



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 8 | Number 1

Article 4

1-1-1985

United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail

Hedwig C. Swanson

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Hedwig C. Swanson, *United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail*, 8 Loy. L.A. Int'l & Comp. L. Rev. 135 (1985).
Available at: <https://digitalcommons.lmu.edu/ilr/vol8/iss1/4>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

United States Corporations Operating in Saudi Arabia and Laws Affecting Discrimination in Employment: Which Law Shall Prevail?

I. INTRODUCTION

Among the major forces which have come into prominence in the American business world in recent years, two are of interest here: the continuing trend to multi-national corporate operations¹ and the passage of numerous laws and regulations affecting discrimination in employment.² Inevitably, conflicts have arisen between American and foreign cultures concerning the effect of United States employment discrimination laws on hiring practices for posts in foreign countries. In order to clearly show some of these cultural conflicts, this comment will focus on the hiring practices of United States corporations operating in Saudi Arabia. The acute difference in cultural values between Saudi Arabia and the United States, including attitudes towards employment rights, highlights problems which arise in international employment.

Specific attention will be given to *Kern v. Dynalectron Corporation*³ and *Abrams v. Baylor College of Medicine*,⁴ two recent cases concerning religious discrimination in hiring for posts in Saudi Arabia; and to *Fernandez v. Wynn Oil Co.*⁵, an analogous case concerning alleged discrimination against women applying for work with a United States corporation operating in South America. The *Fernandez* case was chosen because there are no specific cases on gender discrimination involving Saudi Arabia. Moreover, *Fernandez* serves to differentiate between discrimination based on sexual stereotyping and

1. United States direct investment abroad increased from \$11,788,000 in 1950 to \$78,090,000 in 1970. INTERNATIONAL LABOR OFFICE, MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 6 (1973). By 1975, 4,060,645 people were employed by United States corporations operating abroad. J. CURHAN, W. DAVIDSON, & R. SURI, TRACING THE MULTINATIONALS 258 (1977).

2. See, e.g., Title VII of the 1964 Civil Rights Act, *infra* note 14; Exec. Order 11,246, *infra* note 17.

3. 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984).

4. 581 F. Supp. 1570 (S.D. Tex. 1984).

5. 653 F.2d 1273 (9th Cir. 1981).

customer preference, which is prohibited under *Fernandez*,⁶ and discrimination based upon actual foreign laws which must be followed by a corporation operating within a host country.⁷

As an example, as early as 1959 United States courts confronted the problem of United States corporations attempting to comply with Saudi regulations against the hiring of Jews. In *American Jewish Congress v. Carter*,⁸ Justice Epstein made it clear that United States corporations could not violate United States law—in that case, a New York state anti-discrimination statute⁹—while recruiting workers within the United States for placement overseas.

The question of discrimination on the basis of sex has not been directly addressed by the courts, at least partly due to the severe restrictions placed on the behavior of women in Saudi Arabia.¹⁰ It is difficult to prove affirmative discrimination where few, if any, women have applied for jobs. Sex discrimination in employment is one of the most pervasive forms of discrimination practiced world-wide, and serves as an interesting vehicle for examining cultural differences.

It is perhaps in attitudes towards religion and the place of women in society that Saudi Arabia and the United States are most at variance; therefore, these two areas are focused on, leaving aside questions of race, age, and national origin. By exploring the ramifications of allowing or disallowing sex or religion to be used as hiring criteria for United States corporations with operations in Saudi Arabia, possible procedures for dealing with the cultural clash involved in overseas employment can be formulated. This comment will advocate continued strict application of employment discrimination laws in all contexts, and will show how this can be done even in recruiting for positions in a country where discriminatory cultural values exist.

II. APPLICABLE LAW

A. American Law

Multinational corporations—including foreign corporations operating in the United States¹¹ and United States corporations operat-

6. See *infra* notes 126-31 and accompanying text.

7. See *infra* note 72 and accompanying text.

8. *Am. Jewish Congress v. Carter*, 23 Misc. 2d 446, 19 Misc. 2d 5, 190 N.Y.S.2d 218 (Sup. Ct. 1959), *aff'd.*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

9. N.Y. EXEC. LAW § 296(1)(a), (c) (McKinney 1982).

10. See *infra* notes 61-70, 122-23, and accompanying text.

11. *Sumitomo Shoji Am., Inc. v. Avigliano*, 457 U.S. 176 (1982), where the Supreme

ing abroad¹²—are regulated by many different federal and state laws which generally forbid discrimination in employment.¹³ Those most important here include Title VII of the Civil Rights Act,¹⁴ especially that section known as the bona fide occupational qualification (BFOQ) exception;¹⁵ provisions of the U.S.C. which prohibit joining foreign boycotts;¹⁶ and Executive Order No. 11,246, forbidding companies with U.S. government contracts to discriminate in employment decisions,¹⁷ which has been implemented in the Code of Federal Regulations.¹⁸

1. Title VII

Title VII generally provides that no employer, employment agency, or labor organization may discriminate "because of [an] individual's race, color, religion, sex, or national origin."¹⁹ The primary thrust, therefore, is to prohibit discrimination; any deviation from this standard is an exception. This provision has been interpreted by courts to cover United States corporations operating abroad, as long as the company is one involved in international commerce²⁰ and the prospective employees are United States citizens.²¹ By express lan-

Court ruled that wholly owned subsidiaries of a Japanese corporation operating in the United States are covered by Title VII of the Civil Rights Act.

12. See, e.g., *Am. Jewish Congress v. Carter*, 190 N.Y.S.2d 218 (1959); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

13. Most employers of more than moderate size are covered by federal Title VII; all but six states have comparable laws. M. PLAYER, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* 24 (1984).

14. 42 U.S.C. § 2000e *et seq.* (1982) [hereinafter cited as Title VII].

15. 42 U.S.C. § 2000e-2(e) (1982) [hereinafter cited as BFOQ exception].

16. 50 App. U.S.C. § 2407 (1976 and Supp. II 1979).

17. Exec. Order No. 11,246, 3 C.F.R. 339 (1965) and amendments, *reprinted in* 42 U.S.C. § 2000-e (1982) [hereinafter cited as the Executive Order]. In addition, companies may be affected by state laws forbidding discrimination in employment. See, e.g., N.Y. EXEC. LAW §§ 296-99 (McKinney 1982); CAL. GOV'T CODE §§ 12920-21 (West 1980).

18. 15 C.F.R. § 369.1 *et seq.* (1982).

19. 42 U.S.C. § 2000e-2(a)(b)(c) (1982).

20. The Civil Rights Act of 1964 was enacted pursuant to the Commerce Clause, U.S. CONST. Art. 1, § 8, cl. 3, as noted in 110 CONG. REC. S7210 (daily ed. Apr. 8, 1964) (memorandum by Sec'y of Labor Wirtz). Therefore any United States corporation involved in "commerce with foreign nations [or] among the several states" would be covered by Title VII legislation.

21. See, e.g., *Love v. Pullman Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), in which American porters who worked on trains passing through Canada were deemed entitled to Title VII protection. The court specifically relied on the extra-territorial reach of anti-trust laws, but also noted the inferences raised by specific language in Title VII. *Id.* at 426, n.4. Later cases specifically uphold extraterritorial application of Title VII. *Kern v. Dynalec-tron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984)

guage Title VII itself specifically *exempts* coverage of *aliens* employed outside the United States, and thus by implication *includes citizens* employed outside the country.²² Although not yet explicitly ruled on by the United States Supreme Court, this conclusion, that United States citizens working abroad for United States companies are covered by United States anti-discrimination laws, has been implicitly reached by several federal courts and no longer seems to be an issue in current cases.²³ This conclusion makes it much easier for United States citizens denied employment by United States corporations operating abroad to enforce their rights under Title VII, as it enables them to sue in United States courts under American laws. If it were otherwise, United States corporations might claim to be subject only to the laws of the host country, thus avoiding compliance with the (often more stringent) non-discrimination protections in United States law.

2. Title VII: the BFOQ exception

Certain corporations have attempted to utilize the bona fide occupational qualification (BFOQ) exception in Title VII to avoid the application of the main body of Title VII in their overseas operations. The BFOQ exception provides that it will *not* be illegal to discriminate "on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."²⁴ The BFOQ exception has been narrowly construed by both the Equal Employment Oppor-

(district court accepts jurisdiction over case, including subject matter, person, and stipulation that defendant was an employer covered by Title VII); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981) ("No foreign nation can compel the non-enforcement of Title VII here."). *But see* *Bryant v. Int'l Schools, Inc.*, 502 F. Supp. 472 (D.N.J. 1980) (sustained extra-territorial application of Title VII), *rev'd*, 675 F.2d 562 (3rd Cir. 1982). The circuit court noted that "[t]his case raises significant questions regarding the applicability of Title VII to the overseas employment practices of a private American employer and the scope and meaning of that statute's proscription against sex-based discrimination in employment," but primarily discussed the latter concerns. *Id.* at 565. The court noted that "no court has decided the extra-territorial applicability of Title VII and we find it unnecessary to do so to decide this case." *Id.* at 577, n.23.

22. 42 U.S.C. § 2000e-1 (1982) provides "this title shall not apply to an employer with respect to the employment of aliens outside any State," See also Comment, *The Multinational Corporation and Employment Discrimination: A Strategy for Litigation*, 16 U.S.F.L. REV. 491, 503 (1982) [hereinafter cited as *Strategy for Litigation*].

23. See *supra* note 21.

24. 42 U.S.C. § 2000e-2(e) (1982).

tunity Commission (EEOC), the federal agency charged with enforcement of Title VII,²⁵ and by the federal courts.

The EEOC regulations state that sex is to be allowed as a BFOQ only if authenticity or genuineness is required, such as in hiring an actor or actress.²⁶ The federal courts have generally supported this interpretation, ruling that stereotypical assumptions do not qualify as a BFOQ exception in cases concerning flight attendants,²⁷ telegraph agents,²⁸ telephone installers,²⁹ and caretakers in a home for juvenile males.³⁰ These cases, and others, have established a three-part test for the BFOQ exception: (1) all or substantially all members of a group must lack a desired characteristic;³¹ (2) the link between the desired characteristic and the included group must not be based on stereotypical assumptions;³² and (3) the desired characteristic must pertain to some action which is essential to the given business.³³

Courts have slightly expanded on this definition, allowing a BFOQ exception in *Dothard v. Rawlinson* for all-male guards in a prison characterized as violent, understaffed, poorly designed for separation of guards and prisoners, and "composed of sex offenders mixed randomly with other prisoners,"³⁴ but not in a minimum security prison with non-violent prisoners, with many non-contact jobs.³⁵ Later commentators have noted that *Dothard* is to be interpreted narrowly and limited to its own facts: an environment where the very presence of women would add to an already tense situation, therefore increasing the risk to all workers, regardless of the willingness of women to accept individual risk and their ability to defend themselves individually.³⁶

25. See 42 U.S.C. § 2000e-4 (1982).

26. 29 C.F.R. § 1604.2(a) (1982).

27. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (preference of male customers for unmarried female flight attendants not a BFOQ).

28. *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (stereotypical assumptions about women do not rise to level of BFOQ).

29. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (defendant must show that "all or substantially all" women cannot perform, or there is no BFOQ defense).

30. *Jatzcak v. Ochburg*, 540 F. Supp. 698 (E.D. Mich., S.D. 1982) (BFOQ is an extremely narrow exception to Title VII).

31. *Weeks*, 408 F.2d at 235.

32. *Rosenfeld*, 444 F.2d at 1224-25.

33. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

34. *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977).

35. *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982).

36. See Note, *Sex as a Bona Fide Occupational Qualification: Defining Title VII's Evolving Enigma, Related Litigation Problems, and the Judicial Vision of Womanhood after Dothard v. Rawlinson*, 5 WOMEN'S RTS. L. REP. 107, 161 (1979) [hereinafter cited as *Sex as a BFOQ*].

The BFOQ for religious employment has been similarly narrowly construed. Generally, religious institutions themselves have been allowed to require that employees be members of that religion.³⁷ Recently, a Catholic university was allowed to exclude non-Catholics from professorships on the basis of the BFOQ exception.³⁸ In contrast, churches have not been allowed to require church membership for employment in a church-owned, secular, non-educational institution. In a recent case, a circuit court held that the Mormon Church could not require church membership for employees of a church-owned gymnasium, as the gymnasium activities were not closely related to the beliefs of the Mormon Church.³⁹

3. Foreign boycott provisions of the Export Administration Act of 1979

The Export Administration Act of 1979 (EAA) provides that United States companies cannot "refuse to do business" due to boycotts imposed by foreign governments.⁴⁰ The Act thereby closed a potential loophole created by the BFOQ exception. Prior to passage

37. 29 C.F.R. § 1605 (1982).

38. *Pime v. Loyola Univ. of Chicago*, 505 F. Supp. 435, 442 (N.D. Ill., E.D. 1984) (religion is a BFOQ defense in preference for hiring Catholics at a Jesuit-run university).

39. *Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791 (D. Utah, C.D. 1984). The case was decided under 42 U.S.C. 2000e-1, *infra* text accompanying note 98, and not the BFOQ exception, but the analysis used in delineating when it is legal to require employees to be of a certain religion is similar. The *Amos* case thoroughly covers the history of the religious exemption to Title VII in the courts.

40. 50 App. § 2409.7 (Supp. III, 1979), 15 C.F.R. 369.1 *et seq.* (1982). A table from 15 C.F.R. § 369.2 best illustrates this prohibition:

PROHIBITION AGAINST REFUSALS TO DO BUSINESS		
No United States person may:	to do business	when such a refusal is pursuant to:
refuse, knowingly agree to refuse, require any other person to refuse OR knowingly agree to require any other person to refuse.	with or in a boycotted country, with any business concern organized under the laws of a boycotted country, with any national or resident of the boycotted country, OR with any other person.	an agreement with the boycotting country, a requirement of the boycotting country OR a request from or on behalf of the boycotting country

The *Abrams* case interpreted this to include American Jews under the wording "or any other person." *Abrams*, 581 F. Supp. at 1581.

of the EAA, it was theoretically possible for a corporation to claim that it could legally discriminate against Jews in hiring for Near Eastern positions because the Arab boycott of Israel made this "reasonably necessary to the normal operation of the business." As noted in *Abrams v. Baylor*,⁴¹ the anti-boycott regulations were passed by Congress in response to Arab boycotts of Israeli interests.⁴² Since the regulation itself does not specify which boycotts are excluded, however, there is a possibility for future extension in cases which Congress did not foresee. For example, the boycott against South Africa was theoretically not legal until sanctioned by the President this year, since United States citizens may only participate in boycotts which are sanctioned by the United States government.⁴³ As of this date the EAA has been used only as originally intended by Congress⁴⁴—to prevent United States companies from adhering to a boycott of Jewish/Israeli interests.

In at least one case involving discrimination against Jews by United States corporations hiring for positions in Saudi Arabia, a United States court has allowed an individual plaintiff to sue under the EAA as well as under Title VII, ruling that there is a private right of action under the EAA.⁴⁵ The constitutionality of the EAA as a whole was effectively upheld in *Briggs and Stratton v. Baldrige*, a Seventh Circuit case.⁴⁶ *Briggs* was concerned primarily with answering a questionnaire from Arab League countries concerning business deal-

41. *Abrams*, 581 F. Supp. at 1581.

42. This occurred early in the 1970's, leading to passage of the EAA in 1979. *Id.*

43. It might be possible for United States companies operating in South Africa to claim that they *must* continue operating there because to do otherwise would be acceding to the boycott of South Africa by black African nations. It is also theoretically possible that a boycott of Arabian countries which do not allow women to work on an equal level with men could not be honored by United States companies. There is a possibility here of direct conflict between the EAA and provisions of Title VII. However, the EAA allows boycotts approved by the United States government, and it is arguable that the boycott of South Africa is supported by the Reagan administration, since Reagan has imposed certain restrictions on trade with South Africa. Sandler, *Reagan Imposes Limited Sanctions Against South Africa*, L.A. Daily J., Sept. 10, 1985, at 21, col. 1.

44. S. Rep. No. 95-104, 95th Cong., 1st Sess. 16-19 (1978) and H.R. Rep. No. 95-3590, 95th Cong., 1st Sess. 47-58 (1978), both emphasizing the effect of the boycott on American business and the necessity for the United States to lead resistance against the Arab boycott.

45. See *Abrams*, 581 F. Supp. at 1581-82.

46. *Briggs & Stratton Co. v. Baldrige*, 539 F. Supp. 1307, (E.D. Wis. 1982) [hereinafter cited as *Briggs I*] and *Trane Co. v. Baldrige*, 552 F. Supp. 1378 (W.D. Wis. 1983) were reviewed by the 7th Circuit in *Briggs & Stratton Co. v. Baldrige*, 728 F.2d 915 (7th Cir. 1983) [hereinafter cited as *Briggs II*], cert. denied sub nom. *Trane Co. v. Baldrige*, 105 S. Ct. 105 (1984).

ings with Israel,⁴⁷ and was decided primarily on a First Amendment, commercial speech analysis.⁴⁸ *Briggs* is also certainly applicable to other aspects of the EAA, including those under which discrimination in employment to satisfy a foreign boycott is forbidden.⁴⁹ The *Briggs* court specifically noted that the EAA supported substantial governmental interests, such as foreign policy matters and American values, since it was designed to forestall "attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.'"⁵⁰ It is certainly arguable that equality of opportunity in employment is one of the "American values" which the *Briggs* court held to be of substantial governmental interest.

4. Executive Order No. 11,246

Executive Order No. 11,246, as amended,⁵¹ requires that federal government contractors and subcontractors take "affirmative action" to prevent discrimination in hiring, promoting, or transferring employees.⁵² Unlike Title VII, the Executive Order mandates action to prevent discrimination and to promote hiring of groups (not individuals) with a past history as victims of discrimination.⁵³ Thus, the Executive Order can have far-reaching effects on the day-to-day operations of many United States corporations, including those operating overseas, since it mandates that all government contractors hire and promote without regard to race, color, religion, sex, or national origin.⁵⁴ Moreover, the Executive Order requires that these same contractors implement a written affirmative action program to lead to a "prompt

47. *Briggs I* at 1310-11.

48. *Id.*

49. *Briggs II*, *passim*. *Briggs II* adopted the lower court opinion of *Briggs I* and decided the First Amendment contentions of the appellants.

50. *Briggs I* at 1319.

51. Exec. Order No. 11,246, 3 C.F.R. § 339 (1965); amended by Exec. Order No. 11,375, 3 C.F.R. § 684 (1967); Exec. Order No. 11,478, 3 C.F.R. § 803 (1969), and Exec. Order No. 12,086, 3 C.F.R. § 230 (1978). The Executive Order was codified in various sections of the Code of Federal Regulations; those provisions of interest here are codified in Title 41.

52. Various provisions of the Executive Order mandate that a government contractor pledge in its contract not to discriminate on the basis of race, color, religion, sex, or national origin; post notices to this effect where employees and applicants can see them; and agree to abide by all provisions of the Executive Order. Exec. Order No. 11,246, 3 C.F.R. § 339.1 (1965).

53. *Id.* Groups covered include women, racial minorities, and ethnic minorities. 41 C.F.R. § 60-1.1 (1984).

54. 41 C.F.R. § 60-1.1 (1984).

achievement of full and equal employment opportunity.”⁵⁵ Almost all multinational corporations have either direct or indirect contracts with the federal government, thus subjecting them to the requirements of the Executive Order.⁵⁶ Although a limited exemption is provided in the Executive Order for overseas operations,⁵⁷ it grants little relief to multinational corporations, as it only applies “with regard to work performed outside the United States by employees who were not recruited within the United States.”⁵⁸

B. Saudi Arabian Law

1. Introduction

In moving from a discussion of United States law to Saudi Arabian law, an almost complete change in focus is necessary. United States law is a mutable, statutorily based, government based entity, crafted by people.⁵⁹ In contrast, Saudi Arabian law is based on the word of God as given in the *Qur'an*, promulgated by the prophets, and enforced (generally) by custom as much as by government.⁶⁰ Therefore, it is often impossible to state specifically what is “the law” in Saudi Arabia, since much law is unwritten, few if any court cases are recorded, and most statutory law is in the form of proclamations issued by the King of Saudi Arabia and his ministers.⁶¹

2. Islamic law in general

Islamic law is based upon the concept of the *Shari'a*, or totality of God's commandments. The *Qur'an* as the word of God is the primary source of all law,⁶² supplemented by the traditions of the prophet Mohammed, or *sunnah*.⁶³ It must be understood that the *Shari'a* is not canon law as that term is understood today. In western culture, canon law is seen as a separate entity apart from people's everyday life applying solely to religious matters. Instead, the *Shari'a* governs all aspects of everyday life, and forms the foundation of Mus-

55. *Id.* at § 60-1.40.

56. *Strategy for Litigation*, *supra* note 22, at 496-97.

57. 41 C.F.R. § 60-1.10 (1984).

58. *Id.* (emphasis added).

59. J. FRANK, *LAW AND THE MODERN MIND* 5 (1930).

60. M. RODINSON, *ISLAM AND CAPITALISM passim* (trans. B. Pierce 1978).

61. Asherman, *Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law*, 12 INT'L LAW. 321, 322-25 (1978).

62. *Id.* at 323.

63. *Id.* at 323-26.

lim experience.⁶⁴

Saudi Arabia is governed by the most conservative of the four Sunni schools of Islamic jurisprudence, the Hanbali school,⁶⁵ with supplemental regulations supplied by promulgations of the King and his ministers.⁶⁶ The decrees of the Hanbali scholars are enforced by the *Shari'a* courts, which comprise two lower courts and two Courts of Appeal.⁶⁷ In 1970, a Ministry of Justice was formed, added to in 1975 by a Supreme Judicial Council designed to oversee the *Shari'a* courts.⁶⁸ In addition, there are semi-judicial courts set up to enforce the regulations of ministers and the King,⁶⁹ which are not considered law, but lesser promulgations, since given by man, not God.⁷⁰ Some enforcement is also carried out by the morals or religious police, who concentrate on such items as modesty in dress for women, separation of the sexes outside of the home, enforcement of the daily prayer hours, and similar concerns.⁷¹

4. Saudi Arabian law and foreign businesses

Under Saudi regulations, all foreign companies operating in Saudi Arabia are subject to Saudi law.⁷² Contract provisions requiring that all disputes be tried under Saudi law have been at least partially upheld by United States courts.⁷³ It is in enforcement of such contract provisions that the most egregious problems concerning employment discrimination are bound to occur. Saudi Arabia has promulgated regulations concerning companies doing business with Israel⁷⁴ and the employment and segregation of women⁷⁵ which ap-

64. *Id.*

65. Comment, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 COLUM. J. TRANSNAT'L L. 413, 421-22 (1979) [hereinafter cited as *Islamic Law*]. In the Hanbali school, the only sources of law are the *Qur'an*, the sayings of Mohammed, the legal opinions of Mohammed's companions, the sayings of certain of these companions, and reasoning by analogy when no other way is available. *Id.* at 422.

66. T. PEASLEE, 2 CONSTITUTIONS OF NATIONS 1090 (rev. 3d ed. 1966).

67. *Islamic Law*, *supra* note 65, at 440.

68. *Id.* at 441.

69. Asherman, *supra* note 61, at 328.

70. *Islamic Law*, *supra* note 65, at 439.

71. R. NYROP, AREA HANDBOOK FOR SAUDI ARABIA 125 (1977).

72. Royal Decree No. 35 (1964), quoted in Mustafa, *Legal Aspects of Doing Business in Saudi Arabia*, in THE MIDDLE EAST—A LEGAL UPDATE 13, 42 (1978).

73. *Pirkey v. Hosp. Corp. of Am.*, 483 F. Supp. 770 (D. Colo. 1980).

74. Saudi Arabia has never recognized Israel as an independent state and thus ignores all ties to that state. R. NYROP, *supra* note 71, at 214.

75. A decree of 1979 established that women may not work with men or foreigners. D. PIPES, IN THE PATH OF GOD: ISLAM AND POLITICAL POWER 234 (1983).

pear to be in direct conflict with United States mandates of equal treatment for all.⁷⁶

Exceptions to—or clarification of—these Saudi regulations must be made. Muslims have historically been tolerant of Jews, as fellow “people of the book.”⁷⁷ It is Israel, a political state, for which they have animosity, and which has led at times to the exclusion of Jews from Saudi Arabia.⁷⁸ This restriction was relaxed in 1975 by a decree that “any foreigner sent to Saudi Arabia in fulfillment of contractual obligations will be welcome.”⁷⁹ Unfortunately, this may not end all discrimination, as Saudis may attempt to exclude Jews by contract provisions requiring that United States companies adhere to the Arabian boycott of Israel or by refusing visas to United States citizens whose passports indicate that they have traveled to Israel.⁸⁰

Regulations concerning women stem from a different set of circumstances. There are precepts in the *Qur'an* which prescribe a lesser share to women in inheritance⁸¹ and which equate the testimony of two women with that of one man.⁸² Some commentators argue that these precepts “guarantee rights to women where none had previously existed.”⁸³ Moreover, no specific prohibition of equality between the sexes exists in the *Qur'an*.⁸⁴ In addition, Saudi feminists state that there is no absolute prohibition in the *Qur'an* against women working side by side and on an equal basis with men.⁸⁵ However, these arguments must be viewed in light of the specific precepts of the *Shari'a* and the restrictions placed on women by the 1979 decrees re-enforcing the *Shari'a* following the takeover of the mosque at Mecca and a resurgence of religious fundamentalism.⁸⁶ These new regulations state that Saudi women cannot travel alone, work with men, work with non-Muslim foreigners, dress immodestly, wear crosses openly,

76. See *supra* notes 14-18 and accompanying text.

77. R. NYROP, *supra* note 71, at 119.

78. *Id.* at 214. The reasoning of the Saudi government is: Israel has illegally taken part of the Arab homeland; Saudi Arabia and Israel are therefore technically at war; the Israeli constitution recognizes all Jews as Israeli citizens; therefore all Jews are enemy aliens.

79. *Id.*

80. *Abrams v. Baylor Coll. of Med.*, 581 F. Supp. 1570, 1574-75 (S.D. Tex. 1984).

81. QUR'AN, Sura [chapter] iv, verse 11 (A. Yusuf Ali trans. 1946) [hereinafter cited as s.iv, v.11].

82. *Id.* at s.ii, v.282.

83. A. SHAW AND D. LONG, SAUDI ARABIAN MODERNIZATION: THE IMPACT OF CHANGE ON STABILITY 95 (1982).

84. *Id.* See also QUR'AN, translator's note at p. 76.

85. See *infra* text accompanying note 150.

86. D. PIPES, *supra* note 75, at 234.

or hold hands in public.⁸⁷ These regulations also apply to United States women in public, that is, when operating outside foreign residential compounds or foreign businesses.⁸⁸

III. THE CLASH OF UNITED STATES AND SAUDI LAW

A. Religious and National Origin Discrimination

Two recent cases have specifically dealt with alleged religious discrimination by United States corporations operating in Saudi Arabia. *Kern v. Dynalelectron Corporation*⁸⁹ concerned discrimination in favor of Muslims for certain jobs, while *Abrams v. Baylor Collge of Medicine*⁹⁰ involved discrimination against Jews in hiring.

1. *Kern v. Dynalelectron Corporation*

In *Kern*, the estate of a deceased Dynalelectron employee sued the company, alleging that a company requirement that all helicopter pilots convert to Islam before being stationed in Jeddah, Saudi Arabia constituted religious discrimination under Title VII, by unlawfully denying the applicant a job opportunity.⁹¹ The court ruled that plaintiff Kern had established a prima facie case of religious discrimination,⁹² but that such discrimination was legally based upon a bona fide occupational qualification exception, since being a Muslim was "of the essence" for the job to be performed by Kern.⁹³

The district court's reasoning focused on the specific relationship between the corporation and the Islamic nation. Saudi Arabian law requires that non-Muslims be excluded from Mecca on pain of death.⁹⁴ Dynalelectron's contract with third party Kawasaki Corporation⁹⁵ provided that Dynalelectron would supply helicopter pilots to help in prevention and control of fires in the tents of pilgrims going to Mecca.⁹⁶ "Specifically, the subcontract dated August 28, 1977 re-

87. *Id.*

88. N. ABRAHAM, DOING BUSINESS IN SAUDI ARABIA 275 (1980).

89. 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984).

90. 581 F. Supp. 1570 (S.D. Tex. 1984).

91. *Kern*, 577 F. Supp. at 1198.

92. *Id.*

93. *Id.* at 1203.

94. *Id.* at 1198. Apart from this case, it is difficult to substantiate that non-Muslims found in Mecca are actually beheaded. Most books only state that no non-Muslims are allowed in Mecca, and none have knowingly been admitted there since the 7th century. See, e.g., R. NYROP, *supra* note 71, at 126.

95. *Kern*, 577 F. Supp. at 1197.

96. *Id.* at 1197-98.

quired that Moslem pilots and mechanics be provided as necessary for operation in the holy area of Saudi Arabia. Thus the essence of Dynalelectron's business would be undermined by the beheading of all the non-Moslem pilots based in Jeddah."⁹⁷

It should be noted that the district court could have used a different portion of Title VII in its analysis of Dynalelectron's predicament. Under Section 2000e-1 of Title VII, an exemption is available "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."⁹⁸ Since Saudis consider the word of God to be the basis of law in their country,⁹⁹ and the ministers of Saudi Arabia swear loyalty to God before swearing allegiance to King and country,¹⁰⁰ it could be argued that Dynalelectron was effectively acting as an agent for a religious society. This would apply only in situations such as those where the Saudi government oversees the religious pilgrimages to Mecca and supervises a sacred area,¹⁰¹ not where secular matters are concerned, such as supervision of a public hospital.¹⁰² This interpretation would avoid widening the bona fide occupational qualification exception of Title VII any further, and answer concerns expressed by other writers on possible interpretations of the ruling in *Kern*.¹⁰³ These concerns include the question of whether *Kern* would allow a company to require that all helicopter pilots be Muslim, or whether Saudi Arabian law can supersede United States law so easily.¹⁰⁴

One other aspect of the *Kern* case, not even questioned by the court, concerns Dynalelectron's practice of sending "pilots to indoctrination courses where they were taught the basic formulation of the Islamic faith, converted thereto, and received a certificate manifesting said conversion."¹⁰⁵ Admittedly, it may not be the place of a United

97. *Id.* at 1200.

98. 42 U.S.C. § 2000e-1 (1982). See also *supra* note 39.

99. Asherman, *supra* note 61, at 322.

100. T. PEASLEE, *supra* note 66, at 1095.

101. R. NYROP, *supra* note 71, at 125-26.

102. See, e.g., *Abrams*, 581 F. Supp. at 1570.

103. Note, *The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification*: *Fernandez v. Wynn Oil Co.*, 57 S. CAL. L. REV. 335 (1984). The commentator expressed concern that one possible interpretation would be that "being Moslem is reasonably necessary to flying a helicopter." *Id.* at 336, n.4. This would also avoid the question of whether the court was misinterpreting *Fernandez* itself (to be discussed later) in ruling effectively that Moslem law superseded U.S. law in the facts presented in *Kern*. *Id.*

104. *Id.*

105. *Kern*, 577 F. Supp. at 1198.

States judge to question a religious conversion, especially under the First Amendment,¹⁰⁶ but to allow such a casual attitude to exist towards conversion to Islam may bode ill for United States corporate relations with Islamic governments. The court's own language indicates that the court itself is aware that such a conversion may not be a bona fide total commitment to a new faith. In effect, the court's implication—that it will not question the sincerity of a religious conversion in allowing Dynalectron to first hire helicopter pilots and then give them at least the appearance of the required religious allegiance—may stretch the meaning of “bona fide” in the bona fide occupational qualification exception. The necessity may be bona fide, but it is questionable whether the new found religious faith of Dynalectron's employees is bona fide. Allowing a casual attitude to exist towards adherence to the Islamic faith may cause further cultural clash and hurt a company's relationships with the Saudi people. The court is allowing Dynalectron's plight to blind its eyes to the possible deception practiced as a bona fide religious conversion, where there may truly be only an economic conversion.

Further questioned is the court's analogy to “discrimination against women of child-bearing age in order to protect the safety of their unborn children.”¹⁰⁷ Here, safety of a third party is not involved, only that of helicopter pilots hired by Dynalectron who refuse to convert to Islam and who will not be injured unless actually forced to land in Mecca itself. United States courts have traditionally been protective of physical danger in hiring employees only where there is almost inevitable danger to all workers.¹⁰⁸ Here, where the danger is speculative and can be compensated for by insurance, danger pay, or both, may be an instance where the courts should let the worker choose whether to accept a given job. The theory of “protective benevolence” has previously led to many discriminatory laws inhibiting the employment of women. *Kern* should not serve as a reversal of the trend away from discrimination disguised as protection.

106. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I. At least one court has interpreted this to mean that the government cannot consider the merits of a religious belief. *Universal Life Church, Inc., v. United States*, 372 F. Supp. 770, at 776 (E.D. Calif. 1974).

107. *Kern*, 577 F. Supp. at 1200.

108. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); see also *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

2. *Abrams v. Baylor College of Medicine*

In *Abrams*,¹⁰⁹ Jewish physicians were excluded from participating in a medical program supplying cardio-vascular teams to Saudi Arabia. The teams stationed in Saudi Arabia received greater compensation than those remaining in Texas.¹¹⁰ The district court found that Baylor's decision to exclude Jews from its Saudi Arabian programs was based on stereotypical assumptions concerning Saudi attitudes toward Jews;¹¹¹ that Saudi Arabia never explicitly required that Baylor not send Jews for this program;¹¹² that other programs had insisted on, and received, non-discrimination clauses in their contracts with the Saudis;¹¹³ and that therefore there was no BFOQ defense available to Baylor.¹¹⁴ The court thus extended protection from the state level to the federal level under United States law to Jews who wish to work in Saudi Arabia.

Abrams can be seen as comparable to an earlier New York case, *American Jewish Congress v. Carter*,¹¹⁵ which involved an oil company's hiring practices in New York State and a state law similar to Title VII.¹¹⁶ In *American Jewish Congress*, protection was based on the theory that religious affiliation can never be a bona fide occupational qualification except in a case concerning a religious organization.¹¹⁷ Such would seem to be an implication of the court's ruling in *Abrams*, although this can also be seen as a narrow ruling on its facts, where there was explicit discrimination against a certain religion in a non-religious setting.

Abrams reiterates a persistent theme in the discussion of United States/Saudi relationships. Although Saudi Arabia is not receptive to Israeli interests, it has and will accept American Jewish workers on contract to United States companies. In part, this is because Saudi Arabia desperately needs the skills brought by United States contract workers,¹¹⁸ and will therefore accept American Jews simply as United States citizens, while Israelis are still barred.

109. *Abrams*, 581 F. Supp. 1570 (S.D. Tex. 1984).

110. *Id.* at 1573.

111. *Id.* at 1579.

112. *Id.* at 1575.

113. *Id.* at 1576.

114. *Id.* at 1579.

115. *Am. Jewish Congress*, *supra* note 8.

116. N.Y. EXEC. LAW § 296(1)(a) & (c) (McKinney 1982).

117. *Am. Jewish Congress*, *supra* note 8, at 221.

118. R. NYROP, *supra* note 71, at 144; A. SHAW & D. LONG, *supra* note 83, at 44-45.

One other aspect of *Abrams* deserves mention: the court's discussion of the Export Administration Act (EAA). The court ruled that plaintiffs were entitled to sue under the EAA¹¹⁹ because American Jews were members of the class covered by the EAA;¹²⁰ Baylor acted with the intent to honor the Saudi boycott;¹²¹ and Baylor's actions were specifically prohibited by the EAA.¹²² This ruling gives United States employees one more tool with which to fight discrimination in hiring for overseas positions.

This ruling may have a far-reaching impact on American Jews wishing to work in Arabic countries, because it requires that companies make affirmative efforts to have Jews accepted as employees by the Saudis and because the ruling allows individuals to sue under both the EAA and Title VII. The *Abrams* case has not been appealed or overruled, and thus has considerable precedential value, when coupled with *American Jewish Congress v. Carter*, in furthering the interests of Jewish citizens seeking to work abroad for United States companies (since this type of discrimination is not confined to Arabic countries).

B. Sexual Discrimination

Employment of women in Saudi Arabia is more problematical than employment of specific religious groups. Custom, as embodied in the *Shari'a*, supplemented by Royal decree, and enforced by the Committee for the Encouragement of Virtue and Discouragement of Vice,¹²³ requires that women dress modestly in public, not appear alone in public, and work only in segregated environments—if there.¹²⁴ These requirements are incorporated into the Saudi Arabian legal system, and thus are not comparable to the customer preference

119. 50 U.S.C. App. § 2401 *et seq.*, 15 C.F.R. § 369.1 *et seq.*

120. *Abrams*, 581 F. Supp. at 1581.

121. *Id.* at 1581-82.

122. *Id.* The court quotes an example gleaned from 15 C.F.R. § 369.2(b) as being exactly parallel to the actions taken by Baylor:

(i) U.S. construction company A is awarded a contract to build an office complex in boycotting country Y. A, believing that employees of a particular religion will not be permitted to work in Y because of Y's boycott against country X, excludes U.S. persons of that religion from consideration for employment on the project.

A's refusal to consider qualified U.S. persons of a particular religion for work on the project in Y constitutes a *prohibited boycott-based discriminatory action* against U.S. persons on the basis of religion. [emphasis added by the court].

Id. at 1582.

123. R. NYROP, *supra* note 71, at 125 and 341.

124. See *supra* text accompanying notes 65-71.

standard based on stereotypical attitudes towards women which has been specifically rejected as a BFOQ by United States courts.¹²⁵ These requirements more closely resemble the laws which each country is required to honor by the Treaty¹²⁶ promulgated between Saudi Arabia and the United States in 1933, which provides that citizens of Saudi Arabia and the United States shall be subject to the laws of the country where they are presently situated.¹²⁷

With this background in mind, it is interesting to examine an analogous case involving sex discrimination based upon the perceived needs of foreign customers. In *Fernandez v. Wynn Oil Co.*,¹²⁸ plaintiff Fernandez claimed she was refused a promotion based upon her gender. The Ninth Circuit affirmed the lower court holding that Ms. Fernandez was denied a promotion based on her performance record and not on her gender, but did not follow the lower court's BFOQ analysis.¹²⁹ The Ninth Circuit refused to find masculine gender a bona fide occupational qualification where there was "testimony that [defendant] Wynn's South American clients would refuse to deal with a female DIO [Director of International Operations]."¹³⁰ The court noted, based upon previous United States cases, that "stereotypic impressions of male and female roles do not qualify gender as a BFOQ."¹³¹

Furthermore, the court stated that the EEOC (Equal Employ-

125. 653 F.2d 1273 (9th Cir. 1981).

126. *Provisional Agreement Between the United States of America and the Kingdom of Sa'udi Arabia in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation*. Nov. 7, 1933. 48 Stat. 1826, 142 L.N.T.S. 330 (1934).

127. *Id.* Relevant provisions include:

ARTICLE II. Subjects of His Majesty the King of Saudi Arabia in the the United States of America, its territories and possessions, and nationals of the United States of America, its territories and possessions, in the Kingdom of Saudi Arabia, . . . [i]n respect of their persons, possessions, and rights . . . shall enjoy the fullest protection of the laws and authorities of the country,

ARTICLE IV. . . .

Nothing in this agreement shall be construed as a limitation of the right of either Government to impose, on such terms as it may see fit, . . . regulations for the enforcement of police or revenue laws.

There are, at present, no cases specifically interpreting the treaty. However, in line with the Supreme Court ruling that Japanese nationals are subject to U.S. employment laws (including Title VII) when hiring in the United States, it would seem analogous that U.S. nationals, including women, would be subject to Saudi employment laws while in Saudi Arabia. See *Sumito Shoji Am., Inc.*, 457 U.S. 176.

128. 653 F.2d 1273 (9th Cir. 1981).

129. *Id.* at 1276.

130. *Id.*

131. *Id.* [citations omitted].

ment Opportunity Commission) "has held that the need to accommodate racially discriminatory policies of other countries cannot be the basis of a valid BFOQ exception."¹³² In addition, the court ruled that Title VII applies in all cases where hiring occurs within the United States:

Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here.¹³³

It is unlikely that the *Fernandez* dicta, concerning "stereotypic impressions of male and female roles," would apply in Saudi Arabia. Saudi Arabian dictates against women in business are the result of law, not simply stereotype.¹³⁴ Also, Saudi Arabian law is based on segregation of men and women, not on a perceived inability of women to excel in business. Many Saudi women have managed their own business affairs for some time,¹³⁵ and now are allowed to work in banks staffed by and serving only women.¹³⁶

The United States government has agreed that all United States citizens will honor Saudi law when operating in Saudi Arabia,¹³⁷ and United States corporations must follow United States law while recruiting employees within the United States.¹³⁸ It therefore appears that United States corporations must recruit women for Saudi posts as they normally would for domestic posts—but will be allowed to tell the women that acceptance of any job in Saudi Arabia includes segregation of single women from male co-workers in social situations and all other strictures applicable to women in Saudi society. Although such an honest appraisal of the job requirements will probably lead to few women being recruited, it is unlikely to lead to successful court action on the basis of discrimination, for the United States employer will only be applying Saudi law as required.¹³⁹ Additionally, a United States corporation may be forced to set up segregated work situations

132. *Id.* at 1277 [citations omitted].

133. *Id.* [citation to *Am. Jewish Congress* omitted].

134. *See supra* notes 65-71.

135. A. SHAW & D. LONG, *supra* note 83, at 96.

136. *Islamic Law*, *supra* note 65, at 479.

137. *Supra* note 125.

138. *Supra* note 131.

139. *But see infra* note 149 and accompanying text.

to accomodate women employees.¹⁴⁰ However, the great expense, combined with the foreign location, might preclude imposition of such a requirement on a company operating in Saudi Arabia. Only if service in Saudi Arabia were a prerequisite for promotion within a company would a court be likely to order such a drastic solution.

IV. SUMMARY OF CURRENT LAW

Under current United States statutory and case law, United States corporations that recruit within the United States for placement in overseas positions must follow a policy of strict non-discrimination in hiring or promoting on the basis of race, religion, national origin, or sex. This may at times conflict with treaty requirements that United States citizens and corporations are subject to Saudi law when operating in Saudi Arabia. Therefore, United States corporations must use care in formulating policies regarding employment of women and Jews for positions in Saudi Arabia.

Corporations should ensure that their contracts with Saudi Arabia or with Saudi companies contain clauses mandating non-discrimination against Jews in hiring. Such non-discrimination clauses have been successfully implemented in previous contracts with the Saudis.¹⁴¹ Other non-discriminatory measures would include ensuring that no employee, whether Jewish or not, carries a visa indicating visits to Israel; this can be done, if necessary, by obtaining a substitute visa.¹⁴² By taking these elementary precautions, a United States corporation should be able to comply with Saudi strictures against Israel without violating the EAA or Title VII requirements of non-discrimination in religion or national origin.

Complying with hiring requirements regarding women may be more problematical. As outlined above, in order to avoid violation of Title VII, United States corporations must have a reasonable factual basis to believe that being male is "of the essence" of the job.¹⁴³ An employer cannot depend on an assertion of "customer preference." Instead, proof of a woman's total inability to conduct her job because

140. In one case, the court has required a domestic employer to provide private restrooms and facilities for female employees comparable to those provided for male employees. *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979).

141. *Abrams*, 581 F. Supp. at 1576.

142. *Id.* at 1574-75.

143. *See supra* notes 21-27 and accompanying text.

of her sex must be produced.¹⁴⁴ In Saudi Arabia this may not be difficult, since Saudi law, both *Shair'a* and ministerial regulations, severely limit the role of women.¹⁴⁵

United States corporations may still wish to hire women for positions in Saudi Arabia, despite these restrictions. Whether this would be practical in a given situation would depend on a number of factors: (1) the willingness of American women to comply with Saudi dress and behavior strictures;¹⁴⁶ (2) the continued changes in Saudi Arabia leading to greater acceptance of western social behavior;¹⁴⁷ and (3) a balance between the necessity of the presence of a given woman in a position and the economic considerations involved in setting up a segregated work environment.¹⁴⁸ This last balancing test would be applied where a corporation might otherwise be able to prove that being male was essential to its business operations, but was still willing to make adjustments in an effort to bypass Saudi law.

In the rare event that a corporation needed to hire a Muslim worker for a given job, as in *Kern*, the corporation must look at both its responsibility as a representative of a foreign culture operating in Saudi Arabia and the necessity of operating in a religious environment. Perhaps Dynalectron or similarly situated companies could consider recruiting Islamic residents in the United States and training them for the required job, instead of recruiting those with skills needed for the job and then arranging for conversion to Islam. In view of the extreme deference given religion in Saudi Arabia, this might be a better course of action to maintain good business relationships between United States corporations and Saudi society. In either event, supplying Muslims for such a job should not lead to a penalty under Title VII after *Kern v. Dynalectron Corp.*, since the court specifically allowed a non-religious entity to hire only Muslims under narrowly defined conditions.

V. POLICY CONSIDERATIONS AFFECTING EMPLOYMENT DECISIONS

This comment has essentially focused on the conflict of laws problems inherent in enforcing anti-discrimination laws against

144. *Fernandez*, 653 F.2d at 1276-77.

145. See text accompanying notes 81-88.

146. *Id.*

147. R. NYROP, *supra* note 71, at 96-97.

148. Cf. notes 138-40 and accompanying text.

United States corporations operating in Saudi Arabia: when are these laws preeminent? Other, less tangible considerations are at play in employment decisions, whether acknowledged or not. These may include considerations of overall foreign policy and the effect of imposing American values on a foreign culture.

A. Saudi/United States Relations

Can United States corporations consider United States foreign policy, and the dependence on Arabian oil,¹⁴⁹ in making hiring decisions for employees going to Saudi Arabia? As stated most clearly in *American Jewish Congress*, foreign policy is conducted by the federal government, not private corporations; foreign policy is specifically entrusted to the executive and legislative branches of the federal government by the Consitution.¹⁵⁰ The language of Justice Epstein is clear on this point:

There is no treaty; there is no compact, there is no agreement between the United States and Saudi Arabia relating to the entry of Jews into Saudi Arabia. Aramco's contract with the government of Saudi Arabia cannot be given the status of a treaty of the United States, and not even Aramco dares make any such assertion.

...
*When Commissioner Carter declares that American interests in the Near East "outweigh the abstract vindication of state sovereignty" he makes the Commission for which he speaks the vassal of a foreign potentate. When Commissioner Carter seeks to justify his dismissal of petitioner's case on a claim that "the security of the United States is involved" (second determination, p. 9), he arrogates to himself the functions of the State Department of the United States which has made no such declaration.*¹⁵¹

According to this ruling, then, United States corporations cannot themselves set foreign policy, but can only follow any policy set by the State Department; this dictum is not always followed, as noted by several commentators.¹⁵²

149. *Am. Jewish Congress*, 9 N.Y. 2d at 229.

150. Congress is empowered "to regulate commerce with foreign Nations. . . ." U.S. CONST. art. I § 8(3). The President "ha[s] power, by and with the Advice and Consent of the Senate to make Treaties. . . ." *Id.*, art. II, § 2(2).

The States (and, by implication, any non-Federal body) cannot enter into treaties or alliances, or impose duties on imports or exports, implying that all foreign relationship powers are reserved to the federal government.

151. *Am. Jewish Congress*, 190 N.Y.S. 2d at 223, 224 (emphasis in original).

152. Note, *Civil Rights in Employment and the Multinational Corporations*, 10 CORNELL

B. American versus Saudi Cultural Values

Will imposition of American cultural values on Saudi Arabian society—even indirectly—cause great harm either to that culture or to the United States corporation? Authorities differ on this question. Many authorities see a mere United States presence as a beneficent example to a host country, especially where American cultural standards are “objectively higher” than those of the host country.¹⁵³ Others see the imposition of American standards as arrogance.¹⁵⁴ Still a third group sees a middle ground between “cultural relativism on the one hand, where we feel we have no right whatsoever to value our own traditions above others, and absolute cultural imperialism or arrogance on the other, [where we are convinced that our way at home is right for everyone].”¹⁵⁵ Those in favor of a middle ground argue that the desire to defer to local customs entirely may be a product of the western-educated classes in host countries, while other groups may not expect or desire such tolerance from those in positions of power and privilege.¹⁵⁶ “Thus those who talked about the MNCs [multi-national corporations] from this level tended to argue for something *between* cultural relativism and cultural imperialism (difficult as that point may be to define) and for increased sensitivity to the consequences, foreseen or unforeseen, of massive economic presence.”¹⁵⁷

It must be noted that continued Saudi modernization is being brought about by Saudis who themselves have been educated in the West and have helped to import foreign culture.¹⁵⁸ In the face of such change, the enforced segregation of non-Muslim foreigners from the mass of Saudi peoples, and the economic/social differences already established between Saudis and United States citizens, it appears un-

INT'L L.J. 87 (1976), at 111, and n. 107, citing L. TURNER, MULTINATIONAL COMPANIES AND THE THIRD WORLD (1973).

153. Sucre, quoted in *Discussion on Moral Arrogance, Legal Constraints, and the Search for Higher Standards*, in THE NATION-STATE AND TRANSNATIONAL CORPORATIONS IN CONFLICT 53 (Gunneman ed. 1975) [hereinafter cited as THE NATION-STATE]. Sucre does not define how a social standard can be “objectively” higher, thus avoiding the issue of value judgments.

154. Marshall, in THE NATION-STATE, *supra* note 151, at 45-46. “The attempt by any American group to determine what is socially desirable in another country beyond obedience to that country’s law is arrogant.” *Id.*

155. Weiner, *Multiple Interests in International Bargaining*, in THE NATION-STATE, *supra* note 151, at 147.

156. Gunnemann, *Summary and Analysis*, in THE NATION-STATE, *supra* note 151, at 165.

157. *Id.* (emphasis in original).

158. R. NYROP, *supra* note 73, at 96-97.

likely that a United States corporation's application of non-discriminatory hiring standards for United States personnel will be a major source of friction. Saudi Arabia may always refuse to issue visas to those it views as threatening—women hired to work in an integrated environment, for instance. Also, it would not be likely that any discriminatory charges could be filed in such an instance. Thus, steps to actively encourage defiance of Saudi laws should not be taken. Rather, a gradual change will probably be assimilated, as it has been in most other Arab countries.¹⁵⁹

VI. CONCLUSION

Although the flexibility possible in the courts' attitudes towards enforcement of Title VII and related laws in Saudi Arabia may appear to indicate a softening of the attitude towards discrimination in employment, this is probably only a superficial view. Courts continue to vigorously enforce employment discrimination laws within the United States, extending such coverage to foreign corporations operating within United States borders.¹⁶⁰ There is only an appearance of laxity in enforcing Title VII where there is direct conflict between Title VII and the laws of another nation. Such flexibility allows United States corporations to operate in Saudi Arabia without violating Saudi laws or American precepts of non-discriminatory treatment in hiring, promotion, and conditions of employment.

For many reasons, it is best for United States corporations to continue to fully comply with Title VII, the EAA, and the Executive Order in hiring for overseas positions. Such compliance has in the past been well tolerated in other countries. For example, certain United States corporations have insisted on hiring blacks in South Africa as they would in the United States, and have persisted despite government opposition.¹⁶¹ This is analogous to the position of many United States corporations in hiring Jews for work in Saudi Arabia, as outlined in the *Abrams* case.¹⁶² United States corporations seem to vigorously support American views of racial or religious equality in

159. See Note, *Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values*, 12 GA. J. INT'L & COMP. L. 55, at 63 nn. 48-49 and accompanying text.

160. See *supra* note 11.

161. See, e.g., Comment, *United States Labor Practices in South Africa: Will a Mandatory Fair Employment Code Succeed Where the Sullivan Principles Have Failed?*, 7 FORDHAM INT'L L.J. 358, 362-67 (1984).

162. See text accompanying note 112.

employment opportunity, even when employees will be working where such equality is not the rule and may even cause friction.

It would be consistent for United States corporations to insist upon the same treatment for sex as for race or religion. To date, this has not happened; even internal application of Title VII to sex has never been as stringent in legal terms as it has been for other suspect classifications.¹⁶³ Some commentators have argued that sex will, and should, always have its own special status within the suspect classifications of race, religion, sex, and national origin, based upon privacy needs and biological differences.¹⁶⁴ The domestic cases to date require that a bona fide occupational qualification exemption based upon sex must be substantiated by an immutable sexual characteristic.¹⁶⁵ Companies cannot simply argue that customers prefer to deal with men¹⁶⁶ or that women provide for perceived psychological needs on a job.¹⁶⁷ United States companies may find it difficult to accommodate women who desire to work in Saudi Arabia and other strictly sex-segregated societies, but this should not be the deciding factor. The objective capabilities of the worker should be the deciding factor in hiring decisions. United States citizens must be able to make their own decisions about the desirability and advisability of working in a closed, sex-segregated environment in a foreign culture. Protectionism towards one sex is not a policy favored in United States courts, except in the extreme case of violence or (possibly) harm to a fetus.¹⁶⁸

The attitude of Saudi women must also be taken into account. Just as United States corporations honor the desire of South African blacks to work in integrated jobs for pay equal to that of whites, so should they honor the statements of Saudi women who believe that women can, consistent with Islam, work, and do so in an integrated environment.¹⁶⁹ By continuing to operate within the guidelines of United States law, United States corporations will be promoting the equality of all—an announced goal of United States policy—while

163. See Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RESEARCH J. 583, *passim*.

164. *Id.*

165. See *Sex as a BFOQ*, *supra* note 36, at 161.

166. See *Fernandez*, 653 F.2d at 1276.

167. See *Diaz*, 442 F.2d at 387.

168. See, e.g., *Dothard*, 433 U.S. at 335-36 (1976); *Kern*, 581 F. Supp. at 1200.

169. Wallace, *Saudis Debate the Role of Women*, L.A. Times, Mar. 14, 1985, § 5, at 24, col. 1. In this article Princess Heseah, wife of Crown Prince Abdullah ibn Abdul Aziz, and Aisha Al-Mana, a feminist Saudi educator, both advocate work for women.

still honoring the culture of Saudi Arabia. This would especially hold true for those companies with federal government contracts, since they must employ persons without regard to "race, color, religion, sex, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed."¹⁷⁰ Although this ideal may sound like cultural imperialism, it is more likely another example of the preeminence of the goal of true equality within American life.

Hedwig C. Swanson

170. 41 C.F.R. § 60-1.10 (1984).

