

Mandating English Language Proficiency for Franchisees

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Most franchisors require potential franchisees to have business experience in order to join their franchised systems. In addition, some franchisors require that potential franchisees have at least minimal proficiency in English.¹ English language proficiency requirements have been a source of controversy in recent years as immigrants enter the United States in record numbers and seek to achieve the American dream by owning small businesses. This article discusses recent case law concerning English language proficiency requirements for franchisees and addresses issues that franchisors should consider when implementing those requirements.

From a practical standpoint, an English language proficiency requirement for franchisees makes sense. Franchisees, which are the owners and frequently the operators of the business, must be able to communicate in English with customers, employees, suppliers, and the franchisor. Further, operating manuals and other written materials essential to the operation of a franchise are often in English. English proficiency is particularly critical to food service franchisors, which depend on each franchisee's strict compliance with food, health, and safety standards. Food service franchisees that are unable to speak and understand English may be unable to operate their franchised businesses according to the franchisor's standards, potentially jeopardizing the public health and the franchisor's trademarks and trade name.

English language proficiency requirements, however, are not always popular, as the Ladies Professional Golf Association learned when it announced plans to impose an English language proficiency requirement on its golfers.² Federal and/or state discrimination laws may be implicated if the requirement is not properly implemented because English language proficiency requirements are sometimes deemed to discriminate on the basis

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of an individual's national origin. Therefore, a franchisor interested in adopting an English proficiency requirement as part of its franchise application or transfer process must proceed cautiously.

On the other hand, franchisors should not fear utilizing English language proficiency requirements. If implemented properly and for the right reasons, the requirements will usually pass muster in state and federal courts. The case of *De Walsche v. Togo's Eateries Inc.*,³ where a California federal court upheld the English proficiency requirement of Togo's, is such a case and a good starting point for a discussion of issues that a franchisor should consider before adopting an English language proficiency requirement.

De Walsche v. Togo's Eateries, Inc.

In *De Walsche*, a franchisee challenged the Togo's English proficiency requirement and its use of an English test to measure the English proficiency of potential franchisees.⁴ Specifically, husband and wife buyers were interested in purchasing De Walsche's shop, and De Walsche submitted a fully executed purchase and sale agreement to Togo's for its approval.⁵ In accordance with its policies and procedures and contracts with De Walsche, Togo's required the buyers to pass its English language proficiency assessment test.⁶ The buyers failed the test, and Togo's denied the transfer on that ground.⁷ Togo's invited the buyers to retake the test again in six months, but the buyers never did. Instead of presenting new buyers to Togo's or seeking to remain in the system, De Walsche voluntarily closed the shop at the end of the term, which was six months after Togo's had denied the transfer, and sued Togo's for damages.⁸

De Walsche filed a three-count complaint.⁹ First, he contended that his franchise agreement did not require potential purchasers to pass an English test as a requirement of transfer, and therefore Togo's had breached the agreement and the implied covenant of good faith and fair dealing.¹⁰ He further claimed that the Togo's English test and proficiency requirement unfairly discriminated against the buyers of his shop, as well as other unnamed buyers, in violation of California's Unruh Civil Rights Act.¹¹ He never alleged that Togo's had discriminated against him personally.¹²

Togo's had set forth its reasons for requiring English proficiency of transferees in several documents, including its written policies, the Uniform Franchise Offering Circular (UFOC) provided to prospective franchisees, the franchise agreement, and a rider to the franchisees' purchase and sale agreement that De Walsche and the potential purchasers had executed.¹³ These documents noted the purpose in requiring that franchisees be proficient in English: to ensure that franchisees could pass Togo's extensive training, which was entirely in English,¹⁴ and that its franchisees could communicate with employees,

customers, and suppliers.¹⁵ Having franchisees understand and read English was especially important to Togo's because of the nature of its business, i.e., retail sandwich sales, which requires franchisees to strictly comply with health, safety, and sanitation standards. The court ultimately found notable that Togo's had presented substantial justifications for its English language proficiency requirement and that De Walsche did not dispute those justifications.¹⁶ Indeed, De Walsche acknowledged that a franchisee's ability to speak and read English was essential to the successful operation of a Togo's shop.¹⁷

De Walsche nevertheless argued that Togo's breached the various contracts by unreasonably withholding its consent to the transfer. He alleged that Togo's had misjudged the buyers' level of English proficiency because their English speaking ability "had been sufficient in prior commercial contexts."¹⁸ He also alleged that their English was understandable and that Togo's thus had failed to approve qualified buyers.¹⁹ Yet these arguments were undermined by the fact that at their depositions both buyers at times were unable to understand the questions put to them and had to use an interpreter.²⁰ De Walsche also contended that because the buyers took the test in a noisy coffee shop, they were set up to fail. The buyers, however, testified that they had no difficulty taking the test at the coffee shop. Because De Walsche could not point to any contractual provision that Togo's had breached or show that Togo's had unreasonably withheld its consent to the transfer, De Walsche's breach of contract claim failed.

De Walsche's claim that Togo's had breached the implied covenant of good faith and fair dealing also failed.²¹ "Under California law, 'the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.'²² Stated another way, "if conduct is permitted under the express terms of a contract it does not violate the covenant of good faith."²³ When a contract provides a franchisor the "absolute discretion" or "uncontrolled discretion" to take a certain action, the implied covenant of good faith and fair dealing is inapplicable.²⁴ Because the franchise agreement gave Togo's the absolute discretion to require the buyers to enter into and abide by the terms of its then-current franchise agreement, which included an English language proficiency requirement, the implied covenant of good faith and fair dealing did not apply.²⁵

Additionally, De Walsche alleged that Togo's had discriminated against the buyers and other unnamed buyers in violation of California's Unruh Civil Rights Act, which prohibits a franchisor from discriminating against franchisees in the granting of a franchise.²⁶ The court disagreed. De Walsche never alleged that Togo's personally discriminated against him; in fact, he admitted that Togo's did not engage in such discrimination.²⁷ Rather, he alleged that Togo's had discriminated against the potential buyers, as well as unnamed buyers, in mandating English proficiency.²⁸ However, because the buyers denied that they were discriminated against, the court concluded that De Walsche lacked standing to assert a claim under the Act.²⁹

De Walsche also had no evidence of intentional discrimination. Togo's did not implement the English language proficiency requirement for discriminatory reasons or to target minority franchisees, and no evidence of the sort was produced in the case. On the contrary, Togo's mandated the test to ensure that a franchisee

could successfully operate the business and could understand its standards; could communicate with employees, suppliers, and Togo's; and could pass Togo's extensive training.³⁰

Business Justifications for English Proficiency

The *De Walsche* case highlights several issues that franchisors should consider in assessing whether to implement an English language proficiency requirement in their systems: the need for legitimate business justifications and the need to include such justifications in written materials.

First, the need for legitimate business justifications cannot be overstated. A franchisor wishing to impose an English language proficiency requirement needs to carefully assess the reasons for the requirement and its relationship to the operation of the franchise system. These business justifications will be critical should the franchisor find itself in litigation. In *De Walsche*, Togo's presented substantial evidence showing that the English language requirement was reasonably related to its business and necessary to ensure that franchisees would be able to pass its training program and communicate with employees, suppliers, customers, and Togo's.³¹

The business justification requirement has been held to apply in nonfranchise settings as well. In the employment context, an English language proficiency requirement is "permissible only if required for the effective performance of the position for which it is imposed."³² In employment cases, courts have sanctioned English language proficiency requirements that are necessary to the function of an employee's job. In *Fragante v. City & County of Honolulu*,³³ the U.S. Court of Appeals for the Ninth Circuit upheld the employer's decision not to hire plaintiff. Because the position required constant contact with the public and speaking English was important to the position, the employer decided not to hire him on that basis.³⁴ Similarly, in *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, the U.S. Court of Appeals for the Seventh Circuit held that imposing English proficiency at a hospital did not constitute national origin discrimination against Latino employees.³⁵ Latino employees challenged the hospital's English proficiency requirement, claiming that it disproportionately affected Latino employees under Title VII, 42 U.S.C. § 2000e.³⁶ The Seventh Circuit disagreed.³⁷ The court found that the hospital's English requirement was essential to its operation and therefore was not discriminatory.³⁸ Likewise, in *Stephen v. PGA Sheraton Resort, Ltd.*,³⁹ the U.S. Court of Appeals for the Eleventh Circuit reversed a trial court's decision in favor of plaintiff employee on the employee's discrimination claim under Title VII.⁴⁰ The employee alleged that he was discharged on account of his race.⁴¹ The employer contended that it discharged the employee because of his inability to speak and understand English.⁴² The appeals court found that speaking and understanding English was important to the job in question and that the employer thus was justified in discharging the employee.⁴³

The *De Walsche* case highlights another important issue: the inclusion of business justifications for an English language proficiency requirement in the franchise agreement and other contracts entered into between the franchisor and the franchisee. In *De Walsche*, the franchise agreement at issue explicitly stated that Togo's could review the qualifications of potential buyers.⁴⁴

Based on the franchise agreement alone, the court granted summary judgment to Togo's on the ground that its un rebutted business justifications showed that its reasons for withholding consent to the transfer were reasonable.⁴⁵ Further, these business justifications were stated in a rider to the buyers' and De Walsche's purchase and sale agreement, in the new franchise agreement then required by Togo's, and in the UFOC provided to the buyers.⁴⁶ Accordingly, should a franchisor wish to implement an English proficiency requirement, it should state the business justifications in its contracts as well as in other written materials provided to the franchisee.

Measuring English Proficiency

Once a decision is made to mandate English proficiency for franchisees, the next step is determining how to measure English proficiency. English proficiency can be measured subjectively or objectively. Problems can occur, however, when the test is subjective. In *Fragante*, the employer did not provide the prospective employee with an English test. The employer's representatives decided not to offer the job to Fragante after the representatives were unable to understand Fragante's English. Fortunately for the employer, the court subjectively evaluated Fragante's English and concurred with the company that Fragante's English was not understandable, and thus he was unqualified for the position.⁴⁷ Similarly, in *Rodriguez v. Provident Life & Accident Insurance Co.*,⁴⁸ an insurance company denied plaintiff a disability policy because of plaintiff's inability to read and speak English, but in this case the court did not find for the employer.⁴⁹ The insurance company offered various reasons for its English proficiency requirement.⁵⁰ Plaintiff, however, rebutted the company's evidence, showing that the company did not regularly enforce the requirement.⁵¹ He also showed that the insurance company's requirement was subjective and that the company provided no training or standards to adequately measure its employees' English proficiency.⁵² The court denied the company's motion for summary judgment.⁵³ Whereas in *Fragante* the Ninth Circuit did not question the employer's subjectiveness in evaluating Fragante's English, the *Rodriguez* case points out the perils of companies failing to utilize an objective means of testing English proficiency.

Requiring a franchisee to pass a written English test is one objective means of assessing English proficiency. In *De Walsche*, all prospective franchisees, regardless of a franchisee's background, had to take the Togo's English test to demonstrate proficiency.⁵⁴ Only when a prospective franchisee presented objective evidence of having graduated from a two- or four-year American college was the prospective franchisee not required to take the test.⁵⁵

Should a franchisor decide to require a written English test as a way of measuring English proficiency, it should select the test carefully and determine (1) the levels and types of communication required for the business, (2) the kind of test that will adequately measure English proficiency for its business purposes, and (3) whether to prepare the test in-house or hire an outside expert to prepare it. Having the test prepared by a neutral expert may help to rebut any later allegations of bias.

A test is useful for various reasons. First, a low score by a

prospective franchisee may strengthen a franchisor's contention that the franchisee is not sufficiently qualified to operate within the franchisor's system. An English test will also benefit the franchisee by providing it with an objective criterion to measure its qualifications.

There are various federal agencies and third parties that have established benchmarks for assessing English proficiency. Many organizations use the Interagency Language Roundtable (ILR) scale developed by the federal government or the proficiency guidelines developed by the American Council on the Teaching of Foreign Languages (ACTFL) to assess English proficiency. In addition, colleges and universities (and sometimes corporations) use the Test of English as a Foreign Language (TOEFL) to measure the English proficiency of foreign-born people.

ILR Scale

The federal government has established benchmarks for measuring English language proficiency. These are used by the government and other organizations that specialize in developing English proficiency tests.⁵⁶ ILR is an organization comprised of representatives of various federal agencies and offices.⁵⁷ Professional language associations and individuals with an interest in English language learning or testing are also members of ILR.⁵⁸ The goal of ILR is to help various federal agencies keep abreast of techniques and technology for language learning, language use, language testing, and other language-related activities.⁵⁹

ILR does not develop or administer an English proficiency test.⁶⁰ Instead, it has developed various proficiency levels to measure a person's speaking, reading, listening, and writing skills.⁶¹ ILR has also developed a proficiency scale to measure interpreters' skills. Tests are then developed and assessed against the ILR's proficiency benchmarks. Federal agencies and third-party organizations reference the ILR scale in scoring language proficiency tests, including English tests, and assigning scores.⁶² ILR's scale level descriptions measure, from one through five, the proficiency level of an individual, i.e., whether that individual has a functional understanding or is a native speaker of a given language, including English.⁶³ For example, ILR Level 3 for reading describes a person who is able "to read within a normal range of speed and with almost complete comprehension a variety of authentic prose material on unfamiliar subjects."⁶⁴ A person at ILR Level 3, however, "may experience some difficulty with unusually complex structure and low frequency idioms."⁶⁵

ACTFL Proficiency Guidelines

An organization may use the ACTFL proficiency guidelines to assess the speaking, writing, reading, and listening skills of an individual.⁶⁶ The ACTFL scale is based in large part on that of ILR, but it is adapted for use in academic settings.⁶⁷ The ACTFL scale is different in that it does not use a numbering system to assess a person's proficiency; rather, the ACTFL scale ranges from "novice" to "superior" in terms of an individual's level of proficiency in a given language.⁶⁸ For example, Novice-Mid writers are

able to copy or transcribe familiar words or phrases, and reproduce from memory a modest number of isolated words

and phrases in context. They can supply limited information on simple forms and documents, and other basic biographical information, such as names, numbers, and nationality. Novice-Mid writers exhibit a high degree of accuracy when writing on well-practiced, familiar topics using limited formulaic language. With less familiar topics, there is a marked decrease in accuracy. Errors in spelling or in the representation of symbols may be frequent. There is little evidence of functional writing skills. At this level, the writing may be difficult to understand even by those accustomed to reading the texts of non-natives.⁶⁹

Like the ILR scale, the ACTFL scale includes guidelines for scoring tests and assigning scores.

TOEFL

Colleges and universities and sometimes other organizations use TOEFL.⁷⁰ TOEFL measures the English proficiency of non-native English speakers. It is an English proficiency test that consists of reading, listening, speaking, and writing responses to questions. Although it is generally used as a prerequisite for admission into U.S. colleges and universities,⁷¹ many government, licensing, and certification agencies and commercial organizations use TOEFL or TOEFL scores to evaluate the English proficiency of prospective employees or others.⁷²

Private Organizations

Additionally, there are a number of private entities that prepare English proficiency assessments for commercial organizations. Although there are too many to list here, a franchisor should keep in mind that the skill level and experience of these entities varies. In *De Walsche*, Togo's used the services of a private organization with experience in preparing English tests for the World Bank, the Pentagon, and certain state governmental agencies. Questions were prepared using the franchisor's internal materials and training materials and were tested to ensure that the score of franchisees reached Level 3 of the ILR scale, as discussed above.⁷³ Questions and answers were also tested to ensure that they were fair, understandable, and unambiguous.

Franchisors that desire to mandate English language proficiency for their franchisees need to assess which standards to use, i.e., ILR, ACTFL, or others. They also need to consider the type of test, if any, that they want to institute and who should develop and administer the test. These decisions may prove especially important should a franchisor find itself in future litigation.

Federal Antidiscrimination Laws

A franchisor interested in implementing an English proficiency requirement should keep in mind federal and state discrimination laws. Although an English language proficiency requirement is not in itself evidence of discrimination, it can be if the requirement is intended to weed out candidates based on their national origin or is otherwise improperly applied.⁷⁴

At the federal level, 42 U.S.C. § 1981 covers all contracts and protects against discrimination during and after contract formation.⁷⁵ Section 1981 applies to private contracts and governmental actions, including franchise agreements.⁷⁶ It provides thus:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.⁷⁷

The "make and enforce" contracts provision is further defined as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."⁷⁸

Franchisees have brought claims under § 1981 for a variety of reasons, including the franchisor's refusal to approve a transfer.⁷⁹ Franchisees also have brought claims because of a franchisor's termination of the franchise agreement or the franchisor's refusal to renew the franchise agreement.⁸⁰

Under § 1981, a franchisee must establish "intentional discrimination," which requires a high burden of proof.⁸¹ Claims of disparate impact, i.e., that a facially neutral policy has a disproportionate effect on members of a protected group, are not actionable under § 1981.⁸² Today, a smoking gun or other direct evidence of discrimination is rarely found. Intentional discrimination is typically proven in one of two ways: "(1) . . . direct evidence that race was a determining factor in the adverse . . . decision; or (2) by tendering circumstantial evidence sufficient to 'provide a basis for drawing an inference of intentional discrimination.'"⁸³ In *Home Repair, Inc. v. Paul W. Davis Systems, Inc.*, defendant franchisor refused to consent to the transfer of a franchise to plaintiff, whose owner was African American. Although plaintiff failed to present direct evidence of discrimination, he presented circumstantial evidence to the court, consisting of racial statements made by defendants' employees and other evidence of discrimination, sufficient to meet his burden to show purposeful discrimination.⁸⁴

It is not clear whether § 1981 will prove to be a viable tool in challenging an English proficiency requirement. The Supreme Court has determined that a § 1981 claim applies only to racial discrimination⁸⁵ and not to other forms of discrimination, such as religious discrimination⁸⁶ or discrimination based solely on the place or origin of an individual.⁸⁷ Over the years, the courts have grappled with whether individuals of certain ethnicities have standing to assert a claim under § 1981. Until the Supreme Court's decision in *Saint Francis College v. Al-Khagrazi*, 481 U.S. 604 (1987), it was unclear whether certain ethnic groups, such as Hispanics, could bring a claim under § 1981. The Supreme Court clarified in *Saint Francis College* that § 1981 was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics"⁸⁸ and determined that Hispanics and other ethnic groups were protected from discrimination under § 1981. Still, courts continue to reject discrimination claims based solely on national origin.⁸⁹

Whether a person challenging an English proficiency requirement will succeed on a claim under § 1981 will largely depend on the facts of the case. For example, *Rodriguez v. Provident Life and Accident Insurance Co.*⁹⁰ suggests that a plaintiff may

be able to challenge an English language proficiency requirement under § 1981 under certain circumstances. In that case, plaintiff alleged that defendant life insurance company had denied him disability insurance coverage because of his inability to speak and read English with reasonable fluency.⁹¹ Rodriguez claimed that the insurance company had used “language as a proxy for race and ethnicity discrimination” and pointed to five other instances where the insurance company had denied minorities coverage based on their inability to speak or read English.⁹² He also presented evidence that the insurance company failed to verify the English proficiency of nonminority applicants and that the proficiency/literacy requirement never had been enforced previously.⁹³ Based on this evidence, the California federal court found that Rodriguez had established that he was a member of a protected class (i.e., a member of a racial group) and sufficiently satisfied the elements of a claim under § 1981 to overcome the insurance company’s motion for summary judgment.⁹⁴

State Antidiscrimination Laws

A franchisor should also keep in mind that many states have counterparts to § 1981, at least some of which cover not only racial discrimination but also other forms of discrimination.⁹⁵ For example, although the Massachusetts law specifically encompasses discrimination in the making and enforcement of contracts, it also applies to other discrimination claims, such as discrimination relating to national origin:

All persons within the commonwealth, regardless of sex, race, color, creed or national origin, shall have, except as is otherwise provided or permitted by law, the same rights enjoyed by white male citizens, to make and enforce contracts, to inherit, purchase, to lease, sell, hold and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁹⁶

Similarly, Minnesota’s law provides that it is unlawful

to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.⁹⁷

Other states’ antidiscrimination laws are broadly and/or vaguely worded and arguably encompass the “make and enforce contracts” language of § 1981 even though the statutes do not specifically reference such language.⁹⁸ The New Jersey antidiscrimination law, for example, does not mention the words *make and enforce contracts* but instead provides a general proclamation against discrimination.⁹⁹ What is clear, however, is that the law encompasses the franchise relationship. Specifically, in *Letap Hospitality, L.L.C. v. Days Inn Worldwide, Inc.*,¹⁰⁰ the franchisee sued under the New Jersey antidiscrimination law and claimed that the franchisor treated nonminority franchisees

more favorably by giving concessions and reducing certain fees, benefits that plaintiff alleged it did not receive because of its owner’s Indian descent.¹⁰¹ The Louisiana federal district court found that the franchisee had asserted a valid claim of racial discrimination and therefore did not dismiss the franchisee’s discrimination claim from the lawsuit.¹⁰²

In mandating an English language proficiency requirement, a franchisor needs to consider both federal and state antidiscrimination statutes and whether they may be implicated by the franchisor’s requirements. Even if § 1981 does not apply to the franchisor’s actions, state laws may. Unlike federal law, which generally applies to claims of racial discrimination only, at least some state law counterparts to § 1981 are more expansive; and potential claims may be based on other forms of discrimination, such as those based on an individual’s national origin.

Franchise-Specific Laws

In addition, franchisors should be aware that California and Iowa have franchise-specific laws that prohibit a franchisor from discriminating against a franchisee on account of race, sex, or other class characteristics. The laws differ in scope. Although California specifically prohibits unlawful discrimination in the granting of a franchise, including transfers of franchises, the Iowa law appears to apply only to franchise transfers.

California

Unlike other states, which have implemented general antidiscrimination statutes, California’s Unruh Civil Rights Act specifically prohibits a franchisor from discriminating against a member of a protected group.¹⁰³ The purpose of the act is to prohibit unlawful discrimination in public places, including businesses.

Section 51.8 of the California Civil Code provides thus: “No franchisor shall discriminate in the granting of franchises solely on account of any . . .” person’s sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation.¹⁰⁴ The Unruh Act is interpreted broadly, and courts have repeatedly reiterated that the list of protected categories (sex, race, color, religion, etc.) is not exhaustive.¹⁰⁵ The restrictions of the Unruh Act, however, are not absolute, and a business “may establish reasonable regulations that are rationally related to the services performed and facilities provided.”¹⁰⁶ “[T]he California Supreme Court has determined that certain types of discrimination are reasonable and thus not arbitrary under the Unruh Act.”¹⁰⁷

Additionally, like § 1981, California’s Unruh Act protects against “associational discrimination,” that is, discrimination against a person on account of her association with a person from a protected class.¹⁰⁸ Although California courts have upheld discrimination claims based on actions taken against a plaintiff’s associates, the case law does not create concrete standards for associational discrimination.¹⁰⁹ For instance, in *Winchell v. English*, plaintiffs, white tenants of defendants’ mobile home court, alleged that defendants had adversely discriminated against them when they subleased to and associated with African Americans.¹¹⁰ A California court determined that plaintiffs had sufficiently asserted a claim of standing by association under the Unruh Act.¹¹¹ Likewise, in *Kotev v. First*

Colony Life Insurance Co., plaintiff alleged that defendant denied him coverage when it learned that plaintiff was living with women who had tested HIV positive.¹¹² The federal California court found that such a claim was actionable under the Unruh Act and refused to dismiss plaintiff's complaint. In neither of those cases, however, did the court explain what type of an association is sufficient for a claim of associational discrimination under the Unruh Act.¹¹³

As with § 1981, to make a claim under the Unruh Act, a plaintiff must show intentional discrimination.¹¹⁴ Claims of disparate impact alone are insufficient.¹¹⁵ *Koebke v. Bernardo Heights Country Club* confirms that the Unruh Act prohibits intentional discrimination only and that a disparate impact theory of discrimination does not apply to Unruh Act claims.¹¹⁶ In so holding, the Supreme Court of California observed that "[a]doption of the disparate impact theory to cases under the Unruh Act would expose businesses to new liability and potential court regulation for their day-to-day practices in a manner never intended by the Legislature."¹¹⁷

Claims challenging an English language proficiency requirement are viable under the Unruh Act. In *Rodriguez*, where plaintiff challenged the insurance company's English proficiency requirement, the California federal court acknowledged that plaintiff "may make a claim based on language as an indicator for national origin or ethnicity discrimination."¹¹⁸ Similarly, the California federal court in *De Walsche* implicitly acknowledged that a plaintiff may bring a claim under the Unruh Act in challenging an English proficiency requirement, although a plaintiff still must show that she has standing and must establish intentional discrimination.¹¹⁹

Iowa

Similarly, Iowa's Franchise Laws (promulgated in 1992 and 2000) prohibit a franchisor from discriminating against a proposed franchisee.¹²⁰ The laws provide that "[a] franchisor shall not discriminate against a proposed transferee of a franchise on the basis of race, color, national origin, religion, sex, or disability."¹²¹ Under the law, a franchisee may transfer its franchised business "provided that the transferee satisfies the reasonable current qualifications of the franchisor for new franchisees." Iowa further provides that "a reasonable current qualification for a new franchisee is a qualification based upon a legitimate business reason."

Whether an English proficiency requirement implicates Iowa's Franchise Law remains to be seen. To date, no published case in Iowa has addressed this issue.

Significance of Demonstrating Direct Harm

Critical to a discrimination case is whether the plaintiff can demonstrate direct harm to it; failure to do so may result in the case being dismissed as a result of a lack of standing. In other words, a person claiming discrimination must show some

direct harm or injury-in-fact as a prerequisite to pursuing a claim.¹²² Federal and state discrimination laws often differ on the requirements of standing.

Section 1981

In the context of a § 1981 claim, a plaintiff must show that he is a member of a racial minority, that he was the victim of intentional discrimination, and that the discrimination concerned the making or enforcement of a contract.¹²³ In addition, a plaintiff must show that he had rights under the contract.¹²⁴ That is, "[s]ection 1981 plaintiffs must identify injuries flowing from a

racially motivated breach of their own contractual relationship, not of someone else's."¹²⁵ The Supreme Court in *Domino's Pizza, Inc. v. McDonald*¹²⁶ held that a person bringing a claim under § 1981 must identify an impaired "contractual relationship" under which

plaintiff has rights.¹²⁷ In *Domino's*, the Supreme Court rejected a shareholder's § 1981 claim of racial discrimination, finding that the claim belonged to the corporation and not to the shareholder, who was not a party to the franchise agreement.¹²⁸

Absent a showing that an agent is a party to the franchise agreement, courts have repeatedly rejected an agent's or shareholder's claim under § 1981.¹²⁹ In *Letap Hospitality, L.L.C. v. Patel*, a federal court rejected a § 1981 claim of a member of a limited liability company on the basis of the member's lack of standing because the company, and not the member, was a party to the franchise agreement.¹³⁰ Similarly, in *Bellows v. Amoco Oil Co.*, the U.S. Court of Appeals for the Fifth Circuit rejected a claim of discrimination under § 1981 by a president of a company on the ground that he had never personally contracted with Amoco.¹³¹

California's Unruh Act

Under the Unruh Act, "any person aggrieved by the conduct" can assert a claim.¹³² In *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, the court explained that the Unruh Act "was intended to provide recourse for those individuals actually denied full and equal treatment by a business establishment."¹³³ Therefore, an individual asserting a claim under the Unruh Act must establish that he is the victim of discrimination and cannot point to the alleged discrimination of others to prove his claim.

Courts have rejected a plaintiff's claim of discrimination based solely on lack of standing.¹³⁴ For example, in *Reyes v. Atlantic Richfield Co.*, plaintiff franchisee claimed that the franchisor had failed to renew its franchise in violation of the Unruh Act and pointed to various racial statements made by the franchisor's representatives against its employees as evidence of this discrimination.¹³⁵ The Ninth Circuit rejected the claim and stated that the franchisee had no standing under the Unruh Act to assert a claim of discrimination on behalf of its employees.¹³⁶ Similarly, in *Bowden v. Redwood Institute for Designed Education*, plaintiff alleged that the school fired her in retaliation for

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her objections to the school's treatment of disabled students.¹³⁷ The court rejected plaintiff's claim because she was not a member of a protected class nor could she bring a claim on behalf of disabled students.

Likewise, in *De Walsche*, the court rejected the franchisee's claim of discrimination because he lacked standing.¹³⁸ De Walsche claimed that Togo's discriminated against the buyers of his shop and other unnamed buyers in requiring an English test as one of the conditions of transfer.¹³⁹ The California federal court rejected De Walsche's claim. First, the buyers testified at their deposition that they were not discriminated against by Togo's.¹⁴⁰ Moreover, De Walsche could not identify any buyer against which Togo's had discriminated.¹⁴¹

Conclusion

The success of a franchise system depends in large measure on the success of its franchisees. Speaking and understanding English is critical in order for franchisees to successfully operate a franchise business. English language proficiency requirements may be especially important to a food franchisor, which must ensure that its franchisees comply with its food safety standards. English language proficiency requirements may also be necessary to ensure that a franchisee is able to understand the franchisor's requirements and to operate the business according to the franchisor's standards. An English proficiency requirement, however, has to be fair and implemented for legitimate business reasons. A franchisor considering an English language proficiency requirement needs to evaluate whether the requirement is important to its business. Further, a franchisor needs to evaluate carefully how it will go about measuring English proficiency. If it should decide to implement an English language proficiency requirement, a franchisor should be up-front about the reasons for the requirement and include those reasons, if possible, in the parties' contracts. Finally, the franchisor should carefully review federal and state discrimination laws and implement its English language proficiency requirement in a manner that will not run afoul of those laws.

Endnotes

1. See, e.g., THE UPS STORE, www.theupsstore.com/franchise/seethebes.html; SUNOCO APLUS FRANCHISES, www.sunocoinc.com/Site/Consumer/APlus/ProspectiveFranchisees/FranchiseRequirements.htm.

2. See GOLFWEEK, www.golfweek.com/protours/lpga/story/futures-tour-reaction-news-082808. The PGA, however, reversed course amid criticism and decided to revise its English language proficiency policy. See NEW YORK TIMES, www.nytimes.com/2008/09/06/sports/golf/06lpga.html?scp=4&sq=LPGA%20English&st=cse.

3. *De Walsche v. Togo's Eateries, Inc.*, No. CV 07-2901, 2008 WL 2856412 (C.D. Cal. July 21, 2008).

4. *Id.* at *1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at *5.

13. *Id.* at *2-3.

14. *Id.* at *2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at *4.

22. *Id.* (quoting *Carma Developers v. Marathon Dev. Cal., Inc.*, 826 P.2d 710 (1992)) (citations omitted).

23. *Id.*

24. *Id.* (citing *Flight Concepts Ltd. P'ship v. Boeing Co.*, 38 F.3d 1152, 1157 (10th Cir. 1994); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 506 (Colo. 1995)).

25. *Id.*

26. *Id.*; see also CAL. CIV. CODE § 51(b).

27. *De Walsche*, 2008 WL 2856412, at *5.

28. *Id.*

29. *Id.*

30. *Id.*

31. *De Walsche*, 2008 WL 2856412, at *2.

32. EEOC COMPLIANCE MANUAL, www.eeoc.gov/policy/docs/national-origin.html#V.

33. 888 F.2d 591 (9th Cir. 1989).

34. *Id.* at 593.

35. *Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 660 F.2d 1217 (7th Cir. 1981).

36. *Id.* at 1218.

37. *Id.*

38. *Id.*

39. 873 F.2d 276 (11th Cir. 1989).

40. *Id.*

41. *Id.* at 278.

42. *Id.* at 280.

43. *Id.*

44. *Id.*

45. *Id.*

46. *De Walsche v. Togo's Eateries, Inc.*, No. CV 07-2901, 2008 WL 2856412, at *2 (C.D. Cal. July 21, 2008).

47. *Id.*

48. No. CV 00-01828-GHK, 2001 U.S. Dist. LEXIS 13102 (C.D. Cal. Feb. 28, 2001).

49. *Id.*

50. *Id.* at *16-17.

51. *Id.* at *19-20.

52. *Id.* at *20.

53. *Id.* In granting summary judgment, however, the court refused to comment on the strength of plaintiff's case. *Id.*

54. *De Walsche v. Togo's Eateries, Inc.*, No. CV 07-2901, 2008 WL 2856412, at *2 (C.D. Cal. July 21, 2008).

55. *Id.*

56. INTERAGENCY LANGUAGE ROUNDTABLE, http://govtilr.org/ILR_History.htm.

57. *Id.*

58. *Id.*, <http://govtilr.org/FAQ.htm>.

59. *Id.*, http://govtilr.org/ILR_History.htm.
60. *Id.*
61. *Id.*, <http://govtilr.org/FAQ.htm>.
62. *Id.*
63. *Id.*
64. *Id.*, www.govtilr.org/Skills/ILRscale4.htm#3.
65. *Id.*
66. ACTFL, www.actfl.org/files/public/writingguidelines.pdf.
67. *Id.*
68. *See, e.g.*, *United States v. Torres*, 66 F. Supp. 2d 30, 32 (D.D.C. 1999) (using the ACTFL proficiency guidelines to determine the English proficiency of an inmate).
69. *Id.*
70. TOEFL, www.ets.org/portal/site/ets/menuitem.1488512ecfd5b8849a77b13bc3921509/vgnnextoid=eb872d3631df4010VgnVCM1000022f95190RCRD&vgnnextchannel=9071197a484f4010VgnVCM1000022f95190RCRD.
71. *Id.*
72. *Id.*
73. *Id.*
74. *See, e.g.*, *Dalmau v. Vicao Aerea Rio-Grandense, S.A.*, 337 F. Supp. 2d 1299 (S.D. Fla. 2004) (discussing a Portuguese fluency/literacy requirement); *see also Estenos v. PAHO/Fed. Credit Union*, 952 A.2d 878, 890 (D.C. 2008) (“Language-proficiency requirements can be based on perfectly legitimate considerations, but they are also capable of use to discriminate against nationals of countries where the language is not generally spoken.”).
75. 42 U.S.C. § 1981; *see also Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006).
76. *Smith v. Molly Maid, Inc.*, Business Franchise Guide (CCH) ¶ 13,273 (N.D. Ill. Feb. 16, 2006) (citing *Runyon v. McCrary*, 427 U.S. 160 (1976)).
77. 42 U.S.C. § 1981(a). Section 1981 is interpreted broadly and protects postformation conduct. *See Domino’s Pizza, Inc.*, 546 U.S. at 477.
78. 42 U.S.C. § 1981(b).
79. *Home Repair, Inc. v. Paul W. Davis Sys., Inc.*, No. 98 C 4074, 2000 U.S. Dist. LEXIS 929 (N.D. Ill. Jan. 31, 2000) (§ 1981 claim alleged that franchisor discriminated when it refused to consent to the transfer of franchise to plaintiff, whose owner was African American).
80. *Smith v. Molly Maid, Inc.*, Business Franchise Guide (CCH) ¶ 13,273 (N.D. Ill. Feb. 16, 2006) (franchisee alleged that franchisor had violated § 1981 when it terminated the franchise); *Elkhatib v. Dunkin’ Donuts Inc.*, 493 F.3d 827 (7th Cir. 2007) (discrimination claim under § 1981 asserted that franchisor did not renew the franchise based on racial discrimination).
81. *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997); *see also Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001).
82. *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996) (§ 1981 claim requires evidence of intentional discrimination) (citing *Palmer v. Bd. of Educ. of Comm. Unit Sch. Dist. 201-U*, 46 F.3d 682, 687 (7th Cir. 1995) (§ 1981 is designed to forbid disparate treatment, not disparate impact).
83. *Home Repair, Inc. v. Paul W. Davis Sys., Inc.*, No. 98 C 4074, 2000 U.S. Dist. LEXIS 929, at *13 (N.D. Ill. Jan. 31, 2000).
84. *Id.* at *20.
85. “Although § 1981 does not itself use the word ‘race,’ the Court has construed the section to forbid all ‘racial’ discrimination in the making of private as well as public contracts.” *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609 (1987) (citing *Runyon v. McCrary*, 427 U.S. 160, 168 (1976)).
86. *Elkhatib v. Dunkin’ Donuts, Inc.*, 493 F.3d 827, 829 (7th Cir. 2007).
87. *See, e.g.*, *Simpson v. Enlarged City Sch. Dist. of Newburgh*, No. 05 Civ. 5144, 2005 U.S. Dist. LEXIS 44655, at *14–15 (S.D.N.Y. Sept. 30, 2005) (national origin discrimination claim based on Jamaican pattern of speech is not cognizable under § 1981).
88. *Saint Francis Coll.*, 481 U.S. at 609.
89. *See El-Zabet v. Nissan N. Am., Inc.*, 211 F. App’x 460 (6th Cir. 2006) (allegation under § 1981 that plaintiff was discriminated against because of his Arab heritage); *Simpson*, 2005 U.S. Dist. LEXIS 44655 (plaintiff’s claim that the school discriminated against her because of her Jamaican ethnicity and not on account of race was not an actionable claim under § 1981).
90. *Rodriguez v. Provident Life & Accident Ins. Co.*, No. CV 00-01828-GHK, 2001 U.S. Dist. LEXIS 13102 (C.D. Cal. Feb. 28, 2001).
91. *Id.* at *15.
92. *Id.*
93. *Id.* at *20.
94. *Id.*
95. *See, e.g.*, N.J. STAT. ANN. § 10:2..
96. MASS. GEN. LAWS CH. 93, § 102(a).
97. MINN. STAT. § 363A.17(3); *see also* R.I. GEN. LAWS § 42-112-1(a) (1956) (“[T]o intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose” is a violation of the law.).
98. *See* N.J. STAT. ANN. § 10:5-3 (New Jersey Law Against Discrimination).
99. N.J. STAT. ANN. § 10:5-3.
100. Bus. Franchise Guide (CCH) ¶ 13,959 (E.D. La. Aug. 7, 2008).
101. *Id.*
102. *Id.*
103. CAL. CIV. CODE. § 51.8.
104. *Id.* §§ 51.8(a), 51(b). Section 51.8(a) also prohibits a franchisor from discriminating on account of the composition of a neighborhood or geographical area. CAL. CIV. CODE 51.8(a).
105. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1219 (Cal. 2005) (citing *In re Cox*, 474 P.2d 992 (Cal. 1970)).
106. *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1502 (1999); *Rodriguez v. Provident Life & Accident Ins. Co.*, No. CV00-01828-GHK(CWx), 2001 U.S. Dist. LEXIS 13102, at *23 (C.D. Cal. Mar. 2, 2001).
107. *Rodriguez*, 2001 U.S. Dist. LEXIS 13102, at *23 (citations omitted).
108. *Winchell v. English*, 62 Cal. App. 3d 125 (1976) (discrimination based on plaintiff’s association with African American violated Unruh Act); *Rotary Club of Duarte v. Bd. of Dir. of Rotary Int’l*, 178 Cal. App. 3d 1035 (1986) (discrimination based on plaintiff’s association with women violated Unruh Act); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996) (discrimination based on plaintiff’s association with a person with a disability violated the Unruh Act).
109. *Winchell*, 62 Cal. App. 3d at 129.
110. *Id.*
111. *Id.*

112. *Kotev*, 927 F. Supp. at 1320.

113. *See id.*; *see also Winchell*, 62 Cal. App. 3d at 129. In addition, claims of discrimination by association (i.e., discriminatory action taken against a nonminority person because of the person's relationship to, or association with, a minority person) are also cognizable under § 1981. *Bilello v. Kum & Go, LLC*, 374 F.3d 656, 660 (8th Cir. 2004). Case law suggests that to make a claim of associational discrimination, a plaintiff must be the direct target of discrimination. *Id.* (citing *Clayton v. White Hall Sch. Dist.*, 875 F.2d 676, 678–80 (8th Cir.1989) (concluding that white employee had standing under § 1981 to raise issue of racial discrimination directed against minority coworker); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1266–67 (10th Cir.1989) (concluding that white attorney had standing under § 1981 to sue newspaper publishing allegedly false articles because attorney represented minority clients); *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 114–15 (5th Cir.1986) (permitting § 1981 suit by white plaintiff terminated because of marriage to minority spouse); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890 (11th Cir.1986) (same); *Fiedler v. Marum-sco Christian Sch.*, 631 F.2d 1144, 1150 (4th Cir.1980) (concluding that white father and two white daughters had standing under § 1981 to file suit against private sectarian school for terminating contractual relationship with white daughters because of one daughter's association with a black student); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312, *modified on reh'g*, 520 F.2d 409 (2d Cir.1975) (allowing suit under § 1981 where white employee claimed that his company forced him to retire because he sold his house to a fellow black employee)).

114. *Angelucci v. Century Supper Club*, 41 Cal. 4th 160 (2007) (citing *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App. 3d 1377, 1382 (1990)).

115. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212 (Cal. 2005) (quoting *Harris v. Capital Growth Inv. XIV*, 52 Cal. 3d 1142, 1175 (Cal. 1991)).

116. *Id.*

117. *Id.*

118. *Rodriguez v. Provident Life & Accident Ins. Co.*, No. CV 00-01828-GHK, 2001 U.S. Dist. LEXIS 13102, at *24 (C.D. Cal. Feb. 28, 2001).

119. *De Walsche v. Togo's Eateries, Inc.*, No. CV 07-2901, 2008 WL 2856412, at *2 (C.D. Cal. July 21, 2008).

120. IOWA CODE §§ 537A.10.5.f., 523H.4.8.

121. *Id.*

122. *See, e.g., Bowden v. Redwood Inst. for Designed Educ., Inc.*, No.

C98-1312, 1999 U.S. Dist. LEXIS 2881, at *11 (N.D. Cal. Mar. 9, 1998) (explaining the matter of standing in the various federal antidiscrimination statutes, including the Civil Rights Act of 1964).

123. *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997); *see also Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (noting that to establish a claim under § 1981, plaintiff must show that defendant discriminated against him on account of his race, e.g., that the discrimination was intentional and that the discrimination was a substantial or motivating factor for defendant's actions).

124. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

125. *Id.* at 480.

126. 546 U.S. 470 (2006).

127. *Id.* at 476.

128. *Id.* Justice Scalia writing for the majority in the *Domino's* case contended that plaintiff shareholder could not have it both ways. The shareholder was protected by the corporate form in the bankruptcy proceeding instituted by the corporation and could not at the same time assert a claim on behalf of the corporation. *Id.*

129. *See Letap Hospitality, L.L.C. v. Patel*, Bus. Franchise Guide (CCH) ¶ 13,959 (D. La. Aug. 7, 2008) (rejecting a member's discrimination claim because the limited liability company, and not the member, was a party to the franchise agreement and therefore did not have standing to assert a claim of discrimination); *Bellows v. Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997) (finding that the § 1981 claim failed because Amoco never contracted personally with the president, who brought the discrimination claim).

130. Bus. Franchise Guide (CCH) ¶ 13,959 (D. La. Aug. 7, 2008).

131. 118 F.3d 268 (5th Cir. 1997).

132. *See CAL. CIV. CODE* § 52(c).

133. *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App. 3d 1377, 1383 (1990).

134. *See De Walsche v. Togo's Eateries, Inc.*, No. CV 07-2901, 2008 WL 2856412 (C.D. Cal. July 21, 2008); *Reyes v. Atl. Richfield Co.*, 12 F.3d 1464, 1471 (9th Cir. 1993).

135. *Reyes*, 12 F.3d at 1471.

136. *Id.*

137. *Bowden v. Redwood Inst. for Designed Educ.*, No. C98-1312, 1999 U.S. Dist. LEXIS 2881 (N.D. Cal. 1999).

138. *De Walsche*, 2008 WL 2856412, at *5.

139. *Id.*

140. *Id.*

141. *Id.* at *5 n.5.