Tethered Rights: Liability of American Corporations for Their Foreign Subsidiaries’ Violations of Title VII

Sam Sedaei*

I. Introduction

Corporations in the free marketplace constantly look for ways to secure advantages over their competitors. As the global economy becomes more integrated, free market competition has led corporations to expand beyond their borders. As part of this trend, an increasing number of American companies are establishing an international presence through mergers and acquisitions. Whether the goal is to benefit from cheap labor, gain access to talent or new markets, or isolate risk, companies have to navigate international laws in a variety of areas. An area of the law that is becoming growingly relevant to globalizing companies is employment law.

* Sam Sedaei is a Labor & Employment Attorney in Chicago. His practice is focused on all aspects of labor and employment law. His cases often involve questions regarding the liability of large multinational corporations. Sam is a 2014 graduate of The George Washington University Law School.


Title VII of the Civil Rights Act of 1964 (Title VII) is generally seen among most American employment law practitioners as the most fundamental transformation of employees’ rights in the United States in the twentieth century. Title VII prohibits discrimination in the workplace on the basis of race, color, religion, sex, and national origin. Since its inception over fifty years ago, Title VII has been amended by the United States Congress a number of times, and interpreted by the courts hundreds of times, in ways that have changed its reach and applicability. As global commerce continues to intersect with employment law, American courts growingly find themselves in the position of having to decide the global reach of Title VII, and its capacity to protect employees’ rights beyond American borders.

As this article will explain, an American parent corporation may be held liable for the actions of its foreign subsidiary under Title VII if the plaintiff is a U.S. citizen and the American parent controls the foreign subsidiary. The article begins with a discussion of the extraterritoriality of Title VII prior to 1991 through an analysis of the text of the statute and judicial interpretations. It will then analyze the changes made to the statute in 1991 to expand its applicability beyond U.S. borders and the courts’ application of the revised statute to scenarios involving international plaintiffs. The article will conclude by offering a few practice pointers for plaintiffs seeking to enforce their rights outside of the United States, U.S. corporations and their subsidiaries that wish to limit their liability under Title VII, and courts that have to grapple with threshold jurisdictional issues in international Title VII cases.

II. Title VII Before 1991

A. The Text of Title VII

Since its enactment, Title VII has prohibited discrimination on the basis of race, color, religion, sex, and national origin. The statute puts forth definitions for various terms used in the text of Title VII through which Congress has limited Title VII’s applicability. Two of these terms are “employer” and “employee.”

In the pre-1991 version of Title VII, “employer” was defined as follows:

The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working
day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person[.]\textsuperscript{10}

Furthermore, Title VII defined an “Employee” in the following way:

The term “employee” means an individual employed by an employer . . . .\textsuperscript{11}

Title VII, as drafted before 1991, did not contain any provisions that addressed its international reach and applicability.


In 1990, the United States Supreme Court first addressed the question of whether Title VII protected employees working beyond U.S. borders from discrimination in E.E.O.C. v. Arabian American Oil Co.\textsuperscript{12}

The plaintiff Bouserlan, a naturalized United States citizen born in Lebanon, worked in Saudi Arabia, for Aramco Service Company (ASC), a subsidiary of Arabian American Oil Company (Aramco), both Delaware corporations.\textsuperscript{13} Aramco’s principal place of business was Dhahran, Saudi Arabia, while ASC’s was Houston, Texas.\textsuperscript{14} After the plaintiff was discharged by Aramco, he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission) against both Aramco and ASC and consequently filed a suit in the U.S. District Court for the Southern District of Texas, seeking relief under both state law and the Civil Rights Act of 1964, alleging that he was harassed and ultimately discharged due to discrimination on the basis of his race, religion, and national origin.\textsuperscript{15} Defendants filed a motion for summary judgment, arguing that the district court lacked subject matter-jurisdiction over the plaintiff’s claim because Title VII did not protect U.S. citizens abroad from discrimination by American employers.\textsuperscript{16} The district court agreed and dismissed the plaintiff’s claim. The Fifth Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari to resolve what it viewed as an “important issue of statutory interpretation.”\textsuperscript{17}

The Supreme Court held that Title VII did not apply extraterritorially to regulate the employment practices of United States firms that employed American citizens abroad.\textsuperscript{18} The Court first acknowledged the widely understood idea that Congress has the authority to

\begin{itemize}
  \item \textsuperscript{10} 42 U.S.C. § 2000e (1988).
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} 499 U.S. 244 (1991).
  \item \textsuperscript{13} Id. at 244.
  \item \textsuperscript{14} Id. 247.
  \item \textsuperscript{15} Id. at 244.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
\end{itemize}
enforce its laws beyond U.S. borders, but coupled this analysis with the notion that “the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” It was the Supreme Court’s job to decide whether Congress had intended the protections of Title VII to apply to U.S. citizens employed by American companies abroad.

In conducting its analysis, the Court addressed three main arguments made by the plaintiff in arguing extraterritoriality of Title VII. First, the plaintiff argued that in the statute’s definitions, the terms “employer” and “commerce” were broad, and without limiting qualifiers, applicable to U.S. companies hiring Americans abroad. Secondly, he argued that the statute’s inclusion of a so-called “alien exemption” clause implied that Congress intended to protect American citizens from discrimination abroad. Lastly, he argued that the EEOC had consistently held that Title VII was applicable abroad and that the Court should defer to the Commission’s interpretation of Title VII.

The Court took the position that while the plaintiff’s arguments were “not totally lacking in probative value,” they did not overcome the presumption against extraterritoriality. The Court saw the language cited by the plaintiff as ambiguous and not speaking directly to the question at hand. The Court saw this presumption as strong enough to not be overcome, even when a statute contains broad language in its definition of “commerce” that expressly refers to “foreign commerce.” Relying on the presumption and the Court’s previous case law, the Court held that plaintiff’s argument about Title VII’s jurisdictional language failed.

19. Id. at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
20. Id.
21. Id. at 248–49. An employer is subject to Title VII if it has employed fifteen or more employees for a specified period and is “engaged in an industry affecting commerce.” 42 U.S.C. § 2000e(b) (2012). An industry affecting commerce is “any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ‘affecting commerce’ within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.” Id. § 2000e(h). “Commerce,” is defined as “trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.” Id. § 2000e(g).
22. 42 U.S.C. § 2000e-1(a) of Title VII contains a so-called “aliens exemption,” which provides: “This subchapter shall not apply to an employer with respect to the employment of aliens outside any State . . . .”
24. Id.
25. Id. at 250.
26. Id. at 251.
27. Seeming intent on protecting the strength of the presumption against extraterritoriality, Justice Rehnquist explained that any Acts of Congress are based on the authority of that body to regulate commerce among the several States, and the parts of
With regards to the “alien exemption,” the Court opined that if the exemption carries with it the corollary that Title VII protects American workers abroad, the interpretation would technically result in the law’s application to foreign employers hiring U.S. citizens abroad as well. “Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk.” While the EEOC argued that such an interpretation would not be applicable because the “employer” meant “American employer,” the Court observed that neither the statute, nor the EEOC’s own past decisions lent support to such a presumption. Acknowledging the vague language of the statute, Justice Rehnquist explained: “Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country’s employment-discrimination regime upon foreign corporations operating in foreign commerce.”

The Court also highlighted a number of other aspects of Title VII to further validate its interpretation of the statute. Specifically, it saw the statute as lacking any mechanism for the extraterritorial enforcement of the statute. For example, Title VII provisions contemplated only “any judicial district in the State” to be a proper venue for litigation. In addition, the EEOC was granted only a limited investigative authority under which it could only issue subpoenas for witnesses and documents from “any place in the United States or any Territory or possession thereof,” which further lent support to the notion that Congress did not intend to have Title VII be applied extraterritorially.

The Court also addressed the argument that the EEOC’s consistent interpretation of Title VII to apply abroad must be given deference. The Court explained that because Congress did not confer on the EEOC the authority to promulgate rules and regulations, the level of deference given to the Commission’s guidelines “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

In the Court’s view, the EEOC’s interpretation did not fare well. First, these Acts setting forth the basis for legislative jurisdiction will obviously refer to such commerce in one way or another. If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.

Id. at 253.
28. Id. at 255.
29. Id.
30. Id.
31. Id. (citing § 2000e-5(f)(3) (2012)).
32. Id. at 257.
the Commission’s earlier interpretations had held that Title VII only protected individuals domiciled and residing in the United States.33 Second, because the EEOC’s interpretation that Title VII had extraterritorial effect was not formed contemporaneously with the passage of the law, but twenty-four years later, its persuasive value was limited.34

The Court concluded by acknowledging that “[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.”35 For example, when several courts held that the Age Discrimination in Employment Act (ADEA) did not apply overseas, Congress made changes to the definition of “employee” in that law and added a provision that stated that “[i]f an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.”36 “Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.”37

With these last words, the Court delivered a clear message to Congress: for Title VII to be applicable beyond U.S. borders, Congress had to act.

III. Title VII After 1991

Less than one year after Arabian American Oil Co., Congress heeded the Supreme Court’s decision and made a number of changes to Title VII, clearly establishing its extraterritorial applicability.

A. The Text of Title VII

Congress implemented a number of changes to Title VII with the passage of the Civil Rights Act of 1991, designed to explicitly expand (or clarify) the reach of Title VII. First, the definition of “employee” was changed38 with the following addition: “With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”39

In addition, while the 1991 Act did not change the definition of “employer,” the following provision was added to expand its applicability: “If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or

33. Id.
34. Id.
35. Id. at 258 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989)).
36. Id. at 258–59.
37. Id. at 259.
2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.”

The statute also provides guidance on the factors that must be considered when determining the level of “control” an employer has over a foreign corporation:

For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

(A) the interrelation of operations;
(B) the common management;
(C) the centralized control of labor relations; and
(D) the common ownership or financial control, of the employer and the corporation.

**B. Legislative Intent**

Throughout the process of modifying Title VII, members of Congress made no secret of their intent and spoke on the record in support of the notion that the changes were being made to offer protections for American employees abroad. In supporting the legislation, Senator Ted Kennedy stated that the changes were intended to “extend the protections of Title VII and the Americans with Disabilities Act (ADA) to American citizens working overseas for American employers.”

It is also important to note that the 1991 amendments to Title VII were modeled after the 1984 amendments to the Age Discrimination in Employment Act (ADEA), enacted to grant extraterritorial jurisdiction under that statute.

**C. “Citizenship” Requirement**

Following the passage of the 1991 Act, federal courts in various cases have acknowledged the expansion of the definition of “employee” to include American citizens working abroad. One such case is *Iwata v. Stryker Corp.*, in which a former employee, a Japanese citizen, brought an action against an American corporation and its Japanese subsidiary, alleging discrimination based on race and national origin, as well as retaliation under Title VII. The Plaintiff also alleged violations of

---

40. *Id.* § 2000e-1(c)(1).
41. *Id.* § 2000e-1(c)(3).
43. *Id.*; see 29 U.S.C. § 623(f), (h) (2012).
45. 59 F. Supp. 2d 600, 602 (N.D. Tex. 1999).
the ADEA. The parent corporation moved to dismiss for lack of subject matter jurisdiction.46

The U.S. District Court for the Northern District of Texas granted the defendant’s motion.47 In doing so, the court also delved into Title VII with regards to the specific issue of who is a protected “employee” under Title VII. As the court explained, following the Supreme Court’s decision in Arabian American Oil Co., Congress passed the 1991 Act to give it what the Iwata court called a “limited extraterritorial approach.”48 After highlighting the relevant changes to Title VII, the court observed that the revised sections “establish that Title VII applies abroad only when (1) the employee is a citizen of the United States and (2) the corporation is controlled by an American employer.” Therefore, despite Title VII’s expansion, Iwata, as a Japanese citizen, was not covered under Title VII.49

This strict interpretation of an “employee” was also followed by the United States District Court for the District of Kansas. In Russell v. Mid-West Werner & Pfleiderer, Inc., an employee brought an employment discrimination action against the American subsidiary of a foreign corporation under Title VII.50 The court issued an opinion on the issue of whether the foreign employees of the foreign parent were to be counted as the U.S. subsidiary’s employees for the purpose of determining the applicable statutory damages cap under 42 U.S.C. § 1981a(b)(3).51 Plaintiffs argued that the foreign parent should be considered an “employer” under the so-called “integrated enterprise test,”52 making its employees count for the purposes of damages cap. The defendant argued against the inclusion of the parent’s employees by arguing, in part, that foreign corporations are not subject to the provisions of Title VII.53

The Russell court sided with the defendant. Citing a number of cases from various jurisdictions, it held that “[f]oreign employees of a foreign corporation are not considered employees for purposes of counting the total number of the defendant’s employees[,]” regardless of whether the parent and subsidiary were an integrated enterprise.54

46. Id. at 601.
47. Id.
48. Id. at 603.
49. Id.
51. Under 42 U.S.C. § 1981a(b)(3), the sum of the amount of compensatory damages awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded are capped according to the size of the employer, ranging from $50,000 to $300,000. Id. § 1981a(b)(3).
52. Russell, 955 F. Supp at 114. The “integrated enterprise test” is discussed later in this article.
53. Id.
54. Id. at 115.
The court stated that its ruling was based on two statutes: 42 U.S.C. § 2000e(f), which defined “employee” as including an individual who is a citizen of the United States, and 42 U.S.C. § 2000e-1(c)(2), which provided that “Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.”

The court’s interpretation is particularly notable because the issue before it was not whether a foreign employee is protected by Title VII, but whether a foreign person should count as an employee merely for the purpose of determining the size of the employer. Not all courts have followed such a strict approach. For instance, in Morelli v. Cedel, the Second Circuit Court of Appeals rejected Russell court’s rationale. The plaintiff in Morelli sued a Luxembourg bank and its New York branch office under the ADEA. Defendants moved to dismiss the complaint, arguing that the ADEA did not apply to foreign entities and the bank’s domestic branch office had less than twenty employees (the minimum required by statute).

The Second Circuit denied the defendants’ motion, explaining that employees under age forty were included in the count, even though they were not protected by the statute. As the court analyzed the issue, “The nose count of employees relates to the scale of the employer rather than to the extent of protection.” The court also explained that the reasons for the inclusion of a minimum-employee requirement included “(1) the burdens of compliance and potential litigation costs; (2) the protection of intimate and personal relations existing in small businesses; (3) potential effects on competition and the economy; and (4) constitutionality concerns under the Commerce Clause.” The court borrowed these factors from Tomka v. Seiler Corp., a Title VII case. But it explained that while the legislative history of ADEA did not shed light on the reason for the inclusion of minimum employee requirement, the statute was modeled after Title VII, and the factors for the inclusion of the minimum employee requirement under Title VII just listed also applied to the ADEA. It then went on to conclude that “[n]one of these reasons suggests that whether a foreign employer is subject to the ADEA should turn on the size of its U.S. operations alone.” Therefore, the court held, employees of the foreign corporation

55. Id.
56. 141 F.3d 39, 41 (2d Cir. 1998).
57. Id.
58. Id.
59. Id. at 44–45.
60. Id. at 45.
61. Id. (quoting Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995)).
62. 66 F.3d 1295, 1314 (2d Cir. 1995).
63. Morelli, 141 F.3d at 45.
were properly counted for the purpose of determining whether the defendant was an “employer” under the ADEA.\(^{64}\)

But while there has been some point of disagreement over the applicability of the citizenship requirement, parties and cases appear to have more intensely focused on the other change made to Title VII in 1991: the applicability of Title VII to “controlled” corporations abroad.

D. Foreign Employer

1. The EEOC’s Guidelines

The Supreme Court has previously held that the EEOC is only entitled to limited deference regarding its interpretation of Title VII because of its lack of rule-making authority.\(^{65}\) Nonetheless, because it is the first stop for most\(^{66}\) employment discrimination actions, it is helpful to understand how the EEOC interprets Title VII as it relates to the liability of foreign employers for violations of U.S. equal employment opportunity laws.

In discussing employment outside the United States, the EEOC takes the position that “U.S. citizens who are employed outside the U.S. by a U.S. employer—or a foreign company controlled by [a] U.S. employer—are protected by Title VII, the ADEA, and the ADA.”\(^{67}\) This interpretation should not come as a surprise, given the wording of the 1991 Act previously discussed. The EEOC further delves into the meaning of “control,” explaining:

An employer will be considered a U.S. employer if it is incorporated or based in the United States or if it has sufficient connections with the United States. Several factors help determine whether a company has sufficient connections with the U.S., including the company’s principal place of business and the nationality of its dominant shareholders and management. Whether a foreign company is controlled by a U.S. employer will depend on the interrelation of operations,

\(^{64}\) Id.

\(^{65}\) See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (explaining that “Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability”); see also Eric Dreiband & Blake Pulliam, Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin? 32 ABA J. LAB. & EMP. L. 93, 94–98 (2016).

\(^{66}\) While Title VII, the ADA, and the ADEA require the plaintiff to initially file a charge with the EEOC, the Equal Pay Act has no such requirement. Filing a Charge of Discrimination, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, https://www.eeoc.gov/employees/charge.cfm (last visited Oct. 4, 2018).

common management, centralized control of labor relations, and common ownership or financial control of the two entities.68

There are two distinct sections to the aforementioned portion of the EEOC’s guidelines. The first portion focuses on the kind of entity that is considered a “U.S. employer.” It’s critical to understand that an employer does not have to be located in the United States to be considered a “U.S. employer” for the purposes of Title VII. A company with sufficient contacts with the U.S. can be considered a U.S. employer, regardless of its location. Some factors to be considered for the purpose of determining the nationality of an employer are included in the EEOC’s guideline.69

The second portion of the EEOC’s cited guideline focuses on whether a foreign corporation is controlled by a U.S. employer. It restates the factors stated in Title VII that are to be considered for this determination and provides further details in its own Compliance Manual (Manual), section 2(III)(1)(a)(iii). That section, in turn, discusses situations in which two or more entities’ operations can be so intertwined that they can be considered a single employer.70 Here, the Manual provides additional factors to consider:

• The degree of interrelation between the operations
• Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses;
• Sharing of payroll and insurance programs;
• Sharing of services of managers and personnel;
• Sharing use of office space, equipment, and storage;
• Operating the entities as a single unit.
• The degree to which the entities share common management
  • Whether the same individuals manage or supervise the different entities;
  • Whether the entities have common officers and boards of directors.
• Centralized control of labor relations
  • Whether there is a centralized source of authority for development of personnel policy;

68. Id.
69. Id.
• Whether one entity maintains personnel records and screens and tests applicants for employment;
• Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common;
• Whether the same persons make the employment decisions for both entities.
• The degree of common ownership or financial control over the entities
• Whether the same person or persons own or control the different entities;
• Whether the same persons serve as officers and/or directors of the different entities;
• Whether one company owns the majority or all of the shares of the other company.\textsuperscript{71}

As the Manual explains, the purpose of assessing these factors is to determine the degree of control of one entity over another.\textsuperscript{72} But the presence of all factors is not necessary to establish such control, the presence of no single factor is dispositive, and, perhaps most importantly, the focus should be on whether the entities have centralized control of labor relations.\textsuperscript{73}

As previously explained, the interpretive weight of the EEOC’s guidelines is limited. Therefore, an analysis of judicial opinions is imperative to understanding how Title VII’s “control” requirement is to be applied to factual scenarios.

2. Control

Not many courts have had to decide the question of control in the context of Title VII. But there have been enough decisions pertaining to the matter to shed some light on how the courts are likely to go about analyzing the facts to make a determination on the issue.\textsuperscript{74} Let us review some of those decisions.

A. Watson v. CSA, Ltd.

One of the cases that has touched on the pertinent portions of 42 U.S.C. § 2000e-1(c)(3), and the question of control, is \textit{Watson v. CSA},

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
In *Watson*, the African-American plaintiff, a U.S. citizen who was employed by a subcontractor and stationed at a U.S. military base in Kuwait filed a Title VII suit against his employer, CSA (which was a foreign corporation headquartered in the Cayman Islands), an unincorporated joint venture that wholly owned CSA, and three U.S. companies that were partners of the joint venture, alleging he was denied various promotional opportunities based upon his race. Defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the plaintiff was employed by CSA, making Title VII inapplicable. The plaintiff opposed the motion, arguing that CSA was covered by Title VII because it was controlled by a joint venture of American companies. Having anticipated the defendant's motion, the court allowed for limited discovery on what it described as a “question of jurisdiction.”

Upon the completion of limited discovery, the court denied the defendants' motion. In analyzing the issue, it first briefly discussed the history of Title VII, and the 1991 changes that made foreign corporations liable under Title VII if they were controlled by an American enterprise, and the statutory factors to be considered when determining the question of control. The court then recognized that there were not many similar cases that decided the question of control over a foreign corporation, but there were many cases that used the same four factors from the statute to determine if two entities were to be considered an “integrated employer” under various employment statutes. The court also observed that courts that considered the four factors in other contexts focused on the factor pertaining to the level of centralization of labor relations. The critical question to be answered to some courts was “What entity made the final decisions regarding employment matters related to the person claiming discrimination?” To others, the final authority and decision regarding employment matters were not required, and enough participation in the total process could be sufficient to establish control, regardless of which entity has the final authority on employment decisions.

In light of this overview, the *Watson* court proceeded to discuss the facts under the four relevant factors. In analyzing the “interrelation of operations” factor, the court looked into the relationship between

---

75. 376 F. Supp. 2d at 599.
76. Id. at 590.
77. Id.
78. Id.
79. Id.
80. Id. at 593.
81. Id.
82. Id. at 594.
83. Id. (citing Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995)).
84. Id. (citing Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983)).
the subsidiary and the California-based joint venture. In doing so, it explained that corporate formalities (such as separate accounting books and bank accounts) did not establish that the entities’ operations were not interrelated. The court then determined that facts point to taxation issues as the reason why the entities had utilized a “fictional division” as a “legal mechanism.” Furthermore, many of the employees were “dual status” employees, working for both entities, and “charging” both entities for their work, depending on the type of work they were doing.

In addition, in analyzing the “common management” factor, the court pointed to the fact that eight of the joint venture’s directors also served on the board of the subsidiary. In addition, the defendants had an organizational chart that described a “swapping” management relationship between the entities and shared lower level managers. On the question of “common ownership or financial control” factor, the Court observed that the subsidiary was founded by the joint venture, which itself consisted of three American companies, and created for tax-structuring purposes. Also, there was no question that the joint venture owned the subsidiary.

But the most important factor in determining control was the question of the level of centralization of the entities’ labor relations. The Court determined that sufficient centralization existed to justify finding control. First, the entities shared a human resources department, which was responsible for employees in both companies. Evidence also showed that when one of the subsidiary’s human resources managers left, the joint venture “rotated in” a human resources professional from one of the three American corporate members of the joint venture to fill the role. The human resources staff were responsible for a host of activities for both entities, including recruiting and hiring of personal, promulgation of Human Resources policies and procedures, participation in disciplinary decisions, participation in termination decisions, administration of employee evaluations, participation in employee promotion decisions, and administration of benefits. Other elements in the entities’ labor relations cemented the conclusion that centralization was sufficient. They included the joint venture’s substantial input into the subsidiary’s employment policies and procedures, and the

85. Id. at 595.
86. Id.
87. Id.
88. Id. at 597.
89. Id.
90. Id. at 599.
91. Id. at 597.
92. Id.
93. Id. at 597–98.
94. Id. at 598
requirement that the joint venture give its final concurrence on any decision pertaining to the subsidiary’s termination of any employees.  

After analyzing the facts of the case under the statutory factors, the *Watson* Court determined that sufficient evidence on the record showed control, thereby making the subsidiary covered under Title VII.

**B. ST. JEAN V. ORIENT-EXPRESS HOTELS INC.**

Another case involved an international network of entities and the question of whether the parent could be held liable for the actions of a subsidiary under Title VII. In *St. Jean v. Orient-Express Hotels Inc.*, plaintiff, a former employee of Cupecoy, a Dutch company, brought a Title VII sexual harassment and retaliation action against Oriental-Express Hotels Inc. (OEHI), which, the plaintiff claimed, controlled Cupecoy.  

Plaintiff alleged that a Cupecoy’s director of sales sexually harassed and assaulted her. She emailed two employees of OEHI (with whom the plaintiff worked on a regular basis) to complain about the incidents and also met with OEHI’s Director of Human Resources and an attorney. Plaintiff alleged that, instead of adequately responding to her complaint, OEHI dismissed her complaints and terminated her the next day. The defendant filed a motion to dismiss.

The court made an important observation about the plaintiff’s allegations, which was that she was making two distinct arguments under the single employer and joint employer doctrines. “First, Plaintiff maintained that OEHI was her joint employer, along with Cupecoy, which provides for liability under Title VII. Next, she contended that OEHI, through its management, controlled the manner and means by which Cupecoy’s employees work was accomplished.” But after making this distinction, the Court never addressed the plaintiff’s single employer argument, instead determining that she had alleged sufficient facts to establish that the two entities were her joint employers.

95. *Id.*
97. *Id.* at 304.
98. *Id.*
99. *Id.* at 303. The court did not clearly state the basis for the motion to dismiss, but its analysis reveals that the issue was whether OEHI controlled Cupecoy.
100. *Id.* at 306. At this point in the analysis, the court had made no mention of the liability standard applicable to foreign subsidiaries under 42 U.S.C.A. § 2000e-1(c) (2012).
101. *St. Jean*, 963 F. Supp. at 306. As the court discussed the concept of “control” in the context of joint employer analysis, it is important to not mix up the analysis with the concept of “control” under Title VII, as applied to foreign subsidiaries. Later in the opinion, the *St. Jean* court discussed the concept of “control” under Title VII, as it applied to the facts of this case.
102. *Id.*
103. *Id.* at 308.
The *St. Jean* court explained that “under the joint employer doctrine, liability may be found when separate legal entities have chosen to handle certain aspects of their employer-employee relationships jointly.”\(^{104}\) Where the doctrine is applicable, “

an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violation of employment law on the constructive employer, on the theory that this other entity is the employee’s joint employer.”\(^{105}\)

Federal courts in the Second Circuit had not established a uniform standard for determining joint employment, but had applied different standards for determining the question. In one case, the circuit had directed the district court to apply an “economic realities” test based on “the circumstances of the whole activity.”\(^{106}\) In another case, the district court had found a joint employer relationship in a discrimination case where the court found sufficient evidence that the defendant had “immediate control over the immediate employer’s employees.”\(^{107}\) Factors to be considered in determining control were “commonality of hiring, firing, discipline, pay, insurance, records, and supervision.”\(^{108}\)

The court held that under either the economic realities test, or the immediate control test, Plaintiff had alleged facts sufficient to show that OEHI and Cupecoy were her joint employers.\(^{109}\) It made the determination by citing the plaintiff’s allegations and supporting affidavits, showing that multiple employees of Cupecoy reported to OEHI.\(^{110}\) In addition, the plaintiff had alleged that she was required to report to several OEHI employees via email and phone and that Cupecoy’s major employment decisions, including hiring and termination, were handled by OEHI employees.\(^{111}\) What lent further support to plaintiff’s assertions was that the director of human resources for OEHI came to Porto Cupecoy to handle the plaintiff’s sexual harassment claims.\(^{112}\) But interestingly, the court held that “even where two companies are deemed a joint employer, it is not necessarily the case that both are liable for discriminatory conduct in violation of Title VII.”\(^{113}\)

---

\(^{104}\) *Id.* at 307 (citing Lima v. Addeco, 634 F. Supp. 2d 394, 400 (S.D.N.Y. 2009)).

\(^{105}\) *Id.* (citing Arculeo v. On–Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005)).


\(^{108}\) *St. Jean*, 963 F. Supp. 2d at 308.

\(^{109}\) *Id.*

\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) *Id.*

\(^{113}\) *Id.*
Following its joint employer analysis, the St. Jean court proceeded to answer the question of whether Cupecoy was “controlled” by OEHI under 42 U.S.C. § 2000e-1(c). After citing the four factors applicable to the analysis from 42 U.S.C. § 2000e-1(c)(3)—referring to them as those “comprising the single employer doctrine”\(^\text{114}\)—the court acknowledged that courts applying the test had focused on the third factor, involving the level of centralization of the entities’ labor relations.\(^\text{115}\) Having distinguished the case from those cited by the defendant in which various courts denied the existence of control under Title VII at the summary stage of post-trial stages, the court held that, at the motion to dismiss stage, the court was bound to assume the truth of plaintiff’s well-pleaded facts.\(^\text{116}\)

The court then explained that the plaintiff had alleged facts that, if shown to be true, would establish OEHI’s control of Cupecoy. First, a managing director and vice president of OEHI signed plaintiff’s termination letter and made other hiring decisions for Cupecoy, including hiring the alleged harasser.\(^\text{117}\) In addition, the director of human resources for OEHI was the one who investigated plaintiff’s claim, interviewed her, and later fired her.\(^\text{118}\)

The St. Jean court also conducted a brief review of the other three “control” factors, finding further affirmation in the notion that OEHI may be the plaintiff’s employer. Regarding the interrelations of operations, plaintiff alleged that aspects of Cupecoy’s budget, sales, and marketing were handled by OEHI.\(^\text{119}\) In addition, the entities allegedly shared business records and transferred employees between themselves.\(^\text{120}\) Plaintiff also alleged that when she was out of the office for a week in 2012, an OEHI employee flew into Cupecoy to perform her job duties in her absence.\(^\text{121}\) Thus, there appeared to be some factual issues as to whether OEHI and Cupecoy’s operations and management were interrelated. On the question of ownership and financial control, Plaintiff maintained that OEHI and Cupecoy were both owned by a third entity, which the court deemed insufficient, but left open to be further developed through discovery.\(^\text{122}\) Based on its overall analysis, the court held that the plaintiff had alleged facts sufficient to potentially show

\(^{114}\) Id. In light of the fact that the “control” analysis under 42 U.S.C. § 2000e-1(c)(3) (2012) is both necessary and sufficient to establish a foreign subsidiary’s liability, it is not clear why the St. Jean court engaged in the joint employer analysis before embarking on its Title VII “control” analysis.

\(^{115}\) Id. at 309.

\(^{116}\) Id.

\(^{117}\) Id. at 310.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.
OEHI’s control of Cupecoy, thereby defeating the defendant’s motion to dismiss.\textsuperscript{123}

As the preceding discussion reveals, the 1991 amendments to Title VII were, in part, intended to expand the applicability of Title VII to foreign employers who were linked to American entities, as defined by the statute. Courts that have encountered questions relating to the liability of foreign subsidiaries have engaged in the control analysis required by Title VII to make a determination on those issues. But, as the cases that were discussed show, the analysis is highly fact-specific. This means that, in most scenarios, the courts would not be able to look at incorporation documents or employee handbooks and readily determine the question of control. Therefore, the success of a party to establish or avoid liability depends, in part, on its ability to develop and present facts that would be relevant to the question of control.

While a foreign subsidiary or its American parent may not be able to avoid liability based on arguments relating to control under Title VII, other arguments remain available for the defendants to fend off employment discrimination lawsuits in the international context. The next section will delve into some of those arguments.

\textbf{III. Dismissal on Other Grounds}

Despite the notable expansion of protections for American employees abroad, employers have access to a number of defenses and arguments to obtain dismissal, which have remained available after the 1991 amendments to Title VII. These grounds continue to serve as important shields against liability. One such ground is the “foreign law defense,” which arises from the text of Title VII and relieves a defendant from abiding by the statute if such compliance would lead to the violation of foreign laws.\textsuperscript{124} One court even saw the exclusion of aliens abroad from the coverage of Title VII as a manifestation of Congress’s concern about Title VII’s conflict with foreign laws.\textsuperscript{125} Another argument that is available to international defendants in Title VII cases is one that is available to many international defendants in general: \textit{forum non conveniens}. “[T]he central purpose of the doctrine is to ensure that the trial is convenient.”\textsuperscript{126} What follows is a more in-depth discussion of the aforementioned doctrines.

\textsuperscript{123} Id. Courts that have considered the question of control have not always found that control existed between the parent and the subsidiary. See, e.g., \textit{Frank v. U.S. W., Inc.}, 3 F.3d 1357, 1362-66 (10th Cir. 1993) (applying the integrated enterprise test and affirming the dismissal of the parent as a defendant after analyzing the relationship between it and the subsidiary); \textit{Ruhling v. Tribune Co.}, No. 04 Civ. 2430(ARL), 2007 WL 28283, at *5 (E.D.N.Y. Jan. 3, 2007) (dismissing case against the parent due to insufficient control).
A. The Foreign Law Defense

While Senator Kennedy highlighted the intent of Congress to expand the rights of American employees abroad through the 1991 amendments to Title VII, Senator Bob Dole emphasized that the new Act continued to ensure that employers would not be “required to take actions otherwise prohibited by law in a foreign place of business.”\(^{127}\) Senator Dole’s statement referenced what has come to be known as the “foreign law defense.”

While Title VII protects American employees working for American or American-controlled entities abroad, it contains the following exception:

> It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer . . . 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 workplace is located.\(^{128}\)

As the plain language of this section makes clear, an employer that would normally be covered under the statute is not expected to follow the requirements of Title VII if doing so would force it to run afoul of the laws of a foreign country.

For an employer to establish a foreign laws defense, it must prove that (1) the action is taken with respect to an employee in a workplace located in a foreign country, where (2) compliance with Title VII would cause the respondent to violate the law of the foreign country, (3) in which the workplace is located.\(^{129}\)

Not many cases have analyzed the foreign law defense in the context of Title VII. But, in *Mahoney v. RFE/RL, Inc.*, the U.S. Court of Appeals for the D.C. Circuit discussed the ADEA’s similar foreign law defense provision.\(^{130}\) In *Mahoney*, a group of terminated employees of a U.S. corporation operating in Germany brought an action against corporation, RFE/RL, under the ADEA.\(^{131}\) The plaintiffs were all U.S.


\(^{130}\) 47 F.3d 447 (D.C. Cir. 1995). The ADEA reads, in relevant part, that “[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . 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.” 29 U.S.C. § 623 (2018).

\(^{131}\) 47 F.3d at 448.
citizens, and RFE/RL was a Delaware non-profit corporation.\textsuperscript{132} The court readily acknowledged that “[i]f an American corporation operating in a foreign country would have to ‘violate the laws’ of that country in order to comply with the [ADEA], the company need not comply with the Act.”\textsuperscript{133} But the case presented the question of whether the foreign laws exception was applicable when the foreign “law” in question was a collective bargaining agreement (CBA) with foreign unions and when following the ADEA would have led to a violation of that agreement.\textsuperscript{134}

RFE/RL had entered into a CBA with unions. One of the provisions of the CBA required employees to retire at the age of sixty-five.\textsuperscript{135} In 1982 when the agreement was reached, the ADEA did not have an extraterritorial reach.\textsuperscript{136} But in 1984, Congress amended Title VII to cover American citizens working for American corporations overseas.\textsuperscript{137} After the passage of the 1984 amendments, RFE/RL applied to the “Work Council”\textsuperscript{138} for a limited exemption from the retirement clause of the CBA to permit the American employees to retire at the age of seventy, if they so chose.\textsuperscript{139} The Work Council rejected RFE/RL’s application, determining that granting the request would violate both the mandatory retirement provision of the CBA and its provision forbidding discrimination on the basis of nationality.\textsuperscript{140} RFE/RL appealed to the Munich Labor Court, but lost that appeal.\textsuperscript{141} Apparently left with no choice, RFE/RL terminated the plaintiffs when they reached the age of sixty-five.

In ruling on the parties’ summary judgment motions, the district court found that RFE/RL was liable for violating the ADEA, after ruling that the “foreign laws” exception of the ADEA did not apply to breaches of CBAs.\textsuperscript{142} After the entry of final judgment, RFE/RL appealed the judgment establishing its liability and the damages award.\textsuperscript{143}

The circuit court disagreed with the district court’s ruling and reversed. In doing so, the court discussed the Supreme Court decision, \textit{Norfolk & Western Railway v. American Train Dispatchers’ Ass’n},\textsuperscript{144} which it found to be on point. That case had held that a rail carrier’s

\textsuperscript{132} Id.
\textsuperscript{133} Id. at 447–48.
\textsuperscript{134} Id. at 448.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Work councils are bodies elected by unionized and nonunionized employees. “Their duties include insuring that management adheres to all provisions of union contracts.” Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{143} Mahoney, 47 F.3d at 449.
\textsuperscript{144} 499 U.S. 117 (1991).
exemption under 49 U.S.C. § 11341(a) “from all other law” included a
“carrier’s legal obligations under a collective-bargaining agreement.”145
The court went on to cite a number of other Supreme Court cases that
further established that a contract would be seen as “law” under the
ADEA’s foreign law exemption.

A contract has no legal force apart from the law that acknowledges
its binding character. A contract depends on laws to enforce it and
make it effective. The obligation of a contract is the law which binds
the parties to perform their agreement. It is the law that gives legal
and binding effect to collective agreements. Laws which subsist at
the time and place of the making of a contract, and where it is to be
performed, enter into and form a part of it, as fully as if they had
been expressly referred to or incorporated in its terms. This prin-
ciple embraces alike those laws which affect its construction and those
which affect its enforcement or discharge.146

As the Mahoney court saw it, “when a company fails to comply
with a labor contract it violates ‘law’[].”147 Section 623(f)(1) of the ADEA
was no different than the applicable law in Norfolk & Western Railway.
The court went on to explain that “[i]f RFE/RL had not complied with
the [CBA], if it had retained plaintiffs despite the mandatory retire-
ment provision, the company would have violated the German laws
standing behind such contracts, as well as the decisions of the Munich
Labor Court.”148

The court acknowledged that such a scenario cannot happen in
the United States, as federal law would supersede both contrary state
laws (under the Constitution’s Supremacy Clause149) and contract pro-
visions.150 But Congress could not set aside foreign laws, and, there-
fore, the foreign law exemption appropriately relieved the employers’
ADEA liability in scenarios where ADEA compliance would force the
employer to violate foreign laws, which would include contractual obli-
gations.151 The court saw the statute’s mechanism as its “evident pur-
pose . . . to avoid placing overseas employers in the impossible position
of having to conform to two inconsistent legal regimes, one imposed
from the United States and the other imposed by the country in which
the company operates.”152

Mahoney is significant for two reasons. First, it highlights the
importance of a foreign law exemption in helping employers avoid
dilemmas when U.S. employment discrimination laws run counter to

145. Mahoney, 47 F.3d at 449 (citing Norfolk & W. Ry., 499 U.S. at 127).
146. Id. (internal citations omitted).
147. Id.
148. Id.
149. U.S. Const. art. VI, cl. 2.
150. Mahoney, 47 F.3d at 450.
151. Id.
152. Id.
foreign laws. Second, it supports the notion that the “law” as referenced in the ADEA and Title VII’s foreign law defense clauses is to be interpreted broadly, rather than be limited to only laws passed by legislative bodies.

One can see the significance of Mahoney’s decision and the foreign law defense by looking at a hypothetical scenario. As a background to this scenario, consider the employment laws in the Middle East and North Africa (MENA) region. As of 2016, Morocco and Djibouti were the only MENA countries that prohibited discrimination against women in hiring for jobs. In fact, discrimination against women is coded into a number of “protective” laws in MENA, which include limitations on their work hours or sectors in which they could work. In other words, discrimination against women is mandated by certain MENA laws.

Now let us imagine that a Texas oil company intends to initiate a venture in one of those MENA countries through its acquisition of a local subsidiary. It intends to maintain full control over that subsidiary and plans to make all of its hiring decisions at its headquarters in Houston. In this scenario, there would be little doubt that Title VII would be applicable to any American citizens hired by the subsidiary under Title VII’s control test.

Should this subsidiary decide to hire any female workers who happen to be U.S. citizens, Title VII would require the subsidiary to offer those workers equal terms and conditions. But abiding by Title VII’s requirements would force the company to violate the MENA country’s “protective” laws. In such a scenario, the subsidiary would be relieved from the requirements of Title VII. What this scenario demonstrates is that the foreign law defense can, and does, lead to the erosion of American citizens’ rights in countries with laws that are incongruent with American laws and values. Therefore, the inclusion of the foreign law defense shows the importance to Congress of sparing the courts and litigants of conflicting mandates of contradictory laws.

B. Forum Non Conveniens

As in any other federal case, the doctrine of forum non conveniens can serve as an effective method of disposing of a case involving the extraterritorial application of Title VII. As an initial matter, the Supreme Court has established that “a plaintiff’s choice of forum should rarely be disturbed.” But “when an alternative forum has


jurisdiction to hear the case, and when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case.”

In prevailing on a motion to dismiss on forum non conveniens grounds, “a defendant bears the burden of demonstrating an adequate alternative forum, and that the balance of private and public interest factors favors dismissal.” The factors referenced were set out by the Supreme Court in the 1947 case, Gulf Oil Corp. v. Gilbert. The private interest factors are “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” The Gilbert court also listed a number of factors that it categorized as those pertaining to the “public interest”: administrative difficulties resulting from litigation in congested centers when they should be litigated at their origin, the prospects of imposing jury duty on a community that has no relationship to the underlying litigation, the possibility that the litigation that would touch the affairs of many people would take place out of their view and reach, the local interest of having localized controversies decided at home, and the interest in having a diversity case litigated in the state the law of which is to be applied. The public and private sector factors set out in Gilbert came to be known as the “Gilbert factors.”

There have not been many cases involving the doctrine in the context of the extraterritorial application of Title VII. However, precedent shows the effectiveness of the doctrine in helping an American parent corporation of a foreign subsidiary avoid liability. One such case is Ranza v. Nike, Inc.

In Razna, the plaintiff, a U.S. citizen residing in the Netherlands, filed a charge of discrimination with the EEOC against her employer, NEON—a wholly-owned subsidiary of Nike—and its parent, Nike, in the state of Oregon. The EEOC initially rejected the claim deferring to its Dutch counterpart, the Equal Treatment Commission, which had

156. Id. (citing Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).
159. Id.
160. Id. at 508–09.
161. 793 F.3d 1059, 1076 (9th Cir. 2015).
162. Id. at 1065–67.
found no discrimination. Consequently, Ranza filed a suit against NEON and Nike in the District of Oregon. A magistrate judge presiding over the matter found that NEON was an “alter ego” of Nike, but nevertheless determined that it would be unreasonable to force NEON to litigate in Oregon due to the burden and inconvenience the process would impose on the company, as well as the fact that the evidence and witnesses were located abroad. The magistrate also recommended granting Nike’s motion to dismiss because of what he determined to be Nike’s insufficient control over NEON, or alternatively, on forum non conveniens grounds. The district court dismissed the lawsuit against both defendants, but did not adopt or address the magistrate’s control and forum non conveniens determination.

The U.S. Court of Appeals for the Third Circuit affirmed the district court’s dismissal of the suit against NEON for lack of personal jurisdiction and against Nike under the doctrine of forum non conveniens. After analyzing NEON’s contacts with Oregon, the court turned to Nike and forum non conveniens. The court highlighted that the “alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy.” While the court acknowledged the principle that a plaintiff’s choice of forum should normally not be disturbed, “[t]he selection of a United States forum by an expatriate United States citizen residing permanently abroad, like Ranza, is entitled to less deference because ‘it would be less reasonable to assume the choice of forum is based on convenience.’ “Typically, a forum will be inadequate only where the remedy provided is so clearly inadequate or unsatisfactory, that it is no remedy at all. That the law, or the remedy afforded, is less favorable in the foreign forum is not determinative. A foreign forum must merely provide ‘some’ remedy.”

With these principles in mind, the court turned to the facts. It first noted that the plaintiff had not challenged the first prong of the forum adequacy test stated above. But she was arguing that the Netherlands could not be an adequate forum because it could not provide

163. As the Court explained, the ETC was an independent body established to enforce the Dutch discrimination laws. Id. at 1066. While it did not have the power to provide direct relief, “its power is in its ability to persuade the parties or a court of law to act in accordance with its conclusions and recommendation.” Id.
164. Id. at 1067.
165. Id.
166. Id.
167. Id. at 1067–68.
168. Id. at 1065.
169. Id. at 1077.
170. Id. at 1076–77 (citing Iragorri v. United Techs. Corp., 274 F.3d 65, 73 n.5 (2d Cir. 2001) (en banc)).
171. Id. at 1077 (citation omitted).
The court disagreed with the plaintiff that the ETC did not provide an adequate forum, its lack of enforcement power notwithstanding. First, the plaintiff herself had decided to litigate her claims before the ETC. As the court explained, the Netherlands had charged the ETC with adjudicating claims brought under Dutch equal protection laws. That venue allowed claimants to present evidence and witnesses at a hearing—both of which the plaintiff had done—and also have the benefit of local counsel in the proceedings. Here, the ETC had considered all the evidence and issued a thorough opinion finding no discrimination. The court also explained that, while the ETC did not have the authority to award damages or enforce its own judgments, “it publishes its findings, coordinates with both governmental and non-governmental bodies and actively follows up with employers to ensure compliance with its findings and to remedy any discrimination.” The plaintiff also had the option of asking a Dutch court to enforce a judgment entered by the ETC. Even if the remedies that the court would provide in a hypothetical scenario are less generous than what is provided under American law, it would nonetheless be considered “some remedy,” thereby resulting in the defendant meeting its forum non conveniens burden.

The Ranza court also analyzed the Gilbert factors and determined that they weighed on the side of dismissing the suit. It observed that, although Nike was located in Oregon, the alleged discrimination took place at NEON offices in the Netherlands. In addition, relevant documents and witnesses were located abroad, and even the plaintiff did not reside in the United States, making Oregon an inconvenient forum for the parties. As far as public interest factors were concerned, the court observed that the plaintiff was the citizen of the United States, and the United States had an interest in protecting its citizens from discrimination by subsidiaries that are controlled by American parent corporations. But the Netherlands also had the interest of preventing employers within its borders from engaging in discrimination, a fact that was manifested by the creation of the ETC. The court also noted that U.S. interests were especially diminished in the case, as litigation in the United States would result in the relitigation of claims

172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id. at 1077–78 (internal quotations omitted).
178. Id. at 1078.
179. Id.
180. Id.
181. Id.
182. Id. at 1078–79.
already decided in foreign proceedings.\textsuperscript{183} Therefore, the Netherlands was a more convenient forum overall for the litigation of the case.

Something to note about the \textit{Ranza} decision is that, although \textit{forum non conveniens} is an inherently fact-based analysis, many parts of the \textit{Ranza} court's analysis are transferrable to most cases that involve an American parent, a foreign subsidiary, and Title VII liability. For instance, whenever a plaintiff is residing abroad (and is likely in foreign subsidiary cases), the plaintiff’s choice of forum gets less deference. In addition, in most cases involving subsidiaries, documents and witnesses are abroad, as in \textit{Ranza}. Therefore, \textit{forum non conveniens} can be an effective method for an American parent corporation to dispose of a lawsuit based on Title VII for the actions of its foreign subsidiary.

\textbf{IV. Practice Pointers for Plaintiffs, Defendants, and the Courts}

As parties, employment law practitioners and the courts grapple with matters involving the rights of American citizens beyond American borders, they would do well to take the following steps into consideration.

\textbf{A. Plaintiffs}

The first step any potential Title VII plaintiff who is an American citizen working in countries other than the United States needs to take is to understand if their employer is a subsidiary of an American corporation. American employers are increasingly going beyond the U.S. borders in search of greater market shares and expanding both organically and through mergers and acquisitions. In this context, it is entirely possible that a seemingly local employer is a subsidiary of an American-based entity.

Should a potential plaintiff determine that their employer is indeed a subsidiary of an American corporation, the next step is to attempt to determine the level of control the American parent has over the foreign subsidiary. In investigating this aspect of the entities’ relationships, the potential plaintiff needs to determine the level of integration between the two entities, with a special focus on the entities’ decision-making processes on labor and employment issues.

While it may seem like a party may not be able to meaningfully investigate elements relevant to control without formal discovery, in fact a lot of valuable information is available on the control factors through a number of readily-accessible resources. Companies’ own websites often contain information pertaining to their relationships.

\textsuperscript{183} \textit{Id.} at 1079. The court also noted in the beginning of its \textit{forum non conveniens} analysis that the plaintiff’s filing of the lawsuit after being rejected by the ETC appeared to show that she was engaging in “forum shopping.” \textit{Id.} at 1077.
with other entities. In addition, to the extent that an American public
corporation is suspected of being the parent of a foreign subsidiary, a
party can verify that information on the U.S. Security and Exchange
Commission’s EDGAR database, as public companies are required to
disclose their subsidiaries to the SEC. There are also other ways of
researching the control factors. For example, by looking at corporate
contact information indicated on the subsidiaries’ employee handbooks
or logos used on employment-related documents (such as hiring or
discipline letters), a plaintiff can often develop a fairly robust initial
impression of the relationship between the two entities.

Should a potential plaintiff decide to pursue a lawsuit against an
American parent of a foreign subsidiary, (s)he should expect that the
American parent will challenge the court’s jurisdiction. In that sce-
nario, a plaintiff should propose that the court allow limited discov-
ery designed to determine the level of the American parent’s control.
Courts have been receptive to the notion and are likely to grant such
discovery.

B. Defendants

While the plaintiff will have to establish that the American parent
controls the subsidiary, the defendant’s goal is to defeat those asser-
tions. But the best defense litigation strategy begins at a much earlier
stage than when a lawsuit is filed.

Whatever the reasons might be for an American parent to estab-
lish or acquire a foreign subsidiary, it needs to understand that the
level of integration between the parent and subsidiary can have a
direct impact on its liability under Title VII if the subsidiary employs
or expects to employ American citizens. While many considerations
impact companies’ decisions relating to how they decide to divide up
roles, their level of collaborations on employment issues should be seri-
ously considered as one such consideration. Equally important is the
determination of whether the company expects to hire American citi-
zens. It is also important to understand that while a subsidiary may
decide to avoid liability by refraining from hiring American citizens as
a matter of policy, the country where the subsidiary is based may have
its own anti-discrimination laws, and the subsidiary’s selective hiring
policy may run afoul of those laws.

184. See 17 C.F.R. 210.3-01 (2018) (requiring that consolidated, audited balance
sheets “shall be filed[,] for the registrant and its subsidiaries”). The EDGAR database can
/edgar/searchedgar/companysearch.html (last visited Nov. 22, 2018). OPENCORPORATES,
https://opencorporates.com (last visited Sept. 26, 2018) is another website that main-
tains information on over sixty million companies worldwide.

185. See Watson v. CSA, Ltd., 376 F. Supp. 2d 588, 590 (D. Md. 2005); supra note
75 and accompanying text.
Should the plaintiff be able to show that the American parent controls the subsidiary, the defendant should then focus on its defenses, two of which are the foreign law defense and *forum non conveniens*. Regarding the foreign law defense, the defendant should consider retaining local counsel with deep knowledge of local laws and attempt to determine if abiding by the specific provision of Title VII in question would lead to the violation of any foreign laws. Similarly, the defendant should think about where the evidence and witnesses are located for a possible challenge based on *forum non conveniens*. It is likely that much of the evidence and the witnesses are located in the country where the subsidiary is located. The defendant should use these arguments as a basis to avoid liability.

**C. The Courts**

It is often not easy to determine the questions of control, existence of potentially contradictory foreign laws, and the location of relevant evidence through the parties’ initial pleadings. But although dismissal may not be initially warranted, it will likely be counter to judicial economy to immediately allow the parties to embark on substantive discovery if there is the real possibility that the case could be disposed of based on a threshold issue.

In many cases, there may be enough documentary evidence and admissions by parties regarding local laws and location of the relevant evidence that the court will be able to decide that the parties can pursue full discovery at the outset. But in situations where the plaintiff and defendant initially differ on whether Title VII is applicable, or where the defendant may have a valid defense, the court should strongly consider allowing the parties to engage in limited discovery pertaining to those threshold issues. Should the plaintiff establish that there is enough evidence to establish the question of control and that defendant will not have a strong valid defense, the parties should then be instructed to proceed to a full-scope discovery.

**V. Conclusion**

As the global economy becomes more intertwined, employment attorneys should expect to see an increase in the number of cases involving the extraterritorial application of U.S. employment laws. As such, it is important to understand that an American parent corporation may be held liable for the actions of a foreign subsidiary under Title VII if the plaintiff is a U.S. citizen and the American parent controls the foreign subsidiary. Should the defendant challenge the court’s jurisdiction based on a claim that it is a separate entity than the subsidiary, the plaintiff should be ready to use outmost resourcefulness to show an abundance of integration between the operations of parent and subsidiary, common management, centralization of labor relations,
and common ownership to show that the American parent controls the subsidiary.

But even if the plaintiff can show control, the parent corporation can nonetheless argue for dismissal on a number of grounds, including the foreign law defense and forum non conveniens. In determining whether to mount a challenge based on jurisdiction or resort to the aforementioned defenses, the defendant needs to first internally assess the viability of those strategies. If the plaintiff is expected to readily establish control, relevant evidence is located in different countries so that multiple countries are equally convenient for litigation, and no local laws are inconsistent with the requirements of Title VII, it will be wise for the defendant to not waste its resources and instead focus its strategy on mounting a substantive defense.