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Second Circuit Finds Employee Working Abroad Has No Remedy Under Section 1981 For Discriminatory Conduct Occurring Outside the United States

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In *Ofori-Tenkorang v. American Int'l Group, Inc.*, the U.S. Court of Appeals for the Second Circuit held that the Civil Rights Act of 1871, codified at 42 U.S.C. § 1981 ("Section 1981"), which prohibits race-based discrimination against "persons within the jurisdiction of the United States" in the making and enforcement of contracts, does not extend to discriminatory conduct occurring overseas.

Plaintiff John Ofori-Tenkorang, a non-citizen, began his employment with American International Group, Inc. ("AIG") as a Research Analyst in its Connecticut offices in 1996. In September of 2003, AIG temporarily reassigned plaintiff to work in one of its South African offices, agreeing to deposit his salary into a Connecticut bank account and cover housing and transportation costs.

Plaintiff alleges that before and after his transfer AIG discriminated against him because of his race. The U.S.-based allegations center on the decision-making process which eventually led to the actual transfer. Once in South Africa, plaintiff maintains he was segregated from a majority of white workers, subjected to suspicion surrounding reimbursement for expenses, threatened with termination for inaccurate scrutiny of his job performance, given a smaller bonus than his colleagues, wrongfully accused of

stealing from his office-mate, and asked to provide superfluous documentation of his need for medical leave.

In March of 2005, Mr. Ofori-Tenkorang brought suit against AIG in the U.S. District Court for the Southern District of New York, asserting statutory claims under Section 1981 and the New York State Human Rights Law, as well as a common law claim for defamation. Ruling on defendants' motion to dismiss the Section 1981 claim, the district court presumed the statute had no effect extraterritorially because Congress did not expressly provide for its application outside the territorial jurisdiction of the United States. The court rejected plaintiff's assertion that because his employment contract was executed in Connecticut and the discriminatory acts occurring in South Africa were directed by AIG executives stateside, the employment relationship's "center of gravity" was in the United States.

In a case of first impression among the U.S. Courts of Appeals, the Second Circuit affirmed and vacated in part the district court's dismissal of plaintiff's claims, holding conduct occurring while Mr. Ofori-Tenkorang was in South Africa is not protected, but decisions made while he was in the United States are subject to scrutiny under Section 1981. Distinguishing cases relied upon in support of his "center of gravity"

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argument as not requiring personal presence in the United States, the Court of Appeals found the plain language of the statute precluded its application to individuals outside territorial bounds. Specifically, by its terms, Section 1981 extends protection only to "persons within the jurisdiction of the United States..." Thus, the territorial limitation is confined by the location of the employee or subject of discrimination, not the decisionmaker. Similarly, the Court declined to apply a "balance of contacts" test and thereby "manufacture" jurisdiction where Congress has expressed no intent to extend the statute's reach extraterritorially.

Turning to plaintiff's allegations regarding acts occurring while he was still in the United States, the Court of Appeals determined that the district court incorrectly dismissed claims of discrimination in the formation and modification of plaintiff's employment contract predicated on conduct preceding his transfer to South Africa. In particular, plaintiff alleged that while he was physically within the United States, AIG took steps to segregate him from his soon-to-be white colleagues in South Africa and

place him in an office with a disreputable South African businessman. The Court held that, if these allegations are proven, a reasonable jury could conclude that measures to relocate plaintiff to South Africa to work in unfavorable conditions amount to discrimination under Section 1981.

The Second Circuit also examined plaintiff's claim that he was discriminated against when AIG awarded him a diminished bonus for year-end 2003. While the bonus decision was announced while he was working in South Africa, plaintiff alleged that the relevant calculations included work performed while plaintiff was stationed in the United States. Drawing all reasonable inferences in plaintiff's favor, as required in the procedural context of a motion to dismiss, the Court held this claim survived because there was some evidence of discriminatory action taken while plaintiff was still within the jurisdiction of the United States. Accordingly, the Court vacated the district court's dismissal of plaintiff's Section 1981 claims insofar as they related to actions occurring while he was working for AIG in the United States, and

remanded the case for further proceedings.

Ofori-Tenkorang v. American Int'l Group, Inc., No. 05-5272, 2006 WL 2349169 (2nd Cir., August 15, 2006).

Professional Pointer:

Because, as contrasted from Title VII, the remedies available under Section 1981 for racial discrimination are not restricted, or capped, and there are no statutory prerequisites to suit (e.g., filing of an EEOC charge), companies with international operations should be comforted by the Second Circuit's rejection of Mr. Ofori-Tenkorang's efforts to expend Section 1981's reach beyond U.S. borders. Employers, however, should not regard this decision as an absolute shield against discrimination claims by employees working outside the United States. As the Second Circuit noted, other discrimination statutes, including Title VII, the ADEA and the ADA, extend protection to foreign workplaces, although extraterritorial coverage is limited to U.S. citizens. Moreover, non-citizens working for U.S. entities abroad may find civil rights protections under local statutory schemes.

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