WORKING TO SECURE LANGUAGE RIGHTS: *COTA v. CITY OF TUCSON POLICE DEPARTMENT**

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Today, I want to discuss the area of language rights, primarily as it relates to the case of *Cota v. City of Tucson Police Department.*[1] As an underlying issue, I will also discuss the importance of bilingualism in the Latino community and its relation to the law.

First, I want to provide you with some statistics on bilingualism in the United States; these numbers demonstrate the significance of issues relating to language and the law. Latinos and Asians have the largest percentage of people who speak a primary language other than or in addition to English.[2] According to the 1980 Census, 23 million people spoke a language other than English at home.[3] By 1990, the number of people who spoke a language other than English at home increased to 32 million people—approximately 14% of our country's population.[4] Of these people, nearly half or 14 million people, also identified themselves as poor English speakers.[5] These people are classified as being limited English proficient (LEP) for purposes of federal and state law.

The discussion in *Hernandez v. New York*[6] is an example of the significance of the correlation between linguistic identity and ethnic or cultural identity. In *Hernandez*, a Puerto Rican criminal defendant appealed a prosecutor's removal of two bilingual

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1. 783 F. Supp. 458 (D. Ariz. 1992).

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1984, at 43 (Table 49) (1984).

3. *Id.*

4. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., 1990 CENSUS OF THE POPULATION AND HOUSING, SUMMARY OF SOCIAL, ECONOMIC AND HOUSING CHARACTERISTICS 1990, at 1 (Table 1) (1992).

5. *Id.*

6. 111 S. Ct. 1859 (1991).

jurors because the prosecutor did not trust that the jurors would follow the English language interpretations provided by the certified court interpreter.

The defendant was represented by the Puerto Rican Legal Defense and Educational Fund (PRLDEF) in his appeal, which ultimately reached the Supreme Court. Richard Martinez, former director of employment from our office, worked on the amicus brief that the Mexican American Legal Defense and Educational Fund (MALDEF) submitted to the Supreme Court in this case. In MALDEF's amicus brief and in the *probus et legalis homo* petition to the Supreme Court, MALDEF asked the Court to determine whether the removal of a bilingual juror violated the rule set forth in *Batson v. Kentucky*,[7] which provides that no juror may be removed for a discriminatory reason.

Batson involved a prosecutor's removal of African-American jurors from the jury pool. By analogy, the appellant in *Hernandez* argued that the removal of bilingual jurors was, in effect, a removal of Latino jurors. However, the *Hernandez* Court determined that the removal of bilingual jurors was not a removal of Latino jurors because the removals were not race-related.[8] This holding will have a profound impact in the area of language rights.

Whether a language distinction equals a national origin distinction was also a key issue in *Cota*. MALDEF represented a class of approximately 250 to 300 police officers, most of whom were bilingual. When I use the term "bilingual," I use it loosely to describe anyone who knows a little bit of one language and is fluent in another, or anyone who knows a little bit of two languages. Typically, someone who is bilingual is fluent in one language and has minimal skills in another. The threshold requirement to be described as a "bilingual" is very low. Linguistics all agree on this point. Thus, the term "bilingual" can describe almost anyone who has at least some knowledge of a second language.

This was an important distinction in *Cota* because MALDEF argued that our class was required—as a rule of employment—to use any Spanish-speaking skills they possessed. Although there were Anglos who spoke Spanish, they were not plaintiffs in the case because they were not required to use their Spanish-speaking skills. As a consequence, MALDEF argued that the plaintiffs were subjected to terms and conditions of employment different from those for the rest of the department. Thus, the issue addressed in *Hernandez*, namely whether language discrimination

7. 476 U.S. 79 (1986).
8. *Hernandez*, 111 S. Ct. at 1866.

equals race discrimination, was directly relevant to the *Cota* case. It is MALDEF's position that a language distinction is the same as a national origin distinction. At the very least, the resulting disproportionate impact on Latinos should be sufficient reason for granting legal relief.

In *Cota*, two-thirds of our class members were minimally bilingual. They grew up in homes where their parents spoke mostly Spanish; our class members were classified as passive Spanish speakers because they understood Spanish very well, but could not speak it well. They could form some phrases, but they had never formally studied Spanish grammar in the way that most students study English grammar. In fact, most of our class members had a third or fourth grade Spanish language education. We also assessed the Spanish language capabilities of a group of non-Latino Spanish speakers. It is interesting to note that in comparing the two, we discovered that most of the Anglo Spanish-speakers had learned their Spanish in school and had a higher level of Spanish education with respect to skill level.

A third of our class members fell into another category: proficient Spanish speakers. These people were better Spanish speakers, either because Spanish was their first language or because the requirement to speak Spanish on the job had inadvertently improved their Spanish skills beyond their own expectations. MALDEF argued that the distinction being made, which the employer claimed was a non-racial distinction, actually singled out Latinos for separate treatment. Some police officers were called to more dangerous calls simply because they spoke Spanish. Sergeants, who normally would not take field calls, were taking field calls into their seventh and eighth years as sergeants because they spoke Spanish. Spanish-speaking detectives would not only work for their particular area, but they would be on loan to every other detective squad as the noted Spanish-speaker. Meanwhile, Anglo detectives who spoke Spanish used their Spanish-speaking skills minimally if at all. Thus, the employer was not making a language distinction but rather a Latino versus non-Latino distinction. The irony is that the Tucson Police Department should have tapped into their Spanish-speaking Anglo employees for the proficiency level needed for the service provided.

We learned about the situation in Tucson from a police service officer—an officer who answers the 911 lines—who was being forced to stay on a particular shift to answer telephones because she was the only Spanish speaker. The Tucson Police Department would only allow her to switch shifts if she could find a replacement who was also Spanish-speaking. Incidentally,

the police service officer wanted to switch shifts because she needed to care for her brother who had cancer. Had the woman been English monolingual, she would have been allowed to switch shifts without any fanfare. This is a classic case of Title VII[9] employment discrimination. In the end, the Tucson Police Department offered their police officers with Spanish-speaking skills compensation for the use of this skill. However, this offer came after twenty to twenty-five years of discrimination against Latinos who were forced to use their Spanish speaking skills without any choice or training.

In another case we brought in San Jose, *Communication Workers of America v. Contel*,[10] the company also discriminated against their Spanish-speaking employees. We did not take the case to trial because the company agreed by consent decree to refrain from requiring their employees to speak Spanish without additional compensation for the skill. As a result, the bargaining representative for Communications Workers of America (the workers' union) can now bargain for the use of this skill since employees are no longer *required* to use it as a term and condition of employment.

Before concluding, I would like to address the politics of bilingualism in the Latino community. The existence of 31 million bilingual and LEPs [limited English proficiency speakers] indicates a need for services in the government and private sector in languages other than English. For example, the Tucson Police Department cannot ignore the Spanish-speaking population in Tucson who is entitled to the same police protection afforded English speakers. The private employer, Contel, cannot ignore Spanish-speaking residents in the Central Valley of California where these residents represent profits. How then do these employers respond to the demand for bilingual services? As illustrated by the *Cota* and *Contel* cases, employers respond by utilizing the skills of their Spanish-speaking employees and requiring Latino employees to speak Spanish on the job without additional compensation.

It is interesting that both Contel and the Tucson Police Department required employees to speak Spanish but never tested employees to determine their level of proficiency. Essentially, the employer assumed that if an employee's name was "Jose" or "Maria" that that employee knew how to speak Spanish. For example, when Spanish language service was needed, the Tucson Police Department would send two employees with Spanish sounding surnames. There is a certain logic to this assumption

9. 42 U.S.C. § 2000(e) (1964).
10. No. C-90-20549 (N.D. Cal. 1991).

since three-fourths of Latinos claim to possess some Spanish-speaking skills; however, the level of skills and the employees' ability to use that skill on the job must be assessed.

I advise employers, who call me with questions regarding their bilingual employees, to test their employees to determine the level of skills possessed by each employee. This is sound advice for the employers who need to provide Spanish-speaking service, but it also serves certain litigation purposes. If employers test their employees and there is evidence of the test results somewhere, we will have material obtainable in discovery, which may show whether or not the employer discriminates against Latinos in requiring the use of Spanish-speaking skills. In the *Contel* case, for instance, one of the things that helped us negotiate the settlement was the fact that Contel *had* tested its employees. We were sure that we would discover that most of the employees had tested low in Spanish-speaking ability, while the level of skill needed for the job was high.

These are the politics of bilingualism: employers require Latinos to use their Spanish-speaking skills despite inadequate levels of skill among Latinos. The inadequacy of service does not become a priority because those who would benefit from the service are also Latinos. I call this the "ghettoization" of Latino bilingual service. In sum, the pursuit of language rights is critical for fighting against discrimination toward our Latino employees, but also for securing equal, competent service for Latino citizens and consumers.