

COUNSELING MULTINATIONAL EMPLOYEES: THEIR RIGHTS AND REMEDIES

UNDER US LAW

By: Wendi S. Lazar*

INTRODUCTION

In the modern global workplace, international corporations and multinational employees alike face new and complex legal challenges. For the expatriate employee, knowing what country's laws apply to his or her employment can be bewildering. For the U.S. employment lawyer, advising a client on contract, discrimination, and other employment law issues can require knowledge of the law in multiple jurisdictions and demand a complex choice-of-law analysis.

In the case study below, we meet a German citizen who, after a ten-year career with a U.S. office of a German bank, is relocated outside the U.S. and is later fired in Germany for discriminatory reasons. In his search for a jurisdiction in which he can enforce his rights and make himself whole, broader legal issues concerning cross-border employees and the reach of U.S. law are raised.

This paper presents the facts of his case and analyzes the legal remedies available to him under federal law, whether he is in the U.S. or abroad. In addition, broader principals of U.S. law, including its consideration of foreign law and international treaties, will be discussed and the appropriate legal analysis applied to various scenarios.

CASE STUDY

Thomas Mark, a German citizen, spent 12 years working for CGNE Bank, a German bank (hereinafter, "CGNE" or the "Bank"). CGNE has locations all over the world, with major offices in the U.S. and Germany. For ten years, Thomas worked in New York under a New York employment contract with continuous extensions. He was transferred to Argentina and later returned to Germany, where he fell ill with cancer. When he returned to work following surgery and a three-month convalescence period, he was terminated in an alleged restructuring and offered six months' salary as severance, if he signed a separation agreement and a general release of claims.

Thomas was devastated. He was the primary income-earner in his family, and the offered severance payment would not cover his obligations, including the mortgage on the Marks' New York apartment, rent in Germany, expenses related to his tenuous health, and costs incurred with four children at the American School in Germany. Nor did the severance package give him adequate time to find a new job. In addition, his local health insurance had been cancelled, and he was being denied unemployment insurance and social security benefits in Germany.

Thomas met with several attorneys in Germany who advised him to hire U.S. counsel and pursue his case in the U.S. They reasoned that he had worked for the Bank for 12 years under a

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U.S.-based contract, that he and his wife were U.S. permanent residents, and that U.S. discrimination laws for disability, unlike German law, would provide damages for wrongful termination. The German attorneys also told Thomas that, while German law guarantees lifetime employment, it does not provide adequate protection for disability discrimination and it limits damages. Besides, they said, he was practically an American; given that he had spent his career working in New York, U.S. courts would surely protect his rights.

Thomas is referred to U.S. counsel, whom he calls from Germany. He gives her all the pertinent facts of his employment with CGNE, which are as follows:

Thomas was 30 when he and his wife Anne came to the U.S. to get their MBAs in finance. At graduation, Thomas was offered a position in New York as a Director with CGNE's private banking U.S. office. At the same time, Anne gave birth to Jacques, the family's first U.S. citizen. The Bank petitioned for H-1B status for Thomas and Anne so they could live and he could work in the U.S. The Bank, as was its custom, gave Thomas a two-year contract. The relevant parts of the fully executed contract state the following:

Para 5. The anticipated term of the assignment is currently 2 years. It can however be terminated at any time at our option or subject to our approval and all rights to employment thereafter may be terminated.

Para 6. At the end of your expatriation, you will have a new assignment within CGNE Bank, except in either of the following circumstances:

- (a) in the case of gross misconduct on your part
- (b) if mutually agreed otherwise.

Para 7. It is expressly agreed that every matter pertaining to the conclusion and execution or any breach of this present contract will come under the jurisdiction of the State of New York.

Two years later, Thomas was promoted to Managing Director. The Bank extended his U.S. contract and immigration status for another two years, and Thomas applied for permanent residence – a process that would take at least two or three years if successful. That winter, Anne gave birth to twin girls.

As years went by, CGNE extended Thomas's contract several times and gave him successive promotions. The Marks, meanwhile, had a fourth child. Once Thomas and Anne received their "green cards" and became U.S. residents, they bought an apartment in Manhattan. After 10 years in New York, Thomas was asked to accept a position in Latin America as Chief Financial Officer of the Bank's Americas operation.

While Thomas and Anne were extremely reluctant to leave their home and move their children (some of whom were now school age) to Argentina, they also recognized that this type of promotion would not otherwise occur. The Bank made it known that executives would be promoted to senior positions only after they had worked abroad, testing the loyalty of those who

served the Bank and ensuring that its highest-level executives gained valuable international experience. In June, Thomas and Anne rented out their apartment, and the Bank moved them to Argentina.

One year later, Thomas requested a return to the U.S. The Bank told him to be patient - an opportunity would arise. Months later, nothing had. Finally, with a year left on Thomas's extended contract, the Bank offered him a position of CIO in Germany, with the promise that they would transfer him to New York when something was available. As a condition of his return to Germany, Thomas was told that he had to relinquish his New York contract (which would be effective for an additional year), so that the Bank would not have to pay for his living expenses as an expatriate in his home country. He verbally agreed, but never signed the paperwork.

In Germany, the Marks rented a house and put the children in the American School—all at their expense. A month later, Thomas, who had not been feeling well, was diagnosed with prostate cancer. He went through surgery and rehabilitation, and after convalescing for three months, returned to the Bank, hoping work would alleviate his health concerns. Instead, two weeks later, the newly hired CEO of the German office told him that they were restructuring and that his position would be eliminated. Thomas called his boss in New York, who confirmed that Thomas was being fired. He told Thomas that he could do nothing, that no position was available in New York, and that Thomas's contract had terminated upon his return to Germany.

On the advice of German counsel, Thomas retained U.S. counsel and promised to send her all of his contracts, plus the proposed separation agreement. His U.S. attorney assured him that she would do the necessary research and call him with her advice and opinion.

LEGAL ANALYSIS

U.S. Discrimination Law

A wide range of variables determines whether an individual who has worked in the U.S. and abroad may invoke the protections of federal anti-discrimination statutes. While many of the same principles of extraterritoriality apply to all U.S. anti-discrimination statutes, federal courts have drawn some distinctions between Title VII, the ADEA, and the ADA in application and scope.

Since Thomas seeks protection under the ADA, our initial focus will be on that statute, relevant federal case law, and EEOC guidelines. By considering the specific facts and circumstances surrounding Thomas's life and work in light of relevant case law, we can determine whether Thomas can seek protection in U.S. courts, or at least have enough leverage to negotiate a fair settlement of his claim.

A. Non-citizen Employees

A useful starting place is to consider the citizenship of Thomas and of his employer, CGNE.

Title I of the ADA provides that, “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” U.S. citizenship does not appear to be a prerequisite for invocation of the ADA’s employment protections. Although the statute states that, “[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States,” its definitions of “covered entity,” “qualified individual with a disability,” and “employee” do not include any citizenship prerequisite for ADA coverage. In the absence of any such stated limitation, all individuals employed in the U.S. are protected by the ADA, even if they are not U.S. citizens.¹

Thus, one of the first questions for Thomas is where he was employed. In this case, Thomas worked in the U.S. and Argentina before he fell ill, and he was terminated in Germany. As a non-U.S. citizen, Thomas is protected by the ADA only if he was employed “in the U.S.” at the time of his termination. The fact that Thomas worked outside the U.S. in the years immediately preceding his termination is not by itself determinative. *See, e.g., Torrico v. IBM*, 213 F. Supp. 2d 390, 403 (S.D.N.Y. 2002) (“Whether Torrico was ‘employ[ed]’ abroad or was employed in the United States and merely temporarily deployed to Chile is a question of fact which cannot be answered simply by noting that he spent the bulk of his time in Chile for the three years leading up to the alleged discriminatory termination.”) Nor does the locus of the allegedly discriminatory act determine whether a non-citizen may sue an employer under the ADA. *See, e.g., id.* at 400 (allegations of discriminatory conduct in the U.S. do not by themselves bring a non-U.S. citizen employee within the ambit of the statute’s protections.”) Rather, with respect to individuals who have worked domestically and abroad, courts have noted that, when the work done in the foreign country was part of a “temporary assignment” and the individual otherwise worked in the U.S., he or she is deemed to have been employed in the U.S. for purposes of the ADA, as well as Title VII and the ADEA.

The court in *Torrico v. IBM* used a “totality of the circumstances” test, drawn from general employment law principles, to determine where the plaintiff was employed for purposes of federal anti-discrimination laws. In that case, the district judge turned to New York law and concluded that the appropriate inquiry involved asking where the “center of gravity” of the employment relationship had been:

The center of gravity of an individual's relationship with an employer is determined by considering a variety of factors, including (but not limited to) whether any employment relationship had, in fact, been created at the time of the alleged discrimination, and if so, where that employment relationship was created and the terms of employment were negotiated; the intent of the parties concerning the place of employment; the actual or contemplated duties, benefits, and reporting relationships for the position at issue; the particular locations in which the plaintiff performed those employment duties and received those benefits; the relative duration of the employee's assignments in various locations; the parties' domiciles; and the place where the allegedly discriminatory conduct

¹ *Torrico v. IBM*, 319 F. Supp. 2d 390, 405 (S.D.N.Y. 2004). “Congress established that the ADA applies to non-citizens as well as citizens employed in the United States... .”

took place. The list is not meant to be exhaustive; the center of gravity of the parties' relationship is to be determined based on the totality of circumstances.

Id. at 402-03.

Weighing these and similar factors, if a non-citizen employee's place of employment is deemed to be the U.S., he may sue under the ADA. On the other hand, if the employee is deemed to be employed abroad, he would not be covered by the ADA.²

Under the facts provided above, a court may likely conclude that Thomas was in fact employed in the U.S and that his positions in Argentina and Germany were merely temporary assignments for the following reasons: the employment relationship was initially created and negotiated in the U.S.; despite the two-year term for his successive New York contracts, Thomas spent the vast majority of his career with CGNE working in New York, as opposed to Argentina or Germany; and Thomas's employment in Germany was secured under the promise that it was a prerequisite for returning to the U.S. On the other hand, if a court concludes that Thomas's New York employment contract ended upon his transfer to CGNE's Argentina office or when he orally agreed to relinquish the contract before returning to Germany, the court may find that Thomas was not employed in the U.S.

B. Minimum Employee Requirement

Another threshold issue is whether the former employer is in fact a "covered entity" under Title I of the ADA. The statute "applies only to companies with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."

² Although Title VII and the ADA have numerous textual similarities, including their extraterritoriality provisions, some courts – most notably, Fourth Circuit courts – have imposed an additional element of proof on non-citizen plaintiffs bringing Title VII claims. As part of the standard requirement that a Title VII or ADA plaintiff demonstrate that he or she was in fact qualified for the position in question, the Fourth Circuit has stated that, "[w]hen the applicant is an alien, being 'qualified' for the position is not determined by the applicant's capacity to perform the job--rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question." *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998); see also *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999); *Slaitane v. Sbarro, Inc.*, 2004 WL 1202315, at *17 (S.D.N.Y. Jan. 2, 2004) (UNPUBLISHED) (granting defendant summary judgment on plaintiff's discriminatory termination and unlawful retaliation claims under Title VII because he was not legally authorized to work in the U.S.).

Other courts have concluded, however, that Title VII applies to all non-citizens working in the U.S., regardless of immigration status. In *EEOC v. Tortilleria 'La Mejor'*, 758 F. Supp. 585 (E.D. Cal 1991), the district court reached this conclusion as a matter of statutory interpretation and after consideration of relevant EEOC guidelines. More recently, in *Escobar v. Spartan Security Service*, 281 F.Supp.2d 895 (S.D. Tex 2003), the district court concluded that requiring non-citizen plaintiffs to establish that they were legally qualified to work in the U.S. may be appropriate when the claim is for discrimination in hiring, firing or promotion, but inapplicable to harassment and retaliation claims, since the latter types of Title VII claims do not require any plaintiff to show that he or she was qualified for the position occupied when subjected to the unlawful act by the employer. See *id.* at 897.

As of the writing of this paper, no published federal court opinion requires a non-citizen plaintiff suing under the ADA to establish legal authorization to work in the U.S.

In the case of multinational employers, a key question is whether to count only those employees working in the U.S. or to include employees working for the entity outside the U.S. Determining whether the minimum employee requirement has been met is further complicated when the employer is a U.S. subsidiary of a company incorporated outside the U.S.

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 188-89 (1982), the Supreme Court stated that a U.S.-based employer that is a subsidiary of a business incorporated abroad is “subject to the responsibilities of other domestic corporations,” and by extension, subject to the ADA and Title VII. EEOC guidelines provide that, if the U.S. company and the multinational corporation are an “integrated enterprise,” then all employees, domestic or abroad, should be counted for purposes of the ADA’s requirement. Whether the two form an integrated enterprise is determined by looking at the following factors: (i) interrelation of operations; (ii) common management; (iii) centralized control of labor relations; and (iv) common ownership or financial control.

The Second Circuit agreed with the EEOC’s approach in *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998), an ADEA case. Looking to, among other things, the rationale behind the minimum employer requirement, the court concluded that the intention to exclude small-employers from liability simply did not apply when the employer was a company spanning international borders. Courts have followed the *Morelli* approach in subsequent ADA and Title VII cases.

C. Citizen Employees and the Citizenship of the Employer

Suppose Thomas had become a U.S. citizen before moving to Argentina, but had given up his U.S. contract before leaving New York. Would the analysis be different? The answer is yes. The ADA’s definition of a covered employee, “[w]ith respect to employment in a foreign country ... includes an individual who is a citizen of the United States.” 42 U.S.C. § 12111(4). Thus, as a U.S. citizen, an employee may be covered by the ADA regardless of whether he worked in the U.S. or abroad. The critical variable is the “citizenship” of the employer.

Like Title VII, the ADA explicitly exempts from its coverage “the foreign operations of an employer that is a foreign person not controlled by an American employer.” 42 U.S.C. § 12112(c)(2)(B). The ADA also affirmatively states that it protects against the discriminatory acts of an entity that is incorporated outside the U.S. only if that entity is controlled by a U.S. corporation. 42 U.S.C. § 12112(c)(2)(A). In those situations, the ADA deems the controlling U.S. corporation to be the employer and to be the party that engaged in the discriminatory acts. The statute mandates that determining whether the requisite degree of control exists “shall be based on (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.” 42 U.S.C. § 12112(c)(2)(C) (emphasis added).

Under this framework, if Thomas had become a U.S. citizen, and a court were to conclude that CGNE-Germany and its U.S. office were essentially a single employer operated and controlled by a German corporation, then Thomas could invoke the ADA only if the court also had concluded that he was employed “in” the U.S. On the other hand, if a court were to find that CGNE’s U.S. office was a true, independent subsidiary and not merely a branch, Thomas, as a

U.S. citizen, could have an ADA claim against the U.S. entity regardless of whether his place of employment was within or outside the U.S.

The identity of the employer is also significant in cases brought under the ADEA, albeit for slightly different reasons. The ADEA's foreign employer exception differs from that found in the ADA and Title VII. While the ADEA also does not apply where "the employer is a foreign person not controlled by an American employer," 29 U.S.C. §623(h)(2), the ADEA does not explicitly limit this to "the foreign operations" of such a foreign employer. Some courts, most notably the Second Circuit Court of Appeals, have held that this provision does not exempt domestic operations of an employer incorporated outside the U.S.; in other words, such domestic operations are covered by the ADEA. *See Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998); *EEOC v. Kloster Cruise Ltd.*, 888 F.Supp. 147, 151-52 (S.D. Fla. 1995). Other courts have found such a conclusion to be inconsistent with the legislative history of the ADEA and its statutory amendments, however, holding that the ADEA does not apply to foreign employers, even with respect to their business within U.S. borders. *See, e.g., Robinson v. Overseas Military Sales Corp.*, 827 F.Supp. 915 (E.D.N.Y. 1993); *Mochelle v. J. Walter Inc.*, 823 F.Supp. 1302 (M.D. La. 1993), *aff'd*, 15 F.3d 1079 (5th Cir. 1994).

D. Employer Defenses to Discrimination

1. Foreign law exception and the FCN Treaty Defense

When both the employee and employer come within the ambit of the ADA, an employer may still be able to find a safe haven in the following statutory exemption: employers may lawfully "take any action that constitutes discrimination [under Title I of the ADA] with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located." 42 U.S.C. § 12112(c)(1). Thus, an entity employing workers abroad may have a bona fide occupational qualification defense ("BFOQ") to an ADA claim.

Title VII contains an identical "foreign law exception," and most case law elaborating on the contours of this BFOQ has emerged in the context of national origin discrimination cases under Title VII. Most courts narrowly construe this exception, consistent with EEOC Guidelines. To have its preference upheld as a BFOQ, an employer generally must show the discriminatory conduct to be a "business *necessity*, not a business *convenience*." *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (emphasis added); *see also Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (courts will defer to foreign laws requiring conduct constituting unlawful discrimination under U.S. laws, but will *not* defer to "cultural views" or "customer preferences" of the locality where conduct occurred).

2. The Friendship, Commerce and Navigation Treaty "Of Their Choice" Defense

In certain situations, a multinational employer may avail itself of an international treaty to defend its discriminatory conduct.

³ Article VIII(1) of the U.S.-Japan FCN Treaty⁴ provides that

[n]ationals and companies of either Party [Japan or the United States] 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.⁵

As some federal circuit courts have noted, such “of their choice” language was intended primarily to exempt foreign companies from local legislation restricting the employment of non-citizens and to assist in a foreign company’s employment of its own nationals to ensure its operational success in the host country.⁶

Whether the defendant-employer is a U.S. subsidiary or a foreign entity impacts the viability of such a defense. In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the Supreme Court concluded that, in general, a U.S. subsidiary of a foreign corporation may not invoke any treaty rights of the parent; but if the foreign parent actually controlled the employment decisions of the subsidiary, the treaty could be invoked by both entities. Moreover, under the Court’s holding, a branch office of a foreign-incorporated entity would be entitled to claim FCN treaty immunity.⁷

E. U.S. Contract Law

Thomas’s facts raise issues of contract law in addition to the discrimination issues. If Thomas’s contract is found to be in full force and effect, given that he never signed the proffered early termination document before he moved to Germany, he could have his contract claim heard in federal court in New York State under diversity jurisdiction and/or supplemental to his ADA claim.⁸ Several issues must be analyzed under New York contract law, such as the ambiguity of

³ The following FCN treaties contain an “of their choice” provision: U.S.-Japan Treaty: Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863, U.S.-Greece, art. XII(4), 5 U.S.T. 1829; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, 1950, U.S.-Den., art. VII(4), 12 U.S.T. 908; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R. Germany, art. VIII(1), 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, U.S.-Neth., art. VIII(1), 8 U.S.T. at 2043; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, art. VIII(1), 8 U.S.T. 2217; Convention of Establishment, Protocol, and Establishment and Navigation, Feb 12, 1961, U.S.-Fr., art. VI(1)-(2), Protocol (9), 11 U.S.T. 2398; and Treaty of Friendship, Commerce and Navigation, Feb. 12, 1961, U.S.-Belg., art. 8 (1)-(2), 14 U.S.T. 1284.

⁴ 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863.

⁵ *Id.*

⁶ *Avagliano v. Sumitomo Shoji Am., Inc.* 638 F.2d 552, 554 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982); *see also MacNamara v. Korean Airlines*, 863 F.2d 1135, 1144 (3d Cir. 1988) (“the target of Article VIII(1) was domestic legislation that discriminated on the basis of citizenship”).

⁷ *Id.* at 189. For a more in depth discussion of the FCN Treaty *see* Wayne N. Outten & Jack Raisner, *Extraterritorial Application of U.S. Laws: Anti-Discrimination*, in *INTERNATIONAL LABOR & EMPLOYMENT LAWS*, ABA/BNA Books, 1997.

⁸ 28 USCS § 1332. “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between--(1) Citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.”

the contract provisions⁹ and the validity of Thomas's verbal agreement to waive his contract rights.¹⁰

Paragraphs 5 and 6 of Thomas's contract appear to conflict. While Paragraph 5 states that an assignment and employment can be terminated at the Bank's option, Paragraph 6 states that employment can be terminated only for gross misconduct or by mutual agreement. A review of the facts and circumstances of Thomas' employment is necessary when conflicting provisions are encountered that may reveal the intent and expectations of the parties.¹¹

Here, ancillary oral communications demonstrate that Thomas's position in Germany was conditioned upon his relinquishment of his New York contract. Thomas's written agreement to resign would have created an express waiver of his rights under the contract. In the absence of a written resignation, the oral communications could constitute an implied waiver of these rights. Ultimately, this argument could turn on whether the contract had a modification clause (prohibiting an oral modification) and whether the court would consider the ancillary evidence dispositive.¹²

Even in absence of a contract, Thomas could argue that a promise of employment was created, on which he and his family relied to their detriment.¹³ They purchased property in New York, brought up their children in the U.S., and became permanent residents. Thomas' supervisor in the U.S. promised him that his assignment abroad would enhance his chances for promotion, so he could return to the U.S. in a more senior position. In addition, Thomas is ineligible for New York state unemployment benefits while living in Germany and is ineligible for German Social Security benefits. Based on these circumstances, equitable considerations could cause a U.S. court to find a remedy for Thomas.

F. Counseling Thomas

A non-citizen living abroad takes substantial risks in filing a claim in U.S. courts because the applicability of federal anti-discrimination laws is by no means clear. Thorough research and investigation early on by counsel can assist the client in deciding whether to pursue such a case.

A thorough interview of the client, even if long distance, will help the U.S. attorney evaluate the prospects for litigation in the U.S. Fully comprehending Thomas's employment relationship with the U.S. office can also help determine whether a court will find that the "center of gravity," as defined by the Second Circuit in *Torricono v. IBM*, was indeed the U.S. office and, therefore, that Thomas was "employed" in the U.S. for purposes of the ADA. Also, determining the relationship between the U.S. office and the German bank and understanding the "requisite

⁹ *Elletson v. Bonded Insulation Co.*, 708 N.Y.S. 2d 511 (N.Y. App. Div. 2000).

¹⁰ *See Posh Pillows, Ltd. v. Hawes*, 525 N.Y.S. 2d 877, 878 (N.Y. App. Div. 1998); *see also Gentry v. Stevens*, 536 N.Y.S. 2d 89 (N.Y. App. Div. 1988) (where ambiguity exists, extrinsic evidence may be used to determine intent).

¹¹ *Arthur Glick Truck Sales, Inc. v. Gen. Motors Corp.*, 865 F.2d 494 (2d Cir. 1989).

¹² *See Posh Pillows*, 525 N.Y.S. 2d at 878 ("Where the court determines as a threshold issue that the terms of the agreement are ambiguous and the intent of the parties becomes a matter of inquiry, parol evidence is permitted.").

¹³ *See City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 48 (2d Cir. 1988) (doctrine applicable where plaintiff demonstrates "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance").

degree of control” of the U.S. office over Thomas’s termination in Germany will assist in judging Thomas’s chances of success.

One major issue to consider in counseling a multinational employee abroad is whether he or she can vindicate his or her rights in a jurisdiction outside the U.S. Moreover, practical issues must be considered; for example, litigation in the U.S. would require Thomas and his family to spend a significant amount of time in New York, which may not be practicable in the circumstances.

If Thomas remains in Germany, deciding whether to proceed with his German claims will be based on the advice of German counsel. On one hand, while the law in Germany supports lifetime or “indefinite term” employment so long as termination was not for just cause,¹⁴ German courts may be inclined to discount claims like Thomas’s because he worked most of his career in the U.S. Moreover, German Labor Courts limit the remedy to “reinstatement” or severance in lieu of reinstatement.¹⁵ Generally, the amount of severance will be determined by the salary, age, and length of service with the current employer.¹⁶ Therefore, the time Thomas spent with the U.S. office (if it was a subsidiary) is likely to be discounted when calculating his severance under German law. This would not be the case, however, if Thomas’s service with the U.S. subsidiary was transferred, either contractually or by law, from the U.S. subsidiary to the parent corporation or if the U.S. office was a mere branch of the German parent. In that case, severance pay would be determined by the combined service with the U.S. subsidiary and the German parent company.¹⁷

In these circumstances, pursuing claims in Germany may be the first and most practical step for Thomas while living in Germany, even if his remedies there are limited. In addition, being a defendant in any jurisdiction may motivate the employer to settle because publicity concerning multinational employees can be damaging to the company’s reputation on a global basis. Such a threat may prompt the company to consider a settlement of Thomas’s claims.

Conclusion

The complex and variable application of U.S. discrimination laws, combined with the facts and circumstances in Thomas’s life and work, make it difficult to determine the best course for Thomas. While an issue-by-issue analysis of the case may provide limited guidance, it cannot assure that his rights will be protected under U.S. law. Perhaps answers to the legal issues raised by such circumstances will become clearer as courts deal with more instances of multinational employment in the increasingly global economy.

¹⁴ “Under the Protection Against Dismissal Act, the employer is not permitted to terminate the employment, unless the termination is ‘justified.’ For a termination of employment to be justified, it must be based either on specific business-related reasons resulting in a loss of employment opportunities or on specific reasons relating to employee, such as conduct.” Federal Republic of Germany, INTERNATIONAL HANDBOOK ON CONTRACTS OF EMPLOYMENT, Supplement 19 (July 1999) at 89.

¹⁵ Federal Republic of Germany, INTERNATIONAL HANDBOOK ON CONTRACTS OF EMPLOYMENT, Supplement 19 (July 1999) at 104-105.

¹⁶ The amount of the severance payment varies between 0.5 and 1.5 multiplied by the years of services multiplied by the monthly gross salary, depending on the possible outcome of the action before the labor court.

¹⁷ The discussion of German Employment Law in this paragraph was edited by Christopher Jordan, an attorney-at-law at CMS Hasche Sigle, Germany. The communication and research in regard to German law is on file with the author.

H-1B Employees—Breaking Up is Hard to Do*

By Wendi S. Lazar¹

When an H-1B nonimmigrant employee² is fired and given a severance package, often the package can not begin to compensate the employee for the loss of his job. Unless the nonimmigrant employee is returning home or has secured a new job that starts immediately, he is out of status and may be ineligible for any future employment in the U.S. After years of new proposals, legislation and regulations, being out of work poses enormous problems and confusion for H-1B nonimmigrants. While going abroad temporarily to receive a new visa may appear to be a solution, with H-1B visa numbers running out faster and earlier each year, the likelihood is that the nonimmigrant will not be returning to the US any time soon. While this dilemma presents agonizing issues for these nonimmigrants and their families, counseling these individuals presents enormous challenges for employment and immigration attorneys alike.

Deciphering the status of these employees is one aspect of the problem, but advising them on the practical, legal and ethical responsibilities concerning termination is difficult, and makes it impossible to give legal advice that is unequivocal. The lack of clarity in government regulations in regard to portability and H-1B status upon termination, as well as recent regulations requiring petitions to be withdrawn upon termination, puts the attorney and his client in a precarious situation. Further, inconsistent government policy and practice with little or no guidance for the practitioner has further complicated this dilemma. Finally, counseling these employees on intersecting employment issues, such as discrimination or other wrongful discharge claims and negotiating a meaningful severance agreement, while trying to maintain the employee's immigration status can be daunting.

Recent Law with Little Guidance

While the most recent H-1B legislation, passed by Congress on October 17, 2000 (the American Competitiveness Act in the 21st Century Act, hereinafter referred to as AC21 and H.R. 5362 relating to fee provisions) gave us portability, it left open the question of how much time between jobs will cause an adverse status decision by USCIS³ and result in deportation and a bar against reentry. While AC21 generously provides H-1B nonimmigrants with safe harbors for transferring from job to job through portability, it does not address the gap in time between termination and the filing of a new petition.

¹ Lin Walker, an immigration attorney practicing in New York City contributed to the research and drafting of this article.

² In this article the term "H-1B employee" will have the same meaning as "beneficiary" and "nonimmigrant."

³ USCIS and INS

While AC21's portability provision permits a nonimmigrant previously issued H-1B status to begin working for a new employer as soon as a new petition is filed by that employer (rather than on approval), it does not define maintenance of status in the H-1B context or include it as a condition to porting⁴. This vagueness leaves the H-1B employee with no definitive time frame on porting after termination. Even though specific INS memoranda in 2001 and 2002 provided interim guidance to immigration officers at the ports of entry in regard to admission post employment, and even confirmed that the terminated H-1B nonimmigrant "is not maintaining status"⁵, they did not make maintenance of status a condition to porting.

Moreover, with all of the recent legislation, comments and memoranda, there remains a schism between policy and practice in defining what maintenance of status is in the H-1B context and when being out of status will result in an adverse finding by the government. Prior to AC21, the formal INS policy on the H-1B beneficiary who was terminated from employment was that he or she was not maintaining status and subject to removal if they remained in the United States. They were also out of status if they went to work for a new employer prior to the approval of a new petition.

However, the USCIS Service Centers have not followed the formal policy but have chosen a more practical approach. While not adhering to any formal grace period, adjudicators often allow terminated H-1B beneficiaries a period of up to thirty (30) days of being out of status before the filing of a new petition. This informal policy has been followed at all the Service Centers and for the most part, H-1B nonimmigrants, so long as they quickly secure new employment, are permitted to remain in the US. The question remains, how long is too long?

Also, the fact that a petition's approval date could be valid for up to two years beyond the actual date of the beneficiary's termination creates other confusion

⁴ Section 105 lists the following prerequisites to qualifying for portability: the new H-1B petition must be filed prior to the expiration of the H-1B employee's period of authorized stay; the new H-1B petition must not be frivolous; the H-1B employee must have been lawfully admitted to the United States; and, the H-1B employee must not have worked without authorization after being admitted to the United States in H-1B status and before the filing of the new H-1B petition.

⁵ On January 29, 2001 an INS memorandum provided interim guidance to immigration officers at the ports of entry. The memorandum clarified the requirements for admission when an H-1B employee returned to the United States following a trip abroad and was no longer working for the original employer listed on his or her H-1B visa. Unfortunately, this memorandum failed to define "maintaining lawful status" in the context of H-1B employment. Then, in an April 24, 2002 memorandum issued in response to questions regarding employment and utilization of multiple approved H-1B petitions, INS took the position that an H-1B employee who is terminated from his or her employment was not maintaining his or her status regardless of the validity of the previously approved H-1B petition. However, It did not define "maintenance of status" as a prerequisite to H-1B portability under AC21.get quote from prior draft

and ambiguities for attorneys and clients alike. While some of these issues were addressed by the new legislation—most were not.

Prior History

Historically the government has been non committal at best, in enforcing any consistent policy and practice in regard to these employees. In March 1999, in a letter responding to an AILA member query, the INS Branch Chief of Business and Trade stated that once an H-1B nonimmigrant's services for the petitioning U.S. employer are terminated, the alien is no longer in a valid nonimmigrant status." It further stated that severance does not represent a valid continuation of employment. Unfortunately this memorandum went no further in addressing the practical issue of maintaining status after termination for those H-1B beneficiaries who apply for new employment. However, following these statements, the Service Centers across the country continued to approve these petitions if nonimmigrant's period of unemployment was not "too long" or if they were being paid severance during this period of unemployment.

On August 11, 1999, during a Teleconference between the AILA Liaison Committee for the Vermont Service Center and INS, an unconfirmed comment was made by the Service that there was no fixed period or "grace period" within which an applicant could file a new H-1B petition for a second employer after being terminated by a first employer, adding that the "rule of reason" would govern. This comment, in addition to heightening scrutiny by INS and later USCIS in reviewing H-1B petitions, caused practitioners to question the existence of any informal grace period for these adjudications. Increased requests by the Service for W-2s and pay stubs in establishing on going employment quickly became the new policy, but it was never applied consistently. However, when it was applied, and a nonimmigrant failed to produce the evidence of continued employment, his petition was inevitably denied.

There was also an additional problem that the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), on "unlawful presence," brought to the forefront for the immigration officials. The fact that a petition's approval date could be valid for more than two (2) years beyond the actual date of termination could potentially cause other problems for the terminated H-1B nonimmigrant who remained in the United States. INS took the position that this "unlawful presence" included "any time spent in the U.S. by aliens after they violated the terms and conditions of any form of nonimmigrant status because time spent in violation of status is not authorized."

INS subsequently reversed this position on September 19, 1997, in a memorandum stating "under the modified interpretation, unlawful presence with respect to a nonimmigrant includes only periods of stay in the U.S. beyond the date noted on the I-94. The question of what status, if any, a terminated H-1B nonimmigrant retains prior to the expiration date on the I-94, remains unanswered for the purpose of any subsequent approval or denial of a second petition.

Another Agency gets involved

Complicating an already vague and inconsistent policy in, ____ the U.S. Department of Labor¹ (DOL) came out with regulations that augmented some of the AC-21 legislation and foreshadowed, for the practitioner and the employer alike, areas of conflict between the two agencies that share responsibility for enforcing H-1B legislation. These regulations have principally been responsible for interpreting some of the provisions of AC21. With regard to termination of H-1B employees, DOL regulations require the employer of a terminated employee to withdraw the H-1B petition for that employee or suffer the risk of financial responsibility if an employee files a claim for lost wages for the remaining period of the original approved petition.

As employers face this risk, such a mandate has encouraged employers to act quickly in withdrawing an approved H-1B petition once the employee has been terminated, whereas in the past, this was not common practice. In fact, this employer tactic is now commonplace in fending off employee threats of discrimination or charges of wrongful termination and is an effective tool for employers in pushing back in severance negotiations.

Moreover, the withdrawal of the petition makes the terminated employee's continuing presence in the United States unlawful as of the date of the withdrawal. With the withdrawn petitions on file, USCIS will have to decide whether it is possible to grant a new petition to an H-1B whose termination, as well as lack of status, is confirmed. Clearly, the H-1B nonimmigrant is at the mercy of his former employer if he does not have a job offer that would allow him to remain in the U.S., port and maintain status.

Benching versus performing services.

In addition, under the new DOL regulations⁶, an employer is required to continue paying its H-1B employee the wage specified in the Labor Certification Attestation even if he has been laid off or benched temporarily. This includes periods of time when an employer does not have enough work for the H-1B employee, or he is waiting for a license or permit to continue operating. If not, the employer must withdraw the petition to avoid liability. If, however, the employee does not perform services because of a reason unrelated to his or her employment, for example, maternity or family leaves, temporary disability or vacation, the employer is not required to pay the employee.

Counseling H-1B Non immigrants in both the Immigration and Employment Context

⁶ ??DOL reg.

For an immigration attorney counseling these employees, the lack of clarity and the high risk of disclosure have led to serious ethical questions for both attorney and client. It has also been difficult for the employment practitioner; knowing how to handle a discrimination or severance case involving an H-1B nonimmigrant is a unique skill with many minefields to avoid.

From the immigration perspective, if your client has been out of work for over a month and the prospect for new employment is waning, it is better to advise him to leave the country than to lose the possibility of him re-entering down the road. While the lack of visa numbers makes this option unattractive, being responsible for your client's unlawful presence may be grounds for a malpractice suit. Moreover, when you are filing an initial H-1B petition, even if your primary representation is of the employer, advise the H-1B nonimmigrant of issues that could present problems for him in the future. This way, if he knows a layoff is on the horizon, and he may be vulnerable, at least he will have a chance to port to a new employer before it is too late. Also, explore with him what alternative nonimmigrant or immigrant status may be available to him if he were to lose his job. It is an immigration attorney's responsibility to advise the nonimmigrant (even if you primarily represent, or are paid by the employer) of timing and other status issues if he has no other counsel.

For the employment attorney representing terminated H-1B employees, being totally aware of your client's work and living situation, as well as knowing his ability to attain new employment before you start evaluating the case or creating a strategy, is critical. By approaching the former employer in the wrong way or taking the wrong approach, you may create animosity when what you ultimately need is cooperation. Also, knowing the government's position on severance in the context of H-1B employment is critical. As the government has stated, severance pay is not considered salary and therefore will not give your client the comfort he needs in looking for a new job while collecting it. Further, the DOL regulations have set up numerous definitions of what is illegal "benching" as opposed to actually performing H-1B services, and there are risks the H-1B employer takes if he ignores those rules. Accordingly, approaching an employer with the knowledge of what his own counsel is advising is critical in being able to assist your employee client and negotiate for him.

Make sure you know the length of the employee's period of H-1B employment in the U.S. and what other nonimmigrant or immigrant options are available before reacting to your client's legal claim or employment situation. If his H-1B employment period is coming to an end, and he cannot apply for different status, he may have to leave the U.S. immediately and will want to get the largest severance the employer is willing to give. On the other hand, if he is looking to remain in the U.S. and find a new position to port to, a period of reinstatement may be what this employee needs immediately.

Understand the company's position if there has been a reduction in force (RIF) as well. Often times, these RIFs occur in stages, and perhaps the employer would be willing to delay your client's termination until he has had an opportunity to find other employment. At the very least, often an employer will keep a nonimmigrant employee on salary, rather

than give them the equivalent in severance if they understand the importance of such a gesture. For example, there might be a project your client can finish up for the employer or other interim work that will provide H-1B services to the employer during this period. While there may be little legal leverage in your client's case because of the issues surrounding his status, do not underestimate an employer's desire for good public relations in terms of being known as a fair and equitable employer of H-1B non immigrants—particularly in a dependent industry.

Also, fully evaluate your case and determine the merits of any alleged discrimination if you are representing the nonimmigrant. If the case is meritorious and there may be significant damages, you must decide if your client is willing to bring such a case, even if they are forced to leave the U.S. before any action in the case is taken. Obviously, if there is no reasonable negotiating position, you will need to help your client understand the process as well as the statute of limitations. There are several remedies available to nonimmigrants in bringing discrimination claims of which your client needs to be made aware.⁷

If you discern that there is a meritorious claim, your client may opt for negotiating a better severance that includes a period of salary continuation in exchange for his availability at work, or perhaps a chance to work from home. As in many discrimination cases, you may be able to negotiate reinstatement until your client has found new employment and is able to port to a new employer without risking loss of status. Again, knowing how important that pay stub is to your client may drive the settlement. In fact, often an employment lawyer is hired only to insure that the wrongful termination does not result in the nonimmigrant's loss of status. In the universe of nonimmigrant employment law, negotiating for a pay stub has replaced negotiating for more severance, because the threat of being unemployed is the threat of unlawful presence or worse, the lack of eligibility for rehire.

When confronted with these situations it is also advisable for the employment lawyer representing nonimmigrants to look at any potential contract damages or reliance damages that may in fact give your non immigrant client more negotiating power. While the case law is extremely pro-employer in these cases⁸, if there has been detrimental reliance, the threat of a lawsuit may convince the employer to do the right thing for your client.

Conclusion

H-1B nonimmigrants, while only temporary workers, have become and continue to be an essential part of our workforce. While they have been given increased rights and benefits under new laws and regulations, their fate upon termination of employment has worsened and is dependent on factors that are confusing and even arbitrary. With recent corporate mergers, consolidations and reductions in force, H-1B terminations are again on the rise

⁷ Special counsel—INA etc. Title VII.

⁸ Cases on reliance—look at original article by Steve yale lohr

but there remains little or no guidance from the government. For the H-1 B employer and employee, the issue of maintenance of status is vital, particularly as it effects the portability provisions as well as the employee's future eligibility for additional benefits. With increased scrutiny by USCIS and the Doll's requirement to withdraw approved H-1B petitions, the H-1B employee is at the mercy of his former employer and may not even be eligible for severance benefits offered to other similarly situation workers.

For the practitioners in this area, these are dangerous times and the penalty to you and your client can be severe if not irreparable. Therefore, it is vital to talk to your clients and provide them with all the choices that could be available to them now and in the future--be it changing status, or reinstatement in a job. Moreover, it is essential to take each case individually and fully evaluate the totality of the circumstances from both the perspective of the employer and the nonimmigrant employee. Different circumstances will call for different tactics and considerations whether bringing a claim for discrimination, negotiating a severance agreement or making sure, at the end of the day you have that pay stub to send to USCIS if requested.