

**OBSTACLES TO THE EXTRATERRITORIAL
APPLICATION OF TITLE VII:
THE CIVIL RIGHTS ACT OF 1991 RECONSIDERED**

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ABSTRACT

The Civil Rights Act of 1991 included legislation which extended the protection of Title VII to any United States citizen employed in a foreign country. The purpose of this article is to offer an examination of employer obligations and exemptions, as well as potential conflicts, which are present in applying Title VII extraterritorially. Specifically, the extraterritorial application of Title VII will prove problematic in legal environments which differ radically from the western model of constitutional government, as illustrated by the Arab states of the Persian Gulf. The authors conclude that, in the unlikely event of the repeal of section 109, extensive litigation will be forthcoming to resolve the ambiguities present in the extraterritorial provision of the Civil Rights Act of 1991.

On November 21, 1991, the Civil Rights Act of 1991 (CRA 91) was signed into law. Recognized as the most important equal employment opportunity legislation since the Civil Rights Act of 1964, the new act altered the manner in which firms manage employment practices, ranging from mixed motive decisions to race norming. One of the more controversial issues addressed by the CRA 91 was the extraterritorial application of Title VII [1].

This extraterritorial application was accomplished by amending § 703 (f) of the Civil Rights Act of 1964 to read: "with respect to employment in a foreign

country, such term [employee] includes an individual who is a citizen of the United States.” In essence, U.S. expatriates at foreign work locations are now as protected under the aegis of Title VII as if they were working in the United States. This provision specifically overturned the Supreme Court’s decision in the *EEOC v. Arabian American Oil Company* case [2] (ARAMCO), which had limited Title VII protection to the borders of the United States and its territories.

Fortunately, or unfortunately, the 1991 act is not inflexible on this matter as it does provide for an exception.

It shall not be unlawful under section 703 or 704 for an employer . . . to take any action otherwise prohibited by such section, with respect to an employee in a work place in a foreign country if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such work place is located [3] (emphasis added by authors).

Just what constitutes “the law of the foreign country” will be the focus of this article. To illustrate what the authors perceived as a flaw in the construction of the extraterritorial provisions, the application of Title VII in a foreign jurisdiction is explored. Because the Supreme Court decision that the 1991 act specifically overturned involved an employment decision in Saudi Arabia, this article examines the potential difficulties of Title VII enforcement in that region of the world.

In particular, this article investigates the application of Title VII in legal environments that differ radically from the western model of constitutional government and devotes particular attention to the Arab states of the Persian Gulf. A brief review of employer responsibilities under Title VII is presented, as well as a more thorough discussion of the new obligations and exemptions under the extraterritorial employment provisions of the Civil Rights Act of 1991. This article then discusses the potential for conflicts that exists under extraterritorial coverage and recommends further attention with regard to that coverage.

EMPLOYER OBLIGATIONS UNDER TITLE VII

Title VII is that component of the Civil Rights Act of 1964 governing employment. Under § 703, it is unlawful for a covered employer to engage in employment practices that discriminate on the basis of race, color, religion, sex, and national origin [4]. Until November 1991, these prohibitions on unlawful discrimination applied to all private-sector employers operating within the boundaries of the United States and its territories, provided that the employer had fifteen or more full-time employees. It has long been recognized that foreign enterprises and corporations operating facilities within this geographic confine were bound to comply with these requirements in the same manner as U.S. citizen-owned concerns [5]. However, facilities located on foreign soil and owned by U.S. citizens

or corporations were previously beyond the scope of U.S. equal employment requirements. Employee practices, at that time, were governed strictly by the host country's statutes, if at all.

As stated previously, the enactment of the Civil Rights Act of 1991 has changed the legal requirements on employers. Now, unless specifically exempted by the act, Title VII will prevail *unless superseded by contrary host country laws*.

PRESUMPTION AGAINST EXTRATERRITORIALITY

Before delving further into the extraterritorial application issue, it is first appropriate to briefly review the Supreme Court's decision that precipitated the 1991 amendment. In *ARAMCO*, Ali Boureslan, a naturalized U.S. engineer of Lebanese descent, had been transferred to the Arabian American Oil Company's facilities at Oharan, Saudi Arabia. After arriving on site, Boureslan became the target of ethnic and religious slurs. Boureslan was a Christian, and contended that this abusive work environment eventually resulted in his termination. Upon returning to the United States, Boureslan filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging discriminatory treatment at the hands of his employer on the basis of race, religion, and national origin. His case was eventually appealed to the Supreme Court, which held that since Congress had not *specifically* expressed its intent to apply Title VII extraterritorially, it must be concluded that its jurisdiction was limited to the United States, its territories and possessions [2, at 259].

Relying heavily on the precedence established in *Blackmer v. United States* [6], the *ARAMCO* court held that legislation of the United States is intended to apply only within the territorial jurisdiction of the United States, unless Congress has expressed an intent to the contrary. In essence, Congress must explicitly state in the statute that it is meant to be applied and enforced beyond the territorial jurisdiction of the United States. Congress set forth clear and distinct standards of extraterritorial application in the Comprehensive Anti-Apartheid Act of 1986 and the Export Administration Act [7]. Since, prior to November, 1991, the Civil Rights Act contained no language expressing congressional intent to apply it extraterritorially, the Supreme Court concluded it did not so apply [2, at 259].

During the debate over the Civil Rights Act of 1991, Senators John Danforth and Edward Kennedy proposed and gained enactment of a provision to expand the issue of extraterritorial application of Title VII. Section 109 of the new act was specifically drafted for the purpose of overruling the *ARAMCO* decision [8]. The rationale for extending Title VII coverage to foreign jurisdictions is still unclear, but the poor construction of section 109 poses unfortunate consequences for firms engaged in international operations, as will be explored later.

During the debate, some members of Congress did foresee the possibility that such extraterritorial application could place an employer in the unenviable position of being caught between two opposing laws—that of the United States and

that of the host country. What would an employer do, for example, if obeying Title VII meant violating the laws of the host nation, or *vice versa*? As a result, Section 109 was amended to include exceptions, or exemptions, to extraterritorial coverage.

EMPLOYER EXEMPTIONS

Obviously the foreign operations of a foreign employer are not covered by Title VII [9], but what about foreign operations that are *partially* owned by American employers? This question is not resolved by the exemption included in § 2-c of the amendment, which states the amendment shall not apply to the foreign operations of an employer *if those operations are not controlled by an American employer* [10] (emphasis added). Although the scope of extraterritorial authority has clearly been extended to foreign operations with American ownership, the terms “employer” and “American employer” remain open to debate.

The definition of “American employer” is a legitimate business concern, since there have been an increasing number of joint ventures in the international arena [11]. Some of these joint ventures are partially the result of host-country nationalism and government restrictions on firms with foreign ownership [12]. It also appears that a growing number of foreign investment opportunities are occurring for firms which are majority-owned by U.S. corporations/investors. If the pundits are correct, and by all indications they are, the U.S. economy will become increasingly globalized as time progresses [13]. Consequently, more U.S.-based companies are likely to have overseas subsidiaries and units, with corresponding increases in overseas employment opportunities for U.S. citizens. Thus, it is obvious that the unresolved issue of when foreign operations are to be classified as “controlled by” an American employer is assuming critical significance for many firms.

Congress established a test of four factors in section 109 to determine whether or not an American employer subject to Title VII controls a foreign subsidiary or operation [1]. First of all, is there a clearly defined interrelationship of operations between the American-based parent company and the overseas subsidiary? Next, do both entities share a common management? Additionally, is there evidence that centralized control of labor relations exists? Finally, is there a discernible common ownership or financial control of the entities? What is, unfortunately, unclear at this time is whether all of these factors must be present to establish control and, therefore, the application of Title VII to the foreign subsidiary [14]. In the event that these conditions of control were satisfied, the U.S. employer would be expected to ensure that Title VII was enforced for its U.S. employees at the foreign subsidiary, with the following exception.

According to the statute, the U.S. employer would *not* be required to afford its U.S. employees Title VII rights if such protection in the foreign workplace could be shown to “violate the law of the foreign country in which work place is

located" [1]. In essence, if the host country's laws prohibit the hiring, promotion, or assignment of certain individuals because of their protected class status (i.e., race, religion, sex, national origin) in the foreign work site, then Title VII will *not* apply. Not surprisingly, the host country's laws will prevail in its jurisdiction.

WHAT IS "LAW?"

The problem this exemption presents is what did Congress mean by the phrase "law of the foreign country?" Did Congress mean law in the traditional American legal sense? If "law" is narrowly defined, then it exists in statutory and constitutional enactments and in court rulings. Under our American concept of law, it may only be limited to the United States Constitution, legislative acts, and court decisions. Invariably, our concept of law involves some body of rules of action or conduct (usually formal and written) prescribed by a controlling authority and having binding legal force [15]. Under our basic concept of laws, they are, in one form or another, promulgated by the government (the state). It is the authors' belief that Congress had this narrow form of "law" in mind when the Civil Rights Act of 1991 was enacted.

Herein lies a potential problem. Congress presumed that all of the other nations in the world operate under a legal system not too dissimilar from our own. What happens, however, if a host country's legal system operates more under custom and usage rather than government or constitutional enactments? Surprisingly, there are some nations that operate, and very effectively, without a constitution at all. Would Title VII apply in such foreign jurisdictions because there is an absence of "law," in the American sense?

This problem stems from U.S. legislators' implicit assumption that all societies regulate social behavior using the same instrument; that is, statutory and case law. Such an assumption is naive, at best. In countries with a more homogeneous population, religion, custom, and tradition may play the primary role in regulating social behavior. In such a case, norms rather than law actually govern the society. These norms differ from law in that they are usually unwritten and there is no formal institution responsible for their formulation or implementation. Yet, the norms have the power of law in that they must be obeyed and followed by citizens. People or entities violating them may be sanctioned in various ways.

It is hardly surprising that relationships with host country nationals would deteriorate if the norms of its society are contrary to the spirit and intent of Title VII. An employer's compliance with the host country's norms may deprive it of the protection of the section 109 exemptions, as these norms may not qualify as law. Thus, the firm may find itself liable for Title VII violations, and may not be able to use its foreign compulsion defense [16]. Consequently, a U.S. employer who complied with Title VII would violate the custom and usage of the host nation. The price of compliance would be destructive business relationships in the host country.

ILLUSTRATIVE EXAMPLE

One part of the world where the above scenario could easily occur is the Arab Gulf States (Bahrain, Kuwait, Oman, Ostar, Saudi Arabia, and the United Arab Emirates). These countries predominantly depend on custom and religion rather than statutory law to regulate social behavior. From a western standpoint, the legal systems in all six countries are in the infancy stage. Furthermore, the area with its oil wealth is of great economic significance to U.S. firms, with more than 150 U.S. firms operating in these countries [17].

The legal system currently operating in the Arab Gulf States hardly resembles the aforementioned American model. Most notably, Saudi Arabia and Oman have operated successfully without a constitution since 1913 and 1744, respectively, and continue to do so today. Furthermore, the doctrine that all citizens have equal rights and responsibilities, a concept at the core of our constitution, is nonexistent in the Arab Gulf States. Sex, religion, and ancestry are considered to be important factors when assessing one's rights and responsibilities.

Because Islam originated in this part of the world and almost all of the citizens are Muslims, religion has a significant influence on the legal system. The inhabitants of these states believe that the law giver is God, and that all necessary laws have been revealed through religion. That is, there is no separation between the state and religion in Islam, resulting in a system based upon ecclesiastical law. Law, in the American sense, has been kept to a minimum, and is mostly confined to procedural matters.

The name given by Muslims to Islamic law is "*Shari'ah*," originating from the holy book of Islam and the documented statements and acts of the Prophet Mohamed. The process of bridging the gap from religious principles to contemporary application is entrusted to religious scholars, who may use analogy or logical deduction to make a decision consistent with the principles of *Shari'ah*. Over time, the work of the scholars has evolved into several schools of thought, each having a preferred way of resolving a problem. Each school of thought has a set of classical books compiled by its prominent scholars, thus establishing something akin to our western legal concept of *stare decisis*—adherence to precedence.

A state may prefer one specific school of thought over all others. Thus, a judge presiding over a legal problem is required to search the religious works for a solution. If the judge is unable to find an answer in these sources, he may resort to the literature of a specific school, or, use his own judgment. Since the judges draw heavily on religion in their work, they are trained in religious rather than in legal institutions.

Another substitute for law that has an impact on the judges' decisions are the predominantly conservative, rigid traditions and customs of the people. These cultural dimensions reflect the values of the society that have evolved from the history of the region. Gender roles are clearly defined and enforced. A woman's

role is limited to the household. As a result, women's rights such as voting, holding public office, or serving in the armed forces are restricted. Saudi women, by custom, are even denied the privilege of driving.

It is clear from the above that the legal system and laws that govern the Arab Gulf States are of a different nature and form than those found in the western world. It is further unwise to assume that all countries have specific, identifiable, and written laws. The extraterritorial application of Title VII has the potential, in many cases, of creating problems and conflicts of the very nature it was designed to eliminate.

POTENTIAL FOR CONFLICTS

In framing its *ARAMCO* decision, the Supreme Court set out several factors that should be present to extend the jurisdiction of Title VII beyond the territorial limits of the United States. These factors included expressing specific language to that intent in the statute, the necessity of distinguishing between an American and a foreign employer, the need to specify a way to resolve conflicts with foreign laws, and the need to create extraterritorial enforcement mechanisms for the law [18]. In effect, the Court had provided sound guidelines for Congress in the event it intended to extend the protection of Title VII extraterritorially.

The resultant amendment, however, failed to adequately provide for all four of the contingencies. Section 109 *does* contain specific language of its intention to extend the statute extraterritorially. However, the distinction between "employer" and "American employer" is certainly open to broad interpretation and raises difficult issues of who has the legal obligation to apply the statute extraterritorially. Invariably, this means future resolution through the judicial process, translating into litigation for some employers.

Enforcement is a particularly touchy issue. Although the EEOC has been given broad powers to facilitate the filing of a discrimination charge overseas and, presumably, may still use its authority to issue subpoenas while investigating claims, the lack of an appropriate venue places severe restrictions on the enforcement mechanisms of Title VII [19]. Conducting an on-site investigation, especially in obtaining information to support a discrimination claim, will be greatly complicated in a foreign location. Imagine that an EEOC field investigator must be prepared to fly to Saudi Arabia, or any other foreign location, to investigate an EEO complaint. It is assumed that this would be at government expense. Will the government provide an interpreter if employees/witnesses who are foreign nationals have to be questioned? If a foreign national refuses to cooperate, who is culpable? Obviously, the foreign national is not. He or she is *not* covered under Title VII and is only under the jurisdiction of the law of the host-country. The employer? Would the EEOC require the U.S. employer on foreign soil (under penalty of obstructing EEO laws) to compel its foreign employees to cooperate with the investigation? If so, how would the employees or their government react

toward the employer? These questions have not yet been broached. They may, however, be rhetorical.

In reality, it is unlikely that the EEOC possesses the resources to either investigate or enforce Title VII overseas. The EEOC continues to struggle with an increasing burden of discrimination charges [20]. This pressure on the EEOC's already limited resources will prohibit the agency from effectively pursuing discrimination claims filed under section 109.

CONCLUSION

The principles governing employer obligations and employee rights under Title VII are well-established. Nevertheless, the application of Title VII extra-territorially will prove problematic for both the EEOC and employers. Section 109 was ill-conceived and, consequently, may very well create more difficulties than it was intended to resolve. Too many questions were never considered when it was enacted: What constitutes a "law of the foreign country?" How will overseas investigations be conducted? How will jurisdictional disputes be resolved?

The authors see only two possible solutions to these ambiguities. One solution involves the long term and constitutes a somewhat fragmented resolution through litigation. This would be a particularly tedious and expensive process that would probably evolve on a case-by-case basis. If section 109 remains intact, this is a realistic expectation.

The other form of resolution would entail the repeal of section 109. This would be the most practical means of alleviating the section's inherent deficiencies. However, it could be politically hazardous to those legislators who supported its repeal. Though the authors strongly recommend this latter course of action, they are inclined to predict that the former is far more apt to occur.

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