

# Accent Discrimination Towards Bilingual Employees in the Workplace

By MARINA GARCIA\*

## Introduction

MANUEL FRAGANTE IMMIGRATED TO HAWAII AT THE AGE OF 60.<sup>1</sup> Upon arrival, he began searching for a job.<sup>2</sup> He applied for a clerk position at the City of Honolulu’s Division of Motor Vehicles and Licensing.<sup>3</sup> The position required taking an exam that tested “among other things, word usage, grammar and spelling.”<sup>4</sup> Fragante scored the highest out of 721 test-takers.<sup>5</sup> Shortly after, he was interviewed for the position.<sup>6</sup> During the interview, the interviewers had a difficult time understanding Fragante due to his accent.<sup>7</sup> The employer concluded that Fragante’s accent “would interfere with his performance of certain aspects of the job.”<sup>8</sup> As a result, Fragante dropped from the first to the third position on the list of applicants qualified and eligible for the position.<sup>9</sup> Fragante subsequently filed a Title VII claim alleging accent discrimination.<sup>10</sup> At the trial, two expert witnesses testified that, even though Fragante spoke with a heavy accent, his speech was comprehensible, however due to a history of discrimi-

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1. Fragante v. Honolulu, 888 F.2d 591, 593 (9th Cir. 1989).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 594.
9. *Id.*
10. *Id.*

nation against foreign accents like his, listeners may “turn off” and not understand him.<sup>11</sup>

Similarly, Sophia Poskocil, an immigrant from Colombia, interned as a student teacher for a high school while working on her teaching certification.<sup>12</sup> Her supervisor highly rated her teaching skills and wrote her a strong recommendation letter.<sup>13</sup> However, Poskocil was denied a regular full-time teaching position at the same high school.<sup>14</sup> Over six years, she applied nineteen times, and each time her application was denied.<sup>15</sup> Poskocil brought a claim alleging national origin discrimination.<sup>16</sup> During the trial, the high school claimed they based their decision not to hire Poskocil on poor student evaluations.<sup>17</sup> Students complained that Poskocil’s accent created difficulty understanding her and that “she barely spoke English.”<sup>18</sup> The Court agreed with the school’s argument that Poskocil’s accent interfered with her communication skills, even though Poskocil was applying for a position as a Spanish teacher.<sup>19</sup>

In contrast, Patricia Lee, born in China, obtained her medical degree from the National Taiwan University College of Medicine.<sup>20</sup> Lee moved to the United States and worked as a physician at the Veterans Administration Medical Center for fifteen years.<sup>21</sup> During that time, she was denied a promotion on several occasions.<sup>22</sup> Lee heard complaints about her accent from the superiors on a number of occasions.<sup>23</sup> On one occasion, a supervisor was angry with her when he was unable to understand her.<sup>24</sup> A different supervisor would not talk to her unless someone else was present and could interpret what she was saying.<sup>25</sup> Lee sued the Center alleging race and national origin dis-

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11. *Id.* at 597–98.

12. *Poskocil v. Roanoke County Sch. Div.*, 1999 WL 15938, at \*2–3 (W.D. Va. Jan. 11, 1999).

13. *Id.* at 4.

14. *Id.* at 5–6.

15. *Id.* at 5.

16. *Id.*

17. *Id.* at 5, n.2 (“For example, some students wrote in their evaluations that ‘the teacher’s lack of English made it hard to ask questions,’ or that the ‘instructor barely spoke English, was hard to understand.’”).

18. *Id.* at 3.

19. *Id.* at 17.

20. *Lee v. Walters*, 1988 WL 105887, at \*1 (E.D. Pa. Oct. 7, 1988).

21. *Id.* at 2.

22. *Id.* at 4–5.

23. *Id.* at 12.

24. *Id.* at 12.

25. *Id.*

crimination.<sup>26</sup> The Center argued that Lee's credentials from the Taiwanese University were inadequate because she failed the board certification in internal medicine.<sup>27</sup> The court denied this argument, holding that it was pretext for discrimination.<sup>28</sup> The court explained that even though the accent was "quite noticeable," it did not hinder her ability to communicate and she should not have been denied a promotion for it.<sup>29</sup>

These are just a few stories that demonstrate the prevalence of accent discrimination in the workplace. President Franklin Roosevelt espoused to Americans that, "all of our people all over the country, all except the pure-blooded Indians, are immigrants, or descendants of immigrants, including even those who came over here on the Mayflower."<sup>30</sup> In this one statement, Roosevelt articulated that with the lone exception of Native Americans, every American initially came over with a non-indigenous accent.

The United States workforce is constantly changing due to the flow of immigrants. The increasingly visible Latino, African American, and Asian populations in the United States invites reexamination of Title VII of the Civil Rights Act of 1964.<sup>31</sup> Indeed, scholars discuss whether Title VII is an adequate legal tool for addressing the present and future forms of discrimination likely to be experienced in a more diverse workforce.<sup>32</sup> Today, the term "national origin" discrimination connotes discrimination based on a person's cultural traits. However, to provide a sound and comprehensive basis for protecting employees from discrimination because of ethnic traits, the term "national origin" and its framework must be reevaluated.

This Comment will show that while Title VII prohibits an employer from discriminating against any individual with respect to his or her compensation, terms, condition, or privileges of employment because of that individual's national origin, the linguistic characteristics, such as an individual's accent should be protected under national origin. Thus, this Comment will argue that accent discrimination should be considered *per se prima facie* national origin discrimination and that an employer's only defense is to prove a reevaluated

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26. *Id.* at 1.

27. *Id.* at 10.

28. *Id.*

29. *Id.* at 19.

30. *Text of Roosevelt's Final Campaign Addressing Boston*, N.Y. TIMES, Nov. 5, 1944, at 38.

31. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 809 (1994).

32. *Id.*

Bona Fide Occupational Qualification (“BFOQ”) defense with stricter requirements, including a rejection of the customer preference defense.

To illustrate the effect the current statute has on discriminated employees, Part I will discuss both the legislative history and the evolving jurisprudence surrounding accent discrimination. In the statute’s current state, it does not address Title VII’s prohibition of discrimination based on national origin. This Comment will also discuss how the jurisprudence surrounding accent discrimination fails to equate accent discrimination to national origin discrimination. Part II will explain the current framework courts use and the rules surrounding the determination of a significant discriminatory impact in passing an employee over for a job based on a foreign accent. Part III will discuss the Bona Fide Occupational Qualification (“BFOQ”) defense. Part IV will provide suggestions on how courts should approach accent discrimination lawsuits.

## **I. Defining National Origin Discrimination: Accent Discrimination, To Be or Not To Be?**

Generally, national origin discrimination suggests treating someone less favorably because the individual or their ancestors are from a certain place or belong to a particular national origin group.<sup>33</sup> Specifically, Title VII prohibits discrimination against a person because he or she is associated with a particular national origin.<sup>34</sup>

Facially, however, the language of Title VII does not prohibit accent discrimination.<sup>35</sup> The Equal Employment Opportunity Commission (“EEOC”) Guidelines prohibit “employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group.<sup>36</sup> This Comment seeks to discuss how linguistic traits should be given heightened protection in the judicial system.

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33. 29 C.F.R. § 1606.1 (defining “National Origin Discrimination”).

34. U.S. Equal Emp. Opportunity Comm’n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002).

35. 29 C.F.R. § 1606.1.

36. See U.S. Equal Emp. Opportunity Comm’n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002) (“National origin discrimination includes discrimination because a person comes from a particular place.”); 29 C.F.R. § 1606.1 (“The Commission 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.”).

### A. Legislative History of National Origin Discrimination

Although Title VII prohibits discrimination based on national origin, the prohibition against “national origin” discrimination remains vague and ineffective. The legislative history of the term “national origin” consists of a few paragraphs during the House debate.<sup>37</sup>

Initially, Congress stated its understanding of what “national origin” meant.<sup>38</sup> Congressman Roosevelt made it clear that “national origin” meant the country from which a person came.<sup>39</sup> He also stated that the term has “nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.”<sup>40</sup>

Congressmen Rodino and Dent further discussed instances in which “a person of a certain national origin may be specifically required to meet the qualifications of a particular job.”<sup>41</sup> The Congressmen discussed a hypothetical situation where restaurants served the food of a particular nation.<sup>42</sup> Within the context of a restaurant, they concluded that an individual’s national origin in the operation of a specialty restaurant serving food like a “pizza pie” could properly be an occupational qualification that is reasonably necessary to the operation of the restaurant.<sup>43</sup> Additionally, Congressman Roosevelt linked language and national origin suggesting that the “national origin” definition of the statute encompassed language requirements.<sup>44</sup>

The debate continued in the Senate when Senator Humphrey mentioned the term “ethnic origin.”<sup>45</sup> However, Senator Humphrey neither clarified the term nor differentiated it from national origin.<sup>46</sup> Senator Kuchel commented briefly on the problems faced by “a Negro or Puerto Rican or an Indian or a Japanese American or an American of Mexican descent.”<sup>47</sup>

Although discussion over Title VII resulted in what some consider the longest debate in Senate history, the Supreme Court has characterized the legislative history of the statutory phrase “national origin”

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37. Perea, *supra* note 31, at 821.

38. *Id.*

39. *Id.* at 818.

40. *Id.*

41. *Id.* at 818–19.

42. *Id.* at 819.

43. *Id.*

44. *Id.*

45. *Id.* at 820.

46. *Id.*

47. *Id.*

as “quite meager.”<sup>48</sup> Not only has national origin ended up in Title VII as a part of the “boilerplate” statutory language of fair employment without any meaningful definition, but Congress has also ignored accent discrimination faced by ethnic minorities.<sup>49</sup>

### B. EEOC Guidelines for National Origin Discrimination

As a federal agency, the Equal Employment Opportunity Commission enforces Title VII.<sup>50</sup> The EEOC defines national origin discrimination broadly to include discrimination based on an individual’s physical, cultural, or linguistic characteristics.<sup>51</sup>

The EEOC has interpreted the phrase “national origin” to extend Title VII protection to bar discrimination against persons with characteristics closely correlated with national origin.<sup>52</sup> An example of discrimination based on cultural traits includes discrimination against someone wearing traditional African dress, even if that person is not African.<sup>53</sup> The EEOC explained that discrimination can be based on perception, such as an “employer’s belief that an individual is a member of a particular national origin group—an employer may perceive someone as Arab based on his speech, mannerism, and appearance.”<sup>54</sup>

Moreover, an accent is an important and fundamental aspect of a person’s ethnicity and national origin. Ethnicity refers to physical and cultural characteristics that make a social group distinctive, either from the perspective of group members or the perspective of outsiders.<sup>55</sup> Ethnicity consists of a set of ethnic traits that are inherent to the culture the person grew up with. These traits may include, but are not limited to, race, history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group.<sup>56</sup>

In its Guidelines of National Origin Discrimination, the EEOC defines national origin discrimination to include the “denial of equal employment opportunity because . . . an individual has the . . . linguis-

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48. *Id.* at 821.

49. *Id.* at 817.

50. *Id.* at 844.

51. U.S. Equal Emp. Opportunity Comm’n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002).

52. *Id.*

53. § 13(II)(B): NATIONAL ORIGIN DISCRIMINATION (2002).

54. *Id.*

55. Perea, *supra* note 31, at 833.

56. *Id.*

tic characteristics of a national origin group.”<sup>57</sup> The Ninth Circuit elaborated on linguistic characteristics as a component of national origin:

Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person’s national origin that caused the employment or promotion problem, but the candidate’s inability to measure up to the communication skills demanded by the job.<sup>58</sup>

Although an accent is different from protected characteristics like race or sex, it is “practically immutable,”<sup>59</sup> and as a result, must be protected by Title VII.

### C. National Origin Identity: Accent As an Immutable Characteristic

In a Due Process or Equal Protection Constitutional analysis, courts evaluate the concept of immutable characteristics to determine whether a group of people are considered part of a discrete and insular minority.<sup>60</sup> However, courts have paid insufficient attention to immutability in accent discrimination cases.<sup>61</sup>

The term “immutable characteristic” can be defined as an “accident of birth,” a characteristic that cannot be changed, or a trait that is so fundamental to the identity of an individual.<sup>62</sup> Examples of traits that individuals have from the moment they are born are: “race, color, genetic makeup, many disabilities, and national origin.”<sup>63</sup> These characteristics cannot be altered. Similarly, as explained below, after the age of nine, accents cannot be altered and thus should be considered an immutable characteristic, worthy of greater protection.<sup>64</sup>

A study of 109 speakers found that in cases of a new language acquired before the age of seven, there is no accent transferred past

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57. U.S. Equal Emp. Opportunity Comm’n Compl. Man. § 13: NATIONAL ORIGIN DISCRIMINATION (2002).

58. *Fragante*, 888 F.2d at 596.

59. Juan Perea, *English-Only Rules and the Right to Speak One’s Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265, 265–74 (1990).

60. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1508 (2011); *see also* *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

61. *See Fragante*, 888 F.2d at 596 (the Ninth Circuit upholding the rejection of an applicant whose heavy accent was likely to create communication difficulties without giving proper consideration to accent immutability).

62. Hoffman, *supra* note 60, at 1509.

63. *Id.* at 1515.

64. *See infra* Part I.C.

the age of seven.<sup>65</sup> From the age of seven to the age of nine, the likelihood of having a speech accent in the child's second language is very likely.<sup>66</sup> After nine, the chance of accent-free speech is close to 50%.<sup>67</sup> As the child becomes older, the individual's chances of speaking without an accent becomes minuscule.<sup>68</sup> Therefore, when employers argue that plaintiffs can take accent reduction courses to improve the skill of the language, the employers are discriminating against an attribute of the plaintiff that is beyond their control, which is indicative of national origin.<sup>69</sup>

However, the framers of Title VII did not expand on the meaning of national origin to include accent discrimination, nor did they specify what traits were attributable to national origin.<sup>70</sup> As the study demonstrated, an individual's accent can become an immutable characteristic that cannot be altered. Thus, an individual's accent is a characteristic that warrants greater Title VII protection.

#### **D. Accent Discrimination Issues and Policy Concerns: Society's Commitment to Diversity**

Courts have been extremely unsympathetic to claims of discrimination by someone whose ethnicity differs from the majority.<sup>71</sup> As a result, an employee who speaks with a "foreign accent" may be fired or denied a promotion, in spite of excellent qualifications and skills, because of the "discomfort and displeasure" he has caused as a result of his accent.<sup>72</sup> Despite Title VII's prohibitions against national origin discrimination, situations involving accent discrimination are sometimes not included.<sup>73</sup>

As a result, courts interpret Title VII in a manner that, "encourages uniformity and the rejection of ethnic differences" rather than

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65. Beatrice Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CALIF. L. REV. 1325, 1330-31 (1993) (explaining the experiment done in Sonia Tahta et al., *Foreign Accents: Factors Relating to Transfer of Accent From the First Language to a Second Language*, 24 LANGUAGE & SPEECH 265 (1981)).

66. *Id.*

67. *Id.*

68. *Id.* at 1331.

69. *Id.*

70. Joanna Carey Smith, *Emerging Issues: National Origin Discrimination in Employment*, POPULAR 'GOV'T (2002), at 17-18, available at <http://www.sogpubs.unc.edu/electronicversions/pg/pgfal02/article2.pdf> [<https://perma.cc/3G2N-S82K>].

71. Perea, *supra* note 31, at 807-08.

72. *Id.* at 808.

73. *Id.*



“encouraging equality and tolerance of difference.”<sup>74</sup> Courts often defer to the employers’ decision to deny employment because an applicant’s accent is “too foreign” or “excessive.”<sup>75</sup> A court’s protection depends on a broad construction of “national origin” that finds no support in the statute’s language or legislative history.<sup>76</sup>

In *Fragante*, based on one statement in the entire trial, the judge came to the conclusion that Fragante was too difficult to understand because he had a “difficult manner of pronunciation.”<sup>77</sup> Not only do courts fail to consider all the evidence, they also fail to place meaningful value on accent discrimination cases, “underestimating the harm done to qualified employees when they are denied jobs because of their accents.”<sup>78</sup> The most fundamental question is how current judicial reasoning in accent discrimination cases supports policies that are intended to incorporate immigrants who come from different countries and have different cultural backgrounds.

The Civil Rights Act was the first comprehensive legislation to address the problem of discrimination in American society.<sup>79</sup> With time, the Civil Rights Act became the foundation for equal employment opportunity laws.<sup>80</sup> In contrast to other countries that have been unable to accept the concept of equality and differences between ethnic groups, the United States offers political and economic freedom to immigrants and their descendants. Even though history points to the fact that protection for “national origin” is an afterthought—originally intended as a “boilerplate”<sup>81</sup>—the substantial growth in the national labor force of ethnic groups should force the judicial system to reevaluate the existing Title VII statute. The possibility of eliminating existing tension between employers and employees over linguistics differences is certainly feasible.

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74. *Id.* at 809.

75. *Id.* at 830.

76. *Id.*

77. *Fragante*, 888 F.2d at 598.

78. Braden Beard, *No Mere “Matter of Choice”: The Harm of Accent Preferences and English-Only Rules*, 91 TEX. L. REV. 1495, 1506 (2013).

79. Perea, *supra* note 31, at 806.

80. *Id.* at 809.

81. *Id.* at 811.

## II. Disparate Treatment Theory in Workplace Discrimination Cases

Under Title VII, a plaintiff may prove discrimination under a “disparate treatment theory” or a “disparate impact theory.”<sup>82</sup> Typically, plaintiffs who allege accent discrimination are limited to claiming disparate treatment. In disparate treatment cases, the plaintiff must demonstrate the employer’s intent to discriminate on the basis of race, color, religion, sex, or national origin.<sup>83</sup>

### A. Lack of Clear Method for Accent Discrimination Cases

Typically courts adopt the *Burdine* analysis for evaluating disparate treatment cases.<sup>84</sup> Under *Burdine*, the plaintiff must prove by the preponderance of evidence a prima facie case of discrimination.<sup>85</sup> To meet the burden, the plaintiff must prove four elements established in *McDonnell Douglas* that: (1) he was a member of a protected class; (2) he was qualified for the position; (3) an adverse employment action was taken against him; and (4) that adverse employment action “occurred under circumstances giving rise to an inference of discrimination.”<sup>86</sup> The burden of establishing a prima facie case is “not onerous.”<sup>87</sup> Each case is decided on the facts.<sup>88</sup> Generally, a plaintiff who is not hired based on his accent can establish a prima facie case of national origin discrimination.<sup>89</sup>

After the plaintiff has met the prima facie case, the burden shifts to the employer.<sup>90</sup> The employer must establish that he actually took the adverse action because of some “legitimate, nondiscriminatory reason.”<sup>91</sup> For an employer to have an acceptable business reason for discriminating against a plaintiff because of his accent, the employer must show that the accent “interferes materially with job performance.”<sup>92</sup> Once the employer establishes a legitimate, nondiscrimina-

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82. Nguyen, *supra* note 65, at 1331.

83. *Id.*

84. *See* Tex. Dep’t of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981).

85. *Id.* at 252–53.

86. *Id.* at 253–54.

87. *Id.* at 253.

88. *Id.* at 253 n.4.

89. *Carino v. University of Oklahoma Board of Regents*, 750 F.2d. 815, 819 (10th Cir. 1984).

90. *Id.*

91. *Id.*

92. *Fragante*, 888 F.2d at 596–97.

tory reason, the plaintiff can attempt to show that the stated reason was actually a pretext for a prohibited motivation.<sup>93</sup>

The plaintiff can also claim disparate treatment under a mixed-motive framework.<sup>94</sup> In *Price Waterhouse*, the court established that under this framework, the employee would have to show that even if the employer had legitimate reasons for taking an adverse action against the employee, the employee's protected trait was still impermissibly considered.<sup>95</sup> However, the plaintiff must prove that the employer discriminated intentionally.<sup>96</sup> Under the disparate treatment theory, the plaintiff can assert systematic or individual disparate treatment.<sup>97</sup>

Regardless of whether a court follows a *Burdine* or *Price Waterhouse* analysis, the plaintiff carries the ultimate burden of persuasion that he was discriminated against based on an illegitimate reason.<sup>98</sup> In mixed motive cases, the employer's burden is greater.<sup>99</sup> The employer must prove by a preponderance of the evidence that he would have discriminated absent illegitimate motives.<sup>100</sup>

The lack of a clear approach became evident in *Fragante*, where the court tried to follow the *Burdine* analysis.<sup>101</sup> First, the District Court ruled for the employer finding that the decision to deny *Fragante* the job was justified based on the BFOQ defense.<sup>102</sup> The Ninth Circuit, in its original decision, affirmed its reasoning based on the BFOQ defense.<sup>103</sup> In the amended opinion, the court disregarded its original decision based on the BFOQ defense, but nevertheless ruled in favor of the employer on the ground that the employer articulated a legitimate, nondiscriminatory reason for rejecting *Fragante* from the position.<sup>104</sup> Further, *Fragante* failed to show that the employer's explanation was pretextual.<sup>105</sup>

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93. *Id.* at 595

94. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 229 (1989).

95. *Id.* at 242.

96. *Id.* at 230–31.

97. *Id.* at 266.

98. *Id.* at 230.

99. *Id.* at 252.

100. *Id.* at 229.

101. *Fragante*, 888 F.2d at 595.

102. *Id.* at 593.

103. *Id.*

104. *Id.* at 599.

105. *Id.*

## B. Judicial Interpretation of Accent Discrimination Cases

Perhaps, lack of a clear, direct definition for the phrase “national origin” is the reason for an insufficient judicial approach in evaluating employers’ liability in accent discrimination cases.<sup>106</sup> Courts can freely shift their attention to different elements of the case; in some cases, courts have accepted employers’ argument that a communication error was a legitimate nondiscriminatory reason, in other instances, courts concentrated on the burden of proving pretext.<sup>107</sup> As a result, there is a lack of focus on the standard that courts will find sufficient for a plaintiff to be successful. Thus, courts create a virtually impossible hurdle for employees to prove that discrimination was based on their accent.

### 1. Lack of Effective Communication as a Legitimate, Nondiscriminatory Reason

Typically, courts find that a person’s accent serves as a surrogate for national origin discrimination if the accent is not related to a legitimate feature of the employment.<sup>108</sup> Courts concentrate on whether the defendants articulated a legitimate, nondiscriminatory reason for accent discrimination. In *Fragante*, the Court added a note of caution stating that accent and national origin are inextricably intertwined in many cases.<sup>109</sup> Therefore, employers that may feel protected to discriminate against national origin by falsely stating that it was not the person’s national origin, but the employee’s inability to measure up to positions demanding communication skills are not protected.<sup>110</sup> The *Fragante* court stated, “an adverse employment decision may be predi-

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106. See 110 Cong. Rec. 2549 (1964) (The Congressmen argued on the definition of “national origin” throughout the record.).

107. See generally *Fragante* 888 F.2d 591 (1989). See also *Carino v. University of Oklahoma Bd. Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (“The defendants assert that the plaintiff was ‘demoted’ because he was hired for his technical skills and was given the supervisor title in the first place only to increase his salary. Record, vol. 1, at 140. The court found this proffered reason to be a pretext.”).

108. *Kyriazi v. Western Elec. Co.* 461 F. Supp. 894, 924 (D.N.J. 1978), vacated *Kyriazi v. Western Elec. Co.*, 473 F.Supp. 786 (D.N.J. 1979) (“While it is clear that plaintiff does speak with an accent, and that at times she is difficult to understand, this is principally because she is extremely soft spoken. Nonetheless, none of this stood in the way of her obtaining two graduate degrees at Columbia, more than satisfactory ratings from at least some Western supervisors and literally glowing endorsements from subsequent employers.”).

109. *Fragante*, 888 F.2d at 597.

110. *Id.* at 596.

cated upon an individual's accent when—but only when—it interferes materially with job performance.”<sup>111</sup>

In *Carino*, the plaintiff had a noticeable Filipino accent and was improperly denied a position as a dental laboratory supervisor where his accent did not interfere with his ability to perform supervisory tasks.<sup>112</sup> *Carino* held that “a foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions.”<sup>113</sup> A similar court's approach is found in *Berke*, where the court held that an employee's “pronounced” Polish accent whose command of English was “well above that of the average adult American” was improperly denied two positions because of her accent.<sup>114</sup>

However, courts are suspect about prejudicial comments regarding an employee's accent, thus making it difficult for a plaintiff to prove pretext.<sup>115</sup>

## 2. Evidence of Intent or Motive: Difficulty of Proving Pretext

After the prima facie case and the legitimate, nondiscriminatory reason have been established, the plaintiff has a chance of proving pretext.<sup>116</sup> The job requirement is one of the most significant factors in determining whether an accent is pretext for national origin discrimination.<sup>117</sup> For example, a job requirement that specifies effective communication with customers could be a pretext for accent discrimination.<sup>118</sup> Consequently, for professions such as teachers, employers may legitimately consider a person's ability to effectively communicate.<sup>119</sup>

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111. *Id.*

112. *Carino*, 750 F.2d. at 819.

113. *Id.*

114. *Berke v. Ohio Dep't of Public Welfare*, 628 F.2d 980, 981 (6th Cir. 1980).

115. *See Watt v. New York Botanical Garden*, 2000 WL 193626, at \*7 (S.D.N.Y. 2000) (A statement such as: “I can't understand the way you speak” regarding the plaintiff's accent does not suggest an underlying bias to Jamaicans when the manager hired a person in the protected class and therefore it would be unlikely for the manager to “suddenly develop an aversion to members of that class.”).

116. *Price Waterhouse*, 490 U.S. at 229.

117. 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980) (preamble to “Guidelines on Discrimination Because of National Origin”) (“Many commentators strongly supported this revision of the Guidelines and indicated that these Guidelines would be beneficial in achieving equal job opportunities for all individuals regardless of their national origin, or their cultural or linguistic characteristics.”).

118. *Poskocil*, 1999 U.S. Dist. Lexis 259 at \*2–3.

119. *Id.* at 11

In *Poskocil*, the Court recognized that a professor's accent could be a "legitimate issue" for evaluation.<sup>120</sup> Thus, the court concluded, there was nothing improper about an employer making an honest assessment of the oral communication skills of a candidate for a job when such skills are reasonably related to job performance.<sup>121</sup> The court accepted the employer's argument that accent was a factor and a legitimate consideration in light of the importance of verbal communication in the classroom while hiring a teacher.<sup>122</sup>

Then, the burden shifted to Poskocil to establish pretext. The argument that "native speakers don't always make the best foreign language teachers" was not considered a discriminatory remark demonstrating bias against native speakers.<sup>123</sup> Rather, the court treated it as a neutral statement, insufficient to establish pretext.<sup>124</sup> The employer argued that plaintiff's termination was due to her "modeling" of language, pronunciation, and "idiomatic English."<sup>125</sup> The court found that the employer did not appear to have made any facially discriminatory remarks and as an English as a second language teacher, Poskocil's usage of proper English understandably bore some relationship to her job performance.<sup>126</sup>

Similarly, in *Fragante* the court found that a failure to hire a qualified Filipino based on his oral ability to effectively communicate in English was reasonably related to the normal operations of the clerk position.<sup>127</sup> *Fragante* tried to rebut the presumption by arguing that the selection and evaluation procedures used by the employer were deficient rendering the proffered reason for non-selection as a pretext for national origin discrimination.<sup>128</sup> The court disagreed, holding that, in spite of the process being imperfect, it was insufficient to establish intent.<sup>129</sup>

Again, a refusal to promote a Dominican immigrant for a hotel front desk position was not found to be discriminatory due to the "plaintiff's language barrier" and the alleged hotel requirement "for

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120. *Id.* (citing *Hou v. Com. of Pa., Dep't of Educ., Slippery Rock State College*, 573 F. Supp 1539, 1547 (W.D. Pa. 1983)).

121. *Id.* at 11.

122. *Id.* at 14.

123. *Id.* at 16-18.

124. *Id.* at 18.

125. *Id.*

126. *Id.*

127. *Fragante*, 888 F.2d at 597.

128. *Id.* at 598.

129. *Id.*

greater English proficiency than the plaintiff can exhibit.”<sup>130</sup> The court accepted the business necessity defense from the employer and stated that the employer showed, by clear and convincing evidence, that the employer believed in good faith that the plaintiff would not have been able to competently perform the duties of the position she sought.<sup>131</sup>

However, courts treat discriminatory remarks about an employee’s accent not connected to business necessity or effective communication as pretext.<sup>132</sup> In *Xieng*, the court questioned the employer’s reasons for failure to promote the plaintiff when the plaintiff received positive job performance evaluations and recommendations for promotions.<sup>133</sup> The court found the employer’s explanation was pretextual and “not worthy of credence.”<sup>134</sup>

In *Kyriazi*, the court found that in spite of the plaintiff speaking with an accent, the accent did not interfere with her ability to acquire three degrees, two of them from prestigious universities in the United States.<sup>135</sup> The court noted that the achievement of a “B average at Columbia by a recent immigrant cannot be so lightly brushed aside.”<sup>136</sup> Finally, the court questioned how the plaintiff could be considered unable to communicate effectively while receiving “above expected” ratings for her work.<sup>137</sup> The court agreed that the plaintiff spoke with an accent, and at times it was difficult to understand her, but that was due to her being extremely soft spoken, and not her accent.<sup>138</sup>

### III. The Bona Fide Occupational Qualification Defense in the Workplace

The existing framework in accent discrimination cases omit the importance of accent discrimination as per se national origin discrimination. As a result, the accepted framework for accent cases lack

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130. *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 376–77 (S.D.N.Y. 1978).

131. *Id.* at 378

132. *Akouri v. Fla. DOT*, 408 F.3d 1338, 1348 (11th Cir. 2005) (“They are all white and they are not going to take orders from you, especially if you have an accent,” was sufficient to establish discrimination.).

133. *Xieng v. Peoples Nat’l Bank of Wash.*, 821 P.2d 520, 525 (Wash. 1991) (where the court also questioned the employer’s allegation that the plaintiff was an unsatisfactory employee with a poor performance evaluation).

134. *Id.* at 525.

135. *Kyriazi*, 461 F. Supp. at 925.

136. *Id.*

137. *Id.*

138. *Id.* at 925.

mechanisms that address whether the decision to discriminate was based on conscious or unconscious bias. In cases where the decision was unconscious, it is impossible for the plaintiff to establish pretext. A better approach to these cases is to recognize accent discrimination is per se national origin discrimination, and that the only employer defense available should be the Bona Fide Occupational Qualification defense. However, the BFOQ needs to be amended to prohibit customer preference as a defense to accent discrimination cases.

### A. Conscious and Unconscious Accent Discrimination

A complicating factor in applying the existing Title VII framework to accent discrimination cases is that a plaintiff must establish that the defendant had a discriminatory intent or motive for making a job-related action.<sup>139</sup> In *Fragante*, the court reasoned that there was no discriminatory intent or motive based on the connection between Fragante's "pronounced accent" and his job requirement as a clerk.<sup>140</sup>

Professor Matsuda criticized the court's acceptance of the "difficult to understand defense."<sup>141</sup> Matsuda argues that more often than not it is challenging to determine if the accent actually affects job performance or if it differs from the "some preferred norm imposed, whether consciously or subconsciously, by the employer."<sup>142</sup> Further, Matsuda explains that pretext by its very definition involves a conscious choice to discriminate.<sup>143</sup> Thus, the requirement for the plaintiff to establish pretext is pointless.<sup>144</sup>

However, the situation differs in cases where accent discrimination is unconscious. According to Donald Rubin, the speaker's accent and the lack of comprehension may not be the main problem.<sup>145</sup> In an experiment where a group of listeners heard audiotapes with the same words spoken in different accents, the study found that the level of comprehension was different depending on whom the listeners see at the time they are listening to the tapes.<sup>146</sup> In one experiment, sixty-

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139. 42 U.S.C.A. §§ 2000(e)-(k)(1)(A)(i).

140. *Fragante*, 888 F.2d at 598.

141. Mari J. Matsuda, *Voices Of America: Accent Antidiscrimination Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1332 (1991) (citing *Fragante v. City of Honolulu*, 888 F.2d 593, 598 (9th Cir. 1989)).

142. *Id.*

143. *Id.* at 1352.

144. *Id.*

145. *Id.*

146. Donald L. Rubin, *Nonlanguage Factors Affecting Undergraduates' Judgments of Nonnative English-Speaking Teaching Assistants*, 33 RES. HIGHER EDUC. 511, 514-518 (1992).



two North American undergraduates listened to a four-minute recording.<sup>147</sup> As the students listened to the lecture presented by a university instructor, they saw a photograph of the speaker on the screen.<sup>148</sup> The speaker was either a Caucasian woman or an Asian woman.<sup>149</sup> The same speaker, a native English speaker from Ohio, spoke on all of the tapes.<sup>150</sup> At the end of the experiment, the comprehension test scores were lower for the group that observed an Asian speaker than for the group that observed the Caucasian speaker.<sup>151</sup> The experiment showed that when the students were presented with a photograph of the Asian speaker the accent was perceived as more foreign.<sup>152</sup> The study explained that, due to cultural stereotypes, listeners attach accepted norms to the speaker they are facing.<sup>153</sup> As a result, listeners may not even be aware that they are being discriminatory, thus creating an unconscious bias.<sup>154</sup>

Further, accents are sometimes equated to ineffective communication. However, people are capable of understanding each other by adjusting to different intonations and pronunciations.<sup>155</sup> Matsuda suggests that French and Italian accents are charming.<sup>156</sup> She further suggests that individuals tend to associate certain accents “with wealth and power.”<sup>157</sup> While at other times, accents can be deterring and “low class.”<sup>158</sup> When this is the case, courts must deal with the issue of pure prejudice.<sup>159</sup> Accents that are not charming are often considered “untrustworthy,” even though accents have nothing to do with the honesty and sincerity of a person who has the accent.<sup>160</sup> Matsuda argues that listeners tend to attach cultural meaning to an accent that often creates negative impressions and associations.<sup>161</sup>

Regardless of the link between the accent and the job in question, the employer may discriminate due to the unconscious bias that is a result of stereotypical norms. The employer unconsciously as-

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147. *Id.* at 514.

148. *Id.*

149. *Id.*

150. *Id.* at 515.

151. *Id.* at 518.

152. *Id.*

153. *Id.*

154. Matsuda, *supra* note 141, at 1355.

155. *Id.* at 1362.

156. *Id.* at 1352, 1364.

157. *Id.*

158. *Id.* at 1364.

159. *Id.*

160. *Id.* at 1377.

161. *Id.*

sumes that the plaintiff's accent will impair the job performance when in fact it will not.

## B. A Redefined BFOQ as an Employer's Defense

The majority of accent discrimination cases are brought under the disparate treatment theory. This Comment argues that the BFOQ defense should be re-evaluated. The BFOQ exception applies when an employer can prove that an employment preference based on one of these protected class characteristics is reasonably necessary to the normal operation of its particular business or enterprise.<sup>162</sup> Employers attempting to use the BFOQ exception as a legal defense must be prepared to explain why its bias on the basis of sex, religion, national origin or age is truly necessary to the position in the context of the business or enterprise.<sup>163</sup> For example, in *Fragante*, the court concentrated on whether the employment decision based on accent was permissible because it was based on a legitimate business reason that linked the position with effective communication.<sup>164</sup>

### 1. History of the BFOQ Defense

Section 703 of Title VII of the Civil Rights Act encompasses the the Bona Fide Occupational Qualification defense. This defense is a Title VII exception, which allows intentional discrimination in some instances:

Notwithstanding any provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fine occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.<sup>165</sup>

However, "Congress provided sparse evidence of its intent when enacting the BFOQ exception to Title VII."<sup>166</sup> The Interpretative Memorandum of Title VII referred to the BFOQ as a "limited exception to the Act's prohibition against discrimination, conferring upon employers a 'limited right to discriminate on the basis of religion, sex,

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162. Nguyen, *supra* note 65, at 1343.

163. *Id.* at 1333, n. 43.

164. *Fragante*, 888 F.2d at 596.

165. 42 U.S.C.A. § 2000e-2(e)(1).

166. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 297 (N.D. Tex. 1981).

or national origin where the reason for the discrimination is a bona fide occupational qualification.’”<sup>167</sup>

Congressman Rodino stated, “[t]here may be some instances where a person of a certain national origin may be specifically required to meet qualifications of a particular job.”<sup>168</sup> As examples of “legitimate discrimination,” the memorandum refers to “the preference of a professional baseball team for male players, the preference of a French cook for a French restaurant, and the preference of a business, which seeks the patronage of members of particular religious groups for a salesman of that religion.”<sup>169</sup>

Over time, the elements for establishing BFOQ have developed into a three-part test.<sup>170</sup> First, relying on the Interpretive Memorandum, *Dothard v. Rawlinson* concluded that Congress intended the BFOQ as an “extremely narrow exception” to Title VII.<sup>171</sup> Shortly thereafter, the EEOC pronounced that the BFOQ in claims based on sex and national origin should be “interpreted narrowly.”<sup>172</sup>

## 2. Judicial Interpretation of the BFOQ Defense

The BFOQ defense is applicable in cases where the discrimination is “intentional and unintentional.”<sup>173</sup> In determining whether a BFOQ defense will apply, courts established the “essence of the business test.”<sup>174</sup> The standards for the test were proposed in *Diaz v. Pan American World Airways, Inc.*<sup>175</sup> There, the court stated that the first element of the BFOQ defense is a “necessary” reason for discrimination—the discrimination must be “necessary” for the business to continue to operate, mere business convenience is insufficient.<sup>176</sup> The second element requires the defendant to provide proof “that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all” people being discriminated on “would be una-

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167. *Id.* at 297.

168. Perea, *supra* note 31, at 818–19.

169. 110 CONG.REC. 7213 (Mar. 30, 1964) (April 8, 1964) (Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers).

170. Int’l Union, United Auto., Aerospace and Agr. Implement Workers of America, *UAW v. Johnson Controls*, 499 U.S. 187, 194 (1991).

171. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

172. 29 C.F.R. § 1604.2(a).

173. *Wilson*, 517 F. Supp. at 297.

174. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

175. *Id.*

176. *Id.*

ble to efficiently perform the duties of the job involved.”<sup>177</sup> The “all or substantially all” test has applied to a gender-based BFOQ defense, in which Pan American refused to hire a male for the cabin attendant position.<sup>178</sup> The final element in the BFOQ defense requires proof that a less discriminatory alternative does not exist.<sup>179</sup>

#### a. Customer Preference Defense in Title VII Actions

Notwithstanding Congress’s initial intent to forbid the BFOQ defense based on customer preference, courts often accept this employer defense when applying the “essence of business” test.<sup>180</sup> The issue in *Diaz* was whether an airline’s policy that discriminated against male applicants for the flight attendant position was within the scope of the BFOQ defense.<sup>181</sup> *Diaz* applied as a flight cabin attendant.<sup>182</sup> Pan American Airways did not hire him due to their admitted policy of only hiring females for the cabin attendant position.<sup>183</sup>

In *Diaz*, the District Court held that restricting the position to females was a BFOQ for the position of an airline attendant because it found that women were better than men at “providing reassurance to anxious passengers, giving courteous personalized service, and in general making flights as pleasurable as possible within the limitations imposed by the aircraft operations.”<sup>184</sup>

However, the Fifth Circuit rejected this argument and declared that Pan American’s policy was not a BFOQ because it was not “reasonably necessary to the normal operation” of business.<sup>185</sup> Further, the court stated “customer preference may be taken into account only when it is based on the company’s inability to perform the primary function or service it offers.”<sup>186</sup> The court acknowledged the “very narrow standard for weighing customer preference” adopted by courts following *Diaz*.<sup>187</sup>

Again in *Wilson*, the plaintiff challenged Southwest’s female-only hiring policy.<sup>188</sup> The airline argued the BFOQ defense, explaining

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177. *Weeks v. Southern Bell Tel. & Tel.Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

178. *Id.*

179. *Int’l Union*, 499 U.S. at 192.

180. 29 C.F.R. § 1604.2(a)(1)(iii) (1972).

181. *Diaz*, 442 F.2d at 386.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 387.

186. *Id.* at 388.

187. *Wilson*, 517 F. Supp. at 302, n.24.

188. *Id.* at 295.

that it was “crucial to the airline’s continued financial success.”<sup>189</sup> The court held that Southwest Airlines “was not a business where various sex entertainment was the primary service provided.”<sup>190</sup> The court concentrated on causation to conclude that Southwest “had failed to establish by competent proof that revenue loss would result directly from hiring males.”<sup>191</sup>

#### IV. Suggested Solutions to Address Accent Discrimination

Congress did not try to protect an employer’s rights to make hiring decisions based on customer attitudes and preferences.<sup>192</sup> The BFOQ exception did not justify “the refusal to hire an individual because of the preferences of . . . the employer, clients or customers,” except where “necessary for authenticity.”<sup>193</sup> As Congress stated, according to the EEOC, the application of BFOQ exception in claims based on national origin should be applied narrowly.<sup>194</sup> “The BFOQ exception should be limited to situations only where individuals from different nations cannot perform the duties of the job in question.”<sup>195</sup> National origin must also be an actual qualification for job performance.<sup>196</sup> Even though this defense is limited, courts have interpreted it in accent discrimination cases more generously by allowing employers to use customer preference arguments.<sup>197</sup>

##### A. Rejection of Customer Preference Defense

More often than not, plaintiffs in accent discrimination cases are unsuccessful.<sup>198</sup> In order to change this outcome, the current burden of proving accent discrimination should be reevaluated in order to deter employers from discriminating against employees with an accent based on an enigmatic “customer preference defense.” One solution is to afford less weight to customer preference. This will allow courts

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189. *Id.* at 293.

190. *Id.* at 302.

191. *Id.* at 304.

192. *Id.*

193. 29 C.F.R. § 1604.2(a)(1)(iii) (1972).

194. *Wilson*, 517 F.Supp. at 297.

195. U.S. Equal Emp. Opportunity Comm’n Compl. Man. § 604.10(c): THEORIES OF DISCRIMINATION: STATUTORY DEFENSES (2002).

196. *Id.*

197. *See e.g., Diaz*, 442 F.2d at 389 (stating that customer preference is available when it is based on the “company’s inability to perform the primary function or service it offers.”); *see also Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933, 937 (S.D. Miss. 1987) (allowing customer preference defense to justify a “bona fide occupational qualification.”).

198. *Perea*, *supra* note 31, at 830.

to focus on the actual skills required for a position and whether it is proficiency in English or the accent that precludes an employee from successfully performing the job duties. Applying the *Matsuda* factors can help facilitate this analysis.<sup>199</sup>

The current framework of the BFOQ defense places the burden on the employers to prove that discrimination is “reasonably necessary to the normal operation of that particular business or enterprise.”<sup>200</sup> Even though courts typically reject customer preference defenses, cases like *Fragante* and *Pokoscil* suggest that employers may use this defense rather broadly, such as when employees are dealing with the public or students.<sup>201</sup>

In *Fragante*, the court accepted “dealing with the public” as a customer preference defense.<sup>202</sup> There, the court held, and the defendant’s argued, that *Fragante*’s inability to “deal tactfully and effectively with the public” was sufficient to deny him employment.<sup>203</sup> Likewise in *Poskocil*, the court treated students’ complaints regarding understanding the teacher due to her accent as a valid BFOQ defense.<sup>204</sup>

By accepting the customer preference defense, courts have neglected the plaintiff’s ability to perform the job exceptionally.<sup>205</sup> By reevaluating the accepted BFOQ defense, plaintiffs must still prove that they can competently perform their job, and defendants must prove that the job necessarily requires an employee to speak without an accent. The reevaluation of the interpretation of the BFOQ defense may have given *Poskocil* or *Fragante* a fair chance in defending their arguments. Thus, courts should rely less on the customer preference defense.

A new judicial approach should ensure there is higher scrutiny of legitimate and valid reasons against accent discrimination. Finding a solution to this would not only enable employers to justify their decisions, but the clarification would help raise prospective employee awareness of the English proficiency required for a position. This ap-

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199. *Matsuda*, *supra* note 141, at 1368.

200. 42 U.S.C. § 2000e-2(e) (1988).

201. *See e.g.*, *Fragante*, 888 F.2d at 597 (holding that customer preference is available when it is based on the “important skills required for the position” such as “their communication skills.”). *See also Poskocil*, 1999 U.S. Dist. Lexis 259 at \*5, n.2 (holding that students’ evaluations regarding the “teacher’s lack of English” was a sufficient defense to reject full time employment to *Poskocil*).

202. *Fragante*, 888 F.2d at 597.

203. *Id.*

204. *Poskocil*, 1999 U.S. Dist. Lexis 259 at \*1.

205. *Id.* at 1.

proach would enable courts to evaluate claims that effective communication is necessary for the position while ensuring that the customer preference defense would no longer be accepted as a legitimate, non-discriminatory reason without more valid reasons.

An employer should be required to present evidence that the employee had difficulty communicating. Special attention should be paid to the language used as distinguished from the accent in an attempt to ascertain which of the two is causing difficulties. If an employee is difficult to understand, the employer should be required to answer several questions before making any decision regarding the job or position. Questions such as: Why is it difficult to understand the employee? Is it due to a lack of proficiency in the English language? Is the employee soft spoken? Is the employee's accent impossible to understand? Finally, the employer should be required to provide prior evaluations and reviews. This will allow courts to analyze whether the communication problem is related to an accent or whether some other prejudice is affecting the employee's termination or demotion.

By placing a higher burden on the employer to demonstrate the reasons for their decisions, courts will be better equipped to distinguish between accent-based discrimination and English proficiency issues.

### **B. Expanding Elements of the BFOQ Test**

As the workplace continues to expand, as will its diversity, courts will face more issues regarding communication and accent discrimination. Courts acknowledge that "there are some job positions for which the ability to communicate effectively is a legitimate consideration."<sup>206</sup> Therefore, in some cases, it is appropriate for an employer to make honest assessments of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance.<sup>207</sup>

When such issues arise, employers may present a model of communication in the workplace, which has three main elements: (1) effective communication skills are necessary for job X, (2) accent impedes effective communication, and (3) the applicant speaks with an accent. If all three elements are found then courts can conclude that the applicant or employee lacks the necessary skills for the job.<sup>208</sup>

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206. *Shieh v. Lyng*, 710 F. Supp. 1024, 1032 (E.D. Pa. 1989).

207. *Fragante*, 888 F.2d at 596-97.

208. Rosina Lippi-Green, *Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts*, 23 LANGUAGE IN SOC'Y 163, 178-80, 184 (1994).

However, this assessment must be fair to the plaintiff. A more thorough approach for the evaluation of the requirements should be in place. Professor Matsuda offers a number of factors that a court should take into consideration while evaluating whether there is a nexus between accent and job duties.<sup>209</sup> Matsuda suggests that the following factors will increase the objectivity of court's assessment of a plaintiff's claim: What level of communication is required for the job? Was the candidate's speech fairly evaluated? Is the candidate intelligible to the pool of relevant non-prejudiced listeners, such that job performance is not unreasonably impeded? What accommodations are reasonable given the job and any limitation in intelligibility.<sup>210</sup>

The use of these factors will allow courts to evaluate the nature of the job in question, whether it is primarily oral, and what the consequences of miscommunication are.<sup>211</sup> Matsuda emphasizes the importance of cohesively evaluating and analyzing the conditions, context, and the amount of contact at the job.<sup>212</sup> For example, a dispatcher speaking to the same truck driver many times a day, where the context is indirect, over the phone, yet not limited to one-time exchange, necessarily differs from a situation where communication is not distributed evenly such as a doctor-patient interaction.<sup>213</sup>

Applying the more extended BFOQ defense to *Fragante* and *Poskocil*, the courts may have held differently. In *Fragante*, the court could have reviewed Fragante's interviewing process differently to focus on whether the accent would impede job performance. The Court should have used the Matsuda factors to test Fragante's communications skills. Again, in *Poskocil*, the court might have paid less attention to the impressions of the students, and their possible bias towards their teacher.

## Conclusion

The long history of discrimination against speakers with foreign accents in the United States suggests that people with accents deserve adequate protection under Title VII. Further, the strong link between accent and national origin justifies Title VII protection. Similar to national origin, accent is practically immutable thus requiring accurate protection for accent discrimination. Further, by eliminating the cus-

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209. Matsuda, *supra* note 141, at 1367.

210. *Id.* at 1368.

211. *Id.*

212. *Id.* at 1370.

213. *Id.* at 1370-71.



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tomor preference defense in accent discrimination cases, and implementing the Matsuda factors, courts will ensure fair treatment of prospective employees with accents.