Mercer Law Review

Volume 32
Number 4 *Annual Fifth Circuit Survey*

Article 15

7-1981

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Garcia v. Gloor: Mutable Characteristics Rationale Extended to National Origin Discrimination

In *Garcia v. Gloor,*[1] the Fifth Circuit Court of Appeals upheld a district court ruling that an employer's policy requiring employees to speak only English while at work did not violate the Civil Rights Act of 1964[2] prohibition against national origin discrimination. In so ruling, the court extended the mutable-immutable characteristics rationale that the Fifth Circuit first outlined in *Willingham v. Macon Telegraph Publishing Co.*[3]

The plaintiff in *Garcia v. Gloor,* Hector Garcia, was an American citizen of Mexican descent.[4] While fluent in English, he spoke Spanish at home. In 1975 Garcia was employed as a salesman by the Gloor Lumber Company of Brownsville, Texas. The company had a policy prohibiting employees from speaking Spanish on the job unless they were serving a Spanish speaking customer. The policy was narrowly drawn and did not apply to Spanish speaking employees not working in contact with English speaking customers nor did it apply to any employee on break. The court found that the vast majority of Gloor's employees were Hispanic, and the company had no history of overt discrimination against Hispanics.

In June of 1975, Garcia was asked a question by another employee about an item of stock. Garcia responded in Spanish. The conversation was overheard by a supervisor and, immediately thereafter, Garcia was fired.

Garcia brought suit claiming the policy was discriminatory on its face because the Spanish language is to Mexican-Americans what color is to other races.[5] Garcia also alleged the policy was discriminatory in its dis-

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1. Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3511 (Jan. 20, 1981).

2. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976) (hereinafter Title VII or the Act):

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

3. 507 F.2d 1084 (5th Cir. 1975).

4. All facts are taken from the court's opinion, 618 F.2d at 266-67.

5. The court, relying on Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (in which the

parate adverse impact upon persons of a particular national origin. Garcia claimed both forms of discrimination were prohibited by Title VII.

The court ruled that, since the English-only policy concerned a requirement with which Garcia could have easily complied, the policy was not discriminatory. Further, the court ruled that disparate adverse impact was not an issue in the case. In order to understand fully the ramifications of the court's application of the mutable-immutable characteristics test in *Garcia v. Gloor,* it is necessary to review briefly the development of the disparate adverse impact cause of action as well as the development of the mutable-immutable characteristics rationale.

When the Civil Rights Act of 1964 was passed, it was viewed by Congress as a prohibition against discrimination in the private work place that proscribed *disparate adverse treatment* based on an employee's race, color, religion, sex, or national origin.[6] The cornerstone of any claim of disparate adverse treatment was a showing of discriminatory intent on the part of the employer. This intent was often proved in disparate adverse treatment cases by showing that employees similarly situated to the aggrieved employee in respects other than sex, race, religion, or national origin were treated more favorably in some employment decision.[7]

In 1971 a major shift occurred in employment discrimination law. In *Griggs v. Duke Power Co.,*[8] the Supreme Court considered an employment policy which required all employees to have high school diplomas. Statistics showed that this policy prohibited proportionately more blacks than whites from being hired. The Supreme Court ruled that even facially neutral employment practices, carried out in complete good faith and in the absence of any discriminatory intent, could still violate Title VII if those practices had a disparate adverse impact upon groups protected by the Act.[9] The Court held that, if an employment practice which operates to exclude protected groups cannot be shown to be job related, the practice is forbidden.[10]

Once an employment practice was shown to have a disparate adverse impact upon a protected group, the burden shifted to the employer to show that the policy was business related.[11] In this way, absent discrimi-

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court held that a policy requiring American citizenship was not on its face discriminatory against Hispanics), held that language discrimination does not equate to national origin discrimination. 618 F.2d at 269.

6. B. SCHEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (1st ed. 1976) (citing S. REP. No. 1137, 91st Cong., 2d Sess. 4 (1970).

7. East v. Romaine, Inc., 518 F.2d 332 (5th Cir. 1975).

8. 401 U.S. 424 (1971).

9. *Id.* at 431.

10. *Id.*

11. Of course an entire body of law has developed around this phrase, and the business necessity-job relatedness standard is not a rule which can be applied rotely. In cases of

natory intent, the employer was still allowed to make the day-to-day decisions necessary to run his business.[12] The decision marked the shift from interpreting Title VII as prohibiting only practices based upon discriminatory intent to prohibiting also practices which were discriminatory only in effect.

But as the prohibition against overt discrimination became well-defined, the circuit courts were confronted with more subtle and exotic forms of discrimination. In 1975 the Fifth Circuit decided *Willingham v. Macon Telegraph Publishing Co.*[13] Willingham, a male, sought employment as a layout artist with the Macon Telegraph, a daily newspaper in Macon, Georgia.[14] The Telegraph had a company policy requiring employees who came in contact with the public to be dressed neatly and groomed in accordance with the standards of the local business community. This policy had been applied to prohibit men, but not women, from wearing long hair. Willingham had shoulder-length hair, and for that reason alone he was not hired. Willingham brought suit claiming he had been discriminated against on the basis of sex in violation of Title VII. A three judge panel overruled the trial court's dismissal of the case and held the policy to be a prima facie case of discrimination.[15] The panel remanded the case and instructed the trial court to determine whether the grooming standard was a bona fide occupational qualification.[16]

The Fifth Circuit, sitting en banc, reversed the three judge panel and, on three alternative grounds, upheld the employer's policy.[17] In passages

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adverse disparate impact upon blacks, one court has held that, in order for a practice to be a business necessity, the practice must be related to the employee's ability to do the job efficiently and safely *and* there must be no acceptable alternative that will accomplish that goal "equally well with a lesser differential racial impact." Green v. Missouri Pacific R.R., 523 F.2d 1290, 1298 (8th Cir. 1975). The Supreme Court, however, has stated that once a prima facie case of disparate adverse impact has been shown, the employer can rebut this presumption by showing that the employment policy fosters efficiency and safety. The burden is then shifted to the plaintiff to show that the same end can be achieved with a less undesirable racial effect. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). In cases not concerning disparate adverse impact upon blacks, the courts simply have required the policy to be related to safety and efficiency, Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975).

12. "The touchstone is business necessity." 401 U.S. at 431.

13. 507 F.2d 1084 (5th Cir. 1975).

14. All facts are taken from the court's opinion, 507 F.2d at 1087-88.

15. Willingham v. Macon Telegraph Pub. Co., 482 F.2d 535, *rev'd*, 507 F.2d 1084 (5th Cir. 1975) (en banc).

16. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1976). The employer is required to show that a policy or requirement is a bona fide occupational qualification when charged with deliberate or intentional discrimination. The lower standard of "business necessity" is the relevant defense when the employer is charged with the less invidious form of disparate adverse impact discrimination. *See* Dothard v. Rawlingson, 433 U.S. 321 (1977).

17. The first two grounds upon which the court relied had been used earlier by the District of Columbia Circuit Court. The D.C. Circuit ruled that prohibiting grooming standards

intermingled with more widely followed reasoning, the court articulated the mutable-immutable characteristics rationale.

> Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women *if* the distinction is based upon some fundamental right. But a hiring policy that distinguishes on some other ground . . . is related more closely to the employer's choice of how to run his business. . . .[18]

It is important to note that *Willingham* concerned "sex-plus" discrimination against a man.[19] The court did not address the company policy's disparate impact upon a protected class under the rationale of *Griggs v. Duke Power Co.*

Even in the area of grooming codes, in which the other circuits have unanimously found no violation of Title VII, the mutable-immutable characteristics rationale has not been followed widely.[20] In fact, only the Ninth Circuit has followed it.[21] The majority of circuit courts have simply held that doing away with dress and grooming codes was not within the intent of Congress when sex was included in Title VII as a disfavored employment factor.[22]

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was not within the intent of Congress when sex was made a disfavored employment criteria, Dodge v. Giant Foods, Inc. 488 F.2d 1333 (D.C. Cir. 1973), and that grooming codes that provided one standard for women and another for men were not discriminatory since both sexes had a standard. Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

18. 507 F.2d at 1091 (emphasis in original).

19. "Sex-plus" discrimination is a term of art referring to discrimination based upon the sex of the employee plus some apparently neutral hiring criteria, such as grooming standards. Another example of impermissible sex-plus discrimination is a policy prohibiting the hiring of women (sex discrimination) with pre-school children (neutral characteristic). Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971).

20. Barker v. Taft Broadcasting Co., 549 F.2d 400, 402 (6th Cir. 1977) (McCree, J., dissenting).

21. Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974). The Fourth Circuit quoted the rationale favorably when dealing with a grooming standard that discriminated against a white male in Earwood v. Continental Southwestern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976). However, when a grooming standard prohibiting beards was shown to have a disparate adverse impact upon black males, the court required a showing of "business relatedness" before upholding the policy. Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 42 (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978).

22. Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2nd Cir. 1976). Dodge v. Giant Foods, Inc., 488 F.2d 1333 (D.C. Cir. 1973). In Knott v. Missouri Pac. R.R. 527 F.2d 1249 (8th Cir. 1975), a case concerning male grooming standards, the court found no congressional intent to abolish these codes. *But see* Carrol v. Talman Fed. Sav. & Loan Assoc., 604 F.2d 1028 (8th Cir. 1979), in which a female employee challenged a company policy that required female, but not male, employees to wear prescribed uniforms. The court lookd for but failed to find a business

In *Garcia v. Gloor*, the Fifth Circuit returned to the mutable-immutable characteristics rationale and applied it in the area of national origin discrimination. The court stated that, in passing Title VII, Congress intended to focus "its laser of prohibition" upon characteristics that were beyond the employee's ability to alter.[23] From this premise the court reasoned that the Act does not reach employment policies, even arbitrary policies, that are not based upon an immutable characteristic or a fundamental right.[24]

The court noted, however, that certain employment criteria based upon mutable characteristics still may be held to be discriminatory. It cited as examples policies requiring high school diplomas and policies prohibiting employees from living in a certain area.[25]

In deciding whether language is a mutable characteristic, the court focused upon the individual plaintiff, Hector Garcia. The court found that Garcia was fluent in English, and that he could have complied easily with the policy.

The application of the mutable-immutable characteristics rationale in *Garcia v. Gloor* is a significant expansion of the doctrine. First, the application is an expansion of the types of discrimination to which the court can apply the rationale. The court in *Willingham* was careful to state that the rationale was applicable only to "sex-plus" discrimination.[26] Without any limiting language in *Garcia*, the court appears to hold that the rationale can be applied to any form of discrimination proscribed by Title VII.

Next, the application is an expansion of the groups to which the rationale might be applied. Certain groups are clearly favored by Title VII.[27] The mutable-immutable characteristics rationale, which arose in the context of a claim of discrimination by a person not within one of those groups, is not necessarily transferrable to a case concerning discrimination against a person clearly within the protection of the Act.[28]

The mutable-immutable characterics rationale, however applied, is open to criticism on many levels. First, the rationale appears to be based upon an erroneous presumption. As the court admitted, religion is a pro-

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necessity for the policy and held it to be in violation of Title VII.

23. 618 F.2d at 269.

24. *Id.* at 269-70.

25. *Id.* at 269 n.6.

26. 507 F.2d at 1092.

27. *See* United Steel Workers v. Weber, 443 U.S. 193 (1979).

28. For example, it is difficult to imagine the holding in *Weber*, in which the Court upheld an apprenticeship program that discriminated against whites, being used to uphold a similar plan that discriminated against blacks. *But see* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

hibited employment factor under Title VII.[29] Clearly, immutability, or lack thereof, is not a common thread that runs through all the prohibited employment factors listed in Title VII. The court must strain to discern a congressional intent to prohibit only discrimination based upon immutable characteristics since Congress saw fit to list a characteristic, religion, which is itself mutable.[30]

Next, on a purely analytical level, the mutable-immutable characteristics rationale requires the same analysis used by other courts in cases arising under the equal protection clause of the fourteenth amendment. The fourteenth amendment has been used to shield an individual from discriminatory state action when that individual is a member of a discreet and insular minority,[31] or when the state infringes upon a fundamental right.[32] However, an employee's statutory rights against a private employer are not limited to the restraints placed upon governments in constitutional cases. While the Supreme Court has stated that fourteenth amendment analysis is a useful starting point in Title VII cases,[33] it is apparent that the Supreme Court holds employers to a much higher standard of conduct under Title VII than that to which governments are held under the fourteenth amendment.[34] Since the Supreme Court has mandated a heightened standard of review, it is doubtful that the Fifth Circuit should limit its review of Title VII claims to what is essentially a constitutional standard.

On a more practical level, the rationale is so fraught with exceptions and inconsistencies that it is extremely cumbersome to apply. Given the elements of the mutable-immutable characteristics rationale, as outlined by the court, there is no logical distinction between what the court obviously considers permissible employment criteria based upon mutable characteristics, *e.g.*, hair length and language, and prohibited employment criteria based upon mutable characteristics, *e.g.*, high school graduation and place of abode. Both sets of characteristics are mutable, but the court gave no good reason why some are prohibited while others are not.

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29. 618 F.2d at 269.

30. The court clearly recognized that the rationale could not be extended to religious discrimination and attempted to rationalize the exception by stating that this fundamental right was also a prohibited characteristic. *Id.* at 207.

31. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Justice Stone's famous footnote is the origin of the notion that discreet and insular minorities are to be protected from invidious or arbitrary governmental treatment by the equal protection clause of the fourteenth amendment.

32. Skinner v. Oklahoma, 316 U.S. 535 (1942).

33. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

34. Washington v. Davis, 426 U.S. 229 (1975). The Court held that employment discrimination is subject to a "more probing judicial review" under Title VII than under the fourteenth amendment. *Id.* at 247.

This inconsistency is even more glaring in light of other cases concerning clearly mutable characteristics that have been ruled impermissible employment criteria. The Fifth Circuit has held that employment criteria which excludes persons with criminal records are impermissible, absent a showing of job-relatedness.[35] Other courts have found garnishment,[36] bankruptcy,[37] or less than honorable discharges,[38] all of which are clearly mutable characteristics, to be prohibited employment criteria.

Finally, the rationale is simply not true to the spirit or form of the landmark case in disparate adverse impact analysis, *Griggs v. Duke Power Co.* The court in *Garcia* correctly noted that Title VII does not prohibit all arbitrary employment practices.[39] But the court failed to mention that arbitrary employment practices were expressly forbidden by the Supreme Court in *Griggs* when they can be shown to have an adverse impact upon a protected group.[40] The Engligh-only rule, set in a business in south Texas, would be violated most often by persons of Mexican origin. The rule obviously would have its greatest impact upon this protected minority.[41] The Court in *Griggs* clearly stated that the only permissible discrimination of this type is that which is business related.[42]

By focusing on the named plaintiff and finding that he easily could have complied with the employer's policy, the court in *Garcia* stated that the entire rationale of *Griggs* could be avoided.[43] But the court did not properly interpret the focus that the Court in *Griggs* mandated in disparate adverse impact cases. In looking at disparate adverse impact, the proper focus is upon the affected group.[44] The Court in *Griggs* did not

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35. Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972).

36. Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).

37. In Bell v. Citizens Fidelity Bank & Trust Co., 105 LAB. REL. REP. (BNA) (24 Fair Empl. Prac. Cas.) 792, the Sixth Circuit held that discharging an employee because he filed for bankruptcy could be an impermissible employment criteria and remanded the case to the district court.

38. Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975).

39. 618 F.2d at 269-70. The court hypothesized that Title VII would not prohibit an employer from hiring only persons of a certain zodiac sign or from not hiring persons who smoke.

40. 401 U.S. at 431.

41. The court was obviously influenced by the fact that Gloor Lumber hired many Hispanics. However, the court was looking for the impact of an employment policy that can cause an employee to be fired. The court need not look at the statistics on how many minorities have been hired. Instead, it should have looked at the number of Hispanics fired because of the policy.

42. 401 U.S. at 431.

43. 618 F.2d at 270.

44. The focus should be upon the affected group even when, as here, the suit is not a class action. Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973).

question whether the named plaintiff readily could have secured a high school diploma. To do so is to ignore the entire concept of the prohibited "built-in headwinds" certain policies create for protected groups.[45] By reversing the focus of *Griggs*, the court enabled itself to ignore the fact that only persons of a protected minority could violate the policy.

In light of all the flaws in the mutable-immutable characteristics rationale, it is puzzling why the Fifth Circuit has continued to follow it and indeed to expand upon it. Perhaps the court is guilty of not following its own admonition to consider first "the problem not the answer."[46] Given the integral part the English language plays in all commercial transactions, the court is on firm ground in allowing an employer to require employees to speak the language. Therefore, the result the court reached in *Garcia* is probably correct. But there is a more practical and logical way to arrive at this conclusion. The employer should have been required to show that the policy was business-related.[47] In order to eliminate confusion and reduce the risk of abuse by both employers and the lower courts, the mutable-immutable rationale should be abandoned and replaced with a job-relatedness standard.

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45. 401 U.S. at 432.

46. 618 F.2d at 268 (citing Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947)).

47. *See* Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) for a treatment of a similar claim, although brought under 42 U.S.C. § 1981 (1976) instead of Title VII. In *Frontera*, the court looked for and found job relatedness in a policy requiring Civil Service tests for carpenters to be administered in English.