The Application of American Anti-Discrimination Laws in a Global Work Environment

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All of the nation’s employment protections under Title VII, the ADA, and ADEA travel with American citizens when they work for American enterprises abroad. Whether these same provisions apply to U.S. nationals remains unclear.

THE EXPANSION OF American business into foreign markets has grown precipitously in the last two decades. Untapped markets represent real opportunities for profit maximization. Wal-Mart currently operates in Argentina, Brazil, Canada, China, Mexico, the United Kingdom, South Korea, and Japan. Hoovers, Wal-Mart Stores, Inc. Company Record available at http://premium.hoovers.com/subscribe/co/ops.xhtmlID= ffirjfflhrshkkjs (by subscription). In 2004, Pfizer opened a multi-million dollar drug plant in Singapore. Jim Hopkins, Drugmakers Shift More Production Outside U.S.A., USA Today, Oct. 19, 2004, at B1. Not to be outdone, its pharmaceutical rival Johnson & Johnson at approximately the same time increased its factory space by 38 percent in Europe. Id. With the reconfiguration of American business there are increasing foreign job opportunities with American companies. As a result, U.S. anti-discrimination laws have been amended to reflect this new reality. It was estimated that the expansion of extraterritorial protection embodied in the 1991 Civil Rights Act “[would] affect 2000 United States companies operating 21,000 overseas units in 121 coun-

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**TITLE VII** • Title VII of the Civil Rights Act of 1964 prohibits employment discrimination. Its principal goal was “...the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.” See McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973). The statute provides:

“It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”

42 U.S.C. §2000e-2(a)(1). An “employer” means “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” Id. at §2000e(b). Commerce is defined as “trade, traffic, commerce, transportation, transmission or communication.” Commerce also includes both foreign and interstate commerce. Id. at §2000e(g).

**Remedial Purpose And Extraterritorial Application**


In EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) (Aramco), the Supreme Court squarely addressed the extraterritoriality question in the Title VII context. There, Ali Boureslan, a naturalized American citizen of Lebanese ancestry, was hired as an engineer at Aramco Service Company in Texas. He was subsequently transferred to the American parent company Aramco at its Saudi location. He argued he was dismissed some four years later because of his race, national origin, and religion. As an American, he claimed to be protected against discrimination by a U.S. employer regardless of where in the world he was employed. The Supreme Court rejected the argument that Title VII applied extraterritorially. While acknowledging that “...Congress has the authority to enforce its laws beyond the territorial boundaries of the United States,” it nevertheless concluded that the statute at best was ambiguous. Furthermore, it emphasized that “...legislation of Congress unless a contrary intent appears is meant to apply only within the territorial jurisdiction of the United States.” Id. at 248 (quoting Filardo, 336 U.S. at 285). In the absence of a specific expression of intent, the Court quite simply was unwilling to apply Title VII to American citizens working outside the nation’s borders.
Section 109 Of The Civil Rights Act Of 1991

Responding to the Court's Aramco decision, Congress made its intent unequivocally clear. Under section 109 of the Civil Rights Act of 1991 entitled "Protection of Extraterritorial Employment," Title VII and the Americans with Disabilities Act ("ADA") were amended. See Pub. L No. 102–166 §109, 105 Stat 1071 (1991). As amended, Title VII applies "...to employment in a foreign country... [of] an individual who is a citizen of the United States." 42 U.S.C. §2000 e(f). The language is virtually identical under ADA. See 42 U.S.C. §12111(4). See also H.R. 1, 102d Cong. (1991) (proposed section 1107(a)) ("All federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies").

THE AMERICAN EMPLOYER • American employers and foreign entities controlled by American employers are prohibited from discriminating against Americans working abroad. See 42 U.S.C. §2000e-1(c)(1). See also 42 U.S.C. §12112(c). Section 109, does not, however, protect Americans employed overseas by foreign corporations not controlled by United States companies. 42 U.S.C. §2000e-1(c)(2). See also 42 U.S.C. §12112(c)(2)(B). Moreover, it does not apply to employment in the District of Columbia or the United States territories of Puerto Rico, Guam, Wake Island, the Virgin Islands, American Samoa, the Canal Zone or the Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act. See 42 U.S.C. §2000e-1 (Defining a State). The District and the Territories are treated as States for purposes of the statute. See also Enforcement Guidance on Application of Title VII and ADA to American Firms Overseas and to Foreign Firms in the United States, Notice 915.002, EEOC Compl. Man. ¶2169, at 2229 (Oct. 20, 1993); Hirschbrunner v. Martinez Ramirez, 438 F. Supp. 2d. 10, 15 (D. Puerto Rico 2006) (for purposes of Title VII, Puerto Rico is considered to be a State not a foreign nation).

"American" Employer Not Defined

Congress did not define the meaning of an "American" employer. Because of the dearth of legislative history, the EEOC promulgated its own interpretation. Ordinarily when a corporation is involved, the Agency will determine employer nationality by reference to the place of incorporation. For entities like law firms or accounting concerns it will consider additional factors such as:

- Nationality and location of officers and directors;
- Nationality of substantial shareholders; and
- Location of primary facilities such as offices and factories.

Finally, when a company is incorporated abroad but has many United States contacts, the Agency will examine a totality of its domestic business relationships. See EEOC Compl. Man. ¶2169, at 2226.

Control By American Employers

American employer control of a foreign company is statutorily defined. For purposes of 42 U.S.C. §2000e-1(c)(3), the determination of whether an employer controls a corporation shall be based on "(A) the interrelation of operations; (B) the common management; (C) the centralized control of labor relations; and (D) the common ownership or financial control, of the employer and the corporation." By its very nature, this analysis is a fact-intensive. Essentially it adopts the integrated enterprise or single employer test first articulated by the National Labor Relations Board. See Radio & Television Broadcast Technicians, Local 1264 v. Broadcast Service of Mobile Inc., 380 U.S. 255 (1965) (per curiam). See also Watson v. CSA, Ltd., 376 F. Supp. 2d 588 (D. Md. 2005) (Cayman Island company
is part of a single employer where American joint venture publicly lists it as its division and handles all labor relations for both enterprises; *Kang v. U Lim America, Inc.*, 296 F.3d 810 (9th Cir. 2002) (Mexican company is part of a single employer where employees of Mexican and American companies work at the same factory, company officers are identical, and American corporation handles all labor relations for both enterprises); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995) (subsidiary and parent are a single employer when the two companies share common management structure, the subsidiary is wholly owned by the parent, and the parent controls all personnel decisions for both enterprises). A decision about control much like the numerosity requirements of Title VII is not jurisdictional; rather, it addresses the merits of the claims. It is therefore a jury question. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *see also Rajoppe v. GMAC Corp Holding Corp.*, 2007 U.S. Dist LEXIS 18956 (E.D. Pa. Mar. 19, 2007).

**EXTRATERRITORIAL PROTECTION AND RESIDENT ALIENS** - Title VII, with few exceptions not herein relevant, protects the employment of citizens, permanent residents, and legal aliens alike working in America regardless of whether the employer is domestic or foreign. *See Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998); *EEOC v. Kloster Cruise Ltd.*, 888 F. Supp. 147 (S.D. Fla. 1995); *Ward v. W&H Voortman Ltd.*, 685 F. Supp. 231 (M.D. Ala. 1988).

Historically the courts have been reluctant to uphold classifications based upon alienage. *See e.g., Espinoza v. Farah Mfg Co.*, 414 U.S. 86 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948). Despite this history, the courts and Congress have shown an unwillingness to apply to U.S. residents working abroad for American employers the same protection extended to citizens. Thus, section 109 makes clear that it applies to citizens. The net effect of this language is to make resident aliens working abroad for American companies much more vulnerable than their citizen compatriots.

Based upon the express language of section 109 and based upon rules of comity, courts have routinely dismissed cases brought by resident aliens working internationally for American companies. As defined in 26 U.S. §7701(b)(1)(A)(i), a resident alien “is a lawful permanent resident.” In *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999), the plaintiff, an American resident and Japanese citizen, was hired by Stryker, an American company, to work in Japan for its subsidiary, Matsumoto. After one year, Iwata was dismissed. He brought race, national origin, and age discrimination claims against both corporations. In dismissing his Title VII claims, the court concluded that he was not protected since he was a non-citizen employed in a foreign nation. Moreover, his regular U.S. business trips were irrelevant because he was not employed domestically. *Id.* at 604. Likewise his age claim was dismissed since ADEA contained essentially identical language concerning extraterritorial employment. *Id*. *See 29 U.S.C. §§623, 630. See also Gantchar v. United Airlines*, No. 93 C 1457, 1995 WL 137053 (N.D. Ill., Mar. 28, 1995) (Title VII and ADEA do not protect non-citizens whose work assignments are abroad even though much of their work time is spent in America working for their American employer); *Hu v. Skadden, Arps, Slate, Meagher & Flom*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999) (ADEA does not protect non-citizen interviewed by an American law firm in America for employment overseas). *Mithani v. Lehman Bros. Inc.*, 2002 WL 14359 (S.D.N.Y. Jan. 4, 2002) (Title VII does not protect non-citizen interviewed in America for employment in Europe).

In spite of the strict interpretation of the word “citizen” at least one Federal court has evidenced a willingness to determine whether the extraterritoriality provisions protect U.S. Nationals. As defined in 8 U.S.C. §1101(a)(22) a U.S. National is “...a
person who, though not a citizen of the United States, owes permanent allegiance to the United States.” In Shekoyan v. Sibley Int’l Corp., 217 F. Supp. 2d 59 (D.D.C. 2002), aff’d, 409 F.3d 414 (D.C.Cir. 2005), cert denied, 546 U.S. 1173 (2006), the court did not reach the issue since plaintiff was found to be a lawful resident alien rather than a national and his employment location was Soviet Georgia. However, where a non-citizen initially employed in the U.S. is then subsequently re-assigned to a foreign nation, a “center of gravity test” will be applied to decide if for purposes of discrimination law the employment is domestic or foreign. To answer the question, the court considered:

• The location where the employment was created;
• The location that the parties intended to be the work site;
• The location where the reporting relationship was established;
• The location where the duties were performed;
• The relative duration of overseas assignments compared with domestic ones within the employment relationship;
• The parties’ domiciles, and the place where the alleged discriminatory conduct took place.

See Torrico v. International Business Machines Corp., 213 F. Supp. 2d 390, 403-404 (S.D.N.Y. 2002). In effect, a re-assignment of a foreign national abroad cannot be used as a subterfuge to avoid the application of domestic anti-discrimination laws.

THE FOREIGN COMPULSION DEFENSE

Although the clear intent of Congress in section 109 was to protect American citizens working in foreign countries, it nonetheless provided a foreign compulsion defense. See 42 U.S.C. §2000 e-1(b): “It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer (or a corporation controlled by an employer)...to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation)…to violate the law of the foreign country in which such workplace is located.”

See also 42 U.S.C. §12112(c)(1). The defense is based on antitrust law. See Interamerican Ref Corp. v. Texas/ Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). See also United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968). It acknowledges that there may be circumstances in which an American or an American controlled employer operating abroad will have to violate Title VII in order to comply with the law of the host country. Finally, it is rooted in comity i.e., the authority of a foreign sovereign to implement its own laws in its jurisdiction.

Meaning Of “Foreign Law”

Congress nowhere in the statute defined the meaning of “foreign law.” This statutory language engendered very little legislative discussion. As a result there is a paucity of legislative history. Pursuant to its regulatory authority, the EEOC issued a policy statement narrowly construing the meaning of foreign law. In reliance upon a series of cases that predated section 2000e-1(b), it concluded that foreign custom and practice or local prejudices could not be substituted for foreign law. See e.g., Abrams v. Baylor College of Medicine, 581 E Supp. 1570 (S.D. Tex. 1984) aff’d in relevant part, 805 F.2d 528 (5th Cir. 1986) (deference to Saudi preference for non-Jewish residents does not immunize college from Title VII liability); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) (deference to South American customers’ preference for male business manager does not immunize company from Title VII liability). Governmental approval or acquiescence in employer discriminatory practices is insufficient to satisfy the compulsion standard set by the foreign law defense. Finally the employer must have been unable by resort to mitigating measures to comply with Title VII, as well as the foreign en-
The foreign law defense in the Title VII context has not been examined by a U.S. court. The analogous provision under the Age Discrimination in Employment Act, 29 U.S.C. §623(f)(1) has come under federal court scrutiny. In *Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1 (D.D.C. 1992), rev’d, 47 F.3d 447 (D.C. Cir.), cert denied, 516 U.S. 866 (1995), Americans working for an American subsidiary, Radio Free Europe/Radio Liberty, based in Munich, were compulsorily retired at 65 in compliance with a German collective bargaining agreement approved by a German Labor Court. The Americans contested their dismissal under ADEA. Both the EEOC and the federal district court determined that RFE/RL could not invoke the foreign law defense since a collective bargaining agreement is not law. (“[P]ractices and policies even when embodied in contracts are not ‘laws’.”) 818 F. Supp. at 3-4. The Circuit Court reversed, holding that the employment agreement was tantamount to law. The Supreme Court denied certiorari. In the face of such a limited interpretative history, practitioners are essentially left to the vagaries of their fact patterns to decide if the foreign compulsion defense applies. Questions concerning whether administrative guidelines or official public statements will be treated as foreign law await future litigation.

**BFOQ DEFENSE** • The foreign compulsion defense however does not exhaust all of the statutory defenses an employer may assert to insulate itself from claims of Title VII liability. The Bona Fide Occupational Qualification (“BFOQ”) Defense states: “Notwithstanding any other provision of this [title]…it shall not be an unlawful employment practice for an employer to hire and employ employees… on the basis of…religion, sex, or national origin in those…instances where religion, sex, or national origin is a Bona Fide Occupational Qualification reasonably necessary to the normal operation of that particular business or enterprise.” See 42 U.S.C. §2000e-2(e). The ADA also authorizes the exclusion of disabled persons incapable of performing “...essential job functions with or without ‘reasonable accommodations.’” See 42 U.S.C. §12113(a). The BFOQ exception provides no defense to charges of discrimination premised upon race or color. 42 U.S.C. §§12111(8), 12113(a).

The assertion of the BFOQ defense in many instances will accomplish the same result as resort
to the foreign compulsion argument even though
the factual elements to satisfy the defense differ. In
without opinion, 746 F. 2d 810 (5th Cir. 1984), the
plaintiff, a pilot hired to provide air security over
crowds going to Mecca for their annual pilgrim-
age, filed religious discrimination charges when he
was fired for his refusal to convert to Islam. The
court sustained the dismissal decision in the face
of a Saudi law which authorized the execution of
any non-Muslim flying over Mecca. In that circum-
stance, the court held the termination was warrant-
ed based upon employee safety concerns.

Besides U.S. laws applying to Americans work-
ning abroad for American or American controlled
employers, there are in many instances foreign
laws that also apply and define the employment
relationship. See *Treaty Establishing the European
Community*, art. 137, 2002 O.J. (C325) (equality
between men and women with regard to labor mar-
ket opportunities); *Sex Discrimination Act*, 1975, c.
65 §§6-21 (Eng.); *Race Relations Act*, 1976, c. 74
§§4-16 (Eng.); *Trade Union and Labour Relations
Act* (Consolidation), 1992, c. 52, §§137-177 (Eng.);
C. Trav., art. L. 12-1, L. 22-45 (France). These laws
must therefore also be assessed in evaluating extra-
territorial employment.

**CONCLUSION**: American business expansion
overseas presents many new employment opportu-
nities for U.S. citizens. All of the nation’s employ-
ment protections under Title VII, the ADA, and
ADEA travel with them when they work for Ameri-
can or American controlled enterprises. Whether
these same provisions apply to U.S. nationals re-
 mains unclear. It is obvious, however, that they do
not apply to American legal residents employed
extraterritorially. The statutes are also inapplicable
when they collide with host countries’ laws and the
BFOQ defense may exempt the employer overseas
from complying with the statutes. Any thorough
analysis of the foreign employment relationship
therefore compels the practitioner to fully review
both domestic and foreign nation labor enact-
ments.

**PRACTICE CHECKLIST FOR**

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- Title VII and the ADA define an employer by reference to the number of its employees, the number
  of weeks worked, and whether it is engaged in commerce.
- Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin.
- The ADA prohibits discrimination against an individual (1) with a physical or mental impairment that
  substantially limits one or more major life activities of such individual; (2) with a record of such impair-
  ment; or (3) who is regarded as having such impairment.
- With respect to section 109 of the Civil Rights Act of 1991:
  __ It applies only to extraterritorial employment, i.e., employment outside the 50 states, the District of
    Columbia, Puerto Rico, Guam, Wake Island, the Virgin Islands, American Samoa, the Canal Zone or the
    Outer Continental shelf lands;
  __ The employer must be American or American-controlled and it can be operating anywhere in the
    world;
  __ The individual invoking the extraterritorial protection must be an American citizen;
  __ The individual who is an American natural employed abroad may also qualify for protection;
The individual who is a citizen but employed abroad by a foreign company is not protected; the individual who is a U.S. resident alien working abroad is unprotected regardless of whether he or she works for an American corporation, an American-controlled enterprise, or a foreign business; the protections of section 109 do not apply when its provisions conflict with host country laws. (This exemption is called the "foreign compulsion defense"); the foreign compulsion defense has received very little judicial scrutiny and it is uncertain how courts will interpret "foreign law;" the Bona Fide Occupational Qualification ("BFOQ") exemption may also insulate employers abroad from discrimination liability; foreign laws in some countries enhance American statutory rights and therefore provide added protection for U.S. employees stationed abroad.