hereby VACATED and that the matter is reset for trial before Magistrate Judge Larry M. Boyle on March 13, 2000 at 9:00 a.m. in the Federal Courthouse in Boise, Idaho.

Dated this 11 day of January, 2000.

B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES DISTRICT COURT

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United States District Court
for the
District of Idaho
January 18, 2000

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:98-cv-00378

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