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Opinion No. 08-46

Constitutionality of Senate Bill 2849, which would permit employers to require that English be spoken by employees while working

QUESTIONS

1. Should Senate Bill 2849, as amended, become law, would it be in conflict with the United States Constitution, federal law or rules?

2. Does Tennessee's Constitution, statutory law, or common law create criminal or civil liability or potential criminal or civil liability for an employer to require any employee to speak English while engaged in work?

3. State law recognizes Tennessee as an "employee at will state." How would Senate Bill 2849, as amended, affect an employer's right to hire or fire for "good cause, bad cause, or no cause at all?"

OPINIONS

1. It is unlikely that Senate Bill 2849 would be found to conflict with the United States Constitution, federal law or rules, at least as concerns private employers. Senate Bill 2849 may conflict with federal law with respect to public employers that choose to institute "English-only" policies.

2. Tennessee's present laws do not appear to impose civil or criminal liability on a private employer that requires employees to speak English while engaged in work if business necessity and notice are shown. The State courts would likely follow the majority position established by the federal courts on this issue. Public employers may, however, be subject to civil liability.

3. Tennessee's status as an "at will" state would be unaffected by the passage of this bill.

ANALYSIS

1. Senate Bill 2849 seeks to amend the Tennessee Human Rights Act, Tenn.Code Ann. § 4-21-101 et seq. ("THRA"). The stated intent and purpose of the THRA is to provide for the execution of policies within Tennessee that are consistent with the Federal Civil Rights Acts of 1964, 1968, and 1972 ("Title VII"), including the prohibition of discrimination in employment, public accommodations and housing. Tenn. Code Ann. § 4-21-101(a)(1). *See also Phillips v. Interstate Hotel Corp. No. L07*, 974 S.W.2d 680, 683 (Tenn.1998). Senate Bill 2849, as amended, proposes to amend the THRA by stating that it would not be an "unlawful employment practice" for an "employer to require an employee to speak, or an applicant for employment to agree to speak, English while engaged in work if such requirement is based on business necessity and the employer provides notice to employees of the requirement and the consequences of violating the requirement."[1] Because an "employer" is defined by the THRA to include the "state" and "persons employing (8) or more persons within the state," Senate Bill 2849, if enacted, would affect public as well as private employers. Each could be affected differently by passage of this Bill.

A. Private Employers and "English-Only" Policies.

Passage of this Bill would not likely conflict with the United States Constitution, federal law or rules. The majority of challenges to "English-only" policies have come under Title VII. Title VII prohibits discrimination "based upon race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e *et seq.* Challengers to "English-only" policies have generally argued that they constitute discrimination based upon "national origin." The United States Supreme Court and the Sixth Circuit Court of Appeals have yet to rule on this issue, but the majority of federal courts have held that "English-only" policies do not constitute discrimination based on national origin in violation of Title VII if business necessity and notice are shown.[2] *See, e.g., Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007); *Barber v. Lovelace Sandia Health Systems*, 409 F. Supp.2d 1313 (D.N.M. 2005); *Gonzalez v. Salvation Army*, 1991 WL 11009376 (M.D.Fla. 1991), aff'd without opinion, 985 F.2d 578 (11th Cir. 1993).

The Equal Opportunity Employment Commission ("EEOC") has also adopted guidelines concerning "English-only" policies. These guidelines take a restrictive view concerning the use of such policies:

> (a) When applied at all times. 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

[1] The phrase "unlawful employment practice" is not otherwise found in the Tennessee Code. Presumably, this phrase is intended to have the same meaning as "discriminatory practice," which is found in T.C.A. § 4-21-401. While this opinion will treat the phrases as identical, a court could reach a different conclusion. This opinion will also treat the terms "applicant" and "employee" as synonymous. Applicants, once hired and performing work, would be required to conform to the same "English-only" policy as other employees.

[2] These decisions almost exclusively discuss the effects of these policies on bilingual employees. A different decision could result where the affected employees could not speak English. However, generally, an employer may terminate an employee who cannot speak English proficiently where effective communication skills are necessary to adequately perform assigned tasks and those tasks have a manifest relationship to the employment in question. *See Stephen v. PGA Sheraton Resort LTD*, 873 F.2d 276, 280-81 (11th Cir. 1989).

> 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.
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> (b) When applied only at certain times. 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 business necessity.
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> (c) Notice of the rule. 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.

29 C.F.R. § 1606.7. The United States Supreme Court has determined that the EEOC's guidelines "are entitled to great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). Despite this pronouncement, some federal courts have expressly stated that the EEOC rules concerning "English-only" policies are not binding, declaring that the EEOC overstepped its authority when promulgating these guidelines. *Long v. First Union Corp. of Virginia*, 894 F.Supp. 933, judgment aff'd without opinion, 86 F.3d 1151 (4th Cir. 1996); *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730 (E.D. Pa. 1998).

Regardless of whether the EEOC guidelines are adopted, it does not appear that any federal court has taken a more restrictive approach to "English-only" polices than has the EEOC. As Senate Bill 2849 essentially tracks the EEOC guidelines, it would not likely run afoul of federal law as it presently stands.

It should be noted, however, that the law in this area is not well settled and the EEOC takes a dim view of "English-only" policies. If an employer institutes an "English-only" policy and cannot prove business necessity, the existence of the policy could be used as evidence of discrimination in a Title VII action. While the majority of federal courts require no more than a showing of business

necessity, proof of notice and consequences of noncompliance with policy, at least one court has noted that "even if an English-only rule may not by itself suffice to prove discrimination, such a policy may well be relevant to the issue of discriminatory animus." *Rivera v. Baccarat, Inc.*, 1997 WL 777887, at *4 (S.D.N.Y. 1997). The Ninth Circuit Court of Appeals has also stated that it could envision a situation where the enforcement of an "English-only" policy could be so draconian that it could amount to harassment. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir.1993). Thus, until the Sixth Circuit Court of Appeals or the United States Supreme Court rules on "English-only" policies, some uncertainty will remain concerning these matters.

B. Public Employers and "English-Only" Policies.

The State and other public employers are subject to numerous constitutional provisions and statutes which are not applicable to private employers. For instance, public employers are subject to suit under Title VI[3], the First Amendment of the United States Constitution[4], 42 U.S.C. § 1981[5], and 42 U.S.C. § 1983[6]. Because there is such a scarcity of case law examining these claims in this context, it is impossible to predict how a court would rule when presented with a challenge to an "English-only" policy instituted by a public employer. *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006), is one of the few cases to examine these issues. While some portions of the decision have been overturned, its basic holdings remain and the case still provides some instruction. In *Maldonado*, the Tenth Circuit Court of Appeals upheld the district court's dismissal of the plaintiffs' Title VI claims because the plaintiffs failed to make a threshold showing concerning the public employer's use of federal funds. The court did not reach the question of whether an "English-only" policy could be discriminatory had this threshold showing been made. The court also upheld the district court's determination that no First Amendment violation had occurred, but based on the court's reasoning it is conceivable that a First Amendment claim could have been successful had different facts been presented. The court also overturned the district court's dismissal of the plaintiffs' Section 1981 and 1983 claims.

These issues were also discussed in *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), albeit in a somewhat different context. In *Ruiz*, the Supreme Court of Arizona, was called upon to determine the constitutionality of an amendment that declared that "the State and all political subdivisions of [the] State shall act in English and in no other language." *Id.* at 987. The *Ruiz* court opined that such a construction would violate the First Amendment to the United States Constitution because it adversely impacts the constitutional rights of non-English-speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public

[3] Title VI is a general prohibition against discrimination by federally funded programs, but "covered entities can only be sued for employment discrimination [under Title VI] where a primary objective of the federal financial assistance to that program or activity is to provide employment." *Maldonado* at 1302.

[4] The First Amendment protects free speech and other important rights. *Id.* at 1309.

[5] Section 1981 provides equal rights to make and enforce contracts and to the benefits of laws for the security of persons and property. *Id.* at 1307.

[6] Section 1983 prohibits those acting under color of state law from depriving others of their federal rights. *Id.* at 1307.

employees. *Id.* at 987. The *Ruiz* court also concluded that such a construction would keep persons of limited English proficiency from exercising their constitutional right to participate in and have access to government, a right which is one of the fundamental principle[s] of representative government in this country. *Id.* at 997 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). Additionally, according to *Ruiz*, such a construction would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest. *Id.* at 987. While Senate Bill 2849 does not demand that only English be spoken by government employees, it could allow a public employer to institute a policy that would require that only English be spoken by its employees and, thus, could be vulnerable to the same challenges as the Arizona statute.

Neither *Maldonado* nor *Ruiz* is binding in Tennessee. However, one cannot be certain how the Sixth Circuit Court of Appeals would rule should a public employer adopt an "English-only" policy and be sued under Title VI, the First Amendment of the United States Constitution, 42 U.S.C. § 1981, or 42 U.S.C. § 1983. To this extent then, Senate Bill 2849 could conflict with federal law. Until the Sixth Circuit Court of Appeals or the United States Supreme Court rules on these issues, we simply do not know if a conflict exists between federal law and Senate Bill 2849.

2. An "English-only" policy would not likely subject an employer to liability under current Tennessee law. Challenges to an "English-only" policy under state law would likely be based upon the THRA. Tennessee courts have commonly looked to federal case law applying the provisions of federal anti-discrimination statutes as a baseline for interpreting and applying the THRA. *Newman v. Federal Express Corp.*, 266 F.3d 401 (6th Cir. 2001). It seems likely that Tennessee courts would adopt the majority position and hold that an employer's "English-only" policies would not violate the THRA with respect to bilingual employees where business necessity and notice are shown.

While avoiding liability under the THRA, public employers could face challenges based upon the Tennessee Constitution. For instance, Tennessee Constitution, Article 1, section 19 states, "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." This provision has a scope similar to that of the First Amendment of the United States Constitution. *Leech v. American Booksellers Ass'n*, 582 S.W.2d 738, 745 (Tenn. 1979). At least one federal court has ruled that an "English-only" rule does not violate the First Amendment and it is possible that the Tennessee courts would adopt the same rationale. *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006).

3. Tennessee's status as an "at-will" state would not be affected by passage of this bill. "Tennessee is an employment at-will state. Accordingly, in the absence of a contract providing otherwise, employers in Tennessee may terminate the employment of at-will employees for any or no cause." *Collins v. AmSouth Bank*, 241 S.W.3d 879, 884 (Tenn.Ct.App. 2007). This rule is not absolute and does not permit employers to terminate employees in violation of state or federal statutes. *Id.* Because the THRA and Title VII prohibit discrimination, "any cause" cannot be an unlawful cause.

Senate Bill 2849 proposes to change the language of the THRA and declare that it is not unlawful to require that only English be spoken at work. If passed, this bill would not affect an employer's ability to terminate an employee "for any cause or no cause." This bill would provide an employer with a defense when sued for discrimination. If an employer institutes an English-only policy, terminates an employee for violations of the policy, and is sued for discrimination, the employer could sustain a defense by proving that the English-only policy was a business necessity and that notice of the policy and consequences of its violation had been provided to employees.

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