UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 19 | Number 2 Article 10

Winter 1994

Not in This Country, You Don't (Today): National Origin Discrimination in Goyette v. DCA Advertising, Inc.

Brannon S. Burroughs

Not in This Country, You Don't (Today): National Origin Discrimination in Goyette v. DCA Advertising, Inc.

Cover Page Footnote
International Law; Commercial Law; Law

Not in This Country, You Don't (Today): National Origin Discrimination in *Goyette v. DCA Advertising, Inc.*

I. Introduction

Most Americans are now aware, and envious, of corporate Japan's policy of lifetime employment. Even in times of recession, Japanese employers have diligently retained their countrymen. They have resisted, for example, the temptation to release the estimated nine percent of excess manufacturing employees currently on the payroll.[1] Americans are likely unaware of the motivation behind the lifetime employment policy. Is the policy followed because it makes good business sense, or simply because the Japanese population has come to expect and rely upon it? Two recent events indicate that the latter explanation is more accurate. The first event occurred in Japan, when executives of the Pioneer company, facing severe profit shortfalls, poised themselves to terminate thirty-five high-level employees.[2] Workers complained to the press about their treatment after years of devotion to the company.[3] After government officials, top industrial executives, and trade unions joined the discord,[4] Pioneer "clarified" its earlier statements, and retreated.[5] The second event began in September of 1990, when DCA, the American subsidiary of Japan's Dentsu advertising agency, terminated twenty-two American employees, and assigned their duties to employees of Japanese national origin.[6] These terminations prompted the case of *Goyette v. DCA Advertising, Inc.*,[7] which is the subject of this Note. When compared, these examples suggest that the Japanese public expects, and is assured of, the protection of Japanese employees, while American employees generate less concern, and consequently enjoy less protection.

Had the firing of American citizens occurred in Japan, some de-

---

[1] *See* Joseph Kahn, *Downshifting in Japan; Carmaker Tries Bloody Reformation*, DALLAS MORNING NEWS, Aug. 8, 1993, at 1H.

[2] Colin Nickerson, *Japanese Business Struggles with Its Lifetime Job Ethic*, BOSTON GLOBE, Mar. 14, 1993, at Al.

[3] *Recession Strikes Japan's Lifetime Jobs*, SACRAMENTO BEE, Mar. 22, 1993, at Al.

[4] *See* Nickerson, *supra* note 2.

[5] *See Recession Strikes Japan's Lifetime Jobs*, *supra* note 3.

[6] *See* Goyette v. DCA Advertising, Inc., 828 F. Supp. 227 (S.D.N.Y. 1993) *and* 830 F. Supp. 737 (S.D.N.Y. 1993).

[7] *Id.*

gree of public concern may have developed. But when the firings took place in New York, the Civil Rights Act was implicated. This Note reviews the United States District Court's application of the Civil Rights Act to the national origin discrimination alleged in *Goyette*. Part II of this note examines the court's analysis of parent and subsidiary liability. In Part III, the background law relevant to the claims and defenses of the parties is studied. Part IV contrasts the *Goyette* decision with precedent, identifying ongoing judicial difficulties, and issues of inconsistency between *Goyette* and its predecessor cases. Finally, this Note concludes that *Goyette* is a factually unusual case which, to a large extent, merely propagates past judicial misapprehensions.

II. Statement of the Case

This Note focuses upon two opinions issued in the same suit by the United States District Court for the Southern District of New York. Together, the opinions detail the struggle of a Japanese advertising company and its wholly-owned American subsidiary to escape the grasp of American antidiscrimination law. Plaintiffs invoked the Civil Rights Act of 1964[8] after they were terminated, allegedly without cause, and their responsibilities were reassigned to employees of Japanese descent. The first opinion considers the subsidiary's motion for summary judgment, and includes extensive attention to both the facts and the law. The latter opinion arose from the parent corporation's motion for dismissal, which was converted into a summary judgment motion. That opinion involves the parent company's attempt to disassociate itself from the acts of its subsidiary and the claims of the discharged American employees.

A. *The Cast of Characters*

The defendants in this case are prominent figures in the advertising industry. Dentsu, Inc. is the world's largest advertising and communications company.[9] Dentsu is headquartered and does business in Tokyo.[10] Its Japanese operations led it to serve a variety of prominent Japanese companies with operations and sales in the United States.[11] To better serve its clients in the American market, Dentsu in 1983 entered into a joint venture with Young & Rubicam, a prominent American advertising agency.[12] The joint venture resulted in the creation of

---

[8] 42 U.S.C. § 2000e (1988). Plaintiffs also pursued claims under New York State human rights legislation. These claims will not be discussed in this Note.

[9] Goyette v. DCA Advertising, Inc., 830 F. Supp. 737, 740 (S.D.N.Y. 1993) [hereinafter Goyette II].

[10] *Id.*

[11] *See* Goyette v. DCA Advertising, Inc., 828 F. Supp. 227, 230 (S.D.N.Y. 1993) [hereinafter Goyette I].

[12] *Id.* at 229.

DYR, an American corporation owned equally by the joint venturers.[13] When this relationship ended in 1986, Dentsu became the sole owner of the fledgling agency, which it renamed DCA.[14] Dentsu capitalized DCA with approximately $8 million and implanted ten Japanese Dentsu executives in DCA's New York offices to monitor the subsidiary's operations.[15] Aside from its ownership of DCA, however, Dentsu maintained few business contacts with the United States.[16]

The plaintiffs were among twenty-two American employees fired by DCA in September of 1990.[17] The discharged employees represented slightly more than fifteen percent of DCA's total work force.[18] The five plaintiffs also represented a wide range of advertising agency hierarchy. At the top of the pyramid was Russell Goyette. Goyette was hired in 1985 by DYR and quickly became vice president.[19] When the joint venture dissolved, a DYR client that opted to stay with Young & Rubicam requested that Goyette become a Young & Rubicam employee and continue to service the client's account.[20] DCA also had aspirations for Goyette, however, and succeeded in retaining him.[21] In February of 1988, Goyette was promoted to the position of Vice President and Group Account Director at DCA.[22] In that position, he supervised the accounts of many of DCA's Japanese clients.[23] Until his termination in 1990, Goyette received annual salary increases.[24] Evidence indicated that Goyette's accounts produced significant profits for DCA.[25] Nonetheless, Goyette was fired in September of 1990, and his accounts were divided between three Japanese Americans and one "Dentsu expatriate."[26] Two of Goyette's successors were previously his subordinates.[27] The evidence of Goyette's good performance pales, however, in comparison to a stunning admission noted by the court. When Goyette complained about his dismissal to DCA's President, Toshio Naito, Naito responded, "'I'm sorry. We have to treat Americans and Japanese differently. We have to favor the Japanese.'"[28]

Plaintiff Bernice Gerstein's case further illustrates the discriminatory nature of the DCA terminations. Gerstein was hired in 1987 as

---

13 *Id.* at 229.
14 *Id.*
15 Goyette II, 830 F. Supp. 737, 740 (S.D.N.Y. 1993).
16 *See id.*
17 *Goyette I*, 828 F. Supp. at 229. For the sake of brevity, the details of two plaintiffs' work histories and terminations are omitted from this Note.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.* at 230.
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.* at 230 n.5.
26 *Id.* at 230.
27 *Id.*
28 *Id.*

Media Group Head.[29] One year and two promotions later, she became DCA's Vice President and Associate Media Director.[30] Six months before her termination, Gerstein received a performance evaluation of 4.5, which, on a scale of one to five, ranked her between "exceeds standards" and "exceptional."[31] Though she was praised as "an incredibly gifted writer" and received raises in May and July of 1990, she too was fired in September.[32] Like Goyette, Gerstein was informed that her termination was not due to performance.[33] At the summary judgment hearing, plaintiffs produced evidence that Gerstein was replaced by Japanese expatriates who could not write a basic document in English, and who were unable to serve their clients successfully in the United States.[34]

The pervasive nature of the firings is demonstrated by the case of Julius Filicia. Filicia was hired as an Assistant Art Director in May of 1989.[35] Six months before his termination, he received a performance evaluation of 4.25.[36] Nonetheless, he too was fired in September of 1990, along with the majority of his creative group.[37] Again, Filicia was assured that his termination was not based upon performance.[38] The performance of the two remaining Art Directors, on the other hand, had been openly criticized by DCA supervisors.[39] National background once again surfaced as a likely motivator, because two Art Directors were retained: one Japanese expatriate and one Japanese American.[40] Evidence at the summary judgment hearing suggested that employees at all levels of the agency hierarchy were subjected to discriminatory terminations.

B. Round One: Plaintiffs' Claims for Relief Tested

1. Disparate Treatment

Plaintiffs presented a variety of legal theories to support their claim for damages. Their first cause of action alleged intentional disparate treatment in violation of Title VII of the Civil Rights Act of 1964.[41] In such a case, the court stated, the plaintiff must first establish a prima facie case of discrimination.[42] A prima facie case requires

---

29 *Id.* at 231.
30 *Id.*
31 *Id.*
32 *Id.* at 232.
33 *Id.*
34 *Id.*
35 *Id.* at 231.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 232 (citing 42 U.S.C. § 2000e-2 (1988)).
42 *Id.*

a showing "(1) that the plaintiff belongs to a protected group; (2) that the plaintiff was qualified for the position; (3) that the plaintiff was rejected from the position; and (4) that the discharge occurred in circumstances that give rise to an inference of discrimination."[43] If the plaintiff makes a prima facie showing, the burden of proof shifts to the defendant, who must rebut with a legitimate, nondiscriminatory explanation for its actions.[44] Finally, the plaintiff must prove that the defendant's explanation is a pretext for discrimination.[45]

Defendants mustered only minor challenges to three of plaintiffs' four prima facie elements. With little discussion, the court cited *McDonald v. Santa Fe Trail Transportation*[46] for the proposition that persons of American national origin are protected from discrimination by Title VII.[47] Likewise, the court quickly accepted defendants' concession that plaintiffs were in fact fired.[48] The issue of employee qualification required little more deliberation by the court. Precedent indicated that the plaintiff needed only show that he had the basic skills necessary for performance of the job.[49] Referring to each plaintiff's substantial history of favorable reviews and salary increases, the court found ample evidence to preclude a grant of summary judgment for defendants on the issue of employee capability.[50] Plaintiffs evidence easily withstood judicial scrutiny on the first three elements of the discrimination claim, setting up a more difficult fight on the fourth element.

Plaintiffs offered a barrage of evidence to prove defendants' discriminatory intention. The court first noted defendants' admissions that Japanese employees must be treated differently.[51] It then considered plaintiffs' indirect evidence of discrimination.[52] The indirect evidence included testimony that the American employees were replaced by Japanese employees with inferior performance records.[53] Plaintiffs also offered evidence that Japanese employees of equal or lesser professional stature than their American counterparts received higher pay and more benefits.[54] For example, while cars, club memberships, and other privileges were provided to Japanese expatriates holding positions below Senior Vice President, such perquisites were withheld from

---

43 *Id.* (citing Lopez v. S.B. Thomas, Inc., 832 F.2d 184 (2d Cir. 1987)).

44 *Id.*

45 *Id.*

46 427 U.S. 273 (1976).

47 Goyette I, 828 F. Supp. 227, 232-33 (S.D.N.Y. 1993).

48 *Id.* at 233.

49 *Id.* (citing Owens v. New York City Hous. Auth., 934 F.2d 405, 409 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 431 (1991) (quoting Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1979), *cert. denied*, 439 U.S. 984 (1979))).

50 *Id.*

51 *Id.*

52 *Id.* at 234.

53 *Id.*

54 *Id.*

American employees.[55] Even some business matters, such as the agency's Friday afternoon meetings, were open to Japanese employees, but off limits to Americans.[56]

In response to plaintiffs' evidence that their dismissals resulted from impermissible discrimination, defendants offered alternative explanations and justifications for their actions.[57] Defendants responded that their employees' statements had been misconstrued.[58] The court relegated the interpretation of defendants' statements to the list of jury duties.[59] Defendants also argued that plaintiffs were fired for poor performance in the course of a company-wide personnel reduction.[60] This argument, however, was met by plaintiffs' evidence of positive performance evaluations and the fiscal senselessness of replacing the American employees with better paid, poorly performing Japanese and Japanese American employees.[61] In sum, the court determined that plaintiffs had established a genuine factual issue as to whether DCA's explanations were a pretext for discriminatory treatment.[62]

2. Mixed Motives

Plaintiffs also preserved another theory for holding DCA liable. Plaintiffs argued that even if DCA had valid financial reasons for terminating employees, illegal discriminatory motives also contributed to the agency's actions.[63] The court explained that in such "mixed motive" cases, the plaintiff shifts the burden of proof to the defendant by proving by a preponderance of the evidence that discriminatory intent influenced the employer's decision.[64] The employer, in turn, must show that it would have made the same decision notwithstanding discriminatory intent.[65] After setting forth these rules, the court agreed with plaintiffs that the foregoing evidence raised material issues of fact on the "mixed motive" claim.[66]

3. Disparate Impact

Plaintiffs next advanced a claim of disparate impact discrimination. A disparate impact claim arises when the employer uses a facially neutral employment policy to produce discriminatory results.[67] Such

---

55 *Id.*
56 *Id.*
57 *Id.* at 233.
58 *Id.* at 234.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.* at 235.
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

policies survive judicial review only if they significantly promote legitimate employment purposes, and the plaintiff fails to suggest a policy to accomplish the same goals without the discriminatory effect.[68] In this case, plaintiffs attacked defendants' policy of reassigning, rather than firing, poorly performing Dentsu employees.[69] Plaintiffs based their allegation of discriminatory effect upon the fact that the protected Dentsu employees were Japanese, while the unprotected DCA employees were American.[70] Plaintiffs argued that the facially neutral policy of favoring Dentsu employees actually discriminated against Americans.[71]

The court determined that plaintiffs' discriminatory impact claim faltered on the issue of proof. Plaintiffs submitted statistical evidence which suggested that the Japanese Dentsu employees enjoyed unjustifiable favor.[72] After conceding that discriminatory impact is generally proven most effectively by statistical evidence, the court stated that such evidence is inappropriate when national origin and citizenship are empirically indistinguishable.[73] It then noted that Title VII does not proscribe discrimination based upon citizenship,[74] and explained that "if a company favors Japanese citizens over non-Japanese citizens, statistical studies that indicate that the company is discriminating based on national origin can also be explained by the company's citizenship policies."[75] Statistical evidence is thus unreliable and is prohibited due to its inability to distinguish between legal and illegal motives.[76] Because the Dentsu employees were of Japanese origin and citizenship, plaintiffs' only evidence, statistical data, was rendered useless, and the district court granted summary judgment for defendants on the claim of disparate impact.[77]

4. *The Treaty of Friendship, Commerce, and Navigation*

In response to plaintiffs' arguments, defendants claimed the protection of the Treaty of Friendship, Commerce, and Navigation (the

---

[68] *Id.* at 235-36 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)).
[69] *Id.* at 236.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 237.
[73] The court stated:

> [S]tatistical studies may not be used as evidence in all disparate impact cases. In a case where a defendant claims that it is discriminating based on citizenship, and the citizenship of the employees who the defendant is favoring is identical to the national origin of those employees, statistical evidence is unhelpful. The same statistics which purportedly show that the defendant is discriminating based on national origin can be explained by the defendant's legal policy of favoring persons of a particular citizenship.

Id. at 236.
[74] *Id.* at 236 n.17 (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)).
[75] *Id.* at 236.
[76] *Id.*
[77] *Id.* at 237.

FCN),[78] entered into between the United States and Japan shortly after World War II.[79] Article VIII(1) of that treaty "allows 'companies of either Party [to the treaty] . . . to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.'"[80] Defendants argued that this provision exempted them from the constraints of Title VII and allowed them to discriminate based upon national origin.[81]

Defendants were quickly shown that the FCN does not exempt them from Title VII. Citing the Second Circuit's decision in *Avigliano v. Sumitomo Shoji America, Inc.*,[82] the court stated that the FCN Treaty merely sought to allow Japanese employers to hire non-American citizens.[83] The treaty was not intended to exempt Japanese employers from other American laws.[84]

Despite its refusal to fully exempt defendants from the provisions of Title VII, the court did concede to defendants some benefits under the FCN. The court cited the Second Circuit's *Avigliano* decision for the proposition that Title VII must be interpreted in light of the FCN Treaty.[85] When interpreted in light of the Treaty, Title VII allows Japanese companies to discriminate based upon national origin if that factor is proven to be a bona fide occupational qualification (BFOQ).[86] Such a finding would require a showing that the position requires "(1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with . . . the parent enterprise in Japan, and (4) acceptability to those persons with whom the company . . . does business."[87] The court noted that defendants had produced no evidence that these qualifications were required of DCA's employees.[88] Accordingly, the FCN defense failed.[89]

---

[78] Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 [hereinafter FCN].

[79] *See* Goyette I, 828 F. Supp. 227, 236 (S.D.N.Y. 1993).

[80] FCN, *supra* note 78, art. VIII(1), 4 U.S.T. at 2070. See *infra* notes 128-170 and accompanying text for a discussion of the FCN.

[81] *Goyette I*, 828 F. Supp. at 236-37.

[82] 638 F.2d 552 (2d Cir. 1981), *rev'd and remanded on other grounds*, 457 U.S. 176 (1982). The Second Circuit identified the name plaintiff as "Avigliano." The Supreme Court later spelled the named "Avagliano."

[83] *Goyette I*, 828 F. Supp. at 237.

[84] *Id.* at 237 n.21.

[85] *Id.* at 237.

[86] *Id.* (citing Avigliano v. Somitomo Shoji America, Inc., 638 F.2d 552 (2d Cir. 1981), *rev'd and remanded on other grounds*, 457 U.S. 176 (1982)).

[87] *Id.* at 237.

[88] *Id.*

[89] *Id.*

5. *First Round Result: A Decision for Plaintiffs*

By winning the dismissal of the disparate impact claim, DCA's summary judgment motions limited, but failed to destroy, plaintiffs' case. Although plaintiffs kept their claims alive, the court's discussion of bona fide employment qualifications might have alerted defendants to a plausible defense for trial.

C. *Round Two: Dentsu Seeks Refuge in Japan*

1. *Long Arm, Broad Reach*

Shortly after it heard DCA's summary judgment arguments, the court considered Dentsu's liability under the Civil Rights Act. On a second summary judgment motion, Dentsu first argued that it was not subject to the jurisdiction of the New York District Court and was exempt from the provisions of Title VII.[90] Dentsu's motion for a Rule 12(b)(6) dismissal was accompanied by materials outside the pleadings, and was accordingly converted to a summary judgment motion.[91]

Dentsu unsuccessfully argued that the district court lacked personal jurisdiction over the Japanese concern. Because plaintiffs' suit arose under Title VII, which does not provide for national service of process, the court turned to New York's long-arm statute on the initial issue of personal jurisdiction.[92] New York law grants personal jurisdiction over foreign parent corporations whose subsidiaries provide services "beyond 'mere solicitation,'" which the parent would undertake for itself were the subsidiary not existent.[93] The court determined that DCA's services went well beyond mere solicitation, and that DCA existed to serve Dentsu's present Japanese clients and to generate additional contacts with the American subsidiaries of Japanese concerns.[94] The court then recognized Dentsu's status as the world's largest advertising agency and the sole owner of DCA's stock.[95] Finally, the court considered the tight reins that Dentsu kept over DCA and determined that, were DCA not in existence, Dentsu would find another means of operation in New York.[96] Without further hesitation, the court claimed jurisdiction over Dentsu.[97]

Dentsu next denied that it fell within the Title VII definition of "employer."[98] The court responded by citing *Spirt v. Teachers Insurance*

---

[90] Goyette II, 830 F. Supp 737, 740 (S.D.N.Y. 1993).
[91] *Id.* at 741.
[92] *Id.*
[93] *Id.* at 742 (citing Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967)).
[94] *Id.* at 743.
[95] *Id.*
[96] *Id.* at 744.
[97] *Id.*
[98] *Id.* at 745.

& Annuity Ass'n[99] for the proposition that Title VII defines "employer" broadly enough "to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law."[100] Although Dentsu denied involvement in plaintiffs' terminations, the court held that all of DCA's employees were affected by the general labor policies imposed by the parent company.[101] Accordingly, Dentsu was deemed plaintiffs' employer for the purposes of the Civil Rights Act.

Along similar lines, Dentsu argued that it did not employ more than fifteen people in the United States and was therefore not covered by Title VII.[102] The court responded by citing *Spirt* and asserting that Dentsu's control over DCA's firing practices justified Dentsu's liability under the Civil Rights Act.[103]

Dentsu also claimed that it was not engaged in a trade that affects commerce, as required for the application of Title VII.[104] The court restated precedent that "Title VII applies to foreign corporations to the extent that they employ people and discriminate against them within the United States."[105] It then referred to Dentsu's $8 million investment in DCA and the profits that Dentsu received from DCA for proof that Denstu was engaged in an industry that affected commerce for the purposes of Title VII.[106] Again, Dentsu's argument failed.

2. *The FCN Revisited*

Finally, Dentsu asserted another defense based upon the FCN.[107] The court once again explained that the Treaty does not provide Japanese companies with an unlimited right to discriminate.[108] Instead, the court reiterated, discriminating Japanese companies shoulder the burden of proving that national origin constitutes a bona fide employment qualification.[109] As before, however, the court noted defendants' failure to produce evidence on that issue.[110]

---

99 691 F.2d 1054, 1063 (2d Cir. 1982) (*further citations omitted*).

100 *Goyette II*, 830 F. Supp. at 744.

101 *Id.*

102 *Id.* at 745 (citing 42 U.S.C. § 2000-2 (1988)). In fact, Dentsu had no American employees, when judged by common law standards. *Id.* For the purposes of the Civil Rights Act, though, the court found the common law definition inapposite. *Id.*

103 *Id.*

104 *Id.* (citing 42 U.S.C. § 2000-e (1988)).

105 *Id.* (citing EEOC v. Kloster Cruise Ltd., 743 F. Supp. 856, 858 (S.D. Fla. 1990), *rev'd on other grounds*, 939 F.2d 920 (11th Cir. 1991); Ward v. W & H Voortman, Ltd., 685 F. Supp. 231, 232 (M.D. Ala. 1988)).

106 *Id.* at 746.

107 *Id.* at 749.

108 *Id.*

109 *Id.*

110 *Id.*

3. Second Round Result: Dentsu Suffers Substantial Exposure

New York's broadly structured long-arm statute prevented Dentsu from escaping the jurisdiction of the District Court. Likewise, broad interpretations of Title VII and the FCN prevented Dentsu from escaping the grip of the Civil Rights Act. Alongside its subsidiary, Dentsu was rendered susceptible to significant civil liability.

III. Background Law

The pertinent portions of Title VII are as follows:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .
>
> (e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[111]

The groundwork for plaintiffs' case was laid by the Supreme Court in *McDonald v. Santa Fe Trail Transportation*.[112] *McDonald* involved a claim of racial discrimination by two employees who were fired after being charged with stealing sixty one-gallon cans of antifreeze.[113] The plaintiff alleged discrimination because an alleged black co-conspirator, also charged in the theft, was not fired.[114] The Court first drew upon dicta in *Griggs v. Duke Power Co.*[115] indicating that Title VII prohibits "'[d]iscriminatory preference for any [racial] group, minority or majority.'"[116] It then noted legislative testimony that Title VII "was intended to 'cover all white men and white women and all Americans.'"[117] Finally, the Court held that "Title VII prohibits racial discrimination against the white petitioners in this case, upon the same standards as would be applicable were they Negroes and [the co-conspirator] white."[118]

---

111 42 U.S.C. § 2000e-2(a), (e) (1988).

112 427 U.S. 273 (1976).

113 *Id.* at 276.

114 *Id.*

115 401 U.S. 424, 431 (1971).

116 McDonald v. Santa Fe Trail Transportation, 427 U.S. 273, 279 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

117 *Id.* at 280 (quoting 110 CONG. REC. 2,578 (remarks of Rep. Celler)).

118 *Id.*

Also of relevance to *Goyette* is *Espinoza v. Farah Mfg. Co.*[119] Cecilia Espinoza, a Mexican citizen and American resident alien, initiated the case after being denied employment by the defendant, which had a policy of not employing aliens.[120] Espinoza claimed the defendant had in fact discriminated against her due to her national origin.[121] The Supreme Court first noted the plain language distinction between "citizenship" and "national origin," the latter of which "on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[122] The Court then found support for the distinction in the legislative history of Title VII.[123] Having resolved that issue, the Court conceded that prohibitions against hiring aliens may mask or produce discrimination based upon national origin.[124] "Certainly," the Court held, "Tit[le] VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[125] Ms. Espinoza, however, was unable to prove unlawful discriminatory intent or effect because ninety-six percent of Farah's work force consisted of American citizens of Mexican ancestry.[126] Standing alone, discrimination based upon national citizenship was deemed permissible under Title VII.[127]

The other major legal document considered by the *Goyette* court was the FCN.[128] Article VIII(1) of the treaty states:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of the other Party.[129]

Since its adoption in 1952, however, the forceful plain language of the treaty has been largely judicially curtailed.

The Second Circuit Court of Appeals interpreted the FCN in *Avig-*

---

119 414 U.S. 86 (1973).

120 *Id.* at 87.

121 *Id.*

122 *Id.* at 88.

123 *Id.* at 88-89.

> The only direct definition of 'national origin' is the following remark made on the floor of the House of Representatives by Chairman Roosevelt, Chairman of the House Subcommittee which reported the bill: 'It means the country from which you or your forbearers came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country.'

Id. (citations omitted).

124 *Id.* at 92.

125 *Id.*

126 *Id.* at 93.

127 *Id.* at 95-96.

128 FCN, *supra* note 78, art. VIII(1), 4 U.S.T. at 2070.

129 *Id.*

liano v. Sumitomo Shoji America, Inc.[130] In *Avigliano*, a group of female secretarial employees claimed that their employer, an American-incorporated Japanese subsidiary, violated Title VII by hiring only male Japanese employees for management-level positions.[131] The district court had held that Sumitomo, as an American corporation, was not protected by the FCN.[132] The court of appeals disagreed, arguing that "[i]t is unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in [one article], and then gone on to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains."[133] Nonetheless, the court proceeded to hold that Article VIII of the FCN does not authorize Japanese companies to violate American laws.[134] The court determined that the language of Article VIII was merely intended to override local laws that prohibited the employment of noncitizens.[135] The court decided that the FCN does, however, justify a more expansive interpretation of the bona fide occupational qualification exception to the Civil Rights Act.[136] If the Japanese company can prove that the job requires an understanding of Japanese culture, language, and business practices, the BFOQ exception may be met.[137] The court of appeals remanded the case for an examination of the defendant's BFOQ evidence.[138]

The Supreme Court interpreted the FCN differently.[139] It held that Sumitomo Shoji America, Inc., by virtue of its incorporation in New York, was an American corporation.[140] As such, it was not entitled to the protection afforded by the FCN to Japanese companies merely operating in the United States.[141] Prominent in the Court's conclusion were representations by the governments of Japan and the United States that Article VIII does not apply to companies incorporated in the United States, even if the companies are wholly owned by Japanese companies.[142] The Court discerned that the FCN's corporate provisions were intended to "give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms."[143] An explicit grant of legal status was necessary because corpo-

130 638 F.2d 552 (2d Cir. 1981), *rev'd and remanded*, 457 U.S. 176 (1982).
131 *Id.* at 553.
132 *Id.* at 555.
133 *Id.* at 556.
134 *Id.* at 559.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *See* Avagliano v. Sumitomo Shoji America, Inc., 457 U.S. 176 (1982).
140 *Id.* at 182.
141 *Id.* at 183.
142 *Id.* at 183-84.
143 *Id.* at 185-86.

rations lacked a legal existence outside of their creator's sovereignty.[144] The Court concluded that the defendants' employer was an American corporation and thus was not protected by Article VIII of the FCN.[145] Finally, the Court expressly refused to decide whether, as the Second Circuit found, Japanese citizenship may constitute a bona fide occupational qualification.[146]

The Supreme Court's *Avagliano* opinion also produced conflicting statements and inferences regarding the practical effect of the FCN. The Court stated that "[t]he purpose of the treaty was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."[147] According to the Court, this was accomplished in two ways: by granting Japanese corporations "national treatment," and by allowing them to incorporate subsidiaries in the United States.[148] The Court then distinguished between the two methods, and as noted above, found domestic incorporations outside the scope of Article VIII(1) protection.[149] It rejected the Second Circuit's contention that an interpretation of the FCN that distinguished between national treatment and domestic incorporation would deny Japanese subsidiaries the substantial rights afforded by the FCN to unincorporated branches of Japanese companies.[150] Instead, the Court held, "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)."[151] In sum, the Court interpreted the FCN to secure equal treatment for Japanese companies. The most apparent means of achieving parity is by creating a representative American corporation. Yet companies that incorporate in America are conceded by the Court to lack an advantage that unincorporated firms have: the benefit of Article VIII(1) of the FCN.

After *Avagliano*, the Third Circuit Court of Appeals, in *MacNamara*

---

144 *Id.* at 186.

145 *Id.* at 189.

146 *Id.* at 189 n.19. The Court added however, that, "there can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country." *Id.*

147 *Id.* at 187-88. The Court relegated to a footnote the FCN's own definition of "national treatment," specifically, "treatment accorded within the territories of a Party upon terms *no less favorable than* the treatment accorded therein, in like situations" to domestic companies. *Id.* at 188 n.18 (emphasis added). It then followed the Treaty's definition with the assertion that "[i]n short, national treatment of corporations means equal treatment with domestic corporations." *Id.* at 187-88. For contrasting evidence, see *infra* note 157.

148 *Id.* at 188.

149 *Id.* at 189.

150 *Id.* at 189. The Second Circuit argued that if domestic incorporations were treated differently from unincorporated branches, "a crazy quilt pattern [of varying rights] would emerge." Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 556 (2d Cir. 1981), *rev'd and remanded on other grounds*, 457 U.S. 176 (1982). This reasoning, and the Second Circuit's metaphor, was later adopted by the Fifth Circuit in Speiss v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

151 *Avagliano*, 457 U.S. at 189.

v. Korean Air Lines,[152] examined Korea's FCN Treaty, which included provisions identical to the Japanese FCN. The Third Circuit determined that the FCN protects the foreign employers from citizenship-based, but not national origin discrimination liability.[153] The court stated that the "literal meaning of a treaty's language should control unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of the signatories."[154] After conceding, however, that the Treaty's terms were "absolute and ostensibly self-defining," the court noted that neither litigant had suggested that a literal interpretation of the Treaty was appropriate.[155] Freed from the constraints of plain language, the court proceeded to examine the purpose of Korea's FCN.[156] The court noted expert testimony which indicated that the FCN provisions were intended to ensure fair treatment to investors from both countries.[157] It then asserted that the negotiating countries had no reason to bargain for the right to discriminate within each other's countries.[158] The court further argued that the language of Article VIII(1) reflected an understanding that only citizenship discrimination was protected.[159] If the first sentence of Article VIII(1) was intended to immunize foreign employers from domestic employment law, the court reasoned, the second sentence of the provision would constitute surplusage.[160] The *MacNamara* court thus found no support for the assertion that the FCN authorized national origin discrimination.[161]

Goyette cites *MacNamara* for the latter's holding regarding the use of statistics in disparate impact cases. After establishing that the FCN protected citizenship discrimination, the *MacNamara* court noted that in countries with homogeneous populations, citizenship and national origin are statistically indistinguishable.[162] The use of statistical evidence in such cases could therefore produce false indications of national origin discrimination against corporations permitted under the FCN to discriminate based upon citizenship.[163] To protect the force of

---

152 863 F.2d 1135, 1139 (3d Cir. 1988).

153 *Id.* at 1140-41.

154 *Id.* at 1143 (citations and punctuation omitted).

155 *Id.*

156 *Id.*

157 *Id.* at 1142. The expert testified, "They aim, on a joint and consensual basis, to establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor." *Id.* at 1142-43. The same expert, Herman Walker, was also cited in Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981), for the assertion that the FCN also included "[a]bsolute rules [that] were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population." *Spiess*, 643 F.2d at 360 (citations omitted).

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

159 *Id.*

160 *Id.*

161 *Id.* at 1146.

162 *Id.* at 1148.

163 *Id.* "Thus, unlike a disparate treatment case where liability cannot be imposed with-

the Treaty, the court refused to impose liability solely on the basis of statistical evidence.[164]

Several cases not cited in *Goyette* are also relevant to an analysis of the FCN dilemma. These cases reflect the efforts of other circuits to reconcile FCN treaties with American antidiscrimination law. On one hand, the Fifth Circuit Court of Appeals has determined that the FCN fully insulates Japanese companies from American antidiscrimination law.[165] On the other hand, the Third,[166] Sixth,[167] and Seventh[168] Circuits have each decided that the FCN only protects the foreign employer from liability for *citizenship-based* discrimination.[169] However, all of the latter circuits, like the Second Circuit, have rejected proof of national origin discrimination, which could be explained alternatively in terms of legitimate citizenship-based discrimination.[170]

IV. Significance of the Case

Although *Goyette* reaches what seems to be an equitable and somewhat comfortable conclusion, its comparison with the background law justifies some concern. Defendants arguably prevailed on some issues in which they should not have. For example, defendants' escape from plaintiffs' discriminatory impact cause of action was probably premature. Plaintiffs alleged that former Dentsu employees, in contrast to DCA's American employees, were consistently reassigned rather than being fired for poor performance.[171] Though it is not apparent that defendants made this argument, the court responded with *MacNamara's* conclusion that statistics purportedly showing illegal national origin discrimination cannot be distinguished from legal citizenship discrimination.[172] Looking only to the statistical evidence for proof of illegal discrimination, the court dismissed that claim.[173] In doing so, the court misread or misapplied *Espinoza*, which clearly pro-

---

out an affirmative finding that the employer was not simply exercising its Article VIII(1) right, a disparate impact case can result in liability where the employer did nothing more than exercise that right." *Id.* (emphasis omitted).

164 *Id.*

165 *See* Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982). Though *Spiess* uses the term "citizens," its reasoning seems to cover national origin discrimination. *Spiess* has been interpreted by the Third Circuit to "fully [insulate] the company from domestic anti-discrimination laws with respect to the hiring of executives." MacNamara v. Korean Air Lines, 863 F.2d 1135, 1139 (3d Cir. 1988).

166 *See MacNamara*, 863 F.2d 1135.

167 *See* Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984).

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

169 For an efficient and helpful examination of each of the circuits' interpretations, see Scott Mozarsky, Note, *Defining Discrimination on the Basis of National Origin Under Article VIII(1) of the Friendship Treaty Between the United States and Japan*, 15 FORDHAM INT'L L. J., 1099, 1108-12 (1991-92).

170 *See, e.g., Fortino*, 950 F.2d at 393; *MacNamara*, 863 F.2d at 1148.

171 Goyette I, 828 F. Supp. 227, 236 (S.D.N.Y. 1993).

172 *Id.*

173 *Id.* at 237.

hibits citizenship-based discrimination when used to mask or procure national origin discrimination. The *Goyette* court was obligated to look beyond defendants' defense of citizenship discrimination, as the Supreme Court did in *Espinoza*, to determine whether defendants' policy was a mere pretense for national origin discrimination. Ample evidence of bad faith discrimination was before the court on other issues to justify a denial of summary judgment, and to submit the issue to a trier of fact with more time and inclination to learn the truth. Without a doubt, the court's unqualified statement that "[i]t is well-settled that Title VII permits discrimination based upon citizenship,"[174] is deceptively simple.

The concept of citizenship discrimination also presents other questions that are unresolved, if not confused, by the *Goyette* court. In 1973, the Supreme Court held in *Espinoza*[175] that citizenship-based discrimination was not in itself illegal. Nine years later in *Avagliano*,[176] the Court expressly declined to consider whether Japanese citizenship may be a bona fide occupational qualification. If the discrimination is truly based strictly upon citizenship, *Espinoza* would obviate the need for a BFOQ exception. Only if the discrimination is actually a mask or tool for national origin discrimination should the BFOQ analysis be necessary to avoid the provisions of the Civil Rights Act.

The BFOQ paradox might be explained with reference to procedural matters in *Avagliano*. The *Avagliano* plaintiffs, probably having read *Espinoza*, claimed that Sumitomo was actually discriminating based upon national origin rather than citizenship.[177] The district court, citing *Espinoza*, decided that the defendant's policy resulted in national origin discrimination.[178] That issue was not, however, certified for review to the appellate or Supreme Court.[179] As a result, the Supreme Court did not reach the issue and was careful to classify the case as one involving citizenship, rather than national origin, discrimination.[180] Though the Court was apparently not interested in considering the Second Circuit's treatment of the BFOQ issue, it was also reluctant to allow the Second Circuit's liberal interpretation of the Title VII exclusion to become good law by default. The Court therefore took the middle ground by noting, but neither approving nor rejecting, the Second Circuit's treatment of alleged national origin discrimination with reference to the FCN. In any event, the *Goyette* court was probably correct when it stated that a Japanese corporation can

---

174 *Id.* at 236 n.17.

175 Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

176 Avagliano v. Sumitomo Shoji America, Inc., 457 U.S. 176, 189 n.19 (1982).

177 *See* Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 553 (2d Cir. 1981), *rev'd and remanded on other grounds*, 457 U.S. 176 (1982).

178 *See Avagliano*, 457 U.S. at 180 n.4.

179 *Id.* at 180.

180 *See id.* at 178.

discriminate based upon national origin when origin is a BFOQ.[181] The question remaining unresolved is whether the FCN justifies a liberal interpretation of the BFOQ exception to the Civil Rights Act.

The *Goyette* court may also have been incorrect in its discussion of the beneficiaries of the FCN. The court cited the Second Circuit's opinion in *Avigliano* for the proposition that "Article VIII of the FCN Treaty does not exempt a Japanese company operating in the United States, whether a parent or a subsidiary organization, from the reach of Title VII."[182] In doing so, the *Goyette* court ignored the Supreme Court's implicit rejection of that proposition. The Supreme Court held in *Avagliano* that subsidiaries incorporated in the United States were American companies and were therefore not protected by the FCN.[183] Yet the Court distinguished "national treatment" from domestic incorporations.[184] In fact, the Court asserted that unincorporated branches of Japanese companies *would* enjoy a right not shared by the domestic corporations: the protection of FCN Article VIII.[185] In light of *Espinoza's* holding that companies may discriminate based upon citizenship, the only *additional* benefit that the unincorporated branches could possibly enjoy would be the right to discriminate based upon national origin. The Second Circuit's opinion on this issue is no longer good law, and the *Goyette* court erred by relying on it in the face of contrary Supreme Court precedent.

Goyette may also be seen as merely another propagator of some very suspicious judicial precedent. American courts, particularly the Second and Third Circuits, have demonstrated eagerness to avoid the plain language of the FCN. As noted above, the Second Circuit in *Avigliano* interpreted the treaty in light of business conditions at the time of the treaty. The court concluded that although the FCN was intended to facilitate the employment of foreign nationals, the main obstacle to this goal was legislation restricting the employment of non-citizens, not prohibitions against favoring persons on the basis of national origin.[186] Though the court's understanding of the Treaty's historic setting may be correct, that understanding does not necessarily undercut the literal meaning of the FCN's provisions. Quite possibly, the court was motivated by its own concern that a literal interpretation of the Treaty "would immunize a party not only from Title VII but also, from laws prohibiting employment of children, laws granting rights to unions and employees, and the like."[187]

---

[181] Goyette I, 828 F. Supp. 227, 237 (S.D.N.Y. 1993). After all, a BFOQ exception is included in the plain language of the Civil Rights Act. *See* 42 U.S.C. 2000e-2(e) (1988).

[182] *Goyette I*, 828 F. Supp. at 237.

[183] *Avagliano*, 457 U.S. at 189. *See supra* notes 140-42 and accompanying text.

[184] *Avagliano*, 457 U.S. at 188-89.

[185] *Id.* at 189.

[186] Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 559 (2d Cir. 1981), *rev'd and remanded on other grounds*, 457 U.S. 176 (1982).

[187] *Id.* (citations omitted).

The Third Circuit's analysis in *MacNamara* is less defensible. As noted above, the *MacNamara* court first sought to avoid the plain language of the Korean FCN by arguing that the parties had no reason to bargain for a privilege to discriminate based upon national origin.[188] Yet the court recognized the parties' goal of reciprocal freedom to hire their own countrymen.[189] These two propositions are simply not mutually inconsistent. Assuming, for example, that the primary goal of the FCN was to facilitate economic cross-fertilization, this by no means precludes a subsidiary objective of securing the freedom to hire based upon national origin.[190] Nonetheless, the Third Circuit effectively determined that the adoption of one objective precluded the concurrent pursuit of a similar goal. Although *MacNamara* demonstrates unusual and manipulative interpretation techniques, its conclusions are currently accepted as well-established by the courts of several districts.[191]

The *MacNamara* court's contrived adherence to signatory intent also indicates a profound lack of confidence in the parties who negotiated the treaty. Going into treaty negotiations with Korea, as in *MacNamara*, the American diplomats must have been aware of the homogeneous nature of that society. And in the case of Japan, virtually any American would have been aware that the Japanese citizens, against whom the United States had just fought a World War, all bore striking ethnic and cultural similarities. The assertion that the negotiators did not consider this fact envisions a "sign along the dotted line, and we'll both be home for dinner" approach to treaty making, which is both sobering and hopefully unfounded.

Similarly unsatisfactory is the *MacNamara* court's second argument in support of a limited interpretation of the FCN. The court's identification of surplusage in the first and second sentences of FCN Article VIII(1)[192] can easily be explained with reference to the plain language. The first sentence clearly pertains to the employment of executive *personnel, or employees.* The second sentence, on the other hand, relates to the engagement of other professionals who typically would be independent contractors rather than employees per se. As the *MacNamara* court notes, the language of the Treaty is clear and unambiguous.[193]

Despite the contrived nature of the various courts' reasoning, the conclusion of an emasculated FCN is carried forward into, and through, *Goyette.* At the heart of the controversy is the fact that the

---

188 MacNamara v. Korean Air Lines, 863 F.2d 1135, 1143 (3d Cir. 1988).

189 *Id.* at 1144.

190 *See supra* note 157.

191 *See, e.g.*, Fortino v. Quasar, 950 F.2d 389, 391 (7th Cir. 1991) (stating unequivocally and without citation that "[t]he treaty permits discrimination on the basis of citizenship, not of national origin").

192 *MacNamara*, 863 F.2d at 1143.

193 *Id.*

FCN predated the Civil Rights Act. Courts were thus called upon to determine whether the signatories, like the people of Japan, sought the right to entrust their business to people who looked, sounded, and generally seemed more like themselves, or whether they merely intended to preserve the right to hire their neighbor, whatever his national background. In light of cases such as *Goyette*, the assertion that the Japanese valued, and bargained for, the right to hire based upon national origin does not seem unfounded. But in considering that issue, courts have foreseen and avoided the consequence of foreign companies enjoying greater rights than their American counterparts.[194] *Goyette* simply carries on this judicial tradition, though in a more moderated fashion, by granting to defendants the aid of the Second Circuit's liberalized BFOQ analysis.

The same concerns have arguably led most circuits to reject the Second Circuit's BFOQ analysis. The BFOQ standards laid down by the Second Circuit are more than liberal. Few Japanese employers should have difficulty showing that their employees need Japanese linguistic and cultural skills, knowledge of Japanese products and business practices, and familiarity with the parent company. Yet all of these qualities might reasonably be expected of any American who has earned a Master's Degree in Business Administration within the last ten years. The remaining factor, acceptability to the Japanese clients, may be viewed as catering to the prejudices of Japanese businessmen. While realistic, this concept would likely be distasteful to the average American, and the typical judge.

V. Conclusion

A. About the Law

Goyette v. DCA presents a jurisprudentially pleasing example of the nation's laws responding to and meeting the changing needs of society. As noted in the seminal case of *Griggs v. Duke Power Co.*,[195] the Civil Rights Act of 1964 was intended "to achieve equality of employment opportunities and [to] remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Through legislative and judicial renovation, the Civil Rights Act has remained fresh and capable of protecting even the nation's majority class.

---

[194] The *MacNamara* court explained the dilemma:

> If Article VIII(1) is read as protecting a foreign employer's right to employ its own citizens, it is thereby guaranteed the same access to its own citizens as domestic employers have to theirs. If it is interpreted to confer an immunity from Title VII and the ADEA in connection with personnel decisions involving citizens of the foreign company's country, it would give to foreign businesses a right not possessed by domestic employers.

Id. at 1146. It was this result that the Supreme Court implicitly approved in *Avagliano*.

[195] 401 U.S. 424 (1971).

On the other hand, the civil rights victory in *Goyette* may easily be attributed and limited to its factual situation, which was highly favorable to plaintiffs. After learning its lesson in *Goyette*, Japanese companies will certainly know better than to confess preferential treatment for employees of Japanese descent. As Ward Cleaver might point out, this case should certainly teach the Japanese corporate community a valuable lesson, which the community is unlikely to forget quickly. Furthermore, the setting of the case, an advertising agency, is unique. By its nature, success in advertising depends largely, if not primarily, on knowing and communicating with the audience, not with the client. Plaintiffs were selected and rewarded for their ability to sell Japanese products to American consumers, not vice versa. Thus, defendants had difficulty classifying plaintiffs' positions as jobs requiring intimate knowledge of Japanese business or culture. As a result, the chances of meeting even the Second Circuit's liberalized BFOQ exception were minimal in this case.

B. American Society Examined

What began as a study of Japanese culture, vis-a-vis the economic community, may conclude as a study of American society, vis-a-vis its judicial system. Though the words of the FCN are conceded by the courts to be abundantly clear, few courts have been willing to honor them.[196] In fact, some litigants do not even dare to advocate a literal interpretation.[197] The decisions in cases involving the FCN suggest the existence of a deep-seated repugnance to the concept of national origin discrimination.[198] As a result of this sentiment, courts can barely conceive of American diplomats bartering away freedom from national origin discrimination in exchange for the right to do business in other countries. Obviously, the courts reason, something else was intended, but certainly not *this*. Arguably, Americans feel about national origin discrimination the way that the Japanese feel about layoffs—it should just never happen. Cases like *Goyette*, however, indicate that the Japanese may have sought the freedom to discriminate based upon national origin. Accordingly, the FCN offered status "no less favorable than" that enjoyed by domestic corporations.

Paradoxically, most courts are willing to reject allegations of more covert national origin discrimination. When the defendant obscures its intentions and asserts a defense of citizenship discrimination, courts seem content to accept the defendant's contention out of respect for

---

[196] One exception to the general rule is the Fifth Circuit decision in Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

[197] "Neither KAL nor MacNamara, however, suggest that a literal interpretation of the provision is an appropriate one." *MacNamara*, 863 F.2d at 1143.

[198] It was this sentiment, certainly prevalent before 1964, that gave rise to the Civil Rights Act.

the FCN.[199] Perhaps defendant's "excuse" (assuming that a contrary motivation exists, which is not always apparent) allows the court to reassure itself that the unthinkable is not really occurring. Nonetheless, this blind-eyed approach to discrimination cases results in few victories for the plaintiffs. *Goyette*, due to the remarkable candidness of the defendants, and the unusual nature of the advertising business, was one such victory.

BRANNON S. BURROUGHS

[199] *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 391 (7th Cir. 1991).