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PROTECTING OLDER AMERICANS WORKING FOR FOREIGN EMPLOYERS FROM AGE DISCRIMINATION IN EMPLOYMENT

Lisa A. Butler-Brust

INTRODUCTION

As the American population ages, the percentage of workers over the age of forty continues to rise.1 At the same time, increasing numbers of businesses are expanding globally2 resulting in more Americans employed in the United States by foreign-owned companies.3 The combination of these two trends will lead to an growing number of Americans over the age of forty employed by foreign employers4 in

1. The percentage of Americans over the age of 40 has risen from 36.3% in 1970 to 40.2% in 1995. U.S. Bureau of the Census, Statistical Abstract of the United States: 1996, at 15 (116th ed. 1996) [hereinafter 1996 Statistical Abstract]. The U.S. Census Bureau estimates that 45% of the population will be over the age of 40 by 2005. Id. at 17. The share of Americans over the age of 40, therefore, will increase by more over the next decade—from 1995 to 2005—than it did over the 25 years from 1970 to 1995. See id. at 15, 17. See generally 1 Howard C. Eglit, Age Discrimination § 1.03, at 1-13 to 1-14 (2d ed. 1994) [hereinafter 1 Eglit] (describing the “graying” of the American population).


3. In 1981, foreign-owned businesses employed slightly over 2.4 million Americans in the United States. 1996 Statistical Abstract, supra note 1, at 789. This number nearly doubled by 1993, when close to 4.7 million Americans were employed by foreign-owned businesses in the United States, representing nearly 4.9% of all American workers employed. Id.; see also Gladstone, supra note 2, at 2 (describing the impact the globalization of business has had on the number of Americans working for foreign employers in the United States).

4. In this Note, “foreign employers” refers to two categories of employers that are not domestic employers. First, a “foreign employer” is a subsidiary or division located, but not incorporated, in the United States that is owned and operated by a foreign firm. Second, a “foreign employer” is a foreign parent of a U.S.-incorporated subsidiary. In this situation, the U.S.-incorporated subsidiary is a domestic employer and the foreign parent is a foreign employer. This Note focuses on the applicability of the Age Discrimination in Employment Act of 1967 to both categories of foreign employers in the United States. See infra part II.B.

The ADEA defines an employer as “a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 29 U.S.C. § 630(b) (1994). A person is defined as “one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organ-
the United States. Whether the Age Discrimination in Employment Act of 1967 ("ADEA") protects such employees, therefore, is an issue of great importance to many older Americans.6

Several courts faced with this issue have correctly interpreted the ADEA as enforceable against foreign employers in the United States.7 Under such an interpretation, older Americans working for foreign employers in the United States are afforded the same protection under the ADEA as older Americans working for domestic employers.8 Unfortunately, two federal courts have disagreed with this conclusion and, instead, have interpreted the ADEA as unenforceable against foreign employers in the United States.9 Under this interpretation, older Americans working for foreign employers in the United States are not afforded the protection of the ADEA.


7. See Robins v. Max Mara, U.S.A., Inc., 914 F. Supp. 1006, 1008-09 (S.D.N.Y. 1996) (concluding that a foreign parent of a U.S.-incorporated subsidiary could be held liable under the ADEA if the parent and subsidiary were an "integrated enterprise" and the total of the subsidiary's employees and the parent's employees located in the United States met the statutory minimum of 20 employees); EEOC v. Kloster Cruise Ltd., 888 F. Supp. 147, 151-52 (S.D. Fla. 1995) (holding that a foreign employer in the United States was subject to the ADEA); Helm v. South African Airways, No. 84 Civ. 5404 (MJL), 1987 WL 13195, at *7 (S.D.N.Y. June 25, 1987) (finding that the ADEA was applicable to foreign employers in the United States); see also O'Meara, supra note 6, at 59 (stating that "[a]ll persons, foreign and American, working within the territorial borders of the United States for any employer, foreign or American, are covered by the ADEA"); Robert P. Lewis, Does the ADEA Cover Foreign Employers Operating in the United States?, N.Y. L.J., July 15, 1996, at 1, 6 (describing the disagreement among courts on whether the ADEA applies to foreign employers in the United States and concluding that the more reasonable interpretation is that it is applicable to such employers).

8. See cases cited supra note 7.

9. See Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915, 920-21 (E.D.N.Y. 1993) (concluding that the ADEA does not apply to foreign employers operating in the United States), aff'd on other grounds, 21 F.3d 502 (2d Cir. 1994);
tion, the ADEA does not protect older Americans working for foreign employers in the United States, but rather only protects those Americans working for domestic firms. Older Americans that are discriminated against in these jurisdictions have no legal redress in the United States.

These polar interpretations resulted from amendments made to the ADEA by the Older Americans Act Amendments of 1984 ("OAAA"). Through the OAAA, Congress sought to overrule a number of court decisions that concluded that the ADEA did not cover U.S. companies employing American citizens abroad. Congress intended the amendments to extend ADEA coverage to American citizens working for U.S. employers abroad. To make clear that the OAAA did not affect foreign firms employing U.S. citizens abroad, Congress added the following language to the ADEA: "The prohibitions of [the ADEA] shall not apply where the employer is a foreign person not controlled by an American employer." With this addition, Congress intended only to put a limit on the extension of the ADEA extraterritorially, not to create an ADEA exemption for all foreign employers, including those located in the United States.

As this Note demonstrates, foreign employers in the United States should be held to the ADEA's prohibitions for several reasons. First, the OAAA legislative history is devoid of an intention to rescind ADEA coverage for older Americans working for foreign employers in the United States. Second, Congress expressly acknowledged the

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Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993) (concluding that the foreign parent of a U.S. employer could not be held liable under the ADEA because as a foreign company, it was exempt from the ADEA), aff'd, 15 F.3d 1079 (5th Cir. 1994); see also Lewis, supra note 7, at 1, 6 (discussing two federal courts that refused to apply the ADEA to foreign employers in the United States).

10. See supra note 9.

11. See supra note 9.


13. 130 Cong. Rec. 14,213 (1984) (Senator Grassley stating that the OAAA were intended to extend ADEA coverage to American companies operating abroad in response to several court decisions that created a "loophole" for such companies); see infra part I.B.


sovereignty of other nations by tolerating non-compliance with the ADEA by U.S. employers abroad when compliance would violate the laws of the host country. This is inconsistent with Congress ceding U.S. sovereignty over foreign employers in the United States. Third, the Equal Employment Opportunity Commission ("EEOC"), the administrative agency charged with enforcing the ADEA, has interpreted the ADEA as applicable to foreign employers in the United States. Finally, both the ADEA and Title VII, which proscribes discrimination in employment based on race, color, religion, sex, and national origin, should be applied consistently to foreign employers in the United States.

Part I of this Note describes the ADEA and the court decisions that led Congress to amend it with the OAAA. Part II explains the OAAA and traces the court decisions interpreting the ADEA's applicability to foreign employers in the United States after the OAAA. Part III reviews the arguments for enforcing the ADEA against foreign employers in the United States. This Note concludes that the ADEA should apply to such employers.

I. THE ADEA PRIOR TO THE OAAA

The ADEA was enacted in 1967 to prevent age discrimination in employment and to promote the fair treatment of older Americans in the workplace. The ADEA prohibits employers from engaging in age-based discriminatory practices in hiring and discharging employees, and in setting the terms and conditions of employment. Prior to the enactment of the OAAA, which extended ADEA coverage to American citizens working for U.S. employers abroad, courts assumed that the ADEA covered foreign employers in the United States as well as domestic employers.

A. Background and Purpose of the ADEA

In enacting the ADEA, Congress recognized that many employers were setting "arbitrary age limits regardless of potential for job per-
formance" which made it difficult for older Americans to gain and retain employment. The purposes of the ADEA were to help older persons receive fair treatment in the workplace and to promote the employment of older Americans. Congress hoped the ADEA would encourage employers to recognize ability rather than age in the employment of older persons.

Under the ADEA, an employer may not refuse to hire or discharge an individual, or deprive an individual of employment opportunities on the basis of age. In addition, employers subject to the ADEA may not discriminate against an individual with respect to compensation, terms, or conditions of employment on the basis of age. The ADEA defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." An employer that incorporates in the United States is considered a domestic corporation for purposes of ADEA coverage. The ADEA defines an employee as "an individual employed by any employer" who is age forty and over.

The EEOC is charged with enforcing the ADEA as well as the other U.S. discrimination laws. When enacted in 1967, the ADEA specified the Department of Labor as the agency responsible for its administration and enforcement. In 1978, President Carter transferred this authority to the EEOC. Congress delegated to the EEOC the power to issue legislative rules and regulations that it

25. 29 U.S.C. § 621(a)(1); see Edelman & Siegler, supra note 21, at 73.
26. 29 U.S.C. §§ 621(a)(1), 621(a)(3); see 1 Eglit, supra note 1, § 2.01, at 2-1.
29. Id.
30. 29 U.S.C. § 630(b). This definition also includes agents of an employer, states and their political subdivisions, and interstate agencies, but excludes the United States or any corporation that it wholly owns. Id.
31. See supra note 4 (explaining the definition of "employer" for ADEA purposes).
32. 29 U.S.C. § 630(f). The term "employee" excludes any person elected to a public office of a state or its political subdivision or any person appointed by such an officer to carry out the powers of the office. This exemption, however, does not apply to employees covered by the civil service laws of a state government, governmental agency, or political subdivision. Id.
34. 29 U.S.C. § 628; see also Starr, supra note 4, at 637 (explaining that the EEOC is responsible for enforcing the "major U.S. employment discrimination laws"); Rebecca Hanner White, The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation, 1995 Utah L. Rev. 51, 66-68 (1995) (describing the reorganization plan that established the EEOC as the agency charged with enforcing federal job discrimination laws).
35. 1 Eglit, supra note 1, § 2.03, at 2-10.
36. Id. §2.03, at 2-11.
deemed necessary to enforce the ADEA.\textsuperscript{37} This delegation carries with it "an implied delegation of interpretive authority."\textsuperscript{38} In accordance with this interpretive authority, the EEOC issues interpretations of the provisions of the ADEA and the other discrimination statutes.\textsuperscript{39} These interpretations aid courts reviewing issues on which Congress has not expressly spoken, such as whether the ADEA applies to foreign employers in the United States.\textsuperscript{40} The EEOC has concluded that the ADEA is enforceable against foreign employers in the United States.\textsuperscript{41} Courts are directed to defer to the EEOC's interpretation, but the degree of deference required is unclear.\textsuperscript{42} The Supreme Court has developed two approaches to determine the degree of deference to be given to administrative agencies' interpretations.\textsuperscript{43} The first approach requires a court to treat the agency interpretation as persuasive.\textsuperscript{44} The second approach requires a court to treat it as controlling when the statute is ambiguous and the agency interpretation is reasonable.\textsuperscript{45} The degree of deference to be given to the EEOC's interpretations is unsettled because the Supreme Court has not consistently applied either standard to the EEOC's interpretations.\textsuperscript{46} As demonstrated in part III.C.2 of this Note, under either standard, the EEOC's interpretation with respect to foreign employers in the United States is entitled to substantial deference from the courts.\textsuperscript{47}

\textsuperscript{37} 29 U.S.C. § 628; see White, supra note 34, at 51-53. The EEOC, however, does not have "cease-and-desist" authority and, therefore, cannot issue enforceable orders or determine liability. White, supra note 34, at 91.

\textsuperscript{38} See White, supra note 34, at 89.

\textsuperscript{39} 1 Eglit, supra note 1, § 2.03, at 2-12; see White, supra note 34, at 103; see, e.g., EEOC Policy Guidance, supra note 19, at 1-5 (interpreting liability of foreign employers in the United States and U.S. employers abroad under the ADEA and Equal Pay Act).

\textsuperscript{40} See White, supra note 34, at 52-54.

\textsuperscript{41} See EEOC Policy Guidance, supra note 19, at 3.

\textsuperscript{42} See infra part III.C.1 (tracing the Supreme Court's recent decisions involving the degree of deference to be given to EEOC interpretations).

\textsuperscript{43} See infra part III.C.1 (discussing the two degrees of deference that courts accord EEOC interpretations).

\textsuperscript{44} Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see infra part III.C.1 (discussing the two approaches courts use to determine the degree of deference to be given to agency interpretations).

\textsuperscript{45} Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); see infra part III.C.1 (discussing the two approaches courts use to determine the degree of deference to be given to agency interpretations).

\textsuperscript{46} Compare EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991) (finding that an EEOC interpretation of Title VII was entitled to only persuasive value) with EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115-16 (1988) (finding that an EEOC interpretation of Title VII was entitled to judicial deference and binding on the Court); see also White, supra note 34, at 54 (noting that the Supreme Court has not confirmed which deference standard to apply to EEOC interpretations).

\textsuperscript{47} See infra part III.C.2 (arguing that the EEOC's interpretation that the ADEA applies to foreign employers in the United States is entitled to judicial deference).
Prior to the OAAA, courts assumed that the ADEA covered foreign employers operating in the United States. For example in *MacNamara v. Korean Air Lines*, the court assumed that the ADEA applied to a Korean corporation employing an American citizen in the United States. In *MacNamara*, the court held that the "employee of choice" provision in the Friendship, Commerce and Navigation ("FCN") Treaty between the United States and Korea precluded the plaintiff employee from bringing a disparate impact claim, but not a disparate treatment claim, under Title VII and the ADEA.

MacNamara, an American citizen, worked as a sales manager in the United States for Korean Air Lines ("KAL"). After working for KAL for approximately eight years, KAL terminated MacNamara at the age of fifty-seven in June of 1982. MacNamara claimed that he was discriminated against based on his race and national origin under Title VII and based on his age under the ADEA. KAL argued that

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48. See, e.g., *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988) (assuming that a Korean corporation employing an American citizen in the United States could be liable under the ADEA for disparate treatment discrimination that occurred prior to the OAAA, but not disparate impact discrimination which was protected by the Friendship, Commerce and Navigation Treaty), cert. denied, 492 U.S. 904 (1989); Linskey v. Heidelberg E., Inc., 470 F. Supp. 1181, 1183-84 (E.D.N.Y. 1979) (concluding that if the plaintiff could prove that his U.S. employer and its Danish parent were an "integrated enterprise," then the Danish parent could also be liable for the alleged age discrimination); see also *Helm v. South African Airways*, No. 84 Civ. 5404 (MJL), 1987 WL 13195, at *7 (S.D.N.Y. 1987) (finding that the ADEA was applicable to foreign employers in the United States). The discrimination in *Helm* occurred before the OAAA. The court noted that even if the OAAA exempted foreign employers from coverage, the pre-amendment ADEA applied to foreign employers and the amendments were not retroactive. Id. The court stated in dictum that it did not interpret the OAAA to exempt foreign employers in the United States from ADEA coverage. Id.

49. 863 F.2d 1135 (3d Cir. 1988).

50. Id. at 1147-48.

51. Article VIII(1) of the Korean FCN Treaty provides, in part, "[n]ational 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." Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, art. VIII(1), 8 U.S.T. 2217, 2223.

52. *MacNamara*, 863 F.2d at 1147-48. An age discrimination claim may be based on either of two theories: disparate treatment or disparate impact. Joseph E. Kalet, *Age Discrimination in Employment Law* 59 (1986). Disparate treatment involves employment practices or policies that intentionally disfavor individuals based on their age. Id. Disparate impact involves employment practices that are neutral on their face, but adversely affect older Americans more than other employees and have no business justification. Id.

The lower court dismissed MacNamara's claims on the ground that the FCN Treaty allowed KAL to replace MacNamara with a Korean national without regard to U.S. employment laws. *MacNamara v. Korean Air Lines*, No. Civ. A. 82-5085, 1987 WL 19606, at *9 (E.D. Pa. 1987). KAL did not raise as a possible defense that the ADEA or Title VII was inapplicable to foreign employers. See *id.* at *1.

53. *MacNamara*, 863 F.2d at 1137.

54. *id*.

55. Id. at 1138.
Article VIII(1) of the FCN Treaty allowed it to replace MacNamara with an executive from its own country without being subject to the restrictions of Title VII or the ADEA.\textsuperscript{56} The court concluded that MacNamara could bring a claim under Title VII and the ADEA provided the claim was for disparate treatment and not disparate impact.\textsuperscript{57} The court reasoned that Article VIII(1) of the FCN Treaty only protected KAL from claims of disparate impact that resulted from its employment decisions.\textsuperscript{58} The treaty did not protect KAL from intentional acts of discrimination under Title VII or the ADEA.\textsuperscript{59} The court assumed that the ADEA applied to a foreign corporation employing an American citizen in the United States by allowing MacNamara to proceed with his disparate treatment claim under the ADEA against KAL.\textsuperscript{60}

B. Application of the ADEA to U.S. Employers Abroad—Impetus for the OAAA

As American businesses expanded globally, increasing numbers of Americans were employed in foreign subsidiaries of U.S. employers.\textsuperscript{61} Prior to the enactment of the OAAA, the ADEA did not explicitly state whether it applied to American citizens working overseas for U.S. employers.\textsuperscript{62} When the issue arose, the majority of courts refused to apply the ADEA to American employers operating in foreign locations.\textsuperscript{63} Seven of the federal circuit courts were faced with this issue in ADEA suits brought by American citizens working for

\textsuperscript{56} Id.


\textsuperscript{58} MacNamara, 863 F.2d at 1147-48.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Gladstone, supra note 2, at 1-2.


\textsuperscript{63} See Lopez v. Pan Am World Servs., Inc., 813 F.2d 1118, 1119-20 (11th Cir. 1987) (holding that, prior to the OAAA, the ADEA did not protect Americans employed by U.S. employers in foreign locations and that the amendments were not retroactive); S.F. DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1283 (5th Cir. 1986) (same); Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1130-31 (D.C. Cir. 1985) (same); Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 559-60 (7th Cir. 1985) (same); Zahourek v. Arthur Young & Co., 750 F.2d 827, 828-29 (10th Cir. 1984) (holding that the ADEA did not protect Americans employed by U.S. employers in foreign locations); Thomas v. Brown & Root, Inc., 745 F.2d 279, 281 (4th Cir. 1984) (same); Cleary v. United States Lines, Inc., 728 F.2d 607, 610 (3d Cir. 1984) (same).
U.S. employers abroad. All seven courts interpreted the ADEA as lacking extraterritorial application. The basis for this conclusion was that the ADEA incorporated by reference a provision in the Fair Labor Standards Act of 1938 ("FLSA") which provided that employees working in foreign locations were excluded from coverage. The courts interpreting the ADEA assumed that Congress did not intend the ADEA to apply extraterritorially because it expressly incorporated the FLSA exemption into the ADEA. Thus, prior to 1984, the only legal redress for Americans working abroad against their U.S. employers for age discrimination was under the age discrimination laws of the country in which they were working.

In 1984, Congress passed the OAAA which made several amendments to the ADEA. The purpose of the ADEA amendments was to extend ADEA coverage to American citizens employed in the foreign offices of U.S. employers.

II. The OAAA and Its Effect on the Interpretation of the ADEA

The OAAA extended coverage of the ADEA to American citizens working overseas for U.S. employers. To make clear that the

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64. See supra note 63.
65. See supra note 63.
67. See Lopez, 813 F.2d at 1119; S.F. DeYoreo, 785 F.2d at 1283; Ralis, 770 F.2d at 1122; Pfeiffer, 755 F.2d at 555-56; Zahourek, 750 F.2d at 828-29 & n.*; Cleary, 728 F.2d at 608-09. Section 626(b) of the ADEA provides that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section[. . . ] 216 . . . of this title." 29 U.S.C. § 626(b). Section 216, an FLSA provision, provides that "no employer shall be subject to any liability or punishment . . . for failure to comply with any provision . . . of this chapter . . . with respect to work . . . performed in a workplace to which the exemption in section 213(f) of this title is applicable." 29 U.S.C. § 216(d). FLSA § 213(f) excludes from coverage "any employee whose services during the workweek are performed in a workplace within a foreign country." 29 U.S.C. § 213(f); see also Zanar, supra note 6, at 168 (explaining that the ADEA incorporated an FLSA provision that indirectly addresses extraterritoriality).
68. See Lopez, 813 F.2d at 1119; S.F. DeYoreo, 785 F.2d at 1283; Ralis, 770 F.2d at 1122; Pfeiffer, 755 F.2d at 555-56; Zahourek, 750 F.2d at 828-29 & n.*; Cleary, 728 F.2d at 608-09.
69. In Cleary, however, the country in which the plaintiff was working, England, did not have laws prohibiting age discrimination. Cleary, 728 F.2d at 608 n.3; see also Zanar, supra note 6, at 165-66 (noting that before the OAAA, Americans suffering age discrimination by U.S. employers abroad had legal redress only under foreign law).
70. Older Americans Act Amendments § 802, 98 Stat. at 1792.
72. Older Americans Act Amendments § 802, 98 Stat. at 1792; see Michelle J. Ledina, Comment, The Multinational Enterprise and Title VII: Equal Employment
OAAA did not cover U.S. citizens working for foreign firms overseas, Congress added a subsection stating that the ADEA did not apply to a foreign employer not controlled by an American employer.\footnote{73} Congress intended this subsection as a limit to the ADEA’s extraterritoriality, not an ADEA exemption for all foreign employers, including those located in the United States.\footnote{74} Several courts interpreting the ADEA after its amendment correctly concluded that the OAAA did not provide an exemption for foreign employers in the United States, but rather affected only U.S. employers abroad.\footnote{75} Two federal courts, however, inappropriately interpreted the language of the ADEA amendments to exempt all foreign employers from ADEA coverage including those operating in the United States.\footnote{76}

A. The OAAA

The OAAA amended the ADEA in response to the several court decisions that prohibited its application to U.S. employers abroad.\footnote{77} First, the OAAA amended the definition of “employee” to include American citizens working for employers in foreign countries.\footnote{78} Prior to the OAAA, the ADEA defined “employee” as “an individual employed by any employer.”\footnote{79} The OAAA added: “The term ‘employee’ includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.”\footnote{80} While this amendment does not specifically address whether non-U.S.
citizens are covered, the Senate Report explains that the amendment relates only to "any individual who is a citizen of the United States employed by a U.S. employer in a workplace in a foreign country."\textsuperscript{81}

Concurrently, Congress added 29 U.S.C. § 623(h) which provides, in part:

\begin{enumerate}
\item If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under [the ADEA] shall be presumed to be such practice by such employer.
\item The prohibitions of [the ADEA] shall not apply where the employer is a foreign person not controlled by an American employer.\textsuperscript{82}
\end{enumerate}

Section 623(h)(3) establishes the following test to determine whether an employer controls a foreign corporation: "(A) interrelation of operations, (B) common management, (C) centralized control of labor relations, and (D) common ownership or financial control, of the employer and the corporation."\textsuperscript{83} Congress also amended the ADEA to exempt U.S. employers in foreign locations from complying with the ADEA where compliance would violate the laws of the host country.\textsuperscript{84}

Through the OAAA, Congress hoped to "insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the Age Discrimination in Employment Act."\textsuperscript{85} Thus, the OAAA clarified the issue of the ADEA's extraterritorial reach.\textsuperscript{86} After the OAAA, the ADEA protected American citizens working for U.S. employers abroad from age discrimination.\textsuperscript{87}

\textsuperscript{81} S. Rep. No. 467, supra note 6, at 36, reprinted in 1984 U.S.C.C.A.N. at 3009; see Zanar, supra note 6, at 181.
\textsuperscript{82} Older Americans Act Amendments § 802(b)(2), 98 Stat. at 1792 (codified as amended at 29 U.S.C. § 623(h)(1)-(2)).
\textsuperscript{83} Id. (codified as amended at 29 U.S.C. § 623(h)(3)).
\textsuperscript{84} Older Americans Act Amendments § 802(b)(1), 98 Stat. at 1792 (codified as amended at 29 U.S.C. § 623(f)(1)).
\textsuperscript{85} S. Rep. No. 467, supra note 6, at 27, reprinted in 1984 U.S.C.C.A.N. at 3000; see Zanar, supra note 6, at 166.
\textsuperscript{86} See Zanar, supra note 6, at 196-97; see, e.g., Lopez v. Pan Am World Services, Inc., 813 F.2d 1118, 1119 & n.4 (11th Cir. 1987) (recognizing that the ADEA as amended by the OAAA would apply to a foreign subsidiary of a U.S. parent that engaged in age discrimination against a U.S. citizen, but did not apply retroactively to such a claim that arose prior to its amendment); S.F. DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1283 (5th Cir. 1986) (holding that the ADEA amendments, extending the Act's reach extraterritorially, did not apply to a claim arising prior to the effective date of the amendments).
\textsuperscript{87} See Zanar, supra note 6, at 196-97.
B. Interpretation of the ADEA's Coverage of Foreign Employers in the United States After the OAAA

After the enactment of the OAAA, several courts correctly interpreted the ADEA amendments to affect only U.S. employers operating abroad. These courts interpreted § 623(h)(2) as a limit to the ADEA’s extraterritorial reach. Under such an interpretation, Congress added § 623(h)(2) to make clear that the ADEA did not apply to American citizens working for foreign employers in foreign locations. These courts refused to interpret the OAAA as creating an exemption for foreign employers in the United States, and therefore held them to the ADEA’s prohibitions. Two federal courts, however, interpreting § 623(h)(2) in isolation, wrongly found that it exempts from ADEA coverage all foreign employers, including those operating in the United States.


89. See cases cited supra note 88.

90. See cases cited supra note 88.

91. See Robins, 914 F. Supp. at 1009 (concluding that a foreign parent of a U.S.-incorporated subsidiary could be held liable under the ADEA if the parent and subsidiary were an “integrated enterprise” and the total of the subsidiary’s employees and the parent’s employees located in the United States met the statutory minimum of 20 employees); Kloster Cruise, 888 F. Supp. at 151-52 (holding that a foreign employer operating in the United States was not exempt from ADEA coverage); Helm at *7 (finding that the ADEA was applicable to foreign employers in the United States); see also O’Meara, supra note 6, at 59 (stating that the ADEA applies to all employers, foreign and domestic, working within the territorial borders of the United States).

1. After the OAAA—Courts Interpreting the ADEA to Cover Foreign Employers in the United States

After enactment of the OAAA, several courts correctly concluded that the ADEA is enforceable against foreign employers in the United States. In *EEOC v. Kloster Cruise Ltd.*, the court found that a foreign corporation operating in the United States was subject to the ADEA. Kloster Cruise Ltd. ("Kloster Cruise"), a Bermuda subsidiary of a Norwegian company, maintained a sales office in Florida. As part of a reduction in its workforce, Kloster Cruise terminated five of its Florida office employees, all American citizens over the age of forty. The EEOC, believing that Kloster Cruise terminated these individuals in violation of the ADEA, filed suit on their behalf. Kloster Cruise defended its actions on the ground that § 623(h)(2) specifically exempted it from the ADEA.

The court disagreed with Kloster Cruise's position, finding instead that § 623(h)(2) was intended by Congress to limit the extraterritorial application of the ADEA. The court interpreted § 623(h)(2) in light of the other ADEA amendments made by the OAAA and their legislative history, refusing to simply interpret § 623(h)(2) in isolation. The court noted that if read in isolation, § 623(h)(2) would exempt all foreign corporations wherever located. The court recognized, however, that unless it interpreted § 623(h)(2) as a limit to the extraterritorial application of the ADEA, the other amendments exceeded Congress's legislative reach. For example, the OAAA amended the definition of "employee" to include American citizens employed in a foreign workplace. Read literally, this could extend coverage of the ADEA to foreign employers in foreign countries. The court recognized that Congress did not intend to infringe on the sovereignty of other nations in enacting the ADEA amendments.

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93. See cases cited *supra* note 88 (listing several cases in which courts interpreted the ADEA after its amendment as enforceable against foreign employers in the United States).
95. *Id.* at 151-52.
96. *Id.* at 148.
97. *Id.*
98. *Id.*
99. *Id.* at 148-49.
100. *Id.* at 151.
101. *Id.* at 150-51.
102. *Id.* at 151.
103. *Id.*
104. *Id.* at 150.
105. *Id.* at 151.
The court, therefore, interpreted § 623(h)(2) as a clarification of this intent, rather than as an exemption for all foreign employers.\textsuperscript{107}

The Kloster court also relied on the EEOC's policy guidance which supported its interpretation that the ADEA applied to foreign employers in the United States.\textsuperscript{108} The court found that the EEOC's interpretation was consistent with the other ADEA amendments made by the OAAA, comported with the overall purpose of the ADEA, and did not unnecessarily limit application of the ADEA.\textsuperscript{109} As a result, the court found that the EEOC's policy guidance was entitled to deference.\textsuperscript{110}

In Helm v. South African Airways,\textsuperscript{111} the court also held that a foreign employer was subject to the ADEA.\textsuperscript{112} Helm was employed in the United States by South African Airways ("SAA") headquartered in Johannesburg, South Africa.\textsuperscript{113} SAA's pension plan required all employees to retire at age sixty-two, unless local law provided otherwise, in which case the local law would prevail.\textsuperscript{114} SAA asked Helm to retire at the age of sixty-three after seven years with the company.\textsuperscript{115} SAA automatically rehired him because U.S. law required retirement at age sixty-five.\textsuperscript{116} SAA, however, would not allow Helm to continue his participation in the company's pension plan.\textsuperscript{117} Helm claimed that SAA's termination of his pension plan participation violated the ADEA.\textsuperscript{118}

The court in Helm denied SAA's motion for summary judgment which argued that the ADEA did not apply to foreign employers.\textsuperscript{119} The court found "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."\textsuperscript{120} The court noted that the ADEA applied to "discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control."\textsuperscript{121} The court also noted that the location of the employee's work station determines applicability of the ADEA.\textsuperscript{122}

\textsuperscript{107} Kloster Cruise, 888 F. Supp. at 150-51; see EEOC Policy Guidance, supra note 19, at 3.
\textsuperscript{108} Kloster Cruise, 888 F. Supp. at 149-50, 151-52.
\textsuperscript{109} Id. at 151-52.
\textsuperscript{110} Id. at 150.
\textsuperscript{111} No. 84 Civ. 5404 (MJL), 1987 WL 13195 (S.D.N.Y. June 25, 1987).
\textsuperscript{112} Id. at *7.
\textsuperscript{113} Id. at *1.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at *2.
\textsuperscript{119} Id. at *7.
\textsuperscript{120} Id.
\textsuperscript{121} Id. (quoting 29 C.F.R. § 860.20 (1986)).
\textsuperscript{122} Id. (citing Wolf v. J.I. Case Co., 617 F. Supp. 858, 863 (E.D. Wis. 1985)).
Thus, the ADEA applied to SAA because it employed Helm in the United States.\footnote{123}

After the OAAA, courts also applied the ADEA to foreign parents of U.S.-incorporated subsidiaries for purposes of meeting the ADEA's twenty-employee threshold.\footnote{124} Employers that are incorporated in the United States, even if wholly-owned by a foreign parent, are subject to the ADEA.\footnote{125} Plaintiffs often try to join the foreign parents of their U.S. employers when the U.S. employer does not have the minimum of twenty employees required by the ADEA.\footnote{126} In order to do so, the plaintiff must show that the parent and subsidiary are an "integrated enterprise."\footnote{127} In cases where an "integrated enterprise" has been proven, several courts have then allowed the aggregation of the U.S. employer's employees and the foreign parent's employees in the United States to determine if the statutory minimum is met.\footnote{128} These courts interpreted § 623(h)(2) to require only the inclusion of the foreign parent's employees in the United States and not the global total of the foreign parent's employees.\footnote{129} They refused, however, to interpret § 623(h)(2) as a complete exemption for foreign employers.\footnote{130}

For example, in Robins v. Max Mara, U.S.A., Inc.,\footnote{131} Robins worked for Max Mara U.S.A., a Delaware corporation.\footnote{132} Max Mara U.S.A. ("Max Mara") was wholly owned by Max Mara Fashion Group, SpA ("Fashion Group"), a corporation organized under Ital-

\begin{footnotes}
\footnote{123}{Id.}
\footnote{125}{See Kim v. Dial Serv. Int'l, Inc., No. 96 Civ. 3327 (DLC), 1997 WL 5902, at *3 (S.D.N.Y. Jan. 8, 1997) (noting that a U.S.-incorporated employer, wholly-owned by a foreign parent, could be sued under the ADEA if it employed the statutory minimum of 20 employees); Robins, 914 F. Supp. at 1009 (same); Linskey v. Heidelberg E., Inc., 470 F. Supp. 1181, 1182-83 (E.D.N.Y. 1979) (concluding that plaintiff's U.S.-incorporated employer, wholly-owned by a Danish parent, could be liable under the ADEA); see also Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 188 (1982) (stating that U.S.-incorporated companies are domestic corporations and "subject to the responsibilities of other domestic corporations").}
\footnote{126}{The ADEA requires that an employer have at least 20 employees to be subject to the ADEA. 29 U.S.C. § 630(b). For cases where a plaintiff tried to join a foreign parent to reach the statutory minimum, see Kim, 1997 WL 5902, at *3; Robins, 914 F. Supp. at 1009; Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1307-08 (M.D. La. 1993).}
\footnote{127}{Courts usually look to the following four factors to determine if two or more entities are an "integrated enterprise": "(1) the interrelatedness of the businesses' operations; (2) whether there is common management of the various entities; (3) whether there is centralized control of labor relations; and (4) whether there is common ownership of the businesses." Regan v. In the Heat of the Nite, Inc., No. 93 Civ. 862 (KMW), 1995 WL 413249, at *2 (S.D.N.Y. July 12, 1995).}
\footnote{128}{See Kim, 1997 WL 5902, at *3; Robins, 914 F. Supp. at 1008.}
\footnote{129}{See supra note 128.}
\footnote{130}{Id.}
\footnote{131}{914 F. Supp. 1006 (S.D.N.Y. 1996).}
\footnote{132}{Id. at 1007.}
\end{footnotes}
ian law.\textsuperscript{133} Robins made several claims of discrimination against his employer, including that he was terminated because of his age in violation of the ADEA.\textsuperscript{134} The defendants, Max Mara and Fashion Group, moved to dismiss Robins's age discrimination claim because Max Mara did not employ the requisite twenty employees.\textsuperscript{135} Robins contended that Max Mara and Fashion Group were a single entity and, therefore, their aggregate number of employees should be used to determine if the ADEA minimum had been met.\textsuperscript{136} The court noted that a subsidiary and a parent corporation may be considered one employer under the ADEA if there is sufficient evidence that the parent and subsidiary are an "integrated enterprise."\textsuperscript{137} The court also interpreted § 623(h)(2) to require the inclusion of only the foreign parent's employees in the United States to determine if the statutory minimum had been met.\textsuperscript{138} In Robins, Fashion Group employed no employees in the United States.\textsuperscript{139} The court, therefore, needed to go no further in its analysis.\textsuperscript{140} Even if Robins could have proven that Max Mara and Fashion Group were an "integrated enterprise," only Max Mara had employees in the United States.\textsuperscript{141}

In Robins, the court's holding had the same effect as a finding that the ADEA did not apply to foreign corporations. The court's holding, however, could have had a very different effect if the foreign parent had employees in the United States. In this situation, if the foreign parent's employees in the United States together with the U.S. subsidiary's employees met the threshold of twenty employees, then the foreign parent could have been joined in the discrimination suit and potentially held liable for the ADEA violations.\textsuperscript{142} The approach used in Robins, therefore, holds foreign parents liable under the ADEA to the extent that they are operating in the United States. Under this approach, a foreign employer with an "integrated enterprise" in the United States cannot escape ADEA liability by simply incorporating its subsidiary in the United States and maintaining less than twenty employees in the subsidiary.

\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 1008.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 1009.
\textsuperscript{139} \textit{Id.} at 1009-10.
\textsuperscript{140} \textit{Id.} at 1010.
\textsuperscript{141} \textit{Id.} at 1009-10.
\textsuperscript{142} See \textit{supra} notes 126-28 and accompanying text (explaining the requirements for joining a foreign parent in the ADEA suit).
2. After the OAAA—Courts Interpreting the ADEA to Exempt Foreign Employers in the United States

After enactment of the OAAA, two federal courts refused to apply the ADEA to foreign employers in the United States.\(^{143}\) In *Robinson v. Overseas Military Sales Corp.*,\(^{144}\) Robinson, a Massachusetts resident, was hired as a sales agent to sell automobiles for Overseas Military Sales Corporation ("OMSC"), a Swiss corporation.\(^{145}\) Robinson sold automobiles to U.S. military personnel stationed in Korea and worked in the corporation's Woodbury, New York office.\(^{146}\) Robinson sued OMSC alleging that the company terminated him based on his age in violation of the ADEA.\(^{147}\) The court granted OMSC's motion for summary judgment on the ground that the ADEA did not apply to foreign corporations not controlled by an American employer.\(^{148}\) The court found that § 623(h)(2) provided an exemption for all foreign employers.\(^{149}\)

Robinson attempted to show that the ADEA covered foreign employers because the OAAA amended the definition of "employee" to include individuals "employed by an employer in a workplace in a foreign country."\(^{150}\) The court rejected this argument, finding instead that the amendment's legislative history showed that it was intended solely to extend ADEA coverage to American citizens working abroad for U.S. employers and, therefore, did not apply to this case.\(^{151}\) Ironically, the legislative history pertaining to this amendment is the same as that for § 623(h)(2) because the two provisions were enacted simultaneously by the OAAA.\(^{152}\) The court's use of § 623(h)(2) as an exemption for foreign employers in the United States is questionable given its own recognition that the OAAA were intended to extend ADEA coverage to U.S. employers abroad.

The court in *Robinson* then hedged this conclusion by finding that even if the ADEA did cover OMSC, Robinson failed to show that the justification for his discharge was a pretext.\(^{153}\) Because Robinson failed to establish an essential element of his ADEA claim, summary judgment was warranted even if the ADEA applied to OMSC.\(^{154}\) The court of appeals affirmed the *Robinson* decision on the ground that

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143. See supra note 92 (listing two cases where the courts refused to apply the ADEA to foreign employers in the United States).
145. Id. at 918.
146. Id.
147. Id. at 920.
148. Id. at 920-21.
149. Id. at 920.
150. Id. (quoting 29 U.S.C § 630(f) (1988)).
151. Id. at 921.
152. See supra part II.A (discussing the OAAA and its legislative history).
154. Id.
Robinson failed to state a genuine issue of material fact that the justification for his dismissal was a pretext. The court specifically refused to consider whether the ADEA applied to foreign employers in the United States.

The court in Mochelle v. J. Walter Inc., interpreted § 623(h)(2) to exclude from ADEA liability foreign parents of U.S.-incorporated subsidiaries. Mochelle sued his employer J. Walter Inc. ("Walter Inc.") alleging that he was discharged in violation of the ADEA. Walter Inc. was incorporated in the United States and was the subsidiary of J. Walter Company Ltd. ("Walter Ltd."), a Canadian corporation. Because Walter Inc. had less than twenty employees, Mochelle claimed that Walter Ltd. should also be considered his employer for purposes of determining whether the ADEA's statutory minimum had been met. The court found that Walter Ltd. and Walter Inc. were not an "integrated enterprise." In dictum, the court noted that even if it were proven that the two companies were an "integrated enterprise," Walter Ltd. was "exempt from ADEA liability under 29 U.S.C. § 623(h)(2) . . . . Walter Ltd. is a foreign person not controlled by an American employer. Walter Ltd. is specifically excluded from ADEA liability by the express language of § 623(h)(2).

III. REASONS THE ADEA APPLIES TO FOREIGN EMPLOYERS IN THE UNITED STATES

Foreign employers in the United States should be held to the ADEA’s prohibitions for several reasons. First, if Congress intended the OAAA to rescind ADEA coverage for older Americans working for foreign employers in the United States, it would have expressly addressed such a dramatic change which conflicts with the overall purpose of the ADEA and effectively sanctions age discrimination by foreign employers in the United States. The legislative history of the OAAA, however, is completely devoid of such an intention.

Second, Congress expressly acknowledged the sovereignty of other nations by tolerating non-compliance with the ADEA by U.S. employers abroad when compliance would violate the laws of the host

156. Id. at 507 n.5.
158. Id. at 1309.
159. Id. at 1307.
160. Id. at 1304.
161. Id. at 1306-08.
162. Id. at 1308.
163. Id. at 1309 (footnote omitted).
164. See 29 U.S.C. § 621; Zanar, supra note 6, at 167.
165. See infra part III.A.
166. See infra part III.A.
country.\textsuperscript{167} This recognition of other nations’ sovereignty is inconsistent with Congress’s complete cession of U.S. sovereignty over foreign employers in the United States.\textsuperscript{168} Third, the EEOC, the administrative agency charged with enforcing the ADEA, has interpreted the ADEA as applicable to foreign employers in the United States.\textsuperscript{169} Finally, the ADEA and Title VII, which proscribes discrimination in employment based on race, color, religion, sex, and national origin, should be applied consistently to foreign employers in the United States. Title VII has consistently been applied to foreign employers in the United States.\textsuperscript{170} Allowing foreign employers in the United States to engage in age discrimination, while prohibiting them from other forms of discrimination, is illogical considering that the ADEA and Title VII share the common goal of eradicating employment discrimination.\textsuperscript{171}

A. The Legislative History of the OAAA

If Congress intended to strip the ADEA’s protections from a substantial number of Americans, it would have discussed this intention in the legislative history of the OAAA.\textsuperscript{172} Exempting foreign employ-
ers in the United States from the ADEA exposes older Americans to age discrimination without legal redress in the United States, which is completely contrary to the purpose of the ADEA. Such a dramatic change would have warranted some discussion in Congress. The legislative history of the OAAA, however, lacks any mention of this intention.

In 1983, the Subcommittee on Aging of the Senate Committee on Labor and Human Resources held a hearing to discuss the proposed amendments extending the ADEA's coverage extraterritorially. The focus of this hearing was the concern for older Americans working overseas for U.S. employers, a concern triggered by two federal court decisions that denied these Americans ADEA protection. Initially, the draft bill amended only the ADEA's definition of "employee" to include Americans working for U.S. employers overseas. Clarence Thomas, then Chairman of the EEOC, testified that this amendment was not specific enough, because it was unclear whether this definition of "employee" also included employees of foreign corporations. In response, Senator Grassley, Chairman of the Subcommittee on Aging, asked each of the witnesses to comment on the proposed amendment. William Yoffee, Executive Director of the American Citizens Abroad, reiterated Mr. Thomas's concern explaining that this definition was "overbroad" and could be construed to encompass foreign employers, as well as U.S. employers overseas. This discussion was likely the reason for the addition of § 623(h)(2) to the ADEA. In this hearing, neither the Subcommittee members nor

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173. See 29 U.S.C. §§ 621(a)(1), 621(a)(3); Zanar, supra note 6, at 167.
175. Senate Hearing, supra note 17, at 1-2.
176. Id. at 1. The two federal cases that refused to apply the ADEA to a U.S. employer abroad are Cleary v. United States Lines, 728 F.2d 607, 610 (3d Cir. 1984), and Zahourek v. Arthur Young & Co., 750 F.2d 827, 828-29 (10th Cir. 1984).
177. Senate Hearing, supra note 17, at 30.
178. Id. at 2, 5.
179. Id. at 30.
180. Id. at 23, 32.
the witnesses discussed the applicability of the ADEA to foreign employers in the United States.\textsuperscript{181}

In the Senate Report, Congress stated that the purpose of the OAAA was "to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the Age Discrimination in Employment Act."\textsuperscript{182} To clarify the scope of these amendments, Congress explained that the ADEA "appl[ies] only to citizens of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms."\textsuperscript{183} While discussing the bill in the Senate, Senator Grassley stated that the purpose of the OAAA was to

[Close a loophole recently created by several court decisions . . . [and] bring under the provisions of the [ADEA] Americans working abroad for American companies. These court decisions heed that it was not the intention of Congress when it passed the ADEA to cover such persons. I think that my colleagues will agree that \textit{this class of American citizens should not be treated differently than other Americans by this law}.\textsuperscript{184}

The legislative history of the OAAA focuses on the concern for U.S. citizens who are discriminated against by U.S. employers overseas and does not mention foreign employers operating in the United States.\textsuperscript{185}

The OAAA's legislative history repeatedly discusses the goal of extending the ADEA extraterritorially.\textsuperscript{186} The elimination of ADEA protection for Americans employed by foreign employers in the United States is an equally significant issue. The legislative history also specifically states the intention not to infringe on the sovereignty of other nations.\textsuperscript{187} In light of the legislative history, § 623(h)(2) of the ADEA should be interpreted as Congress's express respect for other nations' sovereignty. Congress wanted to make absolutely clear that the ADEA should cover only American citizens working for U.S. employers abroad and not those working for foreign companies abroad.

\textsuperscript{181} See id. at 1-48.
\textsuperscript{183} Id. at 27-28.
\textsuperscript{185} See supra note 174 (listing the OAAA's legislative history that pertains to the ADEA amendments).
\textsuperscript{186} See supra note 174 (listing the OAAA's legislative history that pertains to the ADEA amendments).
B. Sovereignty over Foreign Employers in the United States

Congress would not cede U.S. sovereignty over foreign employers in the United States without a compelling reason. In extending the ADEA to U.S. employers abroad, Congress was concerned about other nations' potentially conflicting labor laws.\textsuperscript{188} Congress specifically addressed this concern by allowing a U.S. employer to avoid compliance with the ADEA if compliance would violate the laws of its host country.\textsuperscript{189} In the Senate Report, Congress reiterated its respect for the sovereignty of other nations: "[N]o nation has the right to impose its labor standards on another country."\textsuperscript{190} With such explicit recognition of other nations' sovereignty, Congress would not have ceded U.S. sovereignty over foreign employers in the United States. The court in \textit{Helm v. South African Airways}\textsuperscript{191} recognized this inconsistency: "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."\textsuperscript{192}

By ceding U.S. sovereignty over foreign employers in the United States, Congress would leave countless older Americans vulnerable to age discrimination without legal redress in the United States. This contradicts not only the purpose of the ADEA, but also the goal of the OAAA. The OAAA were intended to increase the protection of Americans from age discrimination by extending the ADEA's coverage to U.S. employers abroad.\textsuperscript{193} Congress would not in one breath exercise U.S. sovereignty over Americans working for U.S. employers abroad and, in the next, relinquish U.S. sovereignty over Americans working for foreign employers in the United States.\textsuperscript{194}

\textsuperscript{188} Id.; see Street, \textit{supra} note 2, at 366.
\textsuperscript{189} 29 U.S.C. § 623(f)(1). After amendment, the applicable part of § 623(f)(1) now provides:

\begin{quote}
It shall not be unlawful for an employer . . . to take any action otherwise prohibited under [the ADEA] . . . where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer, or corporation controlled by such employer, to violate the laws of the country in which such workplace is located.
\end{quote}

\textit{Id.}

\textsuperscript{191} No. 84 Civ. 5404 (MJL), 1987 WL 13195 (S.D.N.Y. 1987) (finding that the OAAA did not exempt foreign employers from the ADEA).
\textsuperscript{192} \textit{Id.} at *7.
\textsuperscript{193} \textit{See supra} part II.A (discussing the OAAA and its purpose).
\textsuperscript{194} \textit{See Lewis, \textit{supra} note 7, at 6 (commenting that "[i]t is difficult to imagine that Congress, already concerned that American employers might attempt to evade the ADEA by employing American workers abroad through foreign subsidiaries, would permit foreign employers to evade the ADEA with respect to American workers in this country").
C. The EEOC's Policy Guidance

The EEOC, the administrative agency charged with enforcing the ADEA, issues policy guidance interpreting the provisions of the ADEA. The EEOC issued a policy guidance in March 1989, stating that the ADEA applied to foreign employers in the United States. The EEOC recognized that foreign employers in the United States enjoy many benefits of American law and, therefore, should also be subject to the prohibitions of American employment laws. Prior to issuing this interpretation, the Department of Labor, the EEOC's predecessor, deemed the geographic scope of the ADEA to encompass "places over which the United States has sovereignty, territorial jurisdiction, or legislative control . . . . Activities within such geographical areas which are discriminatory against protected individuals or employees are within the scope of the [ADEA] even though the activities are related to employment outside of such geographical areas." Thus, according to both the EEOC and its predecessor, the Department of Labor, the ADEA has always applied to all employers operating within the boundaries of the United States.

1. Standards for Determining Whether the EEOC's Interpretation Is Entitled to Judicial Deference

The degree of judicial deference to be given EEOC interpretations of the statutes it enforces is unclear. The Supreme Court has developed two approaches to determine the degree of deference to be given to administrative agencies' interpretations. The first approach was adopted in Skidmore v. Swift & Co., where the Court considered the level of deference that should be afforded an interpretation of the FLSA by its Administrator. The Court concluded that although the interpretation was not controlling, it should be treated with persuasive value. The level of persuasive value depended upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and

195. 1 Egliit, supra note 1, § 2.03, at 2-12.
196. EEOC Policy Guidance, supra note 19, at 3; see Maher, supra note 2, at 3-4.
197. EEOC Policy Guidance, supra note 19, at 3-4.
198. 29 C.F.R. § 860.20 (1984). The Department of Labor was the agency charged with enforcing the ADEA before authority to enforce the ADEA was transferred to the EEOC in 1979. 1 Egliit, supra note 1, at § 2.03, at 2-10 to 2-11.
199. See 29 C.F.R. § 860.20 (1984); EEOC Policy Guidance, supra note 19, at 3; O'Meara, supra note 6, at 59 (stating that the ADEA applies to all employers, foreign and domestic, working within the territorial borders of the United States).
200. White, supra note 34, at 54-55.
201. Id. at 58.
203. Id. at 136; White, supra note 34, at 71-72.
204. Skidmore, 323 U.S. at 140; see Russell L. Weaver, Some Realism About Chevron, 58 Mo. L. Rev. 129, 129-30 (1993); White, supra note 34, at 72-74.
all those factors which give it power to persuade.\textsuperscript{205} The second approach was adopted by the Court in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{206} which "called for increased judicial deference to agency statutory interpretations."\textsuperscript{207} In \textit{Chevron}, the Court deferred to the Environmental Protection Agency's interpretation of the definition of a term in the Clean Air Act.\textsuperscript{208} In doing so, the Court adopted a two step inquiry to determine if the agency's interpretation was entitled to deference.\textsuperscript{209} First, if Congress has directly spoken on the precise issue within the statute, then a court must defer to "the unambiguously expressed intent of Congress."\textsuperscript{210} If, however, Congress has not specifically addressed the issue, then a court must determine if the administrative agency's interpretation "is based on a permissible construction of the statute."\textsuperscript{211} A statutory construction is permissible if it is not "arbitrary, capricious, or manifestly contrary to the statute."\textsuperscript{212} Such an interpretation should then be given controlling weight by a court.\textsuperscript{213}

After \textit{Chevron}, the Supreme Court applied both the \textit{Chevron} and \textit{Skidmore} standards to EEOC interpretations.\textsuperscript{214} In \textit{EEOC v. Commercial Office Products Co.},\textsuperscript{215} the Court, using the \textit{Chevron} standard, deferred to the EEOC's interpretation of a Title VII provision involving the time limit for filing a discrimination charge.\textsuperscript{216} In applying the \textit{Chevron} standard, the Court stated that the "EEOC's interpretation of Title VII... need not be the best one by grammatical or any other standards. Rather, [its] interpretation of ambiguous language need only be reasonable to be entitled to deference."\textsuperscript{217} The Court found the EEOC's interpretation reasonable because it was supported by the legislative history, the purpose of the provision, and the other Title VII provisions.\textsuperscript{218}

In \textit{Public Employees Retirement System v. Betts},\textsuperscript{219} the Court was faced with an EEOC interpretation of an ADEA provision that exempted from ADEA coverage certain age-based employment decisions with respect to employee benefit plans.\textsuperscript{220} The EEOC argued

\begin{itemize}
\item \textsuperscript{205} \textit{Skidmore}, 323 U.S. at 140; see White, supra note 34, at 72.
\item \textsuperscript{206} 467 U.S. 837 (1984).
\item \textsuperscript{207} White, supra note 34, at 72-73; see Weaver, supra note 204, at 129-30.
\item \textsuperscript{208} \textit{Chevron}, 467 U.S. at 839-40, 866.
\item \textsuperscript{209} \textit{Id.} at 842-43.
\item \textsuperscript{210} \textit{Id.}; see Weaver, supra note 204, at 134.
\item \textsuperscript{211} \textit{Chevron}, 467 U.S. at 843.
\item \textsuperscript{212} \textit{Id.} at 844; Weaver, supra note 204, at 134.
\item \textsuperscript{213} \textit{Chevron}, 467 U.S. at 844; Weaver, supra note 204, at 134.
\item \textsuperscript{214} White, supra note 34, at 54, 71-76.
\item \textsuperscript{215} 486 U.S. 107 (1988).
\item \textsuperscript{216} \textit{Id.} at 109-10, 115; see White, supra note 34, at 73-75.
\item \textsuperscript{217} \textit{Commercial Office Products}, 486 U.S. at 115.
\item \textsuperscript{218} \textit{Id.} at 115-16.
\item \textsuperscript{219} 492 U.S. 158 (1989).
\item \textsuperscript{220} \textit{Id.} at 161, 170.
\end{itemize}
that its interpretation was entitled to deference under *Chevron*.

The Court, however, did not defer to the EEOC's interpretation because it was inconsistent with the plain meaning of the statute. Still, the Court did not oppose the EEOC's assertion that its interpretation was entitled to deference under *Chevron*.

In *EEOC v. Arabian American Oil Co.* ("ARAMCO"), the Court, using the *Skidmore* standard, concluded that an EEOC interpretation of Title VII's applicability to U.S. employers abroad was entitled to only persuasive value. The Court further found that this interpretation's persuasive value was limited because it contradicted the EEOC's earlier position and was not issued contemporaneously with the statute's enactment. Justice Scalia concurred in the *ARAMCO* judgment, but disagreed with the majority's application of the *Skidmore* standard, rather than the *Chevron* standard. Justices Blackmun, Marshall, and Stevens dissented, arguing that the *Chevron* standard should apply and that the Court, therefore, should defer the EEOC's interpretation.

After the *ARAMCO* decision, the Court once again considered the degree of deference to afford EEOC interpretations in *Gregory v. Ashcroft*. In this case, the Court refused to defer to the EEOC's interpretation that the ADEA covered appointed judges. The EEOC interpretation, however, was merely its litigation position and was never manifested in a guideline or opinion. While the majority did not address the issue of deference, Justice White, in a concurring opinion, stated that the EEOC's position was not entitled to any special deference because it was merely its litigation position. He further contended that the EEOC's position was inconsistent with the plain language of the statute and, therefore, was not entitled to deference. Justices Blackmun and Marshall dissented and, as in *ARAMCO*, argued that the EEOC's interpretation should be afforded *Chevron* deference.

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221. *Id.* at 171; see *White*, supra note 34, at 74.
222. *Betts*, 492 U.S. at 171-72; see *White*, supra note 34, at 74.
223. See supra note 222.
225. *Id.* at 257-58; see *White*, supra note 34, at 74.
226. *ARAMCO*, 499 U.S. at 257-58; see *White*, supra note 34, at 74-75.
227. *ARAMCO*, 499 U.S. at 259-60 (Scalia, J., concurring in part and concurring in judgment).
228. *Id.* at 275-78 (Marshall, J., dissenting).
230. *Id.* at 485 n.3 (White, J., concurring) (noting that the EEOC interpretation was not entitled to deference because it was not embodied in a formal guideline or opinion, but was rather the EEOC's litigation position in this case).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 493-94 (Blackmun, J., dissenting).
2. Judicial Deference to Be Accorded the EEOC’s Interpretation of the Applicability of the ADEA to Foreign Employers in the United States

Whether the EEOC’s interpretation that the ADEA applies to foreign employers in the United States should be accorded *Chevron* deference or the more limited *Skidmore* deference is unclear. For several reasons, a court would likely find that the EEOC’s interpretation is entitled to *Chevron* deference. The Court in *ARAMCO* applied the *Skidmore* standard to the EEOC’s interpretation of Title VII because “Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations.” Unlike the EEOC’s authority to enact only procedural regulations under Title VII, the EEOC has substantive as well as procedural rule-making authority for the ADEA. This distinction favors applying the *Chevron* standard to the EEOC’s interpretations of the ADEA. In addition, the EEOC’s interpretation with respect to foreign employers in the United States is a formal policy guidance, unlike the interpretations in *ARAMCO* and *Gregory*, which were expressed in a less formal opinion letter and as a litigation position, respectively. Even if a court were to apply the more limited *Skidmore* standard, the EEOC’s interpretation with respect to foreign employers in the United States is still significantly persuasive because it is well-reasoned and consistent with earlier positions in this area.

The court in *EEOC v. Kloster Cruise Ltd.* applied the *Chevron* standard and found that the EEOC’s interpretation of the ADEA as applicable against foreign employers in the United States deserved meaningful deference. The court in *Kloster Cruise* found that § 623(h)(2) was ambiguous because if this section were read literally—exempting all foreign employers in the United States from ADEA coverage—it would not comport with the purpose of the ADEA amendments. As the court noted, “[t]he sole expressed purpose of the OAAA’s amendments of the ADEA was to extend the scope of the ADEA, not to carve out an entire class of employers for

235. See supra part III.C.1; White, supra note 34, at 54-55.
238. See White, supra note 34, at 88-92 (arguing that courts should accord *Chevron* deference to the EEOC’s interpretations of the ADEA and, therefore, be bound by these interpretations).
240. See infra notes 247-51 and accompanying text.
242. Id. at 149-52. The court in *Kloster Cruise* concluded that that the ADEA applied to a foreign corporation that employed a U.S. citizen in its Florida subsidiary. Id. at 151-52.
243. Id. at 151.
complete insulation from the ADEA.” In addition, the court found that the ADEA would be internally inconsistent if it recognized the sovereignty of foreign nations as it did in § 623(f)(1), but then relinquished sovereignty over foreign employers operating in the United States. The court concluded that the EEOC’s interpretation was reasonable, because it “square[d] with the purpose and context of the OAAA, [was] consonant with the OAAA’s legislative history, and d[id] not unnecessarily poke a gaping hole in the ADEA.”

If, however, a court decides that the Chevron standard does not apply to the EEOC’s interpretation, it should nonetheless find that the interpretation is of significant persuasive value. Under the Skidmore approach, the persuasive value of an interpretation is dependent on “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.” The thoroughness of the EEOC’s consideration for this interpretation is evidenced by its manifestation in a policy guidance; it is not merely a litigation position or an amicus brief. Furthermore, the EEOC’s policy guidance is well-reasoned given the legislative history and the other ADEA amendments. The EEOC’s interpretation of § 623(h)(2) as limiting the extension of the ADEA extraterritorially is more conservative than the alternative interpretation that § 623(h)(2) exempts all foreign employers from the ADEA. Under the latter interpretation, U.S. sovereignty is abrogated over an entire class of employers—all foreign employers operating within the United States. In addition, the EEOC’s interpretation is consistent with its earlier pronouncements. The EEOC’s position both before and after the OAAA was that the ADEA protects all employees working within the United States. The EEOC’s interpretation, therefore, is of significant persuasive value and deserves substantial judicial deference.

D. The ADEA and Title VII

Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin, should be applied consistently with the ADEA with regard to foreign

244. Id. (citations omitted) (emphasis in original).
245. Id.
246. Id. at 151-52.
247. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see White, supra note 34, at 72.
248. See EEOC Policy Guidance, supra note 19, at 3.
249. See supra parts III.A (arguing that the OAAA’s legislative history supports the application of the ADEA to foreign employers in the United States).
251. For the EEOC’s position before the OAAA, see id. For the EEOC’s position after the OAAA, see EEOC Policy Guidance, supra note 19, at 3.
employers in the United States. Title VII and the ADEA share the common goal of preventing employment discrimination. Title VII was amended in 1991 to extend its protections to U.S. citizens working for U.S. employers abroad. The amendments were almost identical to those made to the ADEA by the OAAA. Congress explicitly recognized their similarity when it passed the Title VII amendments. Prior to its amendment in 1991, courts applied Title VII to foreign employers in the United States. After its amendment, courts continued to interpret Title VII as applicable to foreign employers in the United States. Courts did not interpret the Title VII amendments to exempt foreign employers in the United States, as two federal courts did for the ADEA amendments. Inconsistency in interpreting the ADEA and Title VII with respect to foreign employers in the United States is inappropriate given the similarity of the amendments made to the two statutes. In addition, allowing foreign


255. See infra part III.D.1.


257. See Goyette v. DCA Advertising Inc., 830 F. Supp. 737, 744-45 (S.D.N.Y. 1993) (finding that foreign parent of U.S. subsidiary was also plaintiff's employer within the meaning of Title VII and therefore could be joined in the action); Ward v. W & H Voortman, Ltd., 685 F. Supp. 231, 233 (M.D. Ala. 1988) (holding that "any company, foreign or domestic, that elects to do business in this country falls within Title VII's reach"); EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109, 1112-13 (M.D. Fla. 1990) (holding that Title VII applies to a foreign-flagged ship that allegedly discriminated against an American who sought employment on the ship from its Miami office); see also Cathcart, supra note 254, § 1.08(c), at 49 (stating that foreign companies operating in the United States are generally subject to Title VII for decisions affecting U.S. employees); Gladstone, supra note 2, at 20 (stating that courts have generally held foreign employers in the United States to Title VII's prohibitions).

258. See, e.g., Kim v. Dial Service Int'l, Inc., No. 96 Civ. 3327 (DLC), 1997 WL 5902, at *3 (S.D.N.Y. Jan. 8, 1997) (finding that a foreign parent of a U.S. subsidiary could be joined in the Title VII claim if the plaintiff could prove that the parental and subsidiary were an "integrated enterprise" and together employed the statutory minimum of 15 employees in the United States); Robins v. Max Mara, U.S.A., Inc., 914 F. Supp. 1006, 1009 (S.D.N.Y. 1996) (same); Rao v. Kenya Airways, Ltd., No. 94 Civ. 6103 (CSH), 1995 WL 366305, at *2 (S.D.N.Y June 20, 1995) (same); see also Cathcart, supra note 254, § 1.08(c), at 49 (stating that foreign companies operating in the United States are generally subject to Title VII for decisions affecting U.S. employees); Gladstone, supra note 2, at 20 (stating that it is "well established that Title VII's prohibition of employment discrimination extends to foreign-owned businesses which operate within the United States").

259. See supra note 92 for the two federal courts that exempted foreign employers in the United States from ADEA coverage and supra note 258 for the application of Title VII to foreign employers in the United States after its amendment.
employers in the United States to engage in age discrimination, while simultaneously prohibiting them from other forms of discrimination, is simply illogical.\textsuperscript{260}

1. Extension of Title VII to U.S. Employers Abroad

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.\textsuperscript{261} In 1991, the Supreme Court in \textit{EEOC v. Arabian American Oil Co.}\textsuperscript{262} ("\textit{ARAMCO}") held that the protections of Title VII did not follow American citizens abroad working for U.S. employers.\textsuperscript{263} In response to this decision, Congress amended Title VII with the Civil Rights Act of 1991\textsuperscript{264} to "extend[ ] the protections of Title VII . . . extraterritorially."\textsuperscript{265} These amendments were identical in all material respects to those made to the ADEA in 1984.\textsuperscript{266} Congress even acknowledged that it "adopt[ed] the same language as the ADEA to achieve this."\textsuperscript{267}

Prior to its amendment in 1991, Title VII defined an employee as "an individual employed by an employer."\textsuperscript{268} The Civil Rights Act of 1991 amended the definition of "employee" by adding: "With respect to employment in a foreign country, [the term employee] includes an individual who is a citizen of the United States."\textsuperscript{269} The OAAA made

\textsuperscript{260} See infra part III.D.3 (discussing the reasons that the ADEA and Title VII should be applied consistently to foreign employers in the United States).

\textsuperscript{261} 42 U.S.C. §§ 2000e to 2000e-17.

\textsuperscript{262} 499 U.S. 244 (1991).

\textsuperscript{263} Id. at 259. For a detailed discussion and analysis of the \textit{ARAMCO} case, see Maher, supra note 2, at 7-26.


\textsuperscript{265} 137 Cong. Rec. H9547 (1991) (documenting the section-by-section analysis of the bill, read into record after the House passed it); see 137 Cong. Rec. S15,235 (1991) (Senator Kennedy stating that the purposes of these amendments were to overrule the Supreme Court's decision in \textit{ARAMCO} and to extend Title VII's protections to American citizens working abroad for U.S. employers); Cathcart, supra note 254, § 1.08 at 46 (stating that the Civil Rights Act of 1991 nullified the \textit{ARAMCO} decision); Maher, supra note 2, at 28 (stating the purpose of the Civil Rights Act of 1991 was to expand the scope of Title VII in response to recent Supreme Court decisions).

\textsuperscript{266} See infra notes 270-80 and accompanying text; Maher, supra note 2, at 29.

\textsuperscript{267} See 137 Cong. Rec. H9547 (1991) (documenting the section-by-section analysis of the bill, read into record after the House passed it); 137 Cong. Rec. S15,235 (1991) (Senator Kennedy stating that the Title VII amendments paralleled the OAAA amendments to the ADEA which were enacted to achieve a similar protection for older Americans).

\textsuperscript{268} 42 U.S.C. § 2000e(f). This definition excludes elected officials of any state or its political subdivision, unless such individuals are subject to the civil service laws of the state government or political subdivision. Id.

a similar change to the ADEA. Title VII’s definition of “employer” was not changed by the 1991 amendments, thereby remaining “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” This definition of “employer” is essentially the same as the ADEA’s, except the ADEA requires a minimum of twenty employees rather than fifteen.

In addition, the Civil Rights Act of 1991 added subsections (b) and (c) to § 2000e-1. Section 2000e-1(b) provides that a U.S. employer in a foreign location need not comply with Title VII if compliance would violate foreign law. This subsection is the equivalent of § 623(f) of the ADEA. Section 2000e-1(c) has three subsections. The first creates a presumption that ADEA violations by a foreign employer controlled by a U.S. employer are violations of the U.S. employer. The second subsection of § 2000e-1(c) states that Title VII does not apply to foreign operations controlled by foreign employers. The third subsection of § 2000e-1(c) contains a four part test that determines whether an employer controls another corporation. The three subsections of § 2000e-1(c) of Title VII parallel § 623(h) of the ADEA, which was added to the ADEA by the OAAA.

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270. The ADEA’s definition of employee was amended by adding the following: “The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.” Older Americans Act Amendments § 802(a), 98 Stat. at 1792 (codified as amended in 29 U.S.C § 630(f)).


272. 29 U.S.C. § 630(b); see supra note 30 and accompanying text.


274. Id. (codified as amended at 42 U.S.C. § 2000e-1(b)); see Cathcart, supra note 254, § 1.08(a) at 47; Maher, supra note 2, at 29.


277. Id. (codified as amended at 42 U.S.C. § 2000e-1(c)(1)); see Cathcart, supra note 254, § 1.08(a), at 47; Maher, supra note 2, at 28.

278. Id. (codified as amended at 42 U.S.C. § 2000e-1(c)(2)); see Cathcart, supra note 254, § 1.08(a), at 47.

279. Id. (codified as amended at 42 U.S.C. § 2000e-1(c)(3)). The four part test is exactly the same as that in 29 U.S.C. § 623(h) of the ADEA. The four factors considered are: “(A) the interrelations of operations; (B) the common management; (C) the centralized control of labor relations; and (D) the common ownership or financial control.” Id.; see 29 U.S.C. § 623(h)(3); Cathcart, supra note 254, § 108(a), at 47; Maher, supra note 2, at 29.

2. Title VII Applies to Foreign Employers in the United States

Title VII has consistently been applied to foreign employers in the United States both prior to and after its amendment in 1991.\(^\text{281}\) Prior to Title VII's amendment in 1991, the court in *Ward v. W & H Voortman, Ltd.*\(^\text{282}\) specifically addressed the issue of whether Title VII applied to a foreign employer operating in the United States. Ward alleged that W & H Voortman (''Voortman''), a Canadian corporation, revoked an offer of employment in its Alabama distribution facility because of her sex in violation of Title VII.\(^\text{283}\) The court held that foreign employers operating in the United States are subject to the prohibitions of Title VII.\(^\text{284}\) The court found that it "would be simply illogical to limit the Act's protective reach to only those American employees who work for a domestic entity and to leave open for victimization those employees in the country's workplace who work for companies that happen to be foreign-owned."\(^\text{285}\)

Prior to Title VII's amendment, the Supreme Court in *Sumitomo Shoji America, Inc. v. Avagliano,*\(^\text{286}\) stated in dictum that FCN Treaty rights could be used as a defense to Title VII claims only by foreign employers operating in the United States.\(^\text{287}\) In *Sumitomo*, Avagliano alleged that her employer, Sumitomo Shoji America, discriminated against her based on her sex in violation of Title VII.\(^\text{288}\) Sumitomo Shoji America was incorporated in New York and a wholly-owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese company.\(^\text{289}\) Although Sumitomo Shoji America attempted to use Article III(1) of the FCN Treaty\(^\text{290}\) between the United States and Japan as a defense, the Court found that the FCN Treaty could not be invoked as a defense by a company incorporated under the laws of the United States.\(^\text{291}\) In dictum, the court stated that the FCN treaty rights were available as a defense to Title VII claims only to Japanese companies.

\(^{281}\) For application of Title VII to foreign employers in the United States prior to its amendment in 1991, see *supra* note 257 and accompanying text. For application of Title VII to foreign employers in the United States after its amendment in 1991, see *supra* note 258 and accompanying text. See Cathcart, *supra* note 254, § 1.08(c), at 49-50; Gladstone, *supra* note 2, at 20.


\(^{283}\) *Id.* at 231.

\(^{284}\) *Id.* at 232.

\(^{285}\) *Id.*

\(^{286}\) 457 U.S. 176 (1982).

\(^{287}\) *See id.* at 183, 189.

\(^{288}\) *Id.* at 178.

\(^{289}\) *Id.*


\(^{291}\) *Sumitomo*, 457 U.S. at 179, 182-83. In arriving at this conclusion, the court relied on the definition of "companies" in Article XXII(3) of the FCN Treaty:
operating in the United States.292 The Court, therefore, assumed that Title VII was applicable to foreign employers operating subsidiaries incorporated outside of the United States. Foreign employers in the United States would not need a defense to Title VII claims unless they could be held liable under Title VII in the first place.

After Title VII's 1991 amendment, courts also applied its provisions to foreign employers operating in the United States.293 In Robins v. Max Mara, U.S.A., Inc.294 Robins worked for Max Mara USA ("Max Mara"), a Delaware corporation that was wholly-owned by Max Mara Fashion Group, SpA ("Fashion Group"), an Italian corporation.295 Robins claimed that he was discriminated against based on his national origin in violation of Title VII and based on his age in violation of the ADEA.296 The defendants, Max Mara and Fashion Group, moved to dismiss Robins's Title VII claim on the ground that Max Mara did not employ the requisite fifteen employees.297 Robins contended that Max Mara and Fashion Group were a single entity and, therefore, their aggregate number of employees should be used to determine if Title VII's minimum had been met.298 The court found that Fashion Group could be held liable under Title VII if Robins could prove that Max Mara and Fashion Group were an "integrated enterprise" and if combined the two met the statutory minimum of fifteen employees.299 The court interpreted § 2000e-1(c)(2) to require the inclusion of only the foreign parent's employees located in the United States to determine if the minimum had been met.300 In Robins, Fashion Group had no employees in the United States and, therefore, the statutory minimum was not met.301 The approach used to reach the foreign parent in Robins demonstrates the court's intention to hold a foreign employer to Title VII's prohibitions to the extent that it operates in the United States.

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[C]orporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

292. Sumitomo, 457 U.S. at 183.
293. See supra note 258 (listing cases in which Title VII was applied to foreign employers in the United States after its amendment in 1991).
295. Id. at 1007.
296. Id. For a discussion of the ADEA claim in this case, see text accompanying supra notes 131-41.
298. Id.
299. Id. For a discussion of the "integrated enterprise" doctrine, see supra notes 126-28 and accompanying text.
300. Robins, 914 F. Supp. at 1009.
301. Id. at 1009-10.
3. Application of the ADEA and Title VII to Foreign Employers in the United States

Courts have frequently recognized the similarities of Title VII and the ADEA. Title VII and the ADEA share the common goal of protecting Americans from employment discrimination. Courts have often relied on one to interpret the other. Inconsistency in their application to foreign employers in the United States is inappropriate and counter to their shared goal.

Although the ADEA and Title VII have many similarities, they differ with respect to some of their enforcement provisions. See O'Meara, supra note 6, at 82-96. When the ADEA was originally enacted, the Department of Labor was the agency responsible for its enforcement until this authority was transferred to the EEOC in 1979. See supra notes 34-36 and accompanying text. The EEOC, however, has always been the agency responsible for the enforcement of Title VII. White, supra note 34, at 58-59. Because the Department of Labor was also charged with enforcing the FLSA, Congress incorporated many of the FLSA's procedures and remedies into the ADEA to enhance administrative efficiency. 29 U.S.C. § 626(b); O'Meara, supra note 6, at 82-83. Courts, therefore, are supposed to rely on the applicable FLSA procedures and remedies if they have been incorporated into the ADEA. O'Meara, supra note 6, at 82-84. The continued use of the FLSA enforcement provisions has been criticized because the EEOC now enforces the ADEA and, therefore, no administrative efficiency can be gained. Id. Furthermore, the purpose and provisions of the ADEA are more closely aligned with Title VII. Id. For these reasons, courts have often ignored the FLSA enforcement provisions, and instead have turned to comparable provisions in Title VII. Id. The FLSA does not specifically address foreign employers in the United States. Fair Labor Standards Act, 29 U.S.C. §§ 201-219. Thus, a comparison of the ADEA to the FLSA is not undertaken in this Note.


A similar inconsistency arose in the application of the ADEA and Title VII to U.S. employers abroad. In 1984, the OAAA extended ADEA coverage to American citizens working overseas for U.S. employers. See infra part II.A. In 1991, the Supreme Court held that Title VII did not cover American citizens working for U.S. employers in a foreign workplace. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991). Later that same year, Congress amended Title VII requiring its application to U.S. employers abroad. Civil Rights Act of 1991 § 109, 105 Stat. at 1077 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17). Thus, prior to its amendment, the scope of the ADEA and Title VII was inconsistent with respect to American citizens working for U.S. employers abroad. Reacting to this inconsistency, one commentator noted that “it is not logically consistent for two fair employment statutes as similar as the ADEA and Title VII to have inconsistent extraterritorial application.” David M. Barbash, Note, Same Boss, Different Rules: An Argument for Extraterritorial Extension of Title VII to Protect U.S. Citizens Employed Abroad by U.S. Multinational Corporations, 30 Va. J. Int'l L. 479, 513 (1990). He further noted that it was unfair to protect U.S. citizens employed abroad from age discrimination, but not other forms of
employment discrimination based on race, color, religion, sex, and national origin, while exposing them to age discrimination is unjustified. The eradication of age discrimination should be no less of a priority than combating other forms of employment discrimination.

The amendments to extend Title VII's protections to U.S. employers abroad were almost identical to the OAAA. Congress even expressed its intention of adopting the language in the ADEA to extend Title VII extraterritorially. The only potentially significant difference is between § 623(h)(2) of the ADEA and § 2000e-1(c)(2) of Title VII. Section 2000e-1(c)(2) provides that Title VII does not apply "with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer." Section 623(h)(2) of the ADEA provides that the ADEA does not apply "where the employer is a foreign person not controlled by an American employer." The ADEA, unlike Title VII, does not refer to the "foreign operations" of a foreign employer. Congress could not have intended with this one phrase, however, to distinguish the applicability of Title VII from the ADEA with respect to foreign employers in the United States. The legislative histories of the Title VII amendments and the ADEA amendments express identical intentions—extension of protection to Americans working for U.S. employers abroad—and neither mentions foreign employers in the United States. If Congress had intended to strip older Americans working for foreign employers in the United States of the ADEA's protections, it would have done more than merely withholding this one phrase from § 623(h)(2) of the ADEA.

Conclusion

Older Americans working for foreign employers in the United States deserve the same protection from age discrimination in employment as those working for U.S. employers in the United States and

discrimination. Id. Another commentator found it surprising that Title VII and the ADEA were "non co-extensive in their overseas application" given the complementary nature of the two statutes. Maher, supra note 2, at 3.
306. Senate Hearing, supra note 17, at 9. (Steven Kartzman, attorney who represented the plaintiff in Cleary v. United States Lines, Inc., 728 F.2d 607 (3d Cir. 1984), stating that the application of Title VII, but not the ADEA, to U.S. employers abroad "defies logic").
307. Id. (Steven Kartzman, attorney who represented the plaintiff in Cleary, 728 F.2d 607, stating that "[c]ertainly age discrimination is no less poisonous or wasteful to society than discrimination based on race, color, [or] religion").
308. See supra part III.D.1.
309. See supra note 267 and accompanying text.
313. For the legislative history of the Title VII amendments, see supra note 267. For the legislative history of the ADEA amendments, see supra note 174.
abroad. Foreign employers in the United States, therefore, should be held to the ADEA’s prohibitions. If Congress intended to expose countless older Americans to age discrimination from foreign employers in the United States, it would have mentioned this intention. Nowhere in the legislative history of the OAAA does it mention such an intention. In addition, Congress’s recognition of other nations’ sovereignty in the OAAA is inconsistent with a concession of U.S. sovereignty over foreign employers in the United States. The extension of the ADEA extraterritorially shows that Congress intended to bring as many Americans as possible within the reach of the ADEA. In this same enactment, Congress would not implicitly strip ADEA protection from older Americans working in the United States for foreign employers. Additionally, the EEOC, the agency charged with enforcing the ADEA, supports application of the ADEA to foreign employers in the United States. Finally, the scope of Title VII and the ADEA should be consistent because the two statutes are similar in construction and purpose, and courts have consistently applied Title VII to foreign employers in the United States. Age discrimination in the workplace is equally offensive and, therefore, should be prevented with equal force and breadth.