

**HAS THE AGE DISCRIMINATION IN
EMPLOYMENT ACT REMAINED
EFFECTIVE IN THE UNITED STATES
AS WELL AS ABROAD IN AN
INCREASINGLY GLOBALIZED ECONOMY?**

Cynthia Jean Robertson

Despite congressional amendments to the Age Discrimination in Employment Act of 1967, elder Americans working both in the United States and abroad continue to experience discrimination from their employers. While Congress attempted to limit the negative effects of international employment loopholes, various courts' interpretations of the ADEA fall short of effectively implementing Congress's intent to protect the elderly plaintiff. Such interpretations essentially allow foreign employers in the United States and U.S. employers operating overseas to discard older workers without regard to the underlying purposes of the ADEA. As the economy continues to globalize, age discrimination claims reflecting these situations, along with a number of defenses utilized by employers to escape liability, have grown significantly.

In this note, Ms. Robertson first analyzes the different types of defenses available to foreign employers operating within the United States. While concluding that a plain text reading of the ADEA should not provide a valid defense to the employer, she finds that treaties between the United States and foreign countries create a more formidable hurdle for the ADEA plaintiff to overcome. The note then shifts focus to the defenses specific to American employers operating in a foreign country. Ms. Robertson, acknowledging that the United States must abide by the principles of a foreign law defense, recommends that, at the least, U.S. courts should refuse to recognize contract agreements that bargain away ADEA plaintiff rights as a matter of genuine foreign law.

Cynthia Jean Robertson is an Order of the Coif graduate of the University of Illinois College of Law class of 1998 and a former member of The Elder Law Journal, where she served as Editor-in-Chief during the 1997-98 academic year.

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I. Introduction

Two of the greatest forces shaping the United States today are the globalization of the economy¹ and the "graying of America."² These two forces naturally overlap, due to both the increase in the overall number of older American workers³ and the growing trend among foreign corporations in the United States and American corporations in foreign countries to employ U.S. citizens.⁴ This environment often makes it difficult for American workers age forty and over to prevail in age discrimination suits.⁵

Compared to a time where the United States had little involvement in the global market place, U.S. corporations funded approximately 6400 international mergers and acquisitions in 1996, totaling nearly \$300,000,000,000 in investments.⁶ In 1990, almost 250,000 Americans worked for Japanese companies in the United States,⁷ and within the following decade, Japan's Ministry of Trade anticipated that this number would reach nearly 1,000,000.⁸ While foreign corporate expansion within the United States continues to rise, executives in charge of their U.S. offices often come unprepared for the myriad of U.S. discrimination laws that do not exist in their own home country.⁹ Furthermore, these same executives argue that U.S. discrimination statutes deter foreign businesses from investing in and relocating to the United States.¹⁰ In fact, many international executives view dis-

1. See Pietro S. Nivola, *Having It All? Domestic Regulations and the Global Economy*, 14 BROOKINGS REV. 16, 18 (1996).

2. OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS 1 (BNA 1987) [hereinafter OLDER AMERICANS].

3. See *id.* at 16, 17.

4. See Michael Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW. 635, 636 (1996) (citing 137 CONG. REC. H3934 (daily ed. June 5, 1991)).

5. See *id.*

6. See Robert Frank & Thomas M. Burton, *Cross-Border Merger Results in Headaches for a Drug Company*, WALL ST. J., Feb. 4, 1997, at A1.

7. See Professor Phillip McConnaughy, *Legal Pitfalls Confronting Japanese Employers in the United States* (July 17, 1990) (unpublished comments from a speech delivered in 1990 to the Japan-American Cooperative Committee of the American Chamber of Commerce in Japan) (transcript available in the University of Illinois College of Law Library).

8. See *id.* Japan's estimates likely have become more conservative, given its current economic crisis. Naturally, foreign direct investment within the United States will ebb and flow according to foreign countries' ability to expend capital resources overseas.

9. See Frank & Burton, *supra* note 6, at A1.

10. See Nivola, *supra* note 1, at 20.

crimination statutes, such as the Age Discrimination in Employment Act (ADEA),¹¹ as a hindrance to employment decision making.

As with cases involving U.S. domestic employers, the ADEA creates litigation for foreign employers within the United States,¹² as well as for American employers operating overseas.¹³ However, international employers often successfully combat ADEA suits by advancing several defenses based on either their foreign status within the United States (and commensurate treaty rights)¹⁴ or on their geographical location in another country (and commensurate foreign law rights).¹⁵ In other words, foreign corporations in the United States may escape liability for age discrimination for which similarly situated American corporations would be held accountable.¹⁶ At the same time, U.S. corporations might also escape liability due to their operations overseas.¹⁷

The nature of the ADEA defenses, both for foreign corporations operating within the United States and for American corporations operating overseas, becomes increasingly important as more working Americans each year fall within the ADEA's protected class.¹⁸ As such, it becomes imperative to examine the nature of these defenses to determine whether they, in effect, unreasonably reduce the chances of recovery for age discrimination plaintiffs, thereby eviscerating the underlying purpose of the ADEA.¹⁹

The first goal of this note is to analyze the different types of defenses available to foreign employers within the United States. The two defenses are: (1) a plain text argument that the ADEA exempts foreign employers within the United States from compliance;²⁰ and, (2) an argument that treaty rights allow foreign employers to select and terminate certain types of employees without regard to the

11. 29 U.S.C. §§ 621-634 (1994).

12. *See, e.g., Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).

13. *See, e.g., Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995).

14. *See, e.g., Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 443 (N.D. Tex. 1994).

15. *See, e.g., Mahoney*, 47 F.3d at 447-48.

16. *See, e.g., Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994); *see also* discussion *infra* Part III.A.

17. *See, e.g., Mahoney*, 47 F.3d at 451; *see also* discussion *infra* Part III.B.

18. *See* OLDER AMERICANS, *supra* note 2, at 16, 17.

19. The chance of recovery for all ADEA plaintiffs hovers around only 10%. *See* Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 126 (1996) (reviewing RICHARD A. POSNER, *AGING AND OLD AGE* (1995)).

20. *See, e.g., Mochelle*, 823 F. Supp. at 1309.

ADEA.²¹ An important subargument to this treaty analysis focuses on whether a domestic subsidiary employer is indistinguishable from the foreign parent, thereby enabling that subsidiary to assert its foreign parent's treaty or statutory rights.²²

Following an examination of the defenses used by foreign employers within the United States, this note will then focus on the defenses specific to American employers operating in a foreign country. Based on their international location, American employers have raised two key defenses: (1) that the foreign country's law conflicts with the ADEA and, therefore, exempts the employer from ADEA compliance (also known as simply "the foreign-law" defense);²³ and, (2) that the American subsidiary, rather than being controlled by its American parent, is instead a separate and distinct foreign entity and, thus, exempt from the ADEA's reach overseas.²⁴

In part II, this note will give an overview of the history and growing importance of the ADEA and, in particular, the specific provisions which affect international enforcement. Part III will examine the defenses available to both foreign employers within the United States and American employers within a foreign country. Part IV will conclude that at least some of the international defenses raised by defendants do indeed eviscerate the underlying purpose of the ADEA by unreasonably reducing the chances of a plaintiff's recovery. This note recognizes, however, that, given today's global reality, certain international defenses do seem to find an appropriate balance between compliance with the ADEA and important competing interests, such as international comity. Following this resolution, this note will discuss the ways in which Congress could amend the ADEA to nullify those defenses that seem to swallow the underlying purpose of the ADEA without suspending those defenses which strike the proper

21. See, e.g., *Spiess v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 359 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982). The treaty defense appears to be litigated with greater frequency and debate than does the plain text argument, lending greater legitimacy to this defense. See discussion *infra* Part III.A.2. However, the fact that foreign employers have raised the plain text argument as recently as 1995 in *EEOC v. Kloster Cruise Ltd.*, 888 F. Supp. 147 (S.D. Fla. 1995), indicates that employers have not yet given up on the inartfully phrased ADEA amendment that arguably exempts all foreign employers within the United States from ADEA compliance. See discussion *infra* Part III.A.1.

22. See, e.g., *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991); *Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 443 (N.D. Tex. 1994).

23. See, e.g., *Mahoney*, 47 F.3d at 451.

24. See, e.g., *Mas Marques v. Digital Equip. Corp.*, 490 F. Supp. 56, 58-59 (D. Mass. 1980).

balance between an international employer's prerogatives and an employee's rights. In addition, part V of this note will conclude that the continued rapid globalization of our economy may soon render some of these defenses obsolete, as treaties may no longer be necessary to stimulate foreign investment, fair competition, and equal protection under the laws.

II. Background

A. The Age Discrimination in Employment Act—Its Continued Necessity in the Workplace

The text of the ADEA manifests its purpose: (1) to promote employment of older persons based on their qualifications rather than age; (2) to prohibit arbitrary age-based discrimination in employment; and, (3) to help employers and workers find ways to address problems arising from the impact of age on employment.²⁵ The legislative history of the ADEA indicates that Congress enacted the statute as "a matter of basic civil rights," and thereafter expanded the ADEA's scope of protection as new data regarding older workers' abilities became available.²⁶

25. See 29 U.S.C. § 621 (1994).

26. See S. REP. NO. 95-493, at 2 (1977). The Senate Committee of Human Resources found that "people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about . . . age." *Id.* Because "chronological age alone is a poor indicator of ability to perform a job," *id.*, Congress enacted the ADEA in 1967 to ensure that older workers would not be denied employment solely on the basis of age. 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)).

While the purpose of the ADEA has remained constant since its enactment, the scope of the ADEA has gradually, but continuously, increased by way of congressional amendment. See, e.g., Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189; Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767; Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342. Congress expanded the scope of the ADEA in several ways. First, the age of persons protected by the Act was increased to employees age 40 and over, as opposed to employees between the ages of 40 and 65, as was originally enacted. Second, the number of private employers liable under the Act was increased by redefining "employer" to require only 20 as opposed to 25 employees. Third, while the original ADEA excluded States from liability, the current ADEA has been amended to encompass the liability of any State, its political subdivisions, agencies or instrumentalities, as well as any interstate agency. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(a), (b)(1), (c)(1), 92 Stat. 190, 191 (codified as amended at 29 U.S.C. § 626(d) (1994)). Congress gave the ADEA extraterritorial effect in 1984 by amending the statute to expressly cover Americans working overseas for American companies or American-controlled foreign subsidiaries. Older Ameri-

Despite the ADEA's enactment, employers continue to terminate older employees based on the following arguments. First, employers insist that they can reduce overhead costs by replacing older, more experienced employees with equally productive younger employees who can be paid a much lower wage.²⁷ Unlike race and sex, age is often linked directly to an employee's earning capacity, thereby creating a pure economic motivation for an older employee's termination or failure to be hired.²⁸ Although reducing overhead in this manner creates an immediate gain, these rather shortsighted terminations often fail to account for the added costs of retraining and retaining a younger employee.²⁹ In addition, such terminations fail to consider that younger employees' loyalty and job performance are perhaps more suspect than that of older employees who have worked for a single employer for a number of years.³⁰

Second, some employers argue that terminating older employees creates a younger and more productive work force.³¹ However, stud-

cans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(2), 98 Stat. 1767 (codified as amended at 29 U.S.C. § 623(h) (1994)). Important to note in looking at this section's passage through legislation is that it was originally enacted at subsection (g). In 1990, Congress redesignated subsection (g) as subsection (h) in Pub. L. No. 99-272, § 9201(b)(3), and Pub. L. No. 99-592, § 2(b).

27. See Ulen, *supra* note 19, at 127.

28. See, e.g., *Zahourek v. Arthur Young & Co.*, 567 F. Supp. 1453, 1456 (D.C. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984). Here, the plaintiff employee argued that he was discriminated against because of his age (43) and the "concomitant fact that his pay scale was too high" for Arthur Young's international job openings. *Id.*

29. See WILLIAM S. SWAN, *HOW TO PICK THE RIGHT PEOPLE* xviii (1989). Swan points out that,

factoring in salary, wasted benefits, placement fees, training costs, time wasted by interviewers, relocation costs, the effects on fellow employees, and, most of all, the reduced efficiency and opportunities lost due to the actual inferior work of the person who should never have been hired in the first place—the cost of this mistake may be measured in tens to hundreds of thousands of dollars per hire.

Id. Please note that Swan is not specifically discussing the differences in hiring older as opposed to younger employees, but only the costs associated with making an unfortunate hiring decision (which, of course, would apply to those situations where the older employee is at least equally effective as a younger hire, and more loyal to the corporation).

30. See S. REP. NO. 95-493, at 3 (1977) ("[T]here is substantial evidence that many workers can continue to work effectively beyond age 65 and may, in fact, be better employees because of experience and job commitment."). Furthermore, "with regard to absenteeism, punctuality, on the job accidents, and overall job performance" workers over the age of 65 performed "about equal to and sometimes noticeably better than younger employees." *Id.* at 3 (quoting David A. Andelman, N.Y. TIMES, Sept. 22, 1972, at 45).

31. See S. REP. NO. 95-493, at 3.

ies from a number of industries indicate that older employees, even those age sixty and over, all rated equal if not superior to younger workers regarding "dependability, judgment, work quality, work volume, and human relations."³² Other employers maintain that retaining older employees decreases promotion channels for younger employees who require incentives such as increased job responsibility and salary in order to stay loyal to the employer.³³ Without the enticement of promotion, employers predict difficulty in retaining younger employees targeted for advancement.³⁴ The ADEA remedies this situation by exempting from coverage certain highly compensated management employees age sixty-five and older,³⁵ thereby freeing these positions for promotion opportunities.³⁶

Although the ADEA's provisions attempt to guard the rights of older Americans without placing an undue burden on employers, employers still see benefits in simply violating the ADEA and have gotten more savvy in terms of how to do so.³⁷ Because more Americans each year fall within the protected class of employees age forty and over,³⁸ the incidence of ADEA violations will steadily increase both at home and abroad, even if employers continue to discriminate at the present rate.³⁹ Therefore, adequate enforcement of the ADEA will become increasingly important and should be carefully guarded.

32. *Id.*

33. *See id.* at 7.

34. *See id.*

35. *See* 29 U.S.C. § 623(i)(5) (1994).

36. *See* S. REP. NO. 95-493, at 7.

37. *See* Ulen, *supra* note 19, at 127.

38. According to the Administration on Aging, life expectancies for Americans have increased 29 years during the last century and continue to rise. *See* Administration on Aging, *Profile of Older Americans: 1997* (visited June 20, 1998) <<http://www.aoa.dhhs.gov/aoa/stats/profile>>. In 1996, persons aged 65 and older totaled 33.9 million, or 12.8% of the U.S. population. *See id.* Since 1990, the number of Americans over the age of 65 has increased about 11 times, from 3.1 million in 1990, to 33.9 million in 1997. *See id.* Naturally, America's aging population has had a fairly direct impact on the American workforce. Population experts predict that by 2010, *half* of the workforce will consist of workers age 40 and over. *See* OLDER AMERICANS, *supra* note 2, at 1.

39. The number of suits filed under the ADEA has commensurately increased with the "graying" population trend. *See* DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 1 (Labor Relations & Pub. Policy Series No. 33, 1989). The ADEA, at first, served as "a relatively obscure and unimportant law." In recent years, however, the number of age discrimination cases have skyrocketed. *Id.* at 1; *see also* OLDER AMERICANS, *supra* note 2, at 8. In the six years between 1980 and 1986, age bias suits more than doubled. *See id.* Current data supplied by the Equal Employment Opportunity Commission (EEOC), the administrative agency that enforces the ADEA, estimates that employers spent approximately \$170 million between 1983

B. The Globalization of the Economy: Creating More Foreign Employers Within the United States and a Greater Likelihood of Working Abroad

Currently, the ADEA's efficacy appears to be thwarted by a trend not foreseen by Congress when it enacted the ADEA in 1967⁴⁰—the increasing globalization of our economy.⁴¹ Economic globalization creates more foreign employers in the United States, as well as more U.S. employers operating overseas.⁴² In turn, these employers may utilize defenses to employment discrimination charges that are unavailable to U.S. employers on U.S. soil.⁴³ While some courts limit the negative effects of international employment loopholes, other courts provide interpretations of the amendments of the ADEA that do not give effect to Congress's intent to protect the ADEA plaintiff.⁴⁴

Forty years ago, one could describe the U.S. economy as "self-contained."⁴⁵ The present situation, however, reflects drastic changes. Currently, overseas sales and inward foreign investments generate vital "engines of U.S. growth," with imports and exports accounting for more than a fifth of the Gross National Product.⁴⁶ By 1991, at least 2000 U.S. employers operated 21,000 overseas offices in 121 coun-

and 1987 in litigating and settling age discrimination cases. *See id.* at 14. This figure comprises various forms of relief under the ADEA including: equitable relief (back pay); legal relief (monetary damages); and punitive damages (in cases of intentional discrimination).

It also stands to reason that a significant number of American employees working overseas could constitute potential ADEA plaintiffs. Corporations often need older, more experienced employees to manage an international satellite office or other type of subsidiary. *See Hearings, infra* note 54, at 30 (comment by Mr. William M. Yoffee, Executive Director of American Citizens Abroad, Inc.). These employees, by virtue of their age, necessarily fall under the ADEA's protection.

40. *See Nivola, supra* note 1, at 18. When the ADEA was passed, the American economy was "self-contained," meaning that foreign corporations rarely operated in the United States, and American corporations rarely operated outside U.S. borders. *See id.*

41. *See discussion infra* Part II.C.

42. *See discussion infra* Part II.C.

43. *See Starr, supra* note 4, at 636 (citing 137 CONG. REC. H3934 (daily ed. June 5, 1991)).

44. *See discussion infra* Part III.

45. *See Nivola, supra* note 1, at 18. According to Nivola, a writer for the Brookings Institution, "[international] trade [40 years ago] amounted to a negligible fraction of the gross national product (GNP), and inflows of capital from abroad were small." *Id.*

46. *See id.*

tries.⁴⁷ Approximately 300,000 Americans currently work abroad on expatriate assignments, and that number is expected to rise.⁴⁸

Not only is the American corporate presence felt abroad, but foreign investors are increasingly purchasing or merging with American companies on U.S. soil.⁴⁹ Foreign employers perceive the United States as fertile ground for manufacturing plants and have set up shops in the United States.⁵⁰ Moreover, foreign businesses in the United States have moved beyond manufacturing enterprises by developing service agencies that capitalize on the growing number of foreign businesses within the United States.⁵¹

Regardless of whether the foreign investment involves an international merger or creation of an overseas manufacturing plant, the increased globalization of the economy is apparent both in the United States and abroad. This economic globalization raises several important questions relating to employment decision making on the part of foreign corporations operating within the United States, as well as for American companies operating overseas. Such questions become even more apparent with an ever increasing number of age discrimination claims.⁵²

C. The Passage of Section 623(h): Extending ADEA Protection Overseas

The ADEA has not always expressly covered American citizens working abroad, and it was not until the early 1980s that American workers presented extraterritorial ADEA claims to a number of federal district courts.⁵³ In 1983, the U.S. district courts of New Jersey

47. See Starr, *supra* note 4, at 636 (citing 137 CONG. REC. H3934 (daily ed. June 5, 1991)).

48. See *Cyberscope: Globetrotters' Friend*, NEWSWEEK, June 22, 1998, at 8.

49. For example, foreign corporations have recently purchased American companies such as Columbia Pictures, Zenith, Firestone, and Southland/7-Eleven. See *After Japan: South Korea's Firms Are on a Buying Binge Overseas. Will They Repeat the Mistakes or the Successes of the Japanese?*, ECONOMIST, Oct. 5, 1996, at 17 [hereinafter *After Japan*]; see also *Back on Top? (A Survey of American Business)*, ECONOMIST, Sept. 16, 1995, at 64, *3 [hereinafter *Back on Top?*].

50. See *After Japan*, *supra* note 49, at 17-18.

51. See, e.g., *Goyette v. DCA Adver., Inc.*, 830 F. Supp. 737, 740 (S.D.N.Y. 1993). For example, a large advertising/communications agency of Japanese incorporation purchased an American advertising agency in order to service the Japanese-owned U.S. subsidiaries of its Japanese clients. See *id.*

52. See discussion *supra* note 39.

53. See, e.g., *Zahourek v. Arthur Young & Co.*, 567 F. Supp. 1453 (D.C. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984); *Cleary v. United States Lines*, 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

and Colorado created a "major loophole," by refusing to extend the ADEA's protections to Americans employed overseas by American companies.⁵⁴ The *Cleary v. United States Lines*⁵⁵ and *Zahourek v. Arthur Young & Co.* decisions,⁵⁶ later affirmed by the U.S. Courts of Appeals for the Third and Tenth Circuits respectively, held that the ADEA, which incorporated certain provisions of the Fair Labor Standards Act (FLSA),⁵⁷ did not apply overseas.⁵⁸ The two courts relied on the FLSA's express provision that the FLSA did not apply to situations occurring in foreign countries.⁵⁹ Equally significant, the *Cleary* court found that "the investigatory apparatus of the EEOC is not structured or empowered to function abroad."⁶⁰ The *Cleary* finding at that time represented the consensus among the Federal Circuit Courts of Appeals that had reviewed the ADEA's international scope for American corporations operating overseas.⁶¹

54. See *Reviewing Certain Provisions of the Age Discrimination and Employment Act (Public Law 90-202), which Affect Americans Working Abroad: Hearings Before the Subcomm. on Aging of the Senate Comm. on Labor & Human Resources*, 98th Cong. 1 (1983) [hereinafter *Hearings*] (opening statement of Senator Charles E. Grassley, Chairman). See *infra* note 55 and accompanying text.

55. 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984). Mr. Cleary was fired in England, at the age of 60, on four days notice, after having worked for the same American company for 33 years. See *id.* at 1253-55.

56. 567 F. Supp. 1453, (D.C. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984). Mr. Zahourek, a CPA, had worked for Arthur Young as an international specialist for approximately 10 years prior to his termination in 1981. Zahourek argued that he was discriminated against because of his age (43) and the additional fact that his pay scale was too high for Arthur Young's international job openings. See *id.* at 1453-54.

When terminated, Zahourek was 43 years old and a principal employee, the last rung in the partnership ladder. Arthur Young's partnership structure is such that the early forties are critical years for a would-be partner. Typically, it takes ten years to pay back the sum advanced by Arthur Young to buy into the partnership. . . . Arthur Young, says Zahourek, is accordingly reluctant to make anyone older than 45 a partner.

Id. at 1454.

57. The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994).

58. See *Zahourek*, 567 F. Supp. at 1457 (holding that the plaintiff, employed in a foreign country, does not enjoy ADEA protection); *Cleary*, 555 F. Supp. at 1263 (holding that plaintiff employed in England was not protected by the ADEA regardless in which country the adverse employment decision took place, including the United States).

59. See 29 U.S.C. § 213(f). Furthermore, the *Cleary* court reasoned, "unless a contrary intent appears, a statute should be construed to apply only within the territorial jurisdiction of the United States." *Cleary*, 555 F. Supp. at 1257 (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)).

60. *Id.* at 1259.

61. These courts all applied the well-established presumption against extra-territoriality of federal law. See *Lopez v. Pan Am World Serv., Inc.*, 813 F.2d 1118 (11th Cir. 1987); *S.F. De Yoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th

In response to the *Cleary* and *Zahourek* decisions,⁶² Congress amended § 623 of the ADEA to expressly grant coverage to overseas Americans working for American companies.⁶³ In expanding the ADEA coverage overseas, Congress aimed to counteract the “red flag to international employers telling them that they can freely discriminate based on age against Americans working abroad and, indeed, Americans working here who can be transferred abroad and then fired.”⁶⁴ Thus, through § 623(h) Congress sought to clarify and amend the ADEA to cover executives transferred outside the country but who continued to work for an American employer.⁶⁵ Today, although § 623(h) clearly granted the ADEA extraterritorial power, § 623(h)’s purpose is only partially realized, as confusion remains as to how to extend liability to the American employer who may or may not adequately “control” its foreign incorporated subsidiary.⁶⁶ Section 623(h)(1) states, “If 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.”⁶⁷ The section, then, exempts from the ADEA’s extra-

Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek*, 750 F.2d at 827; *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984); *Cleary*, 728 F.2d at 607. Even Clarence Thomas, as the Chairman of the Equal Employment Opportunity Commission (EEOC), agreed that *Cleary* represented the proper interpretation of the ADEA’s domestic scope. See *Hearings*, *supra* note 54, at 2-3 (statement of Hon. Clarence Thomas, Chairman of the EEOC). At the Senate subcommittee hearing on amending the ADEA, Thomas testified that “it is the view of both the General Counsel and the Legal Counsel of the EEOC that the ADEA does not apply to . . . [overseas plaintiffs] for basically the same reasons set out by the court in *Cleary* . . .” *Id.*

62. These cases represented the only rulings regarding the ADEA’s extraterritorial application when Senator Grassley proposed the express amendment to grant extraterritorial application.

63. Age Discrimination in Employment Act, 29 U.S.C. § 623(h) (1994). Pub. L. No. 99-272, § 9201(b)(3), 100 Stat. 82, 176, and Pub. L. No. 99-592, § 2(b), 100 Stat. 3342, 3342, made identical amendments, redesignating subsection (g), relating to practices of foreign corporations controlled by American employers, as (h).

64. *Hearings*, *supra* note 54, at 7-8 (statement of Steven Kartzman, Attorney, Bourne, Noll & Kenyon). Indeed, an international marketing and management executive testified at a subcommittee hearing that after having filed an ADEA claim against his company, he was “offered a transfer” to Canada as a means of precluding the suit. See *Hearings*, *supra* note 54, at 19-20 (statement of Eugene B. Goodman).

65. See 29 U.S.C. § 623.

66. See discussion *infra* Part III.B.1.

67. 29 U.S.C. § 623(h)(1).

territorial scope foreign employers "not controlled by an American employer."⁶⁸

D. The ADEA in a Globalized Economy: Its Growing Importance at Home and Abroad

As previously mentioned, several factors lend to the increasing importance of the international implications of the ADEA. The U.S. and other world economies continue to globalize with more foreign employers in the United States⁶⁹ and more American employers in foreign countries.⁷⁰ This, in conjunction with the rising number of older Americans in the work force,⁷¹ increases the likelihood that workers covered by the ADEA will work either for a foreign employer in the United States or for an American employer in a foreign country. The incidence of international working situations naturally implicates questions of whether the ADEA's international application differs from that applied to cases concerning employees who remain working for American companies within the United States.

III. Analysis

The effectiveness of the ADEA in an increasingly globalized economy necessarily turns on two separate inquiries. The first inquiry, which will be analyzed in section A of part III, relates to the ADEA's impact on an American plaintiff's claim against a foreign employer operating within the United States. The second inquiry analyzes the ADEA's impact on an American plaintiff's claim against his or her American employer in a foreign country; this topic will be addressed in section B of part III.

A. The ADEA at Home: How Effective Is the ADEA for U.S. Employees Working for Foreign Employers?

Employees working within the United States commonly assume that U.S. discrimination laws protect them. Contrary to this belief, employees working for foreign employers do not always benefit from statutes such as the ADEA. In addition to an ADEA exemption that

68. 29 U.S.C. § 623(h)(2).

69. See Robert D. Hershey, Jr., *For U.S. Teen-Agers, the Summer Is Here, and Job Hunting Is Easy*, N.Y. TIMES, June 21, 1998, at 1.

70. See *Back on Top?*, *supra* note 49, at 64, *4.

71. See *OLDER AMERICANS*, *supra* note 2, at 1.

may cover both domestic and foreign employers,⁷² an employer may raise defenses based specifically on their foreign status.⁷³ Because foreign employers may assert certain defenses, unavailable to American corporations, it is proper to ask whether these defenses are so broad or powerful as to eviscerate the underlying purpose of the ADEA.

Based solely on their status as a foreign employer operating within the United States, corporations utilize various defenses, including: (1) a plain text argument that the ADEA exempts foreign employers operating within the United States from compliance;⁷⁴ (2) an argument that a treaty protects a foreign employer's right to select and terminate employees without regard for the ADEA;⁷⁵ and (3) an argument that the domestic subsidiary employer is indistinguishable from the foreign parent, enabling that subsidiary to assert its foreign parent's treaty or statutory rights.⁷⁶

1. THE PLAIN TEXT ARGUMENT

Presently, courts disagree as to whether the plain language of the ADEA exempts all foreign employers operating in the United States from liability under this Act.⁷⁷ This disagreement is surprising, given that federal discrimination laws typically apply throughout U.S. territorial jurisdiction.⁷⁸ The circuit split hinges on the interpretation of § 623(h)(2) of the ADEA, which is the extraterritorial amendment to the Act.⁷⁹ Section 623(h)(2) plainly states, "The prohibitions of [the

72. For example, an employer must have the requisite number of 20 employees to qualify as "an employer" under the Act). *See, e.g.,* Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915, 920 (E.D.N.Y. 1993), *aff'd*, 21 F.3d 502 (2d Cir. 1994).

73. *See, e.g.,* 29 U.S.C. § 623(h)(2).

74. *See, e.g.,* Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994) (foreign employer not subject to the ADEA where American citizen worked in United States).

75. *See, e.g.,* Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 355 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

76. *See, e.g.,* Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991); Papaila v. Uniden Am. Corp., 840 F. Supp. 440, 443 (N.D. Tex. 1994).

77. *Compare Mochelle*, 823 F. Supp. at 1309 (holding foreign employer not subject to ADEA if American citizen worked for foreign employer in the United States), *with* EEOC v. Kloster Cruise Ltd., 888 F. Supp. 147, 149-52 (S.D. Fla. 1995) (holding that foreign employers, per EEOC regulations and legislative history of ADEA, are subject to ADEA enforcement in the United States unless a treaty is involved).

78. *See* Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261, 267 (S.D.N.Y. 1987) (citing 29 C.F.R. § 860.20).

79. 29 U.S.C. § 623(h) (1994).

ADEA]⁸⁰ shall not apply where the employer is a foreign person not controlled by an American employer.”⁸¹ “Person” is then defined as “one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.”⁸²

The ADEA’s legislative history indicates that § 623(h)(2) should apply only to foreign employers located *outside* the United States.⁸³ Notwithstanding, some courts have used ambiguous statutory language to conclude that the ADEA exempts *all* foreign employers, even those operating *within* the United States, from ADEA compliance.⁸⁴ For example, in *Robinson v. Overseas Military Sales Corp.*,⁸⁵ a case involving a plaintiff primarily working in Korea for a foreign corporation with an office in New York,⁸⁶ the District Court for the Eastern District of New York made the conclusory statement that “[i]t is clear that foreign corporations are not subject to the prohibitions of the ADEA.”⁸⁷ The district court, citing § 623(h)(2), gave the impression that all foreign corporations, even those with headquarters in the United States, are not covered by the ADEA.⁸⁸ The Second Circuit

80. The prohibitions of this section include the following:

It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or, (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

81. 29 U.S.C. § 623(h)(2).

82. *Id.* § 630(a).

83. See S. REP. NO. 98-467, at 36 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, at 3009; H.R. CONF. REP. NO. 98-1037, at 49 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3037.

84. See *Robinson v. Overseas Military Sales Corp.*, 827 F. Supp. 915, 920 (E.D.N.Y. 1993), *aff’d*, 21 F.3d 502 (2d Cir. 1994); see also *Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff’d without opinion*, 15 F.3d 1079 (5th Cir. 1994).

85. 827 F. Supp. 915 (E.D.N.Y. 1993), *aff’d*, 21 F.3d 502 (2d Cir. 1994).

86. The district court described the foreign corporation, Overseas Military Sales Corporation (OMSC), as “a Swiss corporation with an office in Woodbury, New York. OMSC was formerly known as Chrysler Military Sales Corporation and is affiliated with Overseas Military Sales Group (OMSG) and Overseas Military Sales Organization (OMSO), which are also Swiss Corporations.” *Robinson*, 827 F. Supp. at 918-919.

87. *Id.* at 920 (citing 29 U.S.C. § 623(h)(2)).

88. See *id.*

Court of Appeals affirmed *Robinson* on other grounds, avoiding the question of "whether the ADEA applies to foreign corporations headquartered in the United States that employ U.S. nationals abroad."⁸⁹ Here, the Second Circuit⁹⁰ clarified that *Robinson* was an unusual case, because the American plaintiff spent a substantial amount of time in Korea as a sales representative.⁹¹ In fact, the plaintiff had an established residence in Korea and was married to a Korean national.⁹² Because the district court in *Robinson* failed to highlight the critical nature of the plaintiff's international residence, courts should not construe *Robinson* to hold that the ADEA does not, per se, cover American employees *working within the United States* for a foreign employer.⁹³

a. In Conjunction with the Place of Incorporation In *Mochelle v. J. Walter Inc.*,⁹⁴ the U.S. District Court for the Middle District of Louisiana addressed the plain text argument and firmly concluded that foreign employers operating (though not headquartered) within the United States are exempt from the ADEA.⁹⁵ Here, the court noted that, if plaintiff's American employer served as an agent of a Canadian corporation, the Canadian corporation by virtue of its foreign status would exempt both itself and its American counterpart from ADEA liability under § 623(h)(2).⁹⁶ In *Mochelle*, the plaintiff-employee argued that the court should view the American office as an extension of the foreign parent company.⁹⁷ The plaintiff relied on this argument so that he could include the employees of the foreign parent in an at-

89. *Robinson*, 21 F.3d at 507 n.5 [hereinafter *Robinson II*].

90. *Id.*

91. See *Robinson*, 827 F. Supp. at 918-19. Howard E. Robinson, the plaintiff, was employed by OMSG, OMSC and OMSO to sell Chrysler automobiles at Camp Walker and Camp Humphries, which are U.S. military installations in Korea. See *id.*

92. See *id.*

93. The court in *E.E.O.C. v. Kloster Cruise Ltd.*, 888 F. Supp. 147 (S.D. Fla. 1995), incorrectly defined *Robinson* as holding a "foreign employer [is] not subject to the ADEA where [the] American citizen worked in the United States." *Id.* at 149. Although the district court's opinion in *Robinson* was unclear, the court discussed Robinson's stay in Korea, and thus must have been aware that this case was different from one where the American plaintiff worked within the United States, as the *Kloster Cruise* court incorrectly stated.

94. 823 F. Supp. 1302 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).

95. See *id.* at 1309 (citing 29 U.S.C. § 623(h)(2) (1994)).

96. See *id.*

97. See *id.*

tempt to meet the ADEA's minimum employee requirement.⁹⁸ However, in the view of the court, the employer would be exempt from ADEA coverage under § 623(h)(2) by virtue of its Canadian status.⁹⁹ The court, in applying § 623(h)(2), failed to consider that the plaintiff only constructively worked for the Canadian corporation.¹⁰⁰ Because the plaintiff argued that his true employer was a Canadian corporation, the court determined that § 623(h)(2) clearly exempted plaintiff's foreign employer, and did not consider the plaintiff's physical presence in the United States.¹⁰¹ The Fifth Circuit notably affirmed the district court's decision without opinion.¹⁰² Thus, under *Mochelle's* analysis, an American citizen working exclusively in the United States for a foreign company would be without ADEA coverage if that company's headquarters was outside the United States.

b. No Foreign Employer Exemption for U.S. Operations In contrast to decisions such as *Robinson* and *Mochelle*, other courts analyzing § 623(h)(2) believe that Congress could not have intended to exclude American citizens working within the United States from coverage under the ADEA.¹⁰³ To shoulder their argument, these courts look to the overall purpose of the ADEA, its legislative history, as well as to the EEOC guidelines regulating the ADEA.¹⁰⁴

In doing its analysis, the court in *Helm v. South African Airways* understood § 623(h)(2) in terms of the amendment of which it was a part.¹⁰⁵ According to the *Helm* court, because Congress added § 623(h)(2) in 1984 as part of the amendment "to extend the Act's cov-

98. See *id.*

99. See *id.*

100. See *id.* The Court refused to take into account that the U.S. office of this Canadian corporation hired the plaintiff in the United States and defined plaintiff's sales area as exclusively restricted to the United States. See *id.* at 1304.

101. See *id.* at 1309.

102. See *Mochelle*, 15 F.3d 1079. The plaintiff in *Mochelle*, unlike that in *Robinson*, worked exclusively in the United States. See *Mochelle*, 823 F. Supp. at 1304. Yet, the *Mochelle* court simply found that "Walter Ltd.[.] as a foreign company not controlled by an American employer[.] is specifically excluded from ADEA liability under § 623(h)(2)." *Id.* at 1309.

103. See, e.g., *E.E.O.C. v. Kloster Cruise Ltd.*, 888 F. Supp. 147, 149-51 (S.D. Fla. 1995); *Helm v. South African Airways*, 44 Fair Empl. Prac. Cas. (BNA) 261, 267 (S.D.N.Y. 1987).

104. See *Kloster Cruise*, 888 F. Supp. at 149-51; *Helm*, 44 Fair Empl. Prac. Cas. (BNA) at 267.

105. See *Helm*, 44 Fair Empl. Prac. Cas. (BNA) at 267. Jack Helm filed an ADEA suit against his employer, South African Airways (SAA), after having been mandatorily retired from his pension plan benefits at age 63. SAA is headquartered in Johannesburg, South Africa, but Helm worked out of SAA's principal U.S.

erage to Americans employed abroad by American companies or their subsidiaries," the amendment does not usurp the ADEA's power within the United States.¹⁰⁶ The *Helm* court reasoned the following:

We find nothing in the ADEA or its legislative history to indicate that the 1984 amendments were intended to exclude American citizens working within the United States from coverage. ADEA prohibitions apply to "discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control."¹⁰⁷ It is the employee's place of employment which governs the ADEA's applicability [not the foreign status of the employer].¹⁰⁸

The court further reasoned that, because the amendment specifically withholds ADEA coverage from Americans working abroad for foreign employers, "Congress was careful not 'to impose its labor standards on another country.'"¹⁰⁹ The court then concluded, "It is inconceivable that Congress intended to respect the sovereignty of other nations and abandon that of the United States by subjecting American citizens, working inside the United States, to foreign law."¹¹⁰ In other words, it was illogical to hold that Congress wanted to exempt foreign businesses in the United States from the ADEA in light of its efforts to respect a foreign country's jurisdiction and laws when American corporations expanded into the foreign country's borders.

Similarly, the U.S. District Court for the Southern District of Florida, in *EEOC v. Kloster Cruise Ltd.*,¹¹¹ went to great lengths to demonstrate the inapplicability of the foreign employer exemption in § 623(h)(2) to foreign employers operating within the United States.¹¹² The court adopted the EEOC's interpretation of the ADEA—that foreign employers operating within the United States were not exempt—after showing, first, that § 623(h)(2) was ambiguous, and second, that the EEOC's interpretation was reasonable.¹¹³

office in New York. SAA argued that it should be "entirely exempt" because it qualified as a foreign employer under § 623(h)(2). *See id.* at 262-63.

106. *Id.* at 267.

107. *Id.* (quoting 29 C.F.R. § 860.20 (1986)).

108. *Id.* (citing *Wolf v. J.I. Case Co.*, 617 F. Supp. 858, 863 (E.D. Wis. 1985)).

109. *Id.* (quoting S. REP. NO. 98-467, at 27 (1984)).

110. *Id.*

111. 888 F. Supp. 147 (S.D. Fla. 1995).

112. *See id.* at 149-52. In this case, the EEOC filed suit against Kloster Cruise, a Bermuda subsidiary of a Norwegian parent corporation, on behalf of several plaintiffs over age 40 who were terminated from Kloster Cruise's Florida offices. *See id.* at 148.

113. *See id.* at 149.

The *Kloster* court admitted that § 623(h)(2) specifically “exempt[ed] foreign companies from the anti-discrimination rules of § 623(a).”¹¹⁴ However, in viewing the statutory scheme for clarification,¹¹⁵ the court resolved that “closely related sections of the ADEA indicate that § 623(h)(2)’s exemption is limited to overseas operations.”¹¹⁶ For example, at the same time Congress adopted § 623(h)(2), § 623(f) was amended to expand the definition of employee to include, “United States citizens working abroad.”¹¹⁷ In addition, looking at the entirety of § 623(h)(2)’s legislative history, the court found that § 623(h)(2)’s sole purpose was to “fine-tune Congress’ extension of the ADEA so that the statute [would] not govern the *foreign operations* of foreign companies.”¹¹⁸ The court emphasized that an over-broad, or “extreme,”¹¹⁹ interpretation of § 623(h)(2) would greatly limit and “unnecessarily poke a gaping hole” in ADEA protections.¹²⁰

Finding § 623(h)(2) sufficiently ambiguous, the *Kloster* court turned to the EEOC’s interpretation of the ADEA.¹²¹ The EEOC regulations clearly stated that “[t]he ADEA applies to an employer that is a foreign firm operating inside the United States unless a treaty states otherwise.”¹²² In addition, the court recognized that the EEOC is “entitled to great deference,” and, unless its interpretation is “arbitrary [and] capricious,” its interpretation should be upheld by the court.¹²³ Overall, the court found that the policy articulated by the EEOC was not only reasonable and “best squar[ing] with the purpose and con-

114. *Id.* at 150.

115. *See id.* at 152.

116. *Id.*

117. *Id.* (citing 29 U.S.C. § 630(f) (1994)).

118. *Id.* at 151 (emphasis added).

119. *Id.* at 151 n.6.

120. *Id.* at 151-52.

121. *See id.* at 150.

122. *Id.* at 149 (citing EEOC Policy Guidance, N-915.039, Empl. Prac. Guide (CCH) ¶ 5183, at 6536 (Mar. 3, 1989)). The EEOC, in promulgating its policy, used the following example adopted by the court:

Example—Arthur, a 55 year old resident alien of the United States, works for a foreign corporation operating in Ohio. Arthur files a charge with the [EEOC] because his foreign employer has a firm policy requiring all persons over 56 to retire. Arthur should obtain relief since the ADEA generally covers the employment practices of a foreign employer inside the United States.

Id.

123. *Id.* at 150 (citing *Dawson v. Scott*, 50 F.3d 884, 886 (11th Cir. 1995); *Sims v. Trus Joist MacMillan*, 22 F.3d 1059, 1060-61 (11th Cir. 1994); and *Passer v. American Chem. Soc.*, 935 F.2d 322, 329 (D.C. Cir. 1991)).

text” of the ADEA’s history,¹²⁴ but also the interpretation that the court would have chosen had the EEOC not issued policy guidance.¹²⁵

Given the fact that courts’ interpretations of § 623(h)(2) have varied, a firm resolution of this issue is necessary to promote better enforcement of the ADEA. As will be discussed in part IV.A, application of § 623(h)(2) under a rigid textualist approach creates outcomes overwhelmingly contrary to the ADEA’s purpose and legislative history.

2. THE IMPACT OF TREATIES ON ADEA ENFORCEMENT

Foreign employers operating within the United States also look towards treaty rights as another shield against age discrimination liability. Bilateral agreements negotiated between the United States and other countries, most significantly the Treaties of Friendship, Commerce and Navigation (FCN Treaties), establish “the ground rules by which private commerce between American citizens and citizens of other countries is regulated.”¹²⁶ Such treaties comprise “the supreme Law of the Land,”¹²⁷ requiring no further legislative action to become domestic law.

Broadly speaking, the FCN Treaties propose to provide a stable environment for international trade and investment.¹²⁸ The United States began negotiating commercial treaties in 1778 and has continued to do so into the nineteenth and twentieth centuries.¹²⁹ Although the early commercial treaties primarily “were concerned with the trade and shipping rights of *individuals*,”¹³⁰ twentieth century treaties typically protect corporate rather than individual interest.¹³¹ In other words, the U.S. *corporations* did not gain the right to conduct business in other countries until the enactment of postwar FCN Treaties.¹³²

124. *Id.* at 151.

125. *See id.*

126. *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 355-56 (5th Cir. 1981) (citing Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958)).

127. U.S. CONST. art. VI, cl. 2.

128. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 187 (1982) [hereinafter *Sumitomo I*].

129. *See id.*

130. *Id.*

131. *See id.*

132. *See id.* The Court explained that,

[i]n the treaties antedating World War II, American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a

a. **"Employer-Choice" Provisions** Currently, the United States has signed FCN treaties with at least sixteen countries, including Japan, Korea, Greece, and Spain.¹³³ The typical FCN treaty contains an "employer-choice" provision, allowing companies to hire certain professional employees "of their choice" when operating within a foreign country.¹³⁴ For example, Article VIII(1) of the U.S.-Japanese FCN Treaty states in relevant part, "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*."¹³⁵ Foreign companies have used this provision to hire executives from their home country to oversee development of both newly purchased and established companies within the United States.¹³⁶ Contrary to the purpose of the ADEA, these employment decisions often displace or limit an older domestic employee's ability to maintain or obtain these executive positions.¹³⁷

Courts interpret these "employer-choice" provisions in three different ways: (1) the Fifth Circuit holds that a treaty's plain language unequivocally exempts foreign employers from all U.S. antidis-

nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies.

Id. (citing *Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece Before the Subcomm. of the Senate Comm. on Foreign Relations*, 82d Cong., 4-5 (1952) (statement of Harold Linder, Deputy Assistant Secretary of State for Economic Affairs)).

133. See *id.*; see also Gary Taylor, *Bias Cases Strike at Treaty Shielding Foreign Business: The 5th Circuit Rebuffs Effort to Pierce Immunity from Bias Suits that Japanese-owned U.S. Businesses Enjoy*, NAT'L L.J., July 31, 1995, at B1.

134. See *Sumitomo I*, 457 U.S. at 181 (citing Article XII(4) of the Treaty with Greece, Aug. 23, 1951, 5 U.S.T. 1829, 1857, T.I.A.S. No. 3057 (1951); Article VIII(1) of the Treaty with Israel, [1954] 5 U.S.T. 550, 557, T.I.A.S. No. 551 (1951); Article VIII(1) of the Treaty with the Federal Republic of Germany, Oct. 29, 1954, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593 (1954)). These provisions were apparently included at the insistence of the United States. See *id.* The Court pointed out that "[i]n fact, other countries, including Japan, unsuccessfully fought for their deletion." *Id.* (citing State Department Airgram No. A-453, dated Jan. 7, 1952, pp. 1, 3, reprinted in App. 130a, 131a, 133a (discussing Japanese objections to Article VIII(1)); Foreign Service Dispatch No. 2529, dated Mar. 18, 1954, reprinted in App. 181a, 182a (discussing German objections to Article VIII(1))).

135. Treaty of Friendship, Commerce and Navigation with Japan, Apr. 2, 1953, U.S.-Japan, art. VIII, Para. 1, 4 U.S.T. 2063, 2070 (emphasis added).

136. See, e.g., *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

137. See *id.* at 394.

crimination laws;¹³⁸ (2) the Third Circuit holds that a treaty cannot shield a foreign employer from *intentional* discrimination, but that a treaty can shield the same employer from a *nonintentional*, or *disparate impact* claim;¹³⁹ and, finally, (3) the Second Circuit holds that the treaty provision can shield a foreign employer only when foreign citizenship can be seen as a bona fide occupational qualification (BFOQ).¹⁴⁰ Because the ADEA is based in large part on Title VII, the circuits' opinions often follow the analysis of Title VII claims, which protect against discrimination based on race, gender, religion, and national origin.¹⁴¹

Before examining the various circuit courts' holdings in depth, it should be noted that the Supreme Court examined the implication of treaties and U.S. discrimination laws in *Sumitomo Shoji America, Inc. v. Avagliano*.¹⁴² The Court's ruling in *Sumitomo* narrowly decided the question of whether an American-incorporated, wholly owned subsidiary of a foreign corporation could, itself, assert the rights of an FCN treaty.¹⁴³ Based on the language found within Japan's FCN Treaty, the Court found that an American-incorporated subsidiary "constituted under the applicable laws and regulations" of the United States cannot invoke its own treaty rights.¹⁴⁴ The Supreme Court reasoned that such rights are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan.¹⁴⁵ The Court further indicated that the purpose of the FCN Treaties "was not to give foreign corporations greater rights

138. See *Spiess v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

139. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1141-42 (3d Cir. 1988).

140. See *Avagliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 559 (2d Cir. 1981) [hereinafter *Sumitomo II*], *vacated and remanded on other grounds*, 457 U.S. 176 (1982) (emphasis added); see also *Goyette v. DCA Adver., Inc.*, 828 F. Supp. 227, 237 (S.D.N.Y. 1993) (applying *Sumitomo* criteria); *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548, 1562-63 (E.D.N.Y. 1990).

141. See, e.g., *Sumitomo I*, 457 U.S. at 176 (1982) (describing scope of Title VII protections).

142. *Id.* (female secretaries argued that *Sumitomo*, a New York subsidiary wholly owned by its Japanese parent, was discriminating against them by hiring only Japanese males for its executive positions in violation of Title VII).

143. See *id.* Note that the analysis in Section III encompasses those issues relating to the difficult parent/subsidiary distinction. Although the treaty issues discussed in this section can become hopelessly intertwined with parent/subsidiary issues, this section attempts to separate the two analyses to heighten and clarify the issues. Thus, this section will be primarily concerned with whether courts have viewed FCN treaties as a complete defense to U.S. antidiscrimination laws, such as the ADEA.

144. *Id.* at 182-83.

145. See *id.* at 189-90.

than domestic companies, but instead to assure them the right to conduct business on an equal basis."¹⁴⁶ While this holding seems to significantly decrease the ability of foreign employers to skirt antidiscrimination laws such as Title VII and the ADEA, the Court expressly reserved the questions of (1) whether a domestic subsidiary may then assert any Article VIII(1) rights of its *parent*; (2) whether foreign citizenship may be used as a bona fide occupational qualification for certain positions; and (3) whether a business necessity defense may be available.¹⁴⁷ Thus, although *Sumitomo* clarified the Supreme Court's view of the purpose of FCN treaties, it explicitly left open many questions for the circuit courts.¹⁴⁸

b. Fifth Circuit's Analysis: A U.S. Subsidiary's Treaty Defense The Fifth Circuit further considered the implications of the U.S.-Japanese FCN Treaty¹⁴⁹ in *Spiess v. C. Itoh & Co. (America)*.¹⁵⁰ In *Spiess*, a case later vacated by the Supreme Court on unrelated grounds, the Fifth Circuit concluded that foreign subsidiaries had a complete defense to U.S. discrimination laws, due to the plain language of Article VIII(1) within the treaty.¹⁵¹ In reaching its conclusion, the Fifth Circuit first found that "the overriding goal" of the treaty "was to provide national treatment to foreign businesses operating in a host country."¹⁵² The Court defined "national treatment" as granting foreigners the *same treatment* as native citizens.¹⁵³ Thus, it would appear that under this theory, foreign businesses would be subject to the same discrimination laws as their American counterparts. However, the Fifth Circuit

146. *Id.* at 187-88.

147. *See id.* at 189-90 n.19.

148. Compare *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (holding that the treaty did not intend to allow unlawful discrimination based on age, race, sex, religion, or national origin), with *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (carving out a narrow exception to *Sumitomo* where foreign parent company's employment decisions would be thwarted if subsidiary could not assert treaty rights).

149. It should be noted that although the language in the Korean and Japanese FCN treaties is remarkably similar, the U.S. Supreme Court has held that each treaty must be interpreted separately, based on its own negotiation history. Thus, even if a court decides how one foreign country's treaty should be interpreted, this decision does not carry precedential weight with regard to another country's treaty which has a different negotiating history. *See Sumitomo*, 457 U.S. at 185 n.12.

150. 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

151. *See id.* at 359.

152. *Id.* at 360.

153. *See id.* at 359.

carved out a large exception to this rule.¹⁵⁴ In essence, the court found that, with respect to Article VIII(1)'s "of their choice" provision, the treaty's drafters did not intend to grant foreign businesses *national treatment*, but instead, "*an absolute rule* permitting foreign nationals to control their overseas investments."¹⁵⁵ Under this rewording, the Fifth Circuit concluded, "Considering the treaty as a whole, the only reasonable interpretation is that Article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."¹⁵⁶ Of the three federal appellate courts that have considered the issue,¹⁵⁷ only the Fifth Circuit provides such a broad conclusion.¹⁵⁸

c. *Third Circuit Analysis: A Matter of Intent* In *MacNamara v. Korean Air Lines*,¹⁵⁹ the Third Circuit Court of Appeals reversed the district court's ruling and ultimately determined that where a Korean employer *intentionally* discriminated against U.S. employees, the U.S.-Korean FCN Treaty did not exempt a Korean employer from U.S. antidiscrimination laws.¹⁶⁰ Mr. MacNamara, a district sales manager, began working for Korean Airlines (KAL) in 1974.¹⁶¹ On June 15, 1982, KAL dismissed and replaced Mr. MacNamara, then fifty-seven, with a forty-two-year-old Korean citizen.¹⁶² Mr. MacNamara filed a complaint alleging that KAL discriminated against him on the basis of race, national origin, and age.¹⁶³ KAL, in its defense, argued it was merely "reorganizing" its U.S. operations and moved to dismiss Mr. MacNamara's complaint on the ground that KAL's conduct was privileged under the terms of the Korean FCN Treaty.¹⁶⁴ Specifically, KAL argued that the "of their choice" language in the first sentence of Arti-

154. See *id.* at 360.

155. *Id.* (emphasis added).

156. *Id.* at 361.

157. See discussion *infra* notes 159-86.

158. See *Spiess*, 643 F.2d at 361.

159. 863 F.2d 1135 (3d Cir. 1988).

160. See *id.* at 1148.

161. See *id.* at 1137-38.

162. See *id.* In addition to terminating Mr. MacNamara, KAL discharged six American managers nationally and replaced them with four Korean citizens. See *id.* at 1138.

163. See *id.*

164. See *id.*

cle VIII(1)¹⁶⁵ provided a foreign corporation with the right to employ executives of its own choosing, "unhampered by domestic anti-discrimination employment statutes."¹⁶⁶

The *MacNamara* district court found in favor of KAL, holding: (1) that Article VIII(1)'s express language specifically exempted a foreign company's choice of personnel from the operation of domestic employment laws; (2) that Title VII and the ADEA could not be reconciled with Article VIII(1); and, (3) that when such conflicts arose, the terms of the Treaty controlled.¹⁶⁷ However, the court also limited its ruling by stating it applied only to employment decisions regarding "essential personnel" and to situations favoring Korean citizens.¹⁶⁸ Hoping to quell fears that the use of the treaty defense would result in unbridled discrimination by foreign employers, the district court stated:

An examination of Article VIII(1) shows no need for the expressed alarm that all the labor laws of this country will be emasculated if plain meaning were ascribed to the words of the Treaty. The Treaty would exempt only executives, accountants, attorneys, agents, specialists and technical experts whose services are necessary to insure the operational success of the foreign corporation in the host country. . . . Moreover, employees at this level are in a position to make their own bargains or at least to discover before applying for or accepting a position with a foreign corporation

165. Korea's FCN Treaty, Article VIII(1) is similar to Japan's FCN Treaty and states:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-S. Korea, art. VIII, 8 U.S.T. 2217, 2223 [hereinafter Korean FCN Treaty].

166. *MacNamara*, 863 F.2d at 1138. In response to KAL's motion, *MacNamara*, as well the U.S. Department of Justice in an amicus brief, claimed that "Article VIII(1) secured to a foreign business only the right to select managerial and technical personnel on the basis of citizenship and did not provide a broad exemption from laws such as Title VII and the ADEA which prohibit employment decisions on the basis of race, national origin, or age." *Id.*

167. *See id.*

168. *See id.*

that it is doing business in this country pursuant to a Treaty and to ascertain the conditions of employment¹⁶⁹

In essence, the district court held that the treaty language should be construed plainly because it would affect only "a relatively small number of persons who knowingly assume essential positions."¹⁷⁰

The Third Circuit held that, while the existence of a treaty did supply foreign employers with different "rights" than their domestic counterparts, Article VIII(1) provided shelter to foreign business only in regards to personnel decisions that "logically or pragmatically conflict[ed] with the right to select one's own nationals as managers because of their citizenship."¹⁷¹ The Third Circuit, in reversing *MacNamara*, determined that Article VIII(1) does not confer a foreign employer with blanket authority to choose its own citizen over a citizen of the host country simply because of age.¹⁷² In reaching this conclusion, the Third Circuit stressed the overall purpose of the FCN Treaty—to establish equity, or equal protection of U.S. laws, between the foreign investor and the host country's competing organizations.¹⁷³ As argued by the Third Circuit, the general content of the modern FCN Treaties is guided by the principle of "national treatment."¹⁷⁴

After establishing that the Korean FCN Treaty was the type of treaty that granted "national treatment," the Third Circuit reconciled

169. *MacNamara v. Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) 384, 390 (E.D. Pa. 1987) [hereinafter *McNamara I*].

170. *Id.*

171. *MacNamara*, 863 F.2d at 1140.

172. *See id.* at 1144.

173. *See id.* at 1142-43 (citing Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 n.7 (1956)). Walker, at the State Department, served as Advisor on Commercial Treaties and was responsible for formulating the general structure of the postwar FCN Treaties. *See id.* at 1143 n.7 (citing *Avagliano v. Sumitomo Shoji Am., Inc.*, 457 U.S. 176, 181 n.6 (1982) (citing Department of State Airgram A-105, dated Jan. 9, 1976)).

174. *Sumitomo I*, 457 U.S. at 188 n.18. Although "national treatment" was the predominant standard, two other kinds of protection were established in FCN Treaties. When the signatory nations were unwilling to grant national treatment with respect to some issues, the Treaty afforded a lesser standard of protection, "most-favored-nation treatment," or treatment no less favorable than that under which the most privileged foreign company operated. In addition, the Treaty could also provide for "absolute or non-contingent standards that gave foreign employers a certain specified protection without regard to whether the same protection was provided to host country businesses." *MacNamara*, 863 F.2d at 1143 (citing *Sumitomo*, 457 U.S. at 188 n.18).

the treaty with the intent of the parties who drafted the agreement.¹⁷⁵ Significantly, the court determined that treaty rights and civil rights would not conflict where the foreign employer intentionally discriminates against an American employee based on age.¹⁷⁶ The Court reasoned that this differed markedly from a situation where a foreign employer preferred an applicant from its own country to that of an American applicant.¹⁷⁷ In other words, a foreign employer would only be found liable in situations where, but for age, the foreign employer would not have dismissed the plaintiff.¹⁷⁸ The Third Circuit further supported its decision by pointing out that "defending personnel decisions is a fact of business life in contemporary America and is a burden that domestic competitors of foreign enterprise have been required to shoulder."¹⁷⁹ As such, foreign enterprises operating in the Third Circuit must be prepared to defend their motives in a court of law.¹⁸⁰

d. The Second Circuit's BFOQ Standard The Second Circuit Court of Appeals applies a more stringent standard for foreign employers who are protected by FCN treaties. Under *Avigliano v. Sumitomo Shoji America, Inc.*,¹⁸¹ the Second Circuit holds a foreign employer liable, even if "protected by the treaty," unless that employer can show it preferred its own nationals only for "positions where such employment is reasonably necessary to the successful operation of its business."¹⁸² The standard utilized by the Second Circuit is referred to as the BFOQ standard, or the "bona fide occupational qualification" standard, because it requires the employer to justify its foreign citizen per-

175. See *MacNamara*, 863 F.2d at 1143. The intent of the parties to the treaty, according to the Third Circuit, was not to override domestic laws, but instead, to work with them. See *id.* at 1142-43.

176. See *id.* at 1146-47.

177. See *id.* at 1147.

178. See *id.* at 1147 n.15 ("Thus, even where a desire to favor one's own citizens may have played some role in a decision to replace an employee, there can be no liability unless the same decision would not have been made absent the . . . age of the replaced individual.").

179. *Id.* at 1147.

180. See *Starr*, *supra* note 4, at 646.

181. 638 F.2d 552, 559 (2d Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 176 (1982). This case was vacated by the Supreme Court on the basis that a wholly owned American-incorporated subsidiary could not assert the treaty rights of its parent corporation. However, the Second Circuit's opinion in this case, regarding to what degree a treaty can be used as a defense against employment discrimination claims, has never been overruled.

182. *Id.*

sonnel based on that employee's "special skills and aptitudes."¹⁸³ The BFOQ factors the Second Circuit suggests include: "(a) language fluency and cultural skills of the foreign nation; (b) knowledge of the foreign country's products, markets, customs, and business practices; (c) familiarity with the personnel and workings of the parent enterprise; and (d) acceptability to people with whom the company must transact business."¹⁸⁴ Unlike the approach adopted by the Third Circuit which focuses on the employer's motive,¹⁸⁵ the Second Circuit's approach allows a foreign employer to intentionally discriminate against American citizens over the age of forty, so long as the employer can show reasonable necessity for the success of the business.¹⁸⁶

When facing an employer which is covered by an FCN treaty, the plaintiff's strategy will depend on the circuit of the pending suit. In the Fifth Circuit, the plaintiff may have limited success in dismantling the employer's privileges in employment decisions. In contrast, the Second and Third Circuits place some limitations on the "of their choice" provisions of treaties, though their tests differ. As discussed in Part VI.A.2, in order to effectuate consistent application of the ADEA to all plaintiffs facing an employer protected by an FCN treaty, a firm resolution to these different interpretations is necessary.

3. WHO HAS CONTROL: THE FOREIGN PARENT OR THE AMERICAN SUBSIDIARY?

Closely tied to any discussion of treaties and their impact on the ADEA's enforcement within the United States is the question of whether the employer is foreign and therefore potentially protected by a treaty, or domestic and therefore clearly accountable under U.S. discrimination law.¹⁸⁷ The relevant inquiry focuses on who controls the domestic subsidiary—the subsidiary itself or the foreign parent?¹⁸⁸ If the court finds that a foreign parent sufficiently controls its domestic subsidiary, the parent and subsidiary, together, are said to be the "single employer" of the employees working within the United States.¹⁸⁹ Examples of criteria used for determining whether the parent and its

183. Starr, *supra* note 4, at 645.

184. *Sumitomo II*, 638 F.2d at 559.

185. See *supra* discussion accompanying notes 159-80.

186. See *supra* discussion accompanying notes 181-85.

187. See, e.g., *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991).

188. See *Goyette v. DCA Adver., Inc.*, 830 F. Supp. 737, 744 (S.D.N.Y. 1993).

189. See *id.*

subsidiary are in fact a "single employer" include: "(a) interrelated operations, (b) common management, (c) centralized control of labor relations, and, (d) common ownership."¹⁹⁰ A finding of a "single employer" status between a domestic subsidiary and a foreign parent contains variable, yet equally important, repercussions. First, such a finding may allow the domestic subsidiary to assert the treaty rights of its foreign parent.¹⁹¹ Second, it may simply impute liability to the parent corporation.¹⁹² Finally, it may allow a plaintiff to sue a domestic subsidiary which otherwise would not have the requisite number employees to qualify as an employer under the ADEA.¹⁹³

In order to fully appreciate the range of holdings, this analysis must, once again, turn to the U.S. Supreme Court case, *Sumitomo Shoji America, Inc. v. Avagliano*.¹⁹⁴ As previously discussed, the Supreme Court in *Sumitomo* determined that an American-incorporated subsidiary of a foreign corporation cannot, *itself*, claim to have FCN Treaty rights.¹⁹⁵ However, the Court left open the question of whether the American subsidiary of a foreign corporation *may assert the FCN Treaty rights of its foreign parent*.¹⁹⁶

a. Asserting the Parent Corporation's Treaty Rights In *Fortino v. Quasar Co.*,¹⁹⁷ the Seventh Circuit Court of Appeals reviewed whether an American subsidiary, as an unincorporated division of a U.S. corporation wholly owned by a Japanese corporation, could assert the FCN Treaty rights of its foreign parent.¹⁹⁸ The *Fortino* court held that an American subsidiary of this kind should be allowed to assert its par-

190. *Frischberg v. Esprit de Corp., Inc.*, 778 F. Supp. 793, 800 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1042 (2d Cir. 1992).

191. *See, e.g., Fortino*, 950 F.2d at 393; *see also Papaila v. Uniden Am. Corp.*, 840 F. Supp. 440, 446-47 (N.D. Tex. 1994).

192. *Compare Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D. La. 1993) (holding that liability would not be imputed to the foreign parent corporation due to § 623(h)(2), and exempts foreign employers operating in a foreign country from the ADEA), *with Goyette*, 830 F. Supp. at 744 (holding that the foreign parent of an American subsidiary could be held liable for the actions of its subsidiary where parent exercised sufficient control over that subsidiary).

193. *See, e.g., Goyette*, 830 F. Supp. at 745 (holding that even if foreign parent does not directly employ requisite number of employees in the United States, foreign parent is still an "employer" where American subsidiary of foreign parent has requisite number of employees).

194. 457 U.S. 176 (1982).

195. *See id.* at 189-90.

196. *See Papaila*, 840 F. Supp. at 446.

197. 950 F.2d 389 (7th Cir. 1991).

198. *See id.* at 393.

ent's treaty rights.¹⁹⁹ The court reasoned that "[a] judgment that forbids Quasar [the American subsidiary] to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent."²⁰⁰ Notably, the court failed to set forth the required degree of control a parent must exert over its subsidiary. It merely assumed that Matsushita commanded personnel decisions at Quasar.²⁰¹

Lower courts have addressed the "control" issue directly by examining whether the foreign parent sufficiently affects the work policies of its American subsidiary. For example, in *Goyette v. DCA Advertising*,²⁰² the court questioned to what extent Dentsu, a Japanese corporation, controlled DCA Advertising, its wholly owned subsidiary incorporated in New York state.²⁰³ Although the plaintiffs in this case sued under Title VII for national origin discrimination, the court's finding of foreign parent control relied on the same analysis as in an ADEA case.²⁰⁴ In this case, because the foreign parent, Dentsu, "explicitly ordered DCA not to fire any Dentsu expatriates and also . . . regulated the terms of the expatriates employment," the court held that Dentsu qualified as the employer within the meaning of Title VII.²⁰⁵ According to the *Goyette* court, the key inquiry is whether the foreign parent significantly affected the subsidiary's employment policies.²⁰⁶ Due to the fact that Dentsu's expatriate employment policy significantly affected DCA's decision to terminate several American employees, the court ruled that Dentsu could be held liable under Title VII.²⁰⁷

One significant ramification of the ruling is that it effectively allowed a plaintiff to sue an entity which otherwise would not have the requisite number of employees to qualify as an employer under the

199. See *id.* The court stated that such an assertion is justified "at least to the extent necessary to prevent the treaty from being set at naught." *Id.*

200. *Id.* ("[I]t would prevent Matsushita [as the foreign parent company] from sending its own executives to manage Quasar in preference to employing American citizens in these posts.").

201. See *id.*

202. 830 F. Supp. 737 (S.D.N.Y. 1993).

203. See *id.* at 740.

204. Because Title VII does not provide means for service of process, personal jurisdiction may only be exercised pursuant to state law. See *id.* at 742-43. The ADEA does not provide means for service of process and follows the same analysis. See, e.g., *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991).

205. *Goyette*, 830 F. Supp. at 744.

206. See *id.*

207. See *id.*

ADEA.²⁰⁸ Dentsu, the foreign employer in the *Goyette* case, argued that it did not employ the requisite number of employees within the United States to be found liable under Title VII.²⁰⁹ The court, however, determined that all of DCA's employees (as the American subsidiary) should be viewed as employees of Dentsu, because "[t]hey are the people who can or cannot be fired according to Dentsu's policy."²¹⁰

b. "Single Employer" Status? In contrast to the *Goyette* case, a New York district court, in *Dewey v. PTT Telecom Netherlands, U.S., Inc.*,²¹¹ dismissed an ADEA claim, ruling that the American subsidiary failed to meet the ADEA's requisite number of employees and that the activities between the parent corporation and its subsidiary were not sufficiently related to constitute an integrated enterprise.²¹² The court considered whether the following characteristics existed in order to determine whether PTT (the American subsidiary) and Royal PTT (the Dutch parent corporation) operated as a single employer: (1) centralized control of labor relations; (2) interrelated operations; (3) common management; and (4) common ownership.²¹³ Under this analysis the *Dewey* court held that "the most important factor in the 'single employer analysis' is the degree of centralized control of labor relations and whether it exceeds 'the control normally exercised by a parent corporation which is separate and distinct from the subsidiary.'"²¹⁴

The court ultimately refused to find that Royal PTT and PTT qualified under "single employer" status. It based its finding on the fact that: (1) Royal PTT did not dictate the hiring or management of the three PTT Telecom B.V. employees stationed at PTT; (2) board members did not act "in a manner inconsistent with their position on PTT's Board;" and, (3) Royal PTT did not control PTT's employment decisions simply because PTT informed Royal PTT of these deci-

208. See, e.g., *id.* at 745.

209. See *id.* To be an employer under Title VII, the party must employ 15 or more people for 20 or more weeks during the current or preceding calendar year. 42 U.S.C. § 2000e(b) (1994).

210. *Goyette*, 830 F. Supp. at 745.

211. 68 Fair Empl. Prac. Cas. (BNA) 1112 (S.D.N.Y. 1995).

212. See *id.* at 1115.

213. See *id.* at 1114. These four factors are also listed in the ADEA in § 623 (h)(3), used to determine whether an American employer controls a corporation located overseas. 29 U.S.C. § 623 (h)(3)(A)-(D).

214. 68 Fair Empl. Prac. Cas. (BNA) at 1114 (citing *Kellett v. Glaxo Enter., Inc.*, No. 91 Civ. 6237, 1994 WL 669975 at *2 (S.D.N.Y. Nov. 30, 1994), which quoted *Armbruster v. Quinn*, 711 F.2d 1332, 1337-38 (6th Cir. 1983)).

sions.²¹⁵ The court, in assessing the interrelation of operations, stated the most relevant factors included, "common offices, long-distance shipping, bank accounts, payroll and shared facilities rather than . . . [an] overlap of personnel."²¹⁶ Because the court found that Dewey could not point to any such interrelation of operations, the court did not find sufficient evidence for single employer status.²¹⁷ The *Dewey* decision, when compared with the holding in *Goyette*,²¹⁸ seems to indicate that plaintiffs will have a much easier time showing the existence of a "single employer" status between a foreign parent and a domestic subsidiary when the foreign parent exercises an employment policy which generally affects the subsidiary's employees.

4. DOMESTIC ADEA ENFORCEMENT AGAINST FOREIGN EMPLOYERS: FINAL ISSUES RECAPPED

As discussed in the above three sections, plaintiffs working for foreign corporations within the United States face several additional hurdles to succeeding in their ADEA claims. Although most circuits would deny the argument that the ADEA text, in and of itself, exempts foreign employers within the United States from compliance, the fact that such a ruling has been affirmed in the Fifth Circuit may give plaintiffs pause.²¹⁹ Furthermore, plaintiffs may have difficulty in maneuvering around the treaty rights of foreign employers.²²⁰ Even if a plaintiff is prepared to sue a foreign employer with treaty rights

215. *Id.* In contrast, Dewey argued that several factors indicated that Royal PTT (the foreign parent) had control over PTT's employment decisions. *See id.* These factors included: (1) that PTT Telecom B.V., owned by Royal PTT, stationed three of its employees at PTT's U.S. office; (2) that PTT's president could not interfere in employment agreements without the consent of Mr. Volbeda, a Royal PTT employee, who was also on PTT's Board; and (3) that Royal PTT was kept informed of PTT's hiring and firing decisions. *See id.* Dewey's arguments focused on the interrelated operations and common management between PTT and Royal PTT. *See id.* Two out of three of PTT's Board of Directors were Dutch, and furthermore, "nine out of the ten current and past Board members . . . [had] been Dutch citizens and were employees of Royal PTT." *Id.* at *3. Although the evidence in Dewey's favor seemed fairly weighty, the court refused to grant single employer status. *See id.*

216. *Id.*

217. *See id.* The court further cautioned that "[t]he fact that the directors of the subsidiary are all employees of the parent does not establish that the parent controls the subsidiary." *Id.*

218. *See Goyette v. DCA Adver., Inc.*, 830 F. Supp. 737, 745 (S.D.N.Y. 1993).

219. *See Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D.La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).

220. *See Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

under the ADEA, the various tests used by different circuit courts of appeals create uncertainty as to the likelihood of recovery.²²¹ Finally, plaintiffs may employ the "single employer" doctrine to enhance their ability to recover,²²² although the utilization of such a doctrine is not without risks.²²³ Plaintiffs making the "single employer" argument face the possibility of a domestic subsidiary employer asserting its foreign parent's treaty rights, which may effectively counteract their ADEA claims.²²⁴ Part IV of this note examines whether these defenses are so broad as to eviscerate the underlying purpose of the ADEA.

B. The ADEA Overseas: Feasible Protection or Pipe Dream?

In 1984, Congress amended the ADEA to include coverage for American citizens working for American companies outside the territory of the United States.²²⁵ Prior to this amendment, courts refused to grant extraterritorial rights under the ADEA unless the employee's transfer abroad served as "a transparent evasion of the Act."²²⁶ Though U.S. citizens may now rely on statutory protection against age discrimination overseas,²²⁷ the value of such protection is suspect because of the number of defenses specifically available to American companies located overseas.

Age discrimination plaintiffs working abroad for an American employer encounter two main obstacles. The first obstacle involves proving that the American parent corporation sufficiently controls the foreign subsidiary for which the plaintiff works.²²⁸ The second obstacle involves a "foreign law defense," exempting American employers

221. Compare *id.* (which held that treaties allow foreign employers within the United States to unequivocally discriminate in favor of employees "of their choice"), with *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988) (which precludes foreign employers from intentional discrimination within the United States).

222. See *Goyette*, 830 F. Supp. at 744.

223. See *e.g.*, *Mochelle*, 823 F. Supp. at 1309.

224. See *Papaila v. Uniden Am., Corp.*, 840 F. Supp. 440, 446 (N.D. Tex. 1994).

225. See Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(2), 98 Stat. 1767, 1792 (codified as amended at 29 U.S.C. § 623 (h)(1)-(3) and § 623 (f)(1)) (1994).

226. *Wolf v. J.I. Case Co.*, 617 F. Supp. 858, 861 (E.D. Wis. 1985) (citing *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985)). An example of such an evasion is where an employer transfers an employee abroad for a short period of time for the purpose of avoiding the Act's coverage.

227. See 29 U.S.C. §§ 623(h)(1)-(3), 623(f)(1)).

228. See, *e.g.*, *Mas Marques v. Digital Equip. Corp.*, 490 F. Supp. 56, 58 (D. Mass. 1980).

that operate in a foreign country from ADEA provisions where the foreign country's law conflicts with the ADEA.²²⁹

1. FOREIGN SUBSIDIARIES OF U.S. COMPANIES: AGAIN, WHO CONTROLS?

When adopting the amendment granting the ADEA's extraterritorial power, Congress recognized that American employers may attempt to escape liability by simply incorporating subsidiaries overseas.²³⁰ To counteract an employer's evasion of ADEA coverage based on the mere appearance of foreign status, the ADEA expressly calls for a determination of who controls the foreign subsidiary.²³¹ Section 623(h)(1) of the ADEA states, "If an [American] 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."²³² In order to help explain this notion of "control," Congress also adopted § 623(h)(3), which states, "[T]he determination of whether an employer controls a corporation shall be based upon the—(A) interrelation of operations, (B) common management, (C) centralized control of labor relations, and (D) common ownership or financial control."²³³

a. A Standard of Significant Control If an American corporation does not "sufficiently control" its foreign counterpart, as in *Mas Marques v. Digital Equipment Corp.*,²³⁴ an American citizen working abroad for a foreign subsidiary remains uncovered by the ADEA. Mas Marques, a U.S. citizen who resided in West Germany at the time of the suit, claimed that Digital Equipment GmbH (Digital GmbH), a West German corporation, and its parent, Digital Equipment Corporation (Digital), a U.S. corporation, discriminated against him on the basis of age, sex, and national origin.²³⁵ The court refused Mas Marques's claim to

229. See, e.g., *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir. 1995).

230. See *Hearings*, *supra* note 54, at 1-2 (comments of Senator Grassley).

231. See 29 U.S.C. § 623(h)(1).

232. *Id.*

233. *Id.* § 623(h)(3). This section of the ADEA mimics the standard applied in both Title VII cases as well as the standard promulgated by the National Labor Relations Board. See *Mas Marques*, 490 F. Supp. at 58.

234. 490 F. Supp. 56. This case was decided prior to the 1984 amendment which expressly granted ADEA rights to overseas American plaintiffs working for American-controlled companies. However, the court proceeded to analyze the "control" issue using exactly the same four-factored analysis that was later expressly incorporated in the statute. See *id.* at 58.

235. See *id.* at 57. It should be noted that Mr. Mas Marques proceeded as a pro se plaintiff in this matter, which may explain why his complaint had not gone

recover under the ADEA because Digital did not sufficiently control its West German subsidiary.²³⁶ First, the court noted that Digital Equipment International governed the personnel policies at Digital GmbH without any input from Digital Equipment Corporation.²³⁷ Second, the court also found that Digital GmbH and Digital Equipment Corporation maintained "separate corporate structures, with independent business records, bank accounts, tax returns, financial statements and budgets."²³⁸ Finally, the two organizations utilized completely separate marketing strategies and sales goals with Digital GmbH focusing exclusively in the "repair, retail sale and distribution of computers and computer components solely within West Germany."²³⁹ All in all, the only input Digital provided to its foreign subsidiary's operation was the infrequent performance of administrative services, such as accounting and bookkeeping.²⁴⁰ The court, therefore, deemed the entities sufficiently separate and refused to apply the ADEA abroad.

b. Which Entity Controls? *Denty v. SmithKline Beecham Corp.*²⁴¹ represents a more recent consideration of whether the U.S. corporation sufficiently controlled its foreign subsidiary's alleged discrimination. In April 1989, SmithKline merged with the Beecham Group plc, a British corporation, resulting in an overseas corporate partner, SmithKline Beecham plc (SB plc).²⁴² Garland Denty, the plaintiff, began working in the United States for SmithKline Beecham Corp. (SBC) in 1984.²⁴³ In 1990, at fifty-two years old, and in 1992, at fifty-four years old, Denty applied for several positions based outside the United States.²⁴⁴ Denty

through the proper procedural remedies, nor was pleaded properly. As such, his ADEA complaint was not considered because he (1) "failed to resort to a mandatory state remedy before the Massachusetts Commission Against Discrimination, as required by the [ADEA], 29 U.S.C. §§ 621 et seq. . . . (2) fail[ed] to allege a cause of action under the ADEA in his complaint, and (3) [even] failed to allege his age." *Id.* at 58.

236. *See id.* at 59.

237. *See id.* at 58. Specifically, "[a]ll employment decisions of Digital GmbH, including recruitment, hiring, training, promotion, termination, and establishment of working conditions [were] exclusively determined and implemented by Digital GmbH and Digital International." *Id.*

238. *Id.*

239. *Id.*

240. *See id.* at 58.

241. 907 F. Supp. 879 (E.D. Pa. 1995).

242. *See id.* at 881.

243. *See id.*

244. *See id.*

claimed that he failed to acquire these positions because of his age, indicating that all of the positions were filled by younger men.²⁴⁵

Here, the court found "substantial evidence" of integrated operations between SBC and SB plc.²⁴⁶ For example, the corporations organized operations not by location, but by the type of work performed.²⁴⁷ The court found a sufficient interrelationship between SBC employees and SB plc employees because many SBC employees reported directly to SB plc employees.²⁴⁸ In addition, both firms operated under common management, represented by one CEO, a single director, and a vice-president—all of whom had offices in England.²⁴⁹ Both companies filed only one annual report with revenues reported on a consolidated basis.²⁵⁰ In fact, just about every aspect of the two companies was integrated, from employment decisions to financial operations. Ironically, this integration of operations did not save Mr. Denty's ADEA claim.²⁵¹ Instead of finding the integration indicative of the American corporation controlling SB plc in England, the court found that all the factors conversely indicated that the SB plc was the foreign parent that controlled SBC as an American subsidiary.²⁵² Therefore, Denty failed to show the requisite control of a foreign entity by an American employer.²⁵³

c. Contracted Services Abroad The analysis of this situation is similar with contracted services between two entities. In *Brownlee v. Lear Siegler Management Services Corp.*,²⁵⁴ Lear, an American government contractor, hired plaintiffs, Harry Brownlee and Roy Waddell, to provide technical assistance and support to the Royal Saudi Air Force (RSAF) for three years in Saudi Arabia.²⁵⁵ Upon their arrival in Saudi Arabia,

245. *See id.* Because the court found "[t]he promotion decisions . . . were made by SB plc executives in England, while Denty worked for SBC in Philadelphia," the proper defendant in this case was not SBC in Philadelphia, but SB plc, in England. *Id.* Once this determination was made, the court evaluated whether SBC in Philadelphia (the American counterpart) sufficiently controlled SB plc (the foreign employer) to be held liable under the ADEA. *See id.* at 882.

246. *See id.* at 885.

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.*

254. 15 F.3d 976 (10th Cir. 1994).

255. *See id.* at 977.

RSAF barred plaintiffs from their workstations—allegedly because of their age.²⁵⁶

The court's analysis focused on the principle/agent theory in order to determine whether the RSAF's alleged discriminatory intent could somehow be imputed to Lear.²⁵⁷ Although the court acknowledged that "a principal's *status as an employer* can be attributed to its agent to make the agent statutorily liable for *his own* age-discriminatory conduct, . . . no authority [exists] for imputing a principal's *discriminatory intent* to an agent to make the agent liable for his otherwise neutral business decision."²⁵⁸ In addition to finding no authority to support the idea that a culpable principal's action could be imputed to an innocent agent,²⁵⁹ the court implicitly concluded that RSAF could not be held liable under the ADEA because it clearly was not controlled by an American entity.²⁶⁰

2. THE "FOREIGN LAW" DEFENSE: SCAPEGOAT OR VALID PRECAUTION?

The ADEA excuses U.S. corporations operating in a foreign country from ADEA compliance if such compliance would require it to violate laws of that foreign country.²⁶¹ This provision, known as the "foreign laws" exception to the ADEA, preserves international comity when U.S. businesses avail themselves to the benefits of foreign laws in setting up their businesses overseas.²⁶²

Moreover, the U.S. Court of Appeals for the D.C. Circuit recently strengthened this exception by exempting an American overseas corporation from the ADEA if the corporation would have to breach its collective bargaining agreement with a foreign labor union.²⁶³ In *Mahoney v. RFE/RL, Inc.*,²⁶⁴ Radio Free Europe/Radio Liberty (RFE/RL), a Delaware nonprofit corporation located in Munich, Germany, terminated plaintiffs De Lon and Mahoney once they reached age sixty-five

256. *See id.*

257. *See id.* at 978.

258. *Id.* at 978 (citing 29 U.S.C. § 630(b) (1994)) (emphasis in original); *Owens v. Rush*, 636 F.2d 283, 286-87 (10th Cir. 1980); *House v. Cannon Mills Co.*, 713 F. Supp. 159, 161-62 (M.D.N.C. 1988).

259. *See id.*

260. *Id.* at 978 & n.3.

261. 29 U.S.C. § 623(f)(1); *see, e.g., Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995).

262. *See generally Helm v. South African Airways*, 44 Fair Empl. Prac. Cas. (BNA) 261, 267 (S.D.N.Y. 1987) (citing S. REP. NO. 98-467, at 27 (1984)).

263. *See Mahoney*, 47 F.3d at 449.

264. 47 F.3d 447.

based on the collective bargaining agreement in operation.²⁶⁵ The district court in *Mahoney* held § 623(f)(1) did not apply because the mandatory retirement provision "is part of a contract between an employer and unions—both private citizens—and has not in any way been mandated by the German government."²⁶⁶ As such, the bargaining agreement was not covered by a law of general application and, thus, could not be applied as a foreign law.²⁶⁷

Relying upon several Supreme Court cases, the Court of Appeals for the D.C. Circuit reversed the district court. The D.C. Circuit found that a company that breaches a labor contract indeed violates a "law," and the statutory exemption from "law" relieved carriers of their contractual obligations.²⁶⁸ Further,

[i]f RFE/RL had not complied with the collective bargaining agreement in this case, if it had retained plaintiffs despite the mandatory retirement provision, the company would have violated the German laws standing behind such contracts, as well as the decisions of the Munich Labor Court. In the words of § 623(f)(1), RFE/RL's "compliance with [the Act] would cause such employer . . . to violate the laws of the country in which such workplace is located."²⁶⁹

265. See *id.* at 448. RFE/RL applied to the "Works Council" for limited exceptions to the mandatory retirement age for the Americans they now believed covered by both the ADEA as well as the German bargaining agreement. "Works Council (*Betriebsräte*) exist in all German companies with twenty or more employees, [and] are bodies elected by both unionized and nonunionized employees. Their duties include insuring that management adheres to all provisions of union contracts." *Id.* (citing Christopher S. Allen, *Principles of the Economic System, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE; A GERMAN-AMERICAN SYMPOSIUM* 339, 348 (Paul Kirchhof & Donald P. Kommers eds., 1993)). The Works Council in question denied RFE/RL's request, and upon appeal to the Labor Court of Germany, the Works Council's decision was affirmed. See *id.* Thus, RFE/RL claimed it had no choice but to terminate plaintiffs once they reached the mandatory retirement age of 65. See *id.*

266. *Mahoney v. RFE/RL, Inc.*, 818 F. Supp. 1, 3 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir. 1995).

267. See *id.* Although the district court felt the bargaining agreement was legally binding, it found this to be "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.'" *Id.* Courts, however, should be wary in making generalizations about foreign collective bargaining agreements, which often differ from American collective bargaining agreements regarding enactment and enforcement. See Abbo Junker, *Labor Law, in INTRODUCTION TO GERMAN LAW* 305, 327-38 (Werner F. Ebke & Matthew W. Finkin eds., 1996). Unlike U.S. labor law, the law in Germany permits the Federal Minister of Labor and Social Affairs to "extend the scope of application of a collective agreement to all employees within the industry covered by the collective agreement." *Id.* at 328.

268. See *Mahoney*, 47 F.3d at 449-50 (D.C. Cir. 1995).

269. *Id.* at 450 (quoting 29 U.S.C. § 623(f) (1994)).

Thus, the court of appeals viewed the foreign collective bargaining agreement as a contract to be upheld by a valid foreign law for purposes of the foreign law exception.²⁷⁰ The court held that such a conclusion sustains the purpose underlying the ADEA's foreign law exception—"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."²⁷¹ Although the opportunity to assert the foreign law defense does not surface in many cases, *Mahoney* clearly demonstrates its potential sweep. Indeed, what one country may consider a "law," another may not.

Notwithstanding, an argument can be made that the employee who accepts a position overseas has, in fact, "assumed the risk" that the ADEA will conflict with the foreign law where the American corporation operates. In addition, now that the ADEA has express extra-territoriality, it remains to be seen whether an employer could be held liable for bargaining with a foreign union for a mandatory retirement age. It is not hard to imagine a scenario in which an American employer situated overseas accepts a mandatory retirement age as part of a foreign collective bargaining agreement, even if it meant violating the ADEA, in an attempt to keep "all things equal" between its foreign and American employees for purposes of morale. The American employer would not likely hesitate in bargaining away ADEA rights for its American employees, given that foreign employees are accustomed to mandatory retirement ages.

IV. Resolution

A. Has the ADEA Remained Effective for Plaintiffs Suing Foreign Employers Operating Within the United States: Should Congress Do More?

As previously stated, foreign employers have essentially created three defenses against ADEA claims by American citizens. These defenses include: (1) a plain text argument that the ADEA exempts foreign employers within the U.S. from compliance;²⁷² (2) an argument that a treaty protects a foreign employer's right to select and terminate

270. See *id.*

271. *Id.*

272. See *supra* notes 77-125 and accompanying text.

certain types of employees without regard for the ADEA;²⁷³ and, (3) an argument that the domestic subsidiary employer is indistinguishable from the foreign parent, thereby enabling that subsidiary to assert its foreign parent's treaty or statutory rights.²⁷⁴

1. THE PLAIN TEXT ARGUMENT

Although the majority of circuits have not reviewed cases involving foreign employers using a § 623(h)(2) plain text defense, logic and legislative history seems to favor the EEOC interpretation adopted by the *Kloster Cruise* and *Helm* courts. First, automatically granting all foreign employers within the United States the freedom to discriminate on the basis of age would eviscerate the very purpose of the ADEA²⁷⁵—namely, to provide an appropriate remedy for various forms of age discrimination. The focus of the ADEA is to protect the rights of older employees, whose rights are no less valuable when working for a foreign employer than when working for a domestic employer within the United States. Second, allowing all foreign employers operating within the United States to escape ADEA liability would greatly disappoint the employee's reasonable expectation that they are protected by this Act. Many employees may not realize that their employer, an American subsidiary of a large foreign parent corporation, may legally be considered a foreign employer. Thus, it is doubtful that employees would investigate how their ADEA rights change when working for a foreign employer within the United States. In many cases, an employee, due to financial hardship or unavailability of other job offers, may not have a true choice when deciding whether to accept or reject the foreign employer's offer in favor of working for a domestic employer. Therefore, the disadvantage an employee may face when working for foreign employers may, in many cases, be unknown or outside an employee's control. Third, granting foreign employers the unlimited power to discriminate on the basis of age would skew the competitive marketplace, giving foreign companies an advantage over American companies that must continue to litigate ADEA claims. It makes no sense for two neighboring companies to have a different set of laws governing their behavior when the only difference between them is their country of origin.

273. See *supra* notes 126-86 and accompanying text.

274. See *supra* notes 187-218 and accompanying text.

275. See *supra* Part II.A for a discussion of the ADEA's express and implied purposes.

If we do not hold foreign employers to the same discrimination standards as the rest of employers within the United States, then what law should govern their actions—that of their own country? Even if the laws of a foreign country impose some age discrimination standard upon the foreign business operating within the United States, should foreign businesses not first be held accountable under the law of the United States, as they have purposefully availed themselves to our laws and economic advantage? Such logic is the rule of thumb for the ADEA's extension overseas, as the Act only applies to American employers when it is not in conflict with the foreign law of the country where the American employer operates.²⁷⁶ What is most ironic is that an amendment that sought to further the ADEA's scope overseas is now working to the detriment of Americans in their own country, due to some courts' restrictive, plain text interpretation.²⁷⁷ Because the foreign employer avails itself of other U.S. laws in setting up its business, the employer should subsequently be held accountable under all the laws of the United States, including the ADEA, unless application of a particular U.S. law would be in violation of the Constitution or a treaty.

Notwithstanding, employees who allege age discrimination by a foreign employer should be aware that the foreign employer may attempt to argue an exemption based upon a strict construction of the statute.²⁷⁸ With cases like *Mochelle* upholding the language of § 623(h)(2) to exempt foreign employers, this issue remains uncertain.²⁷⁹ Even if an employee can overcome the plain-text hurdles presented by § 623(h)(2), an employee may find no recourse under the ADEA based on a foreign employer's ability to use a treaty to shield its employment decisions.

Though one circuit affirmed the plain text argument that the ADEA exempts foreign employers within the United States from compliance,²⁸⁰ it is unlikely to win many cases for defendants. This is mainly because it takes a very rigid plain text interpretation to reach the outcome that the ADEA, per § 623(h)(2), exempts foreign employers from coverage.²⁸¹ Perhaps the reason why we have not seen a

276. See 29 U.S.C. § 623(f)(1) (1994).

277. See, e.g., *Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).

278. See *id.* at 1309.

279. See *id.*

280. See, e.g., *id.* at 1302.

281. See 29 U.S.C. § 623(h)(2) (1994).

great deal of cases based on this interpretation of the ADEA is that it would, as one court stated, "poke a gaping hole" in the ADEA's coverage within the United States.²⁸² However, if presented to a court of rigid textualists, such an outcome may occur, as the provision quite clearly states that the ADEA shall not apply to a "foreign person not controlled by an American employer."²⁸³ To remedy even the remote chance that such an inflexible interpretation takes hold, Congress would be well advised to simply label the subsection under which this provision occurs as the "ADEA Extraterritorial Provisions," or create some other notation which would make it abundantly clear that the provision exempting foreign employers only applies to foreign employers located outside the United States. Still, the chances that Congress would make such an amendment to the act are slim, because, in many ways, a majority of ADEA provisions apply to foreign corporations operating within the United States.

2. THE TREATY ARGUMENT

An argument that a treaty protects a foreign employer's right to select and terminate certain types of employees without regard for the ADEA constructs a more formidable hurdle for ADEA plaintiffs to overcome. Because the circuit courts differ in the extent to which they allow a FCN treaty to exempt a foreign employer operating within the United States from employment discrimination laws,²⁸⁴ employees may be more or less likely to succeed in their ADEA claims based on where they file their suits. The prevailing view seems to be that a treaty does not mean what it says; in other words, the power of foreign employers to select employees "of their choice" does not necessarily provide foreign employers with unlimited reign in their employment decisions.²⁸⁵ Instead, foreign employers protected by an FCN treaty are constrained to various degrees, depending on circuit court tests utilized to enforce the ADEA.²⁸⁶ Ideally, the Supreme

282. See *E.E.O.C. v. Kloster Cruise, Ltd.*, 888 F. Supp. 147, 151 (S.D. Fla. 1995).

283. 29 U.S.C. § 623(h)(2).

284. See *supra* discussion accompanying notes 138-40.

285. See *supra* discussion accompanying notes 159-86.

286. ADEA plaintiffs may in fact have an advantage over Title VII plaintiffs in proving discrimination by a treaty-protected employer. See *Fortino v. Quasar Co.*, 950 F.2d 389, 394 (7th Cir. 1991). Title VII plaintiffs occasionally mistake the notion of national origin discrimination as being equal to that of citizenship discrimination. See *id.* at 393. A recent Seventh Circuit case, in which an American subsidiary of a foreign parent corporation discharged certain American but not Japanese executives, dismissed the plaintiffs' national origin claims, but nonetheless ruled

Court will grant certiorari and provide lower courts with the most viable interpretation of the interaction between these treaty rights and discrimination statutes, such as the ADEA.²⁸⁷ Based on the language found within the Court's *Sumitomo* decision which described the underlying purpose of treaties to be the provision of equal, rather than "special," treatment for foreign businesses,²⁸⁸ the likely outcome of such a ruling would be more in line with either the Second or Third Circuits, which place at least some restriction on treaty power when that power is used to shield age discrimination.²⁸⁹

Notwithstanding, a question remains as to which treaty interpretation to adopt. Should the determination of discrimination hinge on the employer's motivation, as the Third Circuit established,²⁹⁰ or should the determination hinge on business necessity (or BFOQ), as the Second Circuit established,²⁹¹ or both? It bears noting that, regardless of whether the employer is foreign or domestic, the ADEA (and the accompanying EEOC regulations) contemplates the idea of a BFOQ defense in all age discrimination suits,²⁹² lending some credence to this approach. Still, the approach taken by the statute and regulations is one which contemplates an age limit as a BFOQ,²⁹³ rather than a person's foreign status as a BFOQ. The Third Circuit approach, which limits recovery for ADEA plaintiffs to only instances of intentional discrimination,²⁹⁴ arguably places these ADEA plaintiffs at a decided disadvantage to those who can recover under a disparate impact claim, which does not require a finding of intentional discrimination by the employer. However, showing that an employer's choice was motivated by purposeful discrimination is a burden shared by many ADEA plaintiffs, regardless of whether they are suing a foreign or domestic company. Thus, while the outcome of the Third Circuit's reasoning may put some ADEA plaintiffs at a disadvantage, the Third Circuit's analysis may be the most reasonable, given the language

that claims of age discrimination by the fired American executives would have to be sent to a jury trial. *See id.* at 394.

287. Considering that the Court was unwilling to address just such a question in *Sumitomo*, the grant for certiorari to decide this issue may be a long time in coming. *See Avigliano v. Sumitomo Shoji Am., Inc.*, 457 U.S. 176, 189 n.19 (1982).

288. *See supra* text accompanying note 144.

289. *See supra* discussion accompanying notes 159-86.

290. *See supra* discussion accompanying notes 159-79.

291. *See supra* discussion accompanying notes 181-86.

292. *See* 29 U.S.C. § 623(f) (1994).

293. *See id.*

294. *See MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988).

found in the treaties which protect certain employment decisions by foreign employers.

Is there a way to even the playing field between plaintiffs suing foreign, as opposed to domestic, companies within the United States? Probably not so long as FCN treaties are impossibly cemented between the United States and its most popular trading partners. However, practitioners specializing in employment law offer the ADEA plaintiff hope, believing that FCN treaties "are on their way out . . . to be replaced by other bilateral treaties that incorporate discrimination laws and anticipate these sorts of problems."²⁹⁵

3. THE PARENT/SUBSIDIARY DILEMMA

Plaintiffs working for foreign corporations face additional challenges in their age discrimination suits when forced to determine whether their employer is "the parent or the subsidiary making the decisions."²⁹⁶ The justification for continuing to grant the treaty rights to foreign corporations that allow them to choose their employees in contravention of employment laws within the United States is that treaties establish good public policy, "essential to the continued growth of trade."²⁹⁷ The fact remains that the United States maintains similar employee selection rights when it operates overseas, as it is also governed by a bilateral FCN treaty. Because the United States sets forth more stringent age discrimination standards, deleting the "of their choice" employment provision will create harsher effects on foreign direct investment in the United States, rather than the ability of U.S. entities to invest and grow overseas. However, one may question whether the treaty provisions are truly necessary when many foreign investors have sound reasons for directly investing in the U.S. economy without such protection.²⁹⁸ With the delicate initial stages of

295. Gary Taylor, *Bias Cases Strike at Treaty Shielding Foreign Business: The 5th Circuit Rebuffs Effort to Pierce Immunity from Bias Suits that Japanese-owned U.S. Businesses Enjoy*, NAT'L L.J., July 31, 1995, at B1.

296. *Id.* One attorney currently working for the export administration of the Department of Commerce, and formerly employed by the EEOC, observed, "the situation [between foreign parents and their American subsidiaries] allows too much room for collusion [to bypass U.S. discrimination laws]." *Id.*

297. *Id.*

298. Reasons for investing in the U.S. economy include: (1) in general, the United States's stable economy usually creates good investment returns; and, more specifically, (2) auto manufacturers, while having some voluntary export caps from their own country, have no restriction on the number of cars they can build inside the United States. See generally Michael M. Phillips, *The Outlook: Foreign Executives See U.S. as Prime Market*, WALL ST. J., Feb. 3, 1997, at A1.

global economic relations behind, there are sound reasons for recognizing the situations, particularly when plaintiff's civil rights have been violated, where the economy necessarily heeds to U.S. discrimination law.

B. Has the ADEA Remained Effective for Overseas Plaintiffs Suing American Corporations?

More likely than not, an American citizen's ADEA claim will be dismissed based on an employer defense that: (1) the foreign subsidiary of an American parent is not sufficiently controlled by such American parent to be covered by the ADEA's extraterritoriality;²⁹⁹ or, (2) the law of the foreign country where the corporation operates conflicts with the ADEA.³⁰⁰ With these defenses in tact, will the ADEA ever be effective overseas?

If, for example, U.S. courts equate foreign collective bargaining agreements with a "foreign law," employers overseas can more readily terminate individuals in direct conflict with the ADEA.³⁰¹ The dramatically higher incidence of labor unions in overseas workplaces creates a lasting and notable effect for ADEA plaintiffs. Under such collective bargaining agreements, mandatory retirement was ruled "lawful" only because it had been entered into prior to the ADEA's express extraterritoriality amendment in 1984, and thus should demand an inquiry as to whether American companies overseas will be in a position currently to bargain themselves out of ADEA compliance.³⁰² If the answer is no, the ADEA may remain effective. The employer will be in a position to bargain and, wary of violating the ADEA's extraterritoriality, refrain from adopting a mandatory retirement age during that bargaining process. If, however, employers will no longer be constrained in their bargaining by the ADEA because, once a bargaining agreement is entered into, it becomes the law of the foreign country, then the purpose of the ADEA's extraterritoriality might be completely eviscerated.

When the ADEA's extraterritorial amendment was considered in 1984, Mr. William M. Yoffee, Executive Director of the nonprofit or-

299. See, e.g., *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995).

300. See, e.g., *Mas Marques v. Digital Equip. Corp.*, 490 F. Supp. 56 (D. Mass. 1980).

301. See *Mahoney*, 47 F.3d at 449-50.

302. See *id.*

ganization entitled "American Citizens Abroad, Inc." (ACA), testified at the Senate Subcommittee Hearings, and stated,

ACA recognizes that any extraterritorial application of national laws creates the potential for conflicts of national laws and extralegal conflicts such as result from shopping for friendly treatment among overlapping jurisdictions. Normally, we oppose extraterritorial application of laws. There are many aspects of this issue, however, which we believe argue convincingly for an exception to our usual view. . . . [the ADEA] sets a standard which if found to be valid and worthwhile in our own country can hardly be found otherwise elsewhere. Those employees to whom this standard applies are given a cause of action and offered a venue. They must still meet the burden of proving their cases. The burden on the employers is far less onerous: to assure that the standard is applied honestly to workers.³⁰³

To argue that the ADEA must be enforced regardless of its conflicts with foreign law would go too far. After all, to hold such a proposition would cut both ways, and imply that foreign corporations operating within the United States, with less stringent age discrimination policies, have free reign to abide by their own laws, rather than those of the United States. Thus, while the foreign laws defense may not be interpreted to encompass private contractual agreement, its enforcement at a legislative or statutory level is fundamental to ADEA enforcement.

V. Conclusion

The globalization of the economy and its accompanying growth of foreign employers certainly threatens the strength of ADEA enforcement. More Americans age forty and over continue to find themselves either working for a foreign employer within the United States or for an American employer overseas, as the economy continues to globalize. Given this fact, employees need to become acquainted with the ramifications of such employment situations, in the event they are discriminated against on the basis of their age. The defenses that foreign employers within the United States and American employers overseas can raise make it much more difficult for an ADEA plaintiff to succeed in his or her claim of age discrimination.

The incentives for continuing some form of international age discrimination also persist. The cultural norms regarding forms of age

303. *Hearings, supra* note 54, at 25 (statement of William M. Yoffee).

discrimination vary greatly among foreign countries.³⁰⁴ The United States, with relatively strong fundamental values in civil rights, is generally regarded as having the most protection available for plaintiffs who allege age discrimination. Conflicting with this strong tradition of individual rights, however, is the desire of American employers to enable their overseas business operations to run smoothly and without cultural clashes.³⁰⁵ Furthermore, American employers are anxious not to chill their access to foreign direct investments when contending with mandatory U.S. regulations.³⁰⁶ With strong business and economic incentives causing employers to inappropriately discriminate against employees on the basis of their age, U.S. citizens working for foreign corporations within the United States, or overseas for American corporations, may have difficulty in their ADEA litigation efforts.

Although there are some ways in which Congress and the courts can clarify the scope of the ADEA, particularly in relation to FCN treaties and foreign bargaining agreements, many of the defenses available to employers have some validity based on international comity and policy reasons. However, given that the world economic engines seem to be progressively pushing in the direction of globalization, one wonders whether treaties in particular will be needed in the near future to stabilize what was once nonexistent foreign direct investment. If treaties are no longer necessary to ensure and stabilize such economic growth, ADEA enforcement will certainly become more uniform for American citizens working within the United States, whether their employer is foreign or domestic.

304. See, e.g., *Mahoney*, 47 F.3d at 447 (representing a case where employees in Germany are subject to a mandatory retirement age). Mandatory retirement ages in the United States, for all but a very small number of employees, are illegal under the ADEA.

305. See generally William Scheibal, *When Cultures Clash: Applying Title VII Abroad*, 38 BUS. HORIZONS 4 (1995); Bodo B. Schlegelmilch & Diana G. Robertson, *The Influence of Country and Industry on Ethical Perceptions of Senior Executives in the U.S. and Europe*, 26 J. INT'L BUS. STUD. 859 (1995).

306. See Pietro S. Nivola, *Having It All? Domestic Regulations and the Global Economy*, 14 BROOKINGS REV. 17 (1996).