REPRESENTING AMERICANS EMPLOYED ABROAD: THE EXTRATERRITORIAL APPLICATION OF FEDERAL AND STATE ANTI-DISCRIMINATION LAWS*

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I. INTRODUCTION

More than two million American citizens work in civilian jobs outside of the United States.[1] Those expatriate workers are employed in a variety of industries, including banking, technology, education, and construction.[2] Many of them work in foreign offices of American-based corporations; others are employed by foreign corporations. While federal and New York State laws prohibiting employment discrimination generally apply to workers employed

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* Presented at International Law Weekend 2004, sponsored by the American Branch of the International Law Association and held at the House of the Association of the Bar of the City of New York on October 15, 2004. Originally printed in 29 NYSBA L&E Newsletter No. 2 (Summer 2004), a publication of the Labor and Employment Law Section of the New York State Bar Association.

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1. LAY & LEERBURGER, JOBS WORLDWIDE 1 (Impact Publications 1995), http://www.uc.edu/news/ebriefs/new.htm. More precise data on America's foreign-based civilian workforce are unavailable, as, surprisingly, the United States Census Bureau, Labor Department and State Department do not maintain such data.

2. *See generally id.* at 37, 44, 55 & 72.

in the United States or New York State, respectively, those laws may or may not protect American citizens employed abroad. Whether those laws apply outside of the United States can turn on a number of factors, including: the type of discrimination alleged; the structure of the corporate employer; the residence of the affected employee; the nature of the foreign assignment; and/or the locus of the discriminatory acts.

In this article, we will examine the principal federal and New York State laws prohibiting employment discrimination[3] and their application to American citizens working outside of the United States. This examination is more than academic. Americans who suffer discrimination while employed abroad may find remedies under American laws that are unavailable under the laws of their host country.[4] Moreover, such victims of discrimination may be able to assert concurrent claims under American and foreign statutes, and thereby gain strategic and substantive advantages. Assertion of such concurrent claims, in our experience, can broaden an expatriate claimant's discovery rights, potential damages, and leverage in settlement negotiations. As a general matter, federal courts faced with such concurrent claims will exercise their jurisdiction concurrently with the foreign courts handling the related litigation.[5]

Because the extraterritorial application of anti-discrimination laws depends in large measure on statutory language and legislative history, we will address

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3. Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (2000) (prohibiting age discrimination); Civil Rights Act of 1964 ("Title VII") 42 U.S.C. § 2000e (2000) (prohibiting race, color, religion, sex, national origin, and sex discrimination); Americans with Disabilities Act of 1991("ADA") 42 U.S.C. § 12101 (2000) (prohibiting disability discrimination); 42 U.S.C. § 1981 ("Section 1981") (prohibiting race and color discrimination); New York State Human Rights Law, N.Y. Exec. L. (NYSHRL) § 296(1) (2000) (prohibiting race, color, religion, sex, national origin, sexual orientation, disability, and age discrimination).

4. The United Kingdom, for example, has no law prohibiting age discrimination. In October 2000, however, the U.K. government supported the European Union Directive on Equal Treatment, and committed to implementing such legislation by 2006. *Age Legislation S Diversity*, British Council United Kingdom, *at* http://www.britishcouncil.org/diversity/age_legislation.htm; *see* Council Directive 2000/78/EC, art. 18, 2000 O.J. (L303) 21. The E.U. Directive required all member states to introduce legislation prohibiting direct and indirect age discrimination in employment and training. 2000 O.J. (L303) 21. It remains to be seen how the U.K.'s legislation will compare to federal and New York State age discrimination laws.

5. *See* Sapient Corp. v. Singh, 149 F. Supp. 2d 55 (S.D.N.Y. 2001). In *Sapient*, the American defendant (Singh) had worked in the English operations (Sapient Ltd.) of the American plaintiff (Sapient Corp.). *Id.* at 56-7. Singh commenced an action in the United Kingdom against Sapient Ltd. for wrongful termination and wrongful cancellation of his stock options. *Id.* at 57. Sapient Corp. then commenced an action in the United States against Singh for injunctive relief for breach of a non-disclosure, non-compete agreement. *Id.* at 59. The court refused to stay the U.S. action pending resolution of the U.K. action, because the U.S. action presented broader issues than those presented in the U.K. *Id.* at 57. Specifically, while Singh's pre-termination conduct was at issue in both actions, his post-termination conduct was at issue only in the U.S. The court also noted that injunctive relief was not available in the U.K. and that American witnesses could only be compelled to appear in the U.S. action. *Sapient*, 149 F. Supp 2d at 59.

each law separately (except for Title VII and the ADA, which will be addressed together because they are applied in the same manner outside of the United States).

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA"), 29 U.S.C. § 621. ET SEQ.

The ADEA was the first of the federal employment discrimination statutes to apply beyond United States borders. Enacted in 1967, the ADEA prohibits employment discrimination on the basis of age, providing at 29 U.S.C. § 623(a): "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

The ADEA allows recovery of consequential damages (amounts owing as a result of the ADEA violation),[6] liquidated damages for willful violations of the ADEA by a private sector employer,[7] and attorneys' fees and costs.[8]

The ADEA defines "employer" as a "person in an industry affecting commerce" and having a certain minimum number of "employees," now set at 20.[9] The ADEA originally defined "employee" as "an individual employed by any employer," with certain exceptions.[10] As originally enacted, the ADEA did not explicitly permit or preclude extraterritorial application.[11]

Prior to 1984, several federal courts of appeal held that the ADEA, as originally enacted, did not apply to Americans employed abroad by American employers.[12] Those courts based their rulings on Section 7 of the ADEA, 29

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6. 29 U.S.C. § 626(b) (2000).

7. *Id.*; *see* Grandison v. U.S. Postal Serv., 696 F. Supp. 891 (S.D.N.Y. 1988).

8. 29 U.S.C. § 626(b) (2000) (incorporating remedies available under The Fair Labor Standards Act, 29 U.S.C. § 216 (2000), which allows for recovery of reasonable attorneys' fees); *see* Detje v. James River Paper Corp., 167 F. Supp. 2d 248 (D. Conn. 2001).

9. 29 U.S.C. § 630(b) (2000). Under the original language of the ADEA, an entity was deemed an employer if it employed at least 25 employees; *See* Morelli v. Cedel, 141 F.3d 39, 44 (2d Cir. 1998). In 1974, that threshold was lowered to 20 employees. *Id.* For a brief period of time prior to 1974, the threshold was set at 50 employees. *Id.*

10. *Morelli*, 141 F.3d at 44.

11. Denty v. Smithkline Beecham Corp., 109 F.3d 147 (3d Cir. 1997).

12. Cleary v. United States Lines, Inc., 728 F.2d 607, 610 (3d Cir. 1984) *superseded by statute as stated in* Morelli v. Cedel, 141 F.3d 39 (2d Cir. N.Y. 1998); Zahourek v. Arthur Young & Co., 750 F.2d 827, 828-29 (10th Cir. 1984) *superseded by statute as stated in Morelli*, 141 F.3d at 39; Thomas v. Brown and Root, Inc., 745 F.2d 279 (4th Cir. 1984) *superseded by statute as stated in Morelli*, 141 F.3d at 39; *see also* Pfeiffer v. W.M. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985), *aff'g*, 573 F.Supp. 458 (N.D. Ill. 1983); Osborne v. United Technologies Corp., 1977 WL 15422, 16 Fair Employment Practice 586 (D.Conn. 1977); *see also* Lopez v. Pan Am World Servs., Inc., 813 F.2d 1118 (11th Cir. 1987) (holding that the ADEA did not have extraterritorial effect prior to its amendment); S.F. De Yoreo v. Bell Helicopter Textron, Inc., 785 F.2d

U.S.C. § 626, which incorporates certain remedial provisions of the Fair Labor Standards Act ("FLSA"), including Section 216(d), 29 U.S.C. § 216(d), which exempts from FLSA coverage work performed in a foreign country.[13] The courts rejecting extraterritorial application of the ADEA reasoned that the ADEA's reference to 29 U.S.C. § 216(d) evidenced congressional intent to exempt foreign workplaces from ADEA coverage.[14]

In response to those decisions, Congress, in 1984, amended the ADEA "to assure that the provisions of the ADEA would be applicable to any citizen of the United States who is employed by an American employer in a workplace outside the United States."[15] The 1984 amendments accomplished this objective by expanding the definition of "employee" in Section 11(f) of the ADEA, 29 U.S.C. § 630(f), to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."[16]

The 1984 amendments, however, restricted the extraterritorial reach of the ADEA to employees working in a foreign country for an employer controlled by an American corporation.[17] Specifically, the 1984 amendments added a new subsection (h) to Section 4 of the ADEA, 29 U.S.C. § 623(h),[18] which provides:

> 1) If an 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 employer.
> 2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.
> 3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the:
> a) Interrelation of operations;
> b) Common management;
> c) Centralized control of labor relations; and
> d) Common ownership or financial control of the employer and the corporation.

1282 (5th Cir. 1986); Ralis v. FRE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985); Wolf v. J.I. Case Co., 617 F.Supp. 858 (E.D. Wis. 1985).

13. See 29 U.S.C. § 216(d) (incorporating the foreign country exemption of 29 U.S.C. § 213(f)).

14. *Cleary*, 728 F.2d at 610; *Zahourek*, 750 F.2d at 828-29.

15. *Denty*, 109 F.3d at 149; *Morelli*, 141 F.3d at 42-3.

16. Amendments to the Age Discrimination in Employment Act of 1967, Pub. L. No. 98-459, § 802(a) (1984)(codified as amended at 29 U.S.C. § 630); *see Denty*, 109 F.3d at 150.

17. Older Americans Act Amendments of 1984, P.L. No. 98-467, § 802(a) (1984) *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000; *Morelli*, 141 F.3d at 43.

18. Older Americans Act Amendments of 1984, P.L. No. 98-467, *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000.

Thus, the ADEA covers employment in a foreign country when the employee is an American citizen working or applying for work with an employer that is, or is controlled by, an American corporation.[19] The ADEA will not protect an American (or foreign) citizen working abroad for a foreign employer, including a foreign parent of an American subsidiary.[20] Nor will the ADEA protect a non-American citizen working abroad for an American corporation.[21]

The extraterritorial application of the ADEA will not be affected by the locus of the claimed discriminatory conduct. In *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, for example, a Chinese citizen legally residing in the United States applied and interviewed in New York City for a position as an attorney with the defendant in Beijing and Hong Kong.[22] The plaintiff brought an ADEA claim for the defendant's refusal to hire the plaintiff for those positions. The Southern District of New York held that the plaintiff, as a non-citizen, could not bring an ADEA claim for employment to be performed outside of the United States, even if the defendant made its allegedly discriminatory hiring decision in New York.[23]

In sum, an American citizen who is subject to age discrimination in his or her employment abroad for an American company or an American-controlled company can, assuming he or she meets the other jurisdictional requirements of the statute, bring an action in the United States under the ADEA to redress that discrimination.

III. THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E, ET SEQ. ("TITLE VII") AND THE AMERICANS WITH DISABILITIES ACT OF 1991, 42 U.S.C. § 12111 ("ADA")

Title VII and the ADA also apply, in certain circumstances, to American citizens working abroad. Title VII, 42 U.S.C. § 2000e-2(a)(1), makes it an:

> unlawful employment practice for an employer: 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

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19. *Denty*, 109 F.3d at 151.

20. *Id.* (holding that the ADEA did not cover American citizen who worked abroad for foreign parent of American subsidiary.) The ADEA also protects citizens and non-citizens working for the U.S. operations of foreign corporations. *Morelli*, 141 F.3d 39; Hansen v. Danish Tourist Board, 147 F. Supp. 2d 142 (E.D.N.Y. 2001).

21. Denty, 109 F.3d at 147, 150-51 (affirming the district court's ruling that the "relevant work site is the location of [the position for which the plaintiff applied], not the location of [the plaintiff's] employment at the time of the alleged discrimination.").

22. Hu v. Skadden, Arps, Slate, Meagher & Flom, LLP, 76 F. Supp. 2d 476 (S.D.N.Y. 1999).

23. *Hu*, 76 F. Supp. 2d at 477.

> conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[24]

The ADA prohibits discrimination:

> against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[25]

Title VII and the ADA authorize the recovery of compensatory damages, including front pay and emotional pain and suffering, punitive damages, consequential damages, and attorneys' fees and costs.[26] The amount of compensatory and punitive damages, however, are capped according to the size of the employer. For an employer with more than 500 employees, the sum of compensatory and punitive damages cannot exceed $300,000 per plaintiff.[27]

Like the ADEA, Title VII and the ADA, as originally enacted, did not expressly authorize or preclude extraterritorial application of those statutes. Both Title VII and the ADA prohibit discrimination by an "employer," which is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees."[28] The original language of Title VII and the ADA defined an "employee" as "an individual employed by an employer," with certain exceptions.[29]

In 1991, in *Equal Employment Opportunity Commission v. Arabian Am. Oil Co.,* the Supreme Court held that Title VII did not protect United States citizens working abroad.[30] The Court held that federal laws may be applied extraterritorially only if they expressly authorize such application, and that the language of Title VII contained no such authorization.[31] Shortly after the *Arabian Am. Oil Co.* decision, Congress enacted the Civil Rights Act of 1991,

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24. 42 U.S.C. § 2000e-2(1) (2000).

25. 42 U.S.C. § 12112 (2000).

26. 42 U.S.C. §§ 1981a(a)(1), 1988, 2000e-5(g),(k) (2000); 42 U.S.C. §§ 12117(a) (incorporating remedies available under Title VII, 42 U.S.C. § 2000e-5, 1981a(a)(2), 1988 (2000)).

27. 42 U.S.C. § 1981a(b)(3) (2000); Oliver v. Cole Gift Ctrs, Inc., 85 F. Supp. 2d 109 (D. Conn. 2000).

28. 42 U.S.C. § 2000e(b) (2000); 42 U.S.C. § 12111(5) (2000).

29. Shekoyan v. Sibley Int'l Corp., 217 F. Supp. 2d 59 (D.D.C. 2002); Civil Rights Act of 1991, Pub. L. No. 102-166, § 109 (1991) (codified as amended at 42 U.S.C. § 2000e(f) and 42 U.S.C. § 12111(4)).

30. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248, 256-57 (1991).

31. *Id.* at 256-57.

in part to "strengthen and improve Federal civil rights laws."[32] Section 109 of the Civil Rights Act of 1991, entitled "Protection of Extraterritorial Employment," expressly extended the reach of Title VII and the ADA to American citizens working in foreign countries.[33]

The Civil Rights Act of 1991 expanded the definition of "employee" in Title VII, 42 U.S.C. § 2000e(f), and in the ADA, 42 U.S.C. § 12111(4)), by adding, "[W]ith respect to employment in a foreign country, such term [employee] includes an individual who is a citizen of the United States."[34] The Civil Rights Act of 1991 also authorized extraterritorial application of Title VII and the ADA by adding the following language to those statutes: "If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [this statute] engaged in by such corporation shall be presumed to be engaged in by such employer."[35] Whether an employer "controls a corporation," within the meaning of the foregoing provision, depends upon the "interrelation of operations," "common management," "centralized control of labor relations," and the "common ownership or financial control" of the employer and the corporation.[36] The Civil Rights Act of 1991 also added language to 42 U.S.C. § 2000e-1 and 42 U.S.C. § 12112, respectively, stating that Title VII and the ADA "shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer."[37]

Title VII and the ADA, therefore, apply extraterritorially when "the employee is a United States citizen and the employee's company is controlled by an American employer."[38] Title VII and the ADA do not apply to an American (or foreign) citizen working abroad for a foreign employer, including

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32. Civil Rights Act of 1991, P. L. No. 102-166, § 109 (1991) (codified as amended at 42 U.S.C. § 2000e. 12111).

33. Civil Rights Act of 1991, P. L. No. 102-166, § 109 (1991) (codified as amended at 42 U.S.C. § 2000e(f) and 42 U.S.C. § 12111(4)). Other than the title of Section 109 of the Civil Rights Act of 1991, "Protection of Exterritorial Employment," the legislative history of the Civil Rights Act of 1991 does not explain Congress' intent in enacting the amendments. *See Shekoyan,* 217 F. Supp. 2d at 64-5.

34. *Shekoyan,* 217 F. Supp. 2d 59 at 65; Torrico v. International Bus. Machines Corp., 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002).

35. Civil Rights Act of 1964, P. L. No. 102-166, § 109(c) (1991) (codified as amended at 42 U.S.C. § 2000e-1 (2000) and 42 U.S.C. § 12112 (2000).

36. 42 U.S.C. § 2000e-1(c)(3) (2000); 42 U.S.C. § 12112(c)(2)(C) (2000).

37. Civil Rights Act of 1964, P. L. No. 102-166, § 109(c) (1991) (codified as amended at 42 U.S.C. § 2000e-1(c)(2) (2000) and 42 U.S.C. § 12112(c)(2)(B) (2000)); *see* 42 U.S.C. § 2000e-1(a) (2000) (exempting aliens working outside of the United States for a foreign or American employer from coverage under Title VII).

38. *Shekoyan,* 217 F. Supp. 2d at 65; Iwata v. Stryker Corp., 59 F. Supp. 2d 600 (N.D. Tex. 1999) (Title VII applies abroad only to American citizens working for American companies or their foreign subsidiaries).

a foreign parent of an American subsidiary.[39] Further, although non-citizens working in the United States are covered by Title VII and the ADA,[40] non-citizens working abroad for an American company are not protected by those statutes.[41]

In *Torrico v. International Bus. Machines Corp.*,[42] the Southern District of New York considered whether a temporary assignment abroad constituted foreign employment for the purpose of applying the ADA extraterritorially. The plaintiff, a non-United States citizen who was employed in the United States by an American corporation, had been temporarily assigned to work in Chile. The issue presented was whether the foreign assignment rendered the plaintiff a non-citizen employed abroad, who would not be covered by the statute, or a non-citizen employed in the United States, who would be covered by the statute. Applying traditional contract law principles, the court examined the totality of the circumstances to determine the "center of gravity" of the employment relationship.[43]

Although *Torrico* involved a non-United States citizen, the "center of gravity" test employed in that case could be used to ascertain the place of employment of a United States citizen employed in the United States by a foreign corporation, but temporarily assigned to work abroad. If the "center of gravity" of such an employment relationship was found to be the United States, then the United States citizen could assert claims under Title VII and the ADA. If the "center of gravity" was found to be the foreign workplace, then Title VII and the ADA would not apply to the foreign corporation's discriminatory acts.

In sum, an American citizen who is subject to discrimination on the basis of sex or disability while employed abroad by an American company or a company controlled by an American employer can, assuming he or she meets the other jurisdictional requirements of those statutes, bring an action in the United States under Title VII or the ADA, respectively, to redress that discrimination.

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39. *Shekoyan*, 217 F. Supp. 2d at 68.

40. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (citing 29 C.F.R. § 1606.1(c) (1972) ("Title VII . . . protects all individuals, both citizens or non-citizens, domiciled or residing in the United States" from unlawful discrimination in the United States.)).

41. 42 U.S.C. § 2000e-1 (2000); *Torrico*, 213 F. Supp. 2d at 400-402; *Torrico*, 319 F.Supp. 2d 390, 2004 WL 439493 (S.D.N.Y. Mar. 9, 2004); Mithani v. Lehman Bros. Inc., 2002 WL 14359, 87; Fair Employment Practice Cases, 1297 (S.D.N.Y. 2002).

42. *Torrico*, 213 F. Supp. 2d at 399.

43. *Id.* at 409.

IV. 42 U.S.C. § 1981 (SECTION 1981)

Section 1981 is a general civil rights statute which prohibits race discrimination in, among other contexts, employment.[44] Section 1981, which was enacted by the Civil Rights Act of 1866 and amended by the Voting Rights Act of 1870, grants "[a]ll persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts...." Section 1981 allows a prevailing plaintiff to recover consequential damages, uncapped compensatory and punitive damages, and attorneys' fees.[45]

The Supreme Court, in *Patterson v. McLean Credit Union*,[46] held that Section 1981 did not prohibit racial harassment or other forms of racial discrimination in the employment context. Congress enacted the Civil Rights Act of 1991, in part, to overrule *Patterson* and amend Section 1981 to expressly prohibit all forms of racial discrimination in employment. Specifically, the Civil Rights Act of 1991 expressly defined the phrase "make and enforce contracts" in Section 1981, to include the "making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[47] The Civil Rights Act of 1991 strengthened Section 1981 by amending it to cover, in the employment context, "the claims of harassment, discharge, demotion, [lack of] promotion, transfer, retaliation, and hiring" based on race.[48] The Civil Rights Act of 1991, however, did not address extraterritorial application of Section 1981, as it did for Title VII and the ADA.

The federal courts have refused to apply Section 1981 to persons working outside of the United States.[49] Courts have held that the plain language of Section 1981, granting rights to all "persons within the jurisdiction of the United States" and "in every State and Territory," expressly confines the reach of Section 1981 to the United States.[50]

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44. H.R. Rep. No. 102-40(II), *reprinted in* 1991 U.S.C.C.A.N. 549, *69.

45. 42 U.S.C. §§ 1981a(b)(4) (1988); Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684 (2d Cir. 1998).

46. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

47. Civil Rights Act of 1991, P.L. 102-166 § 101 (1991) (codified as amended at 42 U.S.C. § 1981(1991)).

48. H.R. Rep. No. 102-40(II), *reprinted in* 1991 U.S.C.C.A.N. 549, 731. The word "contract" in Section 1981 has been held to cover an employment relationship, whether pursuant to a written contract or at-will. Lauture v. Int'l Bus. Machines Corp., 216 F.3d 258 (2d Cir. 2000).

49. De Lazzari Barbosa v. Merck & Co., Inc., 2002 WL 32348281 (E.D. Pa. 2002); Mithani v. J.P. Morgan Chase & Co., 2001 WL 1488213, 87 Fair Employment Practice Cases 712 (S.D.N.Y. 2001); Gantchar v. United Airlines, Inc., 1995 WL 798600 (N.D.Ill. April 21, 1995); Theus v. Pioneer Hi-Bred Int'l, Inc., 738 F. Supp. 1252, 1254 (S.D. Iowa 1990).

50. *Theus*, 738 F. Supp. at 1254.

Courts have also examined the legislative history behind Section 1981 and found that it evidenced no congressional intent to apply Section 1981 outside of the United States. In *Theus v. Pioneer Hi-Bred Int'l, Inc.*, the Southern District of Iowa examined Section 1981's enabling statute, the Civil Rights Act of 1866, which granted "citizens," defined as persons born in the United States, certain rights within the United States.[51] The court observed that, although the Voting Rights Act of 1870 amended Section 1981 to change "citizens" to "persons" and thereby extended the protections of the statute to aliens, the 1870 amendment did not change the statute's reference to "every State and Territory."[52] Therefore, the court concluded, the legislative history of Section 1981 does not show a congressional intent to expand the statute's scope beyond United States boundaries.[53]

In sum, Section 1981 cannot be applied to American citizens employed outside of the United States, and an employment discrimination claim under that statute must arise out of occurrences within the United States.[54]

V. NEW YORK STATE HUMAN RIGHTS LAW, N.Y. EXEC. L. § 296 ("NYSHRL")

The NYSHRL is the central anti-discrimination statute under New York State law. That statute provides, at N.Y. Exec. L. § 296(1)(a), that it shall be "an unlawful discriminatory practice":

> [f]or an employer or licensing agency because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The NYSHRL authorizes the recovery of uncapped compensatory and consequential damages, but no punitive damages or attorneys' fees.[55] Thus, the NYSHRL, which may be enforced through a plenary action in state court, a

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51. *Id.*

52. *Id.*

53. *Id.* The court also analogized Section 1981 to its "legislative cousin," the Fourteenth Amendment to the U.S. Constitution, which contains language similar to Section 1981 (No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1) and relied on the fact that the Fourteenth Amendment does not apply extraterritorially. *Theus*, 738 F.Supp. at 1254.

54. *Gantchar*, 1995 WL 798600; *Theus*, 738 F. Supp. at 1254.

55. N.Y. Exec. L. § 297(9) (2000); Abdallah v. City of New York, 2001 WL 262709 (S.D.N.Y. March 16, 2001).

pendent state claim in federal court or a state administrative proceeding, offers claims and damages unavailable under federal anti-discrimination laws, i.e., unlimited compensatory damages and protection from discrimination on the basis of sexual orientation and genetic predisposition.

The NYSHRL can be applied extraterritorially, i.e. outside of New York State, in circumstances quite different from those that permit extraterritorial application of the ADEA, Title VII and the ADA. Section 298-a of the NYSHRL states that the law applies to acts of discrimination: committed in New York State; or committed extraterritorially by a state resident or a non-state resident against a New York State resident.[56] Discrimination committed extraterritorially by a non-resident gives a state resident the right to an administrative proceeding before the New York State Division of Human Rights,[57] while discrimination committed extraterritorially by a state resident against a state resident gives the state resident the right to a private civil action.[58]

To show that discrimination was "committed" in New York State for the purposes of Section 298-a of the NYSHRL, a plaintiff employed outside of New York must show that the decision to act in a discriminatory manner originated in New York.[59] This is a difficult standard to meet. In *Iwankow v. Mobil Corp.*, the plaintiff claimed that he was discriminated against on the basis of age after he was employed by the defendant in England for three and one-half years and then terminated as part of a world-wide reduction in force.[60] The Appellate Division, First Department held that the plaintiff could not state a claim under the NYSHRL even though the termination occurred as "part of a world wide reduction in force . . . decided upon at corporate headquarters in New York" without an allegation that "the decision to implement the reduction in force in an age-discriminatory manner originated at corporate headquarters."[61]

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56. *Torrico*, 213 F. Supp. 2d at 406-7; Duffy v. Drake Beam Morin, Harcourt Gen., Inc., 1998 WL 252063 (S.D.N.Y. May 19, 1998); Iwankow v. Mobil Corp., 541 N.Y.S.2d 428 (1st Dep't App. Div. 1989.

57. N.Y. Exec. L. § 298-a(3); *Torrico*, 213 F. Supp. 2d at 406, n.10. If the New York State Division of Human Rights ("NYSDHR") believes that discrimination has occurred, it can issue an order directing the non-resident to cease and desist from the acts of discrimination alleged. Sherwood v. Olin Corp., 772 F. Supp. 1418, 1422 (S.D.N.Y. 1991). If the non-resident fails to obey the NYSDHR's cease and desist order, the agency must prohibit the non-resident from transacting business in New York State. *Id.* at 1422-23. Violation of that prohibition on transacting business in New York State constitutes a criminal misdemeanor. *Id.*

58. N.Y. Exec. L. § 298-a(2); Sherwood v. Olin Corp., 772 F. Supp. 1418, 1422 (S.D.N.Y. 1991).

59. Iwankow v. Mobil Corp., 541 N.Y.S.2d 428 (1st Dep't App. Div. 1989).

60. *Iwankow*, 541 N.Y.S.2d at 428.

61. *Id. See also* Duffy v. Drake Beam Morin, Harcourt Gen., Inc., 96 Civ. 5606 (MBM), 1998 WL 252063 (S.D.N.Y. May 19, 1998) (A non-New York resident employed in New Jersey could not claim discrimination occurred in New York even though defendant made decision to fire plaintiff in New York.); Miller v. Citicorp., 1997 WL 96569 (S.D.N.Y. Mar. 4, 1997)(A non-New York resident employed in Florida could not state NYSHRL claim even though defendant made decision to terminate plaintiff in New York.).

If an employee employed outside of New York State cannot show that the discrimination at issue was "committed" in New York State, he or she can assert an NYSHRL claim only by showing that he or she is a New York State resident.[62] The NYSHRL, however, does not define the term "resident" for the purposes of Section 298-a. In *Torrico*, the Southern District of New York observed that, where, as in the NYSHRL, "a statute prescribes 'residence' as a qualification for a privilege or the enjoyment of a benefit, New York courts have interpreted the statutory term 'residence' to mean 'domicile.'"[63]

"Domicile," in turn, is defined as residence or physical presence in New York State plus an intent to remain in the state indefinitely,[64] or an intent to return to the state from some other location.[65] A trip to or a stay in a foreign country, "no matter how long continued, without any intention of remaining there permanently, does not result in a change of domicile."[66] Courts generally ascertain domicile by considering the "the entire course of a person's conduct," including, but not limited to, "the place of his family ties, voter registration, tax liability, driver's license and vehicle registration, business activities, bank accounts, social activities and religious affiliations."[67]

In the context of foreign employment of American citizens, courts have adopted a "strong presumption in favor of a domestic [U.S.] domicile rather than a foreign domicile."[68] That presumption appears to only hold, however, if the plaintiff exhibits an intention to return to the United States. In *Kavowras v. Pinkerton, Inc., U.S.A.*, the plaintiff, a native New Yorker, sued for defamation after his employment was terminated in China. The plaintiff paid taxes in New York State, listed his family's Brooklyn, New York house as his permanent residence on his visa, had a New York State driver's license, registered his car in New York State, maintained a bank account in New York State, and was certified as an emergency medical technician in New York State. The Southern District of New York found, however, that the plaintiff lacked domicile in New York State for the purposes of diversity jurisdiction, because the plaintiff had no articulable plan to return to the state permanently, as evidenced by the fact

62. N.Y. Exec. L. § 298-a.

63. *Torrico*, 213 F. Supp. 2d at 407-08.

64. *Id.*

65. Morrison v. Blitz, 1996 WL 403034 (S.D.N.Y. 1996).

66. *Torrico*, 213 F. Supp. 2d at 409.

67. *Morrison*, 1996 WL 403034 at 1; *Bevilaqua*, 642 F. Supp. 1072 (S.D.N.Y. 1986) (in which the plaintiff remained domiciled in New York after he returned to his parents' home in Virginia, where the plaintiff had an apartment in New York, attended classes in New York, had had a full-time job in New York, paid New York State income taxes, and was registered to vote in New York).

68. Davis v. Davis, 525 N.Y.S.2d 777 (Sup. Ct. Nassau Cty. 1988).

that he obtained employment with two other companies in China after the defendant had terminated his employment there.[69]

Significantly, although non-United States citizens working for an American employer abroad cannot bring an action under federal anti-discrimination laws, they may be able to bring an action under the NYSHRL, if they can show domicile in New York State.[70] In *Torrico*, a Chilean citizen resided in New York State before commencing a four-year temporary assignment to Chile for a New York employer. During that temporary assignment, the plaintiff's employment was terminated. The Southern District of New York held that the plaintiff could claim domicile in New York State because the plaintiff had, prior to the temporary assignment, resided and worked in New York and because the assignment to Chile was temporary. Accordingly, the court held, even if the alleged discrimination was committed outside of New York State, the plaintiff could pursue a claim under the NYSHRL as a New York resident.[71]

VI. CONCLUSION

The ADEA, Title VII, the ADA and the NYSHRL can, under certain circumstances, offer significant protection to American citizens and/or New York State residents who suffer discrimination while working abroad. If those statutes can be applied extraterritorially, they can provide expatriate workers with claims, remedies, discovery and litigation advantages that may be otherwise unavailable. Applying these anti-discrimination statutes to expatriate workers, however, requires careful legal and factual analysis, given the many variables that bear upon the issue.

69. Kavowras v. Pinkerton, Inc., U.S.A., 1998 WL 209617 (S.D.N.Y. Apr. 29, 1998).

70. *Torrico*, 213 F. Supp. 2d at 408-9.

71. *Id.* at 410.