

NOTES

THE ARGUMENT FOR MAKING AMERICAN JUDICIAL REMEDIES UNDER TITLE VII AVAILABLE TO FOREIGN NATIONALS EMPLOYED BY U.S. COMPANIES ON FOREIGN SOIL^φ

I. INTRODUCTION

The state of business today has become increasingly global in nature.¹ The international business landscape is ripe with global operations. More and more businesses are expanding their operations beyond the country in which they are incorporated.² A company receives certain

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1. "This is the age of the global economy in which resources, supplies, product markets, and business competition are worldwide rather than purely local or national in scope." JOHN R. SCHERMERHORN JR., *MANAGEMENT* 116 (7th ed. 2002); *see also* KENICHI OHMAE, *THE EVOLVING GLOBAL ECONOMY* (1995).

2. Among those companies which have extensive operations abroad are Fortune 500 companies. The list includes well known names such as Wal-Mart, General Electric, and Exxon. SCHERMERHORN, *supra* note 1, at 125. Wal-Mart, Exxon, and General Electric are ranked numbers 1, 3, and 5 respectively in the 2003 Fortune 500. *The 2003 Fortune 500*, FORTUNE, April 14, 2003 at F-1.

Ford Motor Company is ranked sixth in the Global 500. *The 2003 Fortune Global 500*, FORTUNE, July 21, 2003 at 106. Ford Motor Company includes not only Ford vehicles but also Lincoln, Mercury, Mazda, Volvo, Jaguar, Land Rover, and Aston Martin. Ford does approximately 80% of its purchasing on a global basis in order to cover its needs for production. David Thursfield, *International Operations*, (January 9, 2004), available at http://www.ford.com/NR/rdonlyres/epohetkvyfdibey7vz5qgxxk2l7bbh5b7ce43hko5i2rjjzouacaxtmpu6gag7m55qksebwhwahj545ttvazlz2jzlbba/20040109_ford_intl_oper.pdf.

Citigroup hits the Forbes global list at number 13. *The 2003 Fortune Global 500*, FORTUNE, July

legal advantages from the country in which they opt to incorporate.³ With these legal advantages come legal obligations.

Employers that meet specific requirements are subject to regulation regarding discriminatory employment practices here in the United States.⁴ Title VII of the Civil Rights Act of 1964 ("Title VII") lays out ground rules against discrimination in hiring, firing, promotion, and treatment of certain classes of individuals in the workplace.⁵ Employers found to be in violation of regulations like Title VII must repair such violations; these companies may also face monetary liability to the aggrieved individuals.⁶

This note examines the contention that the true purpose of Title VII is to regulate the actions of the employer. Compensation for the aggrieved employee is ancillary and only increases the deterrent nature of the statute. Presently the statute is interpreted to extend coverage to American citizens employed by United States firms both here and abroad as well as foreign nationals employed on American soil.⁷ How-

21, 2003 at 126. Citigroup bills itself as "a diversified global financial services holding company whose businesses provide a broad range of financial services to consumer and corporate customers in over 100 countries and territories." Citicorp Form 10-k, available at <http://www.citibank.com/citigroup/fin/data/k02cci.pdf#xml>. They provide banking, lending, investment, insurance, and credit services to customers around the world. *Id.* at 13. The 2002 prospectus called for an international stock offering of 42 million shares. 2002 Prospectus, Travelers Property Casualty Corp., March 21, 2002, available at <http://www.citibank.com/citigroup/press/2002/data/020321a1.pdf#xml>

3. Business owners may choose a particular area in which to incorporate for preferential tax treatment. See David Rae, *Small Businesses Face Tax 'Sledgehammer' Threat*, ACCOUNTANCY AGE 1 (2003) (reflecting upon the advantages of incorporating). Additionally, incorporation offers limited liability to individual business owners. "Personal assets cannot be attached and ownership can be easily transferred through the sale of stock shares. The corporation is a legal entity and will continue to exist until its legal dissolution, even if one of the principals in the business should die." *Choose the Right Legal Structure For Your Firm*, SANTA BARBARA NEWS PRESS, Nov. 2, 2003, available at www.newspress.com.

Besides the legal benefits of incorporation in the United States, there also exist multiple advantages outside of the law which are just as important. The high standard of living in the United States is unparalleled. The education level, economic resources, and breadth of knowledge available in the American population are considerably higher than that for the majority of the world. All of these factors contribute to the spirit of entrepreneurialism and business sense that American and American controlled companies take advantage of in their operations.

4. It is required that an employer have a minimum of 15 employees working each day for 20 or more calendar weeks for them to come within the scope of Title VII. However, this does not apply to companies that are wholly owned by the government, Indian Tribes, or bona fide private membership clubs. 42 U.S.C. § 2000e(b) (2000).

5. See *infra* notes 8-23 and accompanying text.

6. Available remedies against employers who violate the statute include injunctions forbidding the employer from continuing the unlawful practice, reinstatement or hiring of employees, the possible award of back and future pay, and attorneys' fees. 42 U.S.C. §§ 2000e-5(g)(1), (k) (2000).

7. See *infra* notes 87-111 and accompanying text.

ever, the statute fails to protect those employees working abroad for American employers who are not citizens of the United States. This note asserts that Congress' refusal to extend Title VII coverage to foreign employees of American companies who work on foreign soil is contrary to public policy. An employer, being allowed to incorporate in the United States while escaping liability for employment violations by moving its operations to foreign soil, stands in opposition to the true intent of the law. This note proposes that the reach of the statute in question be extended to include coverage for both foreign nationals and legal permanent residents of the United States who are employed by American companies on foreign soil.

II. TITLE VII: PAST, PRESENT AND FUTURE

1. Overview of Title VII

Congress enacted Title VII in an effort to achieve equal employment opportunities for all persons, regardless of their national origin, sex, religion, race or color through the elimination of past practices based on those characteristics.⁸

Under Title VII, an employee is defined as "an individual employed by an employer . . . [w]ith respect to employment in a foreign country, such a term includes an individual who is a citizen of the United States."⁹ The first part of the definition, which the Supreme Court has criticized as being "completely circular" and "explaining nothing"¹⁰ and the First Circuit has said is "a turn of phrase which chases its own tail,"¹¹ has been interpreted by the courts to cover only those persons who are not independent contractors.¹²

Prior to the 1991 amendment of the statute, there was no mention of extraterritorial employment included in the definition of the term 'employee.'¹³ Title VII defines an employer as "a person engaged in an in-

8. See Adam M. Mycyk, *United States Fair Employment Law in the Transnational Employment Arena: The Case for the Extraterritorial Application of Title VII of the Civil Rights Act of 1964*, 39 CATH. U.L. REV. 1109, 1111 (1990) (citing *McDonell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) and *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

9. 42 U.S.C. § 2000e(f) (2000).

10. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

11. *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997).

12. See, e.g., *Dykes v. Depuy, Inc.*, 140 F.3d 31, 37 n.6 (1st Cir. 1998).

13. *Mousa v. Lauda Air Luftfahrt*, 258 F. Supp. 2d 1329, 1335 (S.D.Fla. 2003).

dustry affecting commerce.”¹⁴ The term ‘person’ is broadly defined as “one or more individuals . . . partnerships, associations, corporations, legal representatives, [or] mutual companies”¹⁵

Title VII establishes unlawful employment practices against employees on the basis of race, color, religion, sex, and nationality.¹⁶ These practices go beyond hiring, firing, and compensation. It is unlawful for an employer to discriminate in training based upon any of the aforementioned factors.¹⁷ The employment test scores of any person identified as a member of a protected class may not be altered, adjusted or viewed differently.¹⁸ Additionally, retaliatory actions against those who exercise their rights under the statute or participate in the proceedings of those who do the same, are outlawed.¹⁹

Like all civil rights statutes, Title VII is a remedial statute and its broad definitions are reflective of its remedial nature.²⁰ The Supreme Court has instructed the courts to “broadly construe” remedial statutes.²¹ Thus, the terms found in such a statute like ‘employer’ as well as all other definitions, “should be a given liberal construction, but the court’s interpretation cannot contradict statutory definition[s].”²² One of the statutory definitions at issue in this note is the qualifier on the term employee that provides that Title VII does not apply “to an employer with respect to the employment of aliens outside any State. . . .”²³

It is the contention of this note that federal courts have not gone far enough to broadly construe Title VII to meet its remedial purpose. This new, narrow reading of Title VII, best exemplified by the Supreme Court’s requirement of a clear statement of extraterritorial application, is what makes further amendment to Title VII all the more necessary.

14. 42 U.S.C. § 2000e(b) (2000).

15. *Id.* § 2000e(a).

16. *Id.* § 2000e-2(a). “It shall be unlawful employment practice for an employer (1) 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” *Id.* Additionally an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” *Id.*

17. 42 U.S.C. § 2000e-2(d) (2000).

18. *Id.* § 2000e-2(l).

19. *Id.* § 2000e-3(a).

20. *See Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

21. *Id.*

22. *Chester v. Northwest Iowa Youth Emergency Servs. Ctr.*, 869 F. Supp. 700, 716 (N.D. Iowa 1994).

23. 42 U.S.C. § 2000e-1(a) (2000).

2. *The Move Toward Extraterritorial Application of Title VII for U.S. Citizens*

Any discussion on extending the scope of Title VII must first thoroughly investigate the multitude of legal theories surrounding the statute that have brought us to this point. Prior to the installation of the 1991 amendments, the courts applied a “traditional approach” that included an expansive reading of Title VII which took into account the underlying purpose.²⁴

In 1991, the Supreme Court did an about face.²⁵ Suddenly, the Court determined that it now required a clear statement in order to impose extraterritorial jurisdiction.²⁶ In response, Congress drafted and passed the 1991 amendments. These new amendments did not sufficiently rehabilitate the statute to provide comprehensive protection against discriminatory employer activities.

A. Application of Title VII: 1964-1991

i. The Traditional Approach

Prior to the Supreme Court’s decision in *EEOC v. Arabian American Oil Co.*, (“*Aramco*”)²⁷ in 1991, courts throughout the country assumed that Title VII applied extraterritorially to protect U.S. citizens employed in foreign countries. While very few courts actually tackled the question, each one that did came to the same conclusion.

An example of one of these early extraterritoriality decisions is *Bryant v. International Schools Services Inc.*²⁸ In *Bryant*, two American citizen employees working in Iran accused their U.S. based employer of “awarding to its overseas teachers two kinds of employment contracts having substantially different compensation and benefit provisions . . . on the basis of sex.”²⁹ In response to an argument raised by the respondent, the District Court of New Jersey adopted the so-called “negative

24. See, e.g., *Bryant v. Int’l Sch. Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980); *Love v. Pullman*, No. C-899, 1976 U.S. Dist. LEXIS 13997 (D. Co. July 21, 1976), *aff’d* 569 F.2d 1074 (10th Cir. 1978).

25. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

26. *Id.*

27. *Id.*

28. 502 F. Supp. 472 (D.N.J. 1980).

29. *Id.* at 474.

inference” argument³⁰; an argument that would later be specifically rejected by the Supreme Court in *Aramco*.³¹ The district court looked to the alien exemption clause contained in Title VII which provides that Title VII “shall not apply to an employer with respect to the employment of aliens outside any state.”³² The court stated: “[b]y negative implication, since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to non-aliens, i.e. American citizens outside of any state by an employer otherwise covered by the Act.”³³

Another case which considered extraterritorial application is *Love v. Pullman*.³⁴ *Love* involved a class of plaintiffs (both American and Canadian citizens) who claimed that the Pullman Railroad Co. had discriminated against them on the basis of race. The railroad refused to promote the plaintiffs to the position of conductor and denied them a higher rate of pay when they performed duties identical to that of a conductor.³⁵ Pullman was a U.S. based company that operated their railroad out of Montreal, Quebec, Canada.³⁶ Operations were carried on in both the U.S. and Canada.³⁷

The District Court of Colorado held that American employees who worked in Canada were entitled to full compensation.³⁸ The court based its holding on a negative inference of the alien exemption clause, section 702 of Title VII, and the extraterritorial application of anti-trust laws.³⁹ The *Love* court relied heavily on Justice Marshall’s dicta from *Espinoza v. Farah Manufacturing Co.*;⁴⁰ where he noted that aliens employed within the United States had standing to bring anti-discrimination

30. *Id.* at 482.

31. *Aramco*, 499 U.S. at 253-55.

32. 42 U.S.C. § 2000e-1(a) (2000). When Title VII was amended in 1973 to extend protection to federal workers, the same language was included in the definition of federal employees found in Title VII. 42 U.S.C. § 2000e-16(a) (2000).

33. *Bryant*, 502 F. Supp. 482.

34. No. C-899, 1976 U.S. Dist. LEXIS 13997 (D. Co. July 21, 1976), *aff’d* 569 F.2d 1074 (10th Cir. 1978).

35. *Id.* at *5. (“Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered under [§ 702 of the Civil Rights Act] An additional support for this interpretation comes from the international or extraterritorial application of the anti-trust laws.”).

36. *Id.* at *4.

37. *Id.*

38. *Id.* at *15.

39. *Id.* at *5.

40. *Id.*

suits under Title VII.⁴¹ Marshall's opinion in *Espinoza*, which was joined by several other justices, effectively eliminated any distinction between aliens and citizens within the territorial jurisdiction of United States courts.⁴² The Title VII claim at issue in *Espinoza* involved a manufacturer's policy of not hiring non-citizens.⁴³ While holding that Title VII contained no provision that made it unlawful to discriminate on the basis of citizenship, the Court conceded that aliens were protected from discrimination under Title VII.⁴⁴ The Court noted that Congress' intent to protect aliens employed within the United States was clear because aliens employed outside the United States were excluded.⁴⁵ Relying on this construction of the alien exemption clause, the *Love* court determined that Canadian porters who worked on an American train would be eligible to receive damages, but only for the amount of time spent working within the United States, while their American counterparts were entitled to compensation for time spent in both countries.⁴⁶

The *Love* and *Bryant* decisions came together in *Seville v. Martin Marietta Corp.*⁴⁷ In *Seville*, Martin Marietta, a U.S. corporation with a facility in West Germany, hired the four female plaintiffs in the United States to work at its West German facility as clerical staff.⁴⁸ The plaintiffs challenged the defendant's policy of awarding greater fringe benefits to technical employees, who were primarily men, than it did to the predominately female clerical staff.⁴⁹ Martin Marietta challenged jurisdiction claiming that Title VII protections did not extend to American citizens employed overseas by American corporations.⁵⁰

In rejecting the defendant's challenge, the District Court of Maryland noted the strong presumption that Congress intends for legislation only to apply domestically.⁵¹ However, the court found the negative inference of the alien exemption clause, which had been adopted by the Supreme Court in *Espinoza* and adhered to in other districts, to be

41. 414 U.S. 86, 95 (1973).

42. *Id.*

43. *Id.* at 87.

44. *Id.* at 95.

45. *Id.* at 91.

46. Anne C. Levy, *Putting the "O" Back in EEOC: Why Congress Had to Act So Quickly After the Supreme Court Decision in Boureslan*, 1991 COLUM. BUS. L. REV. 239, 243 (1991).

47. 638 F. Supp. 590 (D.Md. 1986); see Mycyk, *supra* note 8 at 1121 (arguing that the *Seville* court "explicitly adopted the *Love* and *Bryant* courts' construction of the alien exemption provision").

48. Mycyk, *supra* note 8 at 1121.

49. *Seville*, 638 F. Supp. at 591.

50. *Id.* at 592.

51. *Seville*, 638 F. Supp. at 592 (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949)).

“soundly reasoned” and persuasive enough to overcome the presumption.⁵²

ii. The Break With Tradition and the Clear Statement Rule

For the 27 years between 1964 and 1991, it seemed clear that Title VII applied to American citizens employed abroad by American employers.⁵³ Despite its holding in *Espinoza*, the Supreme Court reversed itself in *Aramco*⁵⁴ when it affirmed the Fifth Circuit’s decision in *Boureslan v. Arabian American Oil Co.*⁵⁵ and held that Title VII did not apply extraterritorially.

In *Boureslan*, a naturalized United States citizen brought suit against his employer, a U.S. corporation with its principal place of business in Saudi Arabia, for employment discrimination on the basis of race and religion that occurred at the company’s Saudi Arabian offices.⁵⁶ Upholding the district court’s decision that Title VII did not afford extraterritorial protections, the Fifth Circuit rejected the plaintiff’s assertions that the “legislative history of Title VII, when coupled with the statutory language, evidences a clear congressional intent to apply the Act extraterritorially.”⁵⁷ Rejecting Boureslan’s claims, the Fifth Circuit noted:

[W]e cannot ignore strong countervailing policy arguments against the application of Title VII abroad. The religious and social customs practiced in many countries are wholly at odds with those of this country. Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice either of refusing to employ United States citizens in the country or discontinuing business.”⁵⁸

Boureslan appealed to the Supreme Court. A six Justice majority upheld the decision of the Fifth Circuit.⁵⁹ Writing for the majority in *Aramco*, Chief Justice Rehnquist’s opinion turned on the principle that “legislation of Congress, unless a contrary intent appears, is meant to

52. *Id.*

53. *Id.*; see, e.g., *Seville*, 638 F. Supp. at 590; *Bryant*, 502 F. Supp. at 472, *rev’d on other grounds*, 675 F.2d 562 (3d Cir. 1982); *Love*, 1976 U.S. Dist LEXIS 13997 at *5; *Levy supra* note 46 at 241.

54. 499 U.S. 244 (1991).

55. 857 F.2d 1014 (5th Cir. 1988).

56. *Boureslan*, 857 F.2d at 1014.

57. *Id.* at 1018.

58. *Id.* at 1020.

59. *Aramco*, 499 U.S. at 259.

apply only within the territorial jurisdiction of the United States.”⁶⁰ This “canon of construction . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁶¹ Absent express language to the contrary, the Court was unwilling to override the presumption.⁶²

The Court was equally unmoved by the petitioner’s argument that the alien exemption clause of Title VII could be construed, by negative inference, to demonstrate an intent that Title VII was intended to protect U.S. citizens employed outside the United States.⁶³ The Chief Justice reasoned that if Title VII did apply overseas, there would be “no way of distinguishing in its application between United States employers and foreign employers . . . a French employer of a United States citizen in France would be subject to Title VII.”⁶⁴ Recognizing the myriad of problems that would result from such a holding, the Court concluded that in the absence of “clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country’s employment-discrimination regime upon foreign corporations operating in foreign commerce.”⁶⁵

In deciding *Aramco* as it did, the Supreme Court refused to defer to the Equal Employment Opportunity Commission’s (“EEOC”) interpretations of Title VII despite the fact that the EEOC has both investigatory and conciliatory authority.⁶⁶ The Court determined that the EEOC’s in-

60. *Id.* at 248 (quoting *Filardo*, 336 U.S. at 285.).

61. *Id.* (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

62. Keith Highet & George Kahale III, *Decision: Equal Employment Opportunity Commission v. Arabian American Oil Co.* 111 S. Ct. 1227, 85 A.I.J.L. 552, 553 (1991).

63. *Aramco*, 499 U.S. at 253-55 (rejecting the same argument endorsed by the district court in Colorado that was affirmed by the 10th Circuit in the *Love* case).

64. *Id.* at 255.

65. *Id.*

66. See Highet & Kahale, *supra* note 62 at 555. The Court had previously held in *Gen. Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that it was not required to abide by the EEOC reading of Title VII. *Id.*; see also *Aramco*, 244 U.S. at 249. *Gilbert* involved a challenge to General Electric’s disability plan for employees that covered absences due to sickness and accidents, but not pregnancy. *Gilbert*, 429 U.S. at 128-29. In finding that the plan was not discriminatory, the Court included powerful language about the role of the EEOC. The Court said that interpretive rulings, like EEOC guidelines, are limited as to their scope.

[T]he rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lack-

terpretation of the statute was neither “contemporaneous with the statute’s enactment nor consistent with earlier EEOC pronouncements on the issue.”⁶⁷ The Court ultimately decided that absent a “clear statement [by Congress] that a statute applies overseas”⁶⁸ Title VII could not be construed by the high court as applying extraterritorially.⁶⁹

B. The 1991 Amendments to Title VII

Congress amended Title VII and the Americans with Disabilities Act (“ADA”) in 1991.⁷⁰ Congress passed these amendments, in part, as a direct response to the Supreme Court’s affirmation of the Fifth Circuit decision in *Aramco*.⁷¹ The Southern District of New York stated that “with the 1991 amendments, Congress signaled its dissatisfaction with the Supreme Court’s interpretation in *Aramco*”⁷²

The 1991 amendments made several changes to the original 1964 statute with regards to extraterritoriality. First, the amendment expanded Title VII’s definition of employee to include United States citizens em-

ing power to control.

Id. at 141-42 (citation omitted). In the view of the majority, the EEOC’s interpretation did not “meet the General Electric test for reasonableness and hence should not be accorded deference,” Hight & Kahale, *supra* note 62 at 556.

67. Mary Claire St. John, Note, *Extraterritorial Application of Title VII: The Foreign Compulsion Defense and the Principles of International Comity*, 27 VAND. J. TRANSNAT’L L. 869, 880 (1994); see also *Aramco*, 499 U.S. at 257 (noting that the EEOC’s position that Title VII was applicable abroad was “not . . . reflected in its policy guidelines until some 24 years after the passage of the statute.”).

68. *Aramco*, 499 U.S. at 258. For a contrary reading of the *Aramco* holding, see *Kollias v. D&G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994), which held that the Supreme Court did not require a clear statement of extraterritorial intent. The Second Circuit Court of Appeals interpreted the *Aramco* decision as requiring only “sufficiently clear indicia of congressional intent,” because a clear statement rule would eliminate the consideration of legislative history, administrative interpretations and “other extrinsic indicia of congressional intent.” *Id.* at 73.

69. *Aramco*, 499 U.S. at 258. The Court cited numerous instances where Congress had indeed made a clear statement about the international reach of a statute including provisions of the Coast Guard Act, 14 U.S.C. § 89 (a), 18 U.S.C. § 7; the Comprehensive Anti-Apartheid Act, 22 U.S.C. § 5001; the Logan Act, 18 U.S.C. § 953; and the ADEA, 29 U.S.C. §§ 623 (h)(1), 630 (f). *Id.* at 258-59.

70. Melody M. Kubo, *Extraterritorial Application of the Americans with Disabilities Act*, 2 ASIAN-PAC. L. & POL’Y J. 259, 274 (2001).

71. See Civil Rights Act of 1991, Pub L. 102-166, 105 Stat. 1071 (1991) (stating that one of the purposes of the Act was to “respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”); see also, Levy, *supra* note 46 at 240 (arguing that Congress was “forced . . . to take action to correct the Supreme Court’s faulty interpretation of Congressional intent in the area of employment discrimination law”).

72. *Torrico v. IBM Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002).

ployed abroad,⁷³ thus expressly overruling *Aramco*. Section 109(a) of the 1991 Act amended the definition of employee by adding at the end: “With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”⁷⁴ The new definition gave the Court the clear statement of congressional intent to apply the statute to U.S. citizens employed by U.S. corporations abroad that the *Aramco* decision had said was necessary. Much of the clarifying language in the 1991 amendments was borrowed from the definition of employer found in the 1984 amendments to the Age Discrimination in Employment Act (“ADEA”).⁷⁵

Congress was careful not to let these protections go too far. Congress also made an effort to limit the protections now specifically allotted to foreign employment with a U.S. employer.⁷⁶ Congress added a provision that precluded the application of Title VII to “the foreign operations of an employer that is a foreign person not controlled by an American employer.”⁷⁷

Additionally, Congress created what is known as the foreign compulsion defense⁷⁸ to Title VII violations.⁷⁹ In section 109(b)(1) of the amendments, Congress provides an exemption for discriminatory practices “with respect to an employee in a workplace in a foreign country if compliance [with Title VII] would cause such employer (or such corporation) . . . to violate the law of the foreign country in which [the] workplace is located.”⁸⁰ This new provision continues to shelter employers

73. 42 U.S.C. § 2000e(f) (2000).

74. § 109(a), 105 Stat. at 1077. The complete definition of employee in Title VII now reads: The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. § 2000e(f) (2000).

75. Joy Cherian, *Enforcement of Workers’ Rights Abroad*, 43 LAB. L.J. 563, 564 (1992).

76. Mary McKlveen Madden, *Strengthening Protection of Employees at Home and Abroad: The Extraterritorial Application of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act*, 20 HAMLINE L. REV. 739, 746 (1997).

77. § 109(c)(2), 105 Stat. at 1077 (amendment codified at 42 U.S.C. §2000e(f) (2000)).

78. See, e.g., Linda Maher, *Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After Aramco and the Civil Rights Act of 1991*, 9 CONN. J. INT’L L. 1, 29 (1993).

79. For a more detailed discussion of the foreign compulsion defense, see *infra* notes 233-44 and accompanying text.

80. 105 Stat. at 1077 (amendment codified at 42 U.S.C. 2000e-1(b) (2000)).

from the “conflict of laws dilemma resulting from foreign employment practices.”⁸¹

Finally, the amendments clarified whether a foreign corporation is exempt from Title VII by providing that if a U.S. corporation controlled a foreign corporation, prohibited practices engaged in by the foreign subsidiary were presumed to be the actions of a controlling employer.⁸² The amendment further articulated factors which would be taken into consideration when determining if a foreign employer was controlled by a U.S. corporation including: the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the two entities.⁸³

While the legislative history of the amendments reveal very little about specific congressional intent,⁸⁴ an analogy can be drawn between the 1991 amendments to Title VII and the ADA and the 1984 ADEA amendments.⁸⁵ It is important to note that the language that gives Title VII its extraterritorial reach is not identical to the language in the ADEA.⁸⁶ However, it is clear that both amendments seek to discriminate between U.S. citizens working abroad for U.S. employers (who are afforded protection) and non-U.S. citizens working abroad for the same employers (who are not protected).

81. Maher, *supra* note 78.

82. § 109(c)(1), 105 Stat. at 1077 (amendment codified at 42 U.S.C. § 2000e-1(c)(1) (2000) (“If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [this statute] engaged in by such corporation, shall be presumed to be engaged in by such employer.”)).

83. § 109(c)(2), 105 Stat. at 1077 (amendment codified at 42 U.S.C. § 2000e-1(c)(3) (2000)).

84. *See* *Torrico v. IBM Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002) (observing that “the limited legislative history” of the 1991 amendments revealed little information about Congress’ intent).

85. *See generally*, H.R. REP. NO. 102-40 (II), at 4, (1991), *reprinted in* 1991 U.S.S.C.A.N. 694, 696 (“A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, (ADA), et seq., are modeled after, and have been interpreted in a manner consistent with, Title VII”); *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 816 (9th Cir. 2002) (analogizing the Second Circuit’s interpretation of ADEA language to similar language at issue in Title VII); *Torrico*, 213 F. Supp. 2d at 399 (remarking that Congress had “modified the ADA and Title VII in much the same way that it had amended the ADEA in 1984”).

86. *Compare* 42 U.S.C. § 2000e(f) (2000) (applying the statute extraterritorially to U.S. citizens “with respect to employment in a foreign country”) *with* 29 U.S.C. § 630(f) (applying the statute extraterritorially to U.S. citizens “employed by an employer in a workplace in a foreign country”).

C. Application, Pitfalls, and Shortcomings of the 1991 Amendments

The clarifying language in the 1991 amendments did not end the fight over extraterritorial application of Title VII and the ADA. Since 1991, the questions of what defines a U.S. controlled employer and who qualifies for protection under Title VII as a citizen or alien have continued to be litigated. Time and again, courts have determined that a foreign national employed by a U.S. corporation abroad is not entitled to Title VII and ADA protections.

i. Title VII Today: What Defines an Employer

Title VII does not apply to an employer who has less than 15 employees.⁸⁷ In *Kang v. U. Lim America, Inc.*, the Ninth Circuit tackled the question of whether the definition of employee in Title VII⁸⁸ precluded the counting of foreign employees of U.S. controlled corporations.⁸⁹ *Kang* involved a national origin discrimination claim brought by a U.S. citizen employee of U. Lim America, Inc., a U.S. based corporation which had six or fewer employees, all working at its Mexican factory.⁹⁰ However, the American corporation that owned and operated U. Lim de Mexico employed between 50 and 150 workers, all of whom were Mexican citizens.⁹¹ U. Lim America argued that it was exempt from Title VII as a result of its small American workforce.⁹²

In rejecting U. Lim America's challenge to *Kang*'s claim, the court relied on the Second Circuit's decision in *Morelli v. Cedel*.⁹³ While *Morelli* involved an ADEA claim,⁹⁴ the Ninth Circuit found the definitions of employee in the ADEA and Title VII to be analogous and thus found the *Morelli* court's reliance on the intended purpose of the statute to be informative.⁹⁵ The *Kang* court noted that the underlying purpose behind

87. See 42 U.S.C. § 2000e(b) (2000) (defining an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

88. See, e.g., *id.* § 2000e(f); *supra* notes 8-23 and accompanying text.

89. 296 F.3d 810, 816 (9th Cir. 2002).

90. *Id.* at 814.

91. *Id.*

92. *Id.* at 816.

93. 141 F.3d 39 (2d Cir. 1998). It is not just the statutes that are similar. In a fact pattern remarkably similar to *Kang*, *Morelli* involved a U.S. citizen employee of a Luxembourg based bank whose U.S. employees did not meet the minimum ADEA requirement of 20 employees, but whose worldwide employee totals easily exceeded the threshold. *Id.* at 41.

94. *Id.*

95. *Kang*, 296 F.3d at 816.

the 1991 amendments was “to restore civil rights protections that had been limited by the Supreme Court and to strengthen the protections and remedies of Federal civil rights laws.”⁹⁶ The court further reasoned that the purpose behind limiting Title VII coverage to employers with 15 or more workers was to reduce the burdens of compliance, limit litigations costs, and protect “intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the Constitutionality [sic] of Title VII under the Commerce Clause.”⁹⁷ In essence, the Ninth Circuit did not believe that U. Lim was the type of small business that Congress had intended to protect and thus included foreign citizens employed in a foreign nation for purposes of determining Title VII coverage.⁹⁸

Kang and *Morelli* appear to be in direct conflict with other decisions regarding the counting of employees.⁹⁹ An example of the contrary argument is *Mousa v. Lauda Air Luftfahrt*.¹⁰⁰ In *Mousa*, a Muslim-American employee of an Austrian airline claimed that as a result of his religion, he was fired before he was even able to start work.¹⁰¹ In response to the Title VII claim, the airline contended, among other things, that the district court lacked the jurisdiction to hear the plaintiff’s claims because Lauda Air did not meet the Title VII definition of an employer.¹⁰²

The court agreed with Lauda Air¹⁰³ and expressly rejected the Second Circuit’s reasoning in *Morelli*.¹⁰⁴ The district court pointed to the fact that *Morelli* was an ADEA case and that functionally, the ADEA

96. *Id.*

97. *Id.* (quoting *Morelli*, 141 F.3d at 45).

98. *Kang*, 296 F.3d at 816.

99. See, e.g., *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (holding that “non-citizens working outside the United States . . . are not considered employees”); *Greenbaum v. Svenska Handelsbanken*, 979 F. Supp. 973, 983 (S.D.N.Y. 1997) (finding that “non-U.S. citizens employed outside of the United States are not deemed ‘employees’ as that term is defined in Title VII”); *Kim v. Dial Serv. Int’l, Inc.*, No. 96 CIV. 3327, 1997 U.S. Dist. LEXIS 66, at *8 (S.D.N.Y. Jan. 8, 1997) (determining that “the foreign employees of a foreign corporation do not count towards the statutory minimum” and that “the relevant group is the number of employees in the United States.”); but see *Wildridge v. IER, Inc.*, 65 F. Supp. 2d 429, 431 (N.D. Tex. 1999) (“The exemption for overseas operations of foreign companies speaks only to the substantive provisions of Title VII [and] does not preclude counting employees of these foreign entities for purposes of determining whether the minimum employee threshold is met.”).

100. 258 F. Supp. 2d 1329 (S.D. Fla. 2003).

101. *Id.* at 1333.

102. *Id.*

103. See *id.* at 1339 (finding that the plaintiff had failed to meet his burden of demonstrating that Lauda Air was an employer who was subject to Title VII).

104. *Id.* at 1337.

and Title VII were not similar.¹⁰⁵ Specifically, the court pointed to the fact that Title VII, unlike the ADEA, contains a provision excluding from its coverage “the employment of aliens outside of any state”¹⁰⁶ and “the near unanimity of lower courts that Title VII’s coverage and definition of ‘employee’ are co-extensive.”¹⁰⁷ The court also made a negative inference argument (of the type the Supreme Court specifically rejected in *Aramco*¹⁰⁸) that if Title VII’s definition of an employee included all individuals working abroad “there would be no reason for Congress to expressly include United States citizens.”¹⁰⁹

ii. Title VII Today: Who Qualifies for Protection

The Fourth Circuit, in *Chaudhry v. Mobil Oil Corp*, addressed the question that is at the core this note’s proposal when it determined whether Title VII and ADEA protections extended to a foreign national employed overseas by an American company.¹¹⁰ Chaudhry, a Canadian national, worked for the defendant throughout the world, from London, England to Doha, Qatar.¹¹¹ He filed his Title VII and ADEA claims after Mobil “failed to transfer him to the United States in retaliation for his discrimination complaints.”¹¹² The district court granted Mobil’s motions for a protective order staying discovery and to dismiss Chaudhry’s case for failure to state a claim.¹¹³

The Court of Appeals upheld the decision of the district court primarily based upon the fact that Chaudhry failed to establish that he was qualified for employment in the United States.¹¹⁴ Relying on its own recent decision in *Egbuna v. Time Life Libraries, Inc.*,¹¹⁵ the court held

105. *Id.*

106. *Id.* (quoting 42 U.S.C. § 2000e-1(a) (2000)).

107. *Mousa*, 258 F. Supp. 2d at 1337.

108. *See supra* notes 53-69 and accompanying text.

109. *Mousa*, 258 F. Supp. 2d at 1337.

110. 186 F.3d 502 (4th Cir. 1999).

111. *Id.* at 504.

112. *Id.* at 503.

113. *Id.* at 504.

114. *Id.* at 504, 505.

115. 153 F.3d 184 (4th Cir. 1998). In *Egbuna*, a former employee who had allowed his student visa to expire was refused reinstatement by his former employer. The plaintiff sued, arguing that the denial of reinstatement was a direct result of the fact that he had cooperated in a fellow employee’s discrimination suit. The court determined that because the plaintiff was not qualified for reinstatement (because he lacked a valid visa) he had no Title VII recourse. The *Egbuna* decision has been criticized as being inconsistent with the deterrence purposes of Title VII. *See* Recent Cases, 112 HARV. L. REV. 1100, 1124, 1126 (1999). The Fourth Circuit’s reasoning has also been soundly rejected by the EEOC. *See* EEOC, Notice No. 915.002, Enforcement Guidance on Reme-

that a foreign national who applies for a job in the United States “is entitled to Title VII protection ‘only upon a successful showing that the applicant was qualified for employment.’”¹¹⁶ Chaudhry did not have the documentation required to work in the United States at the time he alleged that Mobil had discriminated against him.¹¹⁷ Chaudhry’s ineligibility for employment in the United States at the time the discrimination occurred quashed both his Title VII and his ADEA claims.¹¹⁸

Shekoyan v. Sibley International Corp., decided after the 1991 amendments, involved a non-United States citizen who was denied protection under Title VII for harassment suffered while working overseas for a United States corporation.¹¹⁹ Vladimir Shekoyan was an Armenian born, permanent legal resident of the United States who was hired and trained by the defendant at its corporate headquarters in Washington, D.C.¹²⁰ He was then sent to work in the Republic of Georgia.¹²¹ While in Georgia he was subjected to a course of harassment that he claimed was based on his national origin.¹²² Shekoyan was ultimately fired from his position when his employment contract expired, despite the fact that both the government of the Republic of Georgia and his company’s corporate headquarters praised his job performance.¹²³

The court determined that the plain language of the statute prevented the extension of its protection to non-United States citizens working in foreign countries for U.S. based companies. The court noted that

If Congress had intended to extend Title VII’s scope to protect non-United States citizens working abroad for American controlled companies, it could very well have included such individuals in its definition of employee. . . . While Congress did not explicitly address the extra-territorial reach of Title VII to non-citizen United States nationals in the Civil Rights Act of 1991, Congress was abundantly clear that Title VII’s protections would not be extended abroad to aliens.¹²⁴

dies Available to Undocumented Workers Under Federal Employment Discrimination Laws (1999), available at <http://www.eeoc.gov/docs/undoc.html>. (last visited Mar. 26, 2005).

116. *Chaudhry*, 186 F.3d at 504 (quoting *Egbuna*, 153 F.3d at 187).

117. *Id.*

118. *Id.* at 505.

119. 217 F. Supp. 2d 59 (D.D.C. 2002).

120. *Id.* at 62.

121. *Id.*

122. *Id.*

123. *Id.* at 62-63.

124. *Id.* at 66 (internal citations omitted).

Shekoyan was ultimately denied relief under Title VII because he did not meet the court's definition of a United States citizen¹²⁵ and his primary work station was located within the Republic of Georgia.¹²⁶

Essentially, the dismissal of Shekoyan's Title VII claim came down to whether he had filed an application for citizenship.¹²⁷ The court determined that despite the fact that Shekoyan had been in the United States for more than 20 years, his failure to meet the "minimal requirement" of filing an application for United States' citizenship meant that his claim must fail.¹²⁸

What makes the *Shekoyan* result particularly onerous is the fact that the work the plaintiff was doing for his employer overseas was being funded by a U.S. government agency.¹²⁹ Shekoyan had in fact filed a claim under Executive Order 11246 (which established "a program to eliminate employment discrimination from the Federal Government and by those who benefit from Government contracts").¹³⁰ The court rejected the claim, citing the fact that the Executive Order did not give rise to a private cause of action.¹³¹

Additionally, Shekoyan was denied Title VII relief as a result of the statutory distinction between legal permanent resident and citizen. Justice Blackmun described this legal distinction as being functionally irrelevant when he wrote, "for most legislative purposes there simply is no meaningful difference between legal residents and citizens."¹³² While it is true that legal residents are denied certain rights,¹³³ including the right to vote and hold public office,¹³⁴ it is part of this note's proposal that Title VII be amended to avoid unjust outcomes like the one in *Shekoyan*.

125. *See id.* at 67 (determining that despite Shekoyan's permanent legal resident status, his failure to apply for U.S. citizenship denied him the legal rights and privileges due American citizens employed abroad).

126. *Id.* at 68.

127. *Id.* at 67.

128. *Id.*

129. *Id.* at 62.

130. *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1965).

131. *Shekoyan*, 217 F. Supp. 2d at 70.

132. *Toll v. Moreno*, 458 U.S. 1, 20 (1982); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952) (Douglas, J., dissenting) ("An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned.")

133. *See generally* Nora V. Demleitner, *The Fallacy of Social "Citizenship" or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35 (1997) (discussing recent efforts to marginalize legal permanent residents).

134. Symposium, *Strangers to the Constitution: Immigrants in American Law: Due Process and the Treatment of Aliens*, 44 U. PITT. L. REV. 165, 210 (1983).

III. PROPOSAL FOR EXTENDING TITLE VII LIABILITY TO AMERICAN EMPLOYERS OF FOREIGN NATIONALS ON FOREIGN SOIL

1. The Proposed Extension

As Title VII is currently written, “[t]he general rule is that with respect to foreign employment, Title VII applies only to American citizens employed abroad by American companies or their foreign subsidiaries.”¹³⁵ Thus, Title VII applies abroad only when 1) the employee is a citizen of the United States and 2) the corporation is controlled by an American employer.¹³⁶ This note contends that, in the interests of justice, it is necessary for Congress to amend the current language. In order to conform to the true intent of Title VII, the scope of the law must be expanded.

The thrust of this note’s proposed changes to the statute focus on the definition of employer. First, the term ‘citizen’ should be deleted and replaced with ‘legal resident.’ This will eliminate the injustices incurred by legal permanent residents of the United States who are transferred overseas for temporary or permanent assignments. Second, the definition must be amended to include foreign citizens employed by American corporations overseas. The new, amended definition of employee would be: ‘an individual employed by an employer . . . with respect to employment in a foreign country, such a term will include an individual who is either; a citizen of the United States; a legal resident of the United States; or a citizen of a foreign country employed by an American controlled corporation as determined under 42 U.S.C. 2000e-1(f).

The logic behind these proposed changes is axiomatic. American companies and their subsidiaries can be found in almost every nation in the world. Therefore, one may assume that American employers are employing workers in almost every nation in the world. While compa-

135. *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (quoting *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997)).

136. 42 U.S.C. §§ 2000e-1(a), 2000e-1(c) (2000); *see also Iwata*, 59 F. Supp. 2d at 604 (concluding that those two sections of Title VII taken together constitute the law regarding extraterritorial application of Title VII); *Denty v. Smithkline Beecham Corp.*, 907 F. Supp. 879, 883 (E.D. Pa. 1995) (drawing the same conclusions about extraterritoriality based on similar language in the ADEA).

nies may choose to employ American citizens in their overseas operations, U.S. citizens cannot account for the entire overseas workforce.

U.S. citizens working abroad have available remedies in the American court system when they are subjected to violations of Title VII.¹³⁷ Barring a change in the present language of Title VII, there are no such remedies available to citizens of foreign nations who work side by side with American citizens.¹³⁸ In order to control those employers who organize themselves under the laws of the United States, we must make them liable for the discriminatory actions they are responsible for, regardless of who those actions are taken against.

2. *The True Intent of the Statute*

In *Faragher v. City of Boca Raton*,¹³⁹ the Supreme Court held that “[a]lthough Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”¹⁴⁰ The provisions allowing for recovery by those who suffer unlawful employment discrimination serve to make the victim whole in addition to a much larger purpose. The monetary penalties are a strong incentive to avoid such discriminatory actions in the future. Those who have been forced to pay reparations are inclined to take all necessary steps to avoid having similar sanctions imposed again. Employers who must face the possibility of monetary damages are likely to attempt compliance in order to avoid those penalties. Those employers who have been exposed to liability are under a statutory duty as well as a moral duty to prevent the situation from arising. Yet there is no motivator such as fear. Fear of hefty monetary penalties is a large incentive to comply with enforced regulations.

Civil action by the aggrieved party, attorney general or the EEOC is only available after the respondent has failed to provide conciliation that is acceptable to the Commission.¹⁴¹ The enforcement provisions call for back pay and future pay as two of the numerous possible remedies.¹⁴²

137. See 42 U.S.C. § 2000e-5(f) (2000) (granting Title VII remedies to employees who are employed in a foreign country, so long as they are citizens of the United States).

138. See *id.*

139. 524 U.S. 775 (1998).

140. *Id.* at 806.

141. 42 U.S.C. § 2000e-5(f) (2000).

142. *Id.* § 2000e-5(g)(1) (“which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other eq-

The statute also provides for injunctive relief, as well as appropriate affirmative action.¹⁴³ These available remedies illustrate that the true purpose of the statute is to control the actions of the employer and not to provide compensation for the employee.

The EEOC has put forth enforcement guidelines dealing with protection for unauthorized workers.¹⁴⁴ The EEOC has concluded that unauthorized workers who have been “the victims of unlawful employment discrimination are entitled to the same relief as other victims of discrimination, subject to certain narrow exceptions.”¹⁴⁵ Federal discrimination laws are meant to “protect all employees in the United States, regardless of their citizenship or work eligibility.”¹⁴⁶ One may presume from such a contention that the true purpose of the statute is not to protect American citizens, but rather is to control the actions of American employers.

The EEOC issued additional guidelines dealing with the extraterritorial application of Title VII to American and American controlled employers operating abroad.¹⁴⁷ The guidelines recognize that one of the purposes of section 109 of the Civil Rights Act of 1991 was to provide procedures for determining what defines an American employer.¹⁴⁸ The focus appears to be heavily weighted toward which employers are subject to liability, not which employees are protected.

3. Who is Liable Under the Statute?

Liability under Title VII will be imposed upon any employer who meets the statutory definition.¹⁴⁹ However, the definition itself is not the final word on who is subject to liability.

uitable relief as the court deems appropriate.”).

143. *Id.*

144. EEOC, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL DISCRIMINATION LAWS NO. 915.002 (1999) (rescinded 2002).

145. EMPL. DISCRIMINATION COORDINATOR § 18:26 (2005), available at 2005 WL EDC ANAFED 18:26.

146. EEOC, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL DISCRIMINATION LAWS NO. 915.002 (1999) (rescinded 2002).

147. EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES, NO. 915.002 (1993).

148. *Id.* § I(B)(1).

149. Employers who will be liable under Title VII include labor organizations, employment agencies and any “person engaged in an industry affecting commerce who has fifteen or more employees” as well as the agents of such entities. 42 U.S.C. § 2000e(b) (2000).

There is no explicit test for determining the nationality of employers set forth in either section 109 or its legislative history.¹⁵⁰ “Where a respondent is incorporated in the United States, it will typically be deemed an American employer because an entity that chooses to enjoy the legal and other benefits of being incorporated here must also take on the concomitant obligations.”¹⁵¹ The traditional rule defines any corporation as a national of the state in which it was originally incorporated.¹⁵² Examine for a moment *Mahoney v. RFE/RL, Inc.*¹⁵³ The defendant in this case was a non-profit organization operating in Munich, Germany, while the company was incorporated in Delaware.¹⁵⁴ The District Court of the District of Columbia did not question its ability to exercise jurisdiction over the defendant.¹⁵⁵

However, not all employers are incorporated. Other relevant factors which may be helpful in assessing the nationality of a business entity include: “(a) the company’s principle place of business, i.e., the place where primary factories, offices, or other facilities are located; (b) the nationality of dominant shareholders and/or those holding voting control; and (c) the nationality and location of management, i.e., of the officers and directors of the company.”¹⁵⁶

Liability will also be imposed upon those entities which are controlled by American employers. “If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited [by Title VII] engaged in by such corporations shall be presumed to be engaged by such employer.”¹⁵⁷ The test for control by an American employer consists of: “(A) the interrelation of operations; (B) the common management; (C) the centralized control of labor relations; and (D)

150. EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES, No. 915.002 (1993).

151. *Id.*

152. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 cmt. C (2003).

153. 818 F. Supp. 1 (D.D.C. 1992).

154. *Id.* at 2.

155. *See id.*

156. EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES, No. 915.002 (1993).

157. Gerald L. Maatman, Jr., *A Legal Guide For Multinational Corporations on Dealing With the Extraterritorial Application of U.S. Employment Discrimination Laws*, 3 DIG. INT’L L. 1, 3 (1996), available at 1996 WL 3 DIGINTL 1 (alteration in original).

the common ownership or financial ownership or financial control, of the employer and the corporation.”¹⁵⁸

An example of the application of the test is evident in *Kang v. U. Lim America, Inc.*¹⁵⁹ The court determined that control was shared between U. Lim America and U. Lim de Mexico.¹⁶⁰ The operations of U. Lim America and U. Lim de Mexico shared one facility and one set of records.¹⁶¹ The court found common management based upon the fact that U. Lim de Mexico’s president also served as U. Lim America’s vice-president and that managers for U. Lim de Mexico reported to U. Lim America.¹⁶² The court found control of the labor force to be key: “U. Lim America had the authority to hire and fire U. Lim de Mexico employees. The Mexican supervisors reported to U. Lim America management. U. Lim America had essentially complete control over U. Lim de Mexico’s labor relations.”¹⁶³ When evaluating the fourth factor the court determined that, “[the companies] were owned and controlled by the same person, Yoon’s father Ki Hwa Yoon. Furthermore, U. Lim de Mexico . . . transferred all its funds to U. Lim America.”¹⁶⁴

Yet not all claims of control will be found in favor of the plaintiff. In *Duncan v. American International Group, Inc.*,¹⁶⁵ the court found that American International Company (“AIC”) maintained its own human resources department and made its own administrative decisions.¹⁶⁶ The court also found that the operations of AIC and American International Group (“AIG”) were separate.¹⁶⁷ The court cited the fact that there was no common management between the two companies and that AIG only owned a 20% stake in AIC.¹⁶⁸ Therefore, the court declined to impose liability upon AIG.¹⁶⁹

The Seventh Circuit upheld the notion common among the other circuits that “the most significant of [the four] criteria is the existence of any joint control over labor relations.”¹⁷⁰ The aforementioned factors

158. 42 U.S.C. § 2000e-1(c)(3) (2000).

159. 296 F.3d 810 (9th Cir. 2002).

160. *Id.* at 815.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. 01 Civ. 9269 (AGS), 2002 U.S. Dist. LEXIS 24552 at *4 (Dec. 23, 2002).

166. *Id.* at *9.

167. *Id.*

168. *Id.* at *10.

169. *Id.*

170. *Gen. Drivers v. Pub. Serv. Co.*, 705 F.2d 238, 242 (7th Cir. 1983); *accord Russom v. Sears, Roebuck & Co.*, 558 F.2d 439 (8th Cir. 1977); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722

“are the same as those relied upon by the [Equal Employment Opportunity] Commission for determining when two or more entities (whether foreign or domestic) may be treated as an integrated enterprise or a single employer.”¹⁷¹

4. How May United States Courts Exercise Jurisdiction?

In *Hartford Fire Insurance Co. v. California*,¹⁷² Justice Scalia wrote, “[T]he extraterritorial reach of [a statute] – has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether . . . [when enacting the law] Congress asserted regulatory power over the asserted conduct.”¹⁷³ Thus, by amending Title VII as suggested in this note, the presumption of extraterritoriality will be overcome. However, analysis of a statute’s extraterritorial reach does not end there. Once the presumption of extraterritoriality has been eliminated, international law must be examined in order to ensure that U.S. statutes are not being interpreted so as to conflict with relevant principles of international law.¹⁷⁴

Hartford relied on section 403(1) Restatement (Third) of Foreign Relations Law which provides, in part, that even if a nation has reason to exercise extraterritorial jurisdiction, it should refrain from doing so when “with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”¹⁷⁵ This ‘reasonableness’ test is clarified by the Restatement in section 403(2) which states that a number of factors can be considered. Such factors include, but are not limited to:

the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated¹⁷⁶ . . . the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to

(N.D. Ala. 1981).

171. EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES (1993).

172. 509 U.S. 764 (1993).

173. *Id.* at 813 (citing *Aramco*, 499 U.S. at 248).

174. *See Hartford Fire Ins. Co.*, 509 U.S. at 815.

175. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (2003).

176. *Id.* § 403(2)(b).

which the desirability of such regulation is generally accepted;¹⁷⁷ . . . the extent to which another state may have an interest in regulating the activity;¹⁷⁸ and the likelihood of conflict with regulation by another state.¹⁷⁹

Thus, when seeking to apply Title VII to violations committed in foreign countries against foreign workers, courts must take care to ensure that they are not imposing U.S. remedies where foreign remedies are available.

In order to make Title VII remedies available to non-citizens, we must first establish a basis under which the United States judicial system may exercise jurisdiction. It must be established: 1) who has jurisdiction; 2) over whom do they have jurisdiction; and 3) what are the steps that must be taken in order to exercise that jurisdiction.

According to United States foreign relations law, “a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”¹⁸⁰ The states that make up the United States are not states under international law since the Constitution gives foreign relations power to the federal government.¹⁸¹ The definition of state put forth here is generally accepted and refers to what any layman would call a country.

The Restatement (Third) of Foreign Relations Law of the United States is helpful in determining who is subject to United States judicial action as well as providing a framework for how the courts may go about enforcement. “[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory.”¹⁸² The Restatement also provides that “[a] state may exercise jurisdiction to prescribe laws for acts of its corporate nationals committed outside of its territory”¹⁸³ “For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.”¹⁸⁴

Section 414 of the Restatement of Foreign Relations Law provides that jurisdiction to prescribe laws over foreign branches and subsidiaries

177. *Id.* § 403(2)(c).

178. *Id.* § 403(2)(g).

179. *Id.* § 403(2)(h).

180. *Id.* § 201 (2003).

181. *Id.* § 201 cmt. g (2003).

182. *Id.* § 402 (2003).

183. *Id.* § 213 cmt. b (2003).

184. *Id.* § 213 (2003).

of juridical persons considered to be citizens of a state is allowed when “the regulation is essential to implementation of a program to further a major national interest of the state exercising jurisdiction.”¹⁸⁵ Surely, no country could successfully argue that preventing American employers from engaging in discriminatory practices is not a major national interest of both the United States and the country in which the corporation chooses to operate. This section of the Restatement is a reflection of the recognition that multinational enterprises do not fit neatly into the traditional bases of jurisdiction.¹⁸⁶

The right to adjudicate is reasonable if “the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state.”¹⁸⁷ “A state may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its laws or regulations, provided it has jurisdiction to prescribe. . . .”¹⁸⁸ Therefore, any business organization structured according to the laws of the United States is under the authority of its judicial system, which may prescribe laws, adjudicate infractions, and enforce those laws.

Title VII and other anti-discrimination laws are designed to control the employer. The American employer, as antagonist, easily falls under the jurisdiction of the United States judicial system and should therefore be subject to liability regardless of the nationality of the victim. The operative fact is that the American employer is engaging in discrimination.

5. *The Dangers Associated with Failing to Extend Liability*

As of December 2003, the unemployment rate in the United States was 5.8%.¹⁸⁹ This figure indicates that approximately 17 million people are currently actively seeking employment in the United States.¹⁹⁰ There is great uproar about the number of jobs that have “left the country.”¹⁹¹

185. *Id.* § 414 (2003).

186. *Id.* § 414 cmt. a (2003).

187. *Id.* § 421.2(e) (2003).

188. *Id.* § 431(1) (2003).

189. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *available at* <http://www.bls.gov/cps/home.htm> (last viewed February 25, 2005).

190. According to the U.S. Census Bureau population estimate there are 295,475,049 people in the United States, *available at* <http://www.census.gov/main/www/popclock.html> (last visited February 15, 2005). 5.8% of this number is 17,137,553 people.

191. Marilyn Geewax, *It's Tough to Track Jobs Leaving the U.S.*, ATLANTA J. CONST., *available at* <http://www.ajc.com/business/content/business/0104/14offshore.html> (“In the past year, many workers have railed against “offshoring,” the hot new business practice of moving service jobs to India, China and other low-wage countries.”). The public outcry against the exportation of American Jobs to foreign nations weighs so heavily on the public at large that it was considered

Continuing to allow employers to escape liability under Title VII will only create a larger dearth of employment opportunities. The seductive combination of lower labor costs,¹⁹² combined with the opportunity to escape liability will only serve to push more American employers towards moving their operations overseas. One may conclude that, since liability extends to Americans who are employed overseas by American employers,¹⁹³ the failure to extend liability to foreign nationals may make American citizens less attractive employees than non-citizens. Not only does this continued policy make it more difficult for Americans to be employed in America, it makes it more difficult for Americans to be employed anywhere in the world.

There is also a moral obligation to extend liability to foreign nationals. "Many countries have laws prohibiting employment discrimination that are similar to Title VII."¹⁹⁴ The countries holding policies similar to the United States' include Canada, Ireland, and Britain.¹⁹⁵ For example, Great Britain extends rights under "England's Employment Protection (Consolidation) Act of 1978, [which] depend[] upon the situs¹⁹⁶ of one's employment and not one's nationality."¹⁹⁷ England's Employment Protection (Consolidation) Act of 1978 applies to employees who ordinarily work in Great Britain, for temporary work done outside the country, if the work is done for the same employer, regardless of the nationality of the corporation or the employee.¹⁹⁸ If other countries are willing to extend their protection to our citizens, the United States should be willing to do the same.

likely to play a role in the 2004 presidential election. "Iowa Democrats, both in the caucuses and the rallies and town-hall meetings that preceded them, displayed plenty of anxiety about jobs moving overseas . . ." Jackie Calmes & Jacob M. Schlesinger, *One Big Lesson From Iowa: It's Still the Economy Stupid*, WALL ST. J., Jan. 21, 2004, at A1.

192. See Edwin Render, *Can Tort Law Be Used To Save Blue Collar Jobs in the United States?* 29 CAL. W. INT'L L.J. 175, 177 (1998) (citing low labor costs as the reason most jobs were moving out of the United States).

193. See 42 U.S.C. § 2000e(f) (2000).

194. See 6 EMP. COORDINATOR § 41:278 (2005), available at 2005 WL EMPC EMPLOYMENT § 41:278.

195. *Id.*

196. 'Situs' is defined as "the place where something (as a right) is held to be located in law." MERRIAM WEBSTER ON-LINE, available at www.m-w.com/cgi-bin/dictionary.

197. *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1256 (D.N.J. 1983). *Cleary* involved a United States citizen working for a United States based corporation, with its base of operations in London. *Id.* at 1253. Despite the fact that the plaintiff had already recovered damages under English law, the court held his ADEA claims were actionable, even though his claims in America arose from the same incident, because of the slightly different bases of the American and English statutes. *Id.* at 1256.

198. *Id.* at 1256.

However, many countries have insufficient regulations on the matter, although many are working on improvements.¹⁹⁹ Are their citizens less deserving of protection than ours? The United States has historically responded to the mistreatment of foreign citizens in their home country.²⁰⁰ We have engaged ourselves in more than one war spouting rhetoric. We have claimed that we fight to bring justice to the citizens of other nations.²⁰¹ How can we now turn our backs and allow American employers to skirt their obligation to the same citizens?

6. Similar International Steps

Anti-discrimination regulations on the international front would not be a novel endeavor for the United States government. International treaties and other agreements often discuss the issues facing the international workforce. The United States became a party to such an agreement upon the ratification of the North American Free Trade Agreement (“NAFTA”).²⁰² The U.S. has yet to take advantage of the opportunity to become a party to International Labor Organization Convention No. 111, which additionally confronts the issue of international employment discrimination.²⁰³

A. Convention 111

International Labor Organization Convention No. 111 concerns international discrimination in employment.²⁰⁴ The Convention calls for all ratifying nations to pursue policies that will work toward eliminating

199. *Infra* notes 203-211 and accompanying text.

200. For example, as early as 1898 we cited concerns for the mistreatment of Cuban rebels as a reason for abandoning a long standing policy of neutrality. American outcry over the detention and starvation of Cuban rebels by the Spanish forced a reluctant President McKinley into war. On April 25, 1898 Congress declared war on Spain. See JAMES WEST DAVIDSON ET AL., *THE AMERICAN NATION* 624-29 (Prentice Hall 2000).

201. Since the time of the Spanish American War, we have continued to use humanitarian concerns as ancillary, as well as the sole, reason for our involvement in multiple armed conflicts. For example, in 1999 we sent our forces to fight in Kosovo. “With respect to the Kosovo situation, the United States and its allies used force against Serbia in response to a humanitarian crisis . . .”. Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 356 (2003).

202. *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 1 (Judith H. Bello et al. eds., 1994).

203. For a comprehensive list of countries which have ratified the treaty see note 205.

204. ILO Convention (No. 111) Concerning Discrimination (Employment and Occupation), June 25, 1958 U.S.T. LEXIS 255, TREATY DOC 105-45, at *98-99 (1958).

discrimination in employment.²⁰⁵ The treaty “affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their

205. *Id.* Those countries which have ratified Convention 111 are contained in the following chart, in no particular order:

Country	Country	Country	Country
Afghanistan	Cuba	Jordan	The former Yugoslav Republic of Macedonia
Albania	Cyprus	Kazakhstan	Bosnia and Herzegovina
Algeria	Czech Republic	Kenya	Democratic Republic of the Congo
Angola	Denmark	Republic of Korea	The Islamic Republic of Iran
Antigua and Barbuda	Dominica	Kuwait	Russian Federation
Argentina	Dominican Republic	Kyrgyzstan	Libyan Arab Jamahiriya
Armenia	Ecuador	Latvia	Saint Kitts and Nevis
Australia	Egypt	Lebanon	Saint Lucia
Austria	El Salvador	Lesotho	Saint Vincent and the Grenadines
Azerbaijan	Equatorial Guinea	Liberia	San Marino
Bahamas	Eritrea	Lithuania	Sao Tome and Principe
Bahrain	Ethiopia	Luxembourg	Saudi Arabia
Bangladesh	Fiji	Madagascar	Senegal
Barbados	Finland	Malawi	Serbia and Montenegro
Belarus	France	Mali	Seychelles
Belgium	Gabon	Malta	Sierra Leone
Belize	Gambia	Mauritania	Slovakia
Benin	Georgia	Mauritius	Slovenia
Bolivia	Germany	Mexico	Somalia
Botswana	Ghana	Republic of Moldova	South Africa
Brazil	Greece	Mongolia	Spain
Bulgaria	Grenada	Morocco	Sri Lanka
Burkina Faso	Guatemala	Mozambique	Sudan
Burundi	Guinea-Bissau	Namibia	Swaziland
Cambodia	Guinea	Nepal	Sweden
Cameroon	Guyana	Netherlands	Switzerland

material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”²⁰⁶ Those nations that ratified the Convention pledged to pursue national policies that would promote equality and drive forward in order to eradicate discrimination in the workplace.²⁰⁷

The Treaty Document concerning United States ratification of Convention 111 recommends that the Senate ratify the Treaty.²⁰⁸ President William Jefferson Clinton stated that “[r]atification of this Convention would be consistent with our policy . . . of ensuring that our domestic labor standards meet international requirements, and of enhancing our ability to call other governments to account for failing to fulfill their obligations”²⁰⁹ The Tripartite Advisory Panel on International Labor Standards concluded in its advisory recommendations to the president that the United States would not have to change any laws in order to comply with Convention 111.²¹⁰ Unfortunately, there has not been a Senate report or debate to date. This does not mean that ratification has been ruled out, only that the Senate has not yet addressed the issue. The recommendation for ratification makes note of the fact that the commit-

Canada	Haiti	New Zealand	Syrian Arab Republic
Cape Verde	Honduras	Nicaragua	Tajikistan
Central African Republic	Hungary	Niger	Tanzania
Chad	Iceland	Nigeria	Togo
Chile	India	Norway	Trinidad and Tobago
Colombia	Indonesia	Pakistan	Tunisia
Congo	Iraq	Panama	Turkey
Costa Rica	Ireland	Papua New Guinea	Turkmenistan
Côte d’Ivoire	Israel	Paraguay	Ukraine
Croatia	Italy	Peru	United Arab Emirates
Poland	Jamaica	Portugal	United Kingdom
Uruguay	Uzbekistan	Venezuela	Zambia
Qatar	Romania	Rwanda	Zimbabwe
Viet Nam	Yemen		

Available at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111>.

206. ILO Convention (No. 111) Concerning Discrimination (Employment and Occupation), June 25, 1958 U.S.T. LEXIS 255, TREATY DOC 105-45, at *98-99 (1958).

207. *Id.*

208. *Id.* at *3.

209. *Id.*

210. *Id.* at *7.

tee's "conclusions and practice, in any event, are not legally binding on the United States and have no force and effect on courts in the United States."²¹¹

B. NAFTA

Between the United States, Canada and Mexico, NAFTA entered into force on January 1, 1994.²¹² There are numerous provisions within the agreement, yet this note will only address the eight most significant.²¹³

1) NAFTA opened the Mexican Market to exports from the United States and Canada;²¹⁴ 2) Markets in the United States were opened to an increase in Mexican goods and services;²¹⁵ 3) U.S. workers and farmers are protected from import surges;²¹⁶ 4) The Mexican services market was opened to U.S. service providers;²¹⁷ 5) Intellectual property rights were afforded protections in NAFTA which became the model for protection of intellectual property rights in future international agreements;²¹⁸ 6) NAFTA provided assurances for fair trade as well;²¹⁹ 7) The rules of origin "ensure that the benefits of the Agree-

211. *Id.* at *19.

212. Bello, *supra* note 202, at 1. During the Reagan administration, the United States entered into a free trade agreement with Canada known as the Canadian Free Trade Agreement. *Id.* at 2. The Canadian agreement was arguably the basis for the establishment of NAFTA. *See id.* Trilateral negotiations between Mexico, Canada and the United States officially began on June 12, 1991. *Id.* at 3.

213. *Id.* at 5.

214. *Id.* Mexico was required to eliminate tariffs on two thirds of U.S. imports. *Id.* Additionally, "Mexico is required to eliminate its quantitative restrictions and import licensing requirements." *Id.*

215. *Id.* However, U.S. producers are protected "through transition and safeguard measures." *Id.*

216. *Id.* at 6. NAFTA contains both bilateral safeguards against import surges and allows for the inclusion of NAFTA-origin goods "if they account for a substantial share of total imports." *Id.*

217. *Id.* This creates an additional market for "banks, insurance providers and other financial institutions, providers of enhanced telecommunications services, [and] professionals." *Id.*

218. *Id.*

219. *Id.* Under the fair trade provisions the United States and Canada are provided with due process and judicial review in Mexican proceedings. *Id.* Both Canada and the United States were not required to modify their antidumping and countervailing duty laws. *Id.* More importantly, NAFTA provided for review of national decisions by a bi-national panel of experts. *Id.* The bi-national panel will "determine generally whether a national decision was supported by substantial evidence on the record and was in accordance with law." *Id.*

ment are enjoyed by North Americans²²⁰ rather than other foreign importers;²²¹ 8) NAFTA established rules relating to investment.²²²

The NAFTA was ratified along with two supplemental agreements.²²³ The environmental side agreement is of no concern to this argument. However, the labor side agreement is crucial. The preamble of that agreement stated that the elimination of employment discrimination was one of 10 labor principles to which the three nations were committed.²²⁴ Analysis over labor issues under NAFTA has focused largely on Mexico.²²⁵ There is a substantial disparity between enforcement of labor issues in Mexico and the United States than between the United States and Canada.²²⁶ On paper, Mexico's codified labor regulations look similar to those found in the United States, yet enforcement is severely lacking.²²⁷ This lack of enforcement renders Mexico's regulations useless.²²⁸ The agreement provides a right of private action for aggrieved individuals.²²⁹ The North American Agreement on Labor Cooperation estab-

220. *Id.* at 7.

221. *Id.*

222. *Id.* Mexico was obligated to eliminate requirements related to trade balancing, local content and export performance. *Id.* Investors in Mexico will not export Mexican products. *Id.* Canadian and U.S. manufacturers will no longer be required to locate operations in Mexico in order to sell there. *Id.*

223. LESLIE ALAN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 122 (2d ed. 1994). The environmental side agreement was a concession to "Friends of the Earth, American Cetacean Society, Arizona Toxics Information, Border Ecology Project, Center for International Environmental Law" and others in an effort to gain their support for NAFTA. *Id.* at 92. Proposals included "linking cleanup of past pollution to future trade [and] trade sanctions for failure to comply with environmental law." *Id.* at 105.

224. *Id.* at 122. The remaining nine principles are: the freedom of association, the right to bargain collectively, the right to strike, prohibition against forced labor, restrictions on labor by children and young people, minimum employment standards, equal pay for men and women, prevention of occupational accidents and diseases, and protection of migrant workers. *Id.*

225. *See* Bello, *supra* note 202 at 353.

226. *Id.* at 352 n.2.

227. *Id.* at 353.

228. *See id.* at 352.

229. Canada – Mexico – United States: North American Agreement on Labor Cooperation 32 I.L.M. 1499, 1503 (1993). Article 4 of the side agreement provides:

1. Each party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.

2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under: (a) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and (b) collective agreements, can be enforced.

Id.

lished the possibility of sanctions against any country that continually fails to enforce labor laws.²³⁰

While it is admirable that Convention 111, and similar agreements, address the ideals of anti-discrimination, they are ineffective without provisions for enforcement. It should be noted that the lack of specific enforcement provisions in NAFTA has left many unhappy. Human Rights Watch reported on April 16, 2001 that 23 complaints had been filed due to a failure to adhere to the high labor standards required by the agreement.²³¹ It should also be pointed out that none of the 23 complaints filed resulted in any form of sanction.²³²

The United States has yet to involve itself in an international agreement that effectively provides for enforcement of any of the international anti-discrimination agreements that it has entered into. Espousing ideals is admirable, yet highly ineffective. The provisions this note proposes are not only ground-breaking, but also necessary in order to effectuate international respect for the equal rights of all persons with regards to employment.

IV. RAMIFICATIONS OF EXTENSION AND HOW TO OVERCOME THEM

Any legal argument will encounter opposition. Legislation that carries an international effect will necessarily result in trepidation from both the international and domestic communities. While not an exhaustive list, this section seeks to highlight and preempt the various concerns that such a change in Title VII would raise.

1. Foreign Compulsion Defense

It is a reasonable concern that the laws of differing nations may at

230. *Bello supra* note 202 at 370. The agreement provides seven requirements with which each of the three nations' governments must comply. Canada – Mexico – United States: North American Agreement on Labor Cooperation 32 I.L.M. 1499, 1503 (1993). They are:

[1] appointing and training inspectors; [2] monitoring compliance and investigating suspected violations, including through on-site inspections; [3] seeking assurances of voluntary compliance; [4] requiring record keeping and reporting; [5] encouraging the establishment of worker – management committees to address labor regulation of the workplace; [6] providing or encouraging mediation, conciliation and arbitration services; or [7] initiating in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

Id.

231. Available at <http://www.hrw.org/press/2001/04/nafta0416.htm>.

232. *Id.*

times conflict. How would an American employer deal with its obligation to comply with Title VII in a host country where the values, norms, and laws are in direct conflict with compliance? One must keep in mind that Title VII obligations presently follow the American employer with respect to its American employees anywhere in the world. Therefore, this is an issue already addressed by Congress in the present version of Title VII.

The language of Title VII assures employers that they will not be “required to take actions otherwise prohibited by law in a foreign place of business.”²³³ The statute holds that an employer may take an “otherwise prohibited action if compliance with [the] statute, with respect to an employee in a workplace in a foreign country, would cause an employer to violate the law of the foreign country in which the workplace is located.”²³⁴ Thus, an affirmative defense is available. In order to prove the foreign compulsion defense the employer “must prove three elements . . . (1) the action is taken with respect to an employee in a workplace in a foreign country, where (2) compliance with Title VII or the ADA would cause the respondent to violate the law of the foreign country, (3) in which the workplace is located.”²³⁵

The employer is first required to prove that the employee suffered adverse actions in a workplace in a foreign country.²³⁶ However, the defense is not available concerning employment in Puerto Rico, Guam, the Virgin Islands, Wake Island, American Samoa, the Canal Zone, or the Outer Continental Shelf Lands.²³⁷ The defense is also not available with respect to any employee who suffered employment discrimination in the continental United States, Alaska, Hawaii, or the District of Columbia.²³⁸

Second, the employer must demonstrate the existence of a law.²³⁹ “[A] respondent must initially demonstrate that the source of authority on which it relies constitutes a foreign ‘law.’”²⁴⁰ The District Court of the District of Columbia explained that “the defendant’s union contract,

233. EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES (1993) (quoting the statement of Senator Bob Dole from 137 CONG. REC. S15, 477 (daily ed. Oct. 30, 1991)).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

although 'legally binding,' was not 'law' for purposes of the . . . foreign laws defense."²⁴¹

Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.²⁴²

It must also be shown that compliance with Title VII will cause a violation of the foreign law, "i.e., that it is impossible to comply with both sets of requirements."²⁴³ For example, in Saudi Arabia it is illegal for non-Muslims to enter Mecca.²⁴⁴ Therefore, an employer may claim a foreign compulsion defense for refusing to hire non-Muslims for positions that would require entry into Mecca.²⁴⁵

The final prong of the test requires the employer to show that the laws involved are actually the laws of the nation in which the workplace is located. "The laws of the country in which an employer is headquartered or incorporated would not control for purposes of this element of the defense unless the charging party's workplace is also located in that country."²⁴⁶

Through the satisfaction of the prongs of the foreign compulsion test a corporation may escape liability for acts in violation of Title VII, in the event that there is a conflict of law with the host country. Congress has accorded due respect to the laws and values of other nations in which we do business. The extension of Title VII to their citizens will not, in any way, damage the respect and deference we now show these host countries.

2. Jury Verdicts

There is danger, however, in the large jury verdicts available in the

241. *Id.* (citing *Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1 (D.D.C. 1992)).

242. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

243. See EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES (1993).

244. *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1198 (N.D. Tex. 1983).

245. See *id.* at 1200.

246. See EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES (1993).

United States. The American judicial system awards monetary damages in amounts that far exceed the awards available in most other nations.²⁴⁷ The monetary awards available to foreign plaintiffs will likely be greater than the courts of their home country could or would allow. Yet, this problem should not be cause for major concern.

There is cause for concern in international law where a jury verdict is awarded in sums that exceed the foreign defendant's ability to pay. However, the defendants under the proposed changes to the statute will not be foreign. Every company must either be American or under the control of an American company before the provisions of Title VII will apply. Since the defendants will be American, the award of large verdicts should not be unreasonable. However, this is not the only check upon the concern that the American judicial system will award verdicts that are unreasonably high.

Compensatory damages such as back pay and future pay will not be reflective of the high awards granted by American juries. A jury's opinion of what they feel it should be, or what the American standard is does not adjust the pay level. The rate of pay is the basis for the rate of compensation.²⁴⁸ Therefore the employer is in no worse a position in allowing the courts to order redress, than they would be if they had simply prevented the discriminatory employment practice in the first place.

The dangerous area of redress is in punitive damages. However, the statute itself may and should be drafted in order to combat the problem before it becomes a problem. American jurisprudence, as well as the concern for international conflict, calls for a limit to be imposed on the amount recoverable. Punitive damages are generally where the employee windfall lies. The amount awarded for punitive damages is currently subject to the discretion of the jury and may only be set aside

247. For example, an award of \$200,000, a small sum by American standards, would be the equivalent of 203,000,000 North Korean won. This is more than 150 times the gross domestic product per capita of \$1,300. The World Factbook, available at <http://www.cia.gov/cia/publications/factbook/>.

The same award in China would cost 1,655,299.9496 Chinese Yuan Renminbi. This award is 40 times the gross domestic product per capita of \$5,000 for this nation. *Id.* These figures are better put into perspective when it is illustrated that the gross domestic product per capita in the United States is \$37,800. *Id.* The foreign defendant has the opportunity to experience a major windfall.

248. 42 U.S.C. § 2000e-5 (g)(1) (2000). The statute limits back pay recovery to a period of two years prior to the filing of a claim with the EEOC. *Id.* Additionally, the employee is required to mitigate damages for lost wages. *Id.* "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.*

where there is no rational basis for the decision.²⁴⁹ A limit imposed within the statute may help to alleviate the problem.

Additionally, it should be noted that although the damages in question are being paid to a foreign plaintiff, the employer is an American entity. The awards are not unusual by American standards. The American employer is in no worse a position than it would have been had the infraction occurred in an American workplace. Intuitively, it is most likely in an even better position to afford the compensation. American employers judge profitability by American standards. It is counterintuitive to think that the employer would move operations overseas unless it increased the profitability of the business. Increased profitability may indicate the availability of more capital. More capital means that the employer should have little trouble meeting the financial obligation of a punitive damage award.

3. *The Slippery Slope Argument*

Some may contend that extension will open the floodgates to litigation. Granted, there is the risk of an increase in Title VII litigation, but that risk is run whenever there is new legislation passed or the scope of old legislation is expanded. However, the mere possibility of more litigation should not be enough to inhibit the application of good law.

Our proposal is not designed to increase litigation, but to increase compliance. The desire of an employer to avoid litigation over Title VII issues can be viewed as an incentive to increased compliance.

Not all applications of an expanded Title VII will result in litigation. The EEOC has conciliatory powers.²⁵⁰ Every attempt should be made by both sides to reach an agreement that will resolve the issues involved without relying on the already taxed judicial system. Alternative methods of conference, conciliation, and persuasion are built into the language of Title VII.²⁵¹ These methods are presently encouraged, al-

249. There is a long tradition of according substantial leeway to the workings of a jury. However, as evidenced by *Bell v. Helmsley*, the court will not hesitate to reduce an award when it deems necessary. Judge Tolub postulated that Ms. Helmsley's negative reputation and inflammatory behavior prompted the jury to award an unreasonably high punitive damage. The damages were evaluated and reduced by Judge Tolub in his opinion. No. 111085/01, 2003 N.Y. Misc. LEXIS 192, at *12-13, 21 (N.Y. Sup. Ct. Mar 4, 2003).

250. See *Sanders v. Bd. of Educ. – Sch. Dist. No. 205*, No. 86-C2840, 1986 WL 11978 (N.D. Ill. Oct. 20, 1986) (holding that plaintiff may not exceed the scope of the original complaint placed with the EEOC, because to do so would circumvent their conciliatory power and purpose).

251. 42 U.S.C. 2000e-5(b) (2000).

though not required.²⁵² A civil action may only be filed after receipt of a right to sue letter from the EEOC.²⁵³ If the proposed changes to Title VII include language which requires alternative methods of dispute resolution as a first step in the remedial process the need for litigation may be dissuaded even further.

Additionally, the slippery slope is arguably one of the weakest counterarguments used in today's legal system. Almost any legal argument can be reduced to a slippery slope. Yet there is little evidence that the slippery slope has truly passed muster or been a deciding factor for a court. The slippery slope is simply a theoretical fear that our system is incapable of drawing the necessary distinctions to prevent a flood of negative repercussions from a legal choice.²⁵⁴

There is strong reason to believe that we should "distrust the objectivity and competence of those who will play leading roles in evaluating [the policy's] effects."²⁵⁵ Those who will most feel the burn from such legislation are those American companies large enough to be operating overseas. Large companies often have large bankrolls and those with money often yield strong political power.²⁵⁶ To allow the companies guilty of violation of basic anti-discrimination principles to wield influence is morally reprehensible.

Ultimately there may be an increase in litigation over Title VII principles under this note's proposed statutory provisions. However, an increase in litigation would be tempered by the judicial system's screening procedures. Those cases which will reach the courts will likely in-

252. *Id.*

253. *Id.*

254. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1028 (2003). Volokh uses the following example; "[y]ou think A might be a fairly good idea on its own, or at least not a very bad one. But you're afraid that A might eventually lead other legislators, voters, or judges to implement policy B, which you strongly oppose. . . ." *Id.* Cf. Volokh's proposed questions are:

Is there some other trend or program that might yield benefits that could be erroneously attributed to A?

Is there reason to think that the measurements of A's effectiveness will be inaccurate because they underestimate some costs or overestimate some benefits?

Do we distrust the objectivity and competence of those who will play leading roles in evaluating A's effects?

Have the effects of similar proposals been evaluated incorrectly in the past?

Are there ways to reduce the risk of erroneous evaluation?

Id. at 1101.

255. *Id.* Objectivity and competence of the evaluators is one of the five issues Volokh suggests questioning when analyzing a slippery slope argument. *Id.*

256. See FRED MCCHESENEY, *MONEY FOR NOTHING: THE DARK ECONOMICS OF POLITICAL INFLUENCE* (1997).

volve serious issues of law worthy of the court's time and effort. Additionally, any increase in litigation is likely to ultimately result in an increase in compliance.

4. *Forum Shopping*

The possibility of forum shopping for the best possible result is a real danger in this case. Even in those countries where ample protection is provided for employees, there may be factors that would make American courts more attractive. In those areas where relief is available through the workings of the host nation, we do need to discourage litigants from searching the courts for the most favorable possible result. Our system frowns upon forum shopping within the American judicial system, let alone on an international scale.

There are certain safeguards against forum shopping which already exist. "If . . . an abuse of the judicial process is found to be involved in the selection of a particular forum, the remedies available involve discipline of the parties and their counsel and even, in extraordinary circumstances, dismissal."²⁵⁷ Statutory limitations as to forum availability will provide further hindrance to those that are intent upon forum shopping.

Additionally, one may hope that this move toward international enforcement will inspire more comprehensive regulation and compliance in the nations with which we do business. As the host nation, those with compliance regulations should be given judicial preference as the appropriate forum for remedy.

5. *Application of the Proposed Extension*

Unquestionably, enforcement of the proposed amendment will be an issue. The manpower and money it would take to police U.S. based corporations throughout the world seems staggering.

However, it is important to note that the EEOC was enforcing Title VII, the ADA, and the ADEA abroad even prior to the 1991 amendments.²⁵⁸ American civilian employees of the U.S. government working abroad had been protected by the EEOC since its inception.²⁵⁹ In a few cases, defendants have raised jurisdictional challenges to attempts by the

257. *McLaughlin v. United Va. Bank*, 955 F.2d 930, 935 (4th Cir. 1992).

258. *See Cherian, supra* note 75, at n.2.

259. *Id.*

EEOC to investigate alleged discrimination that occurs overseas.²⁶⁰ All have been met with denials.²⁶¹ While most of these cases did not reach the ultimate question of whether Title VII would ultimately apply to the defendants, each court found the EEOC had jurisdiction.²⁶²

The Northern District Court of Illinois asserted in *EEOC v. Institute of Gas Technology* that “as long as a claim had been filed under Title VII . . . the EEOC has the authority to investigate”²⁶³ Indeed, the court accused the defendant of “mistakenly associat[ing] the issue of ‘authority’ with the ‘jurisdiction’ of the EEOC to hear a claimed violation of Title VII.”²⁶⁴ The court held that “[i]t is the coverage of Title VII which is synonymous with the jurisdiction of the EEOC. . . .”²⁶⁵ Thus, so long as the EEOC has the manpower to investigate such claims, jurisdiction to investigate should not be an issue.

The issue of manpower and resources afforded the EEOC is one that cannot be addressed in a note of this length. Short of advocating an increase in taxes, there are a few ways in which the EEOC could raise money for its overseas investigations. One method would be to impose monetary fines on overseas employers who are caught violating Title VII, which could then be funneled back into the EEOC. Another approach is to impose a small tax on U.S. based corporations wishing to establish overseas operations that could then be used to fund a foreign branch of the EEOC.

The question then arises how aggrieved employees in foreign countries will file grievances with the EEOC and what their remedies will be. Much of the time, an EEOC investigation culminates in the issuance of a right to sue letter.²⁶⁶ This right of a private individual to sue was created in 1964 and has remained pretty much intact ever since.²⁶⁷ Presumably, most foreign workers employed by U.S. corporations abroad will not be

260. See, e.g., *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 924 (11th Cir. 1991) (overturning the district court’s denial of the enforcement of the EEOC’s request for documents from cruise ships flying under a foreign flag); *EEOC v. Inst. of Gas Tech.*, No. 79-C786, 1980 U.S. Dist. LEXIS 13742, at *16-17 (N.D. Ill. July 23, 1980) (enforcing an EEOC subpoena that had been served on an employer in Algeria).

261. *Kloster Cruise Ltd.*, 939 F.2d at 924; *Inst. of Gas Tech.*, 1980 U.S. Dist. LEXIS, at *8.

262. See *id.*

263. *Inst. of Gas Tech.* at *6.

264. *Id.* at *5.

265. *Id.*

266. Sandra Gayle Filler, *Recent Case: Perdue v. Roy Stone Transfer Corp.*, 52 U. CIN. L. REV. 558, 560-61 (1983) (explaining that the EEOC must notify an employee of his right to sue in federal court if the EEOC either does not find reasonable cause, takes no action, or fails to reach an agreement with the employer).

267. See *id.* at 561.

able to pursue a private right of action in U.S. courts due to a lack of personal resources. However, rather than issuing right to sue letters to aggrieved individuals, it may be somewhat more effective for the EEOC to file on its own behalf in cases that would arise under the proposed extension.

There is a danger that enforcement will only be utilized by the wealthy and educated select in these foreign nations. Additionally, class action suits may be filed on behalf of large groups of employees. Many of the plaintiffs in such class action suits may not be sufficiently educated or informed to realize that they are a member of the class. Additionally, members of a class in the most informed circles may not be aware of litigation taking place thousands of miles away, in a foreign country. In order for proper and effective utilization by those employees who are most in need of the protections offered by the proposed revisions, information must reach the masses. This would necessitate proactive involvement from the EEOC in cooperation with international human rights organizations and, wherever possible, foreign governments.

Foreign governments may prove to be allies in the enforcement of the proposed extension of coverage. Those governments which support the ideals of anti-discrimination (as evidenced by their commitment to international agreements like Convention 111), yet lack the resources for effective enforcement, which are available in the United States, may be willing to align themselves with the U.S. government and its agencies in order to ensure that their citizens are not victimized by ultra-wealthy, resource-rich American employers. This allows the government of the foreign nation to still take advantage of the many positive aspects of having American employers operate within its borders, while eliminating at least one of the drawbacks.

While enforcement of any expansion of Title VII may encounter administrative difficulties, such issues cannot be overriding factors when it comes to determinations about international human rights. The possible solutions suggested above are worthy of further investigation and analysis.

V. CONCLUSION

We concede that the topic discussed in this note is controversial. Some may believe that American tax dollars should not be spent protecting the citizens of other nations. Others may believe that the already clogged American courts cannot bear the burden of increased litigation

from any statute. The remainder may simply believe that the United States has no business meddling in the affairs of other nations.

But the United States does have the right to meddle in the affairs of its own corporations and business people. American corporations clearly fall under the jurisdiction of American courts and government. Compliance with the law is a necessary prerequisite for corporations to avail themselves of the many benefits the United States government can offer them.

It is the assertion of this note that compliance is best achieved through closing statutory loopholes. The American government should be able to police and, if necessary, punish the various business entities regardless of where they may try to hide. The government currently has the right to ensure fulfillment of Title VII obligations with regards to domestic employers of American citizens on American soil, domestic employers of aliens on American soil, and domestic employers of American citizens on foreign soil.

Congress must address this shortfall. Following American corporations to foreign nations for the purpose of evincing Title VII observance is not novel, nor is it beyond the scope of the powers of the United States government and the EEOC. The EEOC and Congress have seen fit to apply laws extraterritorially in efforts to protect American citizens from injustices that may be visited upon them by foreign business entities. To then allow American corporations to commit injustices against the citizens of foreign countries is nothing short of hypocrisy.

American corporations should not be permitted to shirk the laws of the United States by transferring non-citizen employees to foreign offices or by simply hiring foreign workers. Title VII must be re-written in order to conform to its original purpose – the deterrence of discriminatory behavior by employers.

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