

The Result of Disparate Treatment of Third-Country Alien Employees in Multinational Enterprises: A Class Distinction

ERIN MURDOCK*

SUMMARY

I.	INTRODUCTION	2
II.	TITLE VII IN THE UNITED STATES AND ITS PROTECTION TO U.S. CITIZENS ABROAD.....	3
	A. <i>Sexual Harassment Under Title VII</i>	4
	B. <i>Title VII's Applicability to American Citizens Abroad</i>	4
	C. <i>Amendments to Title VII</i>	5
	D. <i>Applicability to Aliens Working for an American Employer Outside of the United States and Choice-of-Law Issues</i>	6
	1. Choice of Law.....	6
	2. Applicability to Foreign National Employees.....	8
III.	COMPARATIVE ANALYSIS OF TITLE VII PROTECTIONS WITH THE SEXUAL HARASSMENT PROVISIONS OF CHINA AND MEXICO.....	8
	A. <i>Mexico's Sexual Harassment Laws</i>	8
	B. <i>The People's Republic of China's Sexual Harassment Law</i>	9
	C. <i>Comparison to Title VII and Availability of Adequate Forum</i>	10
IV.	PROBLEMS RESULTING FROM DISPARATE TITLE VII TREATMENT.....	11
	A. <i>Stratification of Employees</i>	11
	1. Historical Overview of Labor Unions and Title VII	11
	2. "Black-collar" Workers.....	12
	3. Contingent Workforce	13
	4. Result of Stratification	15
	B. <i>Policy Inconsistency and Corporate Image</i>	15
	C. <i>Economic Disadvantage to Employer</i>	16
	D. <i>Why American Employers Should Protect All Workers, Including Workers from Third-Party Countries</i>	16
	1. Internationally Protected Labor Norms.....	17

* The University of Texas School of Law, J.D. expected May 2008. The author would like to thank Professor Alvaro Santos for his invaluable critiques and input while working on this Note, as well as David Park for his helpful suggestions, and Professor Jay Westbrook for his instruction and guidance during her time at the law school. Finally, she would like to thank her parents, Richard and Kathleen Murdock, for their unwavering love, support, and encouragement.

V.	RECOMMENDATIONS.....	18
	A. <i>Arbitration Agreements</i>	18
	1. Increased Title VII Protections	19
	2. Consistency Across the MNE	19
	3. America's World Reputation	19
VI.	POSSIBLE NEGATIVE IMPLICATIONS.....	20
	A. <i>Increased Protection Under Title VII and Choice of Law</i>	20
	B. <i>America's World Reputation</i>	21
	C. <i>Stratification of Employees</i>	21
VII.	CONCLUSION.....	22

I. INTRODUCTION

Imagine two employees with equivalent job training, education, and personalities. One is Mexican, the other American. Both work for an American multinational enterprise ("MNE") in China. Both are sexually harassed by the same supervisor and subsequently file grievances with their employer. What are the results? These two employees will have vastly different remedies available to them even though each of them suffered the same harm.

One problem aliens face when working for American MNEs in a country other than their home country is that they are not entitled to the same labor and employment protections as the American employees working alongside them. An American worker can assert a Title VII claim against her employer and receive redress for acts that would be illegal had they occurred in the United States, even though the acts were committed on foreign soil. In other words, an American employer must treat an American employee employed in a foreign country with the same standard of care required in the United States. However, an individual working for the same American employer, but having a different national origin (in this example, Mexico), will not have the same legal protections and redress against the same employer for the same harassment.

A variety of issues arise due to the multinational dimension of the employment relationship, including determining available remedies. Should the law of an alien employee's home country extend to apply to its citizens abroad, as the law of the United States does in the example above? Should the law of the employer's domicile apply? Or should the law of the country in which the act was committed?

Because the remedies available to our hypothetical Mexican worker in China are less desirable than those available to the American worker, she faces a disparate result. Neither the law of China, the country where the harassment occurred, nor the law of her home country would protect the Mexican worker as effectively as American labor and employment law. Unless she is covered by American law, the Mexican worker is subject to a lower standard of care than is her American counterpart.

Following a 1991 United States Supreme Court decision limiting Title VII's application for American MNEs abroad,¹ Congress made clear that the protections of Title

1. See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNEs 3

VII extend to American citizens while employed by American companies overseas.² Yet these protections still do not apply to non-resident aliens working for the same United States employer. In a situation such as the one set forth in our introductory example, a Chinese worker would be covered by Chinese law, and an American worker would be covered by American law. Mexican employment law does not extend to employees abroad, and Title VII does not extend to non-U.S. citizens. Because Chinese courts are unlikely to adequately protect her, the Mexican worker would be left with no redress for the harm she suffered.

While some observers could argue that the United States has no duty to protect non-U.S. alien workers abroad, this Note argues that American companies would benefit from applying American labor standards uniformly throughout the world. By requiring both American employees and alien employees who are not citizens of the host country to sign mutual arbitration agreements authorizing the use of American labor standards, American MNEs could avoid many of the problems that arise from choice of law issues and from the existence of differing employment policies within a single workplace. This is also a more realistic and attainable scenario than forcing all workers within the American MNE to utilize the American standard. Extending Title VII protections through arbitration agreements to alien employees who are not citizens of the host country would diminish the perception of American corporations as imperialistic, reduce the possibility of stratification between employees, and provide an opening for improved labor standards throughout the world.

Part II of this Note details the evolution of the United States' Title VII law, which extended protection to U.S. citizens abroad and denied protection to aliens employed by American MNEs abroad. This section will also provide discussion of why further application of Title VII to workers in all countries would be misguided. Part III then provides a brief analysis of provisions of Mexican and Chinese law that are analogous to Title VII. Part IV evaluates the implications—taking into account both historical and potential future issues of stratification within the workplace—that arise from applying different legal standards to equivalent employees under similar circumstances. Part IV also discusses the merits of using the American sexual harassment standard in an international setting from both an economic and fairness perspective. Part V addresses possible solutions to the problem, including the use of an American choice of law arbitration agreement which all MNEs could utilize. Finally, Part VI discusses the possible negative implications of adopting such a policy and addresses concerns raised by adopting the American standard.

II. TITLE VII IN THE UNITED STATES AND ITS PROTECTION TO U.S. CITIZENS ABROAD

Title VII was enacted in response to the civil rights movement and was intended to provide employees with legal protection against discrimination in the workplace.³ Specifically, Title VII provides protection from discrimination based on gender, race, or national origin.⁴

2. See 42 U.S.C. § 2000e(f) (2006) (stating that “[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States”).

3. *Goluszek v. Smith*, 697 F.Supp. 1452, 1455 (N.D. Ill. 1988).

4. 42 U.S.C. § 2000e-2(a)(1) (2006).

A. *Sexual Harassment Under Title VII*

Title VII does not make all harassment actionable;⁵ in fact, it does not even make every form of verbal harassment with sexual overtones actionable.⁶ Instead, Congress limited the scope of Title VII, focusing on discrimination arising from an imbalance and abuse of power against a “discrete and vulnerable group.”⁷ By enacting Title VII, Congress sought to stem the sense of degradation felt by victims attacked on the basis of their gender and sexuality.⁸ Thus, the intent of Title VII was both to ensure that victims of harassment did not feel degraded within their work environment and to provide a remedy under the law to protect the victim’s autonomy within the workplace.

B. *Title VII’s Applicability to American Citizens Abroad*

Title VII defines an employee as “an individual employed by an employer”⁹ and defines an employer as a person engaged in an industry affecting commerce who employs fifteen or more people.¹⁰ Within the United States, therefore, the term “employee” could be construed as anyone who works for another person, regardless of United States citizenship.¹¹ Every employee working for an employer in the United States is extended the same Title VII protections, and every employer must adhere to the Title VII policies or risk action by the Equal Employment Opportunity Commission (EEOC).¹²

Following the enactment of Title VII, the courts generally construed the definition of an employee to include any American individual, in any country, employed by an American employer.¹³ In 1991, however, the Supreme Court dramatically changed the definition of an employee for purposes of Title VII with its decision in *EEOC v. Arabian American Oil Co.* (“*Aramco*”).¹⁴

5. Essentially, harassment is limited to two main types: “quid pro quo” harassment and “hostile work environment” harassment, both of which may not be covered by Title VII. *Ashworth v. Roundup Co.*, 897 F.Supp. 489, 492 (W.D. Wash. 1995). Quid pro quo harassment occurs when an employer conditions employment based upon sexual favors. *Nichols v. Frank*, 42 F.3d 503, 509 (9th Cir. 1994). Hostile work environment consists of conduct by the employer which creates an intimidating, hostile, or offensive environment, or if the conduct reasonably interferes with work performance. *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991).

6. *Goluszek*, 697 F.Supp. at 1456.

7. *Id.*

8. *Goluszek*, 697 F.Supp. at 1546. It is interesting to note, however, that sex was added to Title VII as a means of stopping the bills’ passage. Congressmen who opposed the act believed that by adding “sex” they would highlight the absurdity of the effort and would contribute to the act’s defeat. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 817–18 (1991).

9. 42 U.S.C. § 2000e(f) (2006).

10. *Id.* § 2000e(b). *Id.* § 2000e(a) states that a person can be a corporation, mutual company or labor union.

11. This can also apply to some extent to those working illegally within the United States. The term “employee” in § 2000e(f) only excludes individuals who are elected to public office, and those elected to be on their personal staff. The statute specifically excludes aliens working outside the United States, but makes no reference to aliens within the United States. Courts have upheld this distinction by stating “Title VII . . . applies to discrimination against undocumented aliens on one of the protected grounds . . .” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 n.4 (9th Cir. 2004).

12. The EEOC will investigate allegations of sexual harassment, then determine what the outcome of the actions should be on a case by case basis. *Larson on Employment Discrimination*, §§ 70.01-70.03 (2006).

13. *Bryant v. Int’l School. Svcs.*, 502 F.Supp. 472, 482 (D. N.J. 1980) (stating that “a fair interpretation of the statutory language leads to the conclusion that Title VII is to be given extraterritorial effect”).

14. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 5

The petitioner in *Aramco*, Boureslan, was transferred at his request to Saudi Arabia.¹⁵ He worked for Aramco for four years in Saudi Arabia and was discharged in 1984. Boureslan filed charges of discrimination with the EEOC and instituted his suit in the Southern District of Texas, seeking relief under both state law and Title VII. The district court dismissed his claim, ruling that it lacked subject matter jurisdiction because Title VII did not apply to U.S. citizens employed abroad by American employers.¹⁶

Boureslan appealed the decision, and the Supreme Court upheld the district court's ruling. While the Court agreed that the statutory definition of employee could be construed differently, the Court ruled that Congress did not intend for Title VII to apply to workers overseas for Congress had not specifically stated that Title VII applied to workers located in other countries.¹⁷ Under general principles of American jurisprudence, federal law is interpreted to apply only within the boundaries of the United States unless Congress expresses its clear intention to the contrary.¹⁸ The Supreme Court's decision caused uproar both in Congress and among employers. The meaning of the statute, as it had been interpreted by the lower courts, was changed and the statute no longer extended protections to Americans abroad.

C. Amendments to Title VII

As a direct response to the *Aramco* decision, Congress amended Title VII (and the Americans with Disabilities Act) to reflect its intent that Title VII apply extraterritorially.¹⁹ The amended definition of employee under Title VII states that, "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."²⁰ If these amendments to Title VII had been made prior to the *Aramco* decision, Boureslan would have had standing to bring his cause of action in the United States. But while the new statutory definition of employee extended the protections of Title VII to American citizens working abroad, it also raised questions about extraterritorial application of the law to foreign employees working for American employers abroad.

One of the leading cases addressing the applicability of Title VII to aliens working for American companies abroad is *Shekoyan v. Sibley International Corp.*²¹ In *Shekoyan*, an employee who was not a U.S. citizen was denied protection from discrimination under Title VII while working for an American employer overseas.²² The court held that Congressional intent on this issue was made clear by the failure of Congress to include such employees in the amended definition of employee under Title VII.²³ As the court interpreted the statute,

15. *Id.* at 247.

16. *Id.*

17. *Id.* at 250–51.

18. *Id.* at 248.

19. Olivia P. Dirig & Mahra Sarofsky, Note, *The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 HOFSTRA LAB. & EMP. L.J. 709, 718 (2005) [hereinafter Dirig and Sarofsky, *American Judicial Remedies*].

20. 42 U.S.C. § 2000e(f) (2006).

21. *Shekoyan v. Sibley Int'l Corp.*, 217 F.Supp. 2d 59 (D.D.C. 2002).

22. While the plaintiff was not a U.S. citizen, he was an "Armenian-born permanent legal resident of the United States." *Id.* at 62. Had the act occurred on United States soil, regardless of citizenship, his claims would have been recognized under Title VII. *Id.* at 65.

23. 42 U.S.C. § 2000e-1 (2006) (stating that "[t]his subchapter shall not apply to an employer with respect to the employment of aliens outside any State . . .").

“[t]itle VII will only have an extraterritorial application when: (1) the employee is a United States citizen and (2) the employee’s company is controlled by an American employer.”²⁴

D. Title VII’s Applicability to Choice-of-Law Issues and Aliens Working for an American Employer Outside of the United States

The Congressional amendments to Title VII provided increased protection abroad to U.S. citizens working for American companies while denying protection to alien employees working overseas, even though these employees would have been protected had the acts had occurred within the United States. Title VII’s application within the United States extends to all employees, including aliens.²⁵ In fact, one form of discrimination prohibited by Title VII is discrimination on the basis of national origin.²⁶

1. Choice of Law

Title VII’s lack of coverage for aliens that work for American MNEs in foreign countries creates a choice of law problem when an alien employee desires to file suit against her company. An alien who wishes to file suit against her employer must determine which potential remedies exist, and identify where those remedies might come from. When the courts evaluate a legal claim, the general rule pertaining to choice of law is that the rule of the law of the country in which the tort was committed controls.²⁷ If the conduct occurred in the United States, there would be sufficient minimum contacts to allow for the territorial jurisdiction in United States courts.²⁸ In the case of a foreign plaintiff, a court in the United States may dismiss the case on the basis of forum non conveniens, or because the case is not in the proper forum. However, several criteria must be met before a court will grant a dismissal for forum non conveniens.

The initial inquiry made by the court hearing a claim asks what degree of deference should be given to the plaintiff’s choice of forum.²⁹ In the United States, there is a strong presumption in favor of the plaintiff’s choice of forum.³⁰ Because the plaintiff is the person instituting the lawsuit, the courts generally defer to the plaintiff’s choice of forum unless private and public interest factors clearly show that the forum is inappropriate.³¹ At the same time, the courts generally give less weight to a foreign plaintiff’s request to proceed with a lawsuit in United States courts.³²

Once the court has determined the degree of deference it is willing to give to the plaintiff’s choice of forum, the court must administer a two-pronged test. The first prong

24. *Shekoyan*, 217 F.Supp. 2d at 65.

25. *Id.* at 64.

26. *Id.*

27. 28 U.S.C. § 1391 (2006) (in the United States, it is the locus “in which a substantial part of the events . . . giving rise to the claim occurred”); *see also* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (stating that “Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism”).

28. BLACK’S LAW DICTIONARY 871 (8th ed. 2004) (territorial jurisdiction is defined as “jurisdiction over cases arising in . . . a defined territory”).

29. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

30. *Id.*

31. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1946).

32. *Piper*, 454 U.S. at 255.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNEs 7

asks whether there is an adequate and available alternative forum.³³ If an alternative forum exists, but the remedy available in that forum is unsatisfactory, the other forum may not be an adequate alternative, and the case should not be dismissed under *forum non conveniens*.³⁴ In the hypothetical situation described in the Introduction, a court might choose to dismiss the Mexican worker's claim under the first prong because a remedy is available to the plaintiff in the Chinese courts. However, if the court does not believe that the remedy available in the Chinese courts is adequate based on, for example, the Chinese courts' response to sexual harassment, the court could move on to the second prong of the test.

The second prong of the test requires the court to balance private and public interest factors.³⁵ Essentially, if the forum interest is sufficient, the case will be heard by the forum court. Because a United States court likely has a sufficient interest in an American company's harassment of a foreign national, a sexual harassment case filed by an alien employee of an American MNE could be heard in the United States. But the determination of whether to allow the case to proceed in the United States would be up to the court's discretion.

If the court allows the plaintiff's case to proceed, the only remedies available will be in tort. Thus, Mexican workers can bring suits in the United States in either federal or state court for torts committed abroad, but such workers are not covered by Title VII.³⁶ Accordingly, any claim brought under Title VII will be barred. For instance, if a worker alleged assault or intentional infliction of emotional distress, the claim may be heard.³⁷ But if the employee alleged sexual harassment in violation of Title VII, the employee's claim would be dismissed. Termination on the basis of sex discrimination could be the basis for an action of wrongful discharge in violation of public policy.³⁸

Even if the MNE consented to the application of Mexican law, the case could still be barred under *forum non conveniens*.³⁹ Moreover, as Mexican law is different than U.S. law, the U.S. court may dismiss some claims which would have merit had they been brought under Title VII.⁴⁰

As the law currently stands, the Mexican worker faces many obstacles in bringing a claim in the United States under Title VII. The clearer way of dealing with these problems is to extend Title VII to workers from third-party countries.

33. *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 13 (1st Cir. 2000).

34. *Id.* at 13–14.

35. *Gulf Oil*, 330 U.S. at 508–09 (stating that the court must consider “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . .” The court found that factors relevant to the public interest include such things as the administrative difficulties of docket congestion; the general goal of “having localized controversies decided at home,” and concomitantly, ease of access to the proceedings on the part of interested citizens; the trier's relative familiarity with the appropriate rules of decision; and the burdens of jury duty.).

36. Michelle Smith, *Potential Solutions to the Problem of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico*, 13 BERKELEY WOMEN'S L.J. 195, 203 (1998).

37. *Id.* at 204 n.68.

38. *Id.* (citing *Rojo v. Kilger*, 801 P.2d 373 (Cal. 1990)).

39. *Id.* at 205.

40. *Id.* at 206.

2. Applicability to Foreign National Employees

A major problem with the amendments to Title VII is that they provide a foreign national working in the United States with a remedy if the employee is harassed, but they leave a foreign national working for an American company abroad without a remedy, even though she suffered the same injury. If an alien employee were sexually harassed in South Carolina, Title VII would apply. However, if an American employer were to sexually harass an alien employee in China, the amended Title VII would not provide the alien employee with the same protection, and she would be forced to find an alternative, perhaps inadequate, forum and remedy.

III. COMPARATIVE ANALYSIS OF TITLE VII PROTECTIONS WITH THE SEXUAL HARASSMENT PROVISIONS OF MEXICO AND CHINA

To illustrate the problems an alien employee could encounter while working for an American firm in a third country, the following section examines the available sexual harassment remedies under Mexican and Chinese law, and contrasts these remedies with those available in the United States.

A. *Mexico's Sexual Harassment Laws*

Overall, Mexican labor standards are the most comprehensive in the world, and they are set forth in Article 123 in the 1917 Constitution and the Federal Labor Law of 1970.⁴¹ However, they differ in one respect from, and perhaps falls short of, labor and employment law in the United States, for they do not specifically address sexual harassment occurring in private industries.⁴² While the Federal Commission stipulates that workers may be entitled to leave their jobs and receive up to three months salary when they are subject to "ill treatment," there are no sanctions against the harasser, and the provision appears to relate only to those workers subjected to "ill treatment" as a result of joining a union.⁴³ Further, Mexican law emphasizes the preservation of workplace discipline as a condition precedent to a charge of sexual harassment. For instance, when an employee harasses an equivalent-level co-worker, the aggressor may only be dismissed if his actions interfere with workplace discipline.⁴⁴ Of the states that criminalize sexual harassment, ten out of the fourteen require the existence of a subordinate relationship between the perpetrator and the victim in order to prosecute.⁴⁵ Finally, while the Mexican Constitution states that there will be equal work for equal pay, without regard to the employees' sex,⁴⁶ nothing in the Constitution explicitly outlaws any other form of sex-based discrimination.⁴⁷

41. Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 545-47 (1995).

42. Lorenia Trueba de Avendano, *A Report on Sexual Harassment in the Workplace in Mexico* 4 (May 2003) (Report for the Int'l Labor Rights Fund's Rights for Working Women Campaign), available at <http://www.laborrights.org/files/Mexico.pdf> [hereinafter Mexico Report].

43. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 123 § VII, *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

44. Mexico Report, *supra* note 42, at 4.

45. *Id.* at 5.

46. Constitución Política de los Estados Unidos Mexicanos art. VII.

47. *See generally* Constitución Política de los Estados Unidos Mexicanos.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 9

The Federal Criminal Code does criminalize sexual harassment under Article 259.⁴⁸ But this provision applies only to federal officers who commit sexual harassment in the scope of their employment.⁴⁹ Furthermore, five out of the fourteen Mexican States that criminalize sexual harassment require that some damage must actually be done to the victim in order to prosecute and sanction the harasser.⁵⁰ In fact, what is criminalized is only the use of sex as a condition for getting a job—quid pro quo hiring practices—as opposed to other forms of harassment such as hostile work environment, or the denial of promotions on the basis of gender.⁵¹ Mexican law as a whole appears only to recognize the right to earn equal pay for equal work without specifying types of harassment barred by employers.⁵² Thus, Mexican law prohibits only a limited amount of conduct, and sexual harassment is subject to penalty only when the victim both requests the prosecution and when the act of harassment has harmed the victim.⁵³

Importantly, there is no specific provision in the Mexican Constitution stating that a citizen will be covered by Mexican law while working in another country. While Mexican labor law is very comprehensive overall, it does not adequately address sexual harassment, and does not offer much redress for the victim.

B. *Sexual Harassment Law in the People's Republic of China*

The People's Republic of China (China) recently passed laws outlawing sexual harassment. Sexual discrimination was supposedly abolished in 1949 when Mao Zedong stated that “women hold up half the sky.”⁵⁴ However, it was not until recently that the Chinese Constitution was amended to make sexual harassment unlawful.

Article 48 of the Chinese Constitution states that “[w]omen in the People's Republic of China enjoy equal rights with men in all spheres of life The state protects the rights and interests of women, applies the principle of equal pay for equal work . . . and trains and selects cadres from among women.”⁵⁵ The Chinese legislature adopted a draft amendment to Article 48 in 2005, containing a clause stating that: “granting men and women equal status is a basic . . . policy of the country. The state will adopt necessary measures to gradually improve various systems to guarantee the rights and interests of women and remove all sorts of discrimination against women.”⁵⁶ China has also taken several steps to improve labor protections for women by establishing laws outside of the formal Chinese

48. Mexico Report, *supra* note 42, at 4.

49. *Id.*

50. *Id.* at 4–5.

51. *Id.* at 4.

52. *Id.* at 4–5.

53. Gaby Oré-Aguilar, *Sexual Harassment and Human Rights in Latin America*, 66 *FORDHAM L. REV.* 631, 635 (1997) [hereinafter Aguilar].

54. *China Outlaws Sexual Harassment*, BBC NEWS, Aug. 28, 2005, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4192672.stm> (last visited Apr. 5, 2008) [hereinafter BBC].

55. XIAN FA [Constitution] art. 48 (1987) (P.R.C.), reprinted in *LAWS OF THE PEOPLE'S REPUBLIC OF CHINA* 32–33 (Legislative Affairs Comm'n of the Standing Comm. of the Nat'l People's Cong. trans., 1987). The most recent amendment of the Constitution was in 2004.

56. *China Outlaws Sexual Harassment*, XINHUANET CHINA VIEW, Aug. 29, 2005, http://news.xinhuanet.com/english/2005-08/29/content_3415372.htm (last visited Apr. 5, 2008); see also M. Ulrich Killion, *Post-WTO China: Quest for Human Rights Safeguards in Sexual Harassment Against Women*, 12 *TUL. J. INT'L & COMP. L.* 201, 202–03 (2004) (stating that “stipulations of equality are only conceptual, because vesting a right of equality for women is primarily contingent on China's polity, not on China's judiciary and Constitution.”).

Constitution, including the 1998 Labor Protection Regulations and the 1995 Labor Law.⁵⁷ Furthermore, Chinese law—including sexual harassment law—extends to Chinese citizens abroad.⁵⁸

It is important to note, however, that the recent amendments to the Chinese Constitution aimed at improving employment conditions for women were adopted because sexual harassment in the workplace is still a growing problem in China. Results of a survey of eight thousand Chinese women indicated that over seventy-nine percent of women have experienced sexual harassment in the workplace.⁵⁹ Additionally, experts have noted that although the amendments prohibit sexual harassment of women and enable victims to lodge complaints, Chinese women generally feel ashamed to speak out, and the collection of evidence is very difficult in sexual harassment cases.⁶⁰ Between 2001 and 2005, only ten cases of sexual harassment were received by the court, and only one plaintiff won her case.⁶¹ Based in part on the hesitancy of women to come forward with claims, the amendments require all work units to take proactive measures against sexual harassment in the workplace.⁶² By making changes within the workplace instead of just providing remedies, China is attempting to change its views of women and sexual harassment from within. Evidence at this point, however, is that views will be slow to change. Thus, even though protections are extended to workers abroad, a Chinese woman who was sexually harassed might still face the same problems getting redress as would the Mexican woman in our initial example.

C. *Comparison to Title VII and Availability of Adequate Forum*

Problems with Title VII and its enforcement still exist within the United States. Sexual harassment continues to occur and is likely underreported.⁶³ A 1991 survey shows that thirty-eight percent of women have been harassed at work, and one-third of those women did not report the incident.⁶⁴ However, by encouraging more women to come forward, sexual harassment will likely be decreased in the workplace.

The United States is one of the few countries with fully defined sexual harassment laws. Article 48 of the Chinese Constitution, for example, still has many loopholes and problems that must be addressed, including forming a better definition of sexual harassment and determining penalties for harassment.⁶⁵ Considering the hesitancy of the Chinese courts to provide sexual harassment remedies for its own citizens, an alien would likely

57. See Christine M. Bulger, Note, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 360–64.

58. XIAN FA art. 50 (2004) (P.R.C.).

59. BBC, *supra* note 54.

60. *China Amends Law to Ban Sexual Harassment*, PEOPLE'S DAILY ONLINE, June 27, 2005, http://english.peopledaily.com.cn/200506/27/eng20050627_192471.html (last visited Apr. 5, 2008); see also Killion, *Post-WTO China*, *supra* note 58, at 204 (stating that “women don’t report sexual harassment because it involves such a loss of face . . .”).

61. *Id.*

62. *See id.*

63. See Cathy Shuck, *That’s It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERK. J. EMP. & LAB. L. 401, 429 (2002).

64. NANCY WYATT, BACKGROUND ON SEXUAL HARASSMENT 4 (2000), <http://www.de2.psu.edu/harassment/generalinfo/background.html> (last visited Apr. 5, 2008) [*hereinafter* BACKGROUND].

65. *Shaanxi Crackdowns on Sexual Harassment*, CHINA DAILY, Dec. 1, 2006, <http://www.china.org.cn/english/features/cw/190872.htm> (last visited Apr. 5, 2008).

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 11

have difficulty obtaining an adequate remedy for a sexual harassment complaint. Mexico has no provisions in its Constitution analogous to those of the United States or China to protect its citizens abroad. For this reason, the Mexican woman from our introductory example who was harassed while working in China would have to rely on the Chinese government to protect her against sexual harassment.

Because Title VII does not extend to aliens abroad, the Mexican woman in our example is left with three choices. As discussed above, one option is to bring her claim in China, where it is unlikely to succeed. As a second option, she could attempt to bring her claim in Mexico, even though the Mexican Constitution and laws do not provide her with specific protection abroad. Finally, the Mexican woman can try to bring her claim in tort in the United States, where she faces the distinct possibility of having her claim dismissed under *forum non conveniens*. The Mexican woman in our example is thus left with an inadequate choice of forum and few remedies available under the law. With so few remedies available, she is left to rely on the internal policies of her American employer, which cannot be legally enforced, or on the laws of China, which are not adequate to deal with her complaint.

Part IV will examine what additional problems both the employee and the employer face when there are not adequate remedies for sexual harassment available for all employees.

IV. PROBLEMS RESULTING FROM DISPARATE TITLE VII TREATMENT

Several possible problems could arise as a result of the disparate treatment of employees in the workplace. This section will provide a historical review of stratification in the workplace, and will then address some of these problems.

A. *Stratification of Employees*

When an employer treats equivalent employees differently, one of the potential problems that could arise is the class stratification of employees in the workforce. Stratification is defined as dividing or arranging into classes, castes, or social strata.⁶⁶ By stratifying employees, the employer loses cohesiveness in the workplace and creates cross-strata conflicts.

1. Historical Overview of Labor Unions and Title VII

One of the reasons labor unions organized was to ensure that better protections were provided to employees.⁶⁷ Theoretically, all union members were entitled to the same protections as all other union members. However, non-union members did not always have the same benefits provided to the union members. Moreover, non-union members were often harassed or pressured to join the union.⁶⁸ Once union membership was established,

66. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1165 (1988).

67. See AFL-CIO: Why You Need A Union, <http://www.aflcio.org/joinaunion/why> (last visited Feb. 18, 2008).

68. The union also pressured non-members to join to increase the collective bargaining power of the union.

members were pressured to do everything with the union, especially strike.⁶⁹ Thus, union members became a separate classification of employee: an employee was either with the union or against it. This classification increased the already-existing “us vs. them” mentality between white-collar and blue-collar workers. Traditionally, blue-collar workers were most in need of union protection, and they were the workers who joined unions. Union membership gave the blue collar workers a greater opportunity to voice their concerns, decreasing the power of the white collar workers.

By enacting Title VII, the federal government not only attempted to provide equal employment opportunities to all Americans, but perhaps also attempted to decrease the influence and discriminatory acts of unions in the workplace by offering some of the same guarantees which unions provided to their employees.⁷⁰ Under Title VII, employees would enjoy protections within the workplace regardless of union membership, thus decreasing the union’s importance and influence. By providing the protections that would have been offered only to union members, the government preempted one of the important functions that unions served. The ability to rely on the protections provided by federal law reduced the stratification between union and non-union members and promoted workforce equality without requiring union membership.

Despite increasing workers rights, unions were traditionally quite discriminatory towards women.⁷¹ While the idea behind a union was to provide workplace protections, those protections were not necessarily meant to extend to women in the workforce. Regardless of union membership, being a woman in the workplace could lead to additional stratification among employees, especially in blue collar fields. The enactment of Title VII gave women unprecedented protection against discrimination in the workplace, which unions had not necessarily provided to their female members.

2. “Black-Collar” Workers

Traditionally there has been stratification between white-collar and blue-collar workers, between union and non-union members, and between female and male employees in the workplace. The introductory example to this Note demonstrates how a new class of employee—and a new level of stratification—could be created between regular employees

JOHN HUTCHENSON, *THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS* 80 (1970) (stating that “a group of strong-arm men & gangsters has been engaged by the union to commit assaults on workingmen who refuse to join their unions or refuse to sympathize with them . . .”). As non-union employees were bound by union agreements in union plants, the only way to change protections was to join the union and attempt to change the bargains through the collective bargaining process. FLORENCE PETERSON, *AMERICAN LABOR UNIONS: WHAT THEY ARE AND HOW THEY WORK* 99 (1945).

69. *THE IMPERFECT UNION*, *supra* note 68, at 80. It is interesting to note that those who crossed picket lines were called “scabs,” and depending upon the union, some who crossed lines were in danger of being shot. Even if union members could not afford to strike, the pressure to do so was so great they would be forced into striking, or face dissociation from their co-workers. *Id.* (noting that sometimes police were used to beat-up non-strikers, for “if a man said he was going to scab . . . he got his.”).

70. See Larson on Employment Discrimination, 1-1 Employment Discrimination § 1.01 (2007); Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV. 339, 344 (1986) (stating that one of the reasons behind Title VII was to halt the discriminatory employment practices of unions); Charles T. Schmidt Jr., *Title VII: Coverage and Comments Symposium Issue: 1964 Civil Rights Act: Title VII*, 7 B.C. INDUS. AND COMM.L. REV. 459, 465 (1966) (stating that Title VII will “directly alter some of the union’s more flagrant discriminatory practices”).

71. Larson on Employment Discrimination, 1-2 Employment Discrimination § 2.02[2] (2007); David E. Bernstein, *Roots of the ‘Underclass’: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 90 (1993).

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 13

who are protected against sexual harassment and alien employees who are not. The Mexican worker in our example would not have Title VII remedies available to her, even though she suffered the same harassment as her American counterpart. This differentiation creates a class of employees that will be subject to a lower standard of care and treatment than other employees. In short, it creates a class that might be referred to as “black-collar” workers because they find themselves in a legal black hole.

The possible ramifications of a new substandard class of employees are numerous. The labor force has traditionally been divided into two broad categories: blue-collar workers and white-collar workers. Blue-collar workers are working class manual laborers who are traditionally paid hourly. White-collar workers, on the other hand, are salaried professionals and employees within administrative or clerical positions.⁷² Within the manufacturing environment there has historically been a feeling of animosity between the two groups. Blue-collar workers traditionally view white-collar workers with some resentment: the white-collar workers are not on the manufacturing floor and they do not understand the conditions faced by blue-collar workers “on the floor.” Conversely, white-collar workers tend to view blue-collar workers as less intelligent and lazy: blue collar workers only punch a clock and just care about their paychecks, not about the company.⁷³

Creating a new class of employees subject to a lower level of legal protection would result in further stratification of the workforce. While blue-collar and white-collar workers might view the other class with some distrust, both groups of employees are entitled to the same protections from harassment under the law. Although there may be resentment between the two groups, if an employee from one of these groups harasses an employee from the other group, that employee would face sanctions from the employer and the possibility of legal liability.

A new class of workers, known as “black-collar” workers, can be in either traditionally blue- or white-collar jobs.⁷⁴ Regardless of the type of job the black-collar worker performs, he is in a separate class because he receives less legal protection than a similarly situated blue-collar or white collar-worker. No black-collar worker enjoys the same standard of protection a white-collar or blue-collar worker enjoys. Further stratification within the workforce is unnecessary and undesirable. This is evident in courts’ attempts to reduce increasing stratification in the workforce affecting contingent workers.

3. Contingent Workforce

In many ways, the black-collar class is analogous to the rapidly expanding contingent workforce sweeping across the United States, now estimated to make up about 25 percent of

72. See Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2307 (1998) (attempting to define the recognized status distinction between “blue” and “white” collar workers). Blue-collar and white-collar workers have been joined by “pink-collar” workers (defined as those engaged in traditionally “female” jobs such as clerical, service or sales). Camille S. Williams, *Women, Equality, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 487, 507–06 n.80 (2006).

73. I make this claim based on three years of experience working as a white-collar employee in a manufacturing firm. My experiences talking with the blue-collar workers “on the floor,” as well as speaking with management, have led me to these generalized assumptions.

74. However, the black-collar workers will most likely be a sub-set of the white-collar workforce: most employers who bring in foreign nationals generally do so because of a highly specialized set of skills which only that worker has. While certain manufacturing jobs may be highly skilled, those skills are more easily transferable than are the education and training of more traditionally white collar workers.

the working population.⁷⁵ The term “contingent worker” is a catch-all that encompasses contract employees, part-time workers, temporary workers, and independent contractors.⁷⁶ There has been enormous growth in this sector of the workforce, due to a variety of factors: the desire for flexibility in the workplace, the desire to reduce employee costs, and the ready availability of these workers from temporary employment agencies.⁷⁷ The rise of the contingent workforce has changed the nature of the employment relationship, and it has provided this class of workers with far fewer protections and benefits than traditional full-time employees.⁷⁸ Many recent cases in employment law have attempted to expand the protections and benefits available to members of the contingent workforce. Yet, many employers continue to label their employees as temporary or contract employees in an attempt to escape paying benefits or having to comply with other requirements.⁷⁹

The Ninth Circuit case, *Vizcaino v. Microsoft Corp.*,⁸⁰ addressed the issue of whether a contingent worker is a contract employee or an employee entitled to the same benefits as all other employees.⁸¹ In *Vizcaino*, Microsoft characterized some of its employees as contract employees although both the contract and regular employees were doing the same work.⁸² This characterization allowed Microsoft to avoid paying into pension plans for these employees and saved Microsoft a great deal of money.⁸³ The *Vizcaino* court determined that the contract employees were entitled to the same protections and benefits as regular employees.⁸⁴ As *Vizcaino* demonstrates, the courts have started to question whether a contingent worker is an “employee” under the statutory definition or a contract worker and look to many factors in making this determination.⁸⁵

Like black-collar workers, contingent workers are exposed to disparate treatment by their employers—disparate treatment flowing from the nature of their employment. These workers are hired knowing they are unable to participate in employee pension plans and that they will be ineligible for certain other benefits from the employer. However, courts are increasingly sympathetic to these workers. Additionally, contingent workers can file Title VII claims against their employers with the EEOC. Instead of being in the same legal black hole as black-collar workers, contingent workers have been increasingly protected by the courts.

In the case of an alien employed overseas by an American employer, the alien would clearly fall within Title VII’s expansive definition of employee if she worked in the United States. However, because Congress has not specifically included aliens in the text of Title VII, and the Supreme Court has refrained from a broad reading of the term “employee,” aliens have not been provided the same level of protection as American employees in a company. The courts have begun to closely question the treatment of contingent workers

75. Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 564 (1996).

76. *Id.* at 564–70.

77. KATHY STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKFORCE 67–70 (2004).

78. *Id.* at 70.

79. *See id.*

80. 120 F.3d 1006 (9th Cir. 1997).

81. *Id.* at 1008.

82. *Id.*

83. *See id.*

84. *Id.* at 1015. The question as to whether the SSP plan should also be included in the ruling was remanded to the plan administrator for a more precise definition of the phrase “employee.” *Id.* at 1022.

85. In *Vizcaino* the courts looked to items listed 26 C.F.R. 31.3401(c)-1 to determine whether an individual is an employee for income tax purposes. *Vizcaino*, 120 F.3d at 1009.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 15

because they are deprived of rights and benefits available to regular employees while seemingly doing the same job.⁸⁶ The courts have also attempted to remedy this unfairness by protecting all employees, including contingent workers and domestic aliens, under Title VII.⁸⁷ This emphasis on fairness that the courts have shown in cases involving contingent employees should be extended to aliens working for American employers abroad.

4. Result of Stratification

Black-collar workers are in a legal black hole when it comes to protection from harassment and discrimination in the workplace. While they have the same health care and pension benefits as white-collar and blue-collar workers, they do not have the same legal status. Instead, black-collar workers can only hope that the employer's internal policy regarding sexual harassment will deter other employees from harassing or discriminating against them. While other employees are shielded from retaliatory discharge, an employer could simply fire a black-collar worker if that worker complained about her treatment. Even if the firing is against company policy, the alien may not have legal redress for her claims within the host country. While there may be some remedies available in the host country, the black-collar employee may have fewer remedies because of issues of territoriality. If the host country does not provide any meaningful remedy in sexual harassment suits, the employer has no incentive to treat black-collar workers with the same level of respect and care afforded to American employees.

The creation of an entirely new class of workers who lack the protections enjoyed by other employees raises a variety of problems in the sexual harassment arena. First, the knowledge of an alien's lack of legal redress could lead some employees to take advantage of the system and treat alien employees differently. Making vulgar comments or inappropriately touching an alien employee might result in a reprimand from the employer, but no more. Further, since most employers develop their employment policies on the basis of current law, the knowledge that an alien would not have any legal redress for harassment discourages the employer from taking any claims raised by alien employees as seriously as it would if the claim were made by fully protected employees. Despite an employer's initial good intentions, without incentives for enforcing policies, some behavior, including sexual harassment, can slip through the cracks.

B. Policy Inconsistency and Corporate Image

In addition to stratification, an MNE may face policy inconsistency within the company as a result of the disparate treatment of black-collar employees. Generally, American companies are likely to have consistent policies across their divisions and throughout the company. For example, Avery Dennison rolls out its company policies to every division of the company on the same day. The company updates its employee handbooks at the same time, and there is company-wide management training. Some

86. See *Vizcaino v. Microsoft*, 1994 U.S. Dist. LEXIS 21039, *11 (stating that persons working on Microsoft projects as freelancers often worked side by side with "regular" staff who were doing identical work to that of the freelancers).

87. See *U.S. E.E.O.C. v. Technocrest Systems, Inc.* 448 F.3d 1035, 1039 (8th Cir. 2006) (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973)).

divergence from the company's standard policies may occur because of regional differences,⁸⁸ but core policies are the same throughout the entire company.

One benefit of this approach is that if management were transferred to locations around the globe, the existence of consistent policies regarding sexual harassment would ensure a smoother transition. A manager who must always treat employees with the highest level of care in terms of sexual harassment would be much less likely to face complaints from employees if that manager were transferred to work in various facilities around the world.

Additionally, policy inconsistency may cause differing public perception of the company in different parts of the world. In one country, the employer could enjoy the reputation of being a very desirable employer, but in another country the company could have difficulty hiring employees due to its reputation for treating employees poorly. Promoting and adhering to the American standard company-wide when it comes to questions of sexual harassment would show employees from all nations that they are equally valued and respected as all other employees around the world.

C. *Economic Disadvantage to Employer*

Alien employees working in a foreign country for American MNEs are highly skilled and highly valued, evidenced by the company's willingness to pay to move the employee around the world. If alien employees have no redress for sexual harassment, a company may face a situation where a highly skilled person feels forced to quit her job because of a hostile work environment. Without legal remedies for harassment, the alien employee may just give up and walk away from an otherwise profitable job. Some may say that it is desirable for employees to leave a company if they are uncomfortable, but the company faces negative economic consequences as a result of the departure. First, the company has paid and trained the employee to fill a specific position. This job is likely to be highly specialized, and there are likely few people able to do the type of work required.

In addition to economic consequences, morale may suffer throughout the company. For example, what would the CEO say upon learning that a highly skilled employee left the company because nothing was being done about the sexual harassment she endured? If an alien employee leaves the company as a result of harassment, the departure underscores the fact that a wrong has been committed, and there is no means to remedy that wrong. Because most Americans believe that a person should be free from sexual harassment on the job, leaving workers without protection from such events is undesirable.

D. *Why American Employers Should Protect All Workers, Including Workers from Third-Party Countries*

One controversy surrounding the applicability of Title VII to alien claims abroad is whether freedom from sexual harassment should truly be protected on a global scale. Because there is no international consensus, we briefly address whether legal protections against sexual harassment should exist. This Note argues that gender equality, and the prevention of sexual harassment, is necessary to the development of the labor force. As the United States is often the leader in initiating higher labor standards, especially in terms of

88. For example, in Avery Dennison's South Carolina plant, Easter is a company holiday, while in other parts of the country Easter is a "floating" holiday that employees can take if they feel it is appropriate.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 17

sexual harassment,⁸⁹ the United States should promote a harassment-free workplace throughout the world, especially with regard to American employers abroad.

1. Internationally Protected Labor Norms

There very few internationally protected labor norms. The International Labor Organization (“ILO”) enumerates four “core” worker rights: (1) freedom of association, (2) protection against forced labor, (3) elimination of child labor, and (4) freedom from discrimination.⁹⁰ While freedom from discrimination is one of the “core” worker rights embraced by the ILO, the meaning of discrimination is not well defined.

Many countries only recognize sexual harassment as a form of discrimination in a limited sense, even though these countries recognize, at least in theory, that women should be hired and paid at the same rate as men.⁹¹ However, once women have been hired, often they are not promoted and are subjected to a hostile work environment. One problem female workers face is that they are often expected to tolerate sexual harassment when an employer “allows” them to work in a traditionally all-male work environment. While the ILO standards enable her to work, she is still subject to harassment on the job. This kind of problem is what Title VII was enacted to address, and it is what other countries are attempting to address as well.⁹²

One economic reason why employers should attempt to eliminate sexual harassment in the workplace is that employees are less productive when they are the victims of sexual harassment.⁹³ Some of the results of sexual harassment include decreased morale, decreased job satisfaction, deteriorating relationships with co-workers, and increased absenteeism.⁹⁴ Instead of concentrating on her job, she is concentrating on avoiding her boss, or on minimizing her appearance. Further, if the harassment occurs around others, it

89. The European Union did not directly address sexual harassment in its member states until September 2002, when the European Parliament and Council adopted Directive 2002/73/EC. *See Stop Violence Against Women: 1976 Equal Treatment Directive and 2002 Sexual Harassment Amendment*, http://www.stopvaw.org/1976_Equal_Treatment_Directive_and_2002_Sexual_Harassment_Amendment.html (last visited Feb. 18, 2008). In contrast, Title VII became law in 1964, thus positioning the U.S. as a leader in the outlawing of discrimination against women.

90. Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?*, in *LABOR LAW BEYOND BORDERS: ADR AND THE INTERNATIONALIZATION OF LABOR DISPUTE SETTLEMENT* 157, 160 (Int'l Bureau of the Permanent Court of Arbitration ed., 2003).

91. *See* Aguilar, *supra* note 53, at 632–34.

92. In 1979 the U.N. adopted the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW has attempted to eliminate the problem of sexual discrimination by addressing discrimination in all facets of women's lives. G.A. Res. 34/180, U.N. GAOR, 34th Sess, Agenda Item 75, U.N. Doc. A/RES/34/180 (Dec. 18, 1979), *available at* <http://www.un.org/Depts/dhl/landmark/pdf/a34pv107e.pdf>. CEDAW has been adopted by numerous countries across the globe, including Mexico and China. *Id.*

93. Effects of Sexual Harassment. Jana L. Raver and E. Marie Shantz, *Why Sexual Harassment Is Bad for Business and What HR Should Do About It*, VERITUDE, 2004, <http://www.veritude.com/ResourceCenter/ResourceView.aspx?id=1266>, 2004. *See* Susan Crawford, *Economic Impact of Sexual Harassment in the Workplace*, USA Today, March 1995, at 35 (stating that the economic impact of sexual harassment falls into three categories: (1) sexual harassment can degrade performance, at the very least by the employee blocking the unwanted attention, (2) sexual harassment can breed resentment and distrust in the workplace, and impart negative tension to co-workers, and (3) sexual harassment results in costly turnover).

94. Kimberly T. Schneider & Suzanne Swan, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. OF APPLIED PSYCHOL. 401, 401 (1997).

could have a slippery slope effect, resulting in others harassing her, as well, once it is seen that such conduct is tolerated.

The United States has struggled with sexual inequality in the past, and it continues to do so today. The United States, however, is one of the few countries with specific sexual harassment laws.⁹⁵ Many other countries adhere to the ILO guidelines concerning the elimination of discrimination, but they find those guidelines difficult to enforce. Although China has passed a sexual harassment law, enforcement of the law is very difficult due to Chinese society's long-held and deeply embedded views of women in the workplace.⁹⁶ In the case of non-U.S. citizens working for American companies in a third country, the law of the United States would provide an adequate forum to those who have been harassed as well as the opportunity to take the case forward in court.

Some may argue that it is not up to the United States to impose its views regarding sexual equality on others, and that each country is entitled to its definition of sexual harassment based upon its cultural norms. However, this Note argues that the United States would not be forcing non-American employers to adopt those standards. Instead, it would be requiring American employers to ensure that each of their employees is treated with the same standard of care that would be required in the United States, regardless of that person's national origin.

It should be emphasized that the intent here is to require American employers to treat all employees with the same level of respect. However, choosing the American standard benefits not only the affected employee, but also the MNE.

V. RECOMMENDATIONS

There are several options which American MNEs can use to promote equality within the workforce and reaffirm the value of employees throughout the world.

A. *Arbitration Agreements*

In the international sector, American MNEs can reduce the impact of the disparate application of Title VII by requiring all non-host country employees to sign an arbitration agreement. This arbitration agreement would provide protection under Title VII to employees who would otherwise not receive those protections, and would reduce any uncertainty regarding choice of law in the event a claim is brought.

Most companies have a standard set of forms which are filled out when they hire a new employee, and one of those forms is usually a mutual arbitration agreement. This agreement varies slightly from company to company. The arbitration agreement proposed here should specifically state that in the event of an employment dispute, an alien employee working for the employer abroad would be subject to American labor standards—including Title VII. This language would avoid any possible choice of law issues and would subject the claim to arbitration in an unbiased forum. Further, arbitration would save time and money for all parties involved, in part because arbitration does not require discovery.

95. Nancy Wyatt, Associate Professor, Pennsylvania State University, Information on Sexual Harassment: International Perspectives (2000), <http://www.de2.psu.edu/harassment/generalinfo/international.html>.

96. BBC, *supra* note 54.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNEs 19

Saving the costs of attorney's fees, time, and travel would be economically beneficial for both the company and the plaintiff.

1. Increased Title VII Protections

As discussed in Part II of this Note, different countries have varying definitions of what constitutes sexual harassment and provide varying remedies for sexual harassment. Arbitration agreements allow American MNEs to voluntarily extend the higher American standards for sexual harassment to all employees.

Another important benefit of the increased Title VII protections to the employee is that she would know, by signing the arbitration agreement, that she had a legally protected means of redress in the event of a harassment dispute. Since the arbitration agreement can specify the type of law that applies in the event of a disagreement, the American standard could be chosen. Further, an arbitral body can be identified within the agreement. A truly unbiased body, such as the International Chamber of Commerce (ICC),⁹⁷ can be utilized and asked to apply the laws of the United States. The employee would not have to file multiple claims in several different courts, thus simplifying the process and saving the employee—and the employer—money.

2. Consistency Across the MNE

The MNE will no longer have to worry about inconsistent policies should the American standard be adopted. A worker will not need to wonder whether she has redress from harassment because of her national origin. Instead, that person will know that company policy dictates a remedy within the workplace to the employee, based upon both the policies of the employer and Title VII. Because company policy is consistent, the employee will always be able to first pursue workplace sanctions prior to bringing suit. Further, knowing that the American courts are available to enforce an arbitral judgment or to pursue alternate claims helps the employee to feel secure that even if the employer sanctions do not work, legal recourse is available.

3. America's World Reputation

One problem the rest of the world has with the United States is its reputation for being imperialistic. While some may respect the United States a great deal and believe its laws to be socially progressive, others dislike the idea of America "taking over" the world by imposing its standards and norms on other countries. Arbitration agreements could help strengthen America's reputation throughout the world by making American law an opt-in system for disadvantaged workers.

97. The ICC has country committees which can be chosen based upon the countries which are in dispute. In our example involving the Mexican employee of the American MNE, the ICC could appoint an Italian arbitrator without ties to either the United States or Mexico. International Chamber of Commerce, International Court of Arbitration: Flexibility—The Choices Are Yours, <http://www.iccwbo.org/court/arbitration/id5326/index.html> (last visited Mar. 3, 2008).

Arbitration agreements could help avoid one potential issue surrounding the reputation of the United States. American employers would be unable to come into a country and treat employees unfairly. Alien employees would be subject to the same standard as American employees, with the American standard tending to be more progressive than the standards of other countries. Since this standard does not affect citizens of the host country, there would be no problems with national sovereignty. Although this Note addresses only sexual harassment, these progressive standards apply to many other aspects of the labor force, and American courts are more willing to hear claims alleging violations of labor standards. By demonstrating that American employers abroad are willing to apply their labor standards throughout the world, the United States can begin to counteract negative connotations which arise when American employers come in and “take over.”

VI. POSSIBLE NEGATIVE IMPLICATIONS

There are many who believe that applying United States labor standards to alien workers employed by American companies abroad would be detrimental to the world and to American companies.⁹⁸ In this section of the paper, we address some of the counterarguments to applying the Title VII standard internationally.

A. *Increased Protection Under Title VII and Choice of Law*

As discussed in Parts II and III of this Note, a variety of standards regarding sexual harassment exist throughout the world. What makes the American standard the correct standard to apply, as opposed to the standard of another country—such as the host country?

For the most part, American labor standards are more progressive than the applicable standards in many other countries. As indicated earlier, many countries are only now implementing sexual harassment policies.⁹⁹ Without the courts’ active enforcement of these policies in these countries, employees are at a disadvantage when trying to get the courts to hear and address their claims. While there is a movement in China toward providing legal remedies to address sexual harassment, Chinese courts and Chinese society have not yet embraced the changing role of women in the workplace. To help provide these protections, where the employer is an American company, Title VII should apply to employees who are not citizens of the host country.

Another reason to use the Title VII standard is the nature of the claim in sexual harassment suits. If the definition of employee under Title VII had not specifically excluded aliens working for American companies abroad, a sexual harassment claim by an alien employee against an American worker could be heard in the courts of the United States. Because the employer is an American company, and the complaining party is a third-country alien, the host country’s courts will be reluctant to pursue the claim because there is little forum interest. While the harassment underlying the claim was committed in the host country, neither party is a national of the host country. Furthermore, some countries do not specifically extend the application of their laws to their citizens who are working abroad; as in our example, the laws of Mexico do not apply to Mexican workers employed in China.

98. See, e.g., Dirig and Sarofsky, *American Judicial Remedies*, *supra* note 18, at 740–48.

99. See *Stop Violence Against Women*, *supra* note 89.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNEs 21

Because American workers have these protections and are unlikely to relinquish them, it makes sense to extend the application of Title VII to alien employees through the use of arbitration agreements. Without every employee signing the same agreement, there could be problems enforcing the provisions of the arbitration agreement.¹⁰⁰ As discussed in Part III, the application of different standards to different employees would cause numerous problems to the MNEs. If different standards applied, there would be problems with enforcing agreements, determining which standard applies to which person, providing consistency throughout the MNE, maintaining overall morale of the employees, and increasing stratification of employees. An arbitration agreement with the American standard of law is easier to enforce. American workers already know the policy, and all employees know that the same standard will apply. Moreover, there will be fewer human resource issues surrounding the actual implementation of the agreements.

B. America's World Reputation

Some could argue that the reputation of the United States would be diminished rather than enhanced if American MNEs go into other countries and require foreign employees to agree to the application of American law. It is true that American MNEs have a reputation for going into other countries and forcing their policies onto others. However, the arbitration agreements would not be forced upon the workers of the host country. Instead, they would simply address the lack of protection afforded to foreign nationals employed by the American MNE, working in the host country, and resulting in no impact on national sovereignty. Instead, there will be increased protection provided to employees who would be otherwise unprotected.

C. Stratification of Employees

One point of contention for some opponents of the use of arbitration agreements might be the continued potential for stratification amongst employees. If all foreign nationals are treated one way, but those employees who are citizens of the host country are subject to the host country's law, how are problems of stratification avoided? While this is an important concern, there are several reasons to believe that the use of arbitration agreements that specify Title VII as the applicable law would still be beneficial to MNEs and would still reduce stratification among employees.

First, employees who are citizens of the host country are already protected by the law of the host country, and they do not need the protection in the same way as alien employees. Many alien employees are not protected against harassment and discrimination by any law. One reason why aliens working in the host country would be less likely to have a remedy for the harassment they have suffered is that there is little forum interest in the courts of the host country. While the harassment occurred within the country, it might not have involved

100. One problem frequently argued within the courts is whether arbitration agreements are even enforceable, for some argue that they require employees to give up their right to trial. While arbitration agreements are now nearly always enforced, asking an employee to give up the right to American remedies could cause the court to rule that the employee is giving up a statutory remedy and thus that the agreement is unenforceable. *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998). Further discussion of this argument is beyond the scope of this Note, however, for a thorough discussion of arbitration agreements within the context of employment discrimination, see LEX. K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 77.02 (2007).

any nationals from the country. If an American employer harassed a Chinese worker, the Chinese courts might be sympathetic to the worker's claim. In fact, one study suggests that foreign employers are more likely than Chinese employers to harass Chinese employees.¹⁰¹ Therefore, American companies will not be forcing their laws onto unwilling workers who are citizens of the host country. Instead, the agreements will provide protection to those workers currently without protection. Unfortunately, Chinese employees working for an American MNE would not have the protection afforded by Title VII. If the Chinese government is reluctant to allow Chinese employees to arbitrate their sexual harassment claims under American law, then the MNE would be seen as forcing its policy position on other countries. In the interests of not only keeping the American MNE in China, but also strengthening relations between the countries, the application of Title VII to Chinese workers is not feasible.

Second, stratification is more likely to occur if American employers were to come in to the country and force Chinese employees to accept American standards. Many Chinese people would be resentful of efforts to force American law upon Chinese workers in China. This is not to suggest that American employers should treat Chinese workers with a lower standard because they have not signed arbitration agreements and Title VII does not apply. Instead, the arbitration agreements would still protect those who otherwise would not have protections and allow the elimination of the black-collar workers within the plant. The use of arbitration agreements would eliminate many of the problems of stratification that might arise if there exist both protected and non-protected employees. The Chinese labor standard is lower than the American standard, and there is a possibility that because the Chinese workers do not have to sign arbitration agreements they may be subjected to a lower standard of care. However, the Chinese workers still have redress under their law, whereas the black-collar workers would have no redress without the arbitration agreements. Requiring the third-country aliens to sign the arbitration agreements is the best available option because the American standard then covers only those employees who are otherwise without legal recourse when they suffer sexual harassment, without imposing on the existing Chinese remedies for the Chinese workers.

VI. CONCLUSION

American MNEs should apply American legal standards when dealing with sexual harassment of and discrimination against third-country alien employees working abroad. Denying these employees protection against sexual harassment and discrimination can lead to stratification in the workplace between protected and non-protected employees and can lead to the formation of a new black-collar class of employees. These alien employees' home countries may not provide protection from sexual harassment violations, and unless Title VII applies, they would be without adequate remedies. Requiring all foreign third-country employees to sign an arbitration agreement specifying Title VII as the applicable law would reduce difficulties raised by with choice of law issues and encourage consistent behavior throughout the MNE. Further, it would reduce stratification among the employees and discourage disadvantageous treatment due to the national origin of an employee. If MNEs were to adopt the American standard in dealing with all employees' claims, not only

101. Cf. BBC, *supra* note 53. Seventy-nine percent of Chinese women claim to have been harassed at work. The study indicates that 40% of Chinese women admit to being harassed by a foreign employer, and 18% by state-owned Chinese businesses.

2008]THE RESULT OF DISPARATE TREATMENT OF EMPLOYEES IN MNES 23

would it be fair and economically efficient, it would also signal to its employees and the world that it values all of its employees, regardless of their national origins.