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Claims by Non-Citizens under the Americans with Disabilities Act: Proper Extraterritorial Application in Torrico v. International Business Machines

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CASENOTE

CLAIMS BY NON-CITIZENS UNDER THE AMERICANS WITH DISABILITIES ACT: PROPER EXTRATERRITORIAL APPLICATION IN *TORRICO V. INTERNATIONAL BUSINESS MACHINES*

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I. Introduction

The Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq.,[1] (ADA) protects the civil rights of disabled individuals by making it unlawful to "discriminate against a qualified individual with a disability because of the disability. . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[2] Specifically, Title I of the ADA requires an employer to provide "reasonable accommodations"[3] for a "qualified individual's"[4] impairments or limitations unless doing so would cause an "undue

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[1] The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 (2003).

[2] 42 U.S.C. § 12112(a).

[3] § 12111(9). Examples of reasonable accommodations may include " . . . making existing facilities accessible to and usable by disabled individuals . . ." or restructuring job parameters.

hardship" on the employer.[5] A major impetus to this legislation was Congress' discovery that disabled workers face numerous employment barriers, which cost the United States billions of dollars in avoidable expenses resulting from non-productivity and dependency.[6]

These fiscal consequences can have international implications. With the increasingly global nature of business and the need for American corporations to employ both American and foreign labor, multinational corporations are greatly impacted by the way they choose to treat their employees.[7] Of the many factors affecting a decision to accept employment, the assurance that civil rights will be protected can be a leading consideration. This concern may be especially powerful in light of an overseas position, where the employee is separated from the familiarity and ordinary legal protections of his or her country's laws. Therefore, in order to maximize overseas potential, American corporations operating abroad must be cognizant of whether federal anti-discrimination laws apply to their employees,[8] both those that are United States citizens and those that are not.

In 1991, Congress amended Title VII of The Civil Rights Act of 1964,[9] and in turn amended the ADA and Title VII by allowing extraterritorial application to American workers employed by U.S. or U.S.-controlled employers overseas: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[10] However,

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[4] § 12111(8). A "qualified individual with a disability" is a disabled person who, either with or without a reasonable accommodation, can perform the basic requirements of the position he or she holds or desires.

[5] § 12111(10). Several factors, outside of the scope of this casenote, are considered when determining whether the reasonable accommodation imposes a "significant difficulty or expense" on the employer.

[6] *See* § 12101(a)(9).

[7] *See* Melody M. Kubo, *Extraterritorial Application of the Americans with Disabilities Act*, 2 ASIAN-PACIFIC L. & POL'Y J. 259 (2001) [hereinafter Kubo] ("With the increasing globalization of business activities, the expansive reach of the ADA and related federal anti-discrimination statutes could potentially have a significant impact on employment-related costs, operations, and profitability.").

[8] *See id.*

[9] Civil Rights Act of 1991, 42 U.S.C. §§ 12111(4), 12112(c) (ADA) and 42 U.S.C. § 2000e-1(c) (Title VII).

[10] *See* § 12111(4) (ADA) and § 2000e-1(c) (Title VII). The 1991 amendments apply to ADA Title I employment discrimination claims, but not expressly to ADA Title III. *See* Arlene S. Kanter, *Symposium: Development in Disability Rights: The Presumption Against Extraterritoriality as Applied to Disability Discrimination*

despite language in the ADA specifying U.S. citizenship as a requirement for applicability, what remains unclear today is whether protection extends to American workers who are actually foreign nationals, rather than US citizens.[11]

In *Torrico v. International Business Machines Corporation,*[12] an individual employed by IBM on a temporary assignment in Chile was terminated while on medical leave and subsequently sued IBM pursuant to the ADA.[13] The court concluded he stated a valid ADA claim notwithstanding his lack of U.S. citizenship,[14] and despite the ADA's statutory definition of "employee" as "an individual who is a citizen of the United States."[15] The issue in *Torrico* was whether the extraterritorial provision of the ADA allowed this foreign national to state a claim upon which relief could be granted pursuant to the ADA.[16] The court held that the issue of extraterritoriality was actually not implicated because Torrico's overseas assignment constituted "employment in the United States" under the court's "center of gravity test," thus bringing his discrimination allegations within the domestic, rather than extraterritorial, reach of the ADA.[17] Ultimately, IBM prevailed.[18] It is yet to be determined whether the court's fact-oriented approach in locating the "center of gravity" of the employment relationship in order to determine whether an employee comes within the domestic or extraterritorial scope of the ADA might open the

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Laws: Where Does It Leave Students with Disabilities Studying Abroad?, 14 STAN. L. & POL'Y REV. 291, 300 (2003) [hereinafter Kanter].

[11] *See* Kubo, *supra* note 7, at 276; Kanter, *supra* note 10, at 291 ("But the extent to which the ADA, or its predecessor the Rehabilitation Act, applies extraterritorially to conduct and Americans overseas remains unresolved."). An example of such an American employee is a foreign professional hired by an American corporation who lives in the U.S. without U.S. citizenship, and is sent to work abroad by his American employer.

[12] Torrico v. Int'l Business Machines Corp., 213 F. Supp. 2d 390 (S.D.N.Y. 2002).

[13] *Id.* Torrico also brought an action under the New York Human Rights Law, but that consideration is beyond the scope of this casenote.

[14] *Id.* at 390.

[15] 42 U.S.C. § 12111(4).

[16] *Torrico*, 213 F. Supp. 2d at 396.

[17] *Id.* at 404.

[18] Torrico v. Int'l Business Machines Corp., 2004 U.S. Dist. Lexis 26142 (S.D.N.Y. 2004). The focus of this note is not to analyze the ultimate outcome or the appropriateness of victory by either side, but to discuss the court's decision to permit Torrico to state a claim under the ADA, and its implications.

floodgates of litigation to foreign nationals in similar predicaments.[19]

The purpose of this casenote is to examine whether the court properly decided *Torrico* in light of guidance on the subject provided by the Equal Employment Opportunity Commission (EEOC),[20] the ADA itself, as well as both supportive and contradictory caselaw interpreting the ADA and comparable legislation. Part II of this note will discuss the historical background leading up to extraterritorial application of the ADA as well as the current state of the law. Part III will present *Torrico*. Part IV will contain a critical analysis of the case against the backdrop of precedent cases and the specific factual circumstances surrounding Jorge Torrico's employment situation. Part V will conclude that while the court in *Torrico* may have acted reasonably in allowing the plaintiff to state an ADA claim based on the facts at hand, the court did not provide definitive guidance to future courts faced with comparable circumstances.

II. History of ADA's Extraterritorial Application and the Law Today

The historical background of the ADA's extraterritorial application can be understood in the context of the legislative history of Title VII of the Civil Rights Act of 1991.[21] Title VII prohibits employers from discriminating on the basis of race, color, religion, national origin, and sex.[22] Prior to 1991, Title VII of the Civil Rights Act of 1964 did not apply to employment

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[19] *Torrico*, 213 F. Supp. 2d at 404, n.6. To support its conclusion that the "center of gravity" standard will not unjustifiably expand the ADA's scope to foreign nationals, the court points to the unlikely chance that foreign litigants will have "sufficient preexisting contacts with the employer or the United States to warrant the conclusion that the center of gravity . . . is in the United States."

[20] Congress has delegated interpretive authority to the EEOC with regard to the ADA; the agency is supposed to resolve statutory ambiguities. *See Enforcement Guidance on Application of Title VII and ADA to American Firms Overseas and to Foreign Firms in the United States*, 2 Equal Emp. Opportunity Comm'n Compliance Manual 605 (1993) [hereinafter *Enforcement Guidance*]; *See also*, Rebecca H. White, *The EEOC, The Courts, And Employment Discrimination Policy: Recognizing The Agency's Leading Role in Statutory Interpretation*, 1995 Utah L. Rev. 51 (1995) (noting the important role of the EEOC in interpreting employment discrimination policy) [hereinafter White].

[21] *See* 42 U.S.C. § 2000e-1(c).

[22] *See* 42 U.S.C. § 2000e-2, 2000e-3.

abroad due to the "presumption against extraterritoriality."[23] This principle, as enunciated by the Supreme Court in *Foley Brothers Inc. v. Filardo*,[24] provided that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[25] In declining to apply a federal labor law to a U.S. citizen in Iran, the court in *Foley Brothers* reasoned that an American regulation did not apply to a contract for business in a foreign country " . . . [o]ver which the United States has no direct legislative control."[26] Similarly, in the consolidated cases of *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, and *Bourlesan v. Arabian American Oil Co. (Aramco)*,[27] the United States Supreme Court held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to employment outside of the U.S., even if the subject employers were American corporations discriminating against U.S. citizens abroad.[28]

In *Aramco*, the plaintiff, a naturalized U.S. citizen born in Lebanon, sued Arabian American Oil Company (Aramco), whose principal place of business was Saudi Arabia and whose subsidiary, Aramco Service Company (ASC), was licensed to do business in Texas.[29] Both companies were incorporated in Delaware.[30] After being hired by ASC in Houston, the plaintiff requested a transfer to Saudi Arabia to work for Aramco.[31] Five years later, the plaintiff was terminated and he subsequently filed a charge of discrimination with the EEOC and instituted a

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[23] James E. Ward, *Is That Your Final Answer? The Patchwork Jurisprudence Surrounding The Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715, 2002. This article contains an informative discussion on the so-called "presumption against extraterritoriality" and highlights the historically inconsistent approaches taken by lower courts when determining whether to apply U.S. statutes to foreign activity.

[24] 336 U.S. 281 (1949), *reh'g denied*, Filardo v. Foley Bros., Inc., 299 N.Y. 684 (1949).

[25] Foley Bros., Inc. et al. v. Filardo, 336 U.S. 281, 285 (1949), *reh'g denied*, Filardo v. Foley Bros., Inc., 299 N.Y. 684 (1949).

[26] *Id.* at 290-91.

[27] EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) [hereinafter *Aramco*].

[28] *See Aramco.*

[29] *See id.* at 247.

[30] *See id.*

[31] *See id.*

federal suit under Title VII, alleging that he was harassed and fired by respondents due to his race, religion, and national origin.[32] Defendants moved for summary judgment on the ground that the court lacked subject matter jurisdiction over the plaintiff's claim because Title VII did not govern U.S. citizens working abroad for American employers.[33] The district court granted summary judgment to defendants, dismissed the plaintiff's claim on this ground, and both the Circuit[34] and Supreme Court affirmed.[35]

Similar to its approach in *Foley Brothers*, the Supreme Court conducted a strict statutory interpretation of Title VII and held that the petitioner failed to make an affirmative showing that the statutory language of Title VII should be construed to apply extraterritorially.[36] The *Aramco* Court did not agree with the plaintiff's contention that Title VII's expansive language with regard to covered employers[37] meant that Congress intended for the statute to extend to employment discrimination "anywhere in the world."[38] The Court also rejected his claim that Title VII's "alien-exemption clause" implied that Congress expected the statute to have extraterritorial reach.[39] This provision states that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State."[40] To the contrary, Justices Marshall, Blackmun, and Stevens in their dissenting opinion agreed that Congress would not have included this provision if it had not expected the statute to apply *outside* any state, and since "only discrimination against aliens is exempted, employers remain accountable for discrimination against United States citizens abroad."[41]

The *Aramco* Court also looked beyond its own interpretation and found no support for the plaintiff's perspective in case

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[32] *See id.*

[33] *See id.*

[34] *See* Bourlesan v. Aramco, 857 F.2d 1014 (5th Cir. 1988).

[35] *See Aramco*, 499 U.S. at 247.

[36] *See id.* at 250.

[37] *See id.* at 251. The court here refers to 42 U.S.C. § 2000e(g), where Congress defines "commerce" in Title VII as activity " . . . among the several states; or between a State and any place outside thereof . . . "

[38] *Id.* at 251.

[39] *Id.* at 253.

[40] 42 U.S.C. § 2000e-1(a).

[41] *See Aramco*, 499 U.S. at 267.

law, and concluded that "even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad."[42] Additionally, the court refused to defer to the EEOC's insistence on extending Title VII protections to US citizens abroad.[43] Despite recognizing this agency's authority to interpret Title VII, the court found the EEOC's reasoning to be inconsistent with the statute's language, and frowned upon the twenty-four year gap between Title VII's enactment and the EEOC's first insistence on extraterritorial application.[44] Finally, the Court provided two reasons for upholding the "presumption against extraterritoriality." First, doing so " [s]erves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[45] Second, unless Congress expresses an affirmative intention otherwise, Congress is presumed to be concerned " [p]rimarily . . . with . . . domestic conditions."[46]

Today, both Title VII and the ADA extend extraterritorially to U.S. citizens employed abroad by American corporations, but it remains unclear whether foreign nationals in these same positions are afforded the same protections. In response to the decision in *Aramco,* Congress added section 109 to the Civil Rights Act in 1991, and thereby amended both Title VII and the ADA to apply extraterritorially to U.S. citizens abroad.[47] The EEOC, in its *Enforcement Guidance*,[48] explained that the purpose behind section 109 of the 1991 Civil Rights Act was to respond to the *Aramco* decision.[49] The applicable language, identical in

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[42] *Id.* at 251.

[43] *See id.* at 256.

[44] *See id.* at 257. "The Commission's early pronouncements on the issue supported the conclusion that the statute was limited to domestic application. While the Commission later intimated that the statute applied abroad, this position was not expressly reflected in its policy guidelines until some 24 years after the passage of the statute. The EEOC offers no basis in its experience for the change. The EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law."

[45] *Id.* at 248 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963).

[46] *Id.* (citing *Foley Bros.*, 336 U.S. at 290-91).

[47] 42 U.S.C. §§ 12111(4), 12112(c) (ADA) and 42 U.S.C. § 2000e-1(c) (Title VII).

[48] *See Enforcement Guidance*, *supra* note 20. *See also*, White, *supra* note 20.

[49] *Id.*

both statutes, provides: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[50]

The ADA thus protects three categories of U.S. citizens; those that are employed by: (1) a U.S. or U.S.-controlled corporation, anywhere in the world; (2) a foreign corporation controlled by a U.S. multinational corporation at a location abroad; and (3) a U.S.-based subsidiary company of a foreign multinational corporation at a location in the United States.[51] Moreover, Congress addressed the potential of international conflict by excusing compliance with the Act if such " [w]ould cause such covered entity to violate the law of the foreign country in which such workplace is located."[52]

Construed in light of EEOC guidance, the ADA seems to cover U.S. citizens working abroad for U.S. employers, but not non-U.S. citizens working abroad for those same employers. The EEOC's Interpretive Guidance[53] on Title I of the Americans with Disabilities Act (Interpretive Guidance) provides that use of the term "Americans" in the title of the ADA does not limit the Act to U.S. citizens.[54] Instead, in this document the EEOC explains that the ADA covers all qualified individuals, "regardless of their citizenship status or nationality."[55] Yet what also remains ambiguous is whether this indiscriminate policy applies to employment situations both within and outside the U.S. In 1993, the EEOC issued its Enforcement Guidance exploring the extraterritoriality issue.[56] Here, the ADA elaborated on whether the 1991 amendments preserved Title VII's alien-exemption provision:

> Section 109 preserves the exemption in section 702 of Title VII for 'employers with respect to the employment of aliens outside any State.' As a result, foreign nationals working abroad are not protected under Title VII whether they work for American or foreign employers. Title VII *does* generally cover aliens working inside the United States. Although the ADA does not contain an explicit

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[50] 42 U.S.C. § 12111(4) (ADA) and 42 U.S.C. § 2000e-f (Title VII).
[51] *See* Kubo, *supra* note 7, at 262-63.
[52] 42 U.S.C. § 12112(c)(1).
[53] 29 C.F.R. § 1630.1(a) Appendix
[54] *Id.*
[55] *Id.*
[56] *See Enforcement Guidance*, *supra* note 48 and accompanying text.

> exemption for aliens abroad, it is the Commission's position, based on the language of the new section 101(4) covering U.S. citizens overseas, that the standards governing coverage of aliens are the same under both the ADA and Title VII.[57]

Based on the above text, the EEOC seems to be indicating that foreign nationals who are not working "inside the United States" are not protected by the ADA, since Title VII does not offer this protection.[58] The EEOC subsequently issued another directive on this matter in 2000, addressing what it termed "threshold issues" in federal anti-discrimination laws.[59] Section 2-III ("Covered Parties") of this Compliance Manual states: "individuals who are employed in the United States are protected by the EEO statutes regardless of their citizenship or immigration status. The EEO statutes do not protect non-citizens outside the United States."[60] Therefore, the EEOC interpretations, taken together, seem to indicate that whether the ADA protects a foreign national will turn on whether or not he is employed in the U.S. at the time of the alleged disability discrimination.[61]

However, the disposition of an ADA discrimination claim may not necessarily turn upon the employee's location. Although Congress has authorized the EEOC to shed light on ADA uncertainties, a lawsuit's disposition is ultimately up to the courts and the statute itself, rather than an administrative agency such as the EEOC because courts are not bound to follow the agency's interpretations.[62] In fact, since the EEOC lacks the authority to declare a party liable under the Act, "

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[57] *Id.* at n.2 (emphasis in original).

[58] *Id.*

[59] *Threshold Issues*, 2 Equal Emp. Opportunity Comm'n Compliance Manual § 2-III (A)(4) (July 27, 2000). *See also* Kubo, *supra* note 7, at 265 n.35.

[60] *Threshold Issues*, *supra* note 59.

[61] *See Torrico*, 213 F. Supp. 2d at 400.

[62] *See* Wm. Scott Smith, *Extraterritorial Application of Title VII and the Americans with Disabilities Act: Have Statute, Will Travel*, 36 S. TEX. L. REV. 191, 223 (1995) [hereinafter Smith] ("Although the EEOC has provided its interpretation of Congress' intent of the extraterritorial application of United States employment discrimination laws, courts are not bound to strictly follow it."). *See also*, White, *supra* note 19, at 56: "I easily conclude the EEOC has been delegated law-interpreting power under both the ADEA and the ADA." For a precise explanation of the authority granted to the EEOC by Congress, see *EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964*, at 2029 (1968).

[t]he judiciary's role in the enforcement process, therefore, gives it undeniable policymaking power . . ."[63] This is the case despite the agency's power to administer claims, and its expansive knowledge of the field.[64] Further, the ADA itself confirms that the source country of allegedly discriminatory acts is not dispositive for extraterritorial application.[65] Instead, the determinative issue is whether the employee makes a claim based on employment in a foreign country.[66] Therefore, courts prior to *Torrico* have both advocated for and against the application of Title VII and other comparable federal anti-discrimination statutes[67] to foreign nationals based on location of alleged discrimination as well as country of employment.

Yet before a court can decide in favor of or against a foreign national plaintiff's request for federal legal protection, the court must decide three foundational issues: first whether the defendant corporation is a covered "employer" within the meaning of the ADA.[68] Second, whether extraterritoriality is an issue at hand, and third, where an extraterritorial situation does exist, the court must ascertain whether the facts justify a denial of ADA or Title VII protection.

A corporation is an "employer" subject to the ADA and Title VII of the Civil Rights Act if it employs "15 or more employees for each working day in each of 20 or more calendar weeks . . ."[69] This statutory requirement is an especially determinative factor for ADA liability in the case of multinational companies, which employ individuals both in America and abroad. Unfortunately, courts have not been consistent on whether

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[63] White, *supra* note 20, at 91.

[64] *See id.*

[65] *See* 42 U.S.C. § 12111(4): "With respect to employment in a *foreign country* [emphasis added]. . ."

[66] *See id.*

[67] *See* Kubo, *supra* note 7, at 275. After the 1991 amendments to the Civil Rights Act, the ADA, Title VII, and the ADEA (Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.,) became similar in their extraterritorial provisions. Consequently, it is logical to analyze the ADA in the context of comparable Title VII provisions.

[68] *Id.* at 289.

[69] 42 U.S.C. § 12111(5)(A) (ADA); 42 U.S.C. § 2000(e)(a) (Title VII).

these corporations may exclude their foreign national employees from this calculation.[70]

Regarding whether an extraterritoriality problem exists, the court in *Equal Employment Opportunity Commission v. Bermuda Star Line, Inc.* [71] held that the presumption against extraterritorial application of Title VII was not implicated where the employer made employment decisions within the U.S. concerning positions located abroad.[72] Therefore, the court considered the defendant corporation to be within the ambit of Title VII despite the international nature of this cruise line's business, and notwithstanding its having been registered pursuant to the laws of the Cayman Islands, rather than American law.[73] The court reasoned that Title VII application was proper because the corporation had principal offices in the U.S. and obtained most of its income from U.S. citizens, making the U.S. its "base of operations."[74] Moreover, in that case the injured plaintiff who was denied employment on the basis of gender was also a U.S. citizen,[75] thus bringing the case directly within the realm of federal anti-discrimination law even though she never actually worked within the U.S. The *Bermuda Star Line* court thus indicated that international business activity does not automatically result in an extraterritoriality problem, and a *substantial connection* (i.e., "defendant has stipulated that substantially all of its advertising, during the time relevant to this case, was directed to residents of the United States, and that substantially all of the travel agencies which referred clients to the defendant were located in the United States. . . [t]he defendant also purchased substantially all necessary goods and services from

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[70] *See* Kubo, *supra* note 7, at 276-277; Morelli v. Cedel, 141 F.3d 39, 45 (2d Cir. 1998) (court counted a corporation's overseas employees toward the Age Discrimination in Employment Act's 20-employee requirement); Greenbaum v. Handelsbanken, N.Y., 26 F. Supp. 2d 649 (S.D.N.Y. 1998) (foreign employees counted toward statutory calculation for Title VII liability). *Compare* Robins v. Max Mara, U.S.A., Inc., 923 F. Supp. 460, *amending* 914 F. Supp. 1006, 1009-1010 (S.D.N.Y. 1996) (where U.S. branch of a foreign multinational company employed fewer than 15 employees, neither the parent nor subsidiary were liable under the ADA; abrogated by the Second Circuit in *Morelli).*

[71] 744 F. Supp. 1109 (M.D. Fla. 1990).

[72] EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109 (M.D. Fla. 1990).

[73] *Id.* at 1110.

[74] *Id.* at 1113.

[75] *Id.* at 1112.

United States businesses") to the U.S. by defendant and plaintiff may justify application of Title VII despite these factors.[76]

Considering the importance attached to a corporation's *substantial connection* to the U.S., the scope of this definition is critical. In *Stevens v. Premier Cruises, Inc.*,[77] the court may have implied a broad definition by allowing a plaintiff to state a claim under the ADA against a foreign-flag cruise ship which utilized U.S. waters. By following *Environmental Defense Fund, Inc., v. Massey*,[78] the *Stevens* court reasoned, "a foreign-flag ship sailing in United States waters is not extraterritorial."[79] Although the issue of whether using U.S. waterways constitutes a strong enough connection to the U.S. to warrant ADA application may be arguable, the *Stevens* court found that Congress intended to give the ADA a broad reach.[80] Therefore, by applying the presumption against extraterritoriality only to " [c]onduct beyond U.S. borders,"[81] the *Stevens* outcome may have set the stage for the *Torrico* court to refuse to find an extraterritoriality problem under the facts in that case, in which the plaintiff insisted that relevant conduct occurred in the United States, rather than abroad.

The third inquiry courts must address is to ascertain whether the facts justify a denial of ADA or Title VII protection where an extraterritorial situation does exist. Courts preceding *Torrico* that have detected extraterritoriality difficulties have generally refused to extend Title VII and ADA protection to

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[76] *Id.* at 1110. *See also* Smith, *supra* note 62, at 221 ("Application of Title VII and the ADA to a United States worker employed overseas is appropriate when the discriminatory decision is made in the United States as opposed to the foreign country. In this situation, the discrimination takes place in the United States, not the foreign country, and issues of sovereignty are of lesser consequence.").

[77] 215 F.3d 1237 (11th Cir. 2000).

[78] 986 F.2d 528, 531 (D.C. Cir. 1993) (activity is not extraterritorial if it occurs within U.S. borders).

[79] Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1242 (11th Cir. 2000).

[80] *Id.* at 1242-43 ("In addition, Congress made no distinction between domestic cruise ships and foreign-flag cruise ships in the statute. . . [t]he idea that Congress intended to apply Title III to only domestic cruise ships, in the light of the breadth of the ADA, seems strange.").

[81] *Massey*, 986 F.2d at 531. For a discussion of the "significant effects" exception to the presumption against extraterritoriality, see Kanter, *supra* note 10, at 298 ("Therefore, even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct that Congress seeks to regulate occurs largely within the United States.").

non-citizen plaintiffs suing over non-U.S. employment. For example, in *Russell v. Midwest-Werner & Pfleiderer, Inc.*,[82] the court held that only American citizens counted for the purposes of Title VII application in cases of foreign employment.[83] In *Russell*, the plaintiff named Werner & Pfleiderer's (an American company) foreign parent (Gummitechnik) as respondent in her Title VII suit, but the court refused to count the foreign parent's employees toward the statutory damage cap for Title VII because those employees would not be afforded the protections of this statute.[84]

Similarly, the court in *Ghandour v. American University of Beirut*[85] declined to extend Title VII protection to a non-citizen cardiac surgeon licensed to practice medicine in the U.S.[86] The plaintiff, a Lebanese citizen, sued defendant, claiming that he was wrongfully terminated from his position in Beirut because of his religion after being employed by the university from 1985 – 1996.[87] The court dismissed his Title VII claim, citing lack of subject matter jurisdiction over the claim of a non-citizen's employment in a foreign country.[88] That court did not address the presence or absence of a substantial connection between plaintiff and the U.S., despite his U.S. medical license. Likewise, the court in *Mithani v. J.P. Morgan Chase & Company*[89] dismissed, for lack of subject matter jurisdiction, the plaintiff's complaint because he based his allegations on employment in the London office, and because he was an English, rather than American citizen.[90] The court reasoned that because foreign employment was involved, the plaintiff failed to state a claim under Title VII due to his lack of U.S. citizenship.[91] Moreover, the court subsequently dismissed the plaintiff's amended complaint, in which

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[82] 955 F. Supp. 114, 115 (D. Kan. 1997).

[83] Russell v. Midwest-Werner & Pfleiderer, Inc., 955 F. Supp. 114, 115 (D. Kan. 1997).

[84] *Id.*

[85] Ghandour v. American Univ. of Beirut, 1998 U.S. Dist. Lexis 19154 (S.D.N.Y. 1998).

[86] *Id.* at *1-2.

[87] *Id.* at *2.

[88] *Id.* at *4.

[89] Mithani v. J.P. Morgan Chase & Co., 2001 U.S. Dist. Lexis 19101 at *2 (S.D.N.Y. 2001).

[90] *Id.*

[91] *Id.* at *3.

he persisted that the Southern District of New York was proper venue by claiming that had his employment with respondent continued, he would have proceeded to work in respondent's New York office by that point.[92] Therefore, that court also did not address the existence or non-existence of the plaintiff's potential connection to the U.S., possibly because this claimed connection was merely speculative.

III. PRESENTATION OF CASE

In *Torrico*, Jorge Torrico, a citizen of Chile, was employed by respondent IBM, a New York corporation with its principal place of business in Armonk, New York, from 1994 until 2000 in the United States in its Latin American division.[93] Although the position was based in the U.S., it required travel between New York and Latin America.[94] To reduce his travel time, Torrico requested and was granted a three-year temporary rotational assignment in IBM Chile – at which time IBM contends he became an employee of IBM's subsidiary.[95] Torrico, in contrast, cited several ties to the U.S. in order to prove that he remained a U.S. employee of the New York-based Latin American division. These factors included the fact that he continued to receive compensation from the IBM US payroll, continued to be covered under U.S. benefit plans, and continued to pay both federal and New York taxes.[96] Further, in an agreement letter detailing the assignment, IBM represented to Torrico that his assignment was temporary and that he was expected to return to his "home country" at its completion.[97] To further support his argument, Torrico indicated that even while in Chile, he reported to IBM US and never actually had line reporting obligations to IBM Chile or any other foreign subsidiary of the US Corporation.[98] Additionally, IBM described Torrico as a U.S.

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92 *Id.* at *5. "Title VII's venue provisions do not create a Title VII claim for non-United States citizens working outside of the United States."

93 *See Torrico*, 213 F. Supp. 2d at 393.

94 *See id.*

95 *See id.*

96 *See id.* at 394.

97 *Id.* at 393.

98 *See id.* at 394.

employee in its correspondence to the Immigration & Naturalization Service in 1995, after the assignment commenced.[99]

During the third year of his overseas project, Torrico's assignment was extended for one year, but IBM thereafter ordered him to quickly obtain another position within the company because they planned to consolidate his division with another.[100] After beginning the interview process for this purpose, Torrico became ill with an autoimmune disease and was advised by physicians to abstain from work for a six-month period.[101] Thereafter, Torrico took a medical leave of absence after which he was willing to return to work on a part-time basis.[102] Notwithstanding, IBM notified Torrico that his division's upcoming reorganization meant he needed to expedite his job search process or risk termination;[103] specifically, Torrico was told to find a new position within six weeks.[104]

Torrico was unable to find a new position by the deadline, and a U.S. IBM manager thereafter discharged Torrico while he was still on medical leave.[105] Subsequently, Torrico filed an ADA claim, in which he alleged that the limited time provided to him by IBM to locate a new position was discriminatory given his illness and inability to return to full-time work.[106] IBM moved to dismiss this action for lack of subject matter jurisdiction, arguing that Torrico was not covered by the ADA because he was not a U.S. citizen, and because he was working in Chile, rather than the U.S., when his employment was terminated.[107]

Torrico presented two arguments in support of his claim that he fell within the domestic scope of the ADA. First, Torrico contended that his suit did not present an extraterritoriality problem because the alleged acts of discrimination, being terminated by a US IBM manager, occurred in the U.S.[108] Second, he posited that his Chilean assignment constituted employment in

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99 *See id.*

100 *See id.* at 394-95.

101 *See id.* at 395.

102 *See id.*

103 *See id.*

104 Torrico v. IBM, 319 F. Supp. 2d 390, 397 (S.D.N.Y. 2004).

105 *See Torrico*, 213 F. Supp. 2d at 395.

106 *See id.*

107 *See id.*

108 *See id.* at 399.

the U.S., rather than "employment in a foreign country" under the ADA, because his attachment to the U.S. did not dissipate.[109] IBM argued that the locus of Torrico's employment when he was terminated was Chile rather than the U.S., thereby excluding him from ADA protection.[110] IBM urged the court to equate Torrico's predicament with those of plaintiffs in several cases, discussed below, in which non-citizen employees were denied protection of federal anti-discrimination laws because their employment locations were foreign countries.

In *Iwata v. Stryker Corporation*,[111] the plaintiff was a Japanese citizen employed by Matsumoto, the Japanese subsidiary of Stryker, an American parent company.[112] The plaintiff had been hired for the job when he was living in the U.S., but returned to Japan to work.[113] After being discharged from his position, plaintiff returned to the U.S. as a resident alien and instituted a suit against both corporations under Title VII.[114] The court dismissed plaintiff's claim for lack of subject matter jurisdiction, in that Title VII did not apply to non-citizens working outside of the U.S. The court found that plaintiff's Japanese residence and locus of employment throughout his tenure made him ineligible for Title VII coverage, especially since he never became a U.S. citizen.[115]

IBM also referred to *Denty v. Smithkline Beecham Corporation*[116] to demonstrate the priority attached to the location of the workplace over the location of plaintiff's employment at the time of the alleged discrimination. In *Denty*, the plaintiff sued under the Age Discrimination in Employment Act (ADEA) after being denied several positions due to his age.[117] These promotion decisions for jobs outside of the U.S. were made in England, so the court held the ADEA's extraterritorial provision did not

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109 *Id.*

110 *See id.* at 400.

111 59 F. Supp. 2d 600 (N.D. Texas 1999).

112 *See* Iwata v. Stryker Corp. & Matsumoto Medical Instruments, Inc., 59 F. Supp. 2d 600, 602 (N.D. Texas 1999).

113 *See id.*

114 *See id.* at 603. Plaintiff also filed an ADEA (Age Discrimination in Employment Act) charge, which is beyond the scope of this casenote.

115 *See id.*

116 Denty v. Smithkline Beecham Corp., 907 F. Supp. 879 (E.D. Pa. 1995), *cert. denied*, Denty v. Smithkline Beecham Corp., 522 U.S. 820 (1997).

117 *Id.*

apply to his claims because that statute did not govern employment decisions made outside the U.S. for a foreign-run company.[118] The court rejected Denty's argument that his complaint was domestic in nature just because he was working in the U.S. for a U.S. employer at the time of the alleged discrimination.[119] Instead, the court declared that the relevant location determinative of extraterritoriality was the location of the proposed positions.

Further, IBM clarified its position on the location of employment issue by pointing to *Gantchar v. United Airlines, Inc.*,[120] in which the court stated: "The primary focus must be on the location of plaintiff's potential employment."[121] In that case, the court denied Title VII protection to foreign national plaintiffs who based their complaints on work outside the U.S.[122] That court concluded that work for the London-based positions applied for would primarily take place in international air space, making the location of employment outside the U.S., even though the positions required twenty percent of work within U.S. territory.[123] By analogizing Torrico's Chilean location to the *Iwata, Denty,* and *Gantchar* plaintiffs' circumstances, IBM maintained that Torrico was not protected by the ADA because he made allegations concerning employment outside of the U.S.[124]

Despite IBM's arguments, the court declined to dismiss Torrico's complaint.[125] First of all, the court refused to analogize Torrico's predicament to those of the plaintiffs in *Iwata* and *Denty*.[126] Unlike Torrico, who commenced employment with IBM in the U.S. and thereafter maintained a significant connection to the U.S. during his temporary Chilean assignment by reporting to a New York superior and receiving compensation from the U.S. payroll, the *Iwata* and *Denty* plaintiffs never con-

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118 *See id.* at 886.

119 *See id.*

120 Gantchar v. United Airlines, Inc., 1995 U.S. Dist. Lexis 3910 *21 (N.D. Ill. 1995).

121 *Id.*

122 *See id.*

123 *See id.* at 35-36.

124 *See Torrico*, 213 F. Supp. 2d at 401.

125 *See id.* at 400.

126 *Id.* at 401.

templated employment within the U.S.[127] Instead, they grounded their federal discrimination claims entirely upon employment within a U.S. employer's foreign subsidiary.[128] Plaintiff Iwata's employment responsibilities required him to reside in and complete work responsibilities entirely in Japan, with the exception of a few business trips to the U.S.[129] At no time did the plaintiff in *Iwata* conduct prolonged work activities or reside in the United States.[130] Similarly, plaintiff Denty sued for age discrimination based on positions denied to him which were based outside the U.S.[131] Unlike Torrico who was temporarily located abroad at the time of the discrimination, not only were the positions sought by Denty located in England, but these jobs were permanent in nature and would have required of him a completely different set of job responsibilities from those of his initial U.S. position.[132] Therefore, the *Torrico* court found that Denty's connection to the U.S. was significantly weaker than that exhibited by Torrico, for the purposes of determining a center of gravity of employment.[133]

Second, although the court did not agree with Torrico that merely being terminated by an American manager brought him within domestic reach of the ADA, the court favored his second argument that the Chile assignment constituted "employment in the United States."[134] Rather than mere location of allegedly discriminatory acts, the court explained, the scope of ADA coverage turns upon whether the employee asserts a claim based in totality on U.S. employment or foreign employment.[135] Thus, the "center of gravity" of the entire employment relationship decides the location of a plaintiff's employment.[136] The court

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127 *Id.*

128 *Id.*

129 *Iwata*, 59 F. Supp. 2d at 602.

130 *Id.* at 604.

131 *Denty*, 907 F. Supp. at 881.

132 *Torrico*, 213 F. Supp. 2d at 401.

133 See *id.* at 402 ("None of these cases involve temporary, fixed-term assignments from an existing, U.S.-based position like the Temporary Assignment at issue in this case.").

134 *Id.* at 400.

135 *See id.*

136 *Id.* at 403.

thereby concluded that a factual analysis was in order, and denied IBM's motion to dismiss Torrico's complaint.[137]

To precisely define its standard, the court presented several factors for consideration as part of the "totality of circumstances" surrounding a plaintiff's relationship with the defendant employer.[138] Subsequently, the court found the "center of gravity" of Torrico's employment with IBM to be within the U.S. for several reasons,[139] some of which included his status as a US IBM employee at the time of termination, the purpose of his Chilean assignment as a way to ease his New York travel duties, IBM's expectation that Torrico would return to New York after the assignment ended, his continued reporting relationship to a U.S. superior, IBM's representation to U.S. tax and immigration officials that Torrico remained a New York employee while in Chile, and the fact that his compensation and benefits were continued to be paid by the New York office.[140] The court held that a reasonable jury, under these facts, could find an extraterritorial application problem did not exist because the jury might believe that Torrico's Chilean assignment constituted employment in the United States for the purposes of ADA coverage.[141]

After the trial court dismissed IBM's motion to dismiss and discovery was completed, IBM moved for summary judgment based on three contentions,[142] the third being that Torrico was not an "employee" under the ADA and that the evidence previously held sufficient to bring Torrico within ADA protection thus remained inadequate.[143] Torrico thereafter cross-moved

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[137] *See id.* at 405-6.

[138] *Id.* at 403-04. These factors included, but were not limited to: if and where an employment relationship existed at the time of the discrimination, intent of the parties concerning employment location, as well as the plaintiff's actual work duties, reporting relationships, locations of work, duration of employee's assignments in various locations, parties' domiciles, and the place of the alleged discriminatory conduct.

[139] *See id.* at 404.

[140] *See id.*

[141] *See id.*

[142] The other two issues raised by IBM on its motion for summary judgment are beyond the scope of this paper.

[143] *Torrico*, 319 F. Supp. 2d 390, 398 (S.D.N.Y. 2004).

for partial summary judgment on liability, but the court denied both motions.[144]

IBM objected to the court's initial ruling for several reasons. First, IBM contended that the court should not have employed the "center of gravity" approach to determine the location of Torrico's employment. IBM argued that courts commonly adopt this approach in choice-of-law questions for breach of contract cases whereas the case at hand involved a discrimination claim.[145] In response, the court indicated that IBM misinterpreted the role of the "center of gravity test" since choice-of-law was not a factor in the present case because neither party claimed that anything but federal law applied.[146] Instead, this court explained that it had to employ a "center-of-gravity" test because in its motion to dismiss, IBM had not cited any factually similar cases involving short-term overseas assignments from a U.S.-based position.[147] Therefore, as a matter of first impression and to properly determine Torrico's place of employment, the court considered such factors as are normally considered *for purposes of* choice-of-law issues.[148]

IBM also attempted to further dispute the court's reliance on the "center of gravity" test by citing *Shekoyan v. Sibley International Corporation*,[149] the facts of which IBM attempted to liken to Torrico's situation. In *Shekoyan*, the court held the Republic of Georgia to be the plaintiff's locus of employment for Title VII purposes, where the defendant employer hired and trained a resident alien in the United States for employment in Georgia. Contrary to IBM's assertion, *Shekoyan* is distinguishable from the present case[150] since Torrico was initially hired for a job in the United States, where he did work for several months.

Next, IBM urged the court to reconsider its reliance on the "center of gravity" test in light of public policy and the importance of adopting predictable and uniform rules. However, the court did not find IBM's perspective that the "center of gravity"

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144 *Id.* at 390.
145 *Id.* at 404.
146 *Id.*
147 *Id.* at 405.
148 *Id.*
149 Shekoyan v. Sibley Int'l Corp., 217 F. Supp. 2d 59 (D.D.C. 2002).
150 *See Torrico*, 319 F. Supp. 2d at 405.

test subjected ". . .the determination concerning an employee's status to a non-exhaustive list of factors and the highly unpredictable 'totality of the circumstances' evaluation" to be persuasive or relevant.[151] The court instead opined that it did not have "license to redefine the meaning of 'employment in a foreign country' under the ADA based on its own appraisal of competing policy goals."[152] Consequently, the court held that it could not conclude as a matter of law that the "center of gravity" of Torrico's employment was in Chile rather than the United States, and thus denied IBM's motion for summary judgment.[153]

In his motion, Torrico argued that he established a prima facie case of disability discrimination under the ADA, entitling him to summary judgment on liability.[154] The court also denied this motion, holding that a jury could potentially find for either party on the present factual record.[155] Among the factual uncertainties, the reasons for Torrico's termination remained ambiguous. While Torrico alleged that IBM terminated his employment for discriminatory reasons, IBM offered affidavits from employees involved in the matter supporting the contention that it discharged Torrico simply because he failed to locate new employment within the designated time period.[156] Thus, faced with questionable facts, the court concluded that the evidence sufficed to create an issue of fact regarding IBM's real reason for terminating Torrico, precluding summary judgment

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[151] *See id.* at 405 n. 14.

[152] *Id.*

[153] *Id.* at 406-07. *See also* Fed. R. Civ. P. 56(c): "Summary judgment must be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." On a motion for summary judgment the evidence must be viewed in the light most favorable to the nonmoving party. Therefore, for the reasons stated in its denial of IBM's motion to dismiss, the court could not conclusively determine that the locus of Torrico's employment was not the United States. Construing the facts in the light most favorable to Torrico, this court reiterated that Torrico formed a relationship with a U.S. office of IBM, Torrico worked in the U.S. for several months, the U.S. office treated Torrico as an American employee regarding salary and benefits, withheld U.S. taxes from his income, Torrico reported to U.S. supervisors throughout his Chilean assignment, and perhaps most revealing, IBM represented in writing to the Department of Justice that Torrico was a U.S.-based employee.

[154] *Torrico*, 319 F. Supp. 2d at 407.

[155] *Id.*

[156] *Id.* at 409.

on the merits of Torrico's claims.[157] Ultimately, this lawsuit was resolved in IBM's favor after a bench trial.[158]

IV. ANALYSIS

By allowing Torrico to state a claim under the ADA, the court made two important implications; first regarding the doctrine of extraterritoriality, and second, concerning the right of non-citizens to assert ADA rights. Although the court came to a reasonable conclusion on the specific facts of Torrico's situation, whether or not the case provides meaningful guiding precedent for future plaintiffs in similar employment arrangements as Torrico remains uncertain.

First, the court in *Torrico* took over where the *Bermuda Star Line*[159] and *Stevens*[160] courts left off in further delineating the scope of extraterritoriality, by implying that extraterritoriality is not implicated by foreign employment where substantial connections to the U.S. exist. Initially, by conducting a "base of operations" test, the *Bermuda Star Line* court analyzed the extraterritoriality issue in a manner quite similar to the *Torrico* court's "center of gravity" approach.[161] Although the *Bermuda Star Line* plaintiff was a U.S. citizen, the court's methodology, in finding significant contacts between defendant and the U.S. and then applying Title VII,[162] seemingly supports the *Torrico* court's decision to do the same with regard to Torrico's ties to the U.S. Likewise, the *Stevens* court found the defendant cruise line to exhibit a significant enough connection to the U.S. to warrant an extension of the ADA. That court determined that a foreign-flag ship, by merely making use of U.S. waters, elimi-

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157 *Id.*

158 Torrico v. Int'l Business Machines Corp., 2004 U.S. Dist. Lexis 26142 (S.D.N.Y. 2004).

159 *See* EEOC v. Bermuda Star Line, 744 F. Supp. 1109 (M.D. Fla. 1990) ("In any case, the fact of defendant's incorporation in the Caymans, by itself, is not an adequate basis to stifle the application of United States law in deference to the law of the Caymans . . .. Accordingly the Court finds that Title VII does apply.").

160 *See* Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1242 (11th Cir. 2000) ("By definition, an extraterritorial application of a statute involves the regulation of conduct *beyond U.S. borders*. Accordingly, a foreign-flag ship sailing in United States waters is not extraterritorial.") (emphasis in original).

161 *See Bermuda Star Line*, 744 F. Supp. at 1113 ("It follows that defendant's base of operations is the United States.").

162 *See id.* at 1112.

nated an extraterritoriality problem.[163] Similarly, *Torrico* followed the above analysis by holding that the *locus* of plaintiff's employment, rather than the mere presence of international factors such as foreign employment location or non-citizen status, determines extraterritoriality.[164] Therefore, considering how broadly *Torrico's* predecessors defined activity within the U.S., *Torrico's* finding of domestic employment within an overseas assignment was not altogether surprising.[165]

Compared with *Ghandour*[166] and *Mithani*,[167] the *Torrico* court's decision to extend plaintiff ADA protection was also logical considering the significant factual differences between *Torrico* and these cases. Although these pre-*Torrico* courts held in favor of their *defendants*, one can argue that Torrico's connections to the U.S. were stronger than those of these counterpart plaintiffs, and thus justified the court's decision to deny IBM's motion to dismiss. For instance, in *Ghandour*[168] the court denied Title VII protection to a non-citizen suing over employment in Beirut.[169] Therefore, unlike Torrico who began his relationship with IBM in its New York office, the plaintiff in *Ghandour* was initially employed in Beirut,[170] rather than the U.S. – making Torrico's claim for federal protection seem more appropriate. However, the issue of whether the plaintiff in *Ghandour* had significant ties to the U.S. highlights the unreliable subjectivity of *Torrico's* "center of gravity" test. By earning a U.S.

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163 *See Stevens*, 215 F.3d at 1242.

164 *See Torrico*, 213 F. Supp. 2d at 403 ("It is the 'center of gravity' of the entire employment relationship between the plaintiff and the defendant employer, rather than one or more particular locations where employment duties may have been performed, that answers the factual question of whether an individual is 'employed in a foreign country' or in the United States within the meaning of the ADA.").

165 The potential impact of *Stevens* on ADA application was noticed by the legal media. For a brief discussion, see *Does Case Signal New Expansion of ADA Title III?* Disability Compliance Bulletin, July 28, 2000, vol. 18, No. 3. ("Gary Davidson, the Miami attorney who defended Premier Cruises, believes that the decision in Stevens v. Premier Cruises, Inc. . . . could signal the beginning of a campaign by the Department of Justice to expand publication of the ADA beyond our borders.").

166 *Ghandour*, 1998 U.S. Dist. Lexis 19154, at *2.

167 *Mithani*, 2001 U.S. Dist. Lexis 19101.

168 *Ghandour*, 1998 U.S. Dist. Lexis 19154.

169 *Id.* at *2.

170 *See id.*

medical license,[171] the plaintiff in *Ghandour* established a strong connection to the U.S., noteworthy enough to afford him federal legal protection. Although not discussed in that case, one can infer that Ghandour must have taken licensing exams for which he had to study American rules in order to obtain an American cardiac surgeon's license. Does achieving an American professional license, with its requisite pre-licensing exam preparation constitute a *locus* of study "within the United States?" While this may be an analytical stretch, it is not an outrageous proposition – one court may find a locus of employment in the U.S. where another finds Beirut. While a basis on which to argue that the *Torrico* court may have granted Ghandour his requested relief may be missing, the inability of the "center of gravity" approach to generate predictable legal outcomes is a legitimate contention.

Torrico's insistence on ADA coverage may seem reasonable when considered in comparison to the decision in *Mithani*.[172] Unlike the plaintiff in *Ghandour* who possessed a U.S. medical license, the plaintiff in *Mithani* did not have any extraneous links to the U.S. In fact, the *Mithani* court refused to extend Title VII to the plaintiff, a non-citizen, because he based his entire Title VII claim on employment in London.[173] Therefore, since Torrico maintained employment within the U.S. and consequently *connections* to the U.S., this case's strong contrast with *Mithani* might make Torrico's argument for subject matter jurisdiction a plausible one.

Beyond its method of analyzing extraterritoriality, the court in *Torrico* also created another important implication. The court inferred that non-citizens might be granted ADA protection in cases of foreign employment despite the ADA's explicit citizenship requirement,[174] and regardless of prevailing EEOC statutory interpretations pointing to the same.[175] Except for the EEOC's *Interpretive Guidance*,[176] which seemed to expand ADA coverage to non-citizens, the other EEOC publications state that U.S. citizenship is a criterion for ADA coverage

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171 *See id.* at *1.
172 2001 U.S. Dist. Lexis 19101.
173 *See id.* at *2.
174 42 U.S.C. § 12111(4) (ADA) and 42 U.S.C. § 2000e-f (Title VII).
175 *See Enforcement Guidance, supra* note 20.
176 29 C.F.R. § 1630.1(a) Appendix.

in cases of foreign employment.[177] Due to what thus appears to be an ambiguity within existing statutory interpretation, U.S. citizenship may be considered a debatable requirement.[178] Therefore, the *Torrico* court was left without clear precedent, giving it the analytical freedom to use its holding on the lack of an extraterritoriality problem to justify extending ADA protection to a foreign national.[179]

Notwithstanding what appears to have been reasonable conclusions on extraterritoriality and citizenship in the case at hand, the *Torrico* decision has failed to provide precedent to future courts faced with non-citizens seeking ADA protection. Instead of attempting to address the citizenship issue head on, the court instead shielded its decision from criticism by stating: " . . .the center of gravity of an employment relationship must be analyzed based on the totality of the circumstances."[180] However, the problem is that both the "totality of the circumstances," as well as the "center of gravity" approaches are highly fact-oriented,[181] and depend on individual fact patterns rather than predictable legal rules.[182] Thus, rather than address the citizenship issue directly, the court attempted to avoid a deeper analysis of the citizenship issue by stating:

> . . . (t)he standard applied here certainly will not, as suggested by IBM, expand the scope of the statute 'to cover millions of foreign nationals who file an overseas application for U.S. employment' and . . . there is no reason to believe that most overseas applicants

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177 *See Enforcement Guidance, supra* note 20; *Threshold Issues, supra* note 58.

178 *See* Smith, *supra* note 62, at 225 (" . . .(C)ongress included little legislative history upon which the EEOC could rely in formulating its policy on the extraterritorial application of Title VII and the ADA. In doing so, Congress left it up to the EEOC to define critical aspects of the Act such as the definition of an 'American' and 'American-controlled' employer . . .. ").

179 *See id.* at 223 ("Although the EEOC has provided its interpretation of Congress's intent of the extraterritorial application of United States employment discrimination laws, courts are not bound to strictly follow it.").

180 *Torrico*, 213 F. Supp. 2d at 404.

181 In fact, commentators have noted the predominance of fact-based approaches within extraterritorial analysis as a whole. See Eric A. Savage and Kenneth J. Rose, *Americans Working Outside The Country Often Benefit From The Extraterritorial Application of U.S. Anti-Discrimination Laws*, N.J. L. J., June 3, 2002, at 1 (" . . . EEOC Guidance No. 915.002 . . . requires a court to decide the issue of employer nationality on a *case-by-case basis*, taking into consideration various factors . . .") (emphasis added).

182 *See Torrico*, 319 F. Supp. 2d at 405 n. 14.

> for employment with U.S. employers – whether the position sought is located in the United States or in another country – will have sufficient preexisting contacts with the employer or the United States to warrant the conclusion that the center of gravity of that applicant's relationship with the employer is in the United States.[183]

On the contrary, there *may* be reason to believe that future foreign national plaintiffs will have strong connections to the U.S., but there may also be reason to believe that they will not. Either way, the potential of pre-existing contacts to the U.S. by a foreign national who subsequently accepts a U.S.-based position is not entirely out of the realm of possibility. For example, the "center of gravity test" may not adequately resolve the case of a future plaintiff, who, for instance, continues to report to a U.S. superior during his overseas stint, but temporarily receives compensation from the American corporation's foreign office rather than his initial U.S. location, for the duration of his foreign employment.

Alternatively, unlike in Torrico's case, the hypothetical overseas assignment may not be meant to necessarily ease U.S. work responsibilities, but instead may intend to supplement them, and the "center of gravity test" may fall short of providing meaningful guidance. Will these details suffice to exclude the individual from ADA protection? These factual variations on the *Torrico* scenario may generate considerable uncertainty for a court equipped only with the *Torrico* decision on which to ground its analysis. By advocating a case-by-case analysis of the scope of an employment relationship[184] and by entirely dismissing the possibility of strong preexisting contacts with the U.S. by a foreign national plaintiff,[185] the court may have fostered unpredictability with regard to the citizenship issue. Moreover, this case may lead to expensive and time-consuming litigation for companies like IBM, who will need to stand trial on discrimination claims such as those alleged by Jorge Torrico.

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183 *Torrico*, 213 F. Supp. 2d at 404 n.6.

184 One of IBM's key criticisms in its motion for Summary Judgment was that the court should have employed a broad, generalized rule more conducive to the difficult task companies face in determining whether foreign national employees are subject to U.S. laws.

185 *See Torrico*, 213 F. Supp. 2d at 404 n.6.

On the whole, in declining to consider the policy problems associated with employing what IBM dubbed an "unpredictable"[186] totality of the circumstances evaluation, the court in its second opinion avoided an important discussion regarding competing policy goals. These issues, written off as irrelevant to the case at hand, are indeed of importance; this case certainly highlights the conflict courts face between employing bright-line legal rules in the interest of predictability, and the goal of deciding discrimination cases on a fact-oriented, individual basis.

V. CONCLUSION

The presumption against extraterritoriality no longer dominates caselaw in the area of employment discrimination.[187] However, the *Torrico* court may not necessarily have had consistent instruction to follow when deliberating over its factual circumstances. Due to disparities within EEOC interpretations of the ADA and noteworthy factual differences between *Torrico* and its predecessors, the *Torrico* court did not abuse its discretion when denying IBM's motion to dismiss[188] or when it denied both cross-motions for summary judgment.[189] The court logically followed in the footsteps of previous decisions regarding the scope of extraterritoriality, and thus concluded that extraterritoriality was not implicated on the given facts.[190] However, the effect of this case on the state of the law as it stood prior to its ruling is ambiguous. By limiting its holding to Torrico's predicament and stating little on the issue of U.S. citizenship, the court in *Torrico* may have created a visible exception to the ADA's statutory citizenship requirement for future cases where the "center of gravity" points to the United States.

The effect of *Torrico* on the international workplace may turn out to be quite powerful – whether or not future courts faced with a "Torrico" plaintiff decide to grant ADA protec-

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186 *See Torrico*, 319 F. Supp. 2d at 405 n. 14.

187 *See* Kanter, *supra* note 10, at 318 (" . . . before and after the Supreme Court's decision in *Aramco*, courts have applied federal statutes to conduct overseas, even in the absence of explicit congressional authorization.").

188 *Torrico*, 213 F. Supp. 2d at 411.

189 *Torrico*, 319 F. Supp. 2d at 407.

190 *Torrico*, 213 F. Supp. 2d at 405 n. 9: "Having concluded that the facts alleged in the complaint can support the conclusion that the center of gravity of Torrico's employment remained in New York. . . "

tion.[191] If a court employs the "center of gravity" test and finds the U.S. *not* to be the locus of employment, a denial of coverage might create a rift between employees of a foreign office whose only difference is their U.S. citizenship status. To illustrate, two employees, working for a major U.S. corporation in an overseas office allege identical disability discrimination, but only one, the U.S. citizen, receives ADA protection. First, this disparate outcome will likely send a disturbing message to the foreign national. Not only may such a disparity in employee treatment lead to on-the-job conflict,[192] but also the foreign national may become disenchanted with the company and his/her incentive to perform may diminish.

Second, this result may lead to confusion on the part of the corporation attempting to prevent *Torrico*-type situations. Corporations may feel the need to investigate the presence of preexisting ties to the U.S. before making offers of employment to these applicants, in order to avoid hiring non-citizens deserving of ADA protection. In addition to being time-consuming and costly, such a practice will likely implicate discrimination issues. Furthermore, a corporation might need to consider the composition and nature of the foreign work environment to prevent disabling incidents or potential for employee rifts.

On the other hand, while the social and business reasons for granting identical anti-discrimination protection to workplace colleagues are numerous, a U.S. corporation should not necessarily be penalized merely because its foreign national workers happen to have preexisting connections to the U.S. In fact, a corporation has the right to specifically seek the best of both worlds - to hire a foreign national who is comfortable with the prospect of working abroad, and who will quickly acclimate to the company's American corporate culture *precisely* because

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[191] *See* Kubo, *supra* note 7, at 289 ("Multinational corporations seeking to successfully compete in this new workplace would do well to take notice of the potential impact of U.S. anti-discrimination laws may have on their workforce.").

[192] For a comprehensive discussion on possible ramifications of the extraterritorial application of the ADA, see Smith, *supra* note 62, at 219 ("Even if a foreign subsidiary of a United States company can implement plans to distinguish its treatment of United States and non-United States citizens, it will have the effect of creating considerable disharmony in the workplace. Nationals of the host country, who are treated according to their local laws, may feel discriminated against due to the preferential treatment the subsidiary confers to United States citizens.").

of his/her preexisting ties to the U.S. Therefore, it is astounding to consider the degree of effort (and resulting expense) associated with such preemptive "research" which may be imposed on corporations by the extraterritorial application of the ADA to non-citizens. These concerns, while somewhat speculative, are not entirely unrealistic, and may face a corporation and a court grappling with facts similar to *Torrico* in the future.