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Employment Discrimination: Not Always Illegal for Aliens

By Stephen H. Kahn

Employment law has its own Guantanamo Bay. It is the place where U.S. businesses are permitted to discriminate against their own employees so long as the employees are not U.S. citizens and the discrimination occurs on foreign soil. The U.S. Court of Appeals for the Second Circuit sailed into this legal-duty free zone where employment discrimination is permitted in its just-issued decision in Ofori-Tenkorang v. American International Group, Inc.

Ofori interpreted the Reconstruction era Civil Rights Act of 1871 commonly known as "Section 1981."2 The court ruled that §1981 only protects an individual from race discrimination by an American business if the discrimination occurred on U.S. soil. The U.S. Court of Appeals for the Sixth Circuit, in an unpublished decision, and five other district courts have reached similar conclusions.3

Our modern anti-employment discrimination laws do not fill the gap left by §1981. Title VII of the Civil Rights Act of 1964, (Title VII), the Americans With Disabilities Act of 1990 (ADA) and the Age Discrimination in Employment Act of 1967 (ADEA)4 do bar American businesses from discriminating against their employees while they are employed overseas, but that protection does not extend to noncitizens.

America sends the wrong message to the world when its laws allow American businesses to discriminate against non-U.S. citizens that they employ overseas. Our political leaders instruct us to export American values as the antidote to global hatred. American corporations, year-by-year, expand their global operations, becoming essential global ambassadors. Ironically, Ofori tells the nations of the world that American business may discriminate while overseas. Title VII, the ADA and the ADEA tell the world that American business may discriminate against their overseas employees unless they hold American citizenship. Instead of exporting American values, we are giving business a license to outsource prejudice.

Congress should amend these civil rights and employment discrimination laws so that they protect all employees of U.S. businesses, regardless of their citizenship or the location of their worksite. That is how to export American values.

John Ofori-Tenkorang (Mr. Ofori) could not find protection under either the modern employment discrimination laws or §1981. Mr. Ofori is a black man whose permanent residence was in Connecticut. He is not a U.S. citizen. After about seven years of employment, he was transferred by his employer, American International Group Inc., to a temporary assignment in

South Africa. The decision to transfer Mr. Ofori was made by executives in Connecticut. The company continued to designate the U.S. as Mr. Ofori's "home country." Mr. Ofori claimed that both before and after his arrival in South Africa he was the victim of race discrimination. The many acts of discrimination he charged included discriminatory assignment to an office in South Africa that was apart from most of his white colleagues, discriminatory treatment with regard to business expense reimbursement and bonus payment, unfair criticism for poor business performance, and unfair suspension and threats of job termination.

Gaps in Modern Laws

Mr. Ofori could not obtain relief under Title VII because he was not a U.S. citizen. The result would have been the same if he invoked the ADEA or the ADA to complain of age or disability discrimination. As originally enacted, the three modern laws failed to protect an individual who was employed by a U.S. corporation or subsidiary in a foreign workplace. Congress attempted to fix all three laws, but the repairs did not go far enough.

In 1984 the ADEA's definition of employee was amended to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."5 In 1991 Title VII and the ADA were also expanded, partially in reaction to the Supreme Court's decision in EEOC v. Arabian Am. Oil Co.,6 which held that Title VII does not apply to U.S. citizens working abroad for U.S. businesses. Congress amended both Title VII and the ADA in the Civil Rights Act of 1991 to provide, inter alia, that "[w]ith respect to employment in a foreign country, [the term "employee"] includes an individual who is a citizen of the United States."7

Congress' "alien exemption" amendments to the three modern civil rights laws protected only American citizens from employment discrimination by U.S. corporations at their off-shore locations. The impact of the amendments was to grant to American business the right to engage in employment discrimination against noncitizens. This defeats the very purpose of the laws -- the elimination of discrimination in employment based upon specific irrelevant characteristics such as alienage. Imagine the case of a U.S. noncitizen legally employed in the U.S. She is protected from being sexually harassed by her boss at the home office, but it is open season as soon as they travel to an overseas business meeting.8

How did Congress justify limiting protection to our citizens alone? The 1984 Senate Report on the ADEA amendment explains:

When considering this amendment, the committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace.9

It is hard to identify the principle of sovereignty that requires U.S. laws to unite with the local prejudices of a foreign country. Do we mean to permit a U.S. company doing business in Iraq to refuse to employ a woman because of her gender, so long as she is an Iraqi woman?

'Ofori,' Limits of §1981

Mr. Ofori could not obtain relief under §1981 for much of the conduct which he challenged as discriminatory because it occurred outside of the United States. Section 1981(a) states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."10 Section 1981(c) clarifies that the term "'make and enforce contracts'" includes "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."11

The Ofori court tasked itself with determining whether at the time Mr. Ofori was allegedly denied the "benefits, privileges, terms and conditions of the contractual relationship" on account of race he was a "person[] within the jurisdiction of the United States."

The Ofori court began by noting that Congress ordinarily presumes that its laws apply only to the territorial United States. The court's review of §1981's language, structure and history would be conducted in the light of this presumption. From this starting point, the court concluded that the plain text of §1981, its structure and its history unambiguously support the conclusion that §1981 does not have extraterritorial application.

Section 1981's language confirms that Congress did not intend the act to apply beyond U.S. borders. Section 1981(a) grants to "persons within the jurisdiction of the United States . . . the same [enumerated] right[s] in every State and Territory."12 Likewise, the historical development of the law does not exhibit any Congressional intent to give it extraterritorial scope. The original Civil Rights Act of 1866 made "all persons born in the United States" U.S citizens and then guaranteed them the same basic rights "in every State and Territory in the United States" as "white citizens" regardless of their "race and color" and "without regard to any previous condition of slavery or involuntary servitude."13 Later, the Voting Rights Act of 187014 extended the original act to apply to "all persons within the jurisdiction of the United States."

The court next applied its analysis of §1981 to Mr. Ofori's discrimination claims. The claims were divided into: 1) those which occurred while he was living and working in South Africa such as being forced to work in a less desirable South African office; and 2) those which occurred while he was physically present in the United States such as creating his employment contract and making certain arrangements for his South African employment. The circuit concluded that §1981 did apply to claims of discrimination that allegedly occurred while Mr. Ofori was within the United States. Accordingly the district court's dismissal of those claims was reversed.

The court concluded that the §1981 claims based upon conduct which occurred while Mr. Ofori was in South Africa were properly dismissed by the district court because of the territorial limits of §1981. Mr. Ofori tried to escape this conclusion by arguing that these claims did not require the extraterritorial application of §1981 because "under a 'center of gravity' test, his employment contract placed him within . . . [U.S. jurisdiction] despite the fact that 'some of the events'

occurred overseas." Mr. Ofori's appeal argued that the district court should have engaged in a "balancing of contacts" analysis concerning the aspects of his employment which were rooted in the United States.

The Second Circuit rejected Mr. Ofori's argument on four grounds. First, its textual analysis of §1981 showed that §1981 requires a person to be "within the jurisdiction of the United States" in order to assert a claim. The law's language was devoid of any indication that Congress intended to permit individuals outside of U.S. jurisdiction to raise §1981 claims just because the discrimination was directed from within the United States. Second, the court found that the statute banned discrimination against "persons who are within the United States." Thus, the controlling factor was the location of the discrimination's victim, not the location of the alleged perpetrator. Third, the court observed that §1981 focused on "persons" within the United States as opposed to "contracts" or "employment." Finally, the Second Circuit reasoned that Mr. Ofori's argument expanded the scope of §1981 far beyond the limits of the statute's actual language.

Amendments to §1981 Failed

The problem with the Ofori decision and with the other similar cases is not that §1981 was misread. The fault is that the amendments to §1981 and the newer employment discrimination laws did not fulfill the promise of outlawing discrimination. The Ofori court recognized as much:

[W]e underscore that it is not our role to decide . . . a matter of public policy . . . . We are not free to ignore the clearly-stated purpose of Congress and expand Section 1981 to protect persons outside the 'jurisdiction of the Unites States,' no matter how sympathetic these persons or their claims may be.

The Second Circuit's understated language points towards the solution. Congress must close the gaps in §1981 and the modern statutes that create a space for U.S. businesses to engage in legalized employment discrimination against their foreign based noncitizen employees.

The final problem with these discrimination laws is that they encourage a defendant to assert a defense which should now be beyond the pale of acceptable legal discourse -- "Even if we engaged in race discrimination, it is legal." Any law which encourages a business or its lawyers to make such a claim must be amended.

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Endnotes:

1. F.3d, 2006 WL 2349169 (2nd Cir. 815/06) affirming in part, vacating and remanding in part 2005 WL 2280211 (SDNY 2005).

2. 42 USC §1981 ("Section 1981").

3. Rodrigues v. Martin Marietta Corp., 829 F.2d 39, 1987 WL 44766, at *2 (6th Cir. Sept. 16, 1987); Ortiz-Bou v. Universidad Autonoma de Guadalajara, 382 F.Supp.2d 293, 296-97 (D.P.R. 2005); de Lazzari Barbosa v. Merck & Co., No. Civ. 01-CV-2235, 2002 WL 32348281, at *2 (E.D.Pa. March 11, 2002); Mithani v. JPMorgan Chase & Co., No. 01 CIV 5928, 2001 WL 1488213, at *1 (SDNY Nov. 21, 2001); Gantchar v. United Airlines, No. 93 C 1457, 1995 WL 798600, at *2 (N.D.Ill. April 21, 1995); Theus v. Pioneer Hi-Bred Int'l, Inc., 738 F.Supp. 1252, 1255 (S.D.Iowa 1990).

4. Title VII, 42 USC §2000e et seq.; the Americans with Disabilities Act of 1990, 42 USC §12101 et seq.; the Age Discrimination in Employment Act of 1967 29 U.S.C. §630(f).

5. Pub. L. No98-459, §802, 98 Stat. 1767, 1792 (1984) codified at 29 U.S.C. 630 (f), §§623(h).

6. 499 U.S. 244, 244 (1991).

7. Pub.L. No. 102-166, §109, 105 Stat. 1071, 1077 (codified at 42 USC §§2000e-1(c), 12111(4), 12112(c)) (amending Title VII and the ADA).

8. "Marcus Pinney, Comment: A Constitutional Dilemma: The Conflict of the Title VII Alien Exemption Clause With the Civil Rights Act of 1991," 26 Hous. J. Int'l L. 707 fn 78 (2004).

9. Senate Report S. REP. 98-467 P.L. 98-459, Older Americans Act Amendments of 1984 Senate Report No. 98-467 May 18, 1984 Amendments to the Age Discrimination in Employment Act of 1967.

10. 42 USC §1981(a).

11. 42 USC §1981(c).

12. 42 USC §1981(a).

13. Ch. 31, §1, 14 Stat. 27, 27 (1866).

14. Ch. 114, §18, 16 Stat. 140, 144 (1870), §16. See Runyon v. McCrary, 427 US 160, 168 n.8 (1976).