

**EMPLOYMENT ISSUES FOR MULTI-NATIONAL
EMPLOYERS AND EMPLOYEES**

**LEGAL RESTRAINTS ON FOREIGN EMPLOYERS
DOING BUSINESS IN THE UNITED STATES**

AMERICAN BAR ASSOCIATION
EMPLOYEE RIGHTS & RESPONSIBILITIES COMMITTEE

1998 Annual Meeting
Toronto, Ontario

August 1-5, 1998

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Introduction

As graphically illustrated by Chrysler Corp.'s merger into a new, German corporation, called DaimlerChrysler Aktiengesellschaft -- the largest industrial merger of all time -- today's transnational mega-mergers are increasing the number of domestic employees who work for foreign entities. With their transfer to foreign management, these employees are likely to find changes in the laws that protect them as employees. This outline examines the rights of employees in the United States who work for foreign employers.

I. Terminology

Following are some terms frequently encountered in this area of the law and the usual meanings given to those terms. When an employee leaves his Home Country to work abroad, he is an Expatriate; the country in which he works is the Host Country, where he is a Foreign National. When an employer's headquarters is not in an employee's Home Country or Host Country, the headquarters are in the Headquarters Country. When an employee is not a citizen of the Home Country or the Host Country, he is a Third Country National. For example, a British subject who works for a U.S. company in its Tokyo office is a Third Party National and the U.S. is the Headquarters Country.

II. **Enforceability of U.S. Civil Rights Laws Against Foreign Employers in the United States**

A. **Title VII.**

When a foreign employer discriminates in the United States against an American by preferring a person from the employer's country, the employer may violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. ("Title VII"). Title VII prohibits employers from discriminating because of a person's race, color, religion, sex, or national origin. In such cases, the employer appears to be discriminating because of the American's national origin.

1. **Definition of National Origin.**

National origin means the country in which a person was born or from which his ancestors came. Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

2. **Disparate Treatment and the BFOQ Defense.**

Although an employer discriminates intentionally (engages in disparate treatment) when it favors employees because of their national origin, it may have a bona fide occupational qualification defense or "BFOQ." 42 U.S.C. § 2000e-2(e)("[i]t shall not be an unlawful practice for an employer to hire ... on the basis of ... national origin in those certain instances where ... national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). The EEOC's Guidelines state that the BFOQ for national origin discrimination "shall be strictly construed." 29 C.F.R. § 1604 (1982), and most courts follow a restrictive construction. See Lewis, J.B. and B. L. Ottley, "Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon Sumitomo Shoji," 44 Ohio State L.J. 45, 77 (1983). To have its preference upheld as a BFOQ, an employer generally must show it to be a "business necessity, not a business

convenience." *Id.*, quoting *Diaz v. Pan American World Airways, Inc.*, 408 F.2d 228 (5th Cir. 1971).

3. Disparate Impact and its Defenses.

Under Title VII, an employer may not adopt practices that appear neutral on their face, but have the effect of creating significant statistical disparities between members of a protected group and those of non-protected groups. 42 U.S.C. § 2000e-2(k). Neutral policies or practices that have such a disparate impact on protected groups can be legal if the employer can show that the policy or practice is "consistent with business necessity."

B. The FCN Treaty Defense.

Foreign employers charged with national origin discrimination have raised another defense: that they are wholly or partially immune from Title VII liability based on one of the 20 or so post-World War II friendship, commerce, and navigation ("FCN") treaties between the United States and its foreign trading partners.

1. FCN Treaties.

After World War II, the United States entered into reciprocal treaties with Japan and other countries, under which the foreign investor has the right to control and manage enterprises in the host country. A key provision of these treaties is the right of foreign companies to engage managerial, professional and other specialized personnel "of their choice" in the host country. Thus, for example, the much-litigated Article VIII(1) of the United States-Japan FCN Treaty, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863, provides that:

Nationals 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.³

2. Purpose of the "of their choice" provision.

After World War II, the laws of some countries restricted the employment of non-citizens (e.g., American investors) by limiting their numbers to certain "percentiles." As several federal Circuit Courts have noted, Article VIII(1)'s "of their choice" (or "employer choice") language was intended primarily to exempt foreign companies from local legislation restricting the employment of non-citizens, and more generally, to facilitate a company's employment of its own nationals to the extent necessary to insure its operational success in the host country. Avagliano v. Sumitomo Shoji America, 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"). It

³ The post-war FCN treaties include the following: Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, U.S.-China (Taiwan), 63 Stat. 1299; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, 63 Stat. 2255; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ireland, 1 U.S.T. 785; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, U.S.-Greece, 5 U.S.T. 1829; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, U.S.-Isr., 5 U.S.T. 550; Treaty of Amity and Economic Relations, Sept. 7, 1951, U.S.-Eth., 4 U.S.T. 2134; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, 1950, U.S.-Den, 12 U.S.T. 908; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R. Germany, 7 U.S.T. 1839; Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, U.S.-Nicar., 9 U.S.T. 449; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, U.S.-Neth., 8 U.S.T. 2043; Treaty of Friendship, Commerce and Navigation, Nov., 28, 1958, U.S.-Korea, 8 U.S.T. 2217; Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, U.S.-Muscat and Oman, 11 U.S.T. 1835; Treaty of Friendship, Commerce and Navigation, Nov. 12, 1959, U.S.-Pak., 12 U.S.T. 110; Convention of Establishment, Protocol, and Establishment and Navigation, Feb 12, 1961, U.S.-Fr., 11 U.S.T. 2398; Treaty of Friendship, Commerce and Navigation, Feb. 12, 1961, U.S.-Belg., 14 U.S.T. 1284; Treaty of Amity and Economic Relations, Apr. 3, 1961, U.S.-S. Vietnam, 12 U.S.T. 1703; Treaty of Friendship, Commerce and Navigation, Feb. 23, 1962, U.S.-Lux. 14 U.S.T. 251; Treaty of Amity and Economic Relations, Feb. 8, 1966, U.S.-Togo, 18 U.S.T. 1; Treaty of Amity and Economic Relations, May 29, 1966, U.S.-Thail., 19 U.S.T. 5843.

should be noted that the U.S.-Korea FCN Treaty contains an employer-choice clause identical to the U.S.-Japan Article VIII(1).

C. Reconciling the Clash between Title VII and FCN Treaties.

There is no legislative discussion, or even recognition, of the apparent conflict between Title VII's ban on discrimination and the FCN Treaties' apparent conferral of a license to foreign companies to discriminate in favor of their own nationals. Courts have had to resolve the conflict based on their interpretations of these treaties in conjunction with Title VII.

1. Absolute Bar.

Some employers have argued that the literal meaning of the employer-choice clause makes them immune from U.S. anti-discrimination laws with respect to all hiring. No court has agreed with this position. See Wickes v. Olympic Airways, 745 F.2d 363, 367 (6th Cir. 1984)(rejecting the employer's argument that the U.S.-Greek FCN Treaty offered complete insulation from Michigan's anti-discrimination law).

2. Full Immunity for Executive Hiring (Minority View).

The Fifth Circuit has held that Article VIII(1)'s language fully insulates a foreign company from the host's anti-discrimination law with respect to the hiring of executives or those others specified in the treaty. Spieß v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981), vacated on other grounds, 457 U.S. 1128 (1982).

3. Immunity for Hiring Executives Based on their Citizenship (Majority View).

This approach attempts to eliminate the conflict between FCN Treaties and Title VII by viewing preferences through the lens of citizenship, given that: (1) FCN Treaties protect the right of foreign companies to utilize their own "nationals" (i.e., citizens), and (2) Title VII does not protect against discrimination based purely on citizenship. Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

- (a) Third Circuit: Employers who favor their own nationals, who are executives (or other enumerated essential personnel) based on their citizenship, are not subject to intentional discrimination claims based on national origin. MacNamara v. Korean Airlines, 863 F.2d 1135 (1988).
- (b) Sixth Circuit: Treaty offered only a narrow privilege to give preference to Greek citizens in the hiring of essential personnel. Wickes v. Olympic Airways, 745 F.2d 363 (1984); see also Papaila v. Uniden America Corp., 51 F.3d 54, 55 (5th Cir. 1995).
- (c) Seventh Circuit: "Foreign businesses have the right to choose citizens of their own nation as executives because they are such citizens," and the exercise of that treaty right "may not be made the basis for inferring a violation of Title VII." Weeks v. Samsung Heavy Industries Co., Ltd., 126 F.3d 926, 935 (1997), quoting Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991); and MacNamara v. Korean Airlines, *supra*.

4. Title VII Applies; Employer's BFOQ-Burden Lightened.

The Second Circuit has held that Article VIII(1) does not exempt Japanese companies operating in the United States from American laws prohibiting discrimination in employment. Such a company "can only hire according to national origin if the company can show that national origin is a bona

vide occupational qualification." Avagliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 554 (2d Cir. 1981), vacated on other grounds, 457 U.S. 176 (1982), quoted in Shane v. Tokai Bank, Ltd., 1997 WL 639255 (S.D.N.Y. Oct. 15, 1997). "Although this exception is generally read in a narrow fashion for domestic Title VII defendants, the Second Circuit has determined that 'as applied to a Japanese company enjoying rights under Article VIII of the [FCN] Treaty,' [this exception to Title VII] must be construed in a manner that will give due weight to the Treaty rights ... " Goyette v. DCA Advertising, Inc., 830 F. Supp. 737, 749 (S.D.N.Y. 1993), citing Avagliano, 638 F.2d at 559. To show that the employment of Japanese nationals is "reasonably necessary to the successful operation of the business" (*i.e.*, a BFOQ), "the employer should assert the 'unique requirements of a Japanese company doing business in the United States' including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business."

5. Immunity from Disparate Impact Claims.

The majority view, above, attempts to harmonize Article VIII(1) and Title VII by pointing out that Title VII, on its face, does not prohibit citizenship-based intentional (disparate treatment) discrimination, and then characterizing the claim as one based on citizenship, not national origin. This reconciliation does not work well, however, in the disparate impact context. A lawful Japanese-citizen-only policy still is likely to have a disparate impact on those of non-Japanese national origin. The two Circuit Courts that have considered this clash have ruled that Article VIII(1) trumps Title VII in such cases.

(a) Third Circuit: The Court reasoned that Korean citizens are

virtually all of Korean origin; thus, when a Korean company in the United States hires on the basis of Korean citizenship, there will always be a statistical disparity created between the national origin of the Korean citizens hired and the non-Korean citizens rejected. The company would likely face "substantial" disparate impact liability for exercising its Article VIII(1) "right". The Court concluded, therefore, that disparate impact liability cannot be imposed. MacNamara v. Korean Airlines, 863 F.2d 1135, 1148 (1988).

- (b) Seventh Circuit: Following the reasoning of the Third Circuit, the Seventh Circuit held that "using the correlation between citizenship and national origin to infer national-origin discrimination from treaty-sanctioned preferences for Japanese citizens would nullify the Treaty." Fortino, 950 F.2d at 392-93; Weeks, 126 F.3d at 937.

D. Criticism of the Majority Approach.

Prof. Michael H. Gottesman contends that the Third, Sixth, and Seventh (and certainly the Fifth) Circuits have erred. His argument, in essence, is that FCN Treaties were meant to sweep away discriminatory quotas imposed by host countries, not to confer on foreigners the right to discriminate against equally qualified host country employees. Such a view eliminates virtually all conflicts between the Treaties and Title VII. See Gottesman, Michael H., "Chickens Come Home to Roost; Have American Treaties Fenced Off Some of Our Best Jobs from Americans?" 27 Law & Policy in International Business 601 (Spring 1996).

Among his key points are:

1. The Purpose of FCN Treaties.

FCN Treaties simply void local rules that required foreign employers to hire local employees by percentile, regardless of their qualifications. By

placing percentile restrictions on domestic employment, these local hiring laws had blocked Americans from jobs in their own overseas operations. Prof. Gottesman argues that it is ironic that the same foreigners, whose "xenophobic laws" were used to discriminate against Americans in the pre-FCN Treaty days, now can do so on American soil, as their companies use FCN Treaties to block Americans from prime executive jobs in their U.S. operations.

2. **The Citizenship Preference is Dubious.**

The Supreme Court in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), did not create a blanket license to discriminate on the basis of citizenship. That case involved a citizenship distinction within members of one national origin group, Mexicans; it did not involve a citizenship distinction between members of two national origin groups (e.g., Japanese and Americans). "Citizenship" rationales for hiring can be pretextual and mask a stereotypical bias against the host country's employees; if citizenship-based hiring policies are not consistent with business necessity, national origin-protected employees should have a Title VII cause of action.

3. **Putting Foreigners on Equal Footing.**

Congress intended in Title VII that employees be chosen on the basis of qualifications. Why should foreign companies be given a blanket exemption when it comes to national origin discrimination?

E. **Branch v. Subsidiary.**

While the courts were struggling over the scope of the FCN Treaty-based defense to Title VII, they were also concerned with the question of who was entitled to raise the defense. The Supreme Court, in Sumitomo Shoji America v. Avagliano, 457 U.S. 176 (1982), faced the question of whether the FCN Treaty defense was

available to a foreign corporation's wholly-owned subsidiary that was incorporated in the United States. The following distinctions flow from its decision. (The Supreme Court avoided any discussion of the substantive scope of the immunity conferred by FCN Treaties.)

1. FCN Treaties protect only foreign corporations and their U.S. branches.

The Sumitomo Court held that the employer provision of Article VIII(1) was applicable only to "companies of either party," which, according to the Court's interpretation of the definitional section, did not apply to domestic corporations. A branch office of a foreign-incorporated entity, under the Court's holding, would be entitled to claim FCN Treaty immunity; but since the Sumitomo corporate party was incorporated in the United States, it did not enjoy any direct protection under the FCN Treaty. Id. at 182.

2. U.S.-incorporated subsidiaries' invocation of their foreign parents' FCN Treaty rights.

The Sumitomo Court, in footnote 19 of its decision, left open the possibility that a domestic subsidiary of a foreign corporation might still assert FCN Treaty-based defenses.

(a) Seventh Circuit: Answering the question posed in footnote 19 of Sumitomo ten years earlier, the Seventh Circuit, in Fortino, determined that much of the employment decision-making in Quasar was directly controlled by its parent corporation. 950 F.2d 389, 393-94 (7th Cir. 1991). Accordingly, the Court decided that "Quasar must be allowed to invoke the treaty rights of its parent 'to prevent the [T]reaty from being set at naught.'" Id. This approach has its critics. The EEOC, in its Enforcement Guidance, expressly rejected Fortino's conclusion and accepts the Fortino rule only in

states in the Seventh Circuit's jurisdiction. See EEOC, Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States, EEOC Notice 915.002, Part II, reprinted in EEOC COMPLIANCE MANUAL at 2313-33; see also Chan, Melvin D., Note, "Fortino v. Quasar Co.: Invocation of Parents' U.S.-Japan FCN Treaty Rights Gives Japanese-owned U.S. Subsidiaries a Defense Against Title VII," 6 Transnational Lawyer 653, 670-74 (1993)(predicting that other circuits will not follow Fortino).

- (b) Fifth Circuit: In Papaila v. Uniden America Corp., 51 F.3d 54 (5th Cir. 1996), as in Fortino, it was alleged that the parent, Uniden Japan, not the domestic subsidiary, Uniden America Corp. ("UAC"), made all of the discriminatory decisions. The Court applied Fortino's logic that, "A judgment that forbids [UAC] to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent; it would prevent [Uniden Japan] from sending its own executives to manage [UAC] in preference to employing American citizens in these posts." Id. at 56, citing Fortino, 950 F.2d at 393.

3. **The "single employer-integrated enterprise" test.**

This widely adopted test determines whether parent companies can be found liable for their subsidiaries' Title VII discrimination, or conversely, whether subsidiaries can be shielded by their parents' FCN Treaty defense. See B. Schlei & P. Grossman, *Employment Discrimination Law*, 1000 (2d ed. 1983). The factors used under this test to measure the common identity of separately incorporated companies are: (1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. See *Robins v. Max Mara, U.S.A.*, 914 F. Supp. 1006, 1008-09 (S.D.N.Y. 1996) (foreign parent of a U.S.-incorporated subsidiary could be held liable under ADEA if the parent and subsidiary were an "integrated enterprise" and the total of the subsidiary's employees and the parent's employees located in the U.S. were 20 or more); *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983).

Typically, Japanese or other foreign corporations that are charged with staffing their U.S. operations with their own executives assert the business justification of "rotating" to defeat discrimination claims. Under a rotation system, employers assign employees to tours of duty overseas so they gain familiarity with the company's foreign operations. Such a system, however, appears to be a double-edged, if not a triple-edged, sword. On the one hand, the parent consents to defendant status when it admits to controlling the subsidiary's employment functions in this manner under the integrated-enterprise rule. On the other hand, the parent can extend its FCN Treaty defense to the subsidiary. If that line of defense fails, the rotation system itself may provide the employer with a business-oriented defense that rises to a BFOQ.

4. **The "affecting access to employment" test.**

Even if the parent's control over the subsidiary is insufficient to create a

single or integrated enterprise for the purpose of attaching Title VII liability to the parent (and, conversely, the FCN Treaty defense to the subsidiary), the plaintiff may try an alternative theory to bring the parent within Title VII's coverage. Third-party entities have been held to be "employers" for Title VII purposes when they significantly affect or interfere with the claimant's access to employment with an employer. See Carparts Distributors Center, Inc. v. Automotive Wholesalers, 37 F.3d 12 (1st Cir. 1994)(denying defendant's motion to dismiss an ADA complaint to allow evidence on issue of whether defendant interfered with claimant's employment relationship); Sibley Memorial Hospital v. Wilson, 448 F.2d 1338, 1342 (D.C. Cir. 1973); Christopher v. Stouder Memorial Hospital, 936 F.2d 870, 875 (6th Cir. 1991), cert. denied, 502 U.S. 1013 (1991)(allowing retaliation claim of scrub nurse against non-employer defendant hospital on the basis that Title VII prohibits a third party's interference with employment opportunities); Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988), rev'd on other grounds, 896 F.2d 1313 (11th Cir. 1990); but see Alexander v. Rush North Shore Medical Center, 101 F.3d 487, 490-492 (7th Cir. 1997)(rejecting the theory that hospitals that contract with a plaintiff's employer, and that deny the plaintiff privileges necessary for employment, are "employers"). For example, Dentsu, Inc., a Japanese corporation, acquired an American corporation and named it DCA Advertising, Inc. ("DCA"). DCA's clientele were the U.S. subsidiaries of Dentsu's clients. Dentsu directed DCA to hire a group of ten Japanese executives, set the terms of their employment, and supplemented their compensation. When DCA laid off 15% of its workforce, it was explicitly ordered by Dentsu not to fire any of the Dentsu executives. Under the interference-with-access test, the Court held that "[a]lthough Dentsu maintained that it had no specific involvement with the plaintiffs' terminations, the expatriate policy that Dentsu dictated had an impact on all DCA employees because it affected

who was to be fired in the downsizing of DCA." Dentsu's control created an adequate "nexus" by which it could be held to be an employer under Title VII. Goyette v. DCA, Inc., 830 Supp. 737, 744 (S.D.N.Y. 1993).

5. Statutory minimum number of employees, as between parent and subsidiary.

Another issue that turns on the whether the parent and subsidiary are integrated is whether the employer meets the statutory minimum number of employees to be subject to Title VII (15 employees) or the ADEA (20 employees). For example, if a domestic subsidiary of a foreign corporation has only 14 employees (for 20 or more weeks per year), it is not subject to Title VII. But if it also employed at the same location 10 expatriates of the parent company, does the domestic corporation satisfy the statutory minimum number of employees?

- (a) This issue was addressed in Robins v. Max Mara, U.S.A., 914 F. Supp. 1006, 1008-09 (S.D.N.Y. 1996). First, the court noted that neither Title VII nor the Americans with Disabilities Act "apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer." 42 U.S.C. §§ 2000e-1(c)(2), 12112(c)(2)(B). Similarly, the ADEA does not apply "where the employer is a foreign person not controlled by an American employer." 29 U.S.C § 623(h)(2). The court thus excluded from the count any employees of the international parent who did not work in the U.S. It took the view, however, that the U.S.-incorporated subsidiary, if not the parent, could be held liable if the two companies were an "integrated enterprise" and the aggregate total of the subsidiary's and the parent's employees located in the U.S. met the 15- or 20-employee minimums. See also Rao v. Kenya Airlines, Ltd., 1995 WL 366305 (S.D.N.Y. June 20, 1995); Burnett v. Intercon Security Ltd., 1998 U.S. Dist. LEXIS 3648 (N.D.Ill. Mar. 20, 1998) (defendants' total domestic employees could not be added together because its subsidiaries were not sufficiently "integrated"); Feit v. Biosynth Int'l, Inc., 1996 WL 99726 (N.D.Ill. Mar. 4, 1996).

(b) The Second Circuit Court of Appeals has endorsed a quicker "nose-count" that obviates the painstaking "integrated enterprise" analysis used in Robins v. Max Mara, U.S.A. and Burnett v. Intercon Security Ltd. In Morelli v. Cedel, 1998 WL 163783 (2d Cir. March 26, 1998), the plaintiff was fired from the U.S. branch of a Luxembourg-based bank, and sued under the ADEA, ERISA, and New York's Human Rights Law. After reviewing the relevant provisions of the ADEA, Title VII, and ADA, the Court concluded that the ADEA applies to the domestic operations of foreign employers. ("We therefore agree with the E.E.O.C. that the law generally applies 'to foreign firms operating on U.S. soil.'" Id. at *4). With respect to the "nose count" of employees, the Morelli Court rejected the notion that only ADEA-protected employees be included. The Court concluded that the purpose of the 20+ employee rule was to avoid imposing liability on small employers; thus, Congress did not intend for the cut-off to exempt large foreign employers. Although the overseas employees of the foreign employer may be outside ADEA's ambit, so too, reasoned the Court, are domestic employees under 40 years of age who are in the nose-count. Thus, in "determining ... the 20-employee threshold, employees cannot be ignored merely because they work overseas." Id. at *6.

F. Age Discrimination in Employment Act ("ADEA").

Although similar to Title VII in many respects, the Age Discrimination in Employment Act of 1967, §§ 29 U.S.C. 621-634 (1994), is codified with the Fair Labor Standards Act, which accounts for the difference in its coverage of foreign employers. At the outset, it is clear that a U.S.-incorporated subsidiary of a foreign corporation is subject to both Title VII and ADEA liability. Sumitomo Shoji America, Inc., v. Avagliano, 457 U.S. 176, 188-89 (1982)(holding that U.S.-incorporated companies are domestic corporations and "subject to the responsibilities of other domestic corporations"). Under the ADEA, such a

subsidiary cannot take advantage of its parent's FCN Treaty rights (except perhaps in the Fifth Circuit) because the courts have restricted the protection offered by those employer-choice treaties to employment decisions based on citizenship, never age. The questions that remain are whether foreign employers are liable under the ADEA when they operate in the United States directly (e.g., through branches) or when they closely control their U.S.-incorporated subsidiaries.

1. Split in the Courts.

- (a) Several courts have held that American employees may sue a foreign employer for age discrimination in the U.S. See Morelli v. Cedel, 1998 WL 163783 (2d Cir. March 26, 1998)(discussed above); Elliot v. British Tourist Authority, 75 FEP Cas. (BNA) 873, 1997 WL 726009 (S.D.N.Y. Nov. 17, 1997)(holding that §623(h)(2) does not carve out an exclusion from coverage for Americans working in the United States for foreign corporations); Robins v. Max Mara, U.S.A., 914 F. Supp. 1006, 1008-09 (S.D.N.Y. 1996); EEOC v. Kloster Cruise Ltd., 888 F. Supp 147, 151-52 (S.D. Fla. 1995); Helm v. South African Airways, 1987 WL 13195, at *7 (S.D.N.Y. June 25, 1987).
- (b) Two federal courts have held that foreign employers in the United States are not subject to the ADEA. See Robinson v. Overseas Military Sales Corp., 827 F. Supp, 915, 920-21 (E.D.N.Y. 1993); Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993), aff'd, 15 F.3d 1079 (5th Cir. 1994).

2. **Reason for the Split.**

Before 1984, courts universally held that the ADEA covered foreign employers operating in the United States, but not U.S. companies employing Americans abroad. This prompted Congress to enact the Older Americans Act Amendments of 1984 ("OAAA"), which extended the ADEA's protection to Americans working abroad for U.S. companies. At the same time, Congress sought to make clear that OAAA did not affect foreign companies employing Americans abroad. To do so, it added the following clause: "The prohibitions of [ADEA] shall not apply where the employer is a foreign person not controlled by an American employer." 29 U.S.C. § 623(h)(2). Taken literally, this language might indicate that foreign employers are immune from ADEA liability in the United States, and two courts have so ruled. The legislative intent of the passage, however, as well as several other policy considerations (including the EEOC's Guidance), indicate that it refers merely to overseas employment sites, not domestic ones. See Note, "Protecting Older Americans Working for Foreign Employers from Age Discrimination in Employment," 65 Fordham L. Rev. 2535 (1997).

G. **Civil Rights Act of 1866 (42 U.S.C. § 1981).**

1. **Coverage.**

Foreign employers in the United States may also be held liable for national origin/race discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"). The extent of that statute's protection against national origin discrimination, however, is a subject of debate.

- (a) Section 1981 does cover national origin discrimination. In Adames v. The Mitsubishi Bank, Ltd., 751 F. Supp. 1548 (E.D.N.Y. 1990), the bank, a Japanese corporation, was sued by four employees of American/Hispanic origin under Section 1981. They alleged denial of promotions, which they blamed, in part, on the rotating staff

system. Their claims were grounded in their non-Oriental ancestry and national origin, not race. The bank sought summary judgment by characterizing their charges as based on non-protected citizenship or origin. Noting that the U.S. Supreme Court, in Saint Francis College v. Al-Khazarahi, 481 U.S. 604, 613 (1987), had defined the scope of Section 1981 as including "race, ethnic characteristics or ancestry," the Court concluded that Section 1981 permits claims by non-Japanese persons against a Japanese employer. In support of its position, the Adames court cited two courts' earlier decisions in which similar conclusions were reached: Spieß v. C. Itoh & Co., 408 F. Supp. 916 (S.D. Tex. 1976)(recognizing that racial and national origin discrimination were "indistinguishable"), and Bullard v. Omi Georgia, Inc., 640 F.2d 632 (5th Cir. 1981).

- (b) Section 1981 does not cover national origin discrimination. On appeal from the underlying district court decision in Avagliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506 (S.D.N.Y. 1979), vacated and remanded on other grounds, 638 F.2d 552 (2d Cir. 1981), rev'd and remanded on other grounds, 457 U.S. 176 (1982), the Second Circuit dismissed the Section 1981 claim. It held that the plaintiffs' claims of discrimination by Japanese managers were essentially based on citizenship and could not be equated with race-based claims. Note that that decision preceded the Supreme Court's decision in Al-Khazarahi.

III. Employer Defenses Based on Sovereignty

When agencies or other branches of foreign governments employ Americans in the United States, they may claim employment law immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. A number of factors affect whether these

laws can be enforced against such entities.

1. Scope of the FSIA's immunity.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428, 443 (1989). Otherwise, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 [of title 28]." 28 U.S.C. § 1604.

- (a) Foreign state. For FSIA immunity purposes, a foreign state includes "a political subdivision of a foreign state or an agency or instrumentality."
- (b) Agency or instrumentality. Under Section 1603(b), "agency or instrumentality" of a "foreign state" means any entity: (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a state of the United States ... nor created under the laws of any third country. For example, the British Tourist Agency ("BTA") argued that it is an "agency or instrumentality of a foreign state" under Section 1603(b). The ADEA plaintiff countered that the BTA, a corporation, was a citizen of the State of New York. The Court found that the BTA was not incorporated in New York and its principal place of business was in London and concluded therefore that the BTA was an agency or instrumentality of a foreign state and was presumed immune. Elliot v. British Tourist Authority, 75 FEP Cas. (BNA) 873, 1997 WL 726009 at *3(S.D.N.Y. Nov. 17, 1997).

2. Exceptions to Immunity under the FSIA.

Once a defendant is deemed a foreign state or agency/instrumentality, the burden of showing that an exception applies shifts to the plaintiff. Id. The most heavily

relied-upon exception is the "commercial activity" exception. When the action arises from the state's/or agency's commercial activity, no immunity applies. 28 U.S.C. § 1605(a)(2).

- (a) Commercial activity. The nature of the activity, not its purpose, renders the activity commercial or noncommercial. Id. The issue is not whether the foreign government is acting with a profit motive, but whether the conduct resembles what a private party does when engaged in "trade and traffic in commerce." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992).
- (b) Is "employment" a commercial activity? It depends on the nature of the work and, perhaps, on the citizenship of the employee. The House Report discusses the distinction as follows:

"Also public or government and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States Activities such as a foreign government's employment or engagement of laborers, clerical staff or public relations or marketing agents ... would be among those included within the definition [of commercial activity]." H.R. Rep. No. 94-1487, at 16 (1976).
- (c) Second Circuit (district court decisions). A marketing executive with the title "Manager of Industry Relations" was deemed to have occupied a commercial activity position. Elliot v. British Tourist Authority, 75 FEP Cas. (BNA) 873, 1997 WL 726009 at *3(S.D.N.Y. Nov. 17, 1997). The employment of a secretary, who brought a sexual harassment claim against the Brazilian National Superintendency of Merchant Marine, was determined to be commercial activity. Zveiter v. Brazilian National Superintendency of Merchant Marine, 833 F. Supp. 1089 (S.D.N.Y. 1993).

- (d) Seventh Circuit. The hiring of an Argentinean national as a marketing agent for Spanish wines was found to be an activity "in which a private person could engage," and thus commercial. Segni v. Commercial Office of Spain, 835 F.2d 160 (1987; see also State Bank of India v. NLRB, 808 F.2d 526 (7th Cir. 1986), cert. denied, 97 L.Ed.2d 735 (1987)(agency's commercial activity precluded immunity from NLRB jurisdiction).
- (e) Ninth Circuit. The hiring and firing of a "Commercial Officer" was held not immune under the reasoning applied in Segni. Holden v. Canadian Consulate, 92 F.3d 918 (1996).
- (f) Fair Labor Standards Act ("FLSA"). In a case of first impression, a foreign diplomat was sued by his domestic servant for, among other things, minimum/overtime wage violations under the FLSA. The Court held that, while a diplomat's contracts for goods and services are incidental to the foreign state's concerns, the servant's employment was personal to the diplomat, thus not a commercial activity of the foreign state. Finding no exception to the FSIA, the Court held the diplomat immune from the suit.
- (g) Civil service. In all of the "commercial activity" holdings above, the plaintiffs were not citizens of the foreign state. When the plaintiff is a citizen of the foreign state, there is a greater likelihood that the courts will view the employment as "civil service" (as mentioned in the House Report) and not apply the commercial activity exception to pierce the immunity veil.