Brooklyn Journal of International Law

Volume 23
Issue 2
Symposium:
Creating Competition Policy for Transition Economies

Article 10

12-1-1997

COMMENT: The Erroneous Interpretation of the Foreign Compulsion Defense in the ADEA: *Manoney v. RFE/RL, Inc.*

Randi Seltzer

COMMENT

THE ERRONEOUS INTERPRETATION OF THE FOREIGN COMPULSION DEFENSE IN THE ADEA: *MAHONEY V. RFE/RL, INC.**

I. INTRODUCTION

In *Mahoney v. RFE/RL, Inc.*,[1] which was decided in February of 1995, the Court of Appeals for the District of Columbia refused to extend extraterritorial protection of the Age Discrimination in Employment Act.[2] That same year, the U.S. Supreme Court denied review.[3] Protection was denied after the Court of Appeals concluded that the employer's liability was exempted by a foreign law compulsion defense and equated a collective bargaining agreement in Germany with German law.[4]

Currently, approximately 42,000 U.S. citizens are employed overseas by 17,835 affiliates of 2,167 U.S. parent companies[5] operating in at least 121 countries.[6] Some contend, however, that at least 500,000 U.S. citizens work overseas.[7] Due to the increasing globalization of the economy, and the escalating number of U.S. citizens employed abroad, a resolution as to when U.S. employment discrimination rights yield to

---

* 47 F.3d 447 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

1. *Id.*

2. *See id.*

3. *See* Mahoney v. RFE/RL, Inc., 116 S. Ct. 181 (1995).

4. *See* Mahoney, 47 F.3d at 450.

5. *See* Alan Gladstone, *Transnational Application of Title VII Employment Protections: A Two-Sided Coin*, 6 INT'L LEGAL PERSP. 1, 1 (1994).

6. *See* Michael Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW. 635, 636 (1996).

7. *See* Gladstone, *supra* note 5, at 1-2 (1994). Note, however, that this estimate may encompass Americans employed by foreign companies which are not U.S. affiliates.

foreign directives is necessary.

In 1984, in response to case law, Congress amended the Age Discrimination in Employment Act[8] (ADEA) to apply extraterritorially by redefining "employee" to include U.S. citizens working for U.S. companies overseas.[9] Consistent with the international law principles of comity and sovereignty, and with the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (RESTATEMENT), Congress enacted the so-called "foreign compulsion defense" to the ADEA.[10] The remaining employment protection statutes, The Americans with Disabilities Act[11] (ADA) and Title VII of the Civil Rights Act (Title VII),[12] were similarly amended to apply extraterritorially in 1991.[13] Accordingly, the ADA and Title VII also incorporated foreign compulsion defenses.[14] The doctrine originated as a defense against extraterritorial application of U.S. antitrust laws.[15] Essentially, the defense exempts U.S. companies from liability for noncompliance with the U.S. law when compliance would force the company to violate the local law of its host country.[16] Stated differently, the company essentially admits the violation of U.S. law but asks for impunity because the government of the host country forced the violation. The foreign compulsion defense is typical of statutes proscribing extraterritorial reach.[17] The defense has, addition-

---

8. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994).

9. Older American Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1792 (1984) (amending 29 U.S.C. § 630 (f)).

10. 29 U.S.C. § 623(f)(1).

11. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (1994 & Supp. I). The act prohibits employment discrimination based on a disability.

12. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. I). The act prohibits discrimination in employment based on national origin, sex, race, color, and religion.

13. *See* Civil Rights Act of 1991 § 109, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amending 42 U.S.C. §§ 2000e-1, 12111(4), 12112).

14. *See* 42 U.S.C. §§ 2000e-1(b), 12112(c)(1).

15. *See* 1 JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 8.14 at 260 (2d ed. 1981); *see also* Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296-98 (D. Del. 1970). For a good summary of the defense see Michael A. Warner, Jr., Comment, *Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law*, 11 NW. J. INT'L L. & BUS. 371, 374 (1990).

16. *See* ATWOOD & BREWSTER, *supra* note 15, § 8.14 at 260; *see also* Older American Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1792 (1984) (amending 29 U.S.C. § 630 (f)); 42 U.S.C. § 12112(c)(1); 42 U.S.C §2000e(1)(b).

17. Several U.S. laws have extraterritorial reach. For criticism of extraterrito-

ally, been construed narrowly by U.S. courts, which have required U.S. companies to show actual compulsion by an official government mandate in order to invoke the defense successfully.[18] In fact, until the case discussed in this comment, assertion of the defense has only succeeded twice in precluding liability in employment discrimination cases.[19]

In *Mahoney v. RFE/RL, Inc.*,[20] a group of U.S. citizens working for the U.S. subsidiary, Radio Free Europe/Radio Liberty (RFE/RL), with its principal place of business in Munich, Germany, were forced to retire at age sixty-five pursuant to RFE/RL's collective bargaining agreement executed in Germany. The plaintiffs challenged the mandatory retirement provision under the ADEA, since termination of employment on the basis of age is discrimination on its face and the Equal Employment Opportunity Commission (EEOC) brought suit in the District of Columbia on the plaintiffs' behalf. RFE/RL invoked the foreign compulsion defense by alleging the collective bargaining agreement, which was approved by the Munich Labor Court, was law in Germany. The EEOC[21] contended that no defense, including foreign compulsion, exempted liability.[22] The district court in *Mahoney* had essentially taken the

---

rial applications of U.S. law see James Michael Zimmerman, *Extraterritorial Application of Federal Labor Laws: Congress's Flawed Extension of ADEA*, 21 CORNELL INT'L L.J. 103 (1988).

18. *See infra* Part III.B.1.

19. *See infra* Part III.B.3.

20. 818 F. Supp. 1 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

21. The Age Discrimination in Employment Act (ADEA) and Title VII vests the Equal Employment Opportunity Commission (EEOC) with investigation and enforcement authority. *See* 29 U.S.C. § 626 (1985 & Supp. 1997) and 42 U.S.C. § 2000e-5 (1994 & Supp. I) (Title VII). Essentially, the EEOC issues regulations under, and monitors compliance with, employment discrimination laws. Accordingly, the EEOC is the executive agency through which private litigants file employment grievances. *See* 42 U.S.C. §§ 2000e-4, 2000e-5 (1985). The Commission has the capacity to resolve some disputes and may bring suits in U.S. courts on plaintiffs' behalf. The EEOC also issues published guidelines for interpreting employment legislation.

22. The EEOC, of course, would not have brought suit on the plaintiffs' behalf if they believed a defense exempted liability. It is noteworthy that the district court's opinion in *Mahoney*, which denied the invocation of the foreign compulsion defense, is cited by the EEOC as exemplary of the agency interpretation and analysis of the foreign compulsion defense. *See* EEOC, EEOC NOTICE 915.002, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND ADA TO AMERICAN FIRMS OVERSEAS AND TO FOREIGN FIRMS IN THE UNITED STATES, (Oct. 20, 1993), *reprinted in* EEOC Compl. Man. (CCH) ¶ 2169 at 2313-28 (1995).

same position. The Court of Appeals reversed the district court, holding the foreign compulsion defense was successfully invoked by equating the collective bargaining agreement with law.[23] The Supreme Court denied review.[24]

This comment analyzes the Court of Appeals' opinion. Part II reviews the extraterritorial application of the ADEA prior to its amendment. Part III discusses the amendment itself. Part III.B explains the foreign compulsion defense, elaborating on its narrow interpretation and its requirement for actual government compulsion to be invoked successfully and discussing its success in past employment discrimination cases. Part IV provides the facts of *Mahoney v. RFE/RL, Inc.* and part V analyzes the opinion. This comment concludes that the Court of Appeals reached an unjust result; U.S. seniors were wrongly discharged due to a blatant exercise of age discrimination. Further, this comment concludes that the Court of Appeals employed an improper analysis by allowing the foreign compulsion defense to preclude liability. The reasoning in the Court of Appeals' opinion was a departure from precedent and vitiated Congressional intent to extend the act's reach overseas. Most importantly, this case will have a dangerous stare decisis effect. Since the global economy is increasingly interdependent and U.S. multinational companies continue to establish subsidiaries on foreign shores, the Supreme Court must determine the appropriate construction of the foreign compulsion defense. If such a resolution is not made, not only will U.S. citizens be victimized by violative corporate conduct, but courts will continue to adopt broad constructions of the foreign compulsion defense to deny extraterritorial application of U.S. laws that have incorporated this defense.

II. LEGISLATIVE BACKGROUND AND JUDICIAL APPLICATION PRIOR TO THE AMENDMENT

The ADEA was enacted in 1967 to prohibit employment discrimination based on older age, particularly with regard to compensation, hiring, and termination.[25] The stated purpose

23. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447, 450 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

24. *See* Mahoney v. RFE/RL, Inc., 116 S. Ct. 181 (1995).

25. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

of the act was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[26]

Prior to the ADEA's amendment, courts ignored the EEOC's interpretation that the law applied extraterritorially[27] and refused to extend this type of protection to U.S. seniors[28] employed overseas. Courts enunciated two rationales: (1) the absence of clear Congressional intent to do so; and (2) the provisions of the ADEA itself which precluded such an application. In accordance with *Blackmer v. United States*[29] and *Foley Bros., Inc. v. Filardo*[30] courts refused to extend the ADEA extraterritorially absent a clear expression from Congress to do so. The language in the ADEA which was construed to preclude extraterritorial reach was borrowed from the Fair Labor Standards Act (FLSA).[31] Provisions of the FLSA were incorporated into the ADEA to assist with enforcement and procedural aspects.[32] The FLSA explicitly applied only within

---

26. 29 U.S.C. § 621(b).

27. The EEOC's position was that the act applied to U.S. citizens employed by U.S. companies overseas reasoning that the substantive provisions are analogous to Title VII, which some courts had held applies overseas. The EEOC interpreted the legislative history of Title VII as supporting extraterritorial application. Further, the agency reasoned that nothing should preclude U.S. citizens employed overseas from retaining their protection. *See* EEOC: Policy Statement on the Application of Title VII To American Companies Overseas and to Foreign Companies, 401 Fair Empl. Prac. Rep. (BNA) 6063, 6064 (1988).

28. The age categorization of U.S. citizens who fall within the act's protection is 40-65. *See* 29 U.S.C. § 631(a).

29. 284 U.S. 421, 437 (1932).

30. 336 U.S. 281, 284-85 (1949).

31. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994)).

32. *See* Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 555 (5th Cir. 1985). Section 626(b) of the ADEA reads in pertinent part:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof) and 217 of this title and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title.

29 U.S.C. § 626(b). Section 216 is part of the Federal Labor Standards Act and provides that an employer will not be:

> subject to any liability or punishment under this Act . . . on account of his failure to comply with any provision or provisions of such Act . . . with respect to work heretofore or hereafter performed in a workplace to

U.S. territory.[33] Consequently, prior to the amendment, courts used these two rationales to deny extraterritorial application of the ADEA.

Every court with occasion to consider the issue of extraterritoriality of the ADEA denied it by contending that a legislative directive was necessary, and by adopting the questionable analysis that the incorporation of FLSA provisions precluded extraterritorial reach.[34] For instance, in *Cleary v. United States Lines, Inc.*,[35] the Third Circuit agreed with the district court that "'[t]here is no valid policy reason why this country's laws against age discrimination should not apply to American citizens employed by American companies abroad.'"[36] Like the district court, though, the Third Circuit concluded that the policy justifications for extension of the ADEA beyond U.S. territory were matters "for the Congress to consider" and held that the ADEA did not apply extraterritorially.[37] That court and others reasoned that the FLSA's enforcement section, section 213(f), which is indirectly incorporated into the ADEA, reading "this title shall *not* apply . . . to any employees . . . in a workplace within a foreign country"[38] mandated solely territorial application of the ADEA.[39] The court continued to reason that when new legislation is enacted which incorporates provisions of an existing law, Congress can be presumed to be cognizant of the interpretation given to the prior law.[40] Thus, the

---

which the exemption in section 213(f) of this title is applicable.

29 U.S.C § 216(d). The section 213(f) exemption provides that enumerated provisions of "this title shall not apply with respect to any employees whose services during the workweek are performed in a workplace in a foreign country." 29 U.S.C. § 213(f).

33. *See* 29 U.S.C. § 213(f).

34. *See* Lopez v. Pan Am World Serv., Inc., 813 F.2d 1118, 1119 (11th Cir. 1987); De Yoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1283 (5th Cir. 1986) (per curium); Pfeiffer, 755 F.2d at 558; Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1124 (D.C. Cir. 1985); Zahourek v. Arthur Young & Co., 750 F.2d 827, 829 (10th Cir. 1984); Cleary v. U.S. Lines, Inc., 555 F. Supp. 1251, 1257-63 (D. N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

35. 728 F.2d 607 (3d Cir. 1984).

36. *Id.* at 610 (quoting Cleary, 555 F. Supp. at 1263).

37. Cleary, 728 F.2d at 607.

38. 29 U.S.C. 213(f) (emphasis added).

39. Cleary, 555 F. Supp. at 1260; *see also* Pfeiffer, 755 F.2d at 555. It is noteworthy that, in *Pfeiffer*, Chief Judge Posner questioned the chain of reasoning and the "logical" incorporation of successive provisions to exclude extraterritorial application. *Id.* at 556.

40. *See* Cleary, 555 F. Supp. at 1260 (citing Lorillard v. Pons, 434 U.S. 575

court inferred that Congress was aware that the ADEA would apply only nationally by incorporating (indirectly) section 213(f) of the FLSA. Accordingly, these courts refused to extend the coverage of the ADEA to Americans employed overseas.

Courts, in refusing to extend application of the ADEA beyond U.S. territory, have also rejected arguments that the ADEA was substantively analogous to Title VII[41] and should therefore be given Title VII's extraterritorial application.[42] Such courts reasoned Title VII was only given extraterritorial application due to the inclusion of statutory language that was absent in the ADEA.[43] Moreover, Title VII lacked incorporation of the FLSA provision prescribing territorial application. Accordingly, courts reasoned that the discrepancies between the statutory language in both acts, with regard to both the inclusion and omission of relevant statutory language, mandated the conclusion that Congress must have intended to apply the ADEA only within the U.S. territory.

(1978)).

41. Title VII was held to have extraterritorial effect by some courts even prior to its amendment. *See, e.g.*, Seville v. Martin Marietta Corp., 638 F. Supp. 590, 592 (D. Md. 1986); Bryant v. Int'l. Sch. Servs., Inc., 502 F. Supp. 472, 482-83 (D. N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982); Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978); *cf.* EEOC v. Arabian American Oil Co., 499 U.S. 244, 257-59 (1991) (holding that Title VII does not apply outside U.S. territory absent clear legislative intent); EEOC v. Kloster Cruise Ltd., 743 F. Supp. 856, 858 (S.D. Fla. 1990) (holding that Title VII does not have extraterritorial application), *rev'd on other grounds*, 939 F.2d 920 (11th Cir. 1991); Akgun v. Boeing Co., 53 Fair Empl. Prac. Dec. (CCH) ¶40,011 at 62,911, 62,914 (W.D. Wa. 1990) (holding Title VII did not apply outside U.S. territory).

42. *See* Chris Lauderdale, Comment, 20 GA. J. INT'L & COMP. L. 207, 210 (1992); Kathleen O'Brien, Note, Cleary v. U.S. Lines, Inc.: *The Protections of the ADEA Held Not to Apply to American Citizens Employed Abroad*, 9 N.C. J. INT'L L. & COM. REG. 173, 186 (1983).

43. Title VII contains the so called "alien exemption" clause exempting employers with respect to the employment of aliens outside the United States: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State." 42 U.S.C. § 2000e-1(A). Courts reasoned this phrase compelled the negative inference that the act thus applies to *American citizens* employed abroad. The analysis relied on reasoning that Congress must have intended to extend the protection to Americans overseas since Congress explicitly excluded aliens (and only aliens). For examples of applications and discussions of this analysis see Akgun, 53 Fair Empl. Prac. Dec. (CCH) ¶ 40,011 at 62,913; Seville, 638 F. Supp. at 592; Bryant, 502 F. Supp. at 482; Love, 13 Fair Empl. Prac. Cas. (BNA) at 482-83.

III. AMENDMENT OF THE ADEA

A. *Legislative Intent and History*

In response to uncertainty and criticism regarding the denial of extraterritorial application of the ADEA,[44] Congress exercised its power to extend its laws to the U.S. citizens employed overseas and amended the act by redefining the terms "employee" and "employer."[45] The term "employee" means "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."[46]

By amending the act, Congress responded to the then prevalent judicial reluctance to apply the act extraterritorially. For instance, Senator Grassley, Chairman of the Committee on Labor and Human Resources' Subcommittee on Aging, specifically addressed the denial of extraterritoriality by district courts in *Cleary v. United States Lines*,[47] and *Zahourek v. Arthur Young & Co.*,[48] during a hearing on age discrimination overseas:

> While I congratulate the judges for judicial restraint uncharacteristic of many of their colleagues, I cannot agree that Congress would ever have intended either to leave out a whole class of American employees or to leave such a large loophole. Nonetheless I have drafted remedial legislation, which I hope can be one subject of discussion today.
>
> I want to take another moment here to address a message to the U.S. Courts of Appeal for the 3d and 10th Districts [sic], to whom the *Cleary* and *Zahourek* cases are on appeal. I hope that those courts will not point to our activities today or to the introduction of legislation as an acknowledgement that the lower courts reached the correct conclusion as [to] congressional intent. It is nothing of the sort. Rather,

---

44. Courts and commentators, recognizing that the omission of a provision for extraterritorial application in the ADEA left United States citizens working abroad outside the protection of that law, began to criticize this lacuna in ADEA coverage. *See* Lauderdale, *supra* note 42, at 209. Furthermore, critics feared employers would immunize themselves from liability by transferring a senior employee to an overseas subsidiary and then discharging him. *See, e.g.*, Cleary, 555 F. Supp. at 1263; *see also* Pfeiffer, 755 F.2d at 559; O'Brien, *supra* note 42, at 186.

45. Older American Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1792 (1984) (amending 29 U.S.C. § 630 (f)).

46. 29 U.S.C. 630(f).

47. 555 F. Supp. 1251, 1257-63 (D. N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

48. 750 F.2d 827, 829 (10th Cir. 1984).

> this is an investigation as to whether further clarification of congressional intent would be helpful in insuring the protection of thousands of American workers.[49]

Additionally, Congress responded to concerns that the lack of ADEA protection abroad gave employers an escape hatch. Congress was troubled by the potential incentive for companies to "ship & fire" their employees if the ADEA did not operate extraterritorially. During the hearing, Senator Grassley quoted from the *Cleary* court to contend that "deny[ing] extraterritorial effect to the age discrimination laws would invite an employer to transfer an older employee to a foreign subsidiary or branch as a subterfuge and then terminate his services in violation of the statute."[50] Critics had the same troubling concerns.[51] Notwithstanding other commentators' contentions that this concern was without merit since the EEOC's position was that the act did apply extraterritorially,[52] Congress nonetheless felt obliged to assure that companies were not presented with such a loophole absent the amendment.[53]

The amendment to ensure extraterritorial reach of the ADEA in response to case law holding the contrary unequivocally dictates that Congress intended for U.S. citizens employed overseas to have a remedy when victimized by age discrimination. The stated reason for the amendment is "to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protection of the Age Discrimination in Employment Act."[54] The fact that Congress did not engage in debate over

---

49. *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 1, 2 (1983) (statement of senator Grassley). [hereinafter *Hearings on Age Discrimination Overseas*].

50. *Id.* at 29-30.

51. *See* O'Brien, *supra* note 42, at 176.

52. *See* Zimmerman, *supra* note 17, at 119.

53. *See Hearings on Age Discrimination Overseas*, *supra* note 49, at 6. Clarence Thomas, then Chairman of the EEOC, told the Subcommittee on Aging that: "we do believe that if an employer intentionally transfers an employee to a foreign operation for the purpose of evading the provisions of ADEA, we would consider that kind of activity a violation of the Act as it is presently written." *Id.* The EEOC's interpretation of the then-current provision was not controlling, but would have been entitled to judicial deference.

54. Amendments to the Age Discrimination in Employment Act of 1967, 1984 U.S.C.C.A.N. 3000.

international issues when considering the legislation does not negate its purpose.[55]

Moreover, Congress' subsequent amendments to the ADA and Title VII[56] in 1991, in response to some judiciary reluctance to extend those acts' reach extraterritorially, manifest Congressional intent to extend the protection of all employment discrimination laws to U.S. citizens employed overseas.[57] Specifically, Congress accepted the U.S. Supreme Court's invitation, made in *EEOC v. Arabian American Oil Co.*,[58] to amend Title VII.[59] The stated purpose of the 1991 amendments to the ADA and Title VII is "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[60] Congress remained faithful to the spirit of anti-discrimination laws and amended the acts, notwithstanding the contentions of critics of extraterritorial application of civil rights provisions.[61]

---

55. When Congress contemplated international issues with regard to the amendment they were more concerned with clearly limiting the application to U.S. citizens only and with avoiding broad language that could be interpreted to include protection for foreign nationals: When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms. 1984 U.S.C.C.A.N. 3000-01.

56. Civil Rights Act of 1991, § 109, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §§ 2000e(f), 12111(4)).

57. Note that these amendments extend the protection only to U.S. citizens employed overseas by U.S. corporations. They do not extend to foreign nationals employed by U.S. companies, nor to U.S. citizens employed by foreign companies. *See, e.g.*, Older American Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1792 (1984) (amending 29 U.S.C. § 630 (f)).

58. 499 U.S. 244, 258 (1991).

59. The Supreme Court decided against extraterritoriality after analyzing the arguments advanced by the EEOC. The Court was satisfied that Congress had amended other statutes to provide for application overseas and "should it wish to do so, may similarly amend Title VII." *Id.* at 259. The Court compared Title VII's then-existing language to the already amended ADEA and its legislative history, and noted Congress' explicit intent to apply ADEA abroad. *Id.* at 256. For a discussion of *EEOC v. Arabian American Oil Co.* and the congressional response see Renée Orleans, *Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad*, 16 MD. J. INT'L L. & TRADE 147, 152-159 (1992).

60. §3, 105 Stat. 1071.

61. *See* Zimmerman, *supra* note 17, at 126 (criticizing the 1984 amendment

B. *Exception to Extraterritorial Application—the "Foreign Compulsion Defense"*

The doctrine of foreign state compulsion allows a company to escape liability for violations of the domestic law in its nation of origin if the host country's law compelled the violation.[62] The doctrine is based on equitable considerations for defendants confronted with an obligation to abide by conflicting laws.[63] The defense originally arose in the U.S. courts as a defense against extraterritorial application of U.S. antitrust laws.[64] The defense was not only recognized, but became fairly well developed by the judiciary in both antitrust and subsequent Title VII cases.[65] However, notwithstanding its acknowledgment and development by U.S. courts, the defense has been limited primarily to theory and dicta, and has enjoyed minimal practical success.[66] Consistent with and in deference to international principles such as the act of state doctrine,[67] international comity,[68] and the "well-established

---

and predicting consequent political problems).

62. *See* ATWOOD & BREWSTER *supra* note 15, §§ 8.14-8.24 at 260-74; Warner, *supra* note 15, at 375.

63. *See* Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970) (observing that if compulsion were not a defense to antitrust enforcement, many U.S. firms would loose the ability to transact business in foreign lands); *see also* Warner, *supra* note 15, at 379-80.

64. *See* Warner, *supra* note 15, at 374; McGhee v. Arabian American Oil Co., 871 F.2d 1412, 1419 n.4 (9th Cir. 1989); *Interamerican Ref. Corp.*, 307 F. Supp. at 1296-98; *see also generally* Pierre Vogelenzang, Note, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131 (1980).

65. *See* Warner, *supra* note 15, at 374; *see also infra* Part III.B.1. Note that prior to the amendment of Title VII to apply its provisions beyond U.S. territory, it was only held to have such reach by some courts and the defense was developed as a theoretical analogy to its analogue in antitrust litigation.

66. *See, e.g.*, Interamerican Ref. Corp., 307 F. Supp. at 1297-98.

67. The act of state doctrine is a "principle of law designed primarily to avoid judicial inquiry into the acts and conduct of the officials of [a] foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of a foreign government." O.N.E. Shipping v. Flota Mercante Grancolombiana, 830 F.2d 449, 452 (2d. Cir. 1987). Courts have confused and commingled the act of state and foreign compulsion doctrines. However, as one author notes, the two doctrines have conceptually different justifications:

> The foreign compulsion defense is distinct from the act of state doctrine because the inability of an American court to inquire as to the validity of [a] foreign governmental act does not in and of itself justify releasing a private plaintiff from liability. Nothing in the act of state doctrine precludes a court from deciding to subject a private defendant to liability and let the defendant choose which master to follow. The question that

principles of sovereignty that no nation has the right to impose its labor standards on another country,"[69] Congress incorporated the foreign compulsion defense into ADEA's amendment providing for its extraterritorial application. It was Congress' stated intent "that [the ADEA's] amendment not be enforced where compliance with its prohibitions would place a U.S. company or its subsidiary in violation of the laws of the host country."[70] The ADEA provides:

> It shall not be unlawful for an employer, employment agency, or labor organization- (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.[71]

When amended to apply extraterritorially, the ADA and Title VII adopted substantially similar language to the ADEA to provide for the foreign compulsion defense. For instance, Title VII provides:

> It shall not be unlawful . . . for an employer (or a corporation controlled by an employer), labor organization, employment agency . . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such a workplace is located.[72]

The ADA provides:

---

the court must ask in a foreign compulsion analysis is whether the alleged compulsion, valid or invalid, actually occurred.

Warner, *supra* note 15, at 380.

68. Comity refers to the mutual respect sovereigns extend to each others' laws out of courtesy. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 3 (1987).

69. Zimmerman *supra* note 17, at 107.

70. Amendments to the Age Discrimination in Employment Act of 1967, 1984 U.S.C.C.A.N. 3001.

71. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1) (1994).

72. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(b) (1994 & Supp. I).

> It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.[73]

With regard to the extraterritorial application of all U.S. laws, in 1986 the RESTATEMENT was redrafted to include a version of the foreign state compulsion doctrine:

> (1) In general, a state may not require a person
> (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
> (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.
>
> (2) In general, a state may require a person of foreign nationality
> (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or
> (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.[74]

The RESTATEMENT version predated both Title VII's and the ADA's amendment, but antedated ADEA's. Thus, endorsement of the same defense by the American Law Institute, and subsequent enactments of the same defense by Congress with regard to the remaining employment discrimination laws, evidences Congress' acceptance of the defense and its limitation.

1. Narrow Construction and Actual Compulsion Requirement of the Defense

As a remedial measure, the language of employment protection acts are to be construed as to effectuate their purposes.[75] All exceptions to employment discrimination laws are

---

73. 42 U.S.C. § 12112(c)(1).

74. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (1986) [hereinafter RESTATEMENT].

75. *See* H.R. REP. NO. 102-83, Sec. 109 at 20 (1991). "Sec. 1007. Rules of

limited and are to be construed narrowly,[76] as the Bona Fide Occupational Qualification[77] (BFOQ) defense has been.[78] Prior to 1984, the foreign compulsion defense was utilized primarily in antitrust cases.[79] In these cases, the defense was construed very narrowly, requiring an official government mandate, and was largely unsuccessful. "In the context of antitrust law courts have held that knowledge, acquiescence, approval, or even encouragement of the illegal activity by the host government does not excuse an antitrust violation."[80] Notwithstanding the substantive differences between antitrust and

---

Construction for Civil Rights Laws. (a) Effectuation of Purpose: — All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies." *Id.*

76. "The ADEA is a remedial statute and exceptions to it are to be construed narrowly." Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 3 (D.D.C. 1992), *rev'd*, 47 F.3d 447, 450 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

77. The Bona Fide Occupational Qualification (BFOQ) Defense permits discrimination when a particular attribute of an employee is a requisite to perform the job effectively. For instance, the ADEA provides:

> It shall not be unlawful for an employer . . . .
> (1) to take any action otherwise prohibited under the subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1) (1994). The Americans with Disabilities Act provides:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this chapter.

42 U.S.C. § 12113(a). Title VII provides:

> Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e)(1).

78. "The defense has properly been construed by the cases as a narrow exception in order to avoid the situation where the exception swallows the rule." Kern v. Dynalectron Corp., 577 F. Supp. 1196, 1199 (N.D. Tex. 1983). For an example of the application of the defense *see infra* notes 120-124 and accompanying text.

79. *See* Lauderdale, *supra* note 42, at 214; Warner, *supra* note 15, at 374.

80. *See id.* at 375.

employment discrimination, the construction of the foreign compulsion defense in antitrust cases is sufficiently analogous, since the defense, in any extraterritorial provision, has an independent meaning irrespective of the act to which it attaches.

Additionally, the RESTATEMENT advocates a strict and narrow interpretation of the defense. For instance, it requires the imposition of severe sanctions, and compulsion in the form of binding law in order to invoke the defense successfully.[81] A comment following the RESTATEMENT's formulation of the foreign state compulsion doctrine sets forth its parameters:

> The defense of foreign government compulsion is in general available only when the other state's requirements are embodied in binding laws or regulations subject to penal or other severe sanction; it is not available when the second state's orders are given in the form of "guidance," informal communications, or the like.[82]

In conformity with a narrow construction, case law has drawn a distinction between mandatory foreign law, and mere foreign practice and custom, where the latter do not suffice for the defense.[83] Additionally, the EEOC contends that a fundamental difference exists between a host country's customs and practices, and a host country's statutory mandates.[84] In *Bryant v. International School Services, Inc.*,[85] the court did not even ascertain whether the violative conduct constituted tradition, custom or policy, since none would be of any consequence to the defense.[86]

---

81. RESTATEMENT, *supra* note 74, § 441 cmt. c.

82. *Id.*

83. *See infra* note 88.

84. *See* EEOC, EEOC POLICY GUIDANCE NOTICE 915.046, ANALYSIS OF § 4(F)(1) "FOREIGN LAWS" DEFENSE OF AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, (Dec. 5, 1989), *reprinted in* EEOC Compl. Man. (CCH) ¶ 6524 at 5121-22 (1995) [hereinafter EEOC POLICY GUIDANCE NOTICE 915.046]. The foreign compulsion defense applies only where compliance with U.S. discrimination laws will lead to a violation of foreign law. Moreover, the company asserting the defense will have to show an authoritative and factual basis and cannot rely on conjecture for the proposition that the conduct was compelled by the host country's government. *See* Host Country Bars Hiring of Women in Foreign Job, EEOC Dec. No. 85-10, Empl. Prac. Guide (CCH) ¶ 6850, 7052 at 7054-55 (July 16, 1985).

85. 502 F. Supp. 472 (D. N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

86. *See id.* at 490-91. The *Bryant* court wrote that "[t]hose were actions and

The foreign compulsion defense requires the employer to prove that an order by the foreign government actually compelled the U.S. business to violate U.S. law.[87] Mere governmental participation is insufficient. The foreign law must have coerced the defendant into violating U.S. law: "[t]he defense is not available if the defendant could have legally refused to accede to the foreign power's wishes."[88] Traditionally, the defense has required an official government mandate. Moreover, the employer must prove that noncompliance with the local law would subject them to severe penalties.[89] Although what losses qualify as severe penalties are still somewhat speculative, several commentators suggest that mere civil liability or potential loss of a customer would not suffice.[90]

Courts have confined the defense's invocation to instances where the violation of U.S. law was compelled by the law of a host country. An exception would be instances where the com-

---

policies of I[nternational] S[chool] S[ervices] and neither reflected sovereign decisions of the Iranian government, nor were compelled by the Iranian government. Thus those actions and policies are not protected by . . . the defense of foreign compulsion." *Id.*

87. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979); *see also* Warner, *supra* note 15, at 375. The compulsion by the government is a difficult threshold to pass. It is important to note, however, that several other factors may come into play which are conceptually distinct from this defense. Specifically, while some activity may not elevate governmental participation to the level of compulsion, the same activity may be relevant on the issue of whether extraterritoriality of this law is reasonable. This necessarily turns on whether the laws explicitly provide for extraterritoriality, as the reasonableness test is a common law doctrine applied to assist in determining whether a U.S. law should apply overseas. In addition, the control test may serve to limit extraterritoriality. For the employment discrimination acts to extend, the company or subsidiary whose conduct overseas is being challenged, must be under U.S. control which is determined by a four prong test. Also, the BFOQ defense can be utilized. Doctrinally, the BFOQ defense is distinct from the foreign compulsion defense. However, circumstances can be manipulated and where foreign compulsion defense fails, BFOQ defense may prevail. *See infra* notes 120-124 and accompanying text; *see also* Abrams v. Baylor College of Med., 805 F.2d 528, 533 (5th Cir. 1986).

88. Mannington Mills, 595 F.2d at 1293.

89. *See* Gladstone, *supra* note 5, at 12.

90. *See id.*; Mark R. Azman, *The Development of Title VII Protection for American Citizens Employed Abroad by American Employers: Yesterday, Today and Tomorrow*, 18 WM. MITCHELL L. REV. 531, 547 (1992). *But see* United States v. First Nat'l City Bank, 396 F.2d 897, 898, 902 (2d Cir. 1968) (expressing in dicta the court's reluctance, in light of principle of international comity, "to hold . . . that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena" where compliance with subpoena would subject U.S. bank to civil liability under German law).

pulsion, although not a formal law, was construed as stemming from an act of state. For instance, in *Interamerican Ref. Corp. v. Texas Maracaibo*,[91] the defense was properly invoked against enforcement of U.S. antitrust laws by Texas Maracaibo and other defendants where those companies had been compelled by regulatory authorities in Venezuela to boycott Interamerican Refining.[92] The court reasoned that the boycott was compelled by the host government and thus was within the scope of the foreign compulsion defense.[93] More often, however, the defense has been accepted in theory and dicta but has failed when invoked.

A sharp and crucial distinction exists between governmental approval or even participation in private conduct and governmental compulsion, and only the latter suffices for the defense. Governmental guidelines do not even rise to the level of law for a proper invocation of the foreign compulsion defense.[94] Since noncompliance with mere guidelines does not impose severe penalties or severely impede the continuation of business activity, guidelines by themselves cannot be construed to constitute law for purposes of this defense.

Activity that is tolerated, licensed, or even participated in by the foreign government is not sufficient, as such activity is not required by the foreign state.[95] Instances of governmental tolerance often arise where a government approves or even directs a certain private arrangement.[96] Nonetheless, condoning or enforcing an activity or a contract does not equate the activity or contract with law, since these types of private arrangements are not compelled by the laws of the host state.[97]

---

91. 307 F. Supp. 1291 (D. Del. 1970).

92. *See id.* at 1297.

93. *See id.* at 1298-99 (ultimately holding that the court was barred by the act of state doctrine from inquiring as to whether or not Venezuelan regulatory agency had legal authority for acts compelling U.S. companies to participate in boycott).

94. *See* Azman, *supra* note 90, at 546-47; Gladstone, *supra* note 5, at 11-12.

95. *See* RESTATEMENT, *supra* note 74, § 441 cmt. d (1986); *see also* U.S. v. Watchmakers of Switzerland Info. Ctr, Inc., 1963 Trade Cas. (CCH) ¶ 70,600 at 77,456-57 (S.D.N.Y. 1962) (finding that Swiss governmental approval of agreement to hinder and prevent the development of competitive watch industries did not amount to a government mandate), *modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

96. *See* RESTATEMENT, *supra* note 74, § 441 cmt. d.

97. *See* EEOC POLICY GUIDANCE NOTICE 915.046, *supra* note 84; Mannington

Additionally, knowledge, acquiescence, or even encouragement of illegal activity by a host government will not excuse a violation.[98]

On the other hand, the existence of a foreign authoritative directive does not necessarily support the defense. In *McGhee v. Arabian American Oil Co.*,[99] a specific directive by a Saudi authority was not held sufficient to invoke the defense, as the company could have taken measures to avoid or mitigate the sovereign's orders.[100] Similarly, in *Airline Pilots Ass'n Int'l v. Taca Int'l Airlines*,[101] a corporation under the laws of El Salvador, was not exempted from liability for a violation of the Railway Labor Act by relocating its pilot base from the U.S. to El Salvador, although it was pursuant to a directive of the Salvadoran Ministry of Labor who relied on El Salvador's new constitution.[102]

Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293-94 (3d Cir. 1979) (mere issuance of patents by a foreign government is not foreign government compulsion). Furthermore, as the district court in *Mahoney* correctly found, "[i]f overseas employers could avoid application of the ADEA simply by embedding an age-discriminatory provision in a contract, having a foreign court enforce the contract, and calling the court's decision 'law', then the Act's extraterritorial provisions would be largely nullified, for employers could easily contract around the law." Mahoney v. RFE/RL Inc., 818 F. Supp. 1, 11-12 (D.D.C. 1992), *rev'd*, 47 F.3d 447, 450 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995). Thus, such an analysis would have been catastrophic and could have essentially eliminated any extraterritorial application. Although fortunately the court did not adopt this court enforcement type of analysis, the one employed is equally inappropriate and devoid of historical and textual support.

98. *See* Warner, *supra* note 15, at 375.

99. 871 F.2d 1412 (9th Cir. 1989).

100. *See id.* at 1419-20. In *McGhee* two U.S. employees were discharged under their employment contract executed in the U.S. which incorporated Saudi Labor Law, including a prohibition against discharge unless a valid reason can be shown. The employees began renting and selling videos from their homes which violated Saudi law prohibiting engagement of commercial activity without a license. General Othman, the Chief of Police of the Eastern Province, agreed to let the officials of the company (Aramco) handle the matter provided the employees were terminated. *Id.* at 1415. The court noted that notwithstanding plaintiffs' concession that they violated Saudi law against unlicensed business, such violation does not necessarily provide a "valid reason" for termination as provided in the contract. Moreover, the foreign compulsion defense is not normally implicated in international contract disputes especially where the dispute is governed by that sovereign's domestic law. *See id.* at 1419.

101. 748 F.2d 965 (5th Cir. 1984).

102. *See id.* at 965. Article 110 ¶ 4 of the El Salvadoran constitution provides in pertinent part: "Salvadoran public services companies will have their work center and base of operation in El Salvador." *Id.* at 968.

Similarly, the RESTATEMENT unequivocally rejects contractual agreements from falling within the scope of the defense. A comment to the RESTATEMENT's foreign state compulsion makes it clear that participation by foreign governments in "essentially private arrangements" will not invoke the defense of foreign state compulsion.[103] Further, at least one court refused to entertain the assertion of the foreign compulsion defense in a contract dispute.[104]

Additionally, the RESTATEMENT requires the imposition of severe sanctions in order to categorize a government directive as law.[105] As a RESTATEMENT comment explains, "an *order* of state X to its nationals to discriminate on the basis of race, sex, or religion . . . would not be a good defense to a charge of unlawful discrimination under United States law."[106] However, if a company in state X were able to prove that conformity with U.S. law would be a *crime* in state X, that company generally would have a good defense.[107]

Furthermore, the government decree must result from the law of the host country. The lack of Congressional debate regarding the construction of the defense, specifically the phrase "to violate the law of the foreign country," does not abrogate Congressional intent to utilize foreign law for the construction of the defense.[108] Indeed, such intent is manifest by the act's plain language. The fact that Congress did not contemplate international implications while amending employment discrimination acts to apply extraterritorially,[109] suggests an in-

---

103. RESTATEMENT, *supra* note 74, § 441 cmt. d.

104. *See* McGhee, 871 F.2d at 1419 (9th Cir. 1989) ("the purposes of foreign compulsion doctrine normally are not implicated in cases involving international contract disputes").

105. *See* RESTATEMENT, *supra* note 74, § 441 cmts. c and b.

106. *Id.* § 441 cmt. b (1986) (emphasis added).

107. *See id.* While the RESTATEMENT relies on the severity of the sanction to determine if the defense should apply, such severity relates only to the host country's law and not to the first state's law. As the RESTATEMENT explains, the limitations on the foreign state compulsion defense apply "whether the requirement or prohibition by the first state is backed by criminal or civil liability or both." *Id.* § 441 cmt. c.

108. Section 109 of the Civil Rights Act of 1991 was intended to make it "clear that employers are not required [by Title VII or the ADEA] to take actions otherwise prohibited by law in a foreign place of business." 137 CONG. REC. 9547 (1991) (Hyde Memorandum).

109. *See* Amendments to the Age Discrimination in Employment Act of 1967,

tention to protect employers against only compulsion by *foreign* law and thereby to reconcile the extraterritorial ramifications of U.S. employment law with international principles of comity and sovereignty. An alternative reading of the act, for instance that U.S. law falls within the scope of "the law of the foreign country" would necessarily infringe upon other nations' sovereignty. It is difficult to envision Congress failing to discuss such an implication. A reasonable interpretation of the act, in light of the absence of legislative discussion regarding the application of the foreign compulsion defense and in light of the plain language of the act, is that Congress intended the foreign law compulsion defense to extend to, and include only, the law of the host country.[110]

2. Foreign Compulsion Defense in Past Employment Discrimination Cases

The defense in the employment discrimination arena has been applied inconsistently,[111] but generally has been construed narrowly as well.[112] The defense has been applied in a limited number of circumstances and has not enjoyed much success. In the few cases where the defense precluded liability, the conduct was compelled by an actual law backed with substantial penalties. For instance, the EEOC held that an employer did not violate Title VII where the laws of the host country forbade the employer from hiring an otherwise qualified woman for a position as an air traffic controller. The position required contact with men, which was prohibited by that country's law.[113]

1984 U.S.C.C.A.N. 3000, 3001, 3037.

110. Representative Stenholm, for instance, expressed concern that the legislature was enacting a bill that had not adequately been discussed and pointed specifically to the issue of extraterritorial coverage. *See* 137 CONG. REC. 3945 (1991) (statement of Rep. Stenholm).

111. *See* Warner, *supra* note 15, at 389.

112. *See* Lauderdale, *supra* note 42, at 207, 216.

113. *See* Host Country Bars Hiring of Women in Foreign Job, EEOC Dec. No. 85-10, Empl. Prac. Guide (CCH) ¶ 6850, 7052 at 7054 (July 16, 1985). As this decision explained:

> The host country's laws restricting the employment opportunities of women are strictly enforced. An official letter of the host country emphasizes that private companies will not be permitted to disregard the laws against the commingling of the sexes and instructs certain of that country's ministers to investigate all private companies employing women.

However, in most employment cases, the defense did not prove to be a useful resource for defendants.[114] The defense was not permitted, for instance, to bar liability where the conduct could not be categorized as actual law. For instance, in *Bryant v. International School Services, Inc.*,[115] the local hire contract for teachers whose spouses were employed in Iran received less favorable treatment than the International School Services sponsored contract.[116] The foreign compulsion defense was not useful since neither the local hire contract itself, nor the act of concealing the differences between the two types of contracts, were mandated by the Iranian government.[117]

> Even if a woman is issued a work permit, the host country may still deport her and her employer for violating those laws.

Id. It is important to note that this decision was written prior to the amendment providing for extraterritorial application, and prior to the codification of the foreign compulsion defense as it pertains to Title VII. The EEOC, at that time, adopted a good faith approach to the foreign compulsion defense, where the company asserting the defense had to establish, with evidence, a good faith reliance on a government order. For a good discussion on the benefits of utilizing a good faith approach to the foreign compulsion defense, see Warner, *supra* note 15, at 385-86.

114. This is illustrated by Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 555 (7th Cir. 1985), where two U.S. citizens were terminated at age 65 in Germany. Although counsel for the plaintiffs had acknowledged the existence of a German "law" requiring retirement at age 65, the court refused to place great weight on what the court considered could have been an "unguarded and possibly inaccurate statement." *Id.* at 557. It is quite significant to the *Pfeiffer* case that the court was not at all convinced that such a law existed. They were very careful to articulate a distinction between custom and law, particularly for purposes of this defense. Such a distinction is consistent with the foreign compulsion defense both as it existed prior and subsequent to its codification in the 1984 amendment. Note, however, that the court was not required to resolve these difficult issues since its unwillingness to apply the amendment retroactively warranted a dismissal of the allegation. Indeed, although not required to, the *Pfeiffer* court found that the defendant had produced no evidence to prove the existence of such a law. Ultimately the court based its conclusion that plaintiff lacked a cause of action under the ADEA on the general policy against extending the reach of U.S. laws beyond U.S. territory absent clear congressional authorization. The court recognized, though, that a cause of action would have existed if a company transferred older employees abroad as a pretext for terminating them. *See id.* at 559.

115. 502 F. Supp. 472 (D. N.J. 1980) *rev'd on other grounds*, 672 F.2d 562, 565 (3d Cir. 1982).

116. *See id.* at 474.

117. *See id.* at 491. International School Services (ISS) asserted that the Iranian government required that there be no payment of double benefits. Double benefits would occur by applying the ISS-sponsored contract instead of the local hire contract to married teachers, as in that situation both spouses would be receiving benefits. However, the court found it unnecessary to determine whether the different contracts were a violation of Title VII, and thus, unnecessary to analyze a

The court in *Abrams v. Baylor College of Medicine*[118] found a Title VII violation where a medical school denied participation by two Jewish applicants on the basis of their religion. Since the College could not prove the official position of the Saudi authorities was to forbid participation of Jews, the defense failed.[119]

Where liability *was* exempted, the court relied on the BFOQ defense, not on foreign state compulsion.[120] The BFOQ defense permits employers to discharge or hire an individual due to certain attributes when either the existence of, or lack of, that attribute is necessary to perform professional duties adequately.[121] In *Kern v. Dynalectron Corp.*,[122] the BFOQ defense was applied to exempt a U.S. subsidiary in Saudi Arabia from liability for religious discrimination against helicopter pilots in a unique employment context: "Dynalectron has proven a factual basis for believing that *all* non-Moslems would be unable to perform this job safely. Specifically, non-Moslems flying into Mecca are, if caught, beheaded."[123] The court held that Saudi law compelled the discriminatory conduct and that hiring Moslems was not merely a company preference, but was an attribute employees must have in order to perform their job safely.[124]

IV. FACTUAL AND PROCEDURAL HISTORY OF *MAHONEY V. RFE/RL, INC.*

Although cases subsequent to the 1984 amendment of the ADEA providing for extraterritoriality thus far have not applied the ADEA extraterritorially, the only rationale for doing

---

foreign compulsion defense. Instead, the court found the Title VII violation occurred when the company failed to advise the employees hired locally of its basis for awarding contracts and by determining the employees' primary purpose for remaining in Iran by using criteria which discriminated against married women. *See id.* at 490. The court found that nothing in this arrangement was compelled by the Iranian government and that the foreign compulsion defense was not applicable. *See id.* at 491.

118. 805 F.2d 528 (5th Cir. 1986).

119. *See id.* at 535 (discussing the factual findings of the district court).

120. *See, e.g.*, Kern v. Dynalectron Corp., 577 F. Supp. 1196, 1200 (N.D. Tex. 1983) *aff'd*, 746 F.2d 810 (5th Cir. 1984).

121. *Id.* at 1199.

122. 577 F. Supp. at 1196.

123. *Id.* at 1200.

124. *See id.*

so was their refusal to apply the amendment retroactively. Since the amendment, courts have only had occasion to consider the extraterritorial application with regard to conduct giving rise to a cause of action which occurred prior to the amendment. Thus, such courts adhered to the well-settled principle against declaring conduct illegal which was perfectly within the confines of the law while it was performed. Absent retroactive application, these courts had no alternative but to prescribe the rule which existed prior to the amendment. They consequently adopted the FLSA analysis, excluded foreign workplaces from coverage and denied extraterritorial reach.[125]

Mahoney v. RFE/RL[126] is the first occasion courts have had to apply the amendment to a cause of action arising after 1984. A determination regarding extraterritoriality is unnecessary since the act clearly extends the protection overseas. Currently, the only issue before the courts is the scope of the amendment and the statutory interpretation of certain terms. Specifically, courts must determine what constitutes a "law of a foreign country" to afford an element of predictability and precision to the foreign compulsion defense.

In *Mahoney*, U.S. citizens were required to retire at age sixty-five from their positions at RFE/RL, a Delaware corporation with its principal place of business in Munich, Germany, under a contract executed in Germany.[127] RFE/RL applied to the Works Council[128] to exempt the U.S. citizens from the

125. *See* Lopez v. Pan Am World Svcs., Inc., 813 F.2d 1118, 1119-20 (11th Cir. 1987) (discussing a possible exception where ADEA *could* be applied to situations where employer transferred employees abroad for purpose of avoiding the act's coverage); S.F. De Yoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1283 (5th Cir. 1986) (per curiam); Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 555-56, 558 (7th Cir. 1985); Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1124 (D.C. Cir. 1985); Thomas v. Brown & Root, 745 F.2d 279, 281 (4th Cir. 1984); Zahourek v. Arthur Young & Co., 750 F.2d 827, 828-29 (10th Cir. 1984); Belanger v. Keydril Co., 595 F. Supp. 823, 824-25 (E.D. La. 1984), *aff'd*, 772 F.2d 902 (5th Cir. 1985); *see also* Wolf v. J.I. Case Co., 617 F. Supp. 858, 861, 863-64 (E.D. Wis. 1985).

126. 818 F. Supp. 1 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

127. *See id.* at 3.

128. Betriebsrat or "Works Councils" are bodies in all German companies that have at least twenty workers. These councils are elected by unionized and nonunionized employees and must approve departures from contractual agreements. They are private rather than governmental entities. *See* Mahoney v. RFE/RL, Inc., 47 F.3d 447-48 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995). *See also* NORBERT

agreement. The Works Council determined that the U.S. citizens had to retire pursuant to the labor contract. The company appealed Works Council's decision to the Munich Labor Court and lost. That court held that an exemption for U.S. employees would unfairly discriminate against Germans and that retaining them despite the agreement would be illegal.[129]

The EEOC evaluated the case and opined that no defense precluded RFE/RL's liability. Accordingly, they brought suit in the U.S. on the Americans' behalf. The district court granted a partial motion for summary judgment for the plaintiffs, denying the invocation of the foreign compulsion defense.[130] The court reasoned this was a contract binding only its parties and it had no broad application. Further, they held the agreement was between two private entities and it had not been mandated by the German government in any way.[131] Additionally, the court rejected defendant's argument that German labor policy and practice calling for a mandatory retirement age of sixty-five, notwithstanding its frequency and strength, constitute law.[132] Most importantly, the court distinguished between a law *per se* and an enforceable provision in a contract. Referring to Professor Simitis, an expert witness for the defendant, the district court wrote:

> Professor Simitis testified that the mandatory retirement provision in the union contract had "legal" force in Germany in the sense that it was legally binding. That is precisely the sense in which such contracts in this country may be said to have "legal force; yet they are not ordinarily thought of as "laws."[133]

On appeal, the Court of Appeals held that the agreement was "foreign law" and reversed. The court reasoned that since the U.S. Supreme Court held a collective bargaining agreement equated law for purposes of a rail carrier's exemption,[134] fail-

---

HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 319-20 (Tony Weir, trans., 1982).

129. *See* Mahoney, 47 F.3d at 448.

130. *See* Mahoney v. RFE/RL Inc., 818 F. Supp. 1 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

131. *See id.* at 3.

132. *See id.* at 3-4.

133. *Id.* at 3.

134. *See* Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117,

ure to comply with this labor contract was a violation of law. While the court mentions the Munich Labor Court decision, it did not rely on it as the basis for its conclusion. Stated differently, the court did not conclude that the Munich Labor Court's enforcement of the agreement elevated it to "law;" rather, the determination that the collective bargaining agreement was law was based on a U.S. case. The instant case was denied review by the U.S. Supreme Court.[135]

V. ANALYSIS OF OPINION

A. *Misplaced Analysis*

Reliance on U.S. precedent in a factually distinguishable case that had exclusively territorial application was not only misplaced but also improper. Whether a collective bargaining agreement is law in the U.S. is not the relevant inquiry; rather, the issue is whether a collective bargaining agreement is law in Germany. Further, the analysis should proceed to inquire whether the so-called "law" rises to the level of an official government mandate. Moreover, not only did the Court of Appeals err in relying on domestic precedent, but the court also misconstrued the case upon which it relied.

The Court of Appeals based its conclusion that a collective bargaining agreement was law on the Supreme Court's analysis in *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n.*[136] *Norfolk & Western*, however, is easily distinguishable from the situation that confronted the *Mahoney* court. The "all other law" provision of the act in *Norfolk & Western* was read to include a collective bargaining agreement only for a very narrow and exceptional purpose. In response to economic and social considerations, and in an effort

---

129 (1991) (holding that language in 49 U.S.C. § 11341(a), making rail carrier consolidations approved by Interstate Commerce Commission exempt from "antitrust laws and from all other law" as necessary to carry out such consolidation, encompasses "carrier's legal obligations under a collective-bargaining agreement").

135. *See* Mahoney v. RFE/RL Inc., 116 S. Ct. 181 (1995).

136. 499 U.S. 117 (1991). At no time did the Radio Free Europe/Radio Liberty (RFE/RL) cite *Norfolk & W. Ry. Co.* to support its contention. Nonetheless, the Court of Appeals concluded that "[i]f *Norfolk & Western* had been brought to the district court's attention, we have no doubt that it would have ruled the other way." Mahoney, 47 F.3d at 449. The court itself acknowledged that neither party ever raised this case in oral argument nor in any memoranda of law.

to promote the welfare of the industry, Congress attempted to encourage railroad carrier consolidations.[137] Thus, once the International Commerce Commission (ICC) approves the consolidation, a carrier "is exempt from the antitrust laws *and from all other law*, including State and municipal law, as necessary to let [the] carrier . . . carry out the transaction."[138] The Court read the phrase "all other law" to encompass a collective bargaining agreement.[139] However, a collective bargaining agreement was only considered within the definition of law "when necessary to carry out an ICC-approved transaction."[140] Indeed, the six times the Court states that a collective bargaining agreement falls within the scope of "all other law", the Court carefully concludes with this qualification, which is precisely how the statute read. The Court did not hold that a collective bargaining agreement will always be elevated to the level of law, even within the United States. The Court's holding merely assured Congressional intent to eliminate impediments to the completion of the ICC-approved consolidation transaction. Indeed, allowing a collective bargaining agreement to impede the transaction where a law could not, would be a holding defying common sense. Moreover, the Court refers to a collective bargaining agreement's contractual feel, and notes it is only binding on the parties and does not have the widespread application that law does. Therefore, reading *Norfolk & Western* as a conclusive determination that a collective bargaining agreement constitutes law in all contexts is incorrect. Had the Court of Appeals read this case in its proper context, it would have been obliged to interpret the act in a manner that would implement Congressional purpose.

Moreover, resorting to domestic precedent for a determination of whether a collective bargaining agreement was law in Germany was not proper. The accurate inquiry is whether a

137. Norfolk & W. Ry. Co., 499 U.S. at 119.

138. 49 U.S.C. § 11321(a) (1994) (formerly 49 U.S.C. 11341) (emphasis added).

139. *See* Norfolk & W. Ry. Co., 499 U.S. at 129. It is noteworthy that Justice Stevens wrote a dissenting opinion with whom Justice Marshall joined where they felt it was a "rather remarkable assumption" to include as law "the restraints created by private contract." *Id.* at 138-39 (Stevens, J., dissenting). He continued by stating "[h]ad Congress intended to convey the message the Court finds in § 11341, it surely would have said expressly that the exemption was from all restraints imposed by law or by private contract." *Id.* at 138-39.

140. Norfolk & W. Ry. Co., 499 U.S. at 119.

collective bargaining agreement is law in Germany, as the act reads the violation shall not be unlawful where compliance "would cause such employer . . . to violate the *laws of the country in which such workplace is located.*"[141] In fact, using U.S. law to define what is considered law abroad is wholly inapposite and negates the act. As a result of this holding, U.S. companies overseas are invited to research U.S. case law to find an instance where nontraditional law was considered law for purposes of one act (even in a completely factually distinguishable case) and allege that it has been conclusively defined as law.

Such a scenario permits the foreign compulsion defense to eviscerate the extraterritorial application. Additionally, by using U.S. law to make a determination about German law, the court imposes U.S. standards on Germany, implying that U.S. law is superior. Such an analysis may infringe upon the sovereignty of other nations, and may ultimately create international political problems.

If, in the alternative, the Court of Appeals had relied on the Munich Labor Court decision to conclude that the collective bargaining agreement was law, that analysis nonetheless would not have exempted RFE/RL's liability. However, such an analysis would have more support, as the text of the act invites such an inquiry. Ultimately, the court would likely have ascertained that the Munich Labor Court only approved and enforced an agreement. As the Ninth Circuit determined in *Timberlane v. Bank of America*,[142] "[m]ere governmental approval or foreign governmental involvement which defendants had arranged does not necessarily provide a defense."[143] The EEOC contends that such a court order is not a German law, and thus should not be relied on as a defense.[144] As in the United States, courts can enforce any agreement at which time it is considered enforceable, yet is not deemed to be law in the same sense that legislation with general application is. Moreover, as a civil law country, court decisions in Germany do not

141. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994) (emphasis added).

142. 549 F.2d 597 (9th Cir. 1976).

143. *Id.* at 606.

144. *See* Joy Cherian, *Current Development in Transnational Employment Rights*, 40 LAB. L.J. 259, 261 (1989).

have a stare decisis effect. The German court was thus "doing no more than applying the law when it makes a decision, the decision itself can have no force as law beyond the very case in which it is rendered."[145]

B. *Proper Determination of Law*

If the circuit court in *Mahoney* had inquired into whether the agreement at issue was law in Germany, the court would have discovered the mandatory retirement age is not part of German law and that neither is the collective bargaining agreement. The trial court did attempt to ascertain the relevant German law and the inquiry was overlooked, and thus rejected, upon review.

During oral argument on cross motions for summary judgment, the district court scrutinized the German labor law and the role of collective bargaining agreements.[146] The judge concluded the mandatory retirement age was policy, and a collective bargaining agreement was merely a legally enforceable contract.[147] The defendant, RFE/RL, informed the court that their expert witness had testified that "the collective bargaining agreement has the same force and effect as the statute."[148] The plaintiff contended that the expert witness had testified that "there was no legislation in Germany whatsoever that would require mandatory retirement for employees of private companies" and that "he indeed testified to some legislation recently enacted, which he identified in his deposition, that would put an end to mandatory retirement in employment contracts."[149] Furthermore, although the Munich Labor Court enforced the contract, that court did not rely on any legislation mandating a retirement age of sixty-five in Germany.[150] The district court judge clarified the use of the term "legislation" to mean an act of parliament or any other level. That early retirement is social policy in Germany is of no consequence.[151]

---

145. HORN ET AL., *supra* note 128, at 11.

146. *See* Lairold Street, *Extraterritoriality: Conflict of Laws*, 9 N.B.A. MAG. 16, 17 (1995) (excerpting oral argument on parties' cross motions for summary judgment).

147. *See* Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd*, 47 F.3d 447, 450 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

148. Street, *supra* note 146, at 17.

149. *Id.*

150. *See id.*

151. *See id.* The judge distinguished between formal laws and merely material

In interpreting the foreign compulsion defense, the district court in *Mahoney* clarified the distinction between law and practice:

> [a]lthough there appears to be no authority directly on point, it is difficult to imagine that Congress intended the term 'laws' to extend beyond its ordinary meaning to encompass practices, policies and contracts. Congress knows how to address the 'policies or practices' of foreign governments, as it has done expressly in legislation condemning such discrimination in the context of arms trading. 22 U.S.C. § 2755(a) & (b)(1). The foreign laws exception of § 623(f)(1), in contrast, applies only where another country's *laws* would be violated by compliance with the ADEA.[152]

The district court concluded that the mandatory retirement age of sixty-five was policy, under which a contract having legal force was made, but that neither policy nor contract were law. The court illuminated its distinction by pointing out that the mandatory retirement age "provision does not have general application, as laws normally do" and that, moreover, "[p]ractices and policies, even when embodied in contracts, are not 'laws.'"[153]

Additionally, although the court was never required to resolve the issue, in *Pfeiffer v. Wm. Wrigley Jr. Co.*,[154] Chief Judge Posner addressed whether a mandatory retirement age of sixty-five in Germany constituted law and expressed doubt that it was.[155] Despite the fact that the German government pursues a more active role in labor negotiations than the U.S. government,[156] involvement does not elevate the agreement

---

laws, concluding that "[a] formal law is a law enacted by a parliament; that is either by the federal parliament or by one parliament of the 16 states. Merely material laws are norms not enacted by parliament." *Id.*

152. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd*, 47 F.3d 447, 450 (D.C. Cir.), *cert. denied*, 116 S. Ct. 181 (1995).

153. *Id.*

154. 755 F.2d 554 (7th Cir. 1985).

155. *See id.* at 557 (summarily denying extraterritorial application of the ADEA on the ground that retroactive application to conduct occurring prior to the amendment would be inappropriate). It is noteworthy that the issue in that case was identical to *Mahoney* and that although there was no reason to inquire into the state of German law then due to the summary denial, Posner nonetheless recognized such an inquiry's relevance.

156. *See* Lauderdale, *supra* note 42, at 219.

to the level of law.

Consequently, the analysis employed by the Court of Appeals was incorrect. Moreover, had the proper inquiries been made, the court would not have found any German law mandating a sixty-five year old retirement age, nor legislation equating a collective bargaining agreement with law.

C. *Deviation from Past Application*

Such a broad interpretation of the defense is an evasion from established precedent. Equating a collective bargaining agreement—perhaps more appropriately referred to as a labor contract—with law is inconsistent with the traditionally narrow interpretation of foreign law. The instant case is distinguishable from both *Kern* and the EEOC decision, where the defense was employed successfully. Both of those cases involved conduct mandated by foreign laws, not a mere labor agreement.[157] Moreover, as the conduct in question there was illegal, severe penalties and/or sanctions would have been imposed, where here, the only likely negative consequence RFE/RL would endure is a civil suit or the imposition of fines by the EEOC.[158]

Furthermore, the departure from precedent is more manifest in this case. Not only does this case hold that a collective bargaining agreement constitutes law based on domestic application of U.S. common law, but the court holds that a mere agreement enforced by a court rises to the level of an official government mandate by a foreign government. Indeed, even directives by Saudi and El Salvadoran officials were not given such effect.[159]

The *Mahoney* decision occasions a lack of predictability in judicial understanding of a defense with increasingly widespread application and will create uncertainty for both employers and employees. It may ultimately prevent employees from accepting opportunities overseas for fear of being victims of immune discrimination, including discharge. Moreover, a vague and inconsistent interpretation may cause certain

157. *See supra* Part III.B.2. However, arguably, the *Kern* court relied on the BFOQ defense and not on foreign state compulsion.

158. *See* Lauderdale, *supra* note 42, at 219.

159. *See supra* notes 99-102 and accompanying text.

countries' corporations to believe they are victims of disparate treatment and may create international political problems.

D. Danger in Future Application: Congressional Intent Undermined

Congress was already forced to return to the drawing board and respond to the judiciary by expressly providing for extraterritorial application of employment discrimination acts. Unequivocally, Congress intends to extend employment discrimination protection. In amending Title VII and the ADA, Congress expected civil rights laws to be construed broadly to effectuate their purpose.[160] If corporations are permitted to invoke the foreign compulsion defense successfully under such a broad interpretation, the purpose of the acts will not be effectuated, but undermined; the acts which were remedial measures, will fail. Ultimately, not only will the extraterritorial provisions be nullified, but Congressional intent to extend employment protection to all U.S. citizens will be vitiated.

Such a broad and improper interpretation of the defense begs the question "what next?" After the Supreme Court's tacit approval of this decision, overseas corporations will be able to assert that several types of practices in their host countries are law. This holding will enable an American corporation overseas to research and find a domestic case holding that a nontraditional "law" is law in the U.S. and contend that therefore it is also law in the host country, whether that is actually the case or not. Alternatively, U.S. companies on foreign soil may successfully exempt their liability by including a discriminatory provision in a labor contract and enforcing it in a foreign court. Again, whether the discriminatory conduct is actually the law in the host country will be of no consequence, as the U.S. transnational companies are invited to utilize this manipulative strategy to immunize their own noncompliance.

This holding also invites multinational corporations to assert that policy and practice in a foreign country constitute law. Such concepts are inherently vague. Absent judicial guid-

160. *See* H.R. REP. NO. 102-83, 102d Cong., at 20 (1991). ("[a]ll Federal laws protecting the civil rights of such persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies").

ance in distinguishing them from "law," U.S. companies overseas inevitably will allege that traditions and customs are law, and likely will be successful. Once the distinction between law and policy disintegrates, the defense potentially will succeed 100% of the time. Consequently, any act applying extraterritorially will be completely nullified by its foreign compulsion defense. A more perfect example of an exception swallowing a rule cannot be envisioned. Thus, such an interpretation cannot be tolerated.

VI. CONCLUSION

This decision is so crucial and so troubling since it was the first to arise after the ADEA's amendment became effective[161] and this was the first court with the opportunity to construe the foreign law conflict exception under the ADEA. In fact, the EEOC took this case and attempted review by the U.S. Supreme Court precisely to achieve a determination of "foreign law" for purposes of the foreign compulsion defense, and finally to afford a remedy to seniors victimized by age discrimination overseas.[162] To much chagrin, the Court of Appeals not only ascertained a vehicle by which to deny overseas protection, they defined foreign law so expansively, they grossly deviated from established precedent, and confused the state of the law regarding the scope of the foreign compulsion defense for the ADEA, the ADA, and Title VII.

Courts have strained to find rationales to preclude extraterritorial application of U.S. laws ever since U.S. employees sought to protect their legal national rights in U.S. courts. In antitrust litigation, courts developed the defense of sovereign state compulsion to preclude liability. Additionally, the judiciary adopted the confusing and tenuous FLSA analysis which relied on several, and substantively immaterial incorporations before one can conclude the ADEA has only territorial effect. Even subsequent to the ADEA's amendment, courts determined that the cause of action occurred prior to the amendment to justify not applying the amendment because of con-

161. *See* Lauderdale, *supra* note 42, at 208.

162. Telephone Interview with Lairold M. Street, Senior International Attorney, Office of the Chief Counsel, Department of Commerce (Oct. 14, 1996). Mr. Street was formerly litigation advisor for the external litigation branch of the EEOC and was co-counsel for the *Mahoney* class in their action against RFE/RL.

cerns of retroactivity. Regarding the ADA and Title VII, courts expanded the definition of the BFOQ defense to include preferences by foreign countries. Alternatively, with respect to the ADA and Title VII, courts simply held legislative directives to extend the acts overseas were necessary. Finally, Congress amended all the discrimination acts to extend extraterritorially, and out of equity to multinational corporations, it also incorporated the foreign compulsion defense. Indeed, the legislature accepted the invitations of several courts, including the Supreme Court, to extend the application explicitly. Yet, courts still strain to find an exception upon which they can justify precluding overseas protection as the Court of Appeals did in *Mahoney v. RFE/RL, Inc.*

This case was wrongly decided. Beyond the global implications of such a misplaced analysis, the U.S. workers victimized by blatant age discrimination are left unemployed and unremedied. In today's increasingly global community, similar scenarios will only proliferate.

Accordingly, it is incumbent upon the U.S. Supreme Court to review a foreign compulsion defense case and conclusively to determine its interpretation. The lack of precision in the defense, prevalent in so many acts, is unfair to both employees and employers. Moreover, the Court should establish that the interpretation is to be narrow, and that the employer relying on the defense must prove that the host government actually compelled the violation. A reading that is consistent with most of the foreign compulsion defense cases would be the only manner in which Congressional purpose can be implemented.

Randi Seltzer