Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Civil Rights and Discrimination Commons, Labor and Employment Law Commons, and the Legislation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol83/iss1/4

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens

After the Supreme Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, foreign investors are forced to consider the effect Title VII of the Civil Rights Act of 1964 has on the hiring practices of their American companies. The decision is significant because a foreign parent corporation may wish to fill key positions in its American

1. 457 U.S. 176 (1982). The respondent's name in the lower court opinion is misspelled. Throughout this Note, the proper spelling is used. Hence, the spelling is corrected from "Avigliano" to "Avagliano." See N.Y. Times, Apr. 8, 1982, at D1, col. 3.

2. The terms "foreign investors" or "foreign employers," as used in this Note, refer to foreign investors who have a controlling interest in companies incorporated in the United States. The Japan Economic Institute of America has recently indicated that, as of 1980, Japanese investors owned a controlling interest in 213 United States manufacturing companies. See S. MACKNIGHT, JAPAN'S EXPANDING MANUFACTURING PRESENCE IN THE UNITED STATES: A PROFILE 2 (1981) (Published by the Japan Economic Institute of America) [hereinafter cited as as JAPAN PROFILE].


4. The issue before the Supreme Court was whether treaty privileges provide a defense to a Title VII employment discrimination suit against an American subsidiary of a foreign corporation. Sumitomo, a domestically incorporated subsidiary of a Japanese parent, defended a sex and national origin discrimination suit by claiming that article VIII(1) of the Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (hereinafter referred to as FCN Treaty), gave it broad discretion to hire employees of its choice. 457 U.S. at 179. The Supreme Court resolved conflicting interpretations of article VIII(1) of the FCN Treaty, compare Avagliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981) (article VIII(1) applies to domestically incorporated foreign subsidiary, but does not insulate subsidiary from Title VII), vacated, 457 U.S. 176 (1982), with Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353 (5th Cir. 1981) (article VIII(1) allows a domestically incorporated foreign subsidiary to discriminate in favor of foreign nationals for essential positions), vacated, 457 U.S. 1128 (1982). The Court held that article VIII(1) does not apply to domestically incorporated subsidiaries of Japanese companies and thus cannot protect the subsidiary from Title VII liability. The Supreme Court refused to reach the question, however, of whether Sumitomo's hiring practices violated Title VII. 457 U.S. at 180 n.4; see note 9 infra and accompanying text.

The Supreme Court reserved the question of whether a domestically incorporated subsidiary can assert its parent's rights under the FCN Treaty. 457 U.S. at 189 n.19. This right has been asserted by C. Itoh & Co. See Spiess v. C. Itoh & Co. (Am.), 687 F.2d 129 (5th Cir. 1982). A related question is whether United States courts could first require the parent company to conform to article 3 of Japan's Labor Standards Act, which forbids discrimination on the basis of nationality. For a discussion of Japan's Labor Standards Act, see generally Brown, Japanese Approaches to Equal Rights for Women: The Legal Framework, 12 LAW JAPAN: ANN. 29 (1979). The Supreme Court's decision in *Sumitomo* has broad implications for domestically-incorporated foreign subsidiaries. See, e.g., Shell Petroleum, N.V. v. Graves, 709 F.2d 593, 596 (9th Cir.) (Netherland corporation holding majority interest in two American companies is on equal footing with domestic corporations under *Sumitomo* and thus has no standing to seek relief from California's unitary tax), cert. denied, 104 S. Ct. 537 (1983); Swearingen v. United States, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (*Sumitomo* rule of construction may apply to executive agreements implementing treaty provisions). Lawyers familiar with the issue in *Sumitomo* have commented that the ruling might be viewed by other nations as an attempt to water-down treaty rights. See Wall St. J., June 16, 1982, at 8, col. 1.

5. Throughout this Note, the terms "key employees" or "key positions" refer to those home-country employees admitted to the United States or those positions provided for under the
subsidiary with employees from the parent's home country. The parent may wish to depend on such employees because they have "familiarity with not only the language of [the parent country], but also the culture, customs, and business practices of that country." The justification for turning away American job applicants would likely be that they either lack the requisite business and cultural familiarity with the parent country or that they are not citizens of the parent country. As in Sumitomo, Americans may challenge a hiring preference for home-country employees, claiming that the preference violates Title VII's prohibition of national origin discrimination.

This Note explores Title VII's relationship to the hiring practices of foreign employers. It focuses on Japanese employers, who might...
face the toughest Title VII challenge to a business and cultural familiarity or citizenship requirement. Part I sets out arguments for and against finding intentional discrimination — disparate treatment — in either of these hiring requirements. It suggests that a court should refuse to find national origin discrimination when the employer imposes a business and cultural familiarity requirement. However, when an applicant is denied employment solely on the basis of citizenship, a strong argument may be made that the employer is using the citizenship requirement as a pretext for intentional discrimination. Part II considers whether prohibited discrimination may exist on disparate impact grounds when a court has not found discriminatory intent.


11. To establish a prima facie case of disparate treatment, the plaintiff must show employer acts from which the court can infer that discriminatory intent underlies the employment decision. The central issue is whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). This discriminatory motive may be established by showing that the plaintiff: (i) belongs to a protected class; (ii) applied and was qualified for a job for which the employer was seeking applicants; (iii) was rejected despite these qualifications; and (iv) the employer continued to seek applications from persons with the plaintiff's qualifications. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (articulating the test in terms of racial minorities); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (applying the test to sex discrimination). For application of the McDonnell Douglas test in lower courts, see, e.g., Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (age discrimination); Benerjee v. Board of Trustees, 495 F. Supp. 1148, 1153 (D. Mass. 1980) (race and national origin discrimination), aff'd, 648 F.2d 61 (1st Cir.), cert. denied, 454 U.S. 1098 (1981).

Should the plaintiff succeed in making the above showing, the employer will be permitted to rebut the prima facie test by articulating a legitimate, nondiscriminatory reason for the challenged practice (e.g., there were better qualified applicants than the plaintiff). See Burdine, 450 U.S. at 254. See generally Méndez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 STAN. L. REV. 1129 (1980). The plaintiff may then attempt to show that the articulated justification is merely a pretext for unlawful discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); McDonnell Douglas, 411 U.S. at 804-05.


To establish a prima facie case of disparate impact discrimination, the "plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). The employer may defend against Title VII liability by demonstrating that the practice is a business necessity. See, e.g., Dothard, 433 U.S. at 329; Griggs, 401 U.S. at 432; Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979). The plaintiff may rebut by showing that there are other equally effective hiring practices with fewer discriminatory effects. See Albemarle Paper Co. v. Moody, 424 U.S.
and has held that the preferential hiring practice is facially neutral. This Part concludes that there is a clear basis for a disparate impact finding only when the employer strictly enforces a Japanese citizenship requirement. Part III considers whether the employer may successfully assert the appropriate Title VII defense — either the bona fide occupational qualification (bfoq) exception to intentional discrimination or the business necessity defense to disparate impact discrimination — in the event that a plaintiff establishes a prima facie case of national origin discrimination. This Part concludes that, based on unique attributes of Japanese management style and foreign trade considerations, the defenses should be available to an employer who turns away an American lacking the requisite business and cultural familiarity. But, when the applicant is refused employment solely on the basis of citizenship neither defense should be available. A citizenship requirement is usually an arbitrary prerequisite for job qualification and is likely to be a pretext for national origin discrimination.

I. INTENTIONAL DISCRIMINATION

Title VII explicitly forbids national origin discrimination.13 It is unclear, however, from the terms of Title VII and its legislative history14 exactly what Congress had in mind by prohibiting discrimination on the basis of national origin. Whether a business and cultural familiarity requirement or a citizenship requirement constitutes intentional national origin discrimination is open to question.15 Both requirements are closely intertwined with an individual's national origin. Thus, a business and cultural familiarity requirement could be viewed as a pretext for intentional discrimination; however, this Part argues that the legitimate business needs of foreign employers counsel against such a narrow view. The citizenship requirement, by contrast, is overbroad if it purports to select employees with a requisite knowledge of business and cultural familiarity. Because it is unreasonably exclusionary, a foreign employer's citizenship requirement should be regarded as national origin discrimination.

405, 425 (1975); Griggs, 401 U.S. at 432; Kirby v. Colony Furniture Co., 613 F.2d 696, 703 (8th Cir. 1980); Boyd v. Ozark Air Lines, 568 F.2d 50, 53-54 (8th Cir. 1977).


14. The legislative history of this section is sparse. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88-89 (1973). One definition of national origin was given in a remark made on the floor of the House of Representatives: "It means the country from which you or your forebears came . . . You may come from Poland, Czechoslovakia, England, France, or any other country," 110 Cong. Rec. 2549 (1964). See also Espinoza, 414 U.S. at 89.

15. See note 9 supra.
A. Imposing a Business and Cultural Familiarity Requirement

A nation's culture would seem to be the essence of its people's "national origin." Where the employer requires a high level of business and cultural familiarity with Japanese culture, that requirement on its face may be tantamount to national origin discrimination. The Equal Employment Opportunity Commission (EEOC) has recognized this by defining national origin discrimination to include those practices based on "cultural or linguistic characteristics of a national origin group." Thus, a business and cultural familiarity requirement is arguably not a legitimate nondiscriminatory reason for refusing employment. Even if a business and cultural familiarity requirement is not directly equated with national origin discrimination, in the case of Japan there is a particularly strong reason to regard the requirement as a pretext for intentional national origin discrimination. Because of Japan's homogeneous population, those with the requisite knowledge of Japanese culture either in Japan or the United States are most likely to be of Japanese national origin. Thus, a court could find intentional discrimination merely by inferring that the employer, aware of the obvious disparate impact, imposes the business and cultural familiarity requirement solely for the purpose of hiring Japanese nationals.

For three reasons there is a better argument for the view that requiring business and cultural familiarity does not in itself constitute national origin discrimination. First, it is unclear whether the construction of national origin discrimination that courts have embraced prohibits reference to cultural characteristics. Courts have viewed "national origin" as referring to "the country where a person was born, or more broadly, the country from which his or her ancestors came." Further, the EEOC offers this view as an alternative to the definition of national origin discrimination that relies on cultural characteristics. Thus, the courts' use of "national origin" may suggest a narrow construction of the term, one that is limited to discrimination

17. Under this argument, an employer could never rebut a prima facie case of discrimination. See note 11 supra.
18. The pretext argument arises in disparate treatment cases when a plaintiff puts in issue the employer's justification for the challenged action. It is the third step of a three-step analysis (employee's prima facie showing of discrimination; employer justification; employee's showing of pretext). See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); note 11 supra.
19. As of 1971, more than 99% of Japan's population was comprised of people of Japanese origin. See D. Whitaker, AREA HANDBOOK FOR JAPAN 70 (3d ed. 1974).
20. Such an elongated method of proof, however, is precisely what the Supreme Court held unnecessary in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). By eliminating the need to prove intent (even if only circumstantially through evidence establishing knowledge of discriminatory impact), the Court lessened plaintiffs' burden.
based on place of birth or ancestry and that would not embrace discrimination based on cultural characteristics.

Second, even if national origin discrimination embraces discrimination based on cultural characteristics, the Japanese employer's requirement is distinguishable from the proscribed discrimination. The EEOC guidelines prohibit discrimination on the basis of cultural or linguistic characteristics that an individual possesses or, as here, does not possess. The guidelines' apparent focus is on those characteristics that may be perceived as immutable in members of a given national origin group and unobtainable by those not of that group. This interpretation of the guidelines is consistent with Title VII's purpose to end discrimination on the basis of arbitrary characteristics beyond a person's control. The Japanese employer's requirement falls outside the prohibition so interpreted because the requirement is merely that the applicant have requisite knowledge of Japanese culture, language and business practices, not that the applicant possess such knowledge by virtue of being Japanese born.

Third, if reference to cultural familiarity is not explicitly prohibited by Title VII and EEOC guidelines, inferring "intent" from the use of such a hiring requirement would be improper. Inferring intent from knowledge of disparate impact might make the existence of prohibited discrimination turn on the degree of ethnic homogeneity of the employer's home country. For example, where the population of the parent country, and, consequently, those most likely to be familiar with its culture, is comprised of people of diverse ancestral roots, there would be no inference of discriminatory motive from a cultural familiarity requirement. In such a case, there would be no substantial likelihood that the familiarity requirement would favor one national

24. The imposition of special disabilities upon members of a particular class would seem to violate "the basic concept of our system that legal burdens should have some relationship to individual responsibility," Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972). See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972) (fourteenth amendment strict scrutiny test does not apply for the protection of people who are not saddled with a disability or subject to a history of purposeful unequal treatment); García v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) ("Save for religion, the discrimination on which the Act focuses its laser of prohibition are those that are . . . beyond the victim's power to alter . . . ."), cert. denied, 449 U.S. 1113 (1981).
26. For example, if an English firm operated in the United States and its work force of English citizens consisted of English-Africans, English-Arabs, English-Italians, etc., no inference of intent to discriminate on the basis of national origin would be possible. But, if a Japanese firm in the United States hired only Japanese citizens there would be a strong inference of discriminatory intent because most Japanese citizens are also of Japanese national origin. Thus, the practice of inferring discriminatory intent leads to different results for employers using business and cultural familiarity or citizenship requirements depending on the ethnic homogeneity or heterogeneity of the employer's home country.

One way to avoid this problem would be to hold that a citizenship requirement prohibits national origin discrimination no matter how homogeneous or heterogeneous the ethnic population of the employer's country. However, citizenship requirements are not explicitly prohibited
origin group over another. By contrast, Japan's population is homo­
genous; a business and cultural familiarity requirement favors one na­
tional origin group over another because of this homogeneity. Thus, where two employers could have the same hiring practice, it would be anomalous to arrive at an inference of discriminatory intent for only one of them. Yet precisely such a result would occur if the prohibited discriminatory intent were inferred from the ethnic homogeneity of the employer's home country.

Finally, an employer may have legitimate reasons for instituting a business and cultural familiarity requirement. Particularly during the early stages of the employer's involvement in the United States, insisting that employees in key positions be familiar with the culture and language of the parent's country rests on sound business policy; key employees of the new subsidiary will be responsible for communicating with the parent and implementing the parent's policies and management style. Treaty trader provisions of the Immigration and Nationality Act (INA) recognize employers' needs in this regard by...
operating to admit foreign employees to the United States only when they are important to the employer's operations. Thus, a court should find that legitimate reasons support the business and cultural familiarity requirement where direct evidence of a discriminatory motive is absent.

B. Imposing a Strict Citizenship Requirement

Rather than imposing a business and cultural familiarity requirement, the employer might flatly require all employees in certain positions to be Japanese citizens. Two arguments suggest that employers requiring citizenship will be sheltered from claims that such a requirement constitutes intentional national origin discrimination. First, courts appear hesitant to find national origin discrimination on the basis of a citizenship requirement alone. The Supreme Court held in *Espinoza v. Farah Manufacturing Co.*\(^{31}\) that the ban on national origin discrimination in Title VII does not embrace citizenship requirements.\(^{32}\) Other courts referring to *Espinoza* have given it a literal interpretation, concluding that a citizenship requirement standing alone can never be the basis for finding national origin discrimination.\(^{33}\) Thus, it appears that a strict citizenship requirement, on its face, is insulated from Title VII.\(^{34}\)

Second, absent direct evidence of intentional national origin dis-
job discrimination, a Japanese citizenship requirement may not constitute a pretext for national origin discrimination. While Espinoza left open the possibility that a citizenship hiring preference might be national origin discrimination if it were but one part of a wider scheme of unlawful national origin discrimination, it is clear from the Court's holding that such a preference does not automatically give rise to national origin discrimination.

Perhaps a court could find intentional discrimination by imputing to the employer knowledge that the citizenship requirement will have the practical effect of selecting only Japanese nationals. The court could then infer from the employer's knowledge in this regard an intent to impose the requirement as a pretext for national origin discrimination. But, as with the business and cultural familiarity requirement, inferring intent on the basis of the citizenship requirement would likely make the existence of prohibited discrimination turn on the ethnic homogeneity of the home country population. Moreover, the "treaty trader" provisions of the INA act as a restraint on the employers' practices because they admit Japanese citizens only if they are executives or supervisors, or specialists who are essential to the firm's operations. Finally, legitimate reasons may motivate a citizenship requirement. Insisting that employees in key positions be Japanese citizens may be the easiest and most efficient means of insuring business and cultural familiarity. For these reasons, then, a court might require a clear showing of intent before finding national origin discrimination.

But the argument for finding national origin discrimination when the employer flatly requires Japanese citizenship as a condition of employment is more compelling. Despite apparent judicial trends to the contrary, requiring citizenship may constitute per se national origin discrimination. A citizenship requirement, while perhaps providing employers with a shortcut to select qualified applicants, is unnecessarily concerned with how the applicant came to possess knowledge of Japanese business and culture, i.e., being born into and growing up in the Japanese culture, rather than with whether the applicant actually has such knowledge. The citizenship requirement, therefore, is largely based on an accidental part of a person's life and unnecessarily ex-

---

35. 414 U.S. at 92.
36. See text at note 27 supra.
37. See notes 18-20 supra and accompanying text.
38. See note 26 supra and accompanying text.
39. See note 30 supra.
40. It provides the employer with a "short cut" method to select employees.
41. See notes 31-33 supra and accompanying text.
42. Citizenship, while not an immutable characteristic such as race or sex, is usually deter-
cludes Americans with the requisite business and cultural familiarity.

Moreover, Espinoza's validation of a United States citizenship requirement need not be interpreted as permitting a foreign employer's citizenship requirement. A principled distinction exists between employers who require United States citizenship and those who require foreign citizenship. Implicit in Title VII must be the recognition that American citizens should be protected from discrimination based on their national origin. A foreign citizenship requirement, however, discriminates against almost all American citizens. The foreign citizenship requirement, because it is so exclusionary, should be deemed "a pretext to disguise what is in fact national origin discrimination."46

II. DISPARATE IMPACT

That an employer's practice does not constitute intentional national origin discrimination will not end the inquiry into whether Title VII proscribes the practice. A court might conclude that neither a Japanese employer's cultural familiarity requirement nor a Japanese citizenship requirement is tantamount to intentional national origin discrimination; but, if either practice results in a disparate impact on a protected group, the practice may still be prohibited under Title VII despite the absence of discriminatory intent.47 To establish disparate impact, an applicant need only show that facially neutral standards select employees for hire in a significantly discriminatory pattern. This Part assumes that the Japanese employer's practice has been held facially neutral and examines whether disparate impact exists. It concludes that there is a clear basis for a disparate impact finding only where the employer adopts a Japanese citizenship requirement.

43. In Espinoza, 96% of the company's employees, though American citizens, were of Mexican ancestry. 414 U.S. at 93. The plaintiff in the suit, a Mexican citizen, claimed that the company's policy of hiring only American citizens constituted national-origin discrimination. Unpersuaded by this claim, the Court held that the company's "policy against employment of aliens [did not have] the purpose or effect of discriminating against persons of Mexican national origin." 414 U.S. at 92 (footnote omitted).

44. In Espinoza, in addition to noting that a United States citizenship requirement does not deny employment to Americans of particular national origins, the Court also found strong prudential reasons to justify the requirement. For example, the Court found that "to interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy" barring aliens from federal employment. 414 U.S. at 90. The anomaly the Court saw in applying Title VII to an American citizenship requirement does not hold in the foreign employer context. Thus, Espinoza need not be read as validating a foreign citizenship requirement.

45. Although Title VII was primarily designed to protect minorities, see Sethi & Swanson, supra note 10, at 485, at the heart of Title VII must be the concern to provide all persons within the United States, both aliens and Americans, a right to equal opportunity in employment. See 42 U.S.C. § 2000e-1 (1982).

47. See note 12 supra and accompanying text.
A. Business and Cultural Familiarity

It seems obvious that requiring applicants to be familiar with Japanese business and culture would have a significant exclusionary effect on persons not of Japanese national origin. Presumably a business and cultural familiarity requirement will disqualify a large percentage of Americans who lack the requisite familiarity, but who would otherwise be qualified for management positions.

However, the Japanese employer with a business and cultural familiarity requirement may have a compelling argument against finding disparate impact. The employer could argue that business and cultural familiarity is a special qualification necessary to perform particular jobs. The employer might then assert that, for purposes of determining disparate impact, the proper statistical comparison should be with that portion of the labor market whose members possess the necessary qualifications. If the employer’s work force reflects the percentage of Americans who possess business and cultural familiarity with Japan, then no discriminatory impact exists.

B. Citizenship Requirement

A disparate impact violation is more clearly evident when the employer requires Japanese citizenship than when the employer merely requires familiarity with Japanese business and culture. Because almost all Japanese citizens are also of Japanese national origin, very few people not of Japanese origin will qualify for employment. The citizenship requirement in effect excludes all potential applicants who are not of Japanese descent. While the ethnic homogeneity of the employer’s home country should be irrelevant to the question of discriminatory intent, it is the focal point for determining impact. Unless an employer can claim that Japanese citizens are uniquely qualified to

48. See notes 98-111 infra and accompanying text.
49. In Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), Justice Stewart explained that if “special qualifications are required to fill particular jobs,” then the proper comparison for purposes of determining discriminatory impact may be with that portion of the labor market whose members “possess the necessary qualifications.” 433 U.S. at 308 n.13. If the specialized portion of the foreign employer’s work force is drawn from applicants who possess unique qualifications, and if the employer’s work force reflects the percentage of other national origin groups who possess the necessary qualifications, then arguably no discriminatory impact occurs under Hazelwood. For a general discussion of relevant labor market analysis see Shoben, Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII, 56 Tex. L. Rev. 1 (1977).
50. To attain this proportional representation and thus avail itself of the Hazelwood analysis, see note 49 supra, the foreign corporation would most likely have to recruit Americans with the requisite business and cultural familiarity.
51. See note 19 supra.
52. See text following note 25 supra.
53. Disparate impact analysis focuses solely on the results of given practice. It is not so much concerned with how or why the results came about. See note 12 supra.
perform particular jobs,\textsuperscript{54} a citizenship requirement cannot in itself represent a legitimate job qualification\textsuperscript{55} for purposes of defining the relevant labor market.\textsuperscript{56} It is, therefore, very difficult for the Japanese employer to deny that the citizenship requirement has a disparate impact on national origin grounds.\textsuperscript{57}

III. DEFENSES

An employer’s hiring practice that constitutes a prima facie case of prohibited discrimination may nonetheless be excused by Title VII under one of two defenses, depending upon which ground a court bases its finding of discrimination. When the court finds intentional discrimination, the employer may assert the bfoq exception to liability;\textsuperscript{58} when there is disparate impact discrimination, the business necessity defense may apply.\textsuperscript{59}

While Parts I and II of this Note discuss whether the prohibition against national origin discrimination in Title VII embraces a business and cultural familiarity requirement or a Japanese citizenship requirement, Part III assumes for the sake of argument that a court finds each of the hiring practices discriminatory. This Part then assesses whether the employer can successfully defend the challenged hiring practice and thereby avoid a Title VII violation. Based on an examination of Japanese management practices, treaty rights and trade policy, this Part argues that courts should establish a \textit{presumption} that the appropriate defense is met in the case of the employer requiring business and cultural familiarity and hiring employees under the “treaty trader” provisions\textsuperscript{60} of the INA. An employer who requires citizenship is not entitled to such a presumption and indeed will not be able to establish a Title VII defense.

\textsuperscript{54} See text at notes 98-111 infra.

\textsuperscript{55} See text at note 39 supra.

\textsuperscript{56} See note 49 supra.

\textsuperscript{57} Unless, of course, the court takes a very broad approach to defining the portion of the employer’s workforce subject to the statistical comparison. In cases like Sumitomo, for example, at issue is the employer’s right to fill executive or sales positions with Japanese nationals. See \textit{N.Y. Times}, Apr. 8, 1982, at D1, col. 3. However, the proportion of all Japanese employees to all American employees may be very small indeed. One poll conducted by the JETRO found that among Japanese-owned manufacturing companies polled in the survey, only 2.5\% of the employees were Japanese. See JETRO Brief, \textit{supra} note 29, at 11. Thus, if a court defined the foreign employer’s \textit{entire workforce} as “the portion” subject to the statistical comparison, the percentage of Japanese citizens might be so small that no disparate impact would be found to exist. By contrast, if a court defined only \textit{executive positions} as the portion subject to the statistical comparison, then the disparate impact on national origin might well be great enough to find a Title VII violation.

\textsuperscript{58} See notes 61-65 infra and accompanying text.

\textsuperscript{59} See notes 98-106 infra and accompanying text.

\textsuperscript{60} See note 30 supra.
A. Business and Cultural Familiarity Requirement

1. Bona Fide Occupational Qualification

The bfoq exception permits intentional discrimination if the discriminatory practice is reasonably necessary to the normal operation of the employer's business. Although explicitly provided for by the language of Title VII, the exception is strictly construed. The defense is meant to accommodate legitimate business needs and therefore requires the employer to prove that there was a reasonable basis to believe that all or substantially all of the protected class cannot perform the job safely or efficiently, or that it is impossible or highly impractical to deal with the class on an individual basis. For three reasons, a foreign employer requiring a business and cultural familiarity requirement should be entitled to a presumption that the defense is met, particularly during the early stages of its business operations in the United States.

First, the unique attributes of Japanese management may alone provide the basis for the bfoq exception. The differences between

61. Although the statutory language of Title VII speaks only to hiring and firing, the bfoq also applies to opportunities for advancement. See Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980) (Title VII applies to promotions from nonmanagerial to managerial positions), cert. denied, 449 U.S. 1115 (1981); Gilmore v. Kansas City Terminal Ry., 509 F.2d 48 (8th Cir. 1975) (Title VII applies to employment policies affecting supervisory and managerial positions).

62. See Dothard v. Rawlinson 433 U.S. 321, 334 (1977) (“the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex”); see also Diaz v. Pan Am. World Airways, 442 F.2d 385, 387 (5th Cir.) (EEOC guidelines indicate that the bfoq is to be narrowly construed), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (criticizing broad construction of bfoq). But see Bowe v. Colgate Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) (employer has discretionary prerogatives to determine a bfoq), aff'd in part, revd. in part on other grounds, 416 F.2d 711 (7th Cir. 1969).

63. Some courts use the language that the bfoq must be “reasonably necessary to the normal operation of that particular business,” while others state that the requirement must go to the “essence of the business operation.” Compare Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp 454, 462 (D.N.J.), remanded on other grounds, 477 F.2d 90 (3d Cir. 1972), with Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

64. See, e.g., Harriss v. Pan Am. World Airways, 649 F.2d 670, 676 (9th Cir. 1980); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976); Weeks v. Southern Bell Tel. & Tel. Co, 408 F.2d 228, 235 (5th Cir. 1969); Fesel v. Masonic Home of Del., Inc., 428 F. Supp. 573, 578 (D. Del. 1977). See also Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1179-80 (1971) (criticizing the application of an “all or substantially all” test because it does not protect those individuals who are qualified to perform the functions).

65. In Avagliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), vacated, 457 U.S. 176 (1982), the Second Circuit noted that consideration of the bfoq exception to Title VII liability must give due weight to the . . . unique requirements of a Japanese company doing business in the United States, including such factors as a person’s (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (2) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business.
Japanese managerial practices and American practices\textsuperscript{67} are striking.\textsuperscript{68} Japanese managerial policies are deeply rooted in tradition and culture.\textsuperscript{69} The integration between management practices and cultural values\textsuperscript{70} explains, at least in part, the success Japanese business has had in maintaining healthy, dynamic growth.\textsuperscript{71} American managers are often perceived by Japanese to be too eager for career development and not well suited to maintain the harmony of the Japanese system.\textsuperscript{72} As a consequence, Japanese goals of promoting a "people oriented" managerial outlook may be undercut by an American system, which to some at least, treats employees as disposable "direct labor costs."\textsuperscript{73} Imposition of a business and cultural familiarity requirement is necessary, then, to insure that managers can successfully integrate the Japanese management style with American practices.\textsuperscript{74} The practice can be defended as a bfoq because the Japanese management style seems to represent the very essence of Japanese business operations.\textsuperscript{75}

Specialist positions in Japanese trading companies\textsuperscript{76} present an

\textsuperscript{67}See Japanese Turn Kansas Plant into a Success, N.Y. Times, Nov. 3, 1983, at 1, col. 2.


\textsuperscript{69}Communication within a Japanese company tends to be vague and general so that opportunities for disharmony and conflict are limited. See S. Sethi, Japanese Business and Social Conflict 56 (1975).

\textsuperscript{70}See, e.g., Tsurumi, supra note 67, at 13-14; N.Y. Times, Apr. 8, 1982, at 33, col. 3 (remarks of Yoshitaka Sajima, General Manager, Mitsui & Co.).

\textsuperscript{71}See Tsurumi, supra note 67, at 13.

\textsuperscript{72}One study suggests that Japanese are able to avoid conflicts of management style in their United States operations by placing Japanese in key slots. See Johnson & Ouchi, supra note 68, at 68.

\textsuperscript{73}See note 68 supra.

\textsuperscript{74}Sumitomo Shoji is one such Japanese trading company. The other major trading companies are Mitsubishi, Nissho-Iwai, Mitsui, C. Itoh, Marubeni, Toyo Menka Kaisha, Kanematsu-Gosho, and Nichimen. See Weigner, Outward Bound, FORBES, July 4, 1983, at 96-97.
even stronger argument for finding a bfoq. Specialist positions, such as sales positions, are uniquely adapted to the Japanese style of doing business. Japanese trading companies develop new business ventures both domestically and internationally. An important component of the Japanese economy, these sogo shosha develop information networks that allow the companies to form vital links between the Japanese, who would otherwise be isolated because of cultural and linguistic barriers, and the world market. Typical Japanese traders undergo a ten-year career development program and must be familiar with the monetary systems, culture and products of the countries with which they trade. Thus a business and cultural familiarity requirement for these positions, even under a bfoq exception strictly construed, would seem to be justified.

Another reason for establishing a bfoq based on a business and cultural familiarity requirement rests on the sound trade policy of promoting foreign investment in the United States. The United States encourages foreign investment because it creates jobs for United States workers, broadens capital markets, and contributes to productivity and economic growth. Establishing a bfoq for key positions may obviate the otherwise chilling effect that imposition of Title VII could


78. Together, the nine trading companies accounted for 30% of Japan's gross national product in 1982. See Weigner, supra note 76, at 96.


80. See K. Hitani, supra note 77, at 130.

81. See N.Y. Times, Apr. 8, 1982, at D6, col. 4.

82. See note 63 supra. But cf. Avagliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981) (suggestions that bfoq should be broadened to include language skills and business and cultural familiarity with the parent country), vacated on other grounds, 457 U.S. 176 (1982). See note 66 supra.

83. In many cases, the Japanese are motivated to invest directly in the United States — and manufacture products in, rather than export products to the United States — by a desire to avoid trade friction. See JAPAN PROFILE, supra note 2, at 2. Another reason the Japanese invest in industrialized countries such as the United States is the desire to gain access to local markets. See Makoto, JAPANESE INVESTMENT ABROAD, in CONFERENCE ON THE JAPANESE ECONOMY AND THE ECONOMIC RELATION OF AUSTRALIA AND JAPAN, SHARPENING THE FOCUS 55 (R. Walton ed. 1977). Increases in Japanese investment abroad seem inevitable since the growth of the Japanese economy is closely tied to exports. As direct foreign investment increases, efforts to secure and develop export markets will be stepped up. See HAMADA, JAPANESE INVESTMENT ABROAD: ECONOMIC AND SOCIAL STUDIES IN DEVELOPMENT 163 (1974).

84. Japanese direct investment in the United States has been significant — rising from $152 million in 1973 to $4.2 billion by 1980. See JETRO BRIEF, supra note 29, at 6. As a consequence of Japanese direct investment, an estimated 261,600 jobs for Americans have been created by Japanese companies employing approximately 10,500 Japanese nationals. JAPAN SOCIETY, INC., ECONOMIC IMPACT OF THE JAPANESE BUSINESS COMMUNITY IN THE UNITED STATES 1 (1979).

have on direct foreign investment.\(^86\) Japan's Ministry of International Trade and Industry takes the position "that the ability of Japanese investors to dispatch executive employees from Japan to manage and control their overseas subsidiaries is of greatest importance and is indeed a basic prerequisite to the successful management of their overseas business activities."\(^87\) Allowing Japanese employers the unfettered discretion to fill the positions of key employees encourages the important trade policy of increasing direct foreign investment. Furthermore, the protections afforded by admitting into the United States only those employees who qualify for "treaty trader" status insures that, at least facially, the requirements of the bfoq are met.

The rigid "treaty trader" requirements\(^88\) foreign employees must meet before entering the United States — requirements designed to admit them only if they are executives or supervisors, or specialists essential to the firm's operation — suggest that a business and cultural familiarity requirement should be presumptively established as a bfoq. The "treaty trader" provisions of the INA were created to guarantee rights of entry to persons who function in international commerce\(^89\) under Friendship, Commerce, and Navigation (FCN) Treaties.\(^90\)

---

86. For [multinational corporations], the Sumitomo case raises some of the most sticky issues of foreign trade policy. Many believe it could have a chilling effect both on Japan's direct investment in the United States — $6.5 billion as of the end of 1981 — and on the investment policies of other countries as well.

N.Y. Times, Apr. 8, 1982, at D1, col. 3.


88. See note 30 supra.


90. Article I of the United States-Japan FCN Treaty, note 4 supra, provides, for example, that "nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein . . . for the purpose of carrying on trade between the territories of the two Parties." Home-country citizens entering the United States under this provision must first conform to the INA's "treaty trader" requirements. See note 30 supra.

FCN treaties are bilateral treaties used to establish ground rules governing trade between two countries. See Walker, supra note 89.

In a real sense . . . the FCN treaty as a whole is an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investments as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total "climate" in which it is to exist.

Since foreign employees are admitted to the United States as treaty traders only upon demonstrating compliance with criteria similar to those necessary to establish a business and cultural familiarity requirement as a bfoq, the employer should be entitled to a presumption that “treaty trader” status itself triggers a bfoq.

Courts have, in the past, utilized a judicially created presumption for Title VII suits. Creating a presumption of defense to Title VII violations for foreign employers who hire home-country citizens meeting “treaty trader” requirements places the burden of proof on the plaintiff to assert the non-applicability of the defense. Such a presumption is warranted because it protects the full breadth of treaty rights, accommodates business differences, encourages foreign investment, yet still preserves Title VII’s goal of eliminating invidious forms of discrimination.


91. The requirements for “treaty trader” visas and for establishing a bfoq or business necessity are, of course, not identical. They overlap to the extent that they both consider, for example, the duties and skills necessary to perform the job, the degree to which the employees will have ultimate control and responsibility for the firm’s overall operations, and for specialists, whether the services are essential to the efficient operation of the business. See note 30 supra. They differ, however, to the extent that a “treaty trader” visa is issued upon the relatively cursory review of an administrative consular officer, while the defenses to Title VII are usually established only after a thorough inquiry, in an adversarial context, into the nature of the employer’s business. Establishing a presumption in favor of “treaty trader” applicants may be justified on the ground that it protects the full scope of FCN treaty rights of entry, but does not prevent a Title VII plaintiff from making a more searching inquiry into the legitimacy of an employer’s defense.

92. Courts have established a presumption of unlawful discriminatory treatment whenever plaintiffs establish a prima facie case of disparate treatment discrimination. See 1 WEINSTEIN’S EVIDENCE 301-43 (1982). After a prima facie case of unlawful discrimination is established, the burden of persuasion remains on the plaintiff, but the burden of production shifts to the defendant. The defendant may attempt to rebut the plaintiff’s prima facie case. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). See generally Méndez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 STAN. L. REV. 1129 (1980).

93. Should the defendant fail to rebut the plaintiff’s prima facie case, he or she must normally carry the burden of persuasion regarding the availability of an affirmative Title VII defense. See text at note 65 supra. Creating a presumption of a Title VII defense will require the plaintiff to carry the burden of proving that a defense is unavailable. See note 97 infra.

94. See notes 88-91 supra and accompanying text.
95. See notes 66-82 supra and accompanying text.
96. See notes 83-87 supra and accompanying text.
97. Establishing a presumption of defense to Title VII liability might appear to create co-
2. Business Necessity

The business necessity defense\(^98\) is similar to the bfoq defense in the sense that it is also founded on the functional necessity of business operations.\(^99\) Unlike the bfoq, which is the explicit statutory defense, the business necessity defense is a judicial creation.\(^100\) It excuses employer practices that have a discriminatory impact,\(^101\) but no discriminatory intent.\(^102\) To establish a business necessity, the practice must be necessary to the safe and efficient operation of the business.\(^103\)

Conflicting presumptions since courts presume unlawful discrimination whenever the plaintiff succeeds in establishing a prima facie case of disparate treatment. See note 92 supra. But in fact the presumptions do not conflict since the opposing parties do not both have the burden of persuasion at the same time as to a particular fact. Establishing a presumptive defense to Title VII liability for employers who hire home-country citizens admitted under the "treaty trader" provision puts the burden of persuasion and production on the plaintiff to prove both a prima facie case of unlawful discrimination \textit{and} that a defense to Title VII liability is not available.

98. The business necessity defense allows an employer to maintain facially neutral employment standards that have the effect of discriminating against a protected class if the employer can show that the standard in question measures legitimate qualifications for the job. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Blake v. City of Los Angeles, 595 F.2d 1367, 1376-79 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980). If the employer fails to establish the business necessity, then the practice violates Title VII. See Griggs v. Duke Power Co., 402 U.S. 424, 431 (1971) (If the practice has a discriminatory impact and cannot be justified as a business necessity, the practice is prohibited); see also Washington v. Davis, 426 U.S. 229, 266 (1976) (Brennan, J., dissenting).

99. "The leading employment discrimination cases have recognized that to justify a discriminatory policy as either a bona fide occupational qualification or a business necessity, the employer must at least show both a valid purpose and that the policy achieves that purpose.\ldots" Harriss v. Pan Am. World Airways, 649 F.2d 670, 680 (9th Cir. 1980). See also Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388-89 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 232 (5th Cir. 1969).

Harriss implies that the bfoq exception and the business necessity defense are very close to the same thing, at least in terms of establishing a nexus between the business purpose and the employer's requirement. In the case of Japanese employers, if the nexus is sufficient to excuse a discriminatory practice under the bfoq defense, it should also excuse the practice as a business necessity.


101. See note 12 supra.

102. See Garcia v. Gloor, 609 F.2d 156, 163 (5th Cir. 1980).

"The practice must be essential, the purpose compelling;"\textsuperscript{104} it is not sufficient to show merely that "legitimate management functions" are served.\textsuperscript{105} There must be no other equally effective hiring practices with fewer discriminatory effects.\textsuperscript{106}

The arguments for establishing a presumptive bfoq defense apply with equal force to the business necessity defense. First, preservation of the unique Japanese management style goes beyond maintaining "legitimate management functions";\textsuperscript{107} it arguably preserves the very essence of the Japanese style of doing business.\textsuperscript{108} Second, a business necessity defense that embraces a business and cultural familiarity requirement will possibly overcome the otherwise chilling effect Title VII might have on foreign investment.\textsuperscript{109} Third, a foreign employee's satisfaction of "treaty trader" requirements carries with it the recognition that the employee is necessary to the United States business operation.\textsuperscript{110} This is especially true for specialist positions where "treaty trader" status is not granted if there are Americans who can also perform the job.\textsuperscript{111} And finally, since the business and culture familiarity requirement is arguably a critical means of insuring that key employees possess the requisite Japanese management skills, it would not seem that other equally effective hiring practices with fewer discriminatory effects exist.

B. Strict Citizenship Requirement

A strict citizenship requirement cannot be defended as either a bfoq or a business necessity. In the context of Japanese employment practices in the United States, a citizenship requirement is not a bfoq because it is not properly related to any job skill one might be expected to possess. Arguably an employer imposes such a requirement to insure the requisite business and cultural familiarity. But since it is not impossible or even difficult to deal with job applicants on an individual


\textsuperscript{104} Williams v. Colorado Springs, Colo. School Dist. 11, 641 F.2d 835, 842 (10th Cir. 1981); see also United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

\textsuperscript{105} Muller v. United States Steel Corp., 509 F.2d 923, 928 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1976). But see Leftwich v. United States Steel Corp., 470 F. Supp. 758 (D.C. Pa. 1979) (good business practices are a recognized defense to a Title VII disparate treatment action).


\textsuperscript{107} See text at note 105 supra.

\textsuperscript{108} See text at notes 64, 66-82 supra.

\textsuperscript{109} See text at notes 83-87 supra.

\textsuperscript{110} See text at notes 30, 88-91 supra.

basis to test for such familiarity, a blanket exception is unjustified.\textsuperscript{112}

For the same reason, the business necessity defense also fails. There are alternatives to a citizenship requirement which will effectively insure that employees possess the requisite qualifications, but which will produce fewer discriminatory effects.\textsuperscript{113} The least discriminatory and most effective way to insure business and cultural familiarity is to test for it. Many Americans who lack the citizenship requirement will nonetheless possess the necessary familiarity with Japanese business and culture. Thus the practice of an employer requiring Japanese citizenship cannot be excused.

CONCLUSION

The Supreme Court’s decision in \textit{Sumitomo Shoji America, Inc. v. Avagliano}\textsuperscript{114} has broad implications for foreign-owned businesses incorporated in the United States. Courts are forced to consider whether a foreign employer’s hiring preference for nationals of the home country violates Title VII of the Civil Rights Act.\textsuperscript{115} A court should not find national origin discrimination where an employer requires that employees be familiar with the \textit{business practices and culture} of the home country. Even if a court does find that the requirement constitutes national origin discrimination, the employer should be able to defend successfully the requirement as a bona fide occupational qualification or business necessity. But where the foreign employer requires that its employees be \textit{citizens} of the home country, the hiring preference is more likely to be a pretext for national origin discrimination and should be prohibited. Likewise, the practice should not be defensible as a bona fide occupational qualification or business necessity.

\textsuperscript{112} One requirement for establishing the bfoq is that it is impossible or highly impractical to deal with the class on an individual basis. \textit{See, e.g.}, \textit{Weeks v. Southern Bell Tel. & Tel. Co.}, 408 F.2d 228, 235 n.5 (5th Cir. 1969).

\textsuperscript{113} \textit{See text at note 106 supra.}

\textsuperscript{114} 457 U.S. 176 (1982).