

English with an Accent

Language, ideology, and discrimination
in the United States

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Chapter 9

Real people with a real language

The workplace and the judicial system

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Real people with a real language

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The workplace and the judicial system

I am from India. Now a US citizen and live in USA for about 24 years. I had my University education in USA. After my PhD and 6 years of employment now I am unemployed and unable to secure a job. Recently I applied for a job . . . The employer called, told me that it was a prescreening interview. She told me she likes everything about me, but she does not like my accent. She said, as a part of the job I need to do telephone interviews . . . She also said she called me first, because she does not want to waste time . . . when it comes to hiring and promotion, my opportunity for advancement is clearly based on my accent.

Anonymous commenter, <http://www.theworkbuzz.com>, October 27, 2010

I never thought about my accent much while I was living in Mississippi. My family had been there over 200 years . . . I moved to Texas and once again, my accent came under fire. I even overheard my boss talking to a coworker one day; she said, "If I'd known how bad her accent was, I never would have hired her."

Anonymous commenter, <http://www.antimoon.com/>, December 18, 2005



The nutshell

Title VII of the Civil Rights Act was designed (in part) to protect workers from discrimination on the basis of race, ethnicity, national origin, sex, age and other protected categories, or traits directly linked to those categories. The Equal Employment Opportunity Commission (EEOC) provides directives on national origin discrimination with multiple examples of what does, and does not constitute discriminatory behavior (Equal Employment Opportunity Commission 2002).

While employers will often go to great lengths to cloak discrimination, sometimes there is direct evidence as in the case of Sergio Fonseca, a native of Guatemala and a native speaker of English, who sued his employer for discrimination on the basis of national origin. In 2004, the United States Court of Appeals, Ninth Circuit found Fonseca's case had merit, in part because of evidence like this:

Fonseca went to tell [his supervisor] Peterson about a problem with the new computer system. Peterson was familiar with the problem, and Fonseca spoke clearly, but Peterson pretended not to understand Fonseca. Fonseca repeated himself more than once while Peterson laughed at him and mocked his accent and repetition.

(Fonseca v. Sysco 2004)

More often employers who are actually guilty of discriminatory practices will try to prove to the court that they had a legal and reasonable motivation for their actions. This is where the courts become complicit.

The Civil Rights Act

With the passage of the 1964 Civil Rights Act (Pub. L. 88-352, 78 Stat. 241), some types of discrimination in the workplace have been illegal under Title VII. In broad terms, Title VII makes it illegal to deny a person employment, promotion or workplace advantages (benefits, use of facilities). The scope of the law is limited to protected categories (also referred to as classes) which are: race, color, national origin, sex, or religion. This protection extends to associations, which means simply this: You cannot refuse to hire Asians, nor can you refuse to hire someone who is married or otherwise interacts with Asians.

Title VII also acknowledges those characteristics or traits that are inextricably linked to protected categories. For example, an employer cannot fire an employee for wearing a head covering that is required by his or her religion. This would apply to a Muslim female who wears a hijab, or a Jewish male who wears a yarmulke.¹ Nor can an employer discriminate against an employee or applicant on the basis of stereotypes and assumptions, even if they are not factually true.

In the case of racial discrimination,² “It is clearly forbidden by Title VII to refuse on racial grounds to hire someone because your customers or clients do not like his race” (Matsuda 1991: 1376).³ Similarly, a qualified person may not be rejected on the basis of linguistic traits linked to a protected category. In contrast to racial discrimination, however, an employer has some latitude in matters of language: “[a]n adverse employment decision may be predicated upon an individual’s accent when – but only when – it interferes materially with job performance” (Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.). The problem, as we’ll see, is the lack of parameters. For example, what does “materially” mean in this context?

The EEOC released updated Compliance Manual for national origin discrimination in 2002, which addresses the issue of accent directly:

Linguistic characteristics are closely related to national origin, and basing employment decisions on a qualified individual’s foreign accent or limited ability to speak English may constitute national origin discrimination. Not all employment decisions based on linguistic characteristics will violate Title VII, however. The EEOC guidelines state, for example, that a business with a diverse clientele may lawfully assign work based on an employee’s ability to speak a foreign language. In addition, an employment decision based on a foreign accent will not violate Title VII if the individual’s accent materially interferes with his or her ability to perform a job. For example, if effective communication in English is required to perform a job and an individual’s accent materially interferes with the ability to communicate in English, rejecting the individual for the job because of the accent would not violate Title VII.

(Equal Employment Opportunity Commission 2002)

District courts have sometimes “shown some deference to the EEOC guidelines or have at least used the guidelines to help inform their analyses” but at the same time the courts are free to ignore the guidelines and have sometimes simply denied their relevance (Robinson 2008: 1528). A court that takes such a stance is making it easier for an employer

to defend his or her decision not to hire or promote. The employer is required to convince the court that the decisions made were not discriminatory:

- By demonstrating that the individual's English language skills were insufficient to meet the employer's needs (Cutler 1985; Matsuda 1991; Oppenheimer 2010; Robinson 2008; The Legal Aid Society 2009; Vertreace 2010).
- By establishing a bona fide occupational qualification (BFOQ). The BFOQ is the more difficult case for the employer. The path taken depends on which of two different theories of liability is used. Disparate treatment, in which proof of discriminatory intent is crucial, requires a BFOQ defense; for disparate impact, in which such proof is not required, the employer must establish only business necessity:

The Plaintiff makes out a prima facie case by showing that the employer's selection device has a substantially adverse impact on his protected group [. . .] it remains open to the plaintiff to show that "other . . . selection devices, without a similarly undesirable . . . effect, would also serve the employer's legitimate interest[s]."

(Cutler 1985: 1169)

The employer must convince the court that there was a legitimate business necessity that precluded hiring the person in question. The trick is to find and document what legal scholars call "second generation discrimination" because "Trait discrimination of this sort is increasingly at the core of Title VII litigation" (Yuracko 2006).

Unequal treatment may result from cognitive or unconscious bias, rather than deliberate, intentional exclusion. "Second generation" claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude no dominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. (Sturm 2001: 460)⁴

In terms of language-focused discrimination, Title VII has one large limitation: Under the law as it currently stands, only those language traits tied to a national origin outside the U.S. are covered. If a person from Sweden, Thailand or South Africa believes he or she has been discriminated against on the basis of accent, the EEOC provides advice and legal assistance. A person from Appalachia, on the other hand, would have no recourse under Title VII. Appalachian English cannot be identified as originating outside the U.S. in any way that would satisfy the courts.

There is little consistency in the way the courts approach issues of communication and accent. One assumes that the legal system is unbiased, and sometimes there is evidence of that. Just as often, however, the courts are willing to put their own beliefs and language ideologies first, even when those beliefs are directly contradicted by expert testimony (see especially Fragante, below).

In the current day it is hard to imagine a judge or jury simply refusing to believe testimony from a geneticist, biochemist, or DNA expert. But language is deceptively approachable, and everyone who has reached a certain level of education feels empowered. As we will see in the Kahakua case, a judge may choose to believe one expert over another simply because one of them provides an opinion that very closely matches his own personal opinions.



Rarely do the courts explore the meaning of the word “communication,” nor are there any widely accepted and used methodologies to assess the communication demands of a given job in a non-prejudicial way.

The legal process⁵

Alleged language-focused national origin discrimination cases usually begin when an individual files a complaint with the EEOC (or a similar agency on a state or local level). The employee may then file a civil action in the trial courts, in which he or she claims that civil liberties (as set out in the federal statutes known as the Civil Rights Act of 1964) have been violated.

In some instances, these cases are brought to the courts not by the individual or group of individuals with the same complaint, but by a private agency acting for the injured party, such as the ACLU, or by a government agency, such as the EEOC. This action may be initiated at the state level, as many states have adopted civil liberties legislation patterned on the federal statutes.⁶

An individual claiming language-focused discrimination must first prove a *prima facie* case of disparate treatment in four steps:

- 1 establishment of identifiable national origin;
- 2 proof of application for a job for which he or she was qualified, and for which the employer was seeking applicants;
- 3 that he or she was rejected in spite of adequate qualifications; and
- 4 that after such rejection, the job remained open and the employer continued to seek applicants with the Plaintiff's qualifications.

After a *prima facie* case has been established, the burden of proof shifts to the employer, who must convince the court that there was a legitimate reason to fire or turn away the person with the accent. If the employer does this, the burden shifts back to the Plaintiff to show that the purported reason for the action was pretext (that is, an excuse) for invidious discrimination. The Plaintiff must prove that the employer was motivated by discriminatory reasons, or otherwise prove that the reason given by the employer is simply not believable (Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. 2000e et seq.). Figure 9.1 shows the number of Title VII language focused complaints tried in the period 1972–1994.

Discrimination in the workplace

In an excellent study of language and discrimination in the workplace in Great Britain, Roberts, Davies and Jupp (1992) provide numerous examples of discrimination focused on language, and directed toward ethnic and racial minorities. No such systematic and well-documented study exists for workers in the United States. The evidence of discrimination provided here is limited to specific instances which have found their way into the legal system and represents what is most likely a very small fraction of the whole.

Here the discussion is based on 25 language-focused national origin discrimination cases that were heard in the federal and state courts and by the EEOC between 1972 and 1993, with exceptions as noted.⁷ More recent cases are brought into the discussion, but they are not included in any statistics seen here. In some of the cases included, both racial and

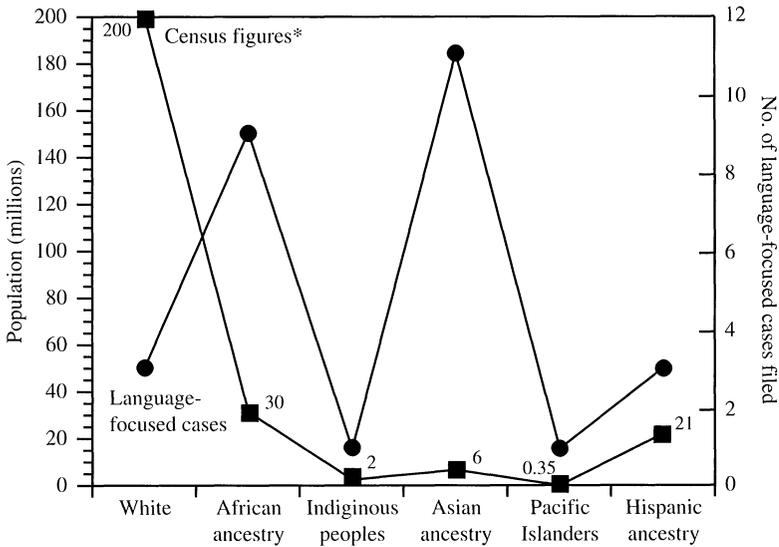


Figure 9.1 U.S. population by race and relative number of Title VII language-focused complaints tried, 1972–1994. (Figures rounded. “Hispanic” may be any race)

Source: U.S. Census 1990

national origin discrimination were at issue. In most of the cases, accent, language use and communication figured prominently in the testimony, argumentation, discussion and final opinion.⁸ Table 9.1 provides an overview.

How widespread is language-focused discrimination? The General Accounting Office of the United States Government (GAO GGD 90-62 Employer Sanctions: 27) conducted a carefully designed statistical study of a stratified random sample of employers nationwide, and reported that 10 percent of their sample, or 461,000 companies employing millions of persons, openly, if naively admit that they “discriminated on the basis of a person’s foreign appearance or accent” (ibid.: 38). In hiring audits specifically designed to detect discrimination on the basis of accent (telephone inquiries about advertised jobs), such discrimination was found to be prevalent (ibid.).⁹ This behavior was documented again in *Carroll v. Elliott Personnel Services* (1985), when an employment agency receptionist was directed by her manager to screen all persons inquiring over the telephone: to those who did not “speak right,” the job was closed. Carroll was also told to make notations about the caller’s speech and accent. Carroll sued on the grounds that her employer was compelling her to break the law, and she won her case.

There are a number of possible reasons for the low number of documented cases, some of which include:

- employers who discriminate may do so in a sophisticated and subtle way;
- the persons discriminated against are so accustomed to this treatment that they no longer react;
- if they are aware of the treatment, they may not know that they have legal recourse, or how to pursue it;

Table 9.1 Distribution of 25 language-focused discrimination cases in the courts/ EEOC hearings by plaintiff's national origin

<i>Plaintiff's national origin</i>	<i>No. cases filed</i>	<i>Court found for</i>	
		<i>Plaintiff</i>	<i>Defendant</i>
ASIA, PACIFIC RIM			
The Philippines: Lubitz, Fragante, Carino	3	1	2
Vietnam: Tran	1	0	1
China: Ang, Hou	2	0	2
India: Dudley, Mandhare, Patel	3	1	1
Cambodia: Xieng	1	1	0
Korea: Park	1	1	0
	11	4	6
CARIBBEAN/WEST INDIES			
Dominican Republic: Meijia	1	0	1
Haiti: Stephen	1	0	1
Cuba: Rodriguez	1	0	1
	3	0	3
CENTRAL/SOUTH AMERICA			
Venezuela: Dercach	1	0	1
Bolivia: Ipina	1	0	1
	2	0	2
EASTERN EUROPE			
Armenia: Vartivarian	1	0	1
Poland: Berke	1	1	0
Ukraine: Staruch	1	0	1
	3	1	2
AFRICA			
Nigeria: Dabor	1	0	1
Liberia: Andrews	1	0	0
Ghana: Kpodo	1	0	0
	3	0	1
OTHER			
African-American: Sparks, Edwards	2	2	0
Hawaiian-Creole: Kahakua	1	0	1
	3	2	1
Total	25	7	15

- complaints are handled internally or mediated by an outside party, and resolved before litigation becomes necessary.

Of course, many discriminated against on the basis of language may not find anything surprising or wrong about that fact. This is, after all, not the only society in the world that promotes a standard language ideology.

The bulk of the burden seems to fall, predictably, on the disenfranchised and the unassimilated. Cutler claims that the manner of enforcement of Title VII “permits an employer to reject qualified applicants of a particular national origin as long as he hires more assimilated applicants of the same origin instead” (Cutler 1985: 1164).

Once on the stand in a courtroom, what do the employers offer in the way of excuse? The approaches taken by defendants range from the naively and openly discriminatory to the understated:

Sophia Poskocil, originally of Colombia and a native Spanish speaker, was repeatedly passed over for a position in the Roanoke, Virginia, school system. This despite the fact

that she had an excellent education at a U.S. college, solid experience and outstanding letters of reference. Poskocil sued under Title VII:

During the trial, evidence was introduced that the school district based its decision not to hire Poskocil on student evaluations. Students in Poskocil's Northside High School class complained that Poskocil was difficult to understand because of her foreign accent. In their evaluations, students wrote, among other things, that the "instructor [Sophia Poskocil] *barely spoke English*, [and] was hard to understand." Ultimately, the district court granted summary judgment in favor of the school district, stating that the plaintiff failed to demonstrate that the county discriminated against her. What is disturbing about the case is that Poskocil was not applying to teach a high school English class, which might have made the students' complaints more relevant, but rather Poskocil was applying to teach Spanish classes. Moreover, it appears that no one at her trial had a difficult time understanding her.

(Smith 2005: 253)

In Willamina, Oregon, the postmaster was harassed and threatened with physical violence:

Galdamez began to receive hostile comments from customers and other residents based on her race, accent, and national origin almost immediately upon taking the job [of postmaster] in Willamina. Several customers, including the mayor, expressed displeasure with having a Hispanic postmaster or criticized her accented English. One local newspaper referred to Galdamez's "thick accent from her native Honduras" in explaining that she had not "made friends in some quarters" and was the object of an ouster campaign.

(Galdamez v. John Potter, Postmaster General 2004)

In Indiana:

[I]n offering examples of Mr. Dercach's communication problems, Mr. M. explained that workers would ask Mr. Dercach what he wanted them to do, and then simply walk away, unable to understand. Mr. M. refused to attribute such incidents to Mr. Dercach's accent, but offered no other explanation. He said they just couldn't understand him "like normal people with normal language."

(Dercach v. Indiana Department of Highways 1987)

Florida:

After listening to the transmission described by Dispatcher M. as jargon, . . . Rodriguez claims that during [a telephone] conversation Sgt. M. told him to "speak English like in Queens, New Jersey, not Little Havana." Sgt. M. testified that he could not recall ever having talked to Rodriguez.

(Rodriguez v. City of Hialeah 1989)

Washington State:

Managerial level employee LS told Xieng he was not being promoted because he could not speak "American."

(Xieng v. Peoples National Bank of Washington 1993)



Hawai'i:

The ability to speak clearly is one of the most important skills . . . we felt the applicants selected would be better able to work in our office because of their communication skills.

(Fragante v. Honolulu 1989)

So the court has before it a Plaintiff who claims that his or her basic civil liberties have been violated, and a Defendant – an employer – who claims the right to make appropriate business decisions. How do courts handle this conflict? What factors, legal and otherwise, play a role in the decision making process?

In some cases one must assume that sometimes a Plaintiff will claim language-focused discrimination when in fact none has taken place – or there is insufficient evidence to persuade the court that there has been discrimination. It also happens that a Plaintiff establishes that she has been discriminated against, but the laws and court system are complicated, and what looks like a minor slip could result in an early dismissal or the lack of remedy for the Plaintiff. Sometimes it is hard to determine, on the basis of case summaries available from legal databases, whether the failure was factual, technical or ideological.

There may be clear evidence of language-focused discrimination which the court overlooks because there is, in addition, a bona fide reason to deny employment. However, as Cutler points out, employers are favorably predisposed to potential employees who are “like” them, and less disposed toward potential employees who are “unlike” them. Because the courts fail to recognize this fact, and refuse to reject the validity of the personal preference rationale, “Title VII becomes a statute which, at best, coerces job applicants to assimilate and, at worst, keeps them jobless” (Cutler 1985: 1166).

I proceed from the point at which the Plaintiff and the Defendant have made their cases, and the court must now decide whose argumentation better fulfills the requirements set forth by the law. It is possible to trace the influence of the standard ideology through much of the court’s deliberations.

In the case summaries below, there are examples of successful and unsuccessful Title VII language trait-based complaints. The chapter concludes with an overview of the cases and the way ideology has interfered (or failed to interfere) in the legal process.

Selected court cases¹⁰

Kahakua v. Friday

James Kahakua’s story is a good place to start, for reasons that will be clear shortly. In Chapter 12, the sociolinguistic complexities of living in Hawai’i will be discussed in more depth. For the moment, the fact that James Kahakua is a native of Hawai’i and bilingual speaker of English and Hawai’ian Creole English (HC) is not as simple a statement as it might seem on the surface. Even the phrase “a native of Hawai’i” is fraught with ambiguity, because it raises the sensitive subject of native Hawai’ian rights and self-determination. What it means to be Hawai’ian, who has the right to call themselves Hawai’ian, how to interpret terms like *haole*,¹¹ these are questions that are hotly debated. So we return to Mr. Kahakua, a university-trained meteorologist with 20 years of experience. Kahakua applied for a promotion which would have required him to read prepared weather reports on the radio. It is important to note that these reports would have been prepared ahead of time, so that editing could be undertaken as necessary.¹²

Likewise, it is important to remember that as a life-long native, Kahakua was absolutely prepared to use the longest and most difficult placenames (such as ‘Alalā-keiki, ‘Ale-nui-hāhā, Hanakāpī’ai) crucial to talking about the weather, and very difficult for a mainlander to learn.

Mr. Kahakua was not given this promotion. His employer found him unqualified to do so, not because he is incapable of reading, but because as a bilingual English–HC speaker, he has an Hawai’ian accent.

Subsequently, Mr. Kahakua sued his employer under Title VII of the Civil Rights Act, on the basis of language traits linked to national origin, and he lost. He lost because the judge, who was not a native of Hawai’i, believed that it was reasonable to require that radio announcers speak “Standard American English” (which was not defined explicitly) and furthermore, the judge added that “there is no race or physiological reason why Kahakua could not have used Standard American English pronunciations” (Matsuda 1991: 1345). The speech pathologist who testified on behalf of the employer gave the judge ammunition when she was questioned during the trial: “I urgently recommend [Mr. Kahakua] seek professional help in striving to lessen this *handicap* . . . Pidgin can be controlled. And if an individual is totally committed to improving, professional help on a long-term basis can produce results” (emphasis added) (ibid.).

This is a very good – if very disturbing – example of how people think about language: if we want to, if we try hard enough, we can acquire a perfect language, one which is clean, pure, free of variation and unpleasant social associations. Language which is not perfect is a handicap, and does not have to be accepted.

The judge and the speech therapist are sure of themselves: they stake their professional reputations on their opinions and pronouncements about language in general and Mr. Kahakua’s language in particular. The court has decreed that Mr. Kahakua could, if he wished, comply with what they see as the reasonable request of his employer.

Kahakua’s attorney disagreed, as any linguist would disagree: Mr. Kahakua can no more comply with the demand that he completely lose his native phonology – his accent – than he could comply with an order of the judge to grow four inches, or, and much more controversially, than it would be possible for him to change the color of his skin. The complexity of the relationship between language, ethnicity and ideology in Hawai’i has only been touched upon. The Fragante case, also in Hawai’i, will make some things clearer.

Fragante v. City & County of Honolulu¹³

One commonly heard myth or misconception about Hawai’i is that of the paradise without racism, where everyone is equal and visitors are welcomed and treated well. In fact, Hawai’i’s history is rife with ethnic and race conflicts that continue to the present day (Okamura 2008; Roher 2005a, 2005b).

In April 1981, at the age of 60, Manuel Fragante emigrated from the Philippines to Hawaii. While Fragante speaks a number of the languages of the Philippines, his entire education had been conducted in English, including his university degree in law. For most of his adult life he was in the military; as a younger man he volunteered to serve on the American side in the Vietnam War. He continued his military training in the U.S. at various army installations and military schools, and his grades and evaluations were consistently excellent.



His daughter had settled in Hawai'i, and so Fragante moved, took up residence and eventually became a naturalized citizen. Because he wanted to stay busy and supplement his income, he began to look for work.

In late 1981 he replied to a newspaper ad and applied for an open entry level Civil Service Clerk position with the City of Honolulu's Division of Motor Vehicles and Licensing. Clerks at this level handle filing, process mail, act as cashier, provide information, and order supplies. Of the 721 applicants who took the written civil service examination, Fragante scored first in subjects that included vocabulary, grammar, and spelling. This ranking assured that he would move forward in the interview process.

A subset of the original applicants came in for an oral interview with two administrators. During the interview, the assistant licensing administrator repeatedly underscored the chaotic atmosphere of the DMV, how demanding the public could be, and how important communication was.

Both interviewers gave Fragante a negative evaluation, noting his very heavy accent. He was not offered employment. Later they would testify that they found Fragante hard to understand, and that his accent was the only reason he had been declined.

Fragante pursued administrative remedies without success, and then filed a claim under Title VII against the City and County of Honolulu. His complaint alleged that he had been discriminated against because of his accent. In a letter to his attorney, he expressed his surprise and outrage:

I have traveled to Europe and South America and managed to communicate effectively in English with strangers who hardly spoke the tongue. How, then, could certain English-speaking interviewers of the City government claim, or pretend, I could not be understood?! Outside that interview office, I never encountered any communication problem with anybody in Hawai'i or on the mainland.

(Matsuda 1991: 1335)

The district court did not question any of the decisions made by the defendant, and based on their own interview with Fragante, decided that he was "hampered by his accent or manner of speaking."

This is another example of how courts are willing to depend on their own often factually incorrect or biased understanding of language issues:

Fragante argues the district court erred in considering "listener prejudice" as a legitimate, nondiscriminatory reason for failing to hire. We find, however, that the district court did not determine Defendants refused to hire Fragante on the basis that some listeners would "turn off" a Filipino accent. The district court after trial noted that: "Fragante, in fact, has a difficult manner of pronunciation."

(Fragante v. Honolulu 1989)

The judge rejected the testimony of the linguist who testified about Hawai'ian Creole in support of the plaintiff. The linguist, the judge stated, was not an expert in speech (Matsuda 1991: 1345–1346).¹⁴

People in the judicial system do not leave their experiences or culture behind when they go to work. The guards at the door, the office clerks, the judges – everyone has a personal history through which all new information is filtered, no matter how dedicated each person is to doing their job well. In Fragante, the issue of racism might have been raised, but there

is no trace of it in any of the published documents about the case. It seems as though the courts are unaware of racism within a particular group, as here, where one Asian group dominated and discriminated against other Asian ethnicities (Anheta 2006; Kim *et al.* 2008; Okamura 2010; Tiongson *et al.* 2006). In Hawai'i, there is a long history of discrimination toward Filipinos, particularly by other Asians.¹⁵

Fragante and Kahakua have something in common, beyond the fact that they both lost their court cases. Filipinos and native Hawaiians tend to be poor, and both groups are low in social prestige and (for the most part) political power. National origin discrimination linked to language trait is hard to prove, but in some contexts it would seem to be impossible.

The courts have stated that “[t]here is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance” (Fragante 1989). Matsuda calls this the *doctrinal puzzle of accent and antidiscrimination law*: Title VII disallows discrimination on the basis of accent when it correlates to national origin, but it allows employers to discriminate on the basis of job ability. Employers claim that “accent” impedes communication, and thereby poses a valid basis for rejection; the courts are especially receptive to this argument (Matsuda 1991:1348 ff.).

In an interesting twist to Fragante’s story, he eventually did take a job as a statistician with the State of Hawai’i after he lost the Title VII case. Ironically his job involved conducting telephone interviews, further giving credence to the argument that the city misjudged the degree to which his accent would interfere with his performance (*ibid.*).

Akouri v. State of Florida Department of Transportation

George Akouri, a licensed engineer with many qualifications and years of experience, applied for and received a job as a maintenance contract engineer with the Florida Department of Transportation (DOT). During his six years with DOT, Akouri applied for three promotions to supervisory positions, and was turned down three times. In 2000 he filed a charge of discrimination on the basis of national origin with the EEOC. In 2001, he was fired.

Direct evidence of discrimination is increasingly rare as managers become more aware of how Title VII works. In this case, however, the administrators seemed to be completely unaware of Title VII, because when Akouri asked why he had not been promoted, the supervisor answered candidly. He explained that the position involved supervising a crew of men who were Anglo, and that white men would not take orders from him, a foreigner, particularly as he had an accent.

The jury found that Akouri had been discriminated against and awarded him back pay and damages. DOT filed an appeal with the district court and lost – Akouri’s claim of discrimination stood fast. However, the court then reduced the award of \$700,000 to nominal damages, and denied Akouri’s motion for a new trial.

Often at this point in the appeals process, the issues have to do not with the original charges, but with procedure. In this case, two appeals courts decided that Akouri had not provided enough documentation to warrant the back-pay award: “the record is devoid of any evidence of [Akouri’s] actual salary at the time he was employed by the DOT. Thus, there was no figure from which the jury could have reasonably calculated net lost wages.”

Note that in this case, evidence was enough to validate Akouri's claims, but not enough to convince the court that he was entitled to back pay. More generally important: the court did not direct the Defendant to take any action to correct or improve their procedures for hiring and promoting.

Kyomugisha v. Clowney and the University of Wisconsin, Milwaukee¹⁶

In the early 1990s, Florence Kyomugisha left her native Uganda for the U.S., where she enrolled at the University of Wisconsin, Milwaukee as a graduate student in political science.

Ms. Kyomugisha was a native speaker of Runyankole and Luganda, indigenous languages of Uganda, as well as of English.¹⁷ She attended Makerere University in Kampala before applying to the graduate program at the University of Wisconsin.

As a student, Kyomugisha began employment in UW-M's Office of Affirmative Action and Equal Opportunity. Over the course of the next four years, three different supervisors were so satisfied with her performance that she was promoted to Administrative Program Specialist. Then a new Assistant Chancellor for Equal Opportunity was hired.

In the next few months, Assistant Chancellor Charmaine Clowney made numerous and documented demeaning and hostile remarks about Kyomugisha's Ugandan accent, excluded her from making oral presentations that she had been making successfully for four years, and restricted her responsibilities in other ways.

After complaints and counter-complaints to the Chancellor and to the federal Equal Employment Opportunity Commission, Clowney issued notice that Kyomugisha's employment contract would not be renewed.

Florence Kyomugisha lost her job at the University of Wisconsin in part because of alleged communication difficulties with her supervisor, Ms. Clowney¹⁸ and so Kyomugisha filed charges against Clowney and the university under Title VII of the Civil Rights Act. The official complaint filed with the court asserted that "the defendant Charmaine P. Clowney was intentionally motivated by prohibited animus based on national origin and acted in bad faith and with malice and in derogation of her duties and contrary to the [laws]."¹⁹

Kyomugisha believed that Clowney was claiming accent as a communicative hindrance as an excuse (or in legal terms, as *pretext*) to fire her, because Clowney disliked African nationals and did not want to work with somebody from Uganda.

The attorney representing Kyomugisha questioned Clowney in a deposition (testimony taken under oath as part of the preparation for a trial). While Clowney is herself an attorney, she was also represented by counsel from the university, who was present.

In the following excerpt from the deposition, "attorney" refers Kyomugisha's lawyer. Please note that he uses the word *animus* rather than *prejudice*, *racism*, or some other more incendiary term.

Attorney: You know about discriminatory animus from your professional preparation in the field of affirmative action and discrimination law; isn't that correct? You were responsible for doing the investigations of discrimination at the university, and you need to know what the laws about that, correct?

Clowney: Yes, sir.

Attorney: And you know about the sociology of discrimination, right?

Clowney: Yes.



Attorney: And you would agree that the process of communication between two individuals involves a degree of burden sharing between the two individuals for purposes of making each other understood, correct?

Clowney: Sometimes. It depends on the nature of the two individuals. I would agree that the burden is more on an investigator to be understood in a university community than employees. The burden is more so on the professional than the nonprofessional.

Attorney: Now, I'm speaking of two people who speak with each other, who have divergent accents. You agree that you have an accent, correct?

Clowney: At times I might. I don't know if I do or not; you tell me.

Attorney: Well, isn't it true that all people have an accent of one kind or another?

Clowney: Not all people, some people. My mother is a schoolteacher and she doesn't necessarily have an accent.

Attorney: Well, do you think somebody from another part of the country who speaks with a different intonation would say that that person in fact has an accent?

Clowney: Possibly, yes.

Attorney: And communication between two such people involves the acceptance of a certain responsibility for burden sharing between each other in order to effectuate communication; isn't that correct?

Clowney: It can. It depends on the relationship between the two individuals.

Attorney: One of the factors in that relationship that could make the communication difficult is when one individual refuses to accept burden, a burden in connection with effectuating comprehensibility; isn't that correct?

Clowney: How about the burden on the other person to go and take courses and study and to be understood as well. What about – why should the burden – I also understand diversity, but why should the burden be on the recipient rather than, I mean, if you look at modern-day diversity studies, we'd be here all day. There's a double burden; there's a dual burden. I'll – I'll say there's a dual burden.

Attorney: Isn't it true that in some conversations where one person has a racial animus of one type or a national origin animus of one type that person refuses to accept a burden, any burden for effectuating the communication and thereby make – makes the allegation that the person is incomprehensible?

Clowney: I'm not going to answer that. I'm not an expert on communications skills. I've written papers on communication skills and racial animus. I can't say that. You're – you're asking me to draw inferences here and I can't say that. There are people I know that are trained who don't have any kind of animus; and if they can't understand someone, they get frustrated, and then have nothing to do with race, sex, religion, whatever. But the bottom line is that, you know, it's – you have to listen a little bit carefully, but, you know.

Attorney: Do you feel like you accepted your portion of the burden in trying to understand Florence's oral communications?

Clowney: Yes.

Attorney: Whether you feel that you accepted your portion of the burden to comprehend what Florence was saying to you when she was orally communicating with you?

Clowney: Yes, I do.

Attorney: Do you feel that you made a reasonable good faith effort to understand Florence?

Clowney: Yes, I do.

Attorney: Is it your testimony that notwithstanding that effort that was not enough and you still had oral communication problems with Florence?

Clowney: Yes, I do.

The fact that Clowney was both an attorney and the Assistant Chancellor for Equal Opportunity in charge of the office investigating claims of discrimination might seem to be ironic. It is also a sobering example of the reach of standard language ideology.

Subsequent to this deposition, the university decided to settle this case and so it never came to trial. Ms. Kyomugisha received compensatory damages, back pay, and the attorney's costs she had incurred. The university's lawyers did not disclose the reasons the university decided to offer a settlement.

Ms. Kyomugisha was knowledgeable about the law, and she had the strength of will and resources necessary to pursue her legal rights. Her story ends well, but many others – most others, I would claim – do not. Everyday individuals are reminded that the language they speak marks them as less-than-good-enough. Most don't realize that they have rights, or that there are organizations who will help making sure those rights are protected. Some might know that they have a legal claim, but be afraid to risk retribution.

Then there are those whose claims are bound to fail, because the ideology of the workplace and that of the court work together to make sure that they do.

Dercach v. Indiana Department of Highways



Anthony Dercach was born in the Ukraine and raised in Venezuela where he attended Spanish-speaking schools. He moved to the United States at age 19, and had at that point no English language skills.

Dercach was hired by the highway department as a maintenance worker, and after three years was promoted to crew leader at the recommendation of his foreman, because of his ability to drive a Mack truck. Two years later, after a series of resignations, Dercach served as acting, temporary unit foreman. The department then advertised the unit foreman position, received 12 applications, and set up interviews. The person given the unit foreman position had also been a crew leader, but had less seniority than Dercach.

Two people on the interview committee testified that they chose not to recommend Dercach for promotion to unit foreman because he had had problems with paperwork and because he had had problems communicating with others. One of the interviewers testified that workers would ask Mr. Dercach what he wanted them to do, and then simply walk away, unable to understand. Mr. Moser refused to attribute such incidents to Mr. Dercach's accent, but offered no other explanation. He said they just couldn't understand him "like normal people with normal language."

The plaintiff repeatedly denied that Dercach's accent was an issue in their promotion decision; the court did not find those denials to be credible. The court recognized that Dercach had indeed been discriminated against on the basis of national origin, but they still found for the plaintiff, because there was one credible reason: Dercach had a very limited ability to read and write English, skills that were necessary for the job.

During [Dercach's] cross-examination, he was shown several of his requests for vacation leave; those requests had been filled out by Mr. Dercach's wife or foreman. Asked to locate the request for vacation for a trip to Hawai'i, he was unable to do so. Asked to read aloud

a story in *USA Today*, he was unable to do so. Asked to read aloud a headline from the same newspaper, he was unable to do so. Asked to read aloud an exhibit critical of his paperwork, he was unable to do so.

All witnesses testified that the highway department Field Operations Handbook for Foremen was an essential manual for unit foremen; Dercach himself testified that it was “the Bible” for unit foremen. While he was being questioned by the Defendant’s attorneys he was asked to find the performance standard for “full-width litter pickup.” After several minutes of searching, he then pointed to the performance standard for “flushing bridges.”

In Dercach, the court felt that blatant discrimination could not mitigate the fact that the Plaintiff, while hard working and knowledgeable, was unable to read or write English and because the job required close work with a written code book and the ability to write multiple reports on a weekly basis, the court found for the defendant. It was not in the court’s power to penalize the employer for blatant national origin discrimination, and in fact, the highway department got away with violating the Civil Rights Act.

Two years after Dercach’s trial, the Supreme Court provided guidelines on how to rule on mixed-motive Title VII cases. Supreme Court held that in such cases the employer/defendant can sidestep liability by proving that even if the illegitimate reason for the employer’s action were eliminated, the employer would have made the same decision on the basis of the non-discriminatory reason alone. Congress stepped in on this ruling, and changed the law so that it is enough for the Plaintiff to prove that the discriminatory reason was a motivating factor. In such cases, the Plaintiff could sue for attorney’s fees, and an injunction on the employer which demanded a change in policy and discriminatory practice (Smith 2005: 242).

Hasan v. Contra Costa County

Saed Hasan came to the U.S. from Palestine to study engineering. At the University of South Dakota he maintained a 4.0 GPA for both his undergraduate and graduate degrees. After three years working as a civil engineer on a variety of projects, he applied for the position of entry-level engineer with Contra Costa County, California.

Hasan went through the interview process, and in the verbal portion ranked second in a field of 344 applicants. There were four openings at the time, but Hasan was not offered work. He applied again in 1998, and this time ranked first in the verbal portion of the interview. Again, he was not offered work. Over two years the county advertised a total of 12 openings for civil engineers with Hasan’s background and experience. One of those positions was never filled because the county interviewers were not satisfied with the candidates. The other 11 were filled with people who spoke English without a foreign accent. The Defendants admitted that, with one or two exceptions, Hasan appeared to be “demonstrably better qualified” than the engineers who were hired.

After Hasan complained to Human Resources he met with Clifford Hansen, Deputy Director of Public Works. Hansen had been on both hiring committees, and in fact, hiring decisions were his responsibility alone. Hansen was quite straightforward in listing his reasons for rejecting Hasan. He stated that, “when it comes to choosing between a person who has an accent and a person who has no accent, he will choose the person who has no accent.” Hasan filed a lawsuit.

During discovery – the period before a case goes to trial in which both sides assemble evidence and work on strategy – Hasan’s attorneys requested access to the interview



committee's written notes from the verbal interviews. The Defendants turned over only one set of notes, and claimed that notes of the other two people on the October 1997 interview panel had been lost. Defendants also lost the envelope in which the notes were kept, and finally, they destroyed the tape recording of Hasan's 1998 oral interview.

Hasan's attorneys hired a forensic documents examiner to look at the notes they did have. In the examiner's professional opinion, a number of remarks had been written at a different time than the rest of the notes. All the notes added at a later time were negative, including "very difficult to understand," and "He talks way too much!" Hasan won his case; he was awarded back pay, damages and court costs.

In some cases, the behavior of the Defendant and Defendant's council damages whatever reasonable claims they might have had. In this case, the employer's hiring and promotion practices were so blatantly discriminatory and their attitude so disdainful that they made it easier for the court to find for the Plaintiff. The Defendants indulged in excessive delay tactics, which resulted in increased legal costs for Hasan and might have forced him to drop his suit, which he did not. The County then went on to appeal the award of court and legal costs, and was firmly slapped down by the appeals court.

The trial court observed both parties over the course of the litigation, and specifically found that much of Hasan's fee award could be attributed to the tactics of the County. The district court correctly applied the relevant law and was well within its discretion in determining both Hasan's entitlement to the attorney's fees and the amount ultimately awarded (Hasan, Decision of the Appeal from the United States District Court for the Northern District).

Mandhare v. W.S. LaFargue Elementary School

In 1965, at the age of 29, Sulochana Mandhare left her home in the Maharashtra region of India and came to the United States. At that point in her life, Ms. Mandhare – a native speaker of Marathi – had been studying English for almost 20 years.²⁰

Ms. Mandhare speaks in a soft voice and an English which is characterized by full vowels in unstressed syllables, distinctive intonation patterns, aspirated fricatives and stops, and a lack of distinction between initial /v/ and /w/. She is an intelligent and articulate woman, and she tells her story in a clear and completely comprehensible accented English (1994, personal communication).

After some time in the U.S., Ms. Mandhare relates, she decided to continue her education. She had arrived with undergraduate degrees in both liberal arts and education, but she returned to school and in 1972 completed a Master's Degree in Education at New Orleans's Loyola University; in 1979 she was certified as a school librarian after completing a program at Nichols State University. After working for one year as an elementary school librarian, Ms. Mandhare applied for and was given a job as a librarian at a school serving kindergarten through second grade in the Lafargue, Louisiana school district, for the 1980–1981 school year.

Ms. Mandhare talks about that year as happy and successful. Her responsibilities were to oversee the small library, read stories to the children and introduce them to using the resources, and she enjoyed this work. Therefore, when in April 1981 she was told that her contract would not be renewed because of her "heavy accent, speech patterns and grammar problems," and in spite of her excellent skills as a librarian, she was stunned and angry. She investigated her options, and because she understood that the Civil Rights Act

prohibits national origin discrimination in the workplace, she filed suit. This civil action was decided in Ms. Mandhare's favor; the decision was reversed by the U.S. Court of Appeals in favor of the School Board.

The official published summary of the case indicates that Ms. Mandhare then met with the Superintendent of Schools and on the advice of her supervisor requested a transfer to Thibodaux Junior High School, as a librarian.²¹ The School Board refused to reappoint Ms. Mandhare to this requested new position; testimony revealed that in their private and public deliberations, Ms. Mandhare's foreignness and accent had been discussed.

The trial court was very firm in this case: Ms. Mandhare had been discriminated against, and must prevail. However, the school's initial decision that the Plaintiff could not teach young children because of her "heavy accent and speech patterns and grammar problems [which] prevented her from effectively communicating with primary school students" (*Mandhare v. W.S. LaFargue Elementary School*) was never questioned. The court took this claim on faith, and instead stated:

Defendant's contention that its legitimate reason for plaintiff's termination or non-appointment was that she had a communication problem because of her accent which prevented her from effectively communicating with primary school students is a feigned contention. Plaintiff was not being considered for a position which would require such communication. She was to be appointed librarian at a Junior High School, a position for which it was established that she was eminently qualified.

(ibid.)

It is important to remember that in this case, as in every other case discussed, no effort was made to make an objective assessment of the communication skills required for the job, the Plaintiff's speech, the quality of her interaction with children or her intelligibility. The administrators found the Plaintiff's accent difficult; they decided not to reappoint her to her job in the grade school. This alone would have made them the focus of the court's scrutiny (although not necessarily to the Plaintiff's favor), but they redeemed themselves in the court's eyes: They praised the Plaintiff's industry and skill, and they went out of their way to locate a position in a school where her accent would neither offend nor inconvenience. The court could then focus on the School Board, which refused to give the Plaintiff this new job. The validity of the initial firing was never challenged. Thus everyone (except the School Board) was happy: the administrators were left intact as arbiters of the standard language ideology and lionized for their largesse; the court was not forced to challenge those educators on the factual basis for their decisions about appropriate language; Ms. Mandhare was to be reinstated as a librarian, in a junior high school.

The question remains: were Ms. Mandhare's civil rights protected? Were her best interests really served? Put more controversially, if Ms. Mandhare had been forbidden to ride public transportation, and challenged that restriction, should she then have been pleased to be offered alternate transportation, in the form of a bicycle, a Mercedes Benz, or another, different but equally functioning, bus?

Ms. Mandhare did not really want the transfer to another school in a school district which had treated her so badly; she wanted back pay, which she did not get. Whether or not she would have been satisfied with the new position was never established, because the trial court decision was reversed by the U.S. Court of Appeals for the Fifth Circuit:

The district court's determination that the Board had intentionally discriminated against Mandhare is clearly erroneous. The court focused on the wrong issue. It premised its conclusion on the Board's refusal to follow LeBlanc's recommendation that Mandhare be transferred to a junior high librarian position. That was not the issue as framed by the unamended pleadings and pre-trial order. Mandhare's action asserted discrimination in the Board's refusal to reemploy her as elementary school librarian, not their failure to create and transfer her to a junior high position.

(Mandhare v. Lafargue Elementary School 1986: 5)

The terrible irony of this reversal should be clear: Ms. Mandhare was originally protesting her dismissal on the basis of language-focused national origin discrimination; the judge in that first case chose not to deal with that delicate issue, but to bypass it completely by focusing on the possibility of a position in another school. This gave the Appeal Court an out, which it took. The Appeal Court accused the Trial Court of focusing on the wrong issue and on that basis, it reversed the decision.

In the end, both courts were satisfied to let the school administrators and School Board exclude on the basis of accent. In the analogy above, the first court offered Ms. Mandhare a Mercedes-Benz when all she wanted to do was ride the bus. The Appeal Court said that the court had been wrong to offer Ms. Mandhare a Mercedes-Benz that didn't exist and that no one was obliged to buy for her; it did not even question why she had been forced off the bus in the first place, and it certainly didn't offer her the opportunity to get back on, or compensate her for her trouble.

The Appeal Court filed the reversal on May 2, 1986, six years after Ms. Mandhare was denied renewal. The failure of the American judicial system caused her untold emotional anguish, financial difficulty, and was detrimental to her health. Today, she works as librarian for a private school in her home town of Thibodaux, but she will carry this experience with her for the rest of her life.

Hou v. Pennsylvania, Department of Education, Slippery Rock State College



Roger Hou, a native of China, is a naturalized citizen of the U.S. He came to the States to study in the early 1960s, became a citizen in 1965, and received a Ph.D. from the University of Indiana at Bloomington the next year.

Hou was hired by Slippery Rock State College as an Associate Professor of Mathematics in 1969, and achieved tenure in the 1973–1974 school year. From 1972 to 1976, Hou applied for promotion to full professor. All six of his applications were denied. After his last unsuccessful application, Hou filed a discrimination suit against the college.²²

If you recall, the first stage in a case like this is for the Plaintiff (Hou) to establish *prima facie*. Hou did reach that standard by showing that: (1) he is Asian, and thus a member of protected minority; (2) he was qualified for promotion in the years in question; (3) he was not promoted; and (4) Anglo faculty members had been promoted in the same period.

At that point, the burden of proof shifted to the college, who had to prove that there were legitimate, non-discriminatory reasons not to promote Hou. The college did this by presenting evidence that Hou was a mediocre teacher, and further, that his mediocrity was due, at least in part, to his heavy accent.

Higher educational institutions were meant to be included within the scope of Title VII; nevertheless, the “trend in many courts has been to exercise minimal scrutiny of college and university employment practices, due, in large part, to the subjective factors on which many academic employment decisions are based” (Hou 1983). There is considerable forbearance for the opinions put forth by school administration. In addition, the courts have shown reluctance to reverse higher education administrative decisions (*ibid.*).

This deference for academic decision worked to Hou’s detriment. The judge pointed out that: “The issue of accent in a foreign-born person of another race is a concededly delicate subject when it becomes part of peer or student evaluations, since many people are prejudiced against those with accents” (*Hou v. Pennsylvania Department of Education and Slippery Rock College* 1983).

The court then went on to approve the loophole used by the institution:

We find that comments about Dr. Hou’s accent, when made, were directed toward the legitimate issue of his teaching effectiveness. Teaching effectiveness, as the testimony at trial indicated, is an elusive concept [citations omitted] (evaluation of teaching ability [is] necessarily [a] matter of judgment). Teaching effectiveness does, however, include the ability to communicate the content of a discipline, a quality which should be carefully evaluated at any college or university.

(*ibid.*)

There was never any discussion of factual, non-prejudicial assessment of Dr. Hou’s communicative competence or intelligibility. The defense depended exclusively on anecdotal evidence provided by the defendant, and this satisfied the court.

No steps were taken to isolate potentially legitimate reasons from the discriminatory ones. In an earlier chapter we looked at the studies which examined the way foreign accents are heard in an educational setting (Atagi 2003; Gluszek and Dovidio 2010; Kang and Rubin 2009; Katz *et al.* 2009).²³ In a thorough review of studies on accent discrimination in education, Fought (2006) assembles the evidence to establish that the mind is capable of manufacturing accents where none exist, a phenomenon she calls accent hallucination. Her conclusion was that it is “possible for expectations about language and ethnicity to override the actual linguistic nature of an individual speech in the minds of hearers” (*ibid.*: Chapter 9.6).

Kang and Rubin (2009) look at this from a slightly different but complementary angle.

If Hou’s attorney had been aware of this academic work and presented it to the court, there might have been a closer examination of Hou’s situation. In the end it is possible that his lecture style was the problem, but the tone of some of the student evaluations of his performance makes it clear that without further research, there was no way to be sure Hou wasn’t being discriminated against on the basis of his national origin.

Lawyers interested in Title VII language-focused cases have been debating how to ameliorate the kind of questionable evidence that was used by Hou’s employers:

[T]he first step in remedying this injustice and making it easier for plaintiffs to win foreign accent discrimination cases is to have courts vigilantly exclude customer preference arguments – such as the student evaluations in *Poskocil* – that operate as a partial defense to foreign accent discrimination and do nothing more than detract from a sound inquiry of whether the plaintiff’s English skills are sufficient to perform his or her job satisfactorily.

(Smith 2005: 234)

Sparks v. Griffin and Edwards v. Gladewater Independent School District

In some cases, language and accent are an issue and do stand in for a protected category, but there is more than one kind of discrimination going on.

The Sparks and Edwards cases both had to do with the variety of English they spoke in the classroom, and in both cases the court focused primarily on racial discrimination. In many pages of correspondence on the matter of Ms. Sparks' dismissal, the school administrator (Mr. Griffin) commented only once on the language issue: "Mrs. Sparks has a language problem. She cannot help the negro dialect, but it is certainly bad for the children to be subjected to it all day" (Sparks v. Griffin 1972).

In *Edwards v. Gladewater Independent School District* (1978), the discussion of language use is limited to general comments: "The plaintiff's contract was not renewed allegedly because of complaints received from parents and students . . . Several complaints concerned students' alleged inability to understand the plaintiff's 'Black accent.'"

If the accent issue had never been raised in Sparks or Edwards, these Plaintiffs would still have won. This was fortunate for the courts, as it relieved them of the trouble of dealing with questions of language, dialect and accent and still more controversially, with the question of AAVE. In discussing the language-focused discrimination portion of Sparks, the court limited its comments to one short footnote: "With no disposition to be unkind, we question, based on the spelling and composition of the two letters . . . the ability of Mr. Griffin to diagnose a 'language-problem'" (Sparks v. Griffin 442).²⁴

The letters written by Mr. Griffin regarding the dismissal of Ms. Sparks and referred to by the court were, in fact, poorly written and contained many spelling and/or typographical errors; nevertheless, the court is clearly uncomfortable chiding an educator, in this case, an administrator with advanced degrees, in matters of language use: "with no disposition to be unkind." More importantly, the court never addressed the content of Mr. Griffin's complaint (Ms. Sparks' "negro dialect" and its appropriateness for the classroom); it addressed only the superintendent's qualifications to make judgments on that dialect, given his poor letter writing skills.

Would the court have thought seriously about this criticism if Mr. Griffin had written elegant, grammatically appropriate prose? If the attorney had argued that Ms. Sparks' teaching effectiveness was compromised by her language use? It seems likely that the school systems could have found a line of argumentation which would have pleased the courts; they just failed to do so in this case. The court neatly sidestepped the "concededly delicate subject" of language-focused discrimination for Edwards as well: "The district court stated in its opinion that it was 'apparent' that the plaintiff could be easily understood and that there was no evidence the plaintiff made grammatical errors rendering her speech difficult to understand" (ibid.).

In these two cases, the schools were deservedly punished for racial discrimination; for language-focused discrimination, they were slapped on the wrist.

It is worthwhile looking at how race and national origin intersect in cases involving persons of African origin. Figure 9.2 breaks down the nine examined language-focused cases which were filed by such persons.

The two successful cases were brought by African Americans, native speakers of English who also speak AAVE. The others were brought by persons who speak English as a second language. This is some indication that there are more negative feelings about persons who have recently immigrated from Africa than there is about U.S. residents who are native



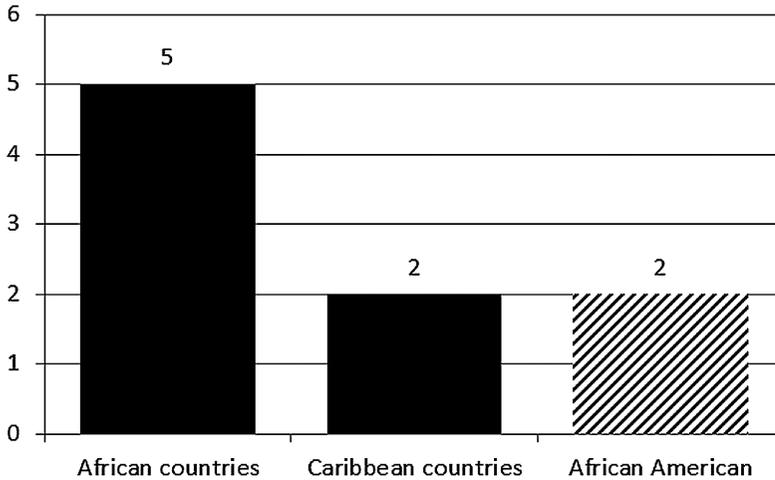


Figure 9.2 Title VII cases won and lost by persons of African ancestry, by area of geographic origin, between 1975 and 1995

speakers of English, even if the variety of English in question is stigmatized (see *Kyomigusha v. Clowney*). There is little work done on the way ethnic and national origin differences may cause strife within the African American community, but that such problems exist is a matter of record.

Xieng v. Peoples National Bank of Washington

How do some plaintiffs manage to avoid settlement, make it to court, and to win? Xieng provides the ultimate example of a successful case.

Phanna Xieng is a Cambodian-American who worked for Peoples National Bank of Washington. Mr. Xieng was repeatedly denied a promotion although he had an excellent work history, high marks in his reviews, and had been filling in on the very position he applied for over an extended period of time. There were documented comments from his superiors concerning his accent as the primary stumbling block to his promotion. In this case, the court could not overlook the fact that Mr. Xieng could carry out the job he claimed he could do, in spite of his accent, precisely because he had already been performing well at the job. It might seem that being on the inside – already employed by the Defendant – provides an employee with a valid language-focused discrimination complaint with some strong evidence, but there are many similar cases in which promotion is denied.

Is it the case, then, that the Plaintiff's chances of winning a language-focused discrimination case depend to the greatest degree on the integrity and objectivity of the judge hearing the trial? Unfortunately, it is not as easy as this. Below it will become clear that for some areas of employment, even the most open-minded of courts still are subject to the unwritten laws of a standard language ideology.



Context

In civil rights violations of the kind discussed here, courts are disposed to favor the employer, which makes it very difficult for the Plaintiff to build a successful case. These cases fail for all kinds of reasons in a variety of combinations, five of which we have seen here:

- 1 Kahakua: Court declared Kahakua's accent a handicap that he could overcome if he wanted to, and found he had not been discriminated against.
- 2 Fragante: Court refused to recognize the connection between foreign accent and national origin discrimination.
- 3 Dercach: Blatant language-focused national origin discrimination established, but the presence of a valid reason for non-promotion caused the court to rule for the employer.
- 4 Mandhare: Discrimination established, but faulty legal procedure resulted in a lack of remedy.
- 5 Hou: Court found no evidence of discrimination, but there was no independent or impartial evaluation of Hou's communication skills.

Employers point out that the decision-making process in business hiring and promotion is often unavoidably subjective in nature. The courts have supported them in this:

It does not follow, though, that ethnic discrimination is the only explanation why Plaintiff was not promoted. Other plausible explanations may exist. For instance, Nasser may not have chosen to promote Plaintiff simply because he personally did not like her.

(Vartivarian v. Golden Rule Insurance 1992)

But how can the courts distinguish between an admissible business judgment based on business necessity or personal preference and inadmissible considerations based on race or national origin? Is it simply a matter of presentation of the right arguments by the employer? The language we've seen so far shows:

- 1 *Refusal to acknowledge accent as an immutable characteristic of national origin (mis-recognition)*. The court added, "There is no race or physiological reason why Kahakua could not have used Standard American English pronunciations" (Matsuda 1991: 1345).
- 2 *Allowing direct and non-factual association of negative social values with stigmatized linguistic variants (disinformation)*: "The agency contended that the appellant's accent was undesirable . . . found to lack authority, friendliness, clarity and other qualities desired in a broadcasted voice" (Staruch, EEOC Hearing Opinion).
[The judge said] "The white candidate was selected because he had 'better diction, better enunciation, better pronunciation, better cadence, better intonation, better voice clarity, and better understandability'" (Matsuda 1991:1345, citing from Kahakua, Findings of Fact).
- 3 *Willingness to allow the media to set its own standards on the basis of personal preferences, even when those preferences necessarily involve language focused discrimination (claiming authority)*: "the judge credited the testimony of speech experts that . . .

Standard American English should be used by radio broadcasters” (Kahakua, *ibid.*).

“The agency stated that the appellant’s voice was not suitable for broadcast purposes . . . Appellant’s voice was described as having a definite Western Ukrainian accent. As in the United States, where national network news is broadcast in ‘television accent’ rather than the regional accents sometimes heard on local broadcasts” (Staruch, *ibid.*).

- 4 *Lack of concern with established facts about language structure and use, or with consistent, non-prejudicial evaluation of language skills (disinformation)*: “[An external review found him] . . . ‘not persuasive’; his pronunciation as ‘often incorrect’, delivery ‘dull’ and ‘sounding strange to the listener’” (*ibid.*).

“I [expert witness, a ‘speech consultant’] urgently recommend he seek professional help in *striving to lessen this handicap* . . . Pidgin can be controlled. And if an individual is totally committed to improving, professional help on a long-term basis can produce results” (Kahakua 1989: Excerpts of the Record: 31, as cited by Matsuda 1991:1366, original emphasis).

There must be a better way to approach these cases, and in fact, Matsuda proposed a process that would be fair to employers and employees both, one by which every position can be evaluated in four steps (Matsuda 1991: 1369). My recasting of Matsuda’s four-step process takes more linguistic factors into consideration:

- 1 In a typical interaction, the consequences of miscommunication are grave.
- 2 Oral communication is the sole or primary way in which information is exchanged.
- 3 The speech interactions are under high stress where time is of the essence.
- 4 The interactions are typically the first and only exchange, so that neither person has time to adjust in listening and comprehension patterns.
- 5 There is no face-to-face contact.
- 6 There is “noise in the channels,” such as a bad telephone connection, lots of background noise, cross-talk.

Matsuda suggests that there are some jobs that fit all of her points, such as a 911 operator. On the other end of the scale would be a computer programmer who worked alone. Most jobs would fall some place between the two extremes, and there is still room for loopholes. Consider, for example, a retired police officer applying for a 911 position in a large city. The police officer is a native speaker of Spanish, and has a strong Spanish accent in his oral communication. Would the hiring committee be acting within reason if they rejected him on that basis? Under what circumstances would they be wrong?

If ideology is most effective when its workings are least visible, then the first step must be to make visible the link between the enforcement of standard language ideology and social domination. Given the way the schools, media and employers work together to promote language ideology, the education of the public is both a lonely and a difficult – but certainly not an impossible – task.

Linguists have hard-won knowledge to offer which would be of some assistance in the difficult questions faced in matters of language policy, but that knowledge is often not sought; if sought, it may be summarily rejected; in either case, it is often hotly resented. Nevertheless, there are good reasons to persevere. This type of behavior causes real harm to real individuals, and it deserves attention.



In the judicial system there may be some lessons for linguists to learn from psychologists and psychiatrists, whose contributions to trial law are better established, although the effectiveness and value of those contributions are often challenged, see *Vartivarian v. Golden Rule Insurance* (Faust and Ziskin 1988).

While the overall quality of contribution of psychologists in legal cases is still being debated, some issues have been clarified as a result of that body of testimony. The law now defines and takes seriously such human conditions as battered woman syndrome, clinical depression and post-traumatic stress syndrome. Conversely, while the courts have called on linguists to address technical matters of authorship and identification to be used as evidence, they are less interested in a linguist's definition of communicative competence or assessment of intelligibility, as was seen in *Kahakua and Fragante*; these are areas where the courts are satisfied with their own powers of reasoning and expertise.

Xieng provides an interesting illustration of the status of linguistics in the courts: there was no expert testimony at all on the pivotal matter, which was the employer's claim that Mr. Xieng's accent was too strong and impeded communication. However, a psychiatrist was called, who then argued and convinced the court that there did exist a "causal relationship between the [employer's] national origin discrimination and Xieng's severe emotional distress and depression" (*Xieng v. Peoples National Bank of Washington* 1991: A13).

Psychologists ask themselves a two-part question to determine the quality of their forensic contribution:

- 1 Can we answer questions with reasonable accuracy?
- 2 Can we help the judge and jury reach a more accurate conclusion than would otherwise be possible (Faust and Ziskin 1988: 31)? That is, does the subject lie beyond the knowledge and experience of the average layman, and can the expert inform without invading the province of the jury by expressing a conclusion as to the ultimate issue?

For most of the cases presented here, a list of questions could have been presented to linguists which would have met both of these basic criteria. Questions about the process of standardization, differences between spoken and written language varieties, cultural differences in discourse style and structure which may cause processing difficulties, second language acquisition and accent, subconscious social evaluation of active variation, and change over time and space could be answered with reasonable accuracy. We could provide the judge and the jury with information and knowledge beyond that of the average layman, but the issue is this: we cannot make them want that information, no matter how factually correct or how strongly supported by empirical evidence.

Linguistic contributions to the legal process are not valued because ideology intervenes in a way that it does not in matters of mental health. A judge may have no personal investment in accepting evidence linking systematic, long-term physical abuse and violent behavior; she is more likely to have a strong personal reaction when asked to reconsider the assumptions underlying the standard language ideology.

Fairclough, who acknowledges this somewhat depressing state of affairs, also points out that "resistance and change are not only possible, but are continuously happening. But the effectiveness of resistance and the realization of change depend on people developing a critical consciousness of domination and its modalities, rather than just experiencing them" (1989 [2001]: 4).

Some of the discussion around language standards is so emotional in tone that parallels can be drawn to disagreements between scientists and theologians over the centuries. In our own time, in the courts, science and rational inquiry have come up against public opinion based on personal preferences and intuition:

[T]he real problem faced is not legal but sociological. In the centers of population men have gone on assuming certain bodies of knowledge and certain points of view without realizing that they were living in a different world from that inhabited by a considerable portion of their fellow-citizens, and they have been unconscious of the danger which threatened them at the inevitable moment when the two worlds should come in.

(*The Nation*, July 22, 1925: 28, cited in Caudill 1989)

This editorial was written at the height of Scopes trial, in which fundamentalists and empiricists argued the very definition of truth. It was a trial surrounded by sensational journalism and followed with great interest by many people. Scopes, a science teacher who taught the theory of evolution in a state which forbade him to do so, lost his case and was fined one hundred dollars.

But something else, something perhaps more important, was won. Before the trial, one might gather that the majority of American citizens had never come in contact with evolutionary theory. After the trial, many of those people were thinking about their own beliefs, about science, and about the nature of authority and its relationship to knowledge. Whatever an individual's personal beliefs, after the Scopes trial it became increasingly difficult for anyone to dismiss out of hand the facts put forth by scientists. Today, more than 70 years later, evolution is taught in all public schools and most private ones. And today fundamentalists still fight to have evolutionary science displaced by biblical narratives.

The Scopes trial involved free speech, educational policy, and a range of sociological issues. When the topic is discrimination on the basis of language, the stakes are very different. Mandhare, Hou, Xieng, Kahakua and the other cases like them test an even more basic freedom: the individual's right to be different:

The way we talk, whether it is a life choice or an immutable characteristic, is akin to other attributes of the self that the law protects. In privacy law, due process law, protection against cruel and unusual punishment, and freedom from inquisition, we say the state cannot intrude upon the core of you, cannot take away your sacred places of the self. A citizen's accent, I would argue, resides in one of those places.

(Matsuda 1991: 1391–1392)

It would seem that linguistics and language-focused discrimination have yet to meet their Scopes trial.

Appendix: the U.S. civil court structure

Before we leave the thorny discussion of linguistics and language-focused discrimination, let us look closely at the civil court structure in the U.S (Table 9.2). The first level is the trial courts.

If any party is dissatisfied with the outcome of a trial, they may appeal to the intermediate courts of appeal (Table 9.3).

Table 9.2 First level of trial courts in the U.S.

<i>State trial courts</i>	<i>U.S. District Courts</i>
<p>Almost all cases involving state civil and criminal laws are initially filed in state or local trial courts. They are typically called Municipal, County, District, Circuit, or Superior Courts.</p> <p>Appeals from the state trial court usually go to the state intermediate court of appeals.</p> <p>About 95% of all court cases in the U.S. come through the state trial courts.</p>	<p>There are 94 federal district courts, which handle criminal and civil cases involving:</p> <ul style="list-style-type: none"> (a) Federal statutes (b) The U.S. Constitution (c) Civil cases between citizens from different states where the amount of money at stake is more than \$75,000 (most District Court cases fall into this group). <p>Most appeals from here go to the U.S. Circuit Court of Appeals.</p>

Table 9.3 Intermediate Courts of Appeal

<i>State intermediate Courts of Appeal</i>	<i>U.S. Circuit Courts of Appeal</i>
<p>40 states have intermediate courts of appeal. These courts are the first court of appeal for most state cases. In 10 states the State Supreme Court is the only court of appeal.</p>	<p>There are 12 Circuit Courts. Each state and U.S. District Court is assigned to one of the 12 circuits.</p>

If any party is dissatisfied with the outcome of the trial, they may appeal to the State Supreme Courts of Appeal (the final court of appeal for all but a small number of cases).

The U.S. Supreme Court is free to accept or reject the cases it will hear. It must, however, hear certain rare mandatory appeals and cases within its original jurisdiction as specified by the Constitution.

Civil action flowchart

The sequence of events is:

- Attempt to find an in-house resolution.
- If this fails, Plaintiff files complaint with the EEOC.
- EEOC finds cause and *prima facie* is established (if not, the plaintiff may proceed independently).
- Plaintiff and/or EEOC files and serves Complaint on the Defendant.
- Defendant returns an Answer.
- Discovery (depositions, etc.).
- Trial.
- Judgment.
- Appeal or Judgment Execution.

Relevant court cases

The relevant court cases discussed in this chapter are shown in Table 9.4 and the list of all court cases studied but not cited is given in Table 9.5. These latter cases are included, however, in the statistics cited in this chapter. Some of these cases settled out of court or were otherwise resolved at an early stage.

Table 9.4 Relevant court cases

<i>Name</i>	<i>Date</i>	<i>Court reference</i>
GOLD v. FEDEX FREIGHT EAST, INC.	2007	<i>In re Rodriguez</i> , 487 F.3d 1001 (6th Cir. 2007)
SALEM v. HERITAGE SQUARE	2007	2007 U.S. Dist. LEXIS 67493 (N.D. Cal. Sept. 4, 2007)
AKOURI v. FLORIDA DEPT OF TRANSPORTATION	2005	408 F.3d 1338 (11th Cir. 2005)
GALDAMEZ v. POTTER	2005	415 F.3d 1015 (4th Cir. 2005)
RAAD v. ALASKA STATE COMMISSION FOR HUMAN RIGHTS	2004	86 P.3d 899; 2004 Alas. LEXIS 5; 93 Fair Empl. Prac. Cas. (BNA) 178; 85 Empl. Prac. Dec. (CCH) P41,629
ELGAGHIL v. TARRANT COUNTY JUNIOR COLLEGE	2000	45 S.W.3d 133 (Tex. App. 2000)
FLORES v. ARIZONA	2000	160 F. Supp. 2d 1043 (D. Ariz. 2000)
HASAN v. CONTRA COSTA COUNTY	2000	45 Fed. Appx. 795 (9th Cir. 2000)
HASHAM v. CALIFORNIA STATE BOARD OF EQUALIZATION	2000	200 F.3d 1035 (7th Cir. 2000)
POSKOCIL v. ROANOKE COUNTY SCHOOLS	1999	1999 U.S. Dist. LEXIS 259 (W.D. Va. Jan. 11, 1999)
RIVERA v. BACCARAT	1998	10 F.Supp.2d 318 (S.D.N.Y. 1998)
KYOMUGISHA v. CLOWNEY AND THE U OF WISCONSIN	1997	Civil case filed; depositions followed by settlement
PRADO V. L. LURIA & SON, INC.	1997	975 F.Supp. 1349 (S.D. Fla. 1997)
HOU v. PENNSYLVANIA, DEPARTMENT OF EDUCATION	1993	573 F. Supp. 1539 (W.D. Penn. 1993)
LUBITZ v. GARRETT	1992	962 F.2d 7; 1992 U.S. App. LEXIS 17272 (4th Cir. 1992)
STARUCH v. U.S. BUREAU OF INFORMATION.	1992	<i>EEOC Opinion</i>
VARTIVARIAN v. GOLDEN RULE INSURANCE COMPANY	1992	1992 U.S. App. LEXIS 12458 (7th Cir. June 3, 1992)
ANG v. PROCTER & GAMBLE CO.,	1991	932 F.2d 540, 546 (6th Cir. 1991)
DABOR v. DAYTON POWER & LIGHT COMPANY	1991	888 F. 2d 127 (6th Cir. 1991)
XIENG v. PEOPLES NATIONAL BANK OF WASHINGTON	1991	120 Wn.2d 512, 844 P.2d 389, 1993 Wash. LEXIS 24, 65 Fair Empl. Prac. Cas. (BNA) 1090 (1993)

Table 9.4 Continued

<i>Name</i>	<i>Date</i>	<i>Court reference</i>
CARROLL v. ELLIOTT PERSONNEL SERVICES	1989	51 FEP 1173, 1175, 1989 WL 167678 (D.Md.1989)
FRAGANTE v. HONOLULU	1989	888 F.2d 591 (9th Cir. 1989)
KAHAKUA v. FRIDAY	1989	876 F.2d 896 (9th Cir. 1989)
RODRIGUEZ v. CITY OF HIALEAH	1989	716 F. Supp. 1425 (S.D. Fla. 1989)
STEPHEN v. PGA SHERATON RESORT, LTD.	1989	873 F.2d 276, 279 (11th Cir. 1989)
GUTIERREZ v. MUNICIPAL COURT OF THE SOUTHEAST JUDICIAL DISTRICT, COUNTY OF LOS ANGELES	1988	838 F.2d 1031 (9th Cir. 1988)
IPINA v. MICHIGAN, DEPARTMENT OF MANAGEMENT & BUDGET	1988	699 F. Supp. 132 (W.D. Mich. 1988)
DERCACH v. INDIANA DEPARTMENT OF HIGHWAYS	1987	1987 U.S. Dist. LEXIS 13413; 45 Fair Empl. Prac. Cas. (BNA) 899 (N.D.Ind.1987)
GOMEZ v. ILLINOIS STATE BOARD OF EDUCATION	1987	811 F.2d 1030 (7th Cir. 1987)
MANDHARE v. LAFARGUE ELEMENTARY SCHOOL	1985	605 F. Supp. 238 (E.D. La. 1985)
BELL v. HOME LIFE INSURANCE	1984	596 F. Supp. 1549 (9th Cir. 1984)
CARINO v. U OF OKLAHOMA BOARD OF REGENTS	1984	750 F.2d 815 (10th Cir. 1984)
TRAN v. CITY OF HOUSTON	1983	1983 U.S. Dist. LEXIS 18958, 31 Empl. Prac. Dec. (CCH) P33412, 35 Fair Empl. Prac. Cas. (BNA) 471 (S.D. Tex. Feb. 28, 1983)
BERKE v. OHIO DEPARTMENT OF PUBLIC WELFARE	1980	628 F.2d 980 (6th Cir. 1980)
EDWARDS v. GLADEWATER INDEPENDENT SCHOOL DISTRICT	1978	572 F.2d 496 (5th Cir. 1978)
GARCIA v. VICTORIA INDEPENDENT SCHOOL DISTRICT	1978	1978 U.S. Dist. LEXIS 16423; 17 Empl. Prac. Dec. (CCH) P8544 (S.D. Tex 1978)
MARTIN LUTHER KING JUNIOR ELEMENTARY SCHOOL v. MICHIGAN BOARD OF EDUCATION	1978	463 F. Supp. 1027 (E.D. Mich. 1978)
MEJIA v. NEW YORK SHERATON HOTEL	1978	459 F. Supp. 375, 376 (S.D.N.Y. 1978)
LAU v. NICHOLS	1974	414 U.S. 563; 94 S. Ct. 786; 39 L. Ed. 2d 1; 1974 U.S. LEXIS 151
SPARKS v. GRIFFIN	1972	460 F.2d 433 (5th Cir.1972)
PARK v. JAMES A. BAKER III, SECRETARY OF THE TREASURY	1990	EEOC No. 05870646.

Table 9.5 Cases studied

<i>Reference</i>	<i>Full legal title</i>
Andrews 1992	George W. Andrews v. Cartex Corporation. Civil Action No. 91-7109. 1992 U.S. District Court
Ang 1991	Ang v. Procter & Gamble Co., 932 F.2d 540, 546 (6th Cir. 1991)
Bell 1984	Bell v. Home Life Insurance Co., 596 F. Supp. 1549, 1554-55 (M.D.N.C. 1984)
Berke 1980	Berke v. Ohio Department of Public Welfare, 30 FEP Cases 387 (S.D. Ohio 1978), aff'd, 628 F.2d 980 (8th Cir. 1980)
Carino 1984	Carino v. University of Okla., 25 F.E.P. 1332, 1336-37 (W.D. Okla. 1981), aff'd, 750 F.2d 815 (10th Cir. 1984)
Carroll 1989	Carroll v. Elliott Personnel Services, 1989 U.S. Dist. LEXIS 16676, 51 Fair Empl. Prac. Cas. (BNA) 1173, 1175 (D.Md. 1989)
Casas 1983	Casas v. First Am. Bank, 31 Fair Empl. Prac. Cas. 1479, 1480-82 (D.D.C. 1983)
Dabor 1991	Dabor v. Dayton Power & Light Co., 925 F.2d 1462, 1991 U.S. App. LEXIS 16912 (6th Cir. Ohio 1991)
Edwards 1981	Edwards v. Gladewater Independent School District, 572 F. 2d 496 – Court of Appeals, (5th Circuit 1981)
Dercach 1987	Dercach v. Indiana Dep't of Highways, 1987 U.S. Dist. LEXIS 13413
Fragante 1989	Fragante v. City & County of Honolulu, 888 F.2d 591 (9th Cir. 1989)
Duddey 1989	John Duddey v. David S. Ruder, Chairman Securities & Exchange Commission, EEOC No. 05890115
Garcia 1978	Garcia v. Victoria Independent School Dist., 1978 U.S. Dist. LEXIS 16423, 17 Empl. Prac. Dec. (CCH) P8544 (S.D. Tex. 1978)
Hou 1983	Hou v. Pennsylvania, Dep't of Education, Slippery Rock State College, 573 F. Supp. 1539, 1983 U.S. Dist. LEXIS 11939, 33 Fair Empl. Prac. Cas. (BNA) 513 (W.D. Pa. 1983)
Ipina 1998	Ipina v. Michigan , 1998 U.S. Dist. LEXIS 10996 (W.D. Mich. June 30, 1998)
Kahakua 1989	Kahakua v. Friday, 876 F.2d 896, 1989 U.S. App. LEXIS 8253 (9th Cir. Haw. 1989)
King 1979	Martin Luther King Elementary School Children v. Ann Arbor School District, 473 F. Supp. 1371 (E.D.Mich.1979)
Kpodo (resolution unclear)	Kpodo and EEOC v. Madison Hotel Corporation, Civil Action No. 92-718 A. Eastern District Virginia, Alexandria Divison.
Lubitz 1992	Lubitz v. Garrett, 962 F.2d 7, 1992 U.S. App. LEXIS 17272 (4th Cir. Va. 1992)
Mandhare 1985	Mandhare v. W.S. LaFargue Elementary School, 605 F. Supp. 238, 241 (E.D.La. 1985). Unpublished opinion of Chief Judge Clark, U.S. Court of Appeals, Fifth Circuit, No. 85-3212.
Mejia 1978	Mejia v. New York Sheraton Hotel, 459 F. Supp. 375, 376 (S.D.N.Y. 1978)
Park 1995	Kee Y. Park v. James A. Baker III, Secretary of the Treasury, EEOC No. 05870646. http://goo.gl/hJlqZ
Patel 1997	Patel and Equal Employment Commission v. Eiki International, Inc. U.S. District Court for the Central District of California.
Rodriguez 1989	Rodriguez v. Hialeah , 716 F. Supp. 1425, (U.S. Dist. 1989)
Sparks 1972	Sparks v. Griffin, 460 F.2d 433, 443 (5th Cir. 1972)
Stephen 1989	Stephen v. PGA Sheraton Resort, Ltd., 873 F.2d 276, 279 (11th Cir. 1989)

Table 9.5 Continued

Reference	Full legal title
Tran 1983	Duong Nhat Tran v. City of Houston, 35 Fair Empl. Prac. Cas. (BNA) 471, 472 (S.D. Tex. 1983)
Vartivarian 1992	Vartivarian v. Golden Rule Ins. Co., 1992 U.S. App. LEXIS 11632 (7th Cir. May 13, 1992)
Xieng 1993	Phanna K. Xieng v. Peoples Nat'l Bank of Wash., 120 Wn.2d 512, 531, 844 P.2d 389 (Supreme Court WA1993)

DISCUSSION QUESTIONS AND EXERCISES

- In *Kyomugisha v. Clowney and the University of Wisconsin*, Clowney asked the following question during her deposition: “How about the burden on the other person to go and take courses and study and to be understood as well why should the burden be on the recipient?” How would you characterize Clowney’s position? How do you think someone in her position might fail to see the flaws in her arguments?
- Matsuda talks about positive reactions to accents, which may “charm, surprise, intrigue.” Which accents do you perceive positively? Pick one, and think about what underlies your positive evaluation. Is there any more substance to this positive evaluation than there is to a negative evaluation?
- One of Matsuda’s students once wrote: “What would be the point of being a citizen if non-citizens had equal rights?” How would you answer that question?
- The courts have sometimes disagreed with the claim that accent is immutable. There is generally agreement that skin color is immutable, but language features are not. How do technological advances change our understanding of “immutability?” As it becomes possible to change skin color and gender, does that mean race and sex should no longer be protected?
- Where does religion – another protected category – fit into the question of immutability? See if you can come up with an interpretation that justifies the use of “immutability” in some cases and not others, and decide where language features fit into the bigger picture.
- Of the cases presented in this chapter, which is most reminiscent of the language subordination model? Which is least?

Notes

- 1 As will become clear, there are exceptions. For example, if the employer could show that the environment poses a physical danger to someone wearing a headscarf, the court would likely agree with the employer. In addition, companies employing less than 15 workers are not bound by these statutes.
- 2 Discrimination is a matter of law: “the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found” (*Black’s Law Dictionary* 1991: 323).

- 3 Some courts have ruled that the customer-preference argument does not apply to language-focused Title VII discrimination. This is a matter of some debate, and Smith argues persuasively that customer preference should be excluded in these cases as they are in other protected categories.
- 4 See also Cutler (1985).
- 5 You will find flow charts for the court system and the progression of civil actions in the Appendix at the end of this chapter.
- 6 The EEOC reviews complaints and if they find a violation has taken place, they may take on the case and file suit for the employee against the employer. Raj Gupta, formerly of the EEOC, estimates that the EEOC prosecutes 70 percent of such cases; in the other 30 percent, they may or may not grant a Notice of Right to Sue. Lack of such Notice does not prohibit the employee from proceeding; the right to pursue such matters in the courts is sacrosanct. Thus the Notice of Right to Sue is primarily an indication to the employee of the strength of the case. For employees of federal government agencies, the EEOC conducts the hearing, which is empowered by Title VII to hear discrimination cases; if they find for the plaintiff, they can order remedies. The federal agencies can appeal only to the EEOC.
- 7 Further excluded or missing are: cases which primarily concerned the English-Only question and cases in which language-focused discrimination played a minimal role in the Plaintiff's arguments.
- 8 There are no summary statistics kept by the EEOC and no central logging system for such cases, and even if proceedings were begun, many cases are not summarized for publication. All statistics are based on the court cases that took place prior to May, 1993.
- 9 This study was conducted in response to a series of inquiries from Congress on the effect of the 1986 immigration laws. Not all the GAO's findings were clear or interpretable, especially in the matter of specifically accent-based discrimination. The report in question outlines a number of reasons for this having to do with sampling and design questions.
- 10 A table of all cases mentioned is provided in Table 9.4. All quotes are taken from court documents and summaries of court findings, opinions, and complaints. Table 9.5 provides a list of all the cases studied for this chapter but not cited expressly but included in the statistics quoted.
- 11 *Haole* is a reference to both skin color (white) and geographic origins (someplace other than Hawai'i). It is often used and understood in a negative way.
- 12 According to Clark and Wilkes-Gibbs:

In many circumstances, as in literary forms, lectures, and radio broadcasts, writers and speakers are distant from their addressees in place, time, or both. They might be assumed to adhere to a weakened version of mutual responsibility . . . speakers still monitor what they say . . . It is just that they do all this without feedback from listeners.

(1990: 35–36)

- The radio broadcasters, of course, are reading from prepared texts and so the distribution of communicative burden does not apply in the way it does in discourse.
- 13 Most of the details of this case originate in Matsuda's seminal 1991 article on language-focused discrimination in the courts (Matsuda 1991: 1902).
 - 14 It seems that three distinct kinds of expert witnesses testify in these trials: linguists (for example, Charlene Sato of the University of Hawaii testified in the Kahakua case); speech pathologists; and "speech consultants." The last group is often composed

- of those who teach “accent reduction” classes, or otherwise have a vested interest in the official commendation of a *SAE. Some judges, especially the judge who heard the Kahakua case, are very receptive to arguments made by accent reduction witnesses.
- 15 Fragante is Filipino, a fact that might seem trivial most people outside Hawai‘i, but it is not. Japanese-Filipino relations are considered in more depth in Chapter 12.
 - 16 I was contacted by the Plaintiff’s attorney and asked to consult on this case, should it come to trial. The case was settled after early depositions, and thus my services were not required, and I took no compensation for initial consultations.
 - 17 English is the official language of instruction from first grade onwards in Uganda; the University of Makerere’s language of instruction is also English. English is the language of government and commerce and the primary medium of education; official publications and most major newspapers appear in English, and English is often employed in radio and television broadcasts. There are other languages which serve as *lingua francas*, including Swahili and French. Which is dominant at any one time is dependent on a wide range of political and social variables.
 - 18 As the Chancellor of the University acknowledged in 1996, while Ms. Kyomugisha does not speak “Wisconsin English, she nevertheless speaks perfectly fine English” (Kyomugisha v. Clowney, complaint filed October 16, 1997).
 - 19 There were no charges of racism filed against Clowney, perhaps because she was also African American. Racism and animosity between African Americans and African nationals is a larger topic, one that is relevant to this and other cases.
 - 20 I conducted two phone interviews with Ms. Mandhare in 1994. Those interviews are the source of much of the detail provided here.
 - 21 Ms. Mandhare tells a very different story. In interview, she alleged that her first year at the K-2 school was also the principal’s first year, and that he openly admitted that he had promised her job as librarian to someone else. She reports that he asked her to request a transfer, which she did not wish to do. After this episode, he told her in a one-to-one meeting that she had a “very heavy accent.”
 - 22 For a more recent but very similar case, see *Poskocil v. Roanoke County*. Poskocil, a native of Columbia who speaks Spanish as her first language, had repeatedly applied for a teaching position and was repeatedly rejected on the basis of her accent, to which the students objected. Poskocil was applying to teach Spanish.
 - 23 In another study, Kavas and Kavas (2008) found much less animosity toward teachers with accents at Southeastern University. However, their data originated in a self-administered solicitation of student opinions. This provides us with an idea of what students believe they believe, or what they know they are supposed to believe, but it reveals nothing about the actual nature of the relationship between foreign-accented faculty and the student.
 - 24 Hill (2008) examines the predisposition to make excuses for and rationalize evidence of racism when the person in question is a white male in a position of power.

Suggested further reading

Legal scholarship

Del Valle, S. (2003) *Language Rights and the Law in the United States: Finding Our Voices*. Buffalo, NY: Multilingual Matters.

- Smith, G. (2005) "I Want to Speak Like a Native Speaker": The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases. *Ohio State Law Journal* 66: 231–267.
- Sturm, S. (2001) Second Generation Employment Discrimination: A Structural Approach. *Columbia Law Review* 101: 458–568.
- U.S. Equal Employment Opportunity Commission (1996) *National Origin Discrimination: Employment Discrimination Prohibited by Title VII of the Civil Rights Act of 1964, as Amended*. Washington, D.C.: U.S. Equal Employment Opportunity Commission, Technical Assistance Program.
- Wyld, D.C. (1996) Managing in a Nuevo Mundo: Accommodating Linguistic and Cultural Diversity under Title VII. *Employee Responsibilities and Rights Journal* 9: 285–302.
- Yuracko, K.A. (2006) Trait Discrimination as Race Discrimination: An Argument about Assimilation. *George Washington Law Review* 74: 365–71.

Legal cases

The quickest and easiest way to get information about a court case is to use Google's "legal opinions and journals" search which is a category within the "scholarly search" page. Type the information you have about the case you're looking up (the names of plaintiffs and defendants are a good place to start).

Language

- Derwing, T.M. and Munro, M.J. (2009) Putting Accent in Its Place: Rethinking Obstacles to Communication. *Language Teaching* 42: 476–490.
- Southern Poverty Law Center (n.d.) Speak up to Bigotry. In *Handbook*, available at: <http://www.splcenter.org/get-informed/publications/speak-up-responding-to-everyday-bigotry>.

Law reference

FindLaw News, cases and codes; a resource for students, legal professionals and the public, available at: <http://www.findlaw.com/>.

Glossary published by the U.S. Court System, available at: <http://www.uscourts.gov/common/glossary.aspx>.

Lawsources.com is a comprehensive, uniform, and useful compilation of links to freely accessible on-line sources of law for the United States and Canada, available at: <http://www.lawsources.com>.

Legal terms and definitions at Law.com, available at: <http://dictionary.law.com/Default.aspx?selected=199>.