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Sea Water Dissolves Disability Discrimination Protections: The Application of Title I of the Americans with Disabilities Act to Foreign-Flag Cruise Ship Employees.

I. Introduction

In an increasingly globalized market, it is not uncommon for American employees to be employed by international organizations, either within the United States or abroad. Thus, the question of extraterritorial application has been raised with regard to many U.S. labor laws and regulations. This question is further complicated when attempting to apply such laws and regulations to foreign-flag vessels – including cruise ships. Although most of the world’s cruise companies, including some of the leading cruise lines such as Royal Caribbean, Norwegian Cruise Lines, and Carnival Corporation, maintain their headquarters within the United States, and nearly half of the world’s cruise ship passengers are American, the cruise industry has often claimed exemption from U.S. laws.¹ This claimed exemption comes from the conflict between the law of the ship’s flag state, international law, and the laws of the United States. Based on the potential conflicts of law, as to cruise ships and international corporations operating within the United States more generally, the courts have adopted a presumption against extraterritorial application of U.S. law, unless Congress has expressed a clear intent for such application.²

¹ Royal Caribbean Cruises, Ltd., Quarterly Report (Form 10-Q) (Sept. 30, 2018) <http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=12513309&type=PDF&symbol=RCL&companyName=Royal+Caribbean+Cruises+Ltd.&formType=10-Q&dateFiled=2018-10-26> (last visited Nov. 10, 2019); Norwegian Cruise Lines, Quarterly Report (Form 10-Q) (Nov. 9, 2018) <http://www.nclhldinvestor.com/static-files/a27b1aa9-dde6-459f-b68a-6dade3b74d48> (last visited Nov. 10, 2019); Carnival Corp., Quarterly Report (Form 10-Q) (Sept. 27, 2018) <https://www.carnivalcorp.com/static-files/bbefd2be-5a86-49db-b7bb-5599d822e947> (last visited Nov. 10, 2019); The Florida-Caribbean Cruise Association, 2018 Cruise Industry Overview, 4, <https://www.f-cca.com/downloads/2018-Cruise-Industry-Overview-and-Statistics.pdf>; Cruise Lines International Association, Travel Agent Cruise Industry Outlook (Winter 2018), <https://cruising.org/docs/default-source/research/clia-2018-state-of-the-industry.pdf?sfvrsn=2> (last visited Nov. 10, 2019) (In 2016, 11.5 million Americans were cruise ship passengers of the 22 million worldwide.); *Spector v. Norwegian Cruise Lines Ltd.*, 545 U.S. 119, 133-34 (2005); *Equal Emp’t Opportunity Comm’n v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 759. (11th Cir. 2014).

² John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 351 (2010).

Accordingly, under a misguided claim of immunity, cruise lines, based out of and operating in the United States, have alleged that the Americans with Disabilities Act of 1990 (“ADA” or “the Act”),³ including Title I, which governs discrimination in employment, is inapplicable to their discriminatory conduct. This Comment will argue that no such exemption exists and, therefore, the ADA should and does apply to cruise line employees of cruise companies based out of the U.S., even if they are not incorporated here.

The Americans with Disabilities Act established a “comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁴ Title I of the ADA states that “no covered entity shall discriminate against a qualified individual on the basis of a disability” in the job application process, hiring, discharge, and privileges of employment.⁵ When initially enacted, the Americans with Disabilities Act did not express a Congressional intent for extraterritorial application, as recognized by the Supreme Court in *EEOC v. Arabian American Oil Co.*⁶ In *Arabian American*, the plaintiff, a naturalized American citizen working in Saudi Arabia, claimed that his employer, Arabian American Oil Company (“Arabian”), a Delaware corporation, had harassed him and ultimately discharged him because of his race, religion, and national origin.⁷ Arabian filed a motion for summary judgment on the ground that the district court lacked subject-matter jurisdiction because Title VII does not apply to American citizens employed abroad.⁸ The Court explained that without clearly expressed Congressional intent, the Court must presume “Congress legislates against the backdrop of the presumption against extraterritoriality,” meaning that it is “primarily concerned with domestic conditions.”⁹

³ Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12101-21213 (Lexis 2018).

⁴ 42 U.S.C.S. § 12101(b)(1).

⁵ § 12112(a).

⁶ *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 258-59 (1991).

⁷ *Id.* at 247.

⁸ *Id.*

⁹ *Id.* (internal citation omitted).

Prior to the amendments to both statutes, neither made any reference to foreign companies or corporations.¹⁰ Prior to the 1991 amendment, an employer was defined by both Title VII and Title I of the ADA as a “person engaged in an industry affecting commerce” with 15 or more employees for each working day in twenty or more calendar weeks in the “current or preceding calendar year.”¹¹ Following *Arabian American*, at the invitation of the Supreme Court, Congress amended Title VII, and Title I of the ADA, to include foreign corporations.¹² Similarly, Title VII was amended to include largely the same language.¹³

Title I of the ADA, and Title VII, limits its extraterritorial application to foreign operations controlled by American employers.¹⁴ The considerations for determining whether a corporation is controlled by an American employer include: “(i) the interrelation of operations; (ii) the common management; (iii) the centralized control of labor relations; and (iv) the common ownership or financial control, of the employer and the corporation.”¹⁵ Further, the Act states that otherwise discriminatory conduct under the ADA is not unlawful if compliance with the Act would cause the entity to violate the law of the foreign country in which the workplace is located.¹⁶

¹⁰ See Equal Employment Opportunity Act of 1972, 92 Pub. L. No., § 261, 86 Stat. 103 (Mar. 24, 1972) (current version at 42 U.S.C.S. §§ 2000e - 2000e-17); Americans with Disabilities Act of 1989, 101 Pub. L. No., § 336, 104 Stat. 327 (current version at 42 U.S.C.S. §§ 12101-12113).

¹¹ § 261, 86 Stat. 103; § 336, 104 Stat. 327.

¹² *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 158 n.9 (2005). See § 12112(c). See also *Loving v. Princess Cruise Lines, Ltd.*, No. CV 08-2898 JFW AJWX, 2009 WL 7236419, at *2545 (C.D. Cal. Mar. 5, 2009) (stating that Congress amended Title I of the ADA in response to the Supreme Court’s decisions in *Equal Emp’t Opportunity v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) and the decision not to similarly amend Title III supports the idea that Congress did not intend for Title III to have extraterritorial effects).

¹³ 42 U.S.C.S. § 2000e-1 (stating that the Act “shall not apply to an employer with respect to the employment of aliens outside any State . . .” and that it will not be unlawful “for an employer. . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance . . . would cause such employer . . . to violate the law of the foreign country” where the workplace is located.)

¹⁴ § 12112(c)(2)(B); Title VII, 42 U.S.C.S. § 2000e-1 (Lexis) (Title VII “shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.”)

¹⁵ 42 U.S.C.S. § 12112.

¹⁶ § 12112 (c)(1)

Although Congress’s clear expression of intent should require the application of the ADA to foreign-flag vessels, the Act’s exception, permitting otherwise unlawful discrimination if compliance with the Act would cause the vessel to violate applicable foreign laws, allows foreign-flag cruise ships to claim immunity for their illegal conduct. Further, faced with a unique area of employment which requires medical examination to ensure workers are “seaworthy,” cruise lines often claim that maritime law regulations require such discrimination. The Supreme Court has not had the opportunity to address the application of Title I of the ADA to foreign flag vessels. However, the Court, in *Spector v. Norwegian Cruise Lines Ltd.*,¹⁷ addressed the application of Title III of the Act under such circumstances.¹⁸ Although the plurality decision left some questions unanswered regarding extraterritorial application of Title III of the Act, the decision is helpful in assessing Title I cases under the Act as it provides a formulaic and predictable means to review such cases, which has not yet been provided in any other decisions on this issue. The few cases that have addressed this issue of extraterritorial application have indicated that, despite the clear expression of intent from Congress, there is still a question as to whether Title I is applicable to foreign flag cruise ships.

Based on the connectedness between the Americans with Disability Act and international labor standards, this Comment will argue that Title I of the Americans with Disabilities Act can and should apply to all employees of foreign-flag cruise ships controlled by American corporations, which this Comment will argue includes those cruise lines based in the U.S. even if they are not incorporated here, without conflicting with international law or the law of a ship’s flag state, regardless of whether or not they are in American waters. Section II of this Comment will describe the scope and application of the Americans with Disabilities Act, focusing

¹⁷ *Spector v. Norwegian Cruise Lines Ltd.*, 545 U.S. 119 (2005).

¹⁸ *Spector*, 545 U.S. at 125.

specifically on Title I; examine the Supreme Court’s decision in *Spector v. Norwegian*; and review the limited available cases applying Title I to foreign-flag cruise ships. Section III will discuss the international laws and guidelines which may potentially conflict with the application of the Act to cruise ships. Section IV will analyze a pending case in Southern District of Florida, *Schultz v. Royal Caribbean Cruises, Ltd.*,¹⁹ using the framework of *Spector* and review all cited Title I cases under the international laws and guidelines which potentially conflict with extraterritorial application of the Act to foreign-flag vessels. It will also propose solutions to fill the gaps left by the statute’s language and the lack of judicial direction in analyzing such cases.

II. The Americans with Disabilities Act and its Application to Foreign-Flag Cruise Ships

A. Americans with Disabilities Act of 1990

The Americans with Disabilities Act was enacted to protect individuals with disabilities from being discriminated against in areas such as “employment, housing, public accommodations, education . . . and access to public services.”²⁰ For purposes of the ADA, a disability is defined as a “physical or mental impairment that substantially limits one or more major life activities;” having a record of an impairment; or being regarded as having an impairment.²¹ Major life activities include caring for oneself, sleeping, performing manual tasks, thinking, working, etc.²² The Act consists of five sections; however, the two most commonly referenced sections of the ADA are Title I, which governs discrimination in the employment

¹⁹ Complaint, *Schultz v. Royal Caribbean Cruises, Ltd.*, No. 24-023 (S.D. Fla. Filed Oct. 1, 2018).

²⁰ 42 U.S.C.A. § 12101.

²¹ § 12102(1).

²² § 12102(2)(A).

context, and Title III, which governs discrimination in the use of “goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”²³

Title I of the ADA states that “no covered entity shall discriminate against a qualified individual on the basis of a disability in the job application process, hiring, discharge, and “terms, conditions, and privileges of employment.”²⁴ Discrimination, as described by the act, includes “limiting, segregating, or classifying a job application or employee in a way that adversely affects” their job opportunities based on their disability, denying equal jobs or benefits to a qualified individual based on a known disability, and not making reasonable accommodations to an individual with a known physical or mental limitation, unless such an accommodation would impose an undue hardship on the business.²⁵

Under the Act, an important defense to discriminatory conduct under the ADA, especially when considering its application to cruise ships, is the direct threat defense. The ADA defines a “direct threat” as a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”²⁶ Further, a direct threat must be based on the “individual’s present ability to safely perform the *essential functions* of the job.”²⁷ The factors that should be considered include the (1) “duration of the risk;” (2) “nature and severity of the potential harm;” (3) “likelihood that the potential harm will occur;” and the (4) “imminence of the potential harm.”²⁸ In the context of cruise ships, the direct threat defense enables employers to protect the integrity of the ship and protect their employees and passengers. Having this defense in place

²³ §§ 12101-21213; § 12112; § 12112(a).

²⁴ § 12112(a).

²⁵ § 12112

²⁶ § 12111.

²⁷ 29 C.F.R. § 1630.2(r) (West 2018) (emphasis added).

²⁸ § 1630.2(r).

allows for an employer to assess the individuals ability to perform the job in question without posing a risk to those around them.

In 1991, in response to the Supreme Court’s decision in *Arabian American*, which held that Title VII does not apply extraterritorially, Congress amended Title I of the ADA to include foreign corporations.²⁹ Prior to this amendment, the ADA, nor Title VII, addressed the statutes application to foreign employers.³⁰ This amendment change Title I of the ADA to state that it will not be unlawful for a “covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance . . . would cause such covered entity to violate the law of the foreign country” where the workplace is located.³¹ Further, the ADA states that “[i]f an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.”³² Similarly, Title VII was amended to include largely the same language.³³ In its amendment, Congress was careful to include an express intent of extraterritorial application.

The Act limits its extraterritorial application to foreign operations controlled by American employers.³⁴ The ADA states that in determining whether an American employer

²⁹ § 12112(c); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 158 n.9 (2005). *See also* *Loving v. Princess Cruise Lines, Ltd.*, No. CV 08-2898 JFW AJWX, 2009 WL 7236419, at *23 (C.D. Cal. Mar. 5, 2009) (stating that Congress amended Title I of the ADA in response to the Supreme Court’s decisions in *Equal Emp’t Opportunity v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) and the decision not to similarly amend Title III supports the idea that Congress did not intend for Title III to have extraterritorial effects).

³⁰ *See* Equal Employment Opportunity Act of 1972, 92 Pub. L. No., § 261, 86 Stat. 103 (Mar. 24, 1972) (current version at 42 U.S.C.S. §§ 2000e - 2000e-17); Americans with Disabilities Act of 1989, 101 Pub. L. No., § 336, 104 Stat. 327 (current version at 42 U.S.C.S. §§ 12101-21213).

³¹ 42 U.S.C.S. § 12112

³² 42 U.S.C.S. § 12112

³³ 42 U.S.C.S. § 2000e-1 (stating that the Act “shall not apply to an employer with respect to the employment of aliens outside any State . . .” and that it will not be unlawful “for an employer. . . to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance . . . would cause such employer . . . to violate the law of the foreign country” where the workplace is located.)

³⁴ § 12112(c)(2)(B).

controls a corporation one must look to “(i) the interrelation of operations; (ii) the common management; (3) the centralized control of labor relations; and (iv) the common ownership or financial control, of the employer and the corporation.”³⁵ Importantly, the Act further limits its application if it would cause the foreign company to fall out of compliance with the law of their country.³⁶ For vessels, this means contending with the law of their flag-state and international maritime regulations.

B. Application of Title III of the ADA by the Supreme Court in *Spector*

Despite the clear intention of Congress for extraterritorial application through the 1991 amendment, cruise lines still claim immunity to the ADA. Therefore, it is helpful to analyze the relevant case law to assess its applicability. To that end, although the Supreme Court has not addressed the application of Title I of the ADA to foreign-flag vessels, the Court, in *Spector v. Norwegian Cruise Line Ltd.*, addressed the application of Title III to foreign-flag cruise ships in the waters of the United States.³⁷ However, the Court’s decision in *Spector* provides some insight into the application of the Act in cases dealing with Title I. The petitioners in *Spector* were disabled individuals who purchased round-trip cruise tickets with Norwegian Cruise Line Ltd. (“Norwegian”) departing from Houston, Texas.³⁸ The petitioners claimed, among other things, that the cruise line charged disabled passengers higher fares, maintained evacuation programs and equipment that were not accessible to disabled passengers, required disabled passengers to waive potential medical liability, and failed to make reasonable modifications to ensure disabled individuals enjoyed the services available to nondisabled passengers.³⁹

³⁵ § 12112(c)(2)(C).

³⁶ § 12112 (c)(1).

³⁷ *Spector*, 545 U.S. at 125.

³⁸ *Id.* at 126.

³⁹ *Id.* at 133-34.

Norwegian, a Bermuda corporation with its principal place of business in Miami, Florida, claimed that, as a foreign-flag vessel, the requirements of Title III of the ADA were not applicable to them.⁴⁰ The plurality opinion held that, although Title III of the Act is not completely inapplicable, when compliance with the ADA requires the removal of physical barriers, the clear statement rule, requiring express congressional intent, appears to make many duties under the Act inapplicable.⁴¹

The Court stated that as a general rule, “absent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port.”⁴² Further, the Court explained, this rule is subject to the narrow exception that, insofar as such statutes regulate the “internal order and discipline” of foreign-flag vessels, a clear statement of congressional intent is required.⁴³ Importantly, the Court stated that this exception does not extend passed matters dealing with the ship’s internal affairs or order.⁴⁴ The Court stated that “general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel” in the United States if its interests, or those of its citizens, are at stake rather than the internal interests of the ship.⁴⁵ It should be noted that internal affairs as it pertains to ships appears to differ from the corporate law concept of the internal affairs doctrine, not discussed in this Comment, which governs the choice of law with regard to corporations.⁴⁶

⁴⁰ *Id.* at 126; Brief for Respondent at 1, *Spector v. Norwegian Cruise Lines Ltd.* 545 U.S. 119 (2005) (No. 03-1388).

⁴¹ *Spector*, 545 U.S. at 125.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 130.

⁴⁶ For clarity, this Comment will use the phrase “internal order” in lieu of “internal affairs” to avoid confusion of the two distinct legal matters.

Although the Court acknowledges that the concept of “internal order” is difficult to define, the Court fails to provide a workable definition or test for what sorts of activities or operations would fit into this category.⁴⁷ Instead, the Court references two Supreme Court cases, *McCulloch v. Sociedad Nacional de Marineros de Honduras*⁴⁸ and *Benz v. Comania Naviera Hidalgo, S.A.*,⁴⁹ involving labor relations, which are generally cited in relation to the principal of internal operations of foreign-flag ships.⁵⁰ Importantly, both cases concerned foreign-flag ships and their foreign employees.⁵¹ In *Benz*, the crew for the S.S. Riviera, a foreign vessel, which was temporarily in Portland, Oregon to load cargo, made up completely of nationals of other countries, were terminated after going on strike in an attempt to get more favorable terms of service.⁵² The ship’s owner, following three picket lines, filed suit in order to obtain an injunction and recover damages.⁵³ In *McCulloch*, the National Labor Relations Board (the “Board”), after determining that the National Labor Relations Act (“NLRA”) applied to the foreign crew, ordered that elections be held for the foreign crew of a corporation’s foreign-flagged ships to participate in the National Maritime Union.⁵⁴ The owner sought to enjoin the Board from holding the election.⁵⁵ In both *Benz* and *McCulloch*, the Court held that the National Labor Relations Act did not apply to these foreign-flagged ships, and their foreign crews, because it would interfere with the ship’s internal order.⁵⁶ Finally, the *Spector* Court points out

⁴⁷ *Id.* at 133.

⁴⁸ *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

⁴⁹ *Benz v. Comania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

⁵⁰ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 131(2005).

⁵¹ *Spector*, 545 U.S. at 135. See *McCulloch*, 372 U.S. at 13; *Benz*, 353 U.S. at 139.

⁵² *Benz*, 353 U.S. at 139-40.

⁵³ *Id.* at 140-41.

⁵⁴ *McCulloch*, 372 U.S. at 12.

⁵⁵ *Id.*

⁵⁶ *Spector*, 545 U.S. at 138. See *McCulloch*, 372 U.S. at 20-21; *Benz*, 353 U.S. at 146-47.

that these cases “recognized a narrow rule, applicable only to statutory duties that implicate the internal order of the foreign vessel *rather than the welfare of American citizens*.”⁵⁷

In contrast, in *International Longshoremen’s Local 1416 v. Ariadne Shipping Co.*,⁵⁸ the Court held that the NLRA was fully applicable to labor relations when the matter involved a foreign vessel and American longshoremen.⁵⁹ Unlike *Benz* and *McCulloch*, the *Spector* Court explained, *Longshoremen* did not implicate a foreign ship's internal order and discipline.⁶⁰ The plaintiffs in *Longshoremen* were American workers, working in American ports and, therefore, there was no interference with internal order.⁶¹ Thus, the focus of the Court seems to indicate that if the welfare of an American worker is at issue, internal order are not implicated. Arguably, based on the Court’s decisions in these cases, when discrimination is directed at American workers, employed by a foreign-flag vessel, U.S. law, and thus the ADA, should govern.

Next, in addressing the Title III’s potential requirement of removing barriers from the cruise ships, the Court recognizes that such removals may create noncompliance with certain international laws, including the Convention for the Safety of Life at Sea (“SOLAS”).⁶² Further, the Court states in assessing any removals under Title III, safety considerations must also be considered.⁶³ However, as Justice Scalia points out in his dissenting opinion, the Court does not address whether the application of Title III would be consistent with the laws of the flag-state or its ports of call.⁶⁴ Based on this reading of *Spector*, the first three steps in analyzing whether the ADA applies extraterritorially are (1) determining whether internal order of the ship is

⁵⁷ *Spector*, 545 U.S. at 131 (emphasis added).

⁵⁸ *International Longshoremen’s Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).

⁵⁹ *International Longshoremen*, 397 U.S. at 198–201.

⁶⁰ *Spector*, 545 U.S. at 131.

⁶¹ *See Longshoremen*, 397 U.S. at 200.

⁶² *Spector*, 545 U.S. at 135.

⁶³ *Id.* at 136.

⁶⁴ *Id.* at 154 (Scalia, J., dissenting).

implicated; (2) whether there is a clear statement of intent regarding the extraterritorial application; and (3) whether the ADA can be applied without interfering with the laws and regulations governing the vessel.

C. Application of Title I of the ADA

Again, despite the 1991 amendment, there remains uncertainty regarding the application of the Act as it pertains to foreign-flag vessels and the Supreme Court has not addressed the extraterritorial application of Title I of the ADA to foreign-flag vessels. However, there are a few decisions from lower courts dealing with the issue and there is currently a case pending in front of the District Court for the Southern District of Florida.⁶⁵ However, the uncertainty that surrounds extraterritorial application has allowed the cruise industry to continue to claim exemptions. Therefore, understanding the way in which courts have thus far applied Title I to foreign-flag cruise ships is important to determining the appropriate means to correct the misconception, and fill the gap, to ensure American workers are protected.

In *Equal Emp't Opportunity Comm'n v. Royal Caribbean Cruises, Ltd.*,⁶⁶ decided prior to *Spector*, the plaintiff, an Argentinean national, was employed by Royal Caribbean Cruises, Ltd. ("RCCL") as an assistant waiter on one of RCCL's cruise ships.⁶⁷ After being diagnosed with HIV, despite being deemed "fit for duty" by a physician, RCCL refused to renew his employment contract.⁶⁸ Accordingly, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").⁶⁹ In its position statement, RCCL contended that the ADA was inapplicable because the plaintiff was a foreign national and, as the company's

⁶⁵ *Equal Emp't Opportunity Comm'n v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014); *Equal Emp't Opportunity Comm'n v. Dolphin Cruise Line*, 945 F. Supp. 15 (S.D. Fla. 1996); *Complaint, Schultz v. Royal Caribbean Cruises, Ltd.*, No. 24023 (S.D. Fla. Filed Oct. 1, 2018).

⁶⁶ *Equal Emp't Opportunity Comm'n v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014).

⁶⁷ *Id.* at 759.

⁶⁸ *Id.*

⁶⁹ *Id.*

cruise ships are registered under Bahamian law, RCCL was required to comply with the Bahamas Maritime Authority (“BMA”).⁷⁰ The BMA registers ships, enforces and improves safety requirements, and represents The Bahamas in front of international bodies, such as the International Maritime Organization (“IMO”) and the European Commission.⁷¹

The EEOC thereafter requested additional information from RCCL regarding the termination and refusal to hire of other employees or applicants with disabilities.⁷² When the company only partially complied with the request, the EEOC sought a court order to compel RCCL’s cooperation.⁷³ Ultimately, the Court determined that the information sought by the EEOC was not relevant to the matter in front of the court.⁷⁴ Importantly, the court, in determining the relevance of the requested material, noted that RCCL admitted that the plaintiff was terminated because of his medical condition but claim immunity due to allegedly conflicting standards under the BMA.⁷⁵ RCCL claimed that the BMA medical standards required the plaintiff’s termination because of his medical condition.⁷⁶ Finally, the court stated that RCCL raised a “legitimate question” regarding jurisdiction over claims related to foreign nationals on foreign-flag ship as a potential interference of internal order of the ship.⁷⁷ Although the court did not decide this jurisdictional question, it determined that the district court was justified in considering this hurdle when deciding whether to enforce the EEOC’s subpoena.⁷⁸ The importance of this opinion is to show that despite the clear expression of congressional intent,

⁷⁰ *Id.*

⁷¹ The Bahamas Maritime Authority, About, <http://www.bahamasmaritime.com/the-bma/about/> (last visited Nov. 10, 2019).

⁷² *Royal Caribbean Cruises*, 771 F.3d at 759-60.

⁷³ *Id.* at 760.

⁷⁴ *Id.* at 761.

⁷⁵ *Id.*

⁷⁶ *Id.* at 761.

⁷⁷ *Equal Emp’t Opportunity Comm’n v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 762 (11th Cir. 2014) (citing *Spector*, 545 U.S. at 125).

⁷⁸ *Id.* at 762.

furnished by the 1991 amendment, courts are still questioning the applicability of the Act to foreign-flag vessels.

In *Equal Emp't Opportunity Comm'n v. Dolphin Cruise Line*,⁷⁹ the plaintiff applied for an entertainer position through a recruiting agency aboard a ship owned by Dolphin Cruise Line, Inc.⁸⁰ The company sent the plaintiff an employment agreement but, as a condition of employment, required a mandatory medical examination.⁸¹ The examination indicated that the plaintiff was HIV positive and the company rescinded his employment offer.⁸² Without addressing any issue regarding extraterritorial application, the court addressed whether the two cruise lines defendants could be considered single or joint employers and whether the plaintiff's medical condition posed a direct threat to others onboard.⁸³

Ultimately, the court determined that the two cruise lines were, as a matter of law, single employers.⁸⁴ The court further found that, based on the most current medical knowledge of the risks of contracting HIV, the plaintiff, as a matter of law, did not present a significant health risk.⁸⁵ The court stated that a risk may only be considered if there is a "high probability of substantial harm" and that a "speculative or remote risk" is not enough.⁸⁶ Further, "generalized fears about risks," like "exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability."⁸⁷

The courts in *Royal Caribbean* and *Dolphin Cruise Line* each took a different approach to the extraterritorial application of the ADA. The 11th Circuit, in *Royal Caribbean*, acknowledged

⁷⁹ *Equal Emp't Opportunity Comm'n v. Dolphin Cruise Line*, 945 F. Supp. 15 (S.D. Fla. 1996).

⁸⁰ *Id.* at 1552.

⁸¹ *Id.*

⁸² *Id.* at 1553.

⁸³ *Id.* at 1554-55.

⁸⁴ *Dolphin Cruise Line*, 945 F. Supp. at 1554.

⁸⁵ *Id.* at 1555.

⁸⁶ *Id.*

⁸⁷ *Id.*

the concern regarding extraterritorial application but, as the requested materials were not relevant to the case, did not need to make any findings regarding the issue. Alternatively, the Southern District of Florida, in *Dolphin Cruise Line*, did not address the issue at all, seeming to indicate that the statute was presumed to apply.

Further, as the language and implication of the ADA and Title VII are similar, it is persuasive to briefly analyze the relationship between Title VII and foreign-flag cruise ships. In *EEOC v. Bermuda Star Line, Inc.*,⁸⁸ Ms. Harmon applied for a position with a cruise line, which she was denied because of her sex.⁸⁹ The court reasoned that the decision not to hire Ms. Harmon was not internal.⁹⁰ On the contrary, the actions took place in the United States and effected the ship's relationship with citizens applying for employment.⁹¹ Therefore, the court determined, the presumption against extraterritorial applicability was not implicated.⁹² Thereafter, the court examined seven factors, laid out in *Lauritzen v. Larsen*,⁹³ which were used by the Supreme Court to determine whether the Jones Act should apply to foreign seamen or whether international law should govern.⁹⁴ These factors include: “(1) place of the wrongful act; (2) the law of the flag; (3) allegiance of domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.”⁹⁵ After weighing all the relevant factors, the court determined that Title VII may be applied.⁹⁶

⁸⁸ *EEOC v. Bermuda Star Line, Inc.*, 744 F.Supp. 1109 (M.D. Fla. 1990).

⁸⁹ *Id.* at 1110.

⁹⁰ *Id.* at 1111.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

⁹⁴ *Bermuda Star Line*, 744 F.Supp. at 1110.

⁹⁵ *See Lauritzen*, 345 U.S. at 583-590; *see also Hellenic*, 398 U.S. at 308-309 (noting that these seven factors are not intended to be exhaustive); *Bermuda Star Line*, 744 F. Supp. at 1111.

⁹⁶ *Id.* at 1113.

III. International Law as Applied to Foreign-Flag Cruise Ship

A. Flags of Convenience

All vessels, including cruise ships, must have a nationality, which ensures that the ship will be subject to the laws of some nation.⁹⁷ Without a flag state, a stateless ship would be subject to the jurisdiction of any nation, as it would not have the protection of national or international law.⁹⁸ A ship's flag state is, therefore, responsible for ensuring that the ship complies with national and international laws regulating, among other things, proper construction, employment of the ship's crew, and environmental protections.⁹⁹ Traditionally, ships would fly the flag of the country to which the owner of the ship hailed. But, for many reasons, including lower taxes, avoiding labor regulations, and hiring crews for lower wages, many ships fly the flag of a country other than the country of the ship's owner.¹⁰⁰ This is typically referred to as a "flag of convenience" and is "used to describe the flag of a ship whose ownership and control lies outside of the flag country."¹⁰¹

Flags of convenience, seen as the ability to choose a level of international regulation, have been said to cause problems with environmental regulation and labor standards.¹⁰² A prime example of this forum shopping issue is the cruise industries' claim of exemption from laws such as the ADA. For example, Carnival Cruise Lines, a subsidiary of Carnival Corporation, a publicly traded corporation on the New York Stock Exchange, is headquartered in Miami,

⁹⁷ H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L. J. 139, 141 (1996).

⁹⁸ *Id.*

⁹⁹ Sang Man Kim & Jingho Kim, *Flags of Convenience in the Context of the OECD BEPS Package*, 49 J. MAR. L. & COM. 221, 221 (2018).

¹⁰⁰ *Id.* at 221-22.

¹⁰¹ *Id.* at 222.

¹⁰² Elizabeth R. DeSombre, *FLAGGING STANDARDS: GLOBALIZATION AND ENVIRONMENTAL, SAFETY, AND LABOR REGULATIONS AT SEA*, 3 (The MIT Press 2006).

Florida and twenty-three of its twenty-four cruise ships have home ports in the United States.¹⁰³ However, Carnival Corporation is incorporated in Panama and all of Carnival Cruise Lines' ships are registered in either Panama, the Bahamas, or Malta, flying the flag of each respective country.¹⁰⁴ Similarly, Royal Caribbean Cruises, Ltd. and Norwegian Cruise Lines are both publicly traded on the New York Stock Exchange and headquartered in Miami, Florida.¹⁰⁵ Yet, most of Royal Caribbean Cruises ships' are home ported in the United States and their ships are either fly the flags of the Bahamas or Malta.¹⁰⁶ All of Norwegian's cruise ships based out of the U.S. have home ports in the U.S. and all fly foreign-flags.¹⁰⁷ These corporations, however, have minimal, if any, contact with the flag-states of their ships.

Nevertheless, as stated by the Supreme Court, it is a "well-established rule of international law that the law of the flag state ordinarily governs the internal [order] of a ship."

¹⁰⁸ As discussed above, in *Spector*, "internal order" has not been clearly defined by the Court. However, based on the Supreme Court's lack of explanation, it appears that when the conduct at issue affects the welfare of American workers, as opposed to foreign workers, internal order is not implicated. If the internal order of vessels are not implicated, the Supreme Court established, in a series of cases, the *Lauritzen* test to determine what nation's laws should apply to suits under the Jones Act.¹⁰⁹ Although these factors were originally used to address the application of the

¹⁰³ Carlos Felipe Llinás Negret, *Pretending to be Liberian and Panamanian: Flags of Convenience and the Weakening of the Nation State on the High Seas*, 47 J. MAR. L. & COM. 1, 1 (2016).

¹⁰⁴ Carnival Corp., Quarterly Report (Form 10-Q) <http://phx.corporate-ir.net/phoenix.zhtml?c=140690&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdlPTEyNDcyMDYxJkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVEIPTI9FTIRJUkUmc3Vic2lkPTU3> (last visited Nov. 10, 2019); Negret, *supra* note 103.

¹⁰⁵ Negret, *supra* note 103 at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *McCulloch v. Sociedad Nacional De Marineros De Hond.*, 372 U.S. 10, 21 (1963).

¹⁰⁹ *See Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308 (1970); *Romero v. International Terminal Operating Co.*, *superseded by statute*, 358 U.S. 354, 378 (1959), 45 U.S.C. § 59, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990).

Jones act, the Court has recognized that the “broad principles of choice of law and the applicable criteria” establish in *Lauritzen* was meant to help guide courts in applying maritime law generally.¹¹⁰ These factors include: “(1) place of the wrongful act; (2) the law of the flag; (3) allegiance of domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.”¹¹¹ Although the court in *Lauritzen* gave the law of the flag great weight, in other circumstances, courts have given it less effect.¹¹² As indicated in Justice Scalia’s dissent in *Spector*, sometimes the laws of the flag state is not even considered.¹¹³ Likely, the concept of flags of convenience is the reason the law of the flag state is often not given much weight, since there is often a lack of connectedness between ships and their flag country in these instances.

Some of the most commonly flown flags of convenience include Panama, Liberia, and the Bahamas.¹¹⁴ Panama holds 18.5% of the total world fleet; Liberia holds 11.4% of the world fleet; and Bahamas holds 4.4% of the world fleet.¹¹⁵ These open registries are known for being lax in their regulation of vessels registered under their flags, which contributes to the appeal of flying their flags.

As the ships of flag states must adhere to national and international law, and the ADA cannot be enforced if it creates a conflict of law, it is relevant to briefly mention that Panama,

¹¹⁰ *Romero*, 358 U.S. at 382.

¹¹¹ *See Lauritzen*, 345 U.S. at 583-590; *see also Hellenic*, 398 U.S. at 308-309 (noting that these seven factors are not intended to be exhaustive); *Bermuda Star Line*, 744 F. Supp. at 1111.

¹¹² *See e.g. Spector*, 545 U.S. at 1261 (“Despite the fact that the cruises are operated by a company based in the United States, serve predominantly United States residents, and are in most other respects United States-centered ventures, almost all of NCL’s cruise ships are registered in other countries, *flying so-called flags of convenience*.”) (emphasis added); *Hellenic*, 396 U.S. at 310 (“... the façade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States.”); *Bermuda Star*, 744 F. Supp. At 1112 (“The law of the flag factor is even further dissipated in this case for the reason that, other than flying the Panamanian flag, and being registered in that country, the Veracruz appears to have no other connections to Panama.”).

¹¹³ *Spector*, 545 U.S. at 154 (Scalia, J., dissenting).

¹¹⁴ Kim & Kim, *supra* note 99, at 226.

¹¹⁵ *Id.*

Liberia, and the Bahamas all appear to provide some legal protection to individuals with disabilities. It is unclear whether these countries enforce or adhere to these protections, but it is relevant to acknowledge their existence. According, a report by the U.S. Department of State indicated that Panama law “prohibits discrimination based on physical, sensory, intellectual, or mental disabilities; however, the constitution permits the denial of naturalization to persons with mental or physical disabilities.”¹¹⁶ Additionally, the U.S. Department of State indicated that it is illegal in Liberia to discriminate against persons with physical and mental disabilities.¹¹⁷ However, there are no regulations in place governing accessibility to public buildings, and there is poor accessibility to school, public buildings, and other facilities in the country.¹¹⁸ Also, Liberia’s Constitution provides that the country will establish policies which ensure “opportunities for employment and livelihood under just and humane conditions, and towards promoting safety, health and welfare facilities in employment.”¹¹⁹ In 2012 Liberia ratified the UN Convention on the Rights of persons with Disabilities and in 2013 put in place a National Human Rights Action Plan of Liberia.¹²⁰

The Bahamas, however, seems to have more disability protections in place. In 2014, the Bahamas signed the Persons With Disabilities (Equal Opportunities) Bill which states that “no person shall deny a person with a disability equal access to opportunities for suitable employment” and “[e]very employer having more than one hundred employees shall employ not less than one percent of qualified persons with disabilities.”¹²¹ The Persons With Disabilities

¹¹⁶ U.S. DEP’T OF STATE, Country Reports on Human Rights Practices for 2017, Panama 2017 Human Rights Report, 16 (2018 <https://www.state.gov/documents/organization/277593.pdf>) (last visited Nov. 10, 2019).

¹¹⁷ U.S. DEP’T OF STATE, Country Reports on Human Rights Practices for 2016, Liberia 201 Human Rights Report, 24 (2017 <https://www.state.gov/documents/organization/265482.pdf>) (last visited Nov. 10, 2019).

¹¹⁸ *Id.*

¹¹⁹ CONSTITUTION OF THE REPUBLIC OF LIBERIA, Jan. 6, 1986, art. 8 (Liberia).

¹²⁰ National Human Rights Action Plan of Liberia, Sept. 2013, https://www.ohchr.org/Documents/Issues/NHRA/Liberia_en.pdf (last visited Nov. 10, 2019).

¹²¹ Persons with Disabilities (Equal Opportunities) Bill, 2014 part III, 14 (Bahamas).

Bill establishes Inspectors who are appointed to investigate and recommend prosecution or other remedies.¹²² The Bill provides a general penalty, if not specified within individual sections, of a fine of \$5,000 or up to three months in prison, but not both.¹²³ Finally, at the request of the Commission, the Attorney-General may take legal action if there has been discriminatory conduct and it is a significant and substantial infringement of the rights of persons with disabilities.¹²⁴ Based on the language of the Persons with Disabilities Bill, however, individuals are not given any personal recourse if they experience discrimination covered by the law. The country does have a National Commission on Disabilities meant to protect the rights of persons with disabilities.¹²⁵

Panama, Liberia, and the Bahamas are all also members of the International Maritime Organization,¹²⁶ a specialized agency of the United Nations which sets international standards for safety, security, and environmental performance of international shipping,” and the International Labour Organization, an agency of the United Nations which sets international labor standards.¹²⁷

B. International Labour Organization

The International Labour Organization (“ILO”) is a tripartite United Nations agency, established in 1919, which brings together 187 nations in order to establish labor standards,

¹²² *Id.* at part VIII, 47.

¹²³ *Id.* at part VIII, 51.

¹²⁴ *Id.* at part VIII, 52.

¹²⁵ THE NATIONAL COMMISSION FOR PERSONS WITH DISABILITIES, <http://www.disabilitiescommissionbahamas.org/index> (last visited Nov. 10, 2019).

¹²⁶ INTERNATIONAL MARITIME ORGANIZATION, Members <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> (last visited Nov. 10, 2019).

¹²⁷ INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Pages/Default.aspx> (last visited Nov. 10, 2019); INTERNATIONAL LABOUR ORGANIZATION, <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Nov. 10, 2019); INTERNATIONAL LABOUR ORGANIZATION, members, <https://www.ilo.org/public/english/standards/relm/country.htm> (last visited Nov. 10, 2019).

policies, and programs that promote “decent work for all women and men.”¹²⁸ In September 2011, the ILO established the “Guidelines on the Medical Examinations of Seafarers” (“Guidelines”) which sought to harmonize the different international standards for seafarer’s fitness.¹²⁹ The purpose of these Guidelines was to ensure that “fundamental rights, protections, principles, and employment and social rights . . . are respected” while maintaining “health and safety at sea.”¹³⁰ The medical certifications made based on these Guidelines are meant to genuinely reflect the health of the seafarer, taking into consideration the duties that they are meant to perform.¹³¹ Further, the medical certification is meant to confirm that the individual is expected to be able to meet the minimum requirements for performing the routine and emergency duties specific to their post at sea safely and effectively.¹³² The Guidelines provide “visions standards,” “hearing standards,” and “physical capability requirements.”¹³³

The Guidelines also provide a chart to assist with understanding the fitness criteria of common medical conditions.¹³⁴ The chart lists many conditions including, but not limited to, infections, cancers, mental disorders, cognitive disorders, behavioral disorders, and conditions involving the cardiovascular, respiratory, and digestive systems.¹³⁵ The chart provides medical examiners with information regarding when the seafarer’s work is likely to be completed, either temporarily or permanently; when duty restrictions may be appropriate or additional supervision required; and, finally, when the individual would likely be able to perform all duties associated

¹²⁸ International Labour Organization, <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Nov. 10, 2019).

¹²⁹ ILO, Guidelines on the Medical Examinations of Seafarers, 3 (2013) http://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/---sector/documents/normativeinstrument/wcms_174794.pdf.wwerr3 (last visited Nov. 10, 2019) [hereinafter Guidelines].

¹³⁰ *Id.* at 7.

¹³¹ *Id.*

¹³² *Id.* at 9.

¹³³ *Id.* at 23, 25, 26.

¹³⁴ Guidelines, *supra* note 129, at 31-47.

¹³⁵ *Id.*

with their department.¹³⁶ It is important to note that the Guidelines recognize that if a medical condition is identified, steps may be taken in order to reduce the potential consequences.¹³⁷

After establishing the Guidelines, the ILO implemented the Disability Inclusion Strategy and Action Plan 2014-17 (the “Disability Action Plan”).¹³⁸ The aim of the Disability Action Plan was to enhance the application of international standards aimed at disability inclusion.¹³⁹

The Guidelines are similar to the ADA in many respects. First, and likely most importantly in the context of the cruise industry, is that the ADA provides a defense when an individual would pose a “direct threat” to either themselves or others around them.¹⁴⁰ As one of the purposes of the Guidelines is to ensure safety aboard sea vessels, one of the top priorities of the Guidelines is likely to ensure that those working on the vessel will maintain a safe environment. Second, the focus of the Guidelines, must like the focus of the ADA, is to ensure that individuals are able to complete the essential functions of their jobs.¹⁴¹ Third, the ADA provides that an employer should provide individuals, disabled within the meaning of the Act, reasonable accommodations, so long as it does not cause the employer an undue hardship.¹⁴² There are likely to be accommodations that might be reasonable as to land-based employers that, in the context of a cruise ship, may not be reasonable or would cause an undue hardship. Finally, the ADA regulates, not prohibits, medical examinations.¹⁴³ Therefore, it would appear that the ADA and the Guidelines are more similar than the cruise industry wish to concede.

¹³⁶ *Id.* at 31.

¹³⁷ *Id.* at 17.

¹³⁸ International Labour Organization, Disability Inclusion Strategy and Action Plan 2014-17 (Geneva: ILO, 2015) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/genericdocument/wcms_370772.pdf (last visited Nov. 10, 2019).

¹³⁹ *Id.* at 6.

¹⁴⁰ § 12113(b).

¹⁴¹ Guidelines, *supra* note 129, at 31-47; 29 C.F.R. § 1630.2(r).

¹⁴² § 12112.

¹⁴³ § 12112(d).

IV. Title I of the ADA Applies to American Employees on Foreign-Flag Vessels

A. *Schultz* under *Spector* framework

In a case pending before the District Court for the Southern District of Florida, *Schultz v. Royal Caribbean Cruises Ltd.*,¹⁴⁴ the plaintiff was hired to perform as an opera singer aboard the Azamara Journey, a cruise ship owned and operated by Azamara Club Cruises (“Azamara”), a subsidiary of Royal Caribbean Cruise, Ltd. (“RCCL”).¹⁴⁵ RCCL and Azamara both maintain their corporate headquarters in Miami, Florida¹⁴⁶ and the Azamara Journey is a foreign-flag vessel, flying a Bahamian flag.¹⁴⁷ The plaintiff, during the course of a required medical examination, indicated that he had previously been diagnosed with depression and seven years prior had attempted suicide, although he has since recovered.¹⁴⁸

RCCL recognized that under the standard of the International Labour Organization (“ILO”), a United National agency which sets international labor standards,¹⁴⁹ such medical cases require a “case-by-case” assessment to determine the likelihood of reoccurrence after a two-year period of no further episodes.¹⁵⁰ In a letter to RCCL, the plaintiff’s doctor assured the organization that the plaintiff has shown no recurring signs of illness for seven years and certified the plaintiff’s capability of successfully meeting the requirements of employment, without the any accommodations.¹⁵¹ After requesting additional information from the plaintiff’s psychiatrist, RCCL terminated the plaintiff, asserting that the cruise line had determined that he was “not medically fit for duty at sea.”¹⁵² Accordingly, the plaintiff filed a claim alleging that

¹⁴⁴ Complaint at 4-5, *Schultz*, No. 24-023.

¹⁴⁵ *Id.* at 4-5.

¹⁴⁶ *Id.* at 3-4.

¹⁴⁷ *Id.* at 6.

¹⁴⁸ *Id.* at 9.

¹⁴⁹ INTERNATIONAL LABOUR ORGANIZATION, <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

¹⁵⁰ Complaint at 9, *Schultz*, No. 24-023.

¹⁵¹ *Id.* at 10.

¹⁵² *Id.*

RCCL violated Title I of the ADA when they terminated his employment because they regarded his as disabled.¹⁵³

Although, as the case has only recently been filed, there has been no decision, this case may give the courts the ability to provide some much-needed clarity on the application of Title I of the ADA to foreign-flag vessels. Further, this case allows for an opportunity to use the framework of *Spector* to determine whether Title I of the ADA is applicable to the cruise line. As a threshold matter, a court would have to assess whether the internal interests of the ship would be implicated by imposing the regulations of the ADA.¹⁵⁴ Despite the lack of a specific definition, but based on the Court's past precedent, a court should seek to determine whether the welfare of American citizens are at issue, which seems to indicate that internal order is not affected.¹⁵⁵ As a resident of the United States, Mr. Schultz is presumably a U.S. citizen, thus implicating the welfare of American citizens.¹⁵⁶

If it is determined that the internal order of the ship was not implicated, as is mostly likely in this case, a court would examine the case using the *Lauritzen* factors, used by the court in *Bermuda Star Line*, to determine whether U.S. law or the law of the flag-state would apply.¹⁵⁷ Under the *Lauritzen* factors, it is likely that a court would determine that U.S. law should apply to the foreign flag vessel employer in *Schultz*. Again, these factors include: “(1) place of the wrongful act; (2) the law of the flag; (3) allegiance of domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.”¹⁵⁸

¹⁵³ *Id.* at 13.

¹⁵⁴ *See Spector*, 545 U.S. at 125.

¹⁵⁵ *McCulloch*, 372 U.S. at 13; *Benz*, 353 U.S. at 139.

¹⁵⁶ Complaint at 2, *Schultz*, No. 24-023.

¹⁵⁷ *Romero*, 358 U.S. at 382; *Bermuda Star Line*, 744 F.Supp. at 1110.

¹⁵⁸ *See Lauritzen*, 345 U.S. at 583-590; *see also Hellenic*, 398 U.S. at 308-309 (noting that these seven factors are not intended to be exhaustive); *Bermuda Star Line*, 744 F. Supp. at 1111.

First, the injury took place in Miami, Florida, where Schultz was participating in rehearsal for the cruise when he was terminated, or alternatively was refused employment, based on his disability – weighing in favor of applying U.S. law.¹⁵⁹ Second, although they may not generally be enforced, there are disability protections under Bahamas law.¹⁶⁰ Also, the International Labor Organization has committed itself to ensuring that people with disabilities have employment opportunities.¹⁶¹ However, a court would need to determine whether the individual would give a forum in which they could seek a remedy. If there would be an alternative forum, this factor could weigh in favor of applying the law of the Bahamas. If no such remedy is available it would weigh in favor of applying U.S. law. In this case, as discussed above, the law of the Bahamas does not provide for individual claims of disability discrimination.¹⁶² Instead, the Attorney-General may take legal action, which would result in a fine or imprisonment for the offender.¹⁶³

Third, Schultz is a U.S. citizen and is domiciled here. Fourth, based on the practices of those in the ship industry, it is clear that Royal Caribbean does not have strong allegiances to the Bahamas, where the ship in question is registered, nor Liberia, where the company is incorporated. The headquarters of the company is located in the United States, many of their ships depart from the United States, they conduct a large amount of advertising here, and the company is publicly traded in the New York Stock Exchange. All of these facts indicate that the company's allegiances are in the United States, and thus weigh in favor of applying U.S. law.

Fifth, the Independent Contractor Agreement was entered into in the United States. Even though

¹⁵⁹ Complaint at 11, *Schultz*, No. 24-023.

¹⁶⁰ Persons With Disabilities (Equal Opportunities) Bill, 2014 part III, 14 (Bahamas) (stating that “no person shall deny a person with a disability equal access to opportunities for suitable employment.”).

¹⁶¹ *See generally* International Labor Organization, Disability Inclusion Strategy and Action Plan 2014-17 (2015 http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/genericdocument/wcms_370772.pdf).

¹⁶² Persons with Disabilities (Equal Opportunities) Bill, 2014 part VIII, 52.

¹⁶³ *Id.* at part VIII, 51-52.

the *Bermuda* court stated that courts do not give much weight to the last two factors, these also weigh in favor of Schultz.

However, even if a court were to determine that the internal order of the vessel is implicated, the analyzing court would then look to whether or not there was a clearly expressed Congressional intent for the statute to be applied extraterritorially. Title I of the ADA, after being amended in 1991, specifically dictates that the Act applies to foreign corporations controlled by American employers, unless it would cause the foreign company to fall out of compliance with the law of their country.¹⁶⁴

Therefore, as there is clear Congressional intent for extraterritorial application, a court would next look to whether compliance with the ADA would cause the foreign-vessel to fall out of compliance with the laws of their flag-state.¹⁶⁵ As previously discussed, many of the countries whose flags are most often used as flags-of-convenience have laws in place which prohibit discrimination.¹⁶⁶ However, it appears as though they are not often enforced.¹⁶⁷ It is important, therefore, to look to the international regulations, specifically the ILO, which regulates the labor standards on vessel. Ultimately, however, in this case, it appears that RCCL could have adhered both to the ADA and the ILO Guidelines.

Finally, as per the express intent of the ADA, a court would need to determine whether RCCL is controlled by an American Employer. To determine whether an employer is an

¹⁶⁴ § 12112(c).

¹⁶⁵ § 12112(c).

¹⁶⁶ CONSTITUTION OF THE REPUBLIC OF LIBERIA, Jan. 6, 1986, art. 8 (Liberia); National Human Rights Action Plan of Liberia, https://www.ohchr.org/Documents/Issues/NHRA/Liberia_en.pdf (validated Sept. 2013); Persons With Disabilities (Equal Opportunities) Bill, 2014 (Bahamas); Persons with Disabilities (Equal Opportunities) Bill, 2014 part III, 14 (Bahamas); THE NATIONAL COMMISSION FOR PERSONS WITH DISABILITIES, <http://www.disabilitiescommissionbahamas.org/index> (last visited Nov. 10, 2019).

¹⁶⁷ U.S. DEP'T OF STATE, Country Reports on Human Rights Practices for 2017, Panama 2017 Human Rights Report, 16 (2018) <https://www.state.gov/documents/organization/277593.pdf> (last visited Nov. 10, 2019); U.S. DEP'T OF STATE, Country Reports on Human Rights Practices for 2016, Liberia 2016 Human Rights Report, 24 (2017) <https://www.state.gov/documents/organization/265482.pdf> (last visited Nov. 10, 2019).

American employers or foreign corporations controlled by American employers, both covered by the act, the EEOC has promulgated guidelines to assist with the analysis.¹⁶⁸ Some of the factors to consider include, but are not limited to, (a) the company's principal place of business; (b) the dominant shareholders' nationalities; (c) the location and nationality of management; and (d) the totality of the employer's contacts with the United States.¹⁶⁹ First, a corporation's principal place of business is "where a corporation's officers direct, control, and coordinate the corporation's activities."¹⁷⁰ Royal Caribbean's principal place of business would be Miami, Florida, where the corporation is headquartered and where its senior management team is located.¹⁷¹ Second, the dominant shareholders of Royal Caribbean are U.S. citizens or institutions within the U.S..¹⁷² Third, as previously stated, based on the Royal Caribbean website, all of the company's senior management team appears to be located in Miami. Finally, Royal Caribbean solicits extensive business in the United States, is publicly traded on the New York Stock Exchange, many of its cruises depart from U.S. ports, and their principal place of business is in Miami. Therefore, a court is likely to determine that Royal Caribbean is an American employer, despite being incorporated in Liberia.

B. ADA and ILO

Both the ADA and the ILO Guidelines require an individualized assessment of the employee's disability in determining whether the individual is capable of meeting the requirements of employment. The ADA, for example, allows as a defense to discriminatory conduct if the individual would pose a direct threat to the health or safety of others in the

¹⁶⁸ U.S. Equal Emp. Opportunity Comm'n, EEOC Enforcement Guidance on Title VII and ADA (Nov. 20, 1993), at N:915.002, <https://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html>.

¹⁶⁹ *Id.*

¹⁷⁰ *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010).

¹⁷¹ Negret, *supra* note 103 at 2.

¹⁷² Nasdaq, Royal Caribbean Cruise Ltd. Ownership Summary, <https://www.nasdaq.com/symbol/rcl/ownership-summary> (last visited Nov. 10, 2019).

workplace or if the individual would be unable to perform the essential functions of the job even with or without reasonable accommodations.¹⁷³ Although the Guidelines potentially allow for employers to deny or terminate employment to more individuals with disabilities, which may be understandable given the inherent danger of certain jobs on a ship, the ILO and ADA seem to provide more protection to cruise ship employees than the cruise organizations claim.

In both *Royal Caribbean Cruises* and *Dolphin Cruise Line* the plaintiffs were diagnosed with HIV and respectively terminated and denied employment.¹⁷⁴ Although neither of the courts in these cases decided on the issue of extraterritorial application, utilizing the ILO guidelines to assess these cases would be helpful in understanding whether both the ILO and the ADA could be complied with simultaneously. The Guidelines first assess the individual's ability to perform the functions of their position.¹⁷⁵ The plaintiff in *Royal Caribbean Cruises* had been working at the time of his diagnosis.¹⁷⁶ Although the facts of the decision do not indicate the status of his health, one could assume that, since he has been working at the time, he would have been able to perform at least some of his job functions, with or without accommodations. Therefore, the plaintiff would likely fall within either the "able to perform some but not all duties" or "able to perform all duties."¹⁷⁷ Accordingly, if the plaintiff were to fall into one of these two categories, it is likely that under the Guidelines the plaintiff could have been deemed fit for sea. Similarly, as the ADA does not allow for the use of stereotypes and only facts related the individual's actual illness and the most current scientific knowledge in determining the potential threat to others in the workplace, it is likely that such a claim could be successful under the ADA. If,

¹⁷³ § 12113(b); §12113(a).

¹⁷⁴ *Royal Caribbean Cruises*, 771 F.3d at 759; *Dolphin Cruise Line*, 945 F. Supp. at 1555.

¹⁷⁵ Guidelines, *supra* note 129, at 31-32.

¹⁷⁶ *Royal Caribbean Cruises*, 771 F.3d at 759.

¹⁷⁷ *See generally*, Guidelines, *supra* 129, at 32.

however, the facts of the case provided more description as to the plaintiff's health, the plaintiff's ability to work would be determined based on the symptoms and severity of his illness.¹⁷⁸

Given the opportunity presented by having a pending case before the District Court for the Southern District of Florida, the known facts in *Schultz* provide for much more of an opportunity to review the case under the ILO guidelines. In *Schultz*, the plaintiff had been diagnosed with depression and had, seven years prior to beginning his employment with RCCL, attempted suicide.¹⁷⁹ The plaintiff's psychiatrist has also certified that he was fully capable of meeting the requirements of employment on the cruise ship and had been compliant with his treatment.¹⁸⁰ Thus, given the time of Mr. Schultz's remission, he would likely fall into the Guidelines category for "minor or reactive symptoms of anxiety/depression," rather than the category for severe depression.¹⁸¹ The plaintiff's depression should then be considered in relation to his symptoms. Again, given that the plaintiff has been in remission for longer than a year and has been successful and compliant with his treatment, it is likely that the plaintiff would be able to "perform all of duties worldwide."¹⁸² Further, RCCL acknowledged that the ILO required them to assess Mr. Schultz's disability on a case-by-case basis, indicating their knowledge and use of the standards.¹⁸³

If, alternatively, the individual had experienced an episode less than year prior but is free from impairing side effects from any medication, the individual may be able to perform some duties or may have some restrictions on how far from the coast they are.¹⁸⁴ This alternative

¹⁷⁸ *Id.*

¹⁷⁹ Complaint at 9, *Schultz*, No. 24-023.

¹⁸⁰ *Id.* at 10.

¹⁸¹ *See generally*, Guidelines, *supra* 129, at 36.

¹⁸² *See generally*, Guidelines, *supra* 129, at 36; Complaint at 10, *Schultz*, No. 24-023.

¹⁸³ Complaint at 9, *Schultz*, No. 24-023.

¹⁸⁴ *See generally*, Guidelines, *supra* 129, at 36.

would seem to implicate the reasonable accommodations aspect of the ADA.¹⁸⁵ It is important to note, however, that reasonable accommodations must not cause the cruise line “undue hardship.” Undue hardship is defined as an action which requires “significant difficulty or expense” in light of factors including the type of operations of the entity, the nature and cost of the accommodation, and the financial resources of the facility.¹⁸⁶ Considering the nature of the cruise industry, it is likely that some accommodations that would otherwise be reasonable in traditional workplace environments may not be reasonable at sea. For example, if, due to a disability, an employee required weekly doctor visits, it is unlikely that a court would deem this reasonable in light of the travel inherent to working on a cruise ship. However, Mr. Schultz’s doctor had indicated that he would be able to complete the requirements of the job without accommodation.¹⁸⁷

C. Need for Amendment or Judicial Clarification

Although the ADA has been amended to expressly extend its applicability to foreign corporations, the Act leaves gaps, which continue to allow cruise lines to claim exemption.¹⁸⁸ It is important to note that the idea of forum shopping for the most corporation-friendly laws is not a new concept but is in fact a common theme with American corporations. For example, within the United States, the state of Delaware is most commonly the state of incorporation for many corporations, which are headquartered elsewhere in the country. Often such corporations do so

¹⁸⁵ See generally, § 121111(9) (the Act indicates that a reasonable accommodation may include (1) making existing facilities readily accessible and usable by individuals with disabilities and (2) restricting the job, allowing for modification of work schedules, reassignment, etc.).

¹⁸⁶ § 121111(10).

¹⁸⁷ Complaint at 9, *Schultz*, No. 24-023.

¹⁸⁸ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 158 n.9 (2005). See §12112(c). See also *Loving v. Princess Cruise Lines, Ltd.*, No. CV 08-2898 JFW AJWX, 2009 WL 7236419, at *23 (C.D. Cal. Mar. 5, 2009) (stating that Congress amended Title I of the ADA in response to the Supreme Court’s decisions in *Equal Emp’t Opportunity v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) and the decision not to similarly amend Title III supports the idea that Congress did not intend for Title III to have extraterritorial effects).

in the hopes that Delaware's corporation friendly laws will apply and for purposes of applicable taxes and regulations. Flags of convenience, and incorporation in foreign countries, are simply another means by which corporations seek to find the most unrestrictive laws and thereby purposefully avoiding the policies of our country. If, as a country, we care about the policies that we put in place, more should be done in an attempt to disallow the avoidance of their regulation by forum shopping.

First, the Act limits its extraterritorial application to foreign corporations controlled by American employers.¹⁸⁹ Even though this may seem appropriately tailored to exclude corporations that should not be exposed to U.S. law, cruise ships are a unique situation. Although most cruise ships fly flags of countries in which they do not operate, and are often incorporated in different countries than their flag-state, the world's leading cruise ships operate primarily within the United States. This disjointed set up may cause difficulties for plaintiffs seeking to prove as the ADA requires, that the cruise ships are an American employer.¹⁹⁰ Most cruise companies, such as Carnival Corporation and Royal Caribbean Cruises, Ltd. own and operate subsidiaries that operate the cruise ships.¹⁹¹ Further, many companies in the cruise industry outsource their hiring and other aspects of their business, likely in order to limit their ability to be connected with their subsidiaries and, thus, their ability to be deemed controlled by an American employer. The ability of cruise corporations to forum shop when registering their ships in order to avoid higher taxes and strict labor laws has paved the way for these corporations

¹⁸⁹ § 12112(c)(2)(B).

¹⁹⁰ Negret, *supra* note 103.

¹⁹¹ Royal Caribbean Cruises, Ltd., Quarterly Report (Form 10-Q) (Sept. 30, 2018) <http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=12513309&type=PDF&symbol=RCL&companyName=Royal+Caribbean+Cruises+Ltd.&formType=10-Q&dateFiled=2018-10-26> (last visited Nov. 10, 2019); Carnival Corp., Quarterly Report (Form 10-Q) <http://phx.corporate-ir.net/phoenix.zhtml?c=140690&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdlPTEyNDcyMDYxJkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVEIPTI9FTIRJkUm3Vic2lkPTU3> (last visited Nov. 10, 2019).

to do anything they can to avoid application of such laws. Therefore, amending the current flagging regulations so ships are not deterred from registering their ships under the American flag, could help minimize the issues of potential conflict between law of a flag-state and U.S. law. Going even further, there may be a benefit to imposing sanctions or fines upon companies that attempt to structure their operations in a manner that appears almost fraudulent.

Second, the Act states that otherwise discriminatory conduct under the ADA is not unlawful if compliance with the Act would cause the entity to violate the law of the foreign country in which the workplace is located.¹⁹² As a general principle, the law of a ship's flag state generally governs foreign-flag vessels. As suggested by the *Lauritzen* test, there are circumstances, such as ships flying flags of convenience, where it may not be appropriate to use the laws of the flag state as a default. The premise of the flag of convenience is based on minimal contacts with the flag state, which suggest the lack of regulation a ship would have. Further complicating the potential conflicts of law, is the international regulations which apply to vessels. However, as the United States is also a member of both the International Maritime Organization and the International Labour Organization in amending the statute Congress could consider the international standards established by these organization.¹⁹³ Given these standards govern the flag-states of most cruises, Congress could indicate their intention for the ADA to coordinate with these standards, eliminating the claim that a cruise company could not comply with both the ADA and the ILO Guidelines.

¹⁹² § 12112 (c)(1).

¹⁹³ INTERNATIONAL MARITIME ORGANIZATION, Members <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> (last visited Nov. 10, 2019).

¹⁹³ INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Pages/Default.aspx> (last visited Nov. 10, 2019); INTERNATIONAL LABOUR ORGANIZATION, members, <https://www.ilo.org/public/english/standards/reim/country.htm> (last visited Nov. 10, 2019).

Finally, judicial clarification is needed to determine what constitutes “internal order” of a ship. Although, based on the language used by the Court previously, it seems as though the internal order of a ship is not implicated when the welfare of American citizens is affected, this is a threshold issue when it comes to extraterritorial application. As stated by the Supreme Court, a clearly expressed intent from Congress is only needed if the application of the statute implicates the internal order of a ship. However, a clear definition has not yet been given by the Supreme Court. Though there is only a small chance that *Schultz* would make it all the way to the Supreme Court, the pending case would allow the district court to attempt to define “internal order.” This issue of avoiding unfavorable laws is part of a larger phenomenon within this country and therefore we should seek to establish our laws in such a way that prevents such conduct.

V. Conclusion

In conclusion, this Comment put forth the position that the law applying Title I of the Americans with Disabilities Act to foreign-flag vessels is unsettled and in need of reconciliation. The analysis of the Court in *Spector v. Norwegian*, although applying Title III of the Act, provides a helpful framework in analyzing such cases. First this Comment discussed the *Spector* opinion and the analysis used by the Court in assessing Title III claims under the ADA. Next, this Comment reviewed case law applying Title I of the ADA in order to establish the lack of a standardized analysis. In furtherance of applying the *Spector* framework, this Comment then addressed the potential international laws that could conflict with the application of the ADA to foreign-flag vessel employees. Finally, this Comment suggests that the Americans with Disabilities Act be amended in order to provide a standardized and predictable means for courts to analyze such cases. Without this clarification, cruise ship companies, almost wholly operating

within the boundaries of the United States, will continue to claim immunity from their discriminatory behavior.