CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

LEGAL OPINION

To: Chairperson Jean Quan and Members of the Finance and Management Committee
From: Vicki Laden, Supervising Deputy City Attorney
Subject: Hiring Bilingual Employees In Public Contact Positions
Date: March 11, 2008

I. Question By Chairperson Quan

What can the City of Oakland lawfully do to increase bilingual hiring, as required by the Equal Access to Services Ordinance, O.M.C. 2.30?

II. Brief Answer

The City may require that applicants for "public contact positions" have language fluency in an underserved language in departments that do not have sufficient numbers of bilingual employees to serve the public. Such a requirement does not violate civil rights protections or any other statute, ordinance or regulation. Even were the Ordinance to have a disparate impact on a protected group, it would not violate Title VII of the Civil Rights Act of 1964, the Fair Employment and Housing Act, or any other statute or constitutional provision. Many job requirements have a disparate impact on protected groups. That, by itself, does not render such requirements unlawful if they are job related and consistent with business necessity. If a public contact position's essential functions involve communication with members of an underserved language group, such a requirement would be job related and consistent with business necessity. Departments may be required to demonstrate, in such instances, that they have required applicants to have bilingual skills in an underserved language. This Office does not know how frequently the Department of Personnel or City agencies or departments have utilized such requirements in the hiring process for individuals applying for public contact positions in the City.

III. Background

The Equal Access Ordinance, O.M.C. 2.30, provides individuals with limited English proficiency access to local government services. The Ordinance requires the City to hire "a sufficient number of bilingual employees in public contact positions so as to adequately serve members of the substantial number of limited-English-speaking persons group(s) in the City." The Ordinance vests discretion in the City Manager to determine the adequacy of service to

members of the group(s). The Ordinance makes no reference to race or national origin. It is fully consistent with California law, the Dymallly-Alatorre Bilingual Services Act, also enacted to provide individuals with limited English proficiency access to state and local government services. Since passage of the Equal Access Ordinance questions have been raised about how the City can fulfill the Ordinance's mandate: ensuring that the City provides "equal access" to its services, given the growing linguistic diversity of the City's population.

IV. Analysis

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e (2)(a)(1) and (2) and California's Fair Employment and Housing Act, California Government Code section 12940, provide that it is an unlawful employment practice for an employer to fail or refuse to hire an individual because of the individual's membership in a protected group (race, national origin, etc.), or to limit, segregate or classify employees or applicants for employment in any way which would tend to deprive them of employment opportunities because of membership in a protected group. Two theories may be used to challenge hiring decisions and practices: disparate treatment and disparate impact.

A. Disparate treatment

A plaintiff seeking to prove discriminatory treatment must prove the employer intentionally discriminated on a prohibited basis. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). So, in the context of a job application an employee presents a prima facie by showing that she or he belongs to a protected group, applied and *was qualified* for the position, and was denied the job, which was then awarded to someone outside the protected group. The employer may rebut the employee's case by articulating a legitimate, nondiscriminatory reason for its actions. The applicant retains the burden of proof to demonstrate intentional discrimination, which can at times be inferred from disbelief of the reasons proferred by the employer. As will be discussed in greater detail below, if bilingual skills are a job requirement, an applicant would be unable to demonstrate that she or he met job requirements and *was qualified* for such a position. A disparate treatment claim based on a neutral qualification such as bilingual skills would fail.

B. Disparate Impact

Unlike a plaintiff proceeding under the disparate treatment theory, a plaintiff bringing a disparate impact challenge may prevail without proof of intentional discrimination by proving that an employment practice or job requirement that is fair in form is nonetheless discriminatory

in practice. *Griggs v. Duke Power Co.*, 410 U.S. 424 (1971). The plaintiff may establish a prima facie case of disparate impact by: 1) identifying the specific employment practice or qualification being challenged; 2) establishing a disparate impact on a protected group; and 3) demonstrating that the disparity is the causal result of the employment practice that has been identified. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). A disparate impact must be established by submission of reliable statistical data that have been tested through adequate statistical techniques. The proper comparison is based on the composition of the qualified population in the relevant labor market (those in the local labor market possessing the relevant skills for the job rather than the local labor pool). *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983). Statistics based on small or incomplete data sets, or analyzed by unaccepted techniques, or based on an unqualified pool of applicants, or that fail to demonstrate a causal connection between the challenged practice or qualification and the statistical disproportion in individuals hired from a protected group, won't support a prima facie case. *Katz v. Regents of the University of California*, 229 F.3d 831 (9th Cir. 2000).

Once the plaintiff has established a prima facie case of disparate impact, the burden shifts to the employer to show that a challenged employment practice or qualification is job related and consistent with business necessity. In order to prove business necessity, an employer must show that its selection criteria bear "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. The employer must also demonstrate that the employment practice significantly serves legitimate employment goals. *New York City Transit Authority v.*Beazer, 440 U.S. 568 (1979). The employer need not show that those employment goals require the employment practice or qualification. "...[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business..." *Wards Cove Packing Co,* 490 U.S. at 659. The Ninth Circuit has approved selection devices causing an adverse impact if shown to be predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job. *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The plaintiff may attempt to rebut the defense by demonstrating that there is an alternate practice or qualification which serves the employer's business necessity but does so without causing a disparate impact and that the employer has refused to adopt that practice.[1] The alternative practice must have comparable effectiveness and not involve

[1] There are far fewer California (FEHA) cases that discuss proof of unlawful discrimination. Those that do rely on the theories of liability developed under Title VII. See *FEHC v. City and County of San Francisco*, FEHC Dec. No. 82-11 (1982), decision aff'd, *City and County of San Francisco v. FEHC*, 191 Cal. App. 3d 976 (1987). State courts often rely on federal law to interpret analogous FEHA provisions. See *Baker v. Children's Hospital Medical Center*, 209 Cal.App.3d 1057 (1989).

significant additional expense, such as training costs. Clady v. County of Los Angeles, 770 F.2d 1421, 1426 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).

C. Case law supports requiring bilingual skills when they are needed for the job

In a recent published case that raises the precise issue for which the Council has sought this Office's legal opinion, a federal district court within the Ninth Circuit swiftly rejected a Title VII challenge to an employer's requirement that a supervisor possess bilingual skills. In *Strong v. Progressive Roofing Services*, 2007 U.S. Dist. LEXIS 61675 (D.Ariz. 2007), the plaintiff sought a position as Safety Coordinator with defendant. Many of the defendant's employees had limited English language ability and communicated more effectively in Spanish. "Defendant desired to make sure that employees had the best understanding of safety rules and safety equipment. It was therefore in Defendant's interest to make sure that employees had the best understanding of safety rules and equipment." *Strong*, 2007 U.S. Dist. LEXIS at 61675 *2. The court found meritless plaintiff's challenge based on disparate treatment because he could not establish that he was qualified for the job he sought: he lacked Spanish fluency. "...[P]laintiff cannot prove a critical element of his prima facie case; that he was qualified for the position of Safety Coordinator. See *McDonnell Douglas*, 411 U.S. at 802 (the plaintiff must demonstrate that he applied for the position *and was qualified*). Plaintiff's argument that he speaks 'a little Spanish' does not raise a triable issue of fact as to whether Plaintiff met the qualifications of being *fluent* in Spanish." *Strong*, 2007 U.S. Dist. LEXIS at 61675 *10 (emphasis in original). Nor, as the court noted, could plaintiff have shown that such a qualification was a pretext for discrimination.

Plaintiff's disparate impact claim contended that the requirement for Spanish fluency caused a disparate impact on African Americans. The court first found that the plaintiff lacked statistical evidence of the type required to establish a disparate impact on African Americans. Even had he done so, however, the court concluded that the company had produced sufficient evidence that the requirement of Spanish fluency was "job related for the position in question" and "consistent with business necessity." "It is in Defendant's interest to communicate safety information in Spanish to employees whose comprehension ability is better in Spanish..." *Strong*, 2007 U.S. Dist. LEXIS at 61675 *16.[2] See also *Najm v. Superior Court*, 2006 Cal.App.

[2] There is no requirement that an employer introduce a "validation study" showing that such a requirement predicts actual on-the-job performance, as is required when an employer uses a test or other device with a statistically significant disparate impact. *Watson*, 487 U.S. at 998-999. Citing *Watson*, two federal district courts have ruled that a formal validation study is not a prerequisite to a finding of job relatedness. *Rudder v. District of Columbia*, 890 F. Supp. 23 (D.D.C. 1995); *Garner v. Runyon*, 769 F. Supp. 357 (N.D.Ala. 1991).

Unpub. LEXIS 2281, an unpublished (uncitable) decision rejecting the FEHA challenge of an applicant for a County probate court investigator position because he was unqualified for a position that required bilingual skills.

V. Conclusion

The most effective means of ensuring adequate bilingual staffing in public contact positions that involve service to members of underserved language groups, or in departments in which service to members of underserved language groups is not sufficient, is to require that applicants for those positions have fluency in the language needed to serve the public. The Council could require the Department of Personnel and department and agencies to produce documents that would identify the frequency with which they have imposed such requirements when recruiting for such positions. Requiring bilingual fluency to be considered for a position serving underserved language groups does not violate the law and is fully consistent with the Ordinance's intent.

Respectfully submitted,

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