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Does Title VII Apply in Saudi Arabia? An Analysis of EEOC v. Arabian American Oil Co.

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Does Title VII apply in Saudi Arabia?

Equal Employment Opportunity Commission

v.

**Arabian American Oil Company and
Aramco Services Company**

(Docket No. 89-1838)

Ali Boureslan

v.

**Arabian American Oil Company and
Aramco Services Company**

(Docket No. 89-1845)

Argument Date: Jan. 16, 1991

ISSUE

Did Congress intend that the mandates of Title VII prohibiting employment discrimination apply extraterritorially? Was it Congress' intent to regulate the employment practices of United States' companies vis-a-vis United States' citizen-employees where the employment occurs outside the territorial boundaries of the United States?

FACTS

Ali Boureslan is a naturalized United States citizen. He was born in Lebanon and his religion is Moslem. He began working for Aramco Services Company as an engineer in Texas in 1979. In 1980 he requested and was given a transfer to work for Arabian American Oil Company (ARAMCO) in Saudi Arabia. During his tenure of employment in Saudi Arabia, Boureslan claims that he was harassed by his supervisor because of his race, religion and national origin and that subsequently he was terminated for these same reasons. He sued both Aramco Services Company and ARAMCO in the United States District Court for the Southern District of Texas, alleging that his harassment and subsequent discharge violated both Title VII and the laws of the State of Texas.

The defendants Aramco Services Company and ARAMCO filed a motion to dismiss, arguing that the court lacked subject matter jurisdiction over the claim because Title VII does not apply to conduct occurring outside the

United States. The district court agreed and dismissed the complaint. 653 F.Supp. 629. On appeal to the United States Court of Appeals for the Fifth Circuit, a divided panel upheld the decision of the district court, finding that Congress did not intend for Title VII to have extraterritorial application. 857 F.2d 1014. Upon a rehearing en banc, the Fifth Circuit again affirmed the dismissal of the complaint. 892 F.2d 1271.

BACKGROUND AND SIGNIFICANCE

Congress possesses the power to enact legislation that has extraterritorial application. The presumption, however, is that when Congress passes a statute it intends that the legislation will apply only within the territorial jurisdiction of the United States. This presumption has two bases: first, that Congress is primarily concerned with domestic matters, and second, that the presumption serves to prevent needless conflicts between the laws of the United States and other sovereign nations. This presumption can be rebutted if the legislation itself indicates that Congress intended for it to be applied to conduct occurring outside the United States.

The issue therefore is whether Congress, in passing legislation, has expressed an intent that it be applied extraterritorially. Most labor laws have been interpreted as not having extraterritorial application, although in 1984 Congress amended the Age Discrimination in Employment Act (ADEA) to explicitly provide for its application to U.S. corporations doing business abroad.

This case involves a pure question of statutory interpretation. Is there in the text of Title VII the requisite expression of intent by Congress that its protections apply to U.S. citizens working for U.S. corporations in foreign countries?

The Supreme Court's answer to this question will have a profound effect on the employment opportunities of many Americans. There are some 2,000 U.S. firms operating more than 21,000 foreign subsidiaries in 121 foreign nations, and approximately 2 million U.S. citizens reside abroad. Overseas assignments are often a necessary step for advancement within a corporation, and certainly enhance an applicant's desirability for employment and provide additional employment opportunities not always available to one with more limited experience. Whether access to these opportunities will be provided on an equal basis will be determined by the Court's decision on the extraterritorial application of Title VII.

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ARGUMENTS

For the Equal Employment Opportunity Commission (Counsel of Record, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217).

1. Title VII's language indicates congressional intent that it be applied to prohibit U.S. corporations from discriminating against U.S. citizens employed outside the United States. The statutory definition of covered employers includes employers who engage in both interstate as well as foreign commerce. The prohibition against unlawful employment practices is not limited to practices that occur in a particular place.
2. The alien exemption contained in section 702 of Title VII is a clear indication that Congress intended the statute to apply to U.S. citizens employed abroad. Section 702 states that Title VII does not apply to the employment of aliens outside the United States, clearly implying that it does apply to the employment of U.S. citizens outside the United States. If the statute were not intended by Congress to apply extraterritorially, there would have been no reason to specifically exclude from coverage a specific class of individuals employed outside the United States. The legislative history of section 702 also indicates that Congress' purpose in including the exemption was to remove potential conflict of law problems which could arise between the United States and foreign nations with respect to the employment of aliens outside the United States.
3. The venue provisions of Title VII do not mitigate against its extraterritorial application. The statute provides for venue in four alternative locations, only one of which is unavailable to a citizen employed outside the United States. Venue would be available in any case in which the defendant employer had an office in the United States. Even if there were a venue gap in some cases where discrimination occurs abroad, this gap does not mandate that the statute should not apply extraterritorially. There is no reason to assume that Congress linked the venue provision to the jurisdictional scope of the statute.
4. The fact that Title VII limits the EEOC's subpoena powers to the territorial confines of the United States does not suggest that its scope is also so limited. The territorial limitation affects only the EEOC's subpoena power; its investigatory, conciliatory and prosecutorial powers are not so circumscribed. Moreover, "there is no necessary relationship between an agency's subpoena power and the scope of the statute it is empowered to enforce."
5. The two federal agencies charged by Congress with the enforcement of Title VII, the EEOC and the Department of Justice, have consistently interpreted Title VII as protecting U.S. citizens employed abroad.
6. Any potential conflict between the extraterritorial application of Title VII and foreign law is minimal. The

alien exemption mitigates most potential conflicts and represents the balance struck by Congress between eradicating discrimination and avoiding conflicts. The extraterritorial application of Title VII covers only U.S. corporations and U.S. citizens. Congress is not deprived of its authority to govern its own citizens in foreign countries, even if the foreign government itself also regulates the conduct. International law recognizes the possibility of dual regulation. Moreover, in light of the emerging international consensus prohibiting employment discrimination, the possibility that foreign law will require a U.S. corporation to discriminate is rare. Even if that rare possibility were to occur, defenses available under Title VII, such as the bona fide occupational qualification defense and the legitimate non-discriminatory reason defense, would likely justify an employer's compliance with foreign law.

7. The fact that Title VII provides for deference to consistent state law procedures but does not make provision for foreign law is not persuasive that Congress did not intend extraterritorial application.
8. The 1984 amendments explicitly extending the coverage of the ADEA abroad do not indicate that Congress did not intend Title VII to apply abroad. The ADEA amendments were enacted only after several courts had held that it did not apply abroad, whereas, until the instant case, all those courts which had considered the issue had held that Title VII did apply abroad. Also, the sponsor of the ADEA amendments indicated they were needed to clear up an anomaly between the extraterritorial application of Title VII and the ADEA.

For Arabian American Oil Company and Aramco Services Company (Counsel of Record, Paul L. Friedman; White & Case, 1747 Pennsylvania Ave., NW, Washington, DC 20006; telephone (202) 872-0013).

1. Federal law is presumed to apply only to conduct within the territorial confines of the United States unless there is a clear and affirmative expression of congressional intent to apply the statute extraterritorially. Such a clear and affirmative statement is not found in Title VII.
2. Title VII's definition of commerce, which describes the breadth of Congress' use of its broad powers under the commerce clause, makes no mention of commerce with foreign nations. Indeed, the foreign nations language was included in an early version of Title VII but was subsequently deleted. The commerce definition contained in Title VII was derived from the National Labor Relations Act, which law has been held by the Court not to have extraterritorial application.
3. The alien exemption found in section 702 is not a clear and affirmative expression of extraterritorial applicability. The purpose of the alien exemption was two-fold: It was meant to exempt from regulation the employers of aliens where such employment occurs in U.S. pos-

sessions (as opposed to U.S. territories or states) and to confirm that Congress meant to protect aliens employed within the U.S. territories and states.

4. Extraterritorial application of Title VII is inconsistent with its domestic focus. The statute specifically makes provision for accommodating the application of consistent state laws with no mention made for foreign laws, whereas Congress in extending the reach of the ADEA abroad specifically made provision for conflicting foreign law. The investigative authority of the EEOC as well as the venue provisions of the statute are both focused on domestic coverage. To accept the reading of the statute as advocated by the EEOC would result in its application not only to U.S. employers of U.S. citizens abroad but also to foreign employers of U.S. citizens abroad.
5. Many sovereign states have employment discrimination laws designed to deal with the problem in a manner appropriate to their national conditions and practice. Congress could not have intended to impose U.S. substantive and procedural law on nations which already deal with this issue in their own way. Application of U.S. law would create direct conflict between U.S. procedures and those of other sovereign nations.
6. The EEOC's interpretation of Title VII as applying extraterritorially is not entitled to deference by the Court. The EEOC's position is supported by neither the language of the statute itself nor its legislative history. Moreover, its interpretation was neither contemporaneous with the passage of Title VII nor consistent over the years since the law's passage.
7. Policy reasons support limiting Title VII's jurisdiction to the United States. Extraterritorial application would create conflict with foreign law, which would create a profusion of litigation and friction with foreign nations. Foreign employers may forego employment of U.S. citizens for fear of liability under U.S. laws.

AMICUS BRIEFS

In Support of All Boursian and the Equal Employment Opportunity Commission

The International Human Rights Law Group (*Counsel of Record, Robert Plotkin; Washington, Perito & Dubuc, 1120 Connecticut Ave., NW, Washington, DC 20036; telephone (202) 857-4000*):

1. The extraterritorial application of Title VII is consistent with international legal principles. International law recognizes that the nature and significance of a state's interests may justify that state in exercising its jurisdiction extraterritorially.
2. The nationality principle provides a jurisdictional basis for Title VII's extraterritorial application. The nationality principle recognizes a state's significant interest in regulating the conduct of, and protecting, its own nationals.
3. The extraterritorial application of Title VII is not un-

reasonable. Reasonableness is determined by considering several factors. Discrimination against a U.S. national abroad by a company incorporated in the United States can impact both the U.S. economy and the livelihood of U.S. citizens. Another factor to consider is that regulation of employment discrimination involves a fundamental and generally recognized human right important not only to the United States but to the international community. A third factor relates to the existence of justifiable expectations that may be helped by the regulation. In light of the strong U.S. policy prohibiting discrimination, a U.S. citizen can justifiably expect to receive the benefit of that policy vis-a-vis a U.S. corporation even if employed by the corporation abroad. Finally, the likelihood of conflict with foreign law is minimal. Saudi law prohibits discrimination generally, as well as specifically prohibiting termination from employment for discriminatory purposes. As a signatory to the ILO Convention concerning employment discrimination, Saudi Arabia is obligated to protect its citizens from discrimination based on, among other things, race, religion and national origin.

The Lawyers' Committee for Civil Rights Under Law (*Counsel of Record, Gary B. Born; Wilmer, Cutler & Pickering, 2445 M St., NW, Washington, DC 20037; telephone (202) 663-6000*):

1. The presumption that federal laws apply only within U.S. territory is outmoded and no longer of any validity. The presumption of territoriality is grounded in the 18th and 19th century principles of international law, which held that there were strict territorial limits to national jurisdiction. Those strict territorial limits are no longer recognized in current international law, which provides that jurisdiction may be based on nationality, on the "effects" principle, on so-called universal offenses, and on the protective principle. The territorial presumption is also based on the premise that Congress is primarily concerned with domestic events. This premise is no longer valid in a century of "dramatic and exponential growth in transnational trade and international commercial interdependence." With increasing regularity, Congress passes laws dealing with extraterritorial matters.
2. International choice of law principles are the correct standard for determining the extraterritorial reach of ambiguous federal law. Choice of law analysis looks to the links between the regulating state and the actors, the legitimate interest of the state in regulating the activity in question, the nationality of the injured party and the effects of the activity upon the regulating state. Applying this analysis, choice of law principles support the extraterritorial application of Title VII.

The NAACP Legal Defense and Educational Fund, Inc., The American Jewish Committee, the American Jewish

Congress, the Anti-Defamation League of B'nai B'rith, and the Women's Legal Defense Fund (*Counsel of Record, Charles Stephen Ralston, the NAACP Legal Defense and Educational Fund, Inc., 99 Hudson St., 16th Floor, New York, NY 10013; telephone (212) 219-1900*); the American Civil Liberties Union, the Women's Law Fund, Inc., the International Labor Rights Education and Research Fund, Carole D. Akgun and Gloria Contreras (*Counsel of Record, Jane M. Picker, Cleveland-Marshall College of Law, 1801 Euclid Ave., Cleveland, OH 44115; telephone (216) 687-3947*).

In Support of Arabian American Oil Company and Aramco Services Company

Rule of Law Committee and the National Foreign Trade Council, Inc. (*Counsel of Record, Cecil Olmstead; Steptoe & Johnson, 1330 Connecticut Ave., NW, Washington, DC 20036; telephone (202) 429-3000*):

1. International law limits the ability of a state to regulate activities outside its territory. Territoriality is the norm for jurisdiction and nationality is the exception. The nationality principle must defer to the territorial principle.
2. Although international conventions recognize the obligation of nations to adopt standards of nondiscrimination, these same documents also recognize that the standards must be applied within the context of each nation's laws and policies and with a respect for the sovereignty of nations.
3. The prevailing international practice is to regulate employment discrimination on a territorial basis, not extraterritorially.

4. Application of Title VII abroad would be unreasonable and therefore contrary to accepted principles of international law. The territorial links with the United States are weak in this case: All the conduct occurred overseas; although incorporated in the United States, Aramco's offices, installations and headquarters are all overseas; and while Boureslan is a U.S. citizen, his residency and activity were overseas. Employment relationships have historically been regulated by the host state. There is no basis for a U.S. citizen to expect that his employment abroad would be regulated by Title VII. Extraterritorial application of Title VII would be inconsistent with the international system, which views labor relations as primarily a matter of local concern. Lastly, application of Title VII overseas would conflict with the provisions of Saudi law giving it exclusive jurisdiction over labor relations in Saudi Arabia.

The Society for Human Resources Management (*Counsel of Record, Kenneth Kirschner; Breed, Abbott & Morgan, Citicorp Center, 153 East 53rd St., New York, NY 10022; telephone (212) 888-0800*); The Washington Legal Foundation (*Counsel of Record, Jeffrey I. Zuckerman; Curtis, Mallet-Prevost, Colt & Mosle, 1735 I St., NW, Washington, DC 20006; telephone (202) 331-9797*); The Equal Employment Advisory Council (*Counsel of Record, Douglas S. McDowell; McGuinness & Williams, 1015 Fifteenth St., NW, Suite 1200, Washington, DC 20005; telephone (202) 789-8600*).