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Ordinarily foreign employers are required to adhere to federal and state anti-discrimination laws. There are, however, exceptions. The Friendship Commerce and Navigation (FCN) Treaties and the Foreign Sovereign Immunities Act (FSIA) both limit the application of Title VII, ADA and ADEA, and related state laws in the American workplace.

ment of Commerce, 1995). During that same year, foreign companies accounted for $504.4 billion in domestic investment. See, Gregory G. Fouch, et al., Foreign Direct Investment in the United States: Detail for Historical-Cost Position and Repeated Capital Income Flows, 1994 Survey Current Business, vol. 75, no. 8 at 53, 62 (Bureau of Economic Analysis, U.S. Department of Commerce 1995). With the rapid growth in mergers and acquisitions in the last 20 years, an employee initially working for a domestic firm might during his career find himself employed by an overseas company. See Labor Holds Key to Fate of Daimler-Chrysler Merger, Wall Street Journal, May 7, 1998, at B18. In the year 2001-2002 there was a steep decline in new foreign investment in America. See, News Release, Bureau of Economic Analysis, Foreign Direct Investors’ Outlays to Acquire or Establish U.S. Businesses Fell Sharply in 2002 for Second Year (June 3, 2003), available at www.bea.gov/newsreleases/international/fdi/2003/fdi02.htm (last visited Feb. 10, 2004). The trajectory of growth has at times been uneven. Despite this fact, it is undisputed that foreign companies have established themselves as a significant presence in the domestic employment market. Large numbers of Americans now find themselves reliant upon foreign enterprises for their livelihoods. In such an environment, the employment laws that define these relationships become particularly important.

THE REACH OF TITLE VII • The Equal Employment Opportunity Commission (EEOC) is the federal agency tasked with enforcement of the nation’s anti-discrimination laws. Among the earliest of these is Title VII of the 1964 Civil Rights Act, as amended by the 1991 Act. Key provisions include the following:

• “It shall be an unlawful employment practice for an employer...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.” 42 U.S.C. section 2000e-2(a)(1); • An “employer” means “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” Id. at section 2000e(b); • Commerce is defined as “trade, traffic, commerce, transportation, transmission or communication.” Commerce also includes both foreign and interstate commerce. Id. at section 2000e(g).

See, Americans with Disabilities Act (ADA) (same employee number and same calendar weeks), 42 U.S.C. section 12111, et seq. See also, Age Discrimination in Employment Act (ADEA) (20 employees and same calendar weeks), 29 U.S.C. section 623, et seq. After so many years, American employers readily acknowledge the applicability of the anti-discrimination statutes to them when they satisfy the statutory requirements. Many foreign enterprises, however, have vigorously resisted the extension of these laws to their American employees working in the United States.

The “Foreign Employer” Exemption

In 1983, a Japanese corporation claimed to be exempt from Title VII because it had no employees permanently working in the United States, was not involved in commerce, and had insufficient American contacts to be amenable to American domestic administrative jurisdiction. Citing Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980), the EEOC held that Title VII was intended to be broadly construed. Moreover, there was no language in the statute limiting the definition of “employer” simply to enterprises with permanent employees. Likewise, hiring employees to perform services for pay was obviously commerce. Finally,
the agency determined that due process standards were satisfied as the recruiter voluntarily came to America to interview student and alumni job applicants on their university campus. See, Foreign Recruiter, University Referrals Subject to Title VII, EEOC Dec. No. 84-2, Empl. Prac. Guide (CCH) para. 6840, at 7018 (1983).

In a seminal case, Ward v. W & H Voortman, Ltd., 685 F. Supp. 231 (M.D. Ala. 1988), the federal court squarely addressed the extension of American anti-discrimination laws to employees working domestically for foreign corporations. There, an American female manager sued a Canadian business for sex discrimination. At the outset, the court noted the absence of any exemption under Title VII for foreign enterprises doing business in the United States. Furthermore, it emphasized that it “would be...illogical to limit the Act’s protective reach to only those American employees who work for a domestic entity and leave open to victimization those employees in the country’s workplace who work for companies that happen to be foreign-owned.” Id. at 232.

Limits Of The Exemption

Under the 1991 Civil Rights Act, both Title VII and the ADA now expressly state that the foreign employer exemption extends only to foreign firms that are not controlled by American enterprises and are operating outside the United States. See, Title VII, 42 U.S.C. sections 2000e-(1)(c)(2); ADA, 42 U.S.C. section 12112(c)(2)(B). See also, EEOC, Enforcement Guidance on Application of Title VII and ADA to Conduct Overseas and to Foreign Employers in the United States (Oct. 20, 1993). Accordingly, Title VII and the ADA have consistently been interpreted to cover foreign employers engaged in domestic business.

What About The ADEA?

Unlike its sister statutes, the ADEA does not contain unequivocal language concerning foreign employers operating in the United States. The statute was amended in 1984 to protect older citizens working abroad for American or American-controlled companies. Read literally, its language afforded no protection to older workers employed domestically by foreign companies. Despite the EEOC policy that stressed “[t]he ADEA applic[s] to an employer that is a foreign firm operating inside the United States unless a treaty is involved,” see, www.eeoc.gov/policy/docs/extraterritorial-adea-cpa.html, some courts ignored the agency interpretation, emphasizing instead that such a construction contravened express statutory language. Mochelle v. J. Walter, Inc., 823 F. Supp. 1302 (M.D. La. 1993), aff’d without opinion, 15 F.3d 1079 (5th Cir. 1994) (overseas employer with American employees working domestically is not covered by ADEA). Contra: Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261 (S.D.N.Y. 1987). More recent cases however have reached a different conclusion. In Morelli v. Cedel, 141 F.3d 39 (2d Cir. 1998), the court was called upon to decide two questions; first whether the ADEA applied to American workers employed domestically by overseas corporations; and second, whether employees working abroad could be counted in assessing whether the American branch of a foreign employer is subject to the ADEA. The court answered both questions in the affirmative. There, the plaintiff was summarily fired without explanation by Cedel, a Luxembourg bank with less than 20 employees, at its only American branch. She brought claims under ADEA and ERISA. The Second Circuit concluded that sections 623(h)(2) and 623(f) did not exempt overseas enterprises from the strictures of the ADEA:

“There is no evidence in the legislative history that these amendments were intended to restrict the application of the ADEA with respect to the domestic operations of foreign employers.... The Title VII and ADA exclusions are expressly limited to the ‘foreign operations of an employer that is a foreign person not controlled by an American employer’ (citations omitted), so these employment
discrimination statutes would apply to a foreign company’s domestic operations. It is not apparent why the domestic operations of foreign companies should be subject to Title VII and ADA but not to the ADEA.”

Id. at 43. Turning its attention to the statutory numerosity requirement, the court acknowledged that Cedel did not satisfy the definition of an “employer,” see, 29 U.S.C. section 630(b), if only its New York branch employees were counted. However, the inquiry did not end with a tabulation solely of its domestic staff. “[T]here is no requirement that an employee be protected by the ADEA to be counted; an enumeration for the purpose of ADEA coverage of an employer includes employees under age 40, who are also unprotected. See 29 U.S.C. section 631(a). The nose count of employees relates to the scale of the employer rather than to the extent of protection.” Id. at 44-45.


Courts have shown a willingness to apply the “single employer” analysis to companies employing both domestic and foreign employees to satisfy the numerosity standard. In Kang v. U Lim America, Inc., 296 F.3d 810 (9th Cir. 2002), the court determined that an American company with fewer than 20 domestic employees satisfied the definition of “employer” for purposes of Title VII. Its 50 to 150 Mexican employees worked at the same site as their American counterparts, company officers were identical and the American firm handled labor relations and made fiscal decisions for both companies.

The numerosity requirements are not only important to the merits of the claim, but relevant to the ultimate liability finding. See, Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). Under Title VII the employer’s maximum exposure for compensatory and punitive damages is dependent upon the number of company-wide employees. Based upon the reasoning of Morelli and its progeny, the worldwide staff would be included, thus enhancing a plaintiff’s potential recovery. See, Greenbaum v. Svenska Handelsbanken, N.Y., 26 F. Supp. 2d 649, 655 (S.D.N.Y. 1998).

THE FRIENDSHIP, COMMERCE AND NAVIGATION TREATIES • The Friendship, Commerce and Navigation (FCN) Treaties limit the scope of protection under the anti-discrimination laws applicable to employees working domestically for foreign employers. Many executive, managerial, and professional positions in treaty-protected foreign businesses are in effect unavailable to American job seekers. As a result, U.S. employees working for such companies may well experience a glass ceiling that limits their professional advancement and their earning potential.

In the treaties antedating World War II, American corporations had only the most limited protection against discriminatory treatment in foreign countries. Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece before a Subcommittee of the Senate Committee on