The International Dimension of Title VII

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The emergence of a global economy has propelled employers to focus on the internationalization of their business. American business leaders have expressed concern that Americans have unduly concentrated on the domestic market, and lack the experience of other countries and cultures necessary for successful market penetration. To combat this perceived deficiency, companies are exhorted to provide assignments that will expose those with high managerial potential to the challenges and opportunities of non-American markets.

The emergence of this global economy in the wake of the oil crises of the 1970s coincided with another significant change for American companies. Although obliged since the 1960s to offer an equal opportunity workplace, employers did not experience a noticeable change in the composition of their managerial ranks until the late 1980s. Changing population demographics and the appearance of a sizable cadre of well-educated women in the labor force compelled companies to consider the challenge of managing diversity in the workplace. The realization that the proportion of white male managers will inevitably decline has led companies to consider how women and minorities can be utilized to their full potential in managerial ranks.

These two developments converge when female and minority managers seek the experience of an international assignment. Although the number of females and minorities sent on overseas assignments has been extremely low, it should rise as the number of female and minority managers increases. Yet, if the 1990 Fifth Circuit decision Bourelslan v.

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Aramco\(^1\) is followed in other circuits,\(^2\) these managers may discover that the protection of Title VII of the Civil Rights Act\(^3\) does not apply to Americans working overseas for American companies.

This Article will argue that the Boureslan decision is incorrect in light of legislative history and proper statutory construction. It will analyze the approach of courts in prior cases and the position of the Equal Employment Opportunity Commission (EEOC or the "Commission") to emphasize the Fifth Circuit's idiosyncratic stance. Moreover, it will argue that in an unnecessarily broad-brush approach to insulating American employers from charges of discrimination, the Fifth Circuit decision ignores the rights granted American employees by Title VII. Finally, this Article will propose an approach based on conventional disparate treatment analysis, for balancing the rights accorded American employees with the demands made on American employers operating abroad.

I. Extraterritorial Application of Title VII

Boureslan v. Aramco is the first case in which a federal court has ruled that Congress intended Title VII to have no extraterritorial application. There have been other cases with an international dimension. In some, the court considered the issue of extraterritoriality along with other issues. In Boureslan, the geographical location of the discrimination was the sole basis for the court's decision.

A. The Boureslan Decision

Plaintiff Ali Boureslan, a naturalized United States citizen born in Lebanon, began working for the Aramco Services Company (ASC) in 1979 as an engineer at ASC's Houston, Texas site. ASC, a Delaware corporation with its principal place of business in Houston, is a subsidiary of Aramco (the "Arabian American Oil Company"). Aramco is a U.S. corporation with its principal place of business in Saudi Arabia. Aramco explores, produces, and refines oil and gas exclusively within the Kingdom of Saudi Arabia.

In November 1980, Boureslan requested a transfer from ASC to Aramco, a transfer that entailed a geographical relocation to Saudi Arabia. Boureslan alleged that for most of his tenure in Saudi Arabia, his supervisor subjected him to racial, religious, and ethnic slurs that

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1. 892 F.2d 1271 (5th Cir. 1990) (en banc), petition for cert. filed, 58 U.S.L.W. 3771 (U.S. May 23, 1990) (No. 89-1838) (filed by the EEOC). The Fifth Circuit en banc decision affirmed the earlier panel decision, 857 F.2d 1014 (5th Cir. 1988), which had affirmed the district court decision, 653 F.Supp. 629 (S.D.Tex. 1987).

2. The Equal Employment Opportunity Commission has taken the position that Title VII applies extraterritorially. It has directed all regional offices, except those in the Fifth Circuit, to adhere to that position. See Cherian, National Origin Discrimination Affecting Civilian Employees Overseas, 41 LAB. L.J. 987, 989 (1990). Mr. Cherian is one of the five Commissioners of the EEOC.

culminated in his involuntary termination in June 1984. Following his discharge, Boureslan filed charges against Aramco with the EEOC, and subsequently filed suit under Title VII against both Aramco and ASC. Aramco and ASC filed motions to dismiss the suit for lack of subject matter jurisdiction. ASC’s motion focused on the severing of the employment relationship between ASC and Boureslan when Boureslan was transferred to Aramco. Aramco’s motion to dismiss raised a more fundamental issue: Aramco argued that Title VII does not apply extraterritorially and, as a result, the statute offered no protection to Boureslan for discriminatory acts which occurred in Saudi Arabia. The Federal District Court for the Southern District of Texas agreed and dismissed the case for lack of subject matter jurisdiction. The Fifth Circuit affirmed by a panel, and subsequently en banc.

1. Extraterritoriality Question

Because the alleged discrimination occurred entirely within the geographical boundaries of Saudi Arabia, the defendant employers asserted that Title VII did not apply. Their argument was based on the established principle that even though Congress has the power to enact legislation which covers American citizens outside the U.S., acts of Congress are presumed not to apply extraterritorially. To rebut this presumption, the plaintiff must show that Congress intended for a statute to apply extraterritorially.

Title VII prohibits employers from discriminating against persons, regardless of their citizenship. Section 702 of Title VII (the “alien exemption”) states that Title VII does not apply to an employer “with respect to employment of aliens outside of any state.” The statute is silent as to whether Title VII applies to an employer with respect to the employment of citizens outside the U.S. Boureslan argued that Congress would not have inserted the alien exemption provision, without any mention of or similar provision for American citizens, if Congress also intended to exclude citizens working abroad from the coverage of Title VII. Boureslan argued that it was unreasonable to conclude that

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5. 857 F.2d 1014 (5th Cir. 1988).
6. Boureslan, 892 F.2d at 1271.
8. The statute uses words such as “person” or “individual,” not “citizen.” The Supreme Court has held that aliens residing within the U.S. come within the statute’s coverage. See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).
9. Civil Rights Act of 1964, § 702, 42 U.S.C. § 2000(e) (1988). Section 702 applies to private sector and non-federal public sector employers. Section 717 (which parallels section 702) applies to federal employers. Section 717 states that all personnel actions affecting employees or applicants for employment in federal civilian employment, except aliens employed outside the limits of the U.S., shall be made free from any discrimination based on race, color, religion, sex, or national origin. Research did not reveal any recorded case where a non-federal public sector employer was sued under Title VII in a case involving employment abroad.
Congress meant to exclude American citizens working abroad from Title VII coverage. If Congress had possessed such an intent, it surely would not have included any mention of aliens working abroad for it would have been unnecessary to do so. The Fifth Circuit concluded that this single negative inference fell short of the required clear expression of congressional intent necessary to apply Title VII extraterritorially.

The Fifth Circuit, sitting en banc, focused exclusively on the statute itself to determine whether Congress intended Title VII to have extraterritorial application. The majority opinion makes no reference to legislative history or the EEOC’s position. The court commented on the statute’s emphasis on domestic discrimination. The court observed that the statute was silent on a number of issues, such as venue, that it might have been expected to cover if Congress did intend it to have extraterritorial application. It contrasted this with statutes where Congress expressly gave the statute extraterritorial reach.  

In concluding that the statute did not have extraterritorial application, the Fifth Circuit anticipated insurmountable obstacles that might arise if it held otherwise. “If we give extraterritorial reach to Title VII, the plain language of the Act would necessarily extend that title to govern the employment relationship between foreign employers, and their American employees anywhere in the world.” The court interpreted Title VII in this way based on its readings of cases, which held that foreign employers engaged in commerce in the U.S. are employers under Title VII.

2. The Dissent

The four dissenting judges found that a negative inference drawn from the alien exemption provision was a sufficiently clear expression of congressional intent regarding the extraterritorial reach of Title VII. The dissent reasoned that a provision exempting aliens working abroad from the coverage of Title VII would not have been needed if Title VII did not apply extraterritorially. The dissent further noted that if Con-

10. The case was decided 9-5. Judge W. Eugene Davis wrote the majority opinion. Judge Davis also wrote the majority opinion in the Boureslan panel decision. 857 F.2d 1014 (5th Cir. 1988).
12. Boureslan, 892 F.2d at 1274.
13. The court cited a case involving a Japanese company as an example, but provided no explanation of how the problem would arise. Suppose that an American citizen working in the United States for the U.S. subsidiary of a Japanese company is sent to Japan to work. The person may still be employed by the U.S. subsidiary, or he or she might be transferred to the payroll of the parent company, which is incorporated in Japan. In the latter case, it is impossible to determine why the Fifth Circuit thought Title VII would apply to an American citizen working in Japan for a Japanese company. In the former case, the American citizen would be working for an American company, albeit the subsidiary of a Japanese company, in Japan. Nonetheless, the employer would still be American for Title VII purposes.
14. Boureslan, 892 F.2d at 1280. One dissenting judge, King, also wrote the panel dissenting opinion. Boureslan, 857 F.2d at 1021 (en banc).
gress merely wanted to emphasize that the statute covered aliens residing in the U.S., it would have inserted a statement to that effect in a more logical place, e.g., the section defining “employee.” The dissent responded to the majority's other points. The dissent pointed out that venue presented no problem. The statute provides for venue in the district where relevant employment records are administered, or in the district where the aggrieved employee would have worked but for the unlawful employment practice. The dissent commented that venue in one of these two districts would usually be available in the not uncommon situation “involving the temporary foreign assignment of an employee advancing on the corporate track of an American multinational corporation.” Moreover, if venue is not found within any of the first three districts specified in the statute, venue is proper in the district in which the respondent employer has its principal place of business. As the employer would always be American, venue in a judicial district in the U.S. would nearly always be available.

The dissent also countered the majority’s treatment of the clear congressional intent of extraterritorial application found in other statutes. The dissent noted that Congress acted to amend the Age Discrimination in Employment Act (ADEA) only after courts had consistently held that the ADEA did not apply extraterritorially. The dissent pointed out that while Congress saw the need to amend the ADEA after these judicial decisions, there was no corresponding need to amend Title VII because up to that point every court that had been faced with the issue of the extraterritorial application of Title VII had found that it existed. More telling of congressional intent was the fact that in the 1983 hearings on the bill to amend the ADEA, the EEOC testified that Title VII applied abroad. Finally, the dissent pointed out the irony of the majority’s interpretation of congressional inaction as an indication of

15. *Boureslan*, 892 F.2d at 1280.

16. The dissent was referring to instances where the employer is a company incorporated in the U.S. A U.S. citizen working abroad may sue his or her employer even if the employer is a foreign subsidiary of an American company. In such cases, however, the parent company is joined as a defendant, and it is alleged that the American company controls the foreign subsidiary. Thus, the defendant is American.


its intent not to give Title VII extraterritorial application when Congress had been specifically informed that Title VII did apply abroad.\(^\text{20}\)

**B. Legislative Intent**

The intent of Congress regarding the extraterritorial applicability of Title VII is far from clear. At most, a negative inference can be drawn from the existence of the alien exemption provision, and from its placement in a separate section rather than in the definitional section.

The first version of the bill, as well as subsequent versions, did include several exemptions designed to exclude Title VII from applying to foreign employers. The enacted statute, however, contains no such exclusion. The EEOC has, as a result, inferred from the rejection of such an exclusion that Congress implicitly decided that foreign employers should be covered by Title VII.\(^\text{21}\)

Scholars dispute what congressional intent can be inferred from the existence of the alien exemption provision. Some argue that gleaning a negative inference from this provision is incorrect. They argue that it is much more likely that Congress enacted this provision to make it clear that while aliens working in the U.S. were protected, aliens working outside the U.S. were not.\(^\text{22}\) Those opposed to this interpretation note that it is well-settled that U.S. law applies to aliens inside the U.S. It is therefore highly unlikely that Congress would have included an unnecessary clause in the Act.\(^\text{23}\) Accordingly, the provision should be interpreted as providing U.S. citizens working abroad with Title VII protection.

**C. The Position of the EEOC and the 1988 Guidelines**

The EEOC has consistently taken the position that Title VII applies extraterritorially to U.S. citizens working abroad for American employers.\(^\text{24}\) The EEOC has reaffirmed its adherence to this position subse-

\(^{20}\) The dissent cited a letter on this specific point from William A. Carey, EEOC General Counsel, to Senator Frank Church, dated March 14, 1975, reprinted in Note, Civil Rights, Employment and the Multinational Corporations, 10 Cornell Int'l L.J. 87, 102-03 (1976). The dissent also noted that during the 1975 legislative debates over a proposed prohibition on participation in foreign boycotts requiring religion-based employment discrimination, the Department of Justice took the position that Title VII applies extraterritorially. Antonin Scalia, then the Assistant Attorney General, stated the Department's position in testimony before Congress. Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. 88 (1975), quoted in Note, Equal Employment Opportunity for Americans Abroad, 62 N.Y.U. L. Rev. 1288, 1291 (1987).

\(^{21}\) EEOC Compl. Man. (CCH) ¶ 2164 (1988).


\(^{23}\) Judge King expressed this view in her dissent. Boureslan, 892 F.2d at 1275.

\(^{24}\) It has formally taken this position by presenting amicus curiae briefs in appropriate cases, e.g., to the Fifth Circuit in Boureslan, and by announcing its position in a set of 1988 policy guidelines. EEOC Compl. Man., supra note 21.
quent to the \textit{Boureslan} decision.\footnote{25}{See EEOC Decision No. 90-1, 52 Fair Empl. Prac. Cas. (BNA) 1893 (Apr. 10, 1990).}

The EEOC 1988 guidelines discuss the coverage of Title VII when the employer is American, when the employer is a foreign subsidiary controlled by an American employer, and when the employer is foreign with no American control.

1. American Employer

The EEOC guidelines state that an American employer is subject to Title VII for discrimination against U.S. citizens overseas when the corporation is (1) incorporated in the U.S. and (2) is doing some further business in the U.S.\footnote{26}{EEOC Compl. Man., supra note 21, at ¶ 2164.}

2. Foreign Subsidiary of American Company

The 1988 guidelines provide that a foreign company which is owned or controlled by an American employer and is doing business overseas must also abide by Title VII with regard to U.S. citizens.\footnote{27}{Id.} A failure to do so may result in liability for both the controlling U.S. company and its foreign subsidiary. The EEOC, however, will only exercise its jurisdiction if it finds an “integrated enterprise” or a “joint employer” relationship between the foreign subsidiary and its American parent. In making this determination, the EEOC will scrutinize the degree of interrelationship between the two companies, using the NLRB standards employed in \textit{Mas Marques v. Digital Equipment Corp.}\footnote{28}{637 F.2d 24 (1st Cir. 1980).}

In \textit{Mas Marques}, the plaintiff was a U.S. citizen living in Germany, who applied for an accounting or clerical position with the German subsidiary of an American corporation. When the company rejected his application, Mas Marques filed suit in Massachusetts Federal District Court, alleging national origin discrimination. He claimed that the company had violated Title VII by preferring German nationals for those positions. The First Circuit affirmed the district court’s dismissal of the case, holding that the foreign subsidiary lacked sufficient contacts with the parent corporation on which to base jurisdiction.

To determine whether it had jurisdiction, the district court applied the NLRB test, which considers the degree of (1) interrelationship of operations between the parent and its subsidiary, (2) common management, (3) common control of labor relations, and (4) common ownership or financial control.

Both the district and circuit courts appear to have assumed that Title VII applied extraterritorially, and focused their attention on the degree of contact between the parent corporation and the subsidiary.
3. Foreign Employer Lacking American Control

The EEOC contemplates a scenario that has yet to be litigated. In its 1988 policy guidelines it provides that a foreign employer will be subject to Title VII for discrimination occurring against a U.S. citizen overseas only when (a) the business is incorporated in the U.S., (b) the company is doing further business in the U.S., and (c) the allegedly discriminatory act has a connection with the business being done in the U.S.\(^{29}\)

D. Prior Case Law

Few cases have dealt with the issue of the extraterritorial application of Title VII. In *Love v. Pullman Co.*, the district court held that Title VII did apply to discriminatory acts alleged to have occurred in Canada.\(^{30}\)

The district court in *Bryant v. International School Services, Inc.*\(^{31}\) followed *Love*. In *Bryant*, the plaintiffs were two American women employed as teachers by the defendant, an American company, which operated an American school in Iran. The plaintiffs alleged that the defendant had discriminated against them by providing fewer relocation benefits in their employment contracts than in the contracts of their male counterparts.\(^{32}\) The defendant contended that Title VII did not apply extraterritorially, and that even if it did, the defendant had acted in accordance with Title VII.\(^{33}\) Drawing a negative inference from the alien exemption provision of Title VII, the district court held that Title VII did not apply extraterritorially, and that even if it did, the defendant had acted in accordance with Title VII.\(^{33}\)

\(^{29}\) EEOC Compl. Man., supra note 21, at § 2164.

\(^{30}\) 13 Fair Empl. Prac. Cas. (BNA) 425 (D. Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978). The plaintiffs were black porters on Pullman cars. The court held that Title VII only applied to acts occurring in Canada to those porters who were U.S. citizens. Porters of Canadian citizenship were not protected, but they could sue for discriminatory acts that occurred in the U.S.


\(^{32}\) Among the benefits were a relocation allowance; housing allowance for accommodation in the American community in Isfahan, Iran; annual roundtrip airfare to the U.S. for the employee and his or her dependents; additional roundtrip airfare allowance for college age dependents; and shipping allowances for belongings.

\(^{33}\) The defendant stated that it determined which contract to offer an employee based on its determination of whether he or she came to Iran and remained there primarily for teaching or for some other purpose. The critical factor was whether the teacher's spouse was employed by one of the large American companies in Isfahan. If the spouse was employed by one of these companies, the spouse would have received a comparable relocation package that covered the relocation expenses of the teacher. The defendant maintained that its benefits policy was applied equally to both male and female applicants for teaching positions.

The fact situation in *Bryant* is typical and is commonly referred to as “the trailing spouse” syndrome. Because of the undesirable location of the site and the highly technical nature of the work, the employees sent from the U.S. are usually male. They are accompanied by their wives who usually find it impossible to find employment locally, except at American schools and hospitals. Sometimes, spouses may also find clerical work at other American companies. In *Bryant*, the two main American employers were Bell Helicopter and Grumman Aerospace. Most of their American employees were male. As a result, most of the spouses working for ISS were female.
VII did apply extraterritorially.\textsuperscript{34} Similar issues were raised in \textit{Seville v. Martin Marietta Corp.}\textsuperscript{35} The plaintiffs, American citizens living in Germany, were employed by the defendant in clerical positions. Martin Marietta paid certain benefits\textsuperscript{36} to its technical employees, but not to its clerical employees. Until 1981, all clerical employees were female.\textsuperscript{37} Martin Marietta argued that Title VII was not intended to apply extraterritorially. Noting that it is presumed that Congress intends legislation to apply only domestically, the district court cited decisions that had construed Title VII, section 702, as extending the coverage of Title VII to U.S. citizens working outside the U.S.\textsuperscript{38} The court stated, "[t]hese decisions are soundly reasoned and this Court adopts their logic."\textsuperscript{39} Having disposed of the jurisdictional issue, the court considered the claim of sex discrimination.\textsuperscript{40}

II. The BFOQ Defense

In \textit{Boureslan}, the Fifth Circuit addressed the issue of the extraterritorial applicability of Title VII. However, in some Title VII litigation involving work abroad, courts have focused instead on the issue of whether the defendant employer could establish a bona fide occupational qualification (BFOQ) defense to a claim of intentional discrimination.

A. The Two-Prong Test

Section 703(a) of the Civil Rights Act makes it an unlawful employment practice for an employer to discriminate against an individual because of that individual's race, color, religion, sex or national origin.\textsuperscript{41} The broad scope of Title VII's coverage is qualified by section 703(e), the BFOQ exception. Section 703(e) states that it shall not be an unlawful

\textsuperscript{34} On appeal, the Third Circuit reversed because the plaintiffs had failed to make a prima facie case of sex discrimination. It noted that the case raised significant questions regarding the extraterritorial applicability of Title VII, but found no need to address those questions. \textit{Bryant}, 675 F.2d at 565, 571.
\textsuperscript{36} Most of these benefits were those typically found in an expatriate compensation package: relocation and housing allowances, annual home leave, educational allowance for employee dependents, and reimbursement of moving and travel expenses. In addition, the technical employees received a foreign service premium of 15% of base wage and a \textit{per diem} allowance for the cost of living overseas. The court's decision does not make clear whether this benefit package was applied to locally hired technicians. \textit{See id.}
\textsuperscript{37} Martin Marietta hired all clerical employees locally from the labor pool of U.S. citizens in the local labor market. Until 1981, all clerical employees were female. Technicians were hired both in the U.S. and locally, with most being male. \textit{See id.}
\textsuperscript{38} The court cited \textit{Bryant} and \textit{Love v. Pullman}.
\textsuperscript{39} \textit{Seville}, 638 F. Supp. at 592.
\textsuperscript{40} The court believed that the plaintiffs had not made out a prima facie case because it found the plaintiffs' categorization of the company's workforce unpersuasive. The court held that even if the plaintiffs had made out a prima facie case, the defendants had articulated a non-discriminatory reason for granting different benefits to different job classes.
employment practice for an employer to hire an employee on the basis of his religion, sex, or national origin "in those certain circumstances" where religion, sex, or national origin is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Congress did not add the BFOQ provision to Title VII until sex was designated a prohibited classification under Title VII. Since this occurred at the very end of the House debates on Title VII, there was little opportunity for Congress to debate the meaning of the BFOQ exception. From the very beginning, the EEOC took the position that courts should interpret the BFOQ exception narrowly.

The Supreme Court has never considered the issue of the BFOQ exception. One case that courts have often cited with approval is Diaz v. Pan American World Airways, Inc. In Diaz, the male plaintiff had applied for the job of flight attendant at a time when Pan American still classified the job as female-only. The airline defended its female-only requirement by citing customer preference for female flight attendants. The airline also argued that passengers found female flight attendants more reassuring. The district court held that Pan American had established the BFOQ defense. The Fifth Circuit reversed. The Fifth Circuit's decision has given rise to a two-prong inquiry: first, does the particular job under consideration require that the employee not be of a certain sex, religion or national origin; and second, is that requirement reasonably necessary to the essence of the employer's business. Few defendants asserting a BFOQ defense have successfully met the two prongs of the Diaz test.

One case in which the defendant employer did successfully assert the BFOQ defense is Kern v. Dynalectron Corp. In Kern, the defendant was under a subcontract with Kawasaki Heavy Industries, Ltd., a subsidiary of a Japanese company, to provide pilots to work in Saudi Arabia. The plaintiff entered into a contract of employment with the defendant to perform duties as a helicopter pilot in Saudi Arabia. The plaintiff was aware that pilots stationed at the Jeddah base were required to fly into the holy area of Mecca, and that Saudi Arabian law prohibited the entry of non-Moslems into the holy area under penalty of death. These pilots were required to either be or become Moslems. Kern, a Baptist, undertook instruction in the Moslem religion and signed the required

42. Id. at § 703(e).
43. Consideration of the BFOQ exception was limited to the last day of the House debate on the bill. See Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Tex. L. Rev. 1025, 1027 (1977).
44. 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).
46. Defendants have been successful where customer preference was based upon a desire for sexual privacy in situations involving disrobing, sleeping, or performing bodily functions in the presence of the opposite sex. See, e.g., Fesel v. Masonic Home of Del., Inc., 428 F. Supp. 573 (D.Del. 1977).
conversion certificate. Subsequently, he rescinded his conversion, returned to Texas at his own expense, and sued his employer alleging religious discrimination. The defendant did not raise the issue of the extraterritorial application of Title VII. Rather, the defendant admitted refusing non-Moslems assignment to pilot positions in Mecca, but argued that being Moslem was a bona fide occupational qualification for the position. The district court agreed. The court stressed that it was "in no way allowing a foreign nation . . . to compel the non-enforcement of Title VII in this country."49

Most of the cases where a BFOQ issue has arisen in an international context are factually distinguishable from Kern and Boureslan. In both cases, the plaintiff was given the overseas assignment. Moreover, the assignment required full-time presence in the foreign country. In other cases, however, the plaintiff never reached the stage of leaving the U.S. because the employer denied the person the assignment on the belief that he would encounter discriminatory treatment abroad.

B. Denial of Short-Term Overseas Assignment

In Abrams v. Baylor Medical College,50 the defendant contracted to provide special cardiovascular surgical teams to the King Faisal Hospital in Riyadh, Saudi Arabia. As part of its contract, Baylor sent surgical teams on three-month rotations to the hospital owned by the Kingdom of Saudi Arabia. Baylor Medical College cardiovascular surgeons, anesthesiologists, and operating room support personnel were eligible to apply to be sent to the King Faisal Hospital for a three-month period. These assignments were attractive because physicians were compensated at twice their normal rate and had all their expenses paid, and because physicians gained experience with heart conditions rarely encountered in a U.S. practice. When the plaintiffs expressed interest in going to Saudi Arabia, both were informed that Jewish staff were ineligible because there would be difficulty in obtaining entry visas. The plaintiffs alleged that Baylor Medical College had intentionally discriminated against them because of their religion. After observing that there was at least a theoretical possibility that Baylor could assert a BFOQ defense, the Fifth Circuit considered whether such a defense was valid under the circumstances. To substantiate the BFOQ defense, Baylor would have to prove that being non-Jewish was a requirement of the job. To do this, Baylor would have to show that the Saudi Arabian Government either refused to issue visas or made it extremely difficult for Jews to obtain visas. Since Baylor had never directly raised the BFOQ defense,51 and

49. Id. at 1202.
50. 805 F.2d 528 (5th Cir. 1986), aff'd in part and rev'd in part, 581 F. Supp. 1570 (S.D.Tex. 1984). The circuit court's reversal was confined entirely to the issue of the award of attorney's fees.
51. Although Baylor did not specifically argue the BFOQ defense, it did enter evidence relevant to the BFOQ two-prong inquiry. Some of the evidence was damaging to the defendant's position; for example, one Baylor witness, Dr. Michael DeBakey, testified that he had on occasions sent Jewish physicians to Saudi Arabia to
since the evidence indicated that such a defense would not have been proven if it had, the court upheld the finding that Baylor had engaged in intentional religious discrimination. Throughout the litigation, the question whether Title VII applied extraterritorially was never raised.

C. Denial of Job Requiring Travel Abroad

In *Fernandez v. Wynn Oil Co.* 52 Delia Fernandez applied for a promotion to the vacant position of director of international operations at Wynn Oil Company, in Orange County, California. Most of Wynn Oil’s extensive operations were outside the U.S., mainly in Latin America. As a result, the director of international operations had extensive dealings with Latin American clients and was required to travel on business to Latin America. When the company denied her the position, Fernandez transferred to another division. The company discharged her within a year. Fernandez filed suit under Title VII.

The district court dismissed the suit on two grounds. First, the court held that because she had not demonstrated that she was qualified for the job, Fernandez had failed to make a *prima facie* case of intentional sex discrimination under the *McDonnell Douglas v. Green* 53 standard. The court further held that even if Fernandez had made a *prima facie* case, her claim still would have failed because the employer had articulated a legitimate, nondiscriminatory reason for the discharge, namely that it had appointed a better qualified man to the position. 54 The Ninth Circuit affirmed the dismissal on the first ground.

The district court also dismissed the case because it found that the employer had established a BFOQ defense to the claim of intentional sex discrimination. On this point, the Ninth Circuit reversed, stating that the district court had erred in its factual findings and its legal conclusions. At trial, several of the employer’s witnesses testified that they would never have even considered appointing a woman to the position of director of international operations. One witness stated that Latin American customers would find it undesirable to deal with a woman in a high level management position. Another witness testified that Latin American customers would be offended by a woman conducting business meetings in her hotel room. However, after scrutinizing the district court’s factual findings, the circuit court ruled that there was no proof that Latin American clients would refuse to deal with a woman.

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54. Fernandez, who lacked a college degree, had worked for Wynn Oil for four years as an administrative assistant to the Vice President of International Operations. She had no experience in management or sales. The person appointed to the job had an engineering and MBA degree, and had extensive experience in both domestic and international sales and management.
The circuit court also emphasized that it found the district court's understanding of the BFOQ defense to be flawed. The district court had concluded that customer preference rises to the level of a bona fide occupational qualification if "no customer will do business with a member of one sex because either it would destroy the essence of the business or it would create serious safety and efficacy problems." In response, the Ninth Circuit bluntly stated, "[t]hat conclusion cannot stand." Citing Diaz, the circuit court declared that neither stereotypic impressions of male and female roles, nor stereotyped customer preferences, justify a sexually discriminatory practice.

The defendant had attempted to distinguish Diaz by arguing that a different rule was applicable to employment in an international context. The Ninth Circuit termed this distinction "unfounded" and declared, "[T]hough the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here." The circuit court further supported its conclusion that the BFOQ defense was not applicable in this case through analysis of the EEOC's regulations. The circuit court pointed out the EEOC's position that the only customer preference allowed as a BFOQ exception is one necessary for the purpose of genuineness or authenticity, such as that required for roles in the performing arts.

III. The International Dimension of Title VII

Title VII should apply to suits brought by U.S. residents travelling abroad whether the discriminatory act occurs within or without the U.S. The pattern of interaction between an American company seeking to abide by an equal employment opportunity policy and foreign customers and/or a foreign workforce not accustomed to such policies will vary greatly by country, even by regions within countries. Terminating the coverage of Title VII at the boundaries of the U.S. is an unnecessarily Draconian response to the problem. Doing so would deny American employees the protection of the statute even when the foreign country in question has similar policies to our own.

In making employers liable for discriminatory conduct suffered by employees, Congress identified the employer as the entity responsible for either causing or permitting the discriminatory act to occur. When

55. Fernandez, 653 F.2d at 1276.
56. Id.
57. Id. at 1276-77.
58. Id. at 1277.
59. 29 C.F.R. § 1604.2(a)(2) (1972).
60. For instance, the result in Bourestan would mean that an American female employee sent to her company's wholly-owned subsidiary in Toronto would not be able to complain even though Ontario law on sex discrimination and pay equity are as strong, if not stronger, than U.S. law.
the duties of an American employee have an international dimension, the ability of the American employer to control the behavior of others so that discriminatory acts do not occur is more limited. Yet, the question of responsibility remains.

In proposing that Title VII apply abroad, it is necessary to pinpoint Congress' interest in such broad-based enforcement. The U.S. has no right to attempt to regulate the employment standards of foreign sovereigns. Nevertheless, it does have a right to dictate the standards that American employers must follow, and it does have an interest in protecting American citizens. Under Title VII, the U.S. has sought to eradicate discriminatory practices, and to establish and maintain equal opportunity in employment for the American labor force. This interest is most pressing when American citizens working abroad are, for all practical purposes, part of an American rather than foreign labor force.

To explore the notion that an American working overseas can be deemed part of the American labor force, the nexus between the employer and the employee must be scrutinized. Cases that have called into question the international dimension of Title VII have involved three categories of plaintiffs: (1) employees based in the U.S. who travel abroad; (2) expatriates on overseas assignments; and (3) non-resident U.S. citizens living and working abroad. Part A of this Section will examine the employer-employee nexus for each of these categories. Part B of this Section will argue that even when the nexus between employer and employee is attenuated, Title VII should apply to non-resident Americans where an American firm is essentially operating an American workplace overseas.

A. Examination of Employer-Employee Nexus

1. Resident U.S. Employees Travelling Abroad

Employees who are based in the U.S., who live and work in the U.S., and who travel abroad as part of their job, constitute perhaps the largest of the three categories. If an employee in this category were denied a job or an assignment because international travel was required, it would be highly surprising for a court to hold that Title VII did not apply.

If, however, Boureslan is followed and applied broadly, the following problem may arise: U.S.-based employees may complain of discriminatory acts suffered while working abroad for a U.S. company. The U.S. company may in turn argue that Title VII does not apply. Two examples will show how this could occur.

Consider, for example, Abrams v. Baylor Medical College, where the employer anticipated that Jewish doctors would encounter problems both entering Saudi Arabia and practicing there. The decision to deny the plaintiffs the overseas assignment was made in the U.S. As a result, Title VII was held to apply and the defendant was found liable because it could not carry its burden of proving the BFOQ defense. Suppose, however, the employer had sent Jewish doctors to Saudi Arabia, and
they had encountered difficulty performing their duties because of anti-Semitic behavior by patients. Suppose further that the Jewish doctors complained and Baylor did nothing for fear of upsetting the Saudi royal family. If Baylor then cut short the doctors’ assignments because of their inability to perform their duties, under the *Boureslan* rationale a Title VII lawsuit filed by the Jewish doctors would be dismissed for lack of subject matter jurisdiction.

*Boureslan*’s insulation of American employers from the requirements of Title VII appears total. Consider, for example, the *Fernandez* case. Assume that Wynn Oil Company had appointed Fernandez director of international operations. Assume further that Fernandez, although based in the U.S., was required to travel frequently to Latin America as part of her job. Suppose that she was usually accompanied by two American male associates and that on one of these trips they, along with Latin American clients, engaged in sexual harassment. Under the *Boureslan* rationale, Fernandez would have no basis for filing a complaint under Title VII against her American co-workers because the behavior occurred abroad.

These hypothetical examples illustrate that a broad reading of *Boureslan* could well lead to anomalous results. Title VII, therefore, should be applied in suits brought by U.S.-based employees, whether the discriminatory act occurs within or without the U.S. The main issue in such cases should be what the employer must prove to qualify for the BFOQ exception.

2. Expatriates on Assignments Abroad

Many American multinational corporations have manufacturing facilities and offices abroad. In most instances, these corporations staff many of the higher-level managerial positions with Americans. Typically, these Americans work in the U.S. for the corporation and then are sent abroad for a period of time to work at one of the corporation’s subsidiaries. Normally, it is anticipated that the employee will return to another job located within the U.S. at the end of the overseas assignment. Such employees are termed “expatriate” Americans. Except for assignments of brief duration, expatriates typically take up residence abroad, usually accompanied by their families. Although the expatriate func-

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61. In sending employees abroad for short-term assignments, companies may find it less expensive for the person to stay in a hotel, a company apartment, or a short-term furnished apartment. Because the cost is considerable, relocation of managers abroad usually does not occur for assignments of less than one year.

62. Expatriate employees taking up residence abroad may or may not sell their homes in the U.S. Expatriate employees who work outside the U.S. for over a year usually establish residence abroad for tax reasons.

63. Most American corporations will provide an expatriate compensation package for managers enabling the manager’s family to accompany him or her, taking into consideration both the cost of schooling for the children and the additional expense of a modified American lifestyle in the foreign country.
tions as a manager in the foreign subsidiary, he or she is usually treated as an employee of the U.S. corporation regardless of how compensation is paid.

Because both the expatriate and the U.S. corporation view the expatriate as an employee of the U.S. corporation, and because the expatriate is expected to return to the U.S. while continuing in the employ of the U.S. corporation, the nexus between the employee and the corporation is close. To exclude the expatriate totally from the protection of Title VII appears unwarranted. Once again, the main issue appears to be what the employer must prove to qualify for the BFOQ exception if an expatriate American sues for discrimination that occurred abroad.

3. **U.S. Citizens Living Abroad**

In some cases, U.S. citizens who reside abroad apply to work for an American company in a foreign country. Often, the company abroad is a subsidiary of the American company and is incorporated in the foreign country. As a result, the employer, as a legal entity, is not American. Where these persons have not worked for the same company in the U.S., and where there is no expectation that the employment abroad is a prelude to employment in the U.S., these non-resident Americans are akin to the foreign nationals who work for the same company. Companies

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64. Surveys indicate that about 90% of expatriate Americans working for private sector companies are male. Female expatriate managers are concentrated in certain industries such as international banking. Missionaries are excluded from these surveys.

65. An expatriate manager may be paid (1) by the U.S. corporation with the paycheck going directly into a U.S. bank account; (2) by the subsidiary; or (3) by both the parent and subsidiary corporations. The method of payment depends on company policy, tax considerations, and foreign country requirements. In addition, American companies may want the expatriate to work under an American contract of employment to minimize the possibility of that employee claiming employment protection rights under the laws of the country in which he or she is located. For a discussion, see Keyko & Kerr, *Problems with Terminating the Employment of an American Executive Stationed Abroad*, 9 N.C. J. Int'l L. 81 (1983). See also Forde, *Transnational Employment and Employment Protection*, 7 Indus. L.J. 228, 237 (1978) (discussing the same issue from the viewpoint of a British employer sending employees abroad).

66. This Article avoids the difficult and highly technical issue of what factors determine residence and domicile. Often, countries apply different rules for men and women, especially for married women. In many countries, a married woman who is living with her husband cannot have a different domicile than he has, even if he concurs in her choice of domicile. In some countries, a foreign woman married to a male national and resident in the country does not need a work permit whereas a foreign man married to a female national does need a work permit. Such rules can lead to employers treating men and women differently. For instance, in a complaint filed against the Boeing Company relating to employment on a military base in Turkey, two American women married to Turkish nationals complained that Boeing paid them less than it would have paid American men married to Turkish women. Boeing admitted doing this but argued that it was required to do so by a NATO treaty read in conjunction with Turkish law. See EEOC Says that Local Law Does Not Bar Bias Finding Against U.S. Company in Turkey, Daily Lab. Rep. (BNA), No. 89, at A-4 (May 8, 1990).
usually treat both groups as local hires.\textsuperscript{67}

As the Bryant and Seville cases indicate, a company operating abroad may treat U.S. citizens differently depending upon the person's job classification and upon the place of hire. Although the trailing spouse syndrome often results in local hires being overwhelmingly female,\textsuperscript{68} American companies should not be liable for differential employment policies where such policies are not sex-based.

The trailing spouse syndrome does highlight important variables operative in local hire cases: the nationality of the co-workers and their attachment to the American labor market. For instance, in \textit{Mas Marques v. Digital Equipment Corp.},\textsuperscript{69} if the plaintiff had been hired by Digital Equipment Gmbh, a subsidiary incorporated in Germany, his co-workers would have been predominately German with no intention of leaving Germany. To grant Mas Marques Title VII protection would have differentiated him from his co-workers. In contrast, in \textit{Bryant v. International School Services},\textsuperscript{70} the plaintiffs had been hired by an American company, and their co-workers were predominately American with the intention of returning to the U.S. as soon as their spouses' overseas assignments were completed. Thus, in Bryant, it was more reasonable to grant Title VII protection because the plaintiffs were Americans still strongly attached to the American labor market.

There are exceptions to the patterns described above, and Boureslan is an example. Boureslan was a non-resident U.S. citizen working in Saudi Arabia for Aramco, a company incorporated in the U.S. It appears that Boureslan was not an expatriate American. Rather, he was a person working in the U.S. who, on his own initiative, asked for a transfer (not an overseas assignment) to Saudi Arabia. There is no indication of an expectation that he would return to the U.S. at any future date and continue in Aramco's employ.\textsuperscript{71} Likewise, the courts' opinions give no information on the nationality of Boureslan's co-workers. It is probable that they were not American, and had no attachment to the American labor market. As such, it was not unreasonable to refuse to apply Title VII standards in a foreign workplace, populated with foreign nationals, attached to a foreign labor market, and operating under foreign employment standards.

\textsuperscript{67} This is an important distinction with regard to compensation. For instance, an American MBA who is hired to work for an American bank's office in Portugal will be compensated as an expatriate American. A Portuguese citizen who has just completed his or her MBA in the U.S., and who is hired in the U.S. by an American bank to work in Portugal will typically be paid as a Portuguese national.

\textsuperscript{68} Traditionally, married men have been much more likely to uproot their families and take a job abroad, based on the expectation that the wife will follow. The reverse pattern occurs infrequently.

\textsuperscript{69} \textit{Mas Marques v. Digital Equipment Corp.}, 637 F.2d 24 (1st Cir. 1980).

\textsuperscript{70} \textit{Bryant v. Int'l School Serv., Inc.}, 675 F.2d 562 (3d Cir. 1982).

\textsuperscript{71} Since this case was decided on a motion to dismiss for lack of subject matter jurisdiction, the courts' opinions do not provide sufficiently specific information to determine conclusively that Boureslan was not an expatriate.
Boureslan is also atypical in that the American employee transferred from the U.S. to the foreign country. More often, an American citizen who is resident abroad will seek employment with the subsidiary of an American corporation in the foreign country. When this occurs, the person is treated as a local hire and is typically compensated on the same basis as foreign nationals. If the subsidiary is incorporated in the foreign country, the employer is not American, and will most likely not be covered by Title VII.72

In some cases, however, the employing entity may be American. This may occur where the American company has a sales or service office in the foreign country but does not incorporate in that country. Airlines and civilian employers on U.S. military bases usually do not incorporate abroad. Hence, local hires will be employed by an American company, albeit one located abroad. Notwithstanding this, the nexus between the non-resident U.S. citizen hired locally in a foreign country with the American labor force is attenuated. Extending the protection of Title VII to such persons is problematic. It must be asked whether to do so is warranted in light of Title VII’s purpose: to eliminate discrimination in employment in the U.S.

B. Application of Title VII in “American Workplaces” Abroad

Regardless of how attenuated the nexus between U.S. citizens who reside abroad and an American firm that hires them, Title VII should apply when an American company is operating what is essentially an “American workplace” in a foreign country. To determine whether the workplace is essentially American, the following factors may be relevant: the proportion of employees in the plaintiff’s job class who are U.S. citizens, the duration of employment of U.S. citizens at the foreign locale, and for non-English speaking countries, the language used in everyday communications among employees in the job class at the foreign workplace.

In Akgun v. The Boeing Co.,73 two American women had relocated with their Turkish husbands to Turkey. Once in Turkey, they were hired by Boeing, which was performing work for the U.S. Air Force at a base in Turkey. Based on its interpretation of Turkish law, the employer paid them in Turkish rather than American currency. The decision was based on the fact that they were not members of a civilian component of a military operation, given that they were ordinarily resident in Turkey because their husbands were Turkish.74 The EEOC held that absent a

72. Title VII does apply where the foreign subsidiary is deemed to be an integrated entity. See supra note 28 and accompanying text.
74. The company took the position that a NATO treaty read in conjunction with Turkish law required payment in Turkish currency for work performed in Turkey, unless employees were members of a civilian component of a military operation. Under the treaty, the determinative factor was whether the employee was ordinarily
compelling conflict with foreign law, Title VII applied. It was not sufficient that Boeing was acting in accordance with the customs of the country. The EEOC, following its 1988 Policy Guidance on American Companies Overseas, applied Title VII solely because an American employer and U.S. citizens were involved.

A better basis for applying Title VII is found under the theory that an American workplace has been transplanted into a foreign country. This commonly occurs in situations like Akgun, when an American company is providing services to the U.S. government at a military base. In such instances, the danger of imposing strange employment standards on foreigners in a foreign workplace is entirely absent. In Akgun, a very high proportion of employees in the plaintiffs' job class were U.S. citizens. In addition, the duration of employment for many of the U.S. citizens at the Turkish base was limited. Finally, English was the language used in everyday communications among employees in the job class at the workplace in Turkey. By having a facility on a U.S. Air Force base, Boeing was effectively re-creating an American workplace in Turkey. Non-Americans working for Boeing at this facility would hardly be surprised that Boeing was applying American employment standards at the facility.

IV. The BFOQ Defense in an International Context

In determining whether a defendant qualifies for the BFOQ exception contained in section 703(e), courts apply a two-prong inquiry: first, does the particular job under consideration require that the worker not be from a certain group; and second, is that requirement reasonably necessary to the essence of the employer's business. In an international context, the two prongs often merge because employers assert that if an employee from the "wrong" group is sent abroad, foreign customers will simply refuse to do business with the person. As a result, the American company's efforts to sell products or services abroad will fail.

The response that customer preference never justifies discrimination fails to address the employer's immediate problem. For instance, certain Islamic nations have laws or religious dictates declaring that women may not drive, that women's clothing must cover them from head to foot, and that adult women may not socialize with men not from their family. It is difficult to see how a woman could perform as director resident in Turkey. These two women were married to men who were Turkish nationals. Under Turkish law, a woman's domicile is determined by that of her husband, yet a man's domicile is not determined by that of his wife. As such, Boeing took the position that the women were ordinarily resident in Turkey, and paid them in local currency. Boeing admitted that it would not have paid in Turkish currency a locally-hired American man living in Turkey with his Turkish wife. In investigating the women's complaint, the EEOC requested an advisory opinion, on the meaning of the NATO treaty from the U.S. Department of State. Based on the advisory opinion, the EEOC concluded that if Boeing had paid the women in American dollars, there would have been no compelling conflict with Turkish law. Id.
of sales for the Middle East in light of these prevailing norms of social behavior. There is, however, a difference between being unable to perform certain jobs and finding it awkward to do so. For instance, businessmen in certain Middle Eastern countries may tolerate behavior from foreign women that would not be engaged in by female nationals.

Courts should modify the inquiry used to assess the validity of the BFOQ defense in international cases. Courts should permit evidence to determine (1) whether it would be impossible for the plaintiff to perform the job adequately, and (2) whether the employer could have taken reasonable action to minimize the unfavorable response the plaintiff was expected to encounter. Such a modification of the BFOQ inquiry would recognize that employers should not be liable for discriminatory situations they cannot control. Yet, it would still place a duty on employers to investigate ways of enabling disfavored groups to take on international assignments.

A. Conflict with Foreign Laws

Critics of the extraterritorial application of American law point out that such a policy brings the U.S. into conflict with the laws and policies of other countries. In a sense, two countries are attempting to regulate the same behavior exhibited by the same actors in one place. In the last two decades, the application of American antitrust laws and the imposition of trade sanctions have aroused particular criticism. In contrast to these situations, the extraterritorial application of Title VII would appear to provoke little criticism. First, such application would extend only to U.S. citizens working outside the U.S., and second, the use of the BFOQ defense would permit American employers to abide by the laws of foreign nations, and in limited circumstances, to accommodate entrenched social norms which rise to the level of law.

B. The BFOQ Defense in the European Context

The U.S. is not alone in confronting these problems. Great Britain, perhaps because of the legacy of its empire, is sensitive to the fact that many British persons work outside Britain. As a result, many of Britain’s labor


76. See, e.g., Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248 (7th Cir. 1980) (The court allowed a private antitrust action against foreign uranium producers, although these producers had not acted with any intention of harming American corporations or the U.S. market. The U.S. antitrust laws have been applied extraterritorially routinely); see also Simon & Waller, A Theory of Economic Sovereignty: An Alternative to Extraterritorial Jurisdictional Disputes, 22 Stan. J. Int’l L. 397, 399 (1986).


78. For instance, in a nation with a state religion, the rulings of the highest religious authority may, for all practical purposes, have the force of law.
laws contain explicit provisions setting out their extraterritorial impact. Employment is to be regarded as being in Great Britain unless the employee does his or her work wholly or mainly outside Great Britain. In addition, the Sex Discrimination Act of 1975 includes a provision for a "genuine occupational qualification" defense. Such a defense would apply where the job needs to be held by a man because it is likely to involve the performance of duties outside of the United Kingdom in a country whose law or customs are such that the duties could not be performed by a woman. The Race Relations Act of 1976 also provides for a genuine occupational qualification defense, but it does not include a similar explicit provision concerning inability to perform duties because of the laws or customs of another country.

All member states of the European Community are required to have laws or regulations guaranteeing the equal treatment of women in the workplace. Except for Britain, none of the Community member states have laws which expressly consider employment outside the country. However, in Harz v. Deutsche Tradax GmbH, the Hamburg Labor Court and European Court of Justice applied equal treatment standards to a German woman who sought employment with a firm which did substantial business with Saudi Arabia. In Harz, the plaintiff, a recent female business school graduate, responded to the defendant's advertisement in Die Welt for a position which offered economics graduates "a springboard for a career in management." The defendant rejected her application, stating in its letter that only male graduates were being considered. Before the Hamburg Labor Court, the defendant maintained that the position had to be filled by a male because only men bought and sold agricultural raw materials. The defendant also stated

79. See Forde, Transnational Employment and Employment Protection, 7 INDUS. L.J. 228, 237 (1978) (noting that much British labor legislation exempts persons who ordinarily work outside the United Kingdom. After reviewing cases where the plaintiffs ordinarily worked both inside and outside the United Kingdom, the author concludes, "Perhaps the best solution would be to provide that once the employment has certain minimum contacts with Britain then the employee falls within the scope of the statute in question." Id. at 237).
80. Race Relations Act, 1976, §§ 4(1)-(2); Sex Discrimination Act, 1975, § 1(i).
81. Sex Discrimination Act, 1975, § 7(g).
82. Redmond, Women and Minorities, in LABOUR LAW IN GREAT BRITAIN 472, 483 (R. Lewis ed. 1986).
84. It should be noted that no British statute makes a distinction between citizens and aliens. In Britain, the concept of citizenship is quite different than in the U.S. For many purposes, the possession of British nationality is much more important. In addition, Britain does not object to persons holding dual citizenship. With a large proportion of Britain's minority workforce having been born in India or Pakistan, the citizen-alien distinction is meaningless.
that it supplied large quantities of cereals to Saudi Arabia, and that the social and religious structures prevailing there precluded a woman from establishing business contacts and maintaining existing ones. The Hamburg Labor Court found that the defendant had discriminated against Harz. The European Court of Justice implicitly supported the Labor Court's decision, but only dealt with the proper calculation of damages.

Extraterritorial application of Title VII to U.S. citizens working abroad for U.S. employers will produce tension with foreign laws only if courts are not sensitive to the obligations placed on employers in foreign countries. Traditionally, American courts have refused to intervene with a foreign sovereign's laws when applied within that nation's borders. In the employment area, it is generally accepted that employers must abide by the local laws.\textsuperscript{87} For instance, employers must observe local wage and hour laws. Thus, if a foreign country forbids women to work in factories at night and on Sundays, an employer should qualify for the BFOQ exemption if it refuses to hire women for factory jobs requiring night and weekend work. In contrast, no country obliges employers to permit employees to be racially or sexually harassed. There is no reason to suspect that the EEOC\textsuperscript{88} and the courts will not be able to distinguish between practices with which an employer is obliged to comply, and practices which an employer is free to tolerate or regulate in the workplace.

\textbf{Conclusion}

Prior to 1964, employers could, and often did, treat employees less favorably based on their race, sex, religion, or national origin. By enacting Title VII of the Civil Rights Act, Congress set out to eliminate discrimination in employment. A review of legislative history leaves no doubt that Congress wanted to change the reality of discrimination in employment.

A wholesale exclusion of Title VII's protection to U.S. citizens whose work takes them abroad is unwarranted. A measured response to the problem would be to apply Title VII to all U.S. citizens whose jobs entail travel abroad (1) if they reside in the U.S., (2) if they are living abroad as expatriate Americans on an overseas assignment with the intent of returning to the U.S., or (3) if they are local hires, working primarily with other U.S. citizens, in what is determined to be a transplanted American workplace.

As might be expected, some domestic employers charged with Title VII discrimination defended themselves by stating that they had refused

\textsuperscript{87} See, e.g., ORG. FOR ECON. COOPERATION & DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (1986).

\textsuperscript{88} Where an employer submits that the alleged discriminatory conduct is occurring because of foreign law, the EEOC consults the State Department for an interpretation of the requirements of the foreign law in question.
to hire the plaintiff out of fear of customer reaction. The courts, however, do not accept customer preference as a defense. Not only would this leave the victim of discrimination without a remedy, but it would also remove the employer’s incentive to make jobs available. Although the posture of the good faith employer raising the issue of discriminatory customer preference might evoke sympathy, courts understandably do not view the rejection of such a defense as too harsh.

Notwithstanding courts’ rejection of customer preference as a defense in domestic contexts, such a defense based on the discriminatory preferences and practices of foreign customers and co-workers cannot be so easily dismissed. American companies doing business abroad compete with non-American companies with whom foreign customers may find it more comfortable to do business. American companies operating abroad do not control the behavior of their foreign workforce to the same extent as in the U.S. Moreover, the ability of American companies to shape social norms is far more limited in foreign countries. Nonetheless, American companies may be able to differ from prevailing social norms in foreign countries if only because American companies are seen as foreign and it is accepted that foreigners have different ways. In Title VII cases involving the discriminatory preferences of foreign countries, an employer should be able to assert a BFOQ defense. In determining whether the BFOQ exception is applicable, the courts should apply the usual two-prong inquiry with two modifications. First, the court should permit the employer to introduce evidence of discriminatory customer preference. Second, in asking whether a person of the “wrong” group can perform the job, the court should expressly consider the ability of the employer to create an environment in which a person possessing the requisite skills and experience can operate. In so doing, the court should not rely on evidence about the alleged discriminatory behavior of foreigners unless the defendant can adduce proof of such behavior. To do otherwise will lead courts to rely on their own stereotypic impressions of the behavior of foreigners toward certain groups.

With the internationalization of business, managers will increasingly seek international experience. Lack of such experience may limit one’s career progress. For the courts to embrace Boureslan would insulate employers from claims that they failed to offer international experi-

89. Consider, for instance, the position of an American company operating a manufacturing facility in a Moslem country. If the company were to place a woman, even an American woman, on the factory floor, wearing slacks, and supervising the male workers on the line, the woman might find herself severely harassed. Deeply offended by her presence and her behavior which the men would deem immoral, the workers might also refuse to work with the woman.

90. For example, it is virtually unknown for a major Japanese corporation to send a Japanese female employee abroad on a sales trip. Yet, American female managers sent to Japan report that Japanese companies accept them as they accept their male co-workers because the Japanese are aware that American companies employ high ranking women.
ence on a non-discriminatory basis. The proposals put forward in this Article provide a mechanism for balancing the rights of American employees with the needs of American employers doing business abroad. Most importantly, the proposals are consistent with one of the main purposes of Title VII: offering employees equal opportunity in America’s workplaces.