Friendship, Commerce and Navigation Treaties and Title VII

Insights
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On April 15, 2015, former employee Steven Heldt sued Tata Consultancy Services, Ltd. in United States District Court for the Northern District of California for discrimination. Tata is multinational corporation headquartered in Mumbai, India with 19 offices in the United States that provides consulting, technology, and outsourcing services. Heldt alleges that "approximately 95% of Tata's United States workforce is of South Asian descent" as a result of Tata's intentional pattern and practice of disfavoring employees not of that ethnicity in hiring, placement, and termination decisions.

This case raises the question of under what circumstances a foreign company operating in the U.S. can offer preferential treatment to its own nationals. Typically, employees who work in the U.S. or its territories for covered employers are protected by Title VII and other discriminations laws. However, if the employer's home country has a Friendship, Commerce, and Navigation treaty with the U.S., the company is permitted to engage certain employees "of their choice", including executive personnel, accountants, attorneys, and other technical specialists. Many circuit courts have interpreted this provision to grant foreign companies operating in the U.S. a limited right to discriminate in favor of its own citizens. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1143 (3d Cir. 1988), *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984), *Ventress v. Japan Airlines*, 486 F.3d 1111 (9th Cir. 2007). There are, however, two important limitations on this privilege. First, courts have held that FCN treaties do not grant a company blanket immunity from federal and state discrimination laws. Second, the privilege only applies to "executive" employees.

Still, a foreign company operating in the U.S. may openly discriminate in favor of its own citizens in executive hiring without running afoul of Title VII *if there* is a FCN treaty in place between the two countries. Unfortunately for Tata, the U.S. does not have an FCN treaty with India.

It is important to note that this litigation is in its infancy, and Tata has not yet had an opportunity to respond to Heldt's allegations. It is also important to note that Heldt's claims are for disparate treatment discrimination, not disparate impact. This means that Heldt is alleging, and bears the ultimate burden of proving, that Tata intentionally discriminated against individuals not of South Asian descent. If Heldt can prove true these allegations, Tata will have to set forth a legitimate, non-discriminatory reason for its hiring decisions, just as any U.S. employer facing these allegations would.