The LPGA's English Proficiency Rule: An-e-yo, Kamsa-Hamnida

CATHRYN L. CLAUSSEN
Washington State University

INTRODUCTION

In 2008, the LPGA attempted to impose a regulation requiring international players on its professional golf tour to demonstrate basic proficiency in the English language for use during pro-ams, acceptance speeches, and media interviews (Shipnuck, 2008). The new rule was initially only announced in a mandatory meeting of the 45 Korean players on the tour, and thus appeared to be targeted at that group (Associated Press, 2008a). Golfers who were unable to pass an oral evaluation of their English proficiency would be subject to indefinite suspension from play until they were able to satisfy the evaluators' assessment of proficiency (Dorman, 2008). Following much negative press, the LPGA eventually decided to reconsider its proposed proficiency rule for possible future implementation of a revised version (Associated Press, 2008b).

Media coverage of the proposed rule reflected concerns on the part of legislators and advocacy groups about illegal discrimination against Asian players (Associated Press, 2008b). The legal issue raised consistently in the media was whether this rule constituted employment discrimination under Title VII of the Civil Rights Act of 1964, based on the idea that language-based discrimination should be considered a proxy for national origin discrimination (Shipnuck, 2008).

This article first describes the LPGA's proposed English-proficiency rule, its scope, and the justification provided by the LPGA, and then presents evidence of the potential targeting of the Asian players. Next follows a discussion of issues raised by the media regarding the international nature of the tour and the legality of the rule. In the third section is an analysis of the application of Title VII to the LPGA's proficiency rule, followed by an examination of the applicability of Title II of the Civil Rights Act, which prohibits national origin discrimination in access to services in places of public accommodation. In the final section, suggestions are provided for changing the law to enhance the opportunity for legal redress in this situation and for any

similar policies that governing bodies of professional individual sports might propose in the future.

I. THE LPGA'S ENGLISH-PROFICIENCY RULE

The LPGA's English proficiency requirement, first proposed in 2008, was an unwritten rule that was communicated orally only to those 45 Korean players attending a mandatory meeting called for that purpose (Associated Press, 2008a). The scope of the rule was broad and its enforcement highly subjective. International players would be required to speak English during pro-am events, trophy acceptance speeches, and interviews with the media (Shipnuck, 2008). Current tour players were to be tested beginning in fall of 2009. Those to be tested would be selected based upon LPGA staff members' observation and subjective judgment about their need to be tested (Walker, 2008). If a current player selected for testing had been on the tour for two years and yet was unable to pass an oral, subjective evaluation of basic English proficiency, she would face indefinite suspension from play (Dorman, 2008). For players new to the tour, the proficiency requirement would be effective immediately.

If suspended indefinitely, the player would only be reinstated to playing status by passing the oral proficiency test, which would only be re-administered at the discretion of tour officials (Shipnuck, 2008). During the suspension period, the LPGA would provide learning resources, individual tutoring, and mock interviews to assist the affected players in acquiring what the tour considered basic competence (Shipnuck). However, for the past three years the LPGA had already offered online language courses to its players and provided a cross-cultural professional development program. According to LPGA Deputy Commissioner Libba Galloway, new features were to include hands-on tutoring and mock interviews conducted by staff particularly dedicated to the task of assimilating international players to tour life (Shipnuck).

The LPGA did not provide a public announcement of the rule, nor a justification for it, until the media began to give it substantial negative coverage. Statements from the LPGA attempting to justify the proficiency requirement cast it as narrowly tailored in scope, and in the best interests of the players as well as the tour (Dorman, 2008). According to the LPGA, the rule was limited in scope and tailored to the particular need at hand because it only required a basic level of spoken English proficiency, as well as the use of those basic skills during a limited selection of situations (pro-ams, acceptance speeches, and media interviews), instead of, for example, imposing an "all-the-

time" and/or fluency requirement (Associated Press, 2008b). The tour claimed that the penalty of suspension was necessary and appropriate because it "demonstrates the importance we are placing on effective communication in English" (Dorman, 2008).

With regard to the positive purposes undergirding its rule, the LPGA asserted that better English would help international players succeed financially by increasing their attractiveness to corporate sponsors (Shipnuck, 2008). According to LPGA staff, "It's in their interests and the tour's to make sure they succeed" (Shipnuck). In essence, the LPGA's position was that the English proficiency requirement was intended as an incentive to help its international players "assimilate to the specific demands of this job" (Shipnuck). This position is a view solidly ensconced in the context of an assumption that professional golf is an entertainment business and the players are in an employment relationship subject to the control of the employing tour. Indeed, according to LPGA Tour Commissioner Carolyn Bivens, "we are asking that they demonstrate a basic level of communication in English at tournaments in the United States in situations that are essential to their job as a member of the LPGA Tour" (Associated Press, 2008b).

As for fair implementation, there are indications that although it eventually claimed that the rule was intended to apply to all international players, the LPGA was targeting the Asian players. At the time, the tour included 121 international players from 26 countries, and 45 of those players were from South Korea, many of whom had recently joined (Van Sickle, 2008). Of the top 25 players at the time, 12 were Asian, nine of whom were from Korea (Van Sickle). That year, three of the four majors were won by Asian players (two from Korean and one from Taiwan), and the fourth was won by a player hailing from Mexico (Van Sickle).

Suspiciously, as mentioned earlier, the unwritten, internal regulation was initially only announced at a mandatory meeting of the Korean players. Furthermore, former touring pro Jan Stephenson stated to the media that she had been in contact with LPGA officials who had finally agreed with her that the influx of Asian players on the tour was a matter of real concern in terms of the attractiveness of the tour to sponsors and fans (Shipnuck, 2008; Van Sickle, 2008).

II. MEDIA COVERAGE

When the story finally broke, most of the media coverage was negative, focusing on moral and legal concerns about requiring English proficiency of international players. A recurring morality theme was the unfairness of doing

so when American players were not required to demonstrate proficiency in the languages of the eight other countries in which tour events were held (Garrity, 2008; Walker, 2008). A related theme was that the LPGA desires, organizes, and promotes an international tour, and therefore should expect international players (who speak other languages) to do their share of winning, and should value them for adding to the prestige of the tour as an international entity instead of singling them out for punishment for failing to meet a subjective standard of proficiency in a non-native language (Garrity; Walker). The sentiment expressed was that playing golf, not speaking English, was the real job of a touring pro (Associated Press, 2008c).

Criticism of the English proficiency rule as a form of illegal employment discrimination was another major media theme, and also appeared to be the context within which the LPGA deliberated when determining the scope of and justifications for the rule (Associated Press, 2008c; Shipnuck, 2008). The focus of the legal criticism was on the function of language as a marker of national origin, and thus that language-based discrimination serves as a proxy for discrimination on the basis of national origin, and is therefore illegal, because national origin discrimination is prohibited by the Civil Rights Act (Associated Press; Shipnuck). Case law regarding English proficiency rules by employers was apparently known to the LPGA when they formulated their policy, because they were careful to address some of the issues raised in the courts, such as selected times bans versus all-the-time bans, and to provide justifications that included job-related and non-discriminatory reasons for implementing their policy (*See* Shipnuck; *See, e.g. Garcia v. Gloor*, 1980). Legislators who called for clearer and/or more specific state legislation to prohibit LPGA enforcement of the proficiency rule also characterized the problem as one of employment discrimination (Associated Press).

III. APPLICABILITY OF TITLE VII EMPLOYMENT DISCRIMINATION LAW TO ENGLISH PROFICIENCY RULES

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of membership in a protected class. The statutory language provides that:

> It shall be unlawful employment practice for an employer. . .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; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

> employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin (42 U.S.C. §2000e *et seq.*, 2010).

Title VII employment discrimination claims may take one of two forms: disparate treatment or disparate impact. Claims for disparate treatment discrimination require proof of intentional discrimination, and are subject to an employer defense that any adverse employment action was justified on the basis of some legitimate non-discriminatory reason. Claims for disparate impact discrimination require a showing that a facially neutral rule had a statistically significant negative effect on the protected class, and are subject to an employer defense that the neutral rule was justified on the basis of business necessity. Both types of claims are analyzed using the *McDonnell Douglas* burden-shifting scheme wherein the burden of establishing a prima facie case of discrimination initially falls on the plaintiff, followed by a burden of production on the defendant to present the appropriate defense, followed by the burden of persuasion shifted back to the plaintiff to establish that the employer's defense was pretext or that there was a less discriminatory alternative to the employer's policy (*McDonnell Douglas Corp. v. Green*, 1973).

English-only rules are rules made by employers that restrict employee use of languages other than English (LOTE) in the workplace. Such rules vary in scope in that some are "all-the-time" bans on the use of LOTEs – that is, they require that English be spoken at all times and in all places while the employee is at work – while others prohibit the use of a LOTE at selected times or in selected work spaces or while the employee is engaged in specific tasks, such as customer interaction (Thorpe-Lopez, 2007). English-only rules are typically litigated as a form of discrimination based on national origin because one's language is so inextricably linked with one's national origin (*See, e.g., Garcia v. Gloor*, 1980; *Maldonado v. City of Altus*, 2006; *EEOC v. Synchro-Start Products, Inc.*, 1999). Indeed, some commentators consider language to be a proxy for national origin because of the difficulty first generation immigrants have in learning English, and the ingrained nature of language that makes code-switching (inadvertent switching back and forth from one's native language to subsequently learned languages) uncontrollable at times of stress or distraction (Thorpe-Lopez; Weeden, 2007). As an example, Korean golf pro Se Ri Pak, winner of five majors, agrees that the winner's acceptance speech should be given in English, but acknowledges that when you win, "mostly what comes out is nerves. Totally different language in front of camera. You're excited and not thinking in English" (Agence France-Presse, 2008).

It should be noted though that others view language as a learned skill, and thus a mutable characteristic that should not receive the same legal protection against discrimination as claims based on immutable and employment-irrelevant characteristics like race and gender (Leonard, 2007; Prescott, 2007). Scholars in the latter category tend to assert the importance of using English for effective communication in the workplace, a point not denied by the others who nevertheless prefer to limit employers' ability to use English-only rules to instances where business necessity is clear (*Contrast* Leonard, 2007 & Prescott, 2007, *with* Thorpe-Lopez, 2007 & Weeden, 2007). Legal challenges to these rules are usually brought as disparate impact claims on the grounds that, although facially neutral and typically enforced with respect to all employees, they negatively impact a high percentage of individuals whose national origins are other than American or British (Thorpe-Lopez; *see also EEOC v. Premier Operator Services, Inc.*, 2000).

The seminal case on the legality of English-only rules in the workplace is *Garcia v. Gloor* (1980). In this case, Garcia, bilingual in English and Spanish but with Spanish as his primary language, worked as a salesperson at Gloor Lumber and Supply. Gloor had hired him for his bilingual abilities, but also had a rule prohibiting salespeople from speaking Spanish unless they were conversing with Spanish-speaking customers. Garcia was fired for, among other things, not speaking English when he responded in Spanish to a Mexican-American co-worker's question about an item desired by a customer, thus violating Gloor's language rule. He sued under Title VII claiming that his violation of Gloor's English-only rule was illegal discrimination on the basis of national origin (*Garcia*, p. 266). The Fifth Circuit upheld the rule and its application to Garcia, citing with approval Gloor's four business necessity defense justifications for the rule which were: 1) English-speaking customers disapproved of employee conversations conducted in Spanish that they could not understand; 2) the trade literature and pamphlets used and distributed by the company were written in English, so salespeople needed to be fluent in English to make good use of those documents; 3) an English-only requirement would result in improving the English of those employees who utilized a different language as primary when not at work; and 4) an English-only rule enabled better oversight of bilingual subordinates by non-Spanish-speaking workplace supervisors (p. 267). In coming to this decision, the *Gloor* court concluded that complying with an English-only rule is simply a matter of preference for a bilingual person and thus Garcia could have obeyed the rule with ease but simply chose otherwise (p. 269).

A few months after the Fifth Circuit's decision in *Gloor*, the Equal Employment Opportunity Commission (EEOC) published formal guidelines

on English-only rules in the workplace (29 C.F.R. §1606 (2010)). Whereas the courts have left the concept of national origin discrimination rather vague, a problem contributed to by a scant record in the legislative history of Title VII, the EEOC guidelines add specificity by defining it 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; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group" (29 C.F.R. §1606.1 (2010)). Additionally, the guidelines provide clarification as to how to treat all-the-time LOTE bans, which are viewed as presumptively discriminatory, versus selective bans which may be defensible upon a showing of business necessity by the employer (29 C.F.R. §1606.7 (2010)).

The few federal courts that have faced the issue of English-only rules in the workplace have differed as to whether they are willing to show deference to the EEOC's guidelines, resulting in a split in the circuits regarding the validity of such rules. Whereas the Fifth Circuit upheld the English-only rule in *Gloor* (prior to publication of the EEOC's guidelines), the Ninth Circuit has gone both ways on the issue, deciding in *Gutierrez v. Municipal Court of the Second Judicial District, Los Angeles County* (1988) that a rule similar to the one in *Gloor* discriminated on the basis of national origin in violation of Title VII, and then ruling in *Garcia v. Spun Steak* (1993) that an English-only workplace rule did not constitute national origin discrimination because there was no disparate impact where "the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference" (1993, p.1487).

More recent decisions deferring to the EEOC guidelines and relying on scientific evidence from the developing field of psycholinguistics, which indicates that code-switching and other linguistic phenomena often make speaking a LOTE uncontrollable, have struck down English-only rules under Title VII. The Tenth Circuit even recognized, in *Maldonado v. City of Altus* (2006), that the mere existence of an English-only policy, regardless of its actual effects on members of a protected class, might create a discriminatorily negative effect on the conditions of employment (*EEOC v. Premier Operator Services, Inc.*, 2000; *cf. EEOC v. Synchro Start Products, Inc.*, 1999).

The Tenth Circuit has also recognized the validity of an employer's business necessity defense. In *Montes v. Vail Clinic, Inc.* (2007), the plaintiff, who was not proficient in English, worked as a housekeeper cleaning the clinic's operating rooms under the supervision of non-bilingual, English-speaking nurses. The clinic's policy allowed her to speak Spanish on her breaks, but required her to speak English in the operating rooms – a policy

which she claimed created a hostile work environment because she was disadvantaged by being unable to comply as well as others. The clinic claimed in its defense that the rule was necessary to ensure "clear and precise communication" between the plaintiff and the nurses and doctors in the operating rooms, and to promote the careful performance of the plaintiff's duties in maintaining sanitary conditions in those rooms. The court found that because the clinic's policy was selectively limited to the places where an English-only rule was indisputably a business necessity, the rule as applied to the plaintiff did not violate Title VII (*Montes*, 2007, pp. 1171-1172). In fact, safety and effective job performance/management have become recognized by the federal courts as legitimate examples of business necessity that are likely to succeed as an employer defense to challenges to English-only rules that prohibit use of LOTEs selectively with respect to times, places, and tasks in the workplace (*Garcia*, 1980; *Garcia v. Spun Steak*, 1993; *Gonzalez v. Salvation Army*, 1991; *Montes*).

The danger, of course, is that employers can use the business necessity defense as a pretext for intentional discrimination on the basis of national origin if courts are not careful to give the employers' justifications close scrutiny. For example, customer preference or business advantage should not be construed as the equivalent of business necessity. Is speaking English really part of the job of being a professional golfer? If the Supreme Court can rule, as it did in *PGA Tour v. Martin* (2001), that the PGA Tour's walking rule is not fundamental to the sport of professional golf, then surely it would not rule that speaking English has anything to do with shot-making. Although cast as having as its purpose the benefit of the players, perhaps the LPGA's English proficiency rule was really designed to promote its own financial interests with sponsors and advertisers. Deputy Commissioner Libba Galloway admitted as much in saying, "that is one of the reasons that we have adopted this policy. We want to ensure the future success of the L.P.G.A. and, again, the better our players can communicate and interact with fans, sponsors, the media, the better off we're going to be in the future" (Dorman, 2008). Because of the potential for letting the ends justify some questionable means, some commentators have urged courts to use the strict scrutiny standard when assessing an employer's business necessity defense, given the importance of protecting an individual's right to be free from discriminatory action based on their natural tendency to speak in their primary language (Hentzen, 2000; Weeden, 2007).

Most of the decisions in the federal courts have dealt with plaintiffs who were bilingual, so it has been relatively easy for those courts to side with the defendant employers when they provide seemingly legitimate business

necessity defenses, on the assumption that bilingual workers could have, and therefore should have, simply chosen to follow their employer's policy. A different situation is presented when the employee is not proficient in English and is thus truly disadvantaged in terms of likely failure to comply with the language policy due to a lengthy learning curve for speakers new to English, and/or due to the greater likelihood of inadvertent code-switching by the less proficient. The Asian players on the LPGA tour are representative of the latter situation.

Furthermore, while in one respect the LPGA's proficiency rule would function the same as the workplace English-only rules litigated in the cases described earlier, in another important way, it would not. The English-only rules that have been litigated were simply restrictions on speaking in a LOTE, whereas the LPGA's rule also included subjective, staff-performed, evaluations of basic proficiency and progress thereto. With this added dimension, a rule like the LPGA's English proficiency rule may require a more protracted legal analysis than the simple English-use-only rules described earlier.

It is also highly unlikely that Title VII applies at all to the LPGA's proposed rule because of the nature of professional golf as an individual sport in which the players are paid in prize money and endorsements rather than as salaried employees of a professional sports league. While the attitudes and opinions expressed in the press, and by the LPGA staff itself, were of the view that professional golfers are employees reachable by Title VII, in another context the United States Supreme Court has concluded that professional golfers are not employees nor independent contractors for the tour, but instead are contestants from the general public who just happen to be very good golfers (*PGA Tour, Inc.*, 2001). If, in fact, this conclusion is generalizable from the context of case law interpreting the American's with Disabilities Act (ADA), which ought to be the case, then Title VII would not apply at all to the professional golfers' plight relative to the LPGA's proficiency requirement. There can be no employment discrimination where there is no employment relationship.

IV. APPLICABILITY OF TITLE II PUBLIC ACCOMMODATION LAW TO ENGLISH PROFICIENCY RULES

In *PGA Tour v. Martin* (2001), after ignoring the views of the district court and Justice Scalia in dissent that plaintiff Casey Martin, an aspiring professional golfer, was an independent contractor, the Supreme Court determined that he was instead a contestant, and thus a mere, though highly

skilled, member of the paying public. Based on this finding, the Court held that Title III of the Americans with Disabilities Act (ADA) was applicable and protected him from discriminatory denial of access to a place of public accommodation (*PGA Tour*, pp. 677, 681).

The PGA Tour had denied Martin a waiver of its rule that golfers on the PGA Tour must walk the course during tournament play, despite a circulatory disorder severely impairing his ability to walk. The Court ruled that Title III covered competitors as well as spectators, and that Martin must be allowed to ride in a cart during tournament play in order to provide a reasonable accommodation for his disability (*PGA Tour*, 2001, pp. 681, 690).

If the Supreme Court's conclusion in *PGA Tour* as to the non-employee/non-independent contractor status of professional golfers is followed, the question that arises is whether pro golfers as contestants (and thus members of the paying public) may challenge English proficiency rules under Title II of the Civil Rights Act of 1964, which is analogous to Title III of the ADA in prohibiting discrimination in access to places of public accommodation. Title III of the ADA provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation (42 U.S.C. §12182(a) (2010)).

Similarly, Title II of the Civil Rights Act provides that:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin (42 U.S.C. §2000a(a) (2010)).

Stadiums, golf courses, and "other place[s] of exercise and recreation," as well as "other place[s] of exhibition and entertainment" are explicitly listed as places of public accommodation in the ADA (42 U.S.C. §12181(7)(C) & §12181(7)(L) (2010)). Sports arenas and stadiums, among other "places of exhibition or entertainment," are explicitly included as examples of places of public accommodation in the Civil Rights Act (42 U.S.C. §2000a(b)(3) (2010)). Given the shared definitions and statutory language, it is reasonable to conclude that the Supreme Court's interpretation of Title III of the ADA in *PGA Tour* should be adopted in applying Title II of the Civil Rights Act regarding the issue of whether these public accommodations provisions apply

to professional golfers. Therefore, because in *PGA Tour* the Court ruled that Title III of the ADA was applicable to protect a pro golfer from disability discrimination based on his status as a paying contestant, it follows that the Court would use the same rationale to find that Title II of the Civil Rights Act is similarly applicable to protect pro golfers from other forms of discrimination, including that based on national origin.

However, the problem with using Title II of the Civil Rights Act is that English-only rules are typically challenged under disparate impact theory because "language" is not an explicitly protected class.

Instead, English-only rules are considered facially neutral because they appear to apply to all employees regardless of ethnicity. A facially neutral rule may be successfully challenged under disparate impact analysis without proof of intentional discrimination if it has a statistically significant negative impact on members of a protected class. However, disparate impact analysis is not allowed in litigating Title II claims, so in order for a plaintiff to challenge an English-only rule using Title II there must be evidence of intentional discrimination. Therefore, in applying a Title II analysis to the LPGA's English proficiency policy, the first determination is that, like the PGA Tour, the LPGA operates places of public accommodation for its "contestants." Thus, Title II is applicable. Second, although the policy appears neutral on its face (and should be analyzed under a disparate impact theory if this were a legitimate employment discrimination claim under Title VII), this is Title II and evidence of intentional discrimination is required.

In this instance, some evidence of disparate treatment of Asian players actually did exist. One piece of evidence was the LPGA's initial targeting of the announcement of the unwritten policy to the Korean players (Associated Press, 2008a). Additional evidence was the timing of the announcement right when there seemed to be a large influx of Asian players, and after a year in which three of the four majors were won by Asians (Van Sickle, 2008). A third bit of evidence suggesting intentional discrimination was the LPGA's reported agreement with former professional golfer Jan Stephenson when she called them to discuss this matter and told them of her view that the "influx of Asians is a problem" (Van Sickle). Fourth, the large amount of subjectivity involved in selecting and orally evaluating players for English proficiency, and in either reinstating them or suspending them from play indefinitely for lack of demonstrable proficiency, raises the suspicion that tour officials might want the power to enable some non-Asians to win for a while by reducing the number of Asian players – particularly during a time when some of the tour's sponsorships were being reconsidered (Dorman, 2008; Shipnuck, 2008). A final bit of evidence of selective discrimination is that no similar language rule

was imposed on Americans – even though several tournaments on the LPGA tour were held in other countries with their own language and culture (Garrity, 2008).

Taken together, this evidence suggests that intentional discrimination may have been lurking in the background, however, there was no direct evidence of it. In fact, the LPGA offered up three legitimate non-discriminatory reasons for its English-proficiency policy: 1) the rule was in the best interests of the players as well as the tour because it would help the players succeed financially; 2) it would result in better English and thus increase player attractiveness to sponsors; and 3) it would provide an incentive for international players to assimilate to the demands of "the job" – which the LPGA characterized as an entertainment business (Shipnuck, 2008). Assuming that the LPGA would have met its evidentiary burden of production by proffering some legitimate non-discriminatory reasons for its rule, the plaintiff would then have had to pull together a persuasive argument that the LPGA's defense was pretext for intentional discrimination. While this might be possible if this case were ever litigated, overcoming the "some legitimate non-discriminatory reason" defense with a pretext rejoinder might prove difficult given the facially neutral nature of the policy and the habit of the federal courts of treating English-only rules as disparate impact, rather than disparate treatment, claims.

V. CONCLUSION AND SUGGESTIONS FOR LEGAL CHANGE

It is possible that the LPGA will attempt to implement a revised version of its English language proficiency policy. As this article has shown, it is likely that the courts would find that, following the Supreme Court's decision in *PGA Tour, Inc.* (2001), Title VII does not apply to professional golfers. It is also quite possible that Title II, with its requirement of proof that the discrimination at issue was intentional, would be of little use to a plaintiff challenging a facially neutral English proficiency policy. A professional golfer or tennis player who wishes to challenge such a policy thus has inadequate legal recourse unless the law changes to enable greater opportunity for redress in the courts.

One suggestion is to borrow concepts from the employment discrimination context and import them into the access to places of public accommodation context. An example would be to analogize from the facts in *Griggs v. Duke Power Co.* (1971), in which the Supreme Court held that, in the employment context, proficiency tests (a diploma requirement and intelligence test) that were not a job-related business necessity could have an illegal disparate

impact on an ethnic minority group. Since professional individual sport athletes are not considered employees or independent contractors, and thus have no protection under Title VII regarding the terms and conditions of their "employment," perhaps the courts should extend disparate impact theory to analysis of Title II claims based on the idea that an English proficiency rule functions for these athletes much the same as an intelligence proficiency test would in the employment context – both would deny access to a job in a discriminatory way. Because this approach would represent a major extension of disparate impact analysis into a new interpretive context (Title II claims), it is unlikely to garner sufficient support.

Two narrower approaches remain. For the first, the courts could acknowledge that the scientific field of psycho-linguistics has begun to develop a better understanding of the deep links between national origin, primary language, and ability to converse. This more informed perspective justifies reconsidering older decisions and adopting the EEOC's Guidelines on Discrimination Because of National Origin inasmuch as they recognize that language often functions as a proxy for national origin (29 C.F.R. §1606; Thorpe-Lopez, 2007; Weeden, 2007). The courts would then need to apply this new perspective in the context of Title II claims in order to reach professional golfers negatively affected by the LPGA's English proficiency rule.

A second more tailored approach, suggested by Thorpe-Lopez (2007), is for Congress to step in and follow the model adopted by the European Union which specifically identifies language difference as a protected category in its anti-discrimination law. That model also imposes a lower burden of proof (akin to a preponderance of the evidence standard) for evidence of a negative impact on a protected group than requiring a statistically significant effect as disparate impact analysis does (Thorpe-Lopez, 2007). Such an approach would demonstrate a valuing of diversity over mere acceptance, and would thus better comport with the purposes of promoting an international golf tour in the first place.

ABOUT THE AUTHOR

CATHRYN CLAUSSEN is a professor and Director of the Sport Management Program at Washington State University. She earned her law degree from Georgetown University Law Center. Claussen brings a wealth of practical experience to her teaching and scholarship, including collegiate coaching experience, retail sporting goods sales, event management experience as a race director and director of a golf tournament, as well as having played tennis

professionally. Known for her work in civil and constitutional rights in the context of sport, Claussen has been an invited and keynote speaker at national and international conferences. She is frequently consulted for her expertise in gender equity in athletics, and has provided years of service on the editorial boards of the International Sports Journal and the Journal of Legal Aspects of Sport. Claussen has served as President of the Sport & Recreation Law Association, and has been the recipient of SRLA's Honor Award in 2007 and its Betty van der Smissen Leadership Award in 2010.

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