OREGON

CIVIL RIGHTS

NEWSLETTER

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Meet the New ADA: Massive Changes Ahead for Employment Lawyers

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In perhaps the most sweeping change to the face of employment law in over ten years, the recent passage of the ADA Amendments Act of 2008 will mean a massive change for most of the country's employers. These changes, which will go into effect on January 1, 2009, will not only have a tremendous impact on the litigation of employment claims, they will require almost all human resource professionals, managers, and business owners to adopt new policies and procedures in dealing with accommodation requests.

Why Were Changes Deemed Necessary?

After the employment provisions of the Americans with Disabilities Act (ADA) went into effect in 1992, it did not take long for most federal courts to reject the majority of ADA claims brought before them. Culminating in a trilogy of pro-employer decisions in 1999—*Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); and *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999)—and a follow-up decision in 2002, *Toyota v. Williams*, 534 U.S. 184 (2002), the U.S. Supreme Court narrowed the playing field for disability discrimination plaintiffs. The decisions required lower courts to strictly apply a "demanding standard" when determining whether a plaintiff was considered sufficiently disabled to advance an ADA lawsuit, *Toyota*, 534 U.S. at 197, and also overturned an EEOC regulation that had instructed employers to determine whether an employee was disabled without considering mitigating measures.

Disability advocates reacted angrily to what they considered an undermining of the ADA's original intent, pointing to a common catch-22 faced by many plaintiffs: they were considered either "not disabled enough" to file a lawsuit or "too disabled" to be deemed qualified for the employment position in question. Although a consortium of advocates had repeatedly proposed ADA amendments similar to these over the past ten years, the political climate in Washington, D.C., was not conducive to such changes until this year.

What Changed?

The following lists the changes that will go into effect on January 1, 2009. Note that although Title I of the ADA applies only to workplaces with 15 or more employees, this requirement is not as limiting as it first appears. The number includes part-time and temporary employees, and applies if an employer had 15 or more employees for at least 20 weeks during the current or preceding calendar year. 42 USC § 12111(5)(A).

"Disability" Definition Must Be Read Broadly

First and foremost, the newly amended ADA instructs courts (and employers) to adopt a broad standard when determining whether an individual is considered disabled. 42 USC § 12102(4)(A). The ADA Amendments Act states that it provides "a broad scope of protection" for employees, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3554, and the new ADA provides that courts examining ADA cases need to provide coverage for plaintiffs "to the maximum extent permitted" by the statute. 42 USC § 12102(4)(A). (Statutory citations are to the amended ADA, effective January 1, 2009.)

Application: This amendment immediately reverses course from more than a decade of conservative federal court opinions. Employers can expect to see more ADA claims survive motions to dismiss and motions for summary judgment, and it should follow that more ADA cases will be greenlighted for trial. Employers who are faced with making employment decisions involving individuals who might have a disability should recognize that the employee is now more likely to be protected under the ADA.

Mitigating Measures Must Be Ignored

When making a decision about whether an employee is considered sufficiently disabled to receive protection under the ADA, employers and courts must now ignore any and all mitigating measures being used by the individual in question, with one major exception. 42 USC § 12102(4)(E).

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✦ In This Issue

Supreme Court Update

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Oral Argument Heard or Scheduled

***14 Penn Plaza LLC v. Pyett*, No. 07-581 (December 1, 2008)**

The United States Supreme Court will determine whether an arbitration provision in a collective bargaining agreement that waives an employee's right to pursue statutory discrimination claims in a federal forum is enforceable. This case arises out of the Second Circuit, which held that arbitration clauses in collective bargaining agreements are unenforceable to the extent that they waive the rights of covered workers to a judicial forum for federal statutory causes of action.

***Arizona v. Gant*, No. 07-542 (October 7, 2008)**

In this case out of the Arizona Supreme Court, the Court will determine whether the Fourth Amendment requires law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence in order to justify a warrantless vehicular search incident to arrest. The Arizona Supreme Court upheld the reversal of Gant's conviction based on evidence obtained in a vehicle search conducted in conjunction with his arrest, determining that exceptions to the Fourth Amendment warrant requirement must be justified by concerns for officer safety or evidence preservation.

***Arizona v. Johnson*, No. 07-1122 (December 9, 2008)**

The Court will decide whether the Fourth Amendment permits an officer to conduct a pat-down search of an individual when there is an articulable basis to believe that the individual may be armed and dangerous, but no probable cause exists to believe the individual has committed, or is committing, a crime. This case comes from the Arizona Court of Appeals, which held that a pat-down search was unconstitutional because an officer may not conduct such a search during a consensual encounter unless there is probable cause to believe that a crime has been, or is being, committed.

***Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595 (October 8, 2008)**

In this case out of the Sixth Circuit, the Court will determine whether an employee's participation in an internal sexual harassment investigation constitutes a "protected activity" for purposes of establishing a Title VII retaliation claim. The Sixth Circuit held that it did not, finding that for the participation to qualify as a protected activity, the plaintiff would have had to make the complaint herself.

***Herring v. U.S.*, No. 07-513 (October 7, 2008)**

In this case out of the Eleventh Circuit, the Court will decide whether the good-faith exception to the exclusionary rule applies when a police officer makes an arrest after receiving incorrect information from a different law enforcement agency. A three-judge panel on the Eleventh Circuit determined that the exception did not apply under these circumstances, as illegally obtained evidence should be suppressed only when doing so could "result in appreciable deterrence" of future police misconduct.

***Oregon v. Ice*, No. 07-901 (October 15, 2008)**

In this case out of the Oregon Supreme Court, the Court will determine whether the Sixth Amendment requires that facts necessary to imposing consecutive sentences on a criminal defendant, other than prior convictions, be found by a jury beyond a reasonable doubt. The Oregon Supreme Court determined that the Sixth Amendment requires that any fact that exposes the defendant to a greater

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American Employees Abroad: The Extraterritorial Effect of U.S. Discrimination and Other Employment Statutes

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Few countries presume to apply their laws to their citizens working in foreign countries. The United States is one of them.[1] Under the *Restatement (Third) of the Foreign Relations Law of the United States*, § 402 (2), a nation-state may legislate regarding the "activities, interests, status, or relations of its nationals outside as well as inside its territory." Under *EEOC v. Arabian American Oil Co.*, 449 U.S. 244 (1991), however, American employment laws are presumed NOT to apply overseas in the absence of a clear and express manifestation of congressional intent.[2] Congress manifested that intent in most, but not all, status discrimination statutes, and in certain other employment enactments.

U.S. Discrimination Laws

Some, but not all, U.S. status discrimination laws apply to employees on overseas assignment.

Title VII, the ADA, and the ADEA

Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) have similar, but not identical, provisions extending the reach of American law to overseas assignments.

U.S. citizens

Starting with Title VII, 42 USC § 2000e et seq., Congress overturned the *Arabian American Oil Co.* holding in the 1991 Civil Rights Act. The definition of "employee" in Title VII now explicitly states: "With respect to employment in a foreign country, ['employee'] covers an individual who is a citizen of the United States." 42 USC § 2000e(f). To eliminate all doubt that Title VII's extraterritorial reach is limited to U.S. citizens, 42 USC § 2000e-1a provides that Title VII "shall not apply to an employer with respect to employment of aliens outside any state."

Thus Title VII does not apply to an Indonesian national employed by Nike in Indonesia. The U.S. citizenship requirement also excludes documented workers with "green cards," authorizing them to work within the United States, when they are assigned to work outside the United States. Thus a Chinese national who works for five years for an American corporation in the U.S. in documented status, and who is then posted to Beijing by that corporation in connection with expansion of its Chinese operations, is not covered by Title VII.[3]

The ADA and ADEA contain similar provisions. The ADA provides that "employee" includes U.S. citizens employed in foreign countries. 42 USC § 12111(4). The ADEA provides that "employee" under that act "includes any individual who is a citizen of the U.S. employed by an employer in a workplace in a foreign country." 29 USC § 630(f).

Workers in U.S. territories or on oil platforms on the Continental Shelf

An alien employed in the U.S. territories of Guam, Puerto Rico, the Virgin Islands, American Samoa, or Wake Island; the Canal Zone; certain Outer Continental Shelf lands (oil platforms); or the District of Columbia is considered to be employed in a "state" and is therefore covered by Title VII. 42 USC § 2000e (i). Employment in those places is not considered "extraterritorial," and thus aliens employed there, like aliens employed in California or Nebraska, are fully covered by Title VII.

The locus/center of gravity of employment

To determine whether the employment is within the U.S. or in another nation, the locus of employment must be analyzed.[4] An instructive case is *Torrico v. Int'l Business Machines Corp.*, 213 F. Supp. 2d 390 (S.D.N.Y. 2002). Torrico was a Chilean national based in New York, but his duties involved "constant travel" between the IBM office in New York City and potential customers in Latin America. After a time, he accepted a three-year temporary posting to IBM Chile, where he fell ill and took medical leave, during which he was terminated. He sued IBM under the ADA.[5]

IBM filed a motion to dismiss, arguing that Torrico was employed in Chile at the time of the alleged discrimination and thus, as an alien working outside the U.S. and its territories, was not covered by the U.S. discrimination laws. The federal district court denied the motion. The "locus" of Torrico's employment was a factual issue; his duties may have been in Chile at the time of his illness and leave, but the question was where was the "center of gravity" of his employment relationship with IBM.

The opposite conclusion was reached by a federal district court in Illinois in a case involving an airline employee who spent one-fifth of his working time within the United States, an amount insufficient, in the court's view, to destroy his job's prevalent extraterritorial character. *Gantchar v. United Airlines*, 1995 WL 137053 (N.D. Ill. 1995).

Hu v. Skadden, Arps, 76 F. Supp. 2d 476 (S.D.N.Y. 1999), involved a recent U.S. law school graduate, a non-citizen, who clerked for the firm in New York and then applied to work at the Skadden, Arps office in Beijing; he filed his application in New York and was interviewed there, but his age complaint was dismissed.

Thus, to determine whether a person is excluded from coverage as an alien employed outside the U.S. or its territories, one must analyze where the employment relationship is centered.

Miscellaneous fact patterns

Two other interesting cases are hard to categorize. In one, a Mexican na-

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tional applied for a position within the U.S. in agricultural employment but was denied, he alleged, because of his age. A federal appeals court declined on policy grounds to allow his claim to be heard because it was reluctant to approve a theory that would allow "millions" of overseas applicants to sue in the U.S. courts. *Reyes-Gomez v. North Carolina Grower's Association*, 250 F.3d 861 (4th Cir. 2001). In another case, an American citizen working in the U.S. for a Singapore citizen could not pursue a retaliation claim because the alleged discrimination took place in Singapore. *Arias-Zebbalos v. Dr. Anamah*, 2006 WL 3075528 (S.D.N.Y. 2006).

Employment by a U.S. corporation or a foreign company controlled by a U.S. corporation

Americans employed abroad by foreign companies generally carry no protection under Title VII, the ADA, or the ADEA. Conversely, a company incorporated in the U.S. is generally considered a U.S. company for purposes of the extraterritorial application of the discrimination laws to U.S. citizens employed abroad. EEOC Guidance No. 915.002 (1993).

In some cases a company may be considered a U.S. entity under a multiple-factor analysis. Those factors are the place of incorporation, principle place of business, nationality of shareholders and/or those holding control, and nationality and location of management. *Id*.

If the employing company fails the U.S. entity tests, there may still be extraterritorial jurisdiction concerning U.S. citizens it employs abroad if the foreign company is controlled by a U.S. entity. Title VII provides: "If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited [by Title VII] engaged in by such corporation shall be presumed to be engaged in by such employer." 42 USC § 2000e-1(c)(1). However, "the determination of whether an employer controls a corporation shall be based on: (A) the interrelation of operations, (B) the common management, (C) the centralized control of labor relations, and (D) the common ownership or financial control, of the employer and the corporation." 42 USC § 2000e-1(c)(3).

The ADA contains a virtually identical provision. 42 USC § 12112(c)(2). Similarly, the ADEA provides: "If the [U.S.] employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such [U.S.] employer." 29 USC § 623(h)(1). Both the ADA and ADEA use the same four-factor test set out above for Title VII in judging the issue of U.S. corporate control of the foreign company. 42 USC § 12112(c)(2); 29 USC § 623(h)(3).

An example of a case testing the coverage of a U.S.–controlled foreign subsidiary involved a U.S. citizen employed in Japan by a Japanese subsidiary of an American corporation. *Rajoppe v. GMAC Corporation Holding Corp.*, 2007 WL 846671 (E.D. Penn. 2007). Alleging race discrimination, the employee asserted that the four-factor test was met by showing enough U.S. corporate control to create Title VII jurisdiction. On the question whether there was "centralized control of labor relations," the district court focused on two subquestions: (1) whether the U.S. parent controlled the subsidiary's day-to-day employment decisions and (2) whether the U.S. parent directed the subsidiary to make the particular employment decisions at issue. *See also Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392 (S.D.N.Y. 1999). In that case, the plaintiff, who was employed in New York, claimed race discrimination and sexual harassment against Ipanema and its Japanese parent, Sumitomo Corporation. The court dismissed the claim against the parent, applying the four-factor test and emphasizing the "centralized control of labor relations" factor, which the court found missing.

The "host country laws" (aka "foreign laws") defense

Title VII, the ADA, and the ADEA contain a defense to a discrimination charge when compliance with the discrimination statute would constitute a violation of the host country's laws. Title VII provides:

> It shall not be unlawful [under Title VII] for an employer (or a corporation controlled by an employer) . . . to take any action otherwise prohibited . . . with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer . . . to violate the law of the foreign country in which such workplace is located.

42 USC § 2000e-1(b). Again the ADA and ADEA contain functionally identical provisions. 42 USC § 12112(c)(1); 29 USC § 623(f)(1).[6] This defense is not available in U.S. territories.

The defense requires that an actual violation of foreign law would be required to comply with the U.S. law. The law of the country of workplace, not the law of the place of incorporation or the principle place of business, is controlling for purposes of the defense. An employer's policies or corporate charter and mere preferences of the host country do not support the foreign laws defense. EEOC Enforcement Guidance N-915.002 (1993).

The leading case is *Mahoney v. RFE/RL Inc.*, 47 F.3d 447 (D.C. Cir. 1995), which involved an age claim against the operator of Radio Free Europe in Germany. A provision in the collective bargaining contract required retirement at age 65. The ADEA, with few exceptions, forbids mandatory retirement at any age. The company's Works Council refused to make an exception for U.S. citizen employees, and the German Labor Court upheld this refusal. The company therefore terminated two U.S. citizen employees who reached age 65. Their ADEA action in the United States was dismissed under the "foreign laws" defense.

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Recent Decisions

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Ninth Circuit Court of Appeals

***Cox v. Ocean View Hotel Corp. d/b/a Radisson*, __F.3d __, No. 06-15903, 2008 WL 2813057 (9th Cir. July 23, 2008)**

Reversing the district court's grant of summary judgment, the Ninth Circuit held that a Honolulu hotel did not breach an arbitration agreement or waive its right to arbitrate sex discrimination and other claims brought by its former director of finance even though the hotel initially told the employee the dispute was not arbitrable.

The employee's demand for arbitration did not comply with the basic requirements as stated in the employment contract. Instead of filing a written notice with AAA of intent to arbitrate, providing a copy to the employer, and paying the applicable fee, the employee only submitted a letter to his supervisor making a request to enter into arbitration. The employer's response, that it did not consider the matter arbitrable, could not be a breach of the agreement since the employee's initiation of arbitration was defective in the first instance.

***Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166 (9th Cir. 2008)**

The Ninth Circuit held that the trial court erred in granting summary judgment on the ADA claim of a Phoenix-area delivery truck driver with heart conditions, as the law does not require him to offer comparative evidence of the ability of an average Phoenix resident to participate in summer outdoor activities.

The plaintiff's cardiologist testified that the plaintiff had cardiomyopathy and that when he worked in temperatures over 90 degrees he experienced shortness of breath, weakness, and chest pain. He further testified that the plaintiff could not do any heavy lifting or exertion for prolonged periods of time. The Ninth Circuit held that the plaintiff's testimony alone regarding the significance of his impairment was sufficient to raise factual issues as to whether he was substantially limited in major life activities, including breathing, thinking, and physical activities, in temperatures of 90 degrees or more.

***Quon v. Arch Wireless*, 529 F.3d 892 (9th Cir. 2008)**

In this decision, the Ninth Circuit limited an employer's ability to review its employee's text messages on employer-provided pagers. The city of Ontario, California, contracted with Arch Wireless to provide pagers for its employees. The city disseminated no official policy regarding text-messaging use of the pagers but did have a general computer usage, Internet, and email policy that limited use to city business only and provided that the city could audit and review usage of its systems. The city also had an informal policy in which employees would reimburse the city for any overage charges and thereby avoid an audit of the messages.

The city subsequently decided to audit the messages of employees who were consistently incurring overage charges and requested the transcripts of the text messages from Arch Wireless as the subscriber. The audit revealed that plaintiff Quon was incurring overage charges and that many of the messages were personal in nature and were often sexually explicit.

Quon brought claims against both Arch Wireless and the city. The court held that Arch Wireless violated the Stored Communications Act, which prevents providers of communication services from divulging private communications to certain entities and/or individuals. Specifically, the court found that Arch was an "electronic communication service," which is prohibited from releasing private information—even to the subscriber—except with the consent of "an addressee or intended recipient" of the communication.

The court also held that the city had violated its employee's Fourth Amendment rights by accessing the text messages, since the employees had a reasonable expectation of privacy in the content of their text messages absent consent for disclosure from either the sender or the recipient of the messages.

Oregon Court of Appeals

***Emerald Steel Fabricators, Inc. v. BOLI*, 220 Or. App. 423, 186 P.3d 300 (2008)**

Emerald Steel Fabricators challenged the Bureau of Labor and Industries' ruling that requires employers to accommodate the medical use of marijuana by adjusting workplace drug and alcohol policies, 27 BOLI 242 (2006). Unfortunately, in its opinion the Oregon Court of Appeals offers no guidance on the underlying issue—whether marijuana must be accommodated. Instead, the ruling was affirmed on a technicality—that the employer had failed to raise the issues before the Bureau of Labor and Industries and, accordingly, had not preserved the error for appellate review. So, while the opinion is a good discussion of preservation of error in the context of appeals, it does not help employers grappling with the issue of medical marijuana. Emerald Steel says that it will seek review by the Oregon Supreme Court.

***Hamlin v. Hampton Lumber Mills, Inc.*, 222 Or. App. 230, 193 P.3d 46 (2008)**

Following the methodology set forth by the Oregon Supreme Court in *Goddard v. Farmers Ins. Co.*, 344 Or. 232, 179 P.3d 645 (2008), the Oregon Court of Appeals provides in this decision a detailed review of whether a punitive damages award was grossly excessive and, thus, unconstitutional.

Hamlin sued his employer after it refused to reinstate him after recovering from a hand injury sustained while working for the employer. A

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RECENT DECISIONS CONTINUED FROM PAGE 5

jury determined that the employer violated the law when it failed to reinstate Hamlin, and awarded Hamlin $10,000 in economic damages, but found that Hamlin failed to mitigate those damages by $4,000, for a total economic damages award of $6,000. The jury also found that Hamlin proved by clear and convincing evidence that punitive damages should be assessed against the employer in an amount of $175,000.

On appeal, the Oregon Court of Appeals held that while the evidence supported an award of punitive damages, an award of $175,000 was grossly excessive and violated the due process clause of the Fourteenth Amendment. Explaining that there is no maximum bright-line ratio that punitive damages cannot exceed, the court noted that when injuries are strictly economic, a punitive damages award generally may not significantly exceed four times the amount of the injured party's compensatory damages. Finding that Hamlin's failure to mitigate his damages must be taken into account when assessing the proper measure of damages attributable to the employer, the court determined that the maximum permissible award of punitive damages the circumstances would permit was four times the compensatory damages of $6,000 plus prejudgment interest. ✦

Rick Liebman has represented employers in labor and employment law for 35 years.

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SUPREME COURT UPDATE CONTINUED FROM PAGE 2

punishment than that authorized by the jury's guilty verdict be submitted to a jury and proved beyond a reasonable doubt.

***Pearson v. Callahan*, No. 07-751 (October 14, 2008)**

In this case out of the Tenth Circuit, the Court will resolve a split among the circuits as to whether the "consent once removed doctrine" extends to civilian informants. That doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, then immediately summons other officers for assistance. The Tenth Circuit determined that the doctrine applies only when the person to whom consent is given is a police officer, not a civilian informant.

***Pleasant Grove City v. Summum*, No. 07-665 (November 12, 2008)**

In this case out of the Tenth Circuit, the Court will resolve a split among the circuits as to whether (1) a monument donated to a municipality thereafter becomes government speech, or whether it remains the private speech of the monument's donor, and (2) a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties.

***Ysursa v. Pocatello Education Association*, No. 07-869 (November 3, 2008)**

The Court will decide whether Idaho's prohibition, through the Voluntary Contributions Act, of payroll deductions for "political activities" violates the First Amendment when applied to private and local government employees. The Ninth Circuit found that the act violated the First Amendment to the extent that it applied to local government and private employers, but that it could be applied to the state's own payroll system.

Certiorari Granted

***Vermont v. Brillon*, No. 08-88 (October 1, 2008)**

The Court has agreed to hear this case from the Vermont Supreme Court involving a defendant's right to a speedy trial. The Court will decide whether delays caused by a public defender can deprive a criminal defendant of his right to a speedy trial.

***Montejo v. Louisiana*, No. 07-1529 (October 1, 2008)**

The Court has agreed to hear this case out of the Louisiana Supreme Court involving a criminal defendant's Sixth Amendment right to counsel. The Court will determine whether an indigent defendant must affirmatively accept the appointment of counsel to preclude future police interrogation in the absence of the attorney. ✦

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The BFOQ defense

Title VII provides that

> it shall not be an unlawful employment practice for an employer to . . . employ any individual . . . on the basis of his religion, sex, or national origin . . . where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise . . . .

42 USC § 2000e-2(e)(1). (This provision does not apply to race-based qualifications.) Under the BFOQ defense, can an employer favor a Hispanic American for a posting in Latin America? Or a Japanese American over a Korean American for a posting in Japan?

The cases say no. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981), held that selecting a male to work with Latin American customers violated Title VII and was not saved by the BFOQ exception. The Fifth Circuit held it illegal to disfavor a Jewish medical doctor for an assignment at a hospital in Saudi Arabia. *Abrams v. Baylor College of Med.*, 805 F.2d 528 (5th Cir. 1986).[7]

It seems counterintuitive to say that American companies competing in the global marketplace cannot assign employees with more cultural identification and awareness of the host country's culture. Of course language skills can be taken into account, as can experience in the host country or perhaps knowledge of its culture. Beyond such obvious bona fide qualifications for overseas assignments, explicitly favoring or disfavoring a group on the basis of national origin or religion will be hard to justify as a qualification "reasonably necessary to the normal operation of the business." Gender-based qualifications may be even harder to justify in most situations. However, disfavoring a female for an assignment as sales representative for sports equipment in a fundamentalist Islamic nation that restricts the activities of women might present a closer case.

42 USC § 1981

Section 1981[8] is the 1866 statute that prohibits race discrimination in contracts, including employment contracts. Rediscovered in the 1970s[9] as a remedy for race discrimination, it remains a powerful remedy, notwithstanding Title VII, for several reasons: it applies to employers with fewer than 15 employees, it does not require exhaustion of administrative remedies, and perhaps most significantly, it allows uncapped damages, in sharp contrast to Title VII damages, which are capped at $50,000 to $300,000, depending on the size of the employer.[10] Section 1981 also broadly defines race discrimination, prohibiting discrimination against groups not defined as "white citizens" in the 19th century; such groups include Hispanics, Native Americans, Iranians, Arabs, Jews, and, potentially, Italians, Greeks, and other peoples around the Mediterranean Sea.[11]

The courts, however, have uniformly held that § 1981 carries no extraterritorial jurisdiction. *E.g., Ofori-Tenkorang v. American Intern. Group Inc.*, 460 F.3d 296 (2d Cir. 2006) (citing many district court decisions to the same effect). Thus the potential consequences of racial discrimination abroad are considerably less than the potential consequences of the same acts in the United States. For example, the $16 million jury verdict in August 2008 in Clackamas County, Oregon, in a case alleging racial harassment at a car dealership would not be possible for extraterritorial racial discrimination against U.S. citizens. This seems a curious result as a policy matter, but the conclusion of the courts that Congress has not "clearly and explicitly" provided for the extraterritorial application of § 1981 seems unassailable.

State Discrimination Laws

Many states, including Oregon, now provide for damages for discrimination that are uncapped. The question whether these laws apply to discrimination against U.S. citizens employed abroad by U.S. firms, or companies controlled by U.S. firms, raises questions of state legislative intent. Most courts find that the state law was not intended to have extraterritorial reach. In *Guillory v. Princess Cruise Lines*, 2007 WL 102851 (Cal. 2007), for example, a cruise line employee who was hired in California at the cruise line's California offices was terminated when she became pregnant while working on ships that sailed in the Caribbean from a Florida port. Her claim under the California Fair Employment and Housing Act was dismissed for lack of any legislative intent that the California statute have extraterritorial reach. Similarly, the court in *Doricent v. American Airlines*, 1993 WL 437670 (D. Mass 1993), dismissed a discrimination claim under Massachusetts law because the alleged discriminatory acts occurred in Haiti.[12]

In contrast, the *Torrico* case, *supra*, involving the locus of the employment relationship of an employee transferred from New York temporarily to Chile, raised a claim under the New York Human Rights Law that, like the federal ADA claim, the trial judge refused to dismiss. Note that the New York State Human Rights Law arguably provides expressly for extraterritorial reach. N.Y. Exec. Law § 298-a (1).[13] That state statute also poses potential problems for foreign parent companies in that it covers any entity that "aids or incites" discrimination forbidden under the state discrimination law. *Robins v. Max Mara U.S.A.*, 1996 WL 88565 (S.D.N.Y. 1996).

Thus the first question is whether the state legislature intended to extend state discrimination laws to protect state citizens working for U.S. firms abroad. The next question is whether considerations of comity or federal supremacy in foreign relations matters should defeat those applications.

Other U.S. Laws

Veterans Act

The Uniformed Services Employment and Reemployment Rights Act

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The measures to be ignored include medications, prosthetics, hearing aids, mobility devices, and learned adaptations. This amendment will create, at times, a guessing game for the employer and the court, as they will be forced to make speculative assumptions about "what may be" instead of "what is."

Application: When engaging in the interactive process and communicating with employees and their health care providers, employers will need to specify that the examination being conducted should be without regard to mitigating measures. Interactive process questionnaires will need to be adapted to structure questions accordingly.

Exception: The new ADA specifically provides that employers and courts can consider the effect of "ordinary eyeglasses or contact lenses" when examining an individual under the act, excluding this one condition from the new mitigating measures analysis. 42 USC § 12102(4)(E) (ii). If this provision had not been included, virtually everyone in the country could have been considered disabled under the new ADA.

Just About Anything Is a "Major Life Activity"

Up until now, the ADA was silent on what constituted a "major life activity"—that is, the areas of life that needed to be adversely affected in order for someone to claim a disability. Although the EEOC had proposed a list of recommended activities, many courts rejected the agency's broad interpretation, and in *Sutton*, even the U. S. Supreme Court expressed skepticism about the list.

But the new ADA includes a thorough and non-exhaustive list of major life activities, including caring for oneself, performing manual tasks, eating, sleeping, reading, concentrating, thinking, communicating, and working. 42 USC § 12102(2)(A). Moreover, it also expressly states that the operation of any major bodily function is considered a major life activity, including functions of the immune system, cell growth, digestive functions, reproductive functions, and neurological and brain functions. 42 USC § 12102(2)(B).

Application: Combined with the broad definitional section noted above, the new and expansive list of major life activities will ensure that almost every employee who wants to file an ADA claim will be able to do so. Even those conditions that might not be readily apparent on the surface will be considered disabilities, such as those that have an impact on the body's internal functions.

The "Regarded As" Prong Is More Broadly Read

In addition to those with impairments that substantially limit a major life activity, the ADA has always offered protection for employees whom an employer wrongly "regarded" as being disabled. Under previous federal court interpretation, ADA plaintiffs needed to prove that the employer regarded them as being substantially limited in a major life activity, which was a difficult standard to meet. Under the new ADA, a "regarded as" plaintiff need only demonstrate that the employer perceived the individual as having a mental or physical impairment. 42 USC § 12102(3)(A).

Application: If the other amendments have not opened the courtroom door widely enough, this amendment will ensure that it is thrown as wide open as possible. Even if an employee has an impairment that somehow is not held to substantially limit a major life activity, it seems likely that courts will grant an expansive definition and make it fairly easy for an employee to prove that the employer regarded the employee as having an impairment.

Also: The new ADA states that the "regarded as" prong will not be applicable when an impairment is "transitory" (defined as lasting six months or less) and "minor." 42 USC § 12102(3)(B). The new ADA also clarifies that "regarded as" disabled employees are not entitled to reasonable accommodations under the ADA. 42 USC § 12201(h).

EEOC Is Permitted to Regulate ADA and Define "Substantial Limitation"

The new law also provides an express mandate to the Equal Employment Opportunity Commission (EEOC) to issue binding regulations and other interpretative guidance to further flesh out the statute. This is significant because the U.S. Supreme Court had called into question the EEOC's authority to do so under a technical reading of the old ADA, *Sutton*, 527 U.S. at 479; such concerns are now eliminated. 42 USC § 12205a. Also, the ADA Amendments Act specifically requests that the EEOC provide a regulatory definition for the term "substantially limits" that lowers the standard to a level consistent with congressional intent. Pub. L. No. 110-325, § 2(b)(6), 122 Stat. 3554.

Application: Next year will most likely see the introduction and passage of new EEOC regulations expanding on this definition and the rest of the revised statute, almost certainly with a pro-employee and expansive bent. It will be interesting to see how broadly the regulatory agency classifies the "significantly restricted" definition and how much of the previous definition (involving an analysis of the condition, manner, and duration of the restriction) will be retained.

Miscellaneous Amendments

Other amendments included in the new ADA address these topics:

- Impairments that are "episodic or in remission" can still be considered disabling if, "when active," they substantially limit a major life activity. 42 USC § 12102(4)(D). In other words, employers again need to play a guessing game and determine whether episodic or intermittent impairments could rise to the level of disability, and treat employees accordingly.
- Provisions attempt to conform to Title VII and other antidiscrimina-

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MEET THE NEW ADA CONTINUED FROM PAGE 8

tion statutes by changing some of the ADA's technical language to more clearly demonstrate that a plaintiff can prevail in a claim by showing discrimination "because of" the protected disability.

- The new ADA prohibits "reverse discrimination" claims—employees without disabilities cannot sue under the ADA by claiming that an employer impermissibly rejected them in favor of individuals with disabilities. 42 USC § 12201(g).
- The amendments to the definitions section, discussed above, also apply to Title II and Title III of the ADA. Therefore, plaintiffs bringing claims against government entities for alleged discrimination in the providing of services (Title II) or against places of public accommodation (Title III) have the same advantages as employment claimants.

Bottom Line: Meet the New ADA

The bottom line is that when it comes to ADA litigation, employers should now have the same expectation for ADA claims as they do for other discrimination claims (gender, race, religion, age, etc.). It is no longer difficult to prove that you have a right to bring an ADA claim. Although employers still have the same ability to defend against a discrimination claim by showing that a legitimate and non-discriminatory reason existed to justify an employment action such as termination or demotion, they can no longer count on being able to defeat such a claim before getting to that point.

When it comes to day-to-day human resource management, employers need to be prepared to immediately adapt interactive process policies, and to offer accommodations to a wider percentage of the workforce. Employers will be well served to err on the side of caution when determining whether to engage in the interactive process with an employee, and will need to more cautiously react to requests for accommodation. ✦

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AMERICAN EMPLOYEES ABROAD CONTINUED FROM PAGE 7

(USERRA), 38 USC § 4301 et seq., contains an express provision for extraterritorial application to both U.S. citizens and permanent U.S. residents employed outside U.S. territory by a U.S. firm or a foreign company controlled by a U.S. firm. 38 USC § 4303(3). On the issue of control, the USERRA uses the same four-part test as is specified in Title VII. The statute also contains a "foreign law" defense. 38 USC § 4319(d).

Sarbanes-Oxley Act Whistleblower Provisions

The whistleblower provisions of the Sarbanes-Oxley Act (SOX), 18 USC § 1514A(a), have been given a very narrow interpretation within the U.S. Department of Labor (DOL), and in any event, do not extend extraterritorially, according to the leading First Circuit opinion. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006); *see also Concone v. Capital One Fin. Corp.*, 2004 DOLSOX LEXIS 97 (ALJ 2004). Again, on policy grounds it seems unsound not to extend SOX's whistleblower protection to U.S. citizens exposing financial fraud by U.S. corporations, or firms controlled by U.S. companies, in operations abroad. Congress should amend SOX to allow extraterritorial protection, just as it amended Title VII and the ADA to similar effect in 1991.

FLSA

The federal minimum wage, overtime pay, and child labor law generally carries no effect abroad. The operative provisions of the Fair Labor Standards Act (FLSA), 29 USC § 201 et seq., "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country . . . ." 29 USC § 213(f). There are at least two exceptions. First, the DOL applies the FLSA to workers who work part of a given workweek in the U.S. but perform services for the rest of workweek in a foreign country. 29 CFR § 776.7, n. 20 (1993). The courts have not always agreed. In *Hodgson v. Union Permisionarios Circulo Rojo, S. De R.L.*, 331 F.Supp.1119 (S.D. Tex. 1971), for example, Mexican bus drivers employed by a Mexican company were not protected by the minimum wage provisions of FLSA even though they spent part of each workweek driving in the United States. The second exception is for U.S. seamen working on U.S. ships.

LMRA and RLA

The Labor Management Relations Act (LMRA), 29 USC § 141 et seq. (including the National Labor Relations Act), and the Railway Labor Act (RLA), 45 USC § 151 et seq., generally carry no extraterritorial application.[14] There may be an exception for U.S. oceanographic vessels. *Alcoa Marine Corp.*, 240 NLRB 1265 (1979).

FMLA, WARN, and OSHA

The Family Medical Leave Act (FMLA), 29 USC § 2601 et seq., the Worker Adjustment and Retraining Notification Act, 29 USC § 2101 et seq., and the Occupational Safety and Health Act, 29 USC § 651 et seq., contain no language extending extraterritorial application. OSHA is expressly limited to "employment in a workplace in a State" or U.S. territory or the U.S. Continental Shelf. 29 USC § 653(a) (1990).

ERISA

Employee benefit plans "maintained

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outside of the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens" are excluded from the Employee Retirement Income Security Act (ERISA). 29 USC § 1003(b)(4).

Alien Torts Claims Statute

This statute makes actionable as a tort a violation of any treaty of the United States or the "law of nations." It has been used to sue for the actions of multinational companies who allegedly have committed, often with the alleged aide of foreign governments, egregious acts against workers. For example, Exxon Mobil was accused in a 2001 case of cooperating in the torture of villagers in Indonesia.[15] The district court and court of appeals refused to dismiss the suit brought by 11 villagers, and the Supreme Court denied pretrial review in June 2008.[16]

Conclusion

In summary, the status discrimination laws carry broad extraterritorial effect, but Congress could improve the consistency and logic of the laws. First, 42 USC § 1981, like its sister racial discrimination statute (Title VII), should be amended to give it explicit extraterritorial effect. Second, the BFOQ defense should be expanded to embrace the unique interests of American businesses oversees in the employment of U.S. citizens who have a cultural and ethnic identity with the host country. Third, Sarbanes-Oxley (SOX) should be amended to protect U.S. citizens who whistleblow about financial irregularities abroad. Fourth, documented workers posted by U.S. companies from the U.S. to workplaces abroad should be brought within the protections afforded to U.S. citizens. Finally, American workers stationed abroad should be included in the protections provided by the Family Medical Leave Act, including the 2008 amendments creating special protections for the families of military personnel. ✦

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Endnotes

1. Venezuela is another.

2. *Arabian American Oil* involved a U.S. citizen born in Lebanon and working in Saudi Arabia. Before he was assigned at his own request to work in Saudi Arabia, he had been hired in Houston, Texas. In Saudi Arabia he allegedly suffered harassment from his supervisor on the basis of his national origin, race, and religion. After he was terminated, he filed charges with the EEOC and later in a federal district court alleging violations of Title VII. The Supreme Court ultimately held that Congress did not intend for Title VII to apply to employment overseas. *See also Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993). *But see Spector v. Norwegian Cruise Lines*, 545 U.S. 119 (2005) (ADA public accommodations claim cognizable).

3. *See, e.g., Shekoyan v. Sibley Int'l*, 409 F.3d 414 (D.C. Cir. 2005). Shekoyan, a lawful permanent resident of the U.S., was assigned to work in Tbilsi, Georgia, under a 21-month contract. When his contract was not renewed, his termination letter was sent to his home in Washington, D.C., where he had previously been assigned. His Title VII claim was dismissed because, as an alien working outside the U.S., he had no Title VII rights. *See also Hugh E. O'Loughlin, Sr. v. Pritchard Corp.*, 972 F. Supp. 1352 (D. Kan. 1997) (ADEA does not protect aliens working abroad even if they are authorized to work in the U.S.); *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999) (Japanese citizen granted permanent residence status in the U.S. was hired in the U.S. to work in Japan; he could not pursue national origin, race, and age discrimination claims); *Mendonca v. Tidewater Inc.*, 2001 WL 283091 (E.D. La. 2001) (Indian national who alleged discrimination by U.S. subsidiary in Dubai could not sue under Title VII).

4. *Mithani v. Lehman Bros.*, 2002 WL 14359 (S.D.N.Y. 2002), involved a British citizen who applied for positions with the London office of Lehman Brothers. The court dismissed his discrimination claim because the workplace was in England and thus he was an alien alleging discrimination outside the U.S. and its territories, and there was no jurisdiction.

5. The principle of the case also applies to Title VII and ADEA claims.

6. *See generally* EEOC, "Policy Guidance: Analysis of the Section 4 (f)(1) 'Foreign Laws' Defense of the Age Discrimination Act of 1967" (Dec. 5, 1989).

7. A BFOQ defense was upheld when an employer required helicopter pilots flying into Mecca to be Muslims. *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). That case, however, involved a Saudi Arabian law requiring the beheading of non-Moslems flying into Mecca, and is therefore most appropriately viewed as an application of the foreign laws defense principle.

8. 42 USC § 1981.

9. *Johnson v. Railway Express*, 421 U.S. 454 (1975); *McDonald v. Sante Fe Railroad*, 427 U.S. 273 (1976).

10. 42 USC § 1981A.

11. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Gonzalez v. Stanford Applied Engineering Inc.*, 597 F.2d 1298 ((9th Cir. 1979); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977); *MacDissi v. Valmont Industries*, 856 F.2d 1054 (8th Cir. 1988).

12. *See also Iwankow v. Mobil Corp.*, 150 A.2d 272 (N.Y. App.Div. 1989).

13. The statute does not, however, provide a non–New York resident with a remedy for discrimination occurring outside of New York by a New York corporation. *Ghandour v. American University of Beirut*, 1998 U.S. Dist. LEXIS 19154 (S.D.N.Y. 1998).

14. *RCA OMS Inc.*, 202 NLRB 224 (1073); *Independent Union of Flight Attendants*, 1989 WL 123203 (N.D. Cal, 1989).

15. BBC News, "Exxon 'Helped Torture In Indonesia,'" June 22, 2001.

16. "Justices Turn Down Appeal By Exxon," *New York Times*, June 17, 2008. *See generally*, J. Baldwin, "International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens," 40 *Cornell Int'l L.J.* 749 (2007).

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