No. 18–1045

IN THE

Court of Appeals for the Ames Circuit

CARLA ESPINOSA AND BOBBY SIMONE,

Plaintiffs-Appellees/Cross-Appellants,

v.

CITY OF AMES AND COMMISSIONER ROBERT "BOB" KELSO,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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March 19, 2018
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Oral Argument

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INTRODUCTION

Espinosa and Simone's claims are no doubt sincere. But Title VII sets the terms for employment discrimination cases, and Espinosa and Simone have not met them. Instead, they have asked this Court to raise the evidentiary standard for employers and lower the burden for employees. These requests should give this Court pause.

ARGUMENT

I. On the disparate impact claim, this Court should reverse.

Espinosa and Simone seek to raise the evidentiary standard for business necessity; to present an alternative that tinkers at the margins; to substitute the EEOC's guideline for their prima facie case; and to rely on only one employee's testimony. This Court should not allow them to do so.

A. Summary judgment is appropriate for the City of Ames because, as a matter of law, the English-only policy is a business necessity.

1. Ames has demonstrated business necessity.

Espinosa and Simone do not contest that the English-only policy helps officers understand critical communications and combat harassment, that these are legitimate goals for police, or that these safety-related determinations deserve substantial deference. Instead, they demand more of Ames than Title VII requires. Ames' showing is sufficient to establish business necessity as a matter of law.

a. The appropriate legal standard for business necessity is manifest relationship.

Espinosa and Simone propose that a policy must be "essential" in order to be consistent with business necessity. Appellees' Br. at 46. But the dispositive cases, which Appellees correctly identify, unanimously agree: employers need only show a "manifest relationship to the employment in question." *Dothard v. Rawlinson*, 433 U.S. 321, 329

(1977); *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Were "essential" the standard, an employer would bear the burden to disprove all reasonable alternatives in order to demonstrate business necessity. But Title VII does not place that burden on employers; it obligates *employees* to prove that a reasonable alternative exists. 42 U.S.C. § 2000e-2(k) (2012).

b. Prior problems need not exist for a court to find business necessity.

It is not true that courts "refuse[] to find business necessity" without evidence of prior problems. Appellees' Br. at 48. Indeed, courts uphold English-only policies, even at summary judgment, without such evidence. *E.g.*, *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 416 (S.D.N.Y. 2005) (finding business necessity to improve customer relations without evidence of complaints); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (finding business necessity to improve workplace harmony without evidence of interpersonal problems). Moreover, the APD plays a critical role in ensuring public safety. It would be imprudent to require the APD to "institut[e] a more limited trial rule," Appellees' Br. at 48, before acting to prevent fatal miscommunications. If such experiments were required, then "safety measures could be instituted only once accidents had occurred rather than in order to avert accidents." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1120–21 (11th Cir. 1993).

c. Employer testimony is sufficient to establish business necessity.

Courts do not refuse to find business necessity when presented with only employer testimony. Rather, for English-only policies, employers need only articulate a sensible rationale for how the policy "sufficiently relate[s] to job performance." *Sephora*, 419 F. Supp. 2d at 416; *see Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599 (S.D.N.Y. 2009). Ames has articulated two such rationales, *see* Appellants' Br. at 20–22 (ensuring clear communication); *id.* at 22–24 (deterring harassment), and Appellees challenge neither.

Appellees suggest that Commissioner Kelso needed to "investigat[e] the APD's actual working conditions" before acting. Appellees' Br. at 48. But he did investigate, undertaking a seven-month review. J.A. at 4, 16. And to the extent his judgment needed independent corroboration, Appellees' Br. at 47, which it did not, *Sephora*, 419 F. Supp. 2d at 416, Mayor Bloomberg and NYPD Commissioner Kelly provided this support, J.A. at 53.

Ultimately, Appellees do not undercut Ames' showing that the English-only policy has a manifest relationship to safety. Although Appellees raise policy tradeoffs, any cost-benefit weighing is properly done by Kelso. *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1278 (9th Cir. 1981) ("Title VII was not intended to diminish traditional

management prerogatives."). Summary judgment is thus appropriate for the City. At the very least, business necessity is a question of fact.

2. Espinosa and Simone have not demonstrated a reasonable alternative.

a. Espinosa and Simone's proposed alternative is not legally cognizable.

Appellees present an alternative: the APD's English-only policy, but with exceptions for "personal calls, breaks, or 'other common-sense type situations.'" Appellees' Br. at 52. But because Espinosa and Simone did not present this alternative "before the district court, [it] cannot properly be considered by this court." *Fitzpatrick*, 2 F.3d at 1122 n. 11.

Yet even if this Court considers Appellees' proposal, it is deficient. Title VII requires employees to show that "*other* tests or selection devices" would be preferable. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (emphasis added). But Appellees' proposed policy so closely resembles the APD's current one that it cannot be an "other" policy within the meaning of the statute. To hold otherwise would make little sense. Under Title VII, an employer's policy need not be "perfectly tailored," *El v. Se. Pennsylvania Transp. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007), because "the purpose of [the alternatives analysis] is not to second guess the employer's business decision," *Shollenbarger v. Planes Moving & Storage*, 297 F. App'x 483, 487 (6th Cir. 2008). Appellees'

alternative — which merely tinkers at the margins of a relatively broad policy — would require the APD to demonstrate a perfect fit. To our knowledge, no court has invalidated an English-only policy because the employee proposed a more limited version of that same policy as an alternative.

b. Regardless, Espinosa and Simone's proposed alternative is not equally valid.

Appellees assert that their alternative would equally serve the APD's goals, but this showing requires more than "mere speculation." *Allen v. City of Chicago*, 351 F.3d 306, 315 (7th Cir. 2003). Here, Appellees present only speculative benefits. They propose that the alternative would improve bilingual recruitment, but it is not plausible that policies covering brief breaks affect the appeal of joining the APD. And, contrary to Appellees' assertion, it is not plausible that replacing a relatively broad policy with a slightly narrower one will decrease stigma. Moreover, Appellees fail to account for the fact that fewer officers would be able to combat harassment at times when the policy would not apply. *See* Appellants' Br. at 23–24.

Because Ames has shown that the policy is justified by business necessity, and Appellees have not presented a valid alternative, summary judgment for the City is appropriate.

B. Summary judgment is not appropriate for Espinosa and Simone because whether they have made out a prima facie case is a question of fact.

1. This Court should not adopt EEOC guideline § 1606.7.

Espinosa and Simone emphasize that § 1606.7 is a longstanding guideline that went through notice-and-comment. *See* Appellees' Br. at 38–41. But neither longevity nor process can cure an agency interpretation "premised on legal error." *Barber v. Thomas*, 560 U.S. 474, 503 (2010).

Facing an ambiguous guideline, Appellees adopt an interpretation of § 1606.7 that contravenes Title VII. They read the guideline to "move the inquiry to the second step," business necessity, upon identification of an English-only policy. Appellees' Br. at 39. Title VII requires more.

First, Title VII obligates employees to make a prima facie case on more than mere policy identification. Title VII mandates several discrete tasks: employees must show "(1) an identifiable, facially-neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two." *Bennett v. Nucor Corp.*, 656 F.3d 802, 817 (8th Cir. 2011). Employees must then show "that the adverse effects are significant." *Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9th Cir. 1993). Section 1606.7, as interpreted by Appellees, moots these elements.

Second, Title VII permits employers to disprove these prima facie elements — not merely rebut them with a business justification. 42 U.S.C. § 2000e-2(k)(1)(B)(ii). Appellees' interpretation of § 1606.7 robs employers of this opportunity.

Appellees surface Senator Kennedy's floor statement to suggest that Congress ratified the guideline in its 1991 Amendments, Appellees' Br. at 40, but "scattered floor statements by individual lawmakers" are "among the least illuminating forms of legislative history," *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017). Regardless, because in 1991 no circuit had valid precedent deferring to § 1606.7, Senator Kennedy could have intended only to allow the EEOC to continue using the guideline internally. He could not have meant to affect how litigants proceed in court.

2. Without the guideline, Espinosa and Simone have not independently established a prima facie case.

Appellees must demonstrate a prima facie case on this record. All parties agree: the policy must have a "significant, adverse impact" on a protected class. Appellees' Br. at 43. If a policy's impact is not significant, a showing of disproportionate discipline does not establish a prima facie case. *See Batson v. Powell*, 912 F. Supp. 565, 572 (D.D.C. 1996), *aff'd*, 203 F.3d 51 (D.C. Cir. 1999) (upholding workplace policy where six females and no males were disciplined, because compliance was within employees' control).

Appellees attempt to demonstrate significance by invoking the theory of code-switching. Appellees' Br. at 44. But the fact that bilinguals generally switch between languages is not dispositive here. On the narrow question of whether bilingual employees will continue to code-switch when obligated to speak a single language, there is a genuine issue of material fact. First, the research is contested. For example, scientists have found that bilinguals are "staying experts": they "likely have even more practice staying within the same language" than switching. Gail H. Weissberger et al., *Language and Task Switching in the Bilingual Brain*, 66 Neuropsychologia 193, 201 (2015). Second, circuit precedent is unanimous: bilinguals can comply with English-only policies. *See* Appellants' Br. at 33. The single district court to find otherwise did so only after a full trial. *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1068–72 (N.D. Tex. 2000).

Appellees further argue that the policy's burden is significant because it requires bilingual officers "to be constantly on guard." Appellees' Br. at 45 (citing *Premier Operator*, 113 F. Supp. 2d at 1068–72). But Espinosa and Simone did not testify to feeling this way; to the contrary, Espinosa testified that she thought the policy would not be enforced, J.A. at 45. This argument is unconvincing for law enforcement professionals, who already work under meaningful restrictions. Appellants' Br. at 35.

* * *

Appellees ask this Court to deem one employee's testimony sufficient, as a matter of law, to demonstrate a prima facie case of disparate impact — even when that theory rests on contested sociolinguistics. They simultaneously ask this Court to deem an employer's testimony insufficient, as a matter of law, to demonstrate business necessity — even when his rationale is sensible, uncontested, and grounded in decades of experience. Finally, Appellees ask this Court to empower an employee, as a matter of law, to bring down an entire policy by focusing on a fragment of its applications. To tip Title VII's scales so heavily would threaten to undermine police rules of all kinds. This Court should not take that step. It should direct summary judgment for Ames, or in the alternative, reverse the judgment below.

II. On the disparate treatment claim, this Court should affirm.

Lacking direct evidence of discrimination, Espinosa and Simone attempt to prove disparate treatment using circumstantial evidence. Appellees' Br. at 14. Yet whether they use a single-motive or mixed-motive framework, the legal conclusion is the same: the evidence is too weak to raise an inference of discriminatory intent. Accordingly, Appellees make several attempts to relax the evidentiary standard. But the law does not permit such shortcuts.

Appellees cannot lower their evidentiary burden. Nor, on this record, can they meet it. Summary judgment is appropriate for Ames and Commissioner Kelso.

A. Espinosa and Simone cannot lower the evidentiary bar.

1. There is no employment discrimination exception to the summary judgment standard.

Appellees claim that summary judgment is rarely appropriate in disparate treatment cases because these cases involve questions of motive. Appellees' Br. at 14. But the law is to the contrary. Summary judgment is warranted when the nonmoving party has not produced sufficient evidence to support their claims, *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986), and disparate treatment cases are no different, *see Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000) ("[C]ourts should not treat discrimination differently from other ultimate questions of fact."); *see also Chapman v. Al Transp.*, 229 F.3d

1012, 1025–26 (11th Cir. 2000) (disavowing earlier statement that summary judgment is improper for claims turning on employer intent).

2. There is no issue of witness credibility to lower the evidentiary standard in this case.

Espinosa and Simone also claim that their evidentiary burden is lowered because questions about Kelso's credibility "loom large." Appellees' Br. at 21. But plaintiffs must present contradictory facts in order to raise a factual dispute as to particular issues. *See Gillham v. Tenn. Valley Auth.*, 488 F. App'x 80, 86 (6th Cir. 2012). Mere accusations that a witness is not credible cannot raise such disputes. *Rand v. CF Indus.*, 42 F.3d 1139, 1146 (7th Cir. 1994) ("[Plaintiffs] cannot avoid summary judgment merely by asserting [defendants] are lying."). Appellees fail to anchor their assertions about Kelso's credibility in evidence cognizable at summary judgment. For example, the record does not suggest that "Kelso's investigation [into the APD's policies] was [in]sufficiently rigorous," Appellees' Br. at 34.

Appellees' burden is not, as they claim, "particularly low." *Id.* at 21. They must provide sufficient evidence to survive summary judgment.

B. Espinosa and Simone cannot meet their evidentiary burden.

1. Then-Candidate Cox's campaign statements should be disregarded.

In their attempt to establish that Cox and Kelso were motivated by discriminatory animus, Appellees rely heavily, and in Cox's case exclusively, on two campaign statements. But this Court should disregard those statements because their use would trigger serious policy consequences.

Appellees do not deny that relying on campaign statements may turn the intent inquiry into an impermissible exercise in cherry-picking. Nor do they contest that the use of campaign statements would substantially chill political candidates' speech, or that such chilling would be untenable.

Instead, they argue that using Cox's campaign statements respects the purpose of the marketplace of ideas: holding officials accountable. Appellees' Br. at 32. But that marketplace does not promote accountability *through litigation*; it ensures that citizens can "make informed choices *among candidates for office*." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (emphasis added). The marketplace protects legitimate democratic choice by "assur[ing] the unfettered interchange of ideas." *Roth v. United States*, 354 U.S. 476, 484 (1957). Where

government action threatens that interchange, "whether by design or inadvertence," the Supreme Court has instructed that "political speech must prevail." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

Additionally, Appellees downplay the risk that Cox's campaign statements will indefinitely shackle his administration. In their view, courts are capable of reliably determining whether a once-impermissible government purpose has been cured. Appellees' Br. at 32 (citing *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (9th Cir. 2016)). But the case they cite does not support this broad legal proposition. *Felix* holds only that courts can manageably evaluate whether a physical monument's support for religion has been abated by the addition of other, secular monuments. *Felix* does not hold — and Appellees have not shown — that courts are able to declare a once-biased person newly animus-free without psychoanalyzing to determine whether he sincerely repudiated his earlier views.

Finally, although Appellees cite four cases where courts considered campaign statements, Appellees' Br. at 32 & n.2, none provide a model here. Two are readily distinguishable. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (considering official statement supporting ballot initiative printed in state election pamphlet); *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003)

(considering campaign slogan as one of many pieces of evidence of religious monument's "primary *effect*," rather than defendant's intent). And the other two arose from the "highly unique" circumstances of President Trump's travel ban. *See* Appellants' Br. at 52 (distinguishing those facts).

2. The remaining evidence cannot withstand summary judgment.

Even if this Court considers Cox's statements, it should still affirm summary judgment, as the full record does not raise an inference of discrimination. *See id.* at 46–55. Without Cox's statements, the record certainly does not do so.

a. Espinosa and Simone's purported showing of disparate impact carries no evidentiary weight.

Though a showing of disparate impact can sometimes be "itself evidence of intent," Appellees' Br. at 18, the probative value of any impact depends on that showing's strength. *See Reeves*, 530 U.S. at 148–49 (holding "strength of the plaintiff's prima facie case" determines its probative value); *cf. Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977) (requiring "gross statistical disparit[y]" to make out prima facie case of discrimination). Here, Appellees have not shown that the English-only policy imposed a significant burden on a protected class. *See supra* Section I.B.2. And their numerical showing of only six affected employees is meager. *Cf. Morgan v. Harris Trust and Sav.*

Bank of Chicago, 867 F.2d 1023, 1028 (7th Cir. 1989) (holding sample size of five too small to show disparate impact). Thus, even assuming a disparate impact existed here, it would be too minimal to permit an inference of discriminatory intent.

b. The evidence does not suggest that Commissioner Kelso's reasons for the policy were pretextual.

Attempting to indirectly establish discriminatory intent, Appellees allege that Commissioner Kelso's stated reasons for adopting the policy were pretextual. Appellees' Br. at 22–26. Their two pretext arguments boil down to a quarrel with the wisdom of Kelso's decision. But the pretext inquiry is "not whether the employer has made the best, or even a sound, business decision; it is whether the real reason is discrimination." *Willis v. UPMC Children's Hospital of Pittsburgh*, 808 F.3d 638, 647 (3d Cir. 2015).

Appellees first assert that the policy does not respond to an existing problem facing the APD. Appellees' Br. at 22–24. But as discussed above, it need not do so. *See supra* Section I.A.1.b (citing cases upholding proactive policies).

Appellees next hypothesize that the English-only policy could undermine Kelso's business goals. Appellees' Br. at 24–26. But "[e]vidence that the employer should not have made the [employment] decision — for example, that the employer was mistaken or used poor business judgment — is not sufficient to show that the employer's

explanation is unworthy of credibility." *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 948 (10th Cir. 2011). Thus, even if Kelso enacted a policy that undermined every one of his objectives, that would not imply that his reasons were pretextual.

c. Commissioner Kelso's isolated remark does not permit an inference of animus.

Finally, Appellees try to demonstrate Commissioner Kelso's animus by stretching his statements in three implausible ways.

First, they claim that Commissioner Kelso expressed a "pejorative view of non-English speakers" by "equat[ing] 'professionalism' with speaking English." Appellees' Br. at 20. But for Kelso, professionalism meant "everyone [being] on the same page" while on duty. J.A. at 35. That "same page" had to include the common language every officer knew. The fact that English was the common denominator says nothing about how Kelso viewed other languages.

Second, Appellees assert that Commissioner Kelso equated speaking English with being intelligent. Appellees' Br. at 10. They claim that he "liked" Cox's campaign statement advocating that Latino immigrants learn English. *Id.* at 6, 29. But the statement Kelso actually "liked" was another, unrelated statement concerning only the quality of policing in Ames. J.A. at 31–32. It did not mention Spanish language or Spanish speakers. Moreover, though Kelso "agree[d] with the general principle" behind Cox's other campaign statement — "come

to America, learn English" — he expressed disagreement with Cox's use of the word "smart," recognizing that "language learning is difficult." J.A. at 31.

Lastly, Appellees reference three statements to suggest that Commissioner Kelso believed that Spanish speakers are "indistinguishable and inferior." Appellees' Br. at 20. But two of these statements were made by Cox, not Kelso. *Id*. The third was an isolated deposition remark in which Kelso discussed Spanish-speaking officers "celebrat[ing] [their] culture" at home by cooking tacos, eating guacamole, and playing soccer. *Id*. (citing J.A. at 36). This remark shows, at most, Kelso's indifference toward officers' private lives. It is not negative, and does not fairly imply that Kelso considers Hispanics "inferior." Furthermore, the single case that Appellees cite to show otherwise involved a "barrage" of disparaging statements. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763, 766 (7th Cir. 2016) (finding speakers "didn't much like Hispanics" from insults including "'taco eater,' 'f****** beaner,' 'taco,' 'bean eater,' 'dumb Mexican,' 'stupid Puerto Rican,' [and] 'f****** Puerto Rican'"); *cf. Keyes v. Wayne State Univ.*, No. 10-12087, 2010 WL 4054500, at *2 (E.D. Mich. Oct. 5, 2010) (finding "isolated and vague remark about eating fried chicken" not indicative of discrimination). Kelso's statement shows no such animosity.

* * *

Discrimination is intolerable. But the evidentiary standard in employment discrimination cases is the same as in any other. Espinosa and Simone ask this Court to lower that standard and accept an inadequate circumstantial showing. But "it is simply not true . . . that if a litigant presents an overload of irrelevant or nonprobative facts, somehow the irrelevancies will add up to relevant evidence of discriminatory intent. They do not." *Gorence v. Eagle Food Ctrs.*, 242 F.3d 759, 763 (7th Cir. 2001). Affirming summary judgment is appropriate.

CONCLUSION

On the disparate impact claim, this Court should reverse and direct summary judgment for Ames. In the alternative, this Court should reverse and remand for further proceedings. On the intentional discrimination claim, this Court should affirm summary judgment for Ames and Commissioner Kelso.

March 5, 2018 Respectfully submitted,

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