International Employment

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Significant developments in international employment law in 1997 include the passage or implementation of new employment-related legislation and regulations in the European Union (E.U.), Malawi, Japan, and China. In the United States, federal courts continue to clarify the application of anti-discrimination laws to overseas employment.

I. European Union and Malawi

A. EUROPEAN UNION

On October 2, 1997, the heads of the E.U.'s fifteen member states signed the Treaty of Amsterdam,[1] which amends the constitutional founding treaty of the E.U. itself. The new Treaty's employment (or so-called "social") provisions are especially important; indeed, according to commentators: "[t]he social and employment provisions of the Treaty of Amsterdam probably represent the most substantial short-term contribution of the Treaty (although the transfer to Community competence of most of the former field of justice and home affairs may constitute an even more important contribution in the long term)."[2]

The history of European Union-level social regulation has been tortured, largely due to the United Kingdom's (U.K.) ongoing refusal to concede that employment issues are properly part of the E.U.'s "competence" (that is, jurisdiction)—the position championed by former U.K.

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1. Treaty of Amsterdam, 1997 O.J. (C 340) 1, *reprinted as* EUROPEAN UNION: TREATY OF AMSTERDAM (1997) (Luxembourg, Office of Official EU Publications) [hereinafter Treaty].

2. BERMANN ET AL., 1998 SUPPLEMENT TO CASES & MATERIALS ON EUROPEAN COMMUNITY LAW 424 (1997).

Prime Ministers John Major and Margaret Thatcher. The Treaty amendment that established the E.U. prior to the Treaty of Amsterdam, called the Maastricht Treaty on European Union,[3] contained a unique and almost unwieldy social compromise, under which the U.K. opted out of much European Union social regulation, leaving the non-U.K. member states to regulate many employment matters pursuant to a special Agreement and Protocol.[4]

However, the recent election to Prime Minister of the U.K. Labour Party's Tony Blair changed Britain's decades-old resistance to "social Europe." Coming from the Labour Party, Blair of course has a pro-labor orientation, and therefore turned an about-face on the stance against European-level social issues. Blair agreed that the Treaty of Amsterdam could bring into the body of the E.U. Treaty itself what used to be the Maastricht Treaty's social Agreement and Protocol—provisions which, until Amsterdam, were effective only among the E.U. states other than the United Kingdom.[5] Blair also agreed that the Treaty of Amsterdam could clear the way for new areas of social competence (that is, new employment topics for the E.U. to regulate).

The Treaty of Amsterdam's employment chapter, to be inserted into the European Community (EC) Treaty as articles 117-120, sets forth five basic fields of E.U. competence: worker health and safety; work conditions; worker information and consultation (that is, worker participation in management); "the integration of persons excluded from the labour market;" and the "equality between men and women with regard to labour market opportunities and treatment at work."[6] New "instruments" (that is, E.U. laws such as directives and regulations) on these five topics will pass under the E.U.'s co-decision procedure (by which the European Parliament effectively has a right to veto legislation that otherwise can pass by a qualified majority of the E.U. Council of Ministers).

Allowing employment legislation now to pass under the co-decision procedure is itself an important innovation. Historically, many aspects of E.U. social legislation were subject to a unanimous voting procedure at the E.U. Council of Ministers. Indeed, the unanimity requirement was until now the main bar to comprehensive E.U. legislation of social issues. Yet, even the Treaty of Amsterdam retains more than a vestige of the unanimity requirement; it requires that legislation on four employment-related subjects be legislated only by a unanimous E.U. Council of Ministers: social security; "the protection of workers where their employment contract is terminated;" "collective defense of the interests of workers and employers, including co-determination;" and the employment of third-state nationals.

And going even farther in taking a hands-off approach to some social topics, the Treaty of Amsterdam's new EC Treaty article 118(6) actually excludes four other employment topics from European competence. In deference to the subsidiarity principle, the Treaty of Amsterdam recognizes that the following four employment areas should be regulated by each member state, and not the E.U.: pay, the right of association, the right to strike, and the right to impose lock-outs. The fact that pay appears on this list shows that no European-wide minimum wage is on the horizon.

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3. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

4. For citations to and an explanation by this author of the Maastricht Treaty's social regulation provisions, *see* Donald C. Dowling, Jr., *From the Social Charter to the Social Action Program 1995–1997: European Union Employment Law Comes Alive*, 29 CORNELL INT'L L.J. 43, 53-56 (1996), *reprinted in* 8 INT'L Q. 507 (1996).

5. *See id.* at 53-56 and citations therein.

6. Treaty, *supra* note 1, at tit. XI, arts. 136-45.

Besides adding its new social chapter to the EC Treaty, the Treaty of Amsterdam contains some other significant employment-related innovations. The Treaty adds a separate title on employment and a new Treaty goal: "a high level of employment." Indeed, the need to foster increased employment has shaped E.U. employment policy in recent years. Also, under the new article 109(a), the Commission must make an annual report on employment to the Council, which shall then draw up guidelines for member states. The first set of proposed guidelines, for 1998, emphasize the need to remove practical hurdles to employment (financial, linguistic, professional, and bureaucratic) and set out the goal of a thirty-five hour work week.

Perhaps the farthest-reaching employment provision of the Treaty of Amsterdam (but one without any immediate impact) is the Treaty's new article XIa, which authorizes the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." In regulating these issues, the Council must act unanimously, and Parliament need only be consulted. To date, member state law and E.U. law actively address discrimination on the bases of gender and nationality; and some initiatives prohibit discrimination on the bases of race, religion, and ethnic origin. However, still today in Europe, discrimination based on disability, age, and sexual orientation remains essentially unregulated. The new article XIa could some day change this fact—but as it stands now, the new article is merely a framework by which instruments might pass in the future. Article XIa, by itself, does not prohibit anything.[7]

B. Malawi

The Central African nation Malawi was led for decades by a virtual dictator, Kamuzu Banda. Although Banda left office in May 1994 and died in November 1997, his decades of rule continue to cast a long shadow over his country. Under Banda, Malawi enacted surprisingly restrictive social laws—including prohibitions on viewing television, on wearing short pants and skirts, and on holding beauty pageants. Included among Banda's social restrictions was a flat prohibition on labor unions. Only after Banda left office did Malawi pass its first modern labor law—the Labour Relations Bill 1996, which just came into effect on October 22, 1997.[8] According to Malawi's Ministry of Labour and Vocational Training, the new labor law is meant to: "promote industrial democracy. . . . The future of Industrial Relations in Malawi lies in the challenges that the country is facing now. The major challenges are consolidation of democracy and globalization of the world economy where Malawi has to remain competitive if it is to survive as a viable nation, economically."[9]

Because Malawi's official European language is English and because Malawi inherited a common law legal system from England, the Labour Relations Bill 1996 is in English and

7. While Americans tend to assume that Europe should prohibit as many bases of discrimination as are prohibited in the United States, Americans need to remember that European employment laws do not arise from an employment-at-will model; they tend to provide generous levels of severance pay and pre-termination notice to all workers—including those in categories that are specially protected stateside. Also, Europe's social safety nets tend to be stronger than those in the United States, and Europe has little history of slavery and social segregation against economically disadvantaged groups. To this extent, the need to prohibit discrimination on ever expanding grounds may be less in Europe than in the United States. Americans should not jump to the conclusion that because we protect more groups from discrimination we are necessarily more enlightened than the Europeans.

8. B. No. 11 (Malawi) [hereinafter Malawi Law].

9. Ministry of Labour and Vocational Training (Malawi), Rationale for the Labour Relations Act No. [sic] 1996 (Sept. 23, 1997) (unpublished paper).

follows common law principles. The law contains eight titles that together legalize trade unions, assure freedom of worker association, grant collective bargaining rights, create a labor dispute settlement mechanism, and establish a "tripartite labour advisory council" and an "industrial relations court." Yet Malawi's new labor law contains unique aspects that make it unlike the labor laws of other common law countries.

The new law's most controversial aspect is the fact that a mere twenty percent of a workforce can vote in a labor union.[10] This percentage may be the lowest such threshold that exists in the world. Employers in Malawi, not surprisingly, see the twenty percent threshold as less than "industrial democracy;" they insist that to allow twenty percent of a workforce to impose its will on the majority is unfair and makes Malawi less able to attract foreign investment.[11] The Malawi Government's response is that because labor unions have no track record in the country, they need a boost to get up and running. The argument is that because Malawi has excess manpower and low wages, it will attract foreign investment despite easy unionization.[12]

Malawi's new Labour Relations Bill also sets out a unique form of official government arbitration, by which labor disputes are resolved in government supervised proceedings that will look, to a common law lawyer, very similar to private labor arbitrations. However, the government provides three judges from a new "Industrial Relations Court," rather than the parties choosing a private arbitrator.[13]

On September 23 and 24, 1997, just a month before Malawi's new labor law came into effect, the U.S. Information Agency (U.S.I.A.) sponsored, in cooperation with the American Bar Association's Section of International Law & Practice, a seminar in Malawi for the country's labor and management leaders; leaders of the program were Donald C. Dowling, Jr. (Cincinnati lawyer and chair of the Section's International Employment Law Committee) and Sarah Christie (Senior Commissioner for Conciliation, Mediation and Arbitration for the Western Cape Region of South Africa).[14] Dowling and Christie explained to the Malawian labor/management community how collective bargaining and labor dispute resolution work in common law countries with advanced economies, and focused on how these procedures will most likely develop under the provisions of Malawi's new labor law. The program—which included a "Chief Executives' Forum on Conflict Resolution and Collective Labour Relations Management" featuring Malawi's Minister of Labour and Vocational Training, Kaliyoma Phumisa—was the subject of a page-one article in Blantyre, Malawi's *Daily Times*.[15]

Malawi is only now getting started under its new law, and the U.S.I.A. seminar was only a beginning. The Malawian labor/management community still needs to learn the basics of collective bargaining and labor arbitration procedure. To this end, the U.S.I.A. is collecting, for distribution to Malawi's labor and management leaders, common law resources on collective

10. *See* Malawi Law, *supra* note 8, art. 25(i).

11. *See, e.g.*, DAILY TIMES (Blantyre, Malawi), Sept. 24, 1997, at 1 ("[Lawyer] Shabir Latif said there was a need for a sound, balanced labour Act[,] saying the Act ignored the existence of small enterprises. 'The Act is not investment conducive, either. It might force prospective investors to go to other countries in the region which do not have such funny laws . . .' ").

12. "Minister of Labour and Vocational Training Kaliyoma Phumisa said investors are not worried about labour as Malawi was on record for having a lot of manpower." *Id.*

13. *See* Malawi Law, *supra* note 8, arts. 42-54, 63-75.

14. *See Labour Act Stand-off Continues*, DAILY TIMES (Blantyre, Malawi), Sept. 24, 1997.

15. *Id.*

bargaining and labor arbitration procedure—such as, copies of the recently superseded fourth-edition of Elkouri & Elkouri's *How Arbitration Works*.[16]

Malawi today is effectively in a position similar to the 1930's Wagner Act-era United States:[17] labor unions are just becoming legalized, and the society is starting to work out its balance of workplace democracy. Although the country's twenty percent unionization threshold sets out a unique vision of workplace democracy, Malawi is beginning down the road to finding its balance of labor/management power.

II. Pacific Rim Employment Law Report

There were several key developments in the Pacific Rim this past year that deserve close attention by those following employment law. The first occurred in Japan where, in June 1997, the National Diet amended the 1985 Equal Employment Opportunity Act (EEOA). All other notable events occurred in China where the rapid transition to a social market economy is evidenced by the promulgation of new collective bargaining regulations from the China Labor Bureau affecting (1) wages paid by joint venture companies with foreign investors and (2) protection against worker dismissal in the heavily commercialized South China Guangdong province. In addition, 1997 marked the first year that detailed Chinese regulations regarding the employment of foreigners were in effect.

A. Japan

Despite the existence of a provision in its 1947 Constitution guaranteeing equality between the sexes in all aspects of Japanese life, it took almost forty years for this commitment to be translated into action by the National Diet. The obstacles facing women during these decades in trying to achieve workplace equality were summed up by one of Japan's foremost legal scholars: "[a]lthough the post-war constitution provided complete equality under the law for men and women, the main problems were not in the legal system or explicit public policy but rather in social customs and practices based on a paternalistic conception of women's role in society and work life."[18] In 1985 the Diet, under pressure from the international community, finally enacted the EEOA. Modest in nature, the EEOA imposed mild requirements upon Japanese business to level the workplace playing field that had long been dominated by men.

In the period leading up to the eventual passage of the EEOA, there was a highly divisive debate, both public and behind the scenes, over the reach of the proposed legislation.[19] Consensus was impossible to achieve given the strongly held positions of business, labor, and the women's rights advocates. The end result was a compromise measure drafted by the Ministry of Labour that was crafted in such a way as to only prohibit discrimination against women in matters of training, welfare benefits, retirement, and dismissal. As to the equally significant areas of

16. Such materials can be sent, for distribution in Malawi, to:
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17. *See* International Labor and Employment Laws 23-24 (W. Keller ed., 1997).

18. Tadashi Hanami, *Chapter on Japan, in* Women and Trade Unions (in Eleven Countries) 219 (Alice H. Cook et al. eds., 1984).

19. For an excellent review of this turbulent period, *see* Frank K. Upham, Law and Social Change in Postwar Japan (1987).

workplace practices such as recruitment, promotion, and job assignments, employers were asked only "to endeavor" not to discriminate. A major omission from the Act was any effective enforcement mechanism, with implementation being primarily accomplished through administrative guidance by prefecture offices of the Ministry of Labour and a regional mediation scheme requiring the employer's consent.

The experience of Japanese women in the years since 1985 has been one of disappointment and frustration as employers, through artful interpretation of the EEOA, continued practices that appeared neutral on their face but were discriminatory against women in their impact.[20] In 1996 a special Advisory Committee was created to study the experiences of the first ten years under the EEOA. It was déjà vu as the struggle of the 1980s was renewed between the various interest groups. The Advisory Committee submitted its recommendations for changes in the law to the Ministry of Labour which prepared amendments; the Diet enacted the changes in June 1997. While the changes remedied one major shortcoming of the original statute, they failed to correct the overriding flaw that women's rights advocates claim maintains the Act's passivity and effectively prevents leveling the workplace playing field.[21]

The 1985 law's limited ban on discrimination was expanded to include the previously omitted areas of hiring, promotion, and job assignments with the elimination of the "to endeavor" language. Thus, the Act as now amended contains a broad prohibition in the workplace against discrimination because of sex. However, the changes did not include the much sought after comprehensive enforcement mechanism, but saw some fine tuning of the existing mediation procedures. Under the amendments, the process can be invoked at the request of either party and does not require the employer's consent. But, if there is no resolution of the dispute, the only remedy available is for the Ministry to make public the names of the recalcitrant employers. In the words of the Labour Minister, compliance is obtained by the "embarrassment of social sanction." Finally, the changes are not effective until April 1, 1999, to afford Japanese employers time to adjust to the new requirements.

The new law thus remains dependent upon social and economic pressures to improve workplace treatment for Japanese women and is continually criticized as "lacking any teeth."[22] In light of these developments, women's rights attorneys maintain that they will continue to bypass the EEOA, even as revised, and will utilize the courts to obtain relief under section 90 of the Civil Code, through which they have achieved unexpected success in recent years with a number of well publicized rulings against employers.[23] It remains to be seen if the recent increase in the amount of litigation over such issues, in a nation that traditionally eschews seeking relief through the judicial process, will accelerate as Japan approaches the end of the century.

B. China—Collective Bargaining

In China, collective bargaining followed the old Soviet model, which meant local or regional governments set wage and salary rates after they were "approved" by the trade union at the

20. *See* Mary C. Brinton, Women and the Economic Miracle: Gender and Work in Postwar Japan 229 (1993).

21. Ironically, protection afforded to women against employers asking them to work long overtime and late night hours was stricken at the same time from the Labour Standards Act as a demonstration of treating both sexes equally in the workplace.

22. Tomoko Otake, *Editorial, Workplace equality still a dream*, Japan Times, June 15, 1997, at 16.

23. One interesting case involved a court ordering a municipal employer to reinstate a woman and pay her back pay after she was dismissed for refusing to serve tea or do overtime work. The Judge observed that "[o]rdering only women to serve tea is not rational." *Yomuri Shiumbun*, Apr. 3, 1996.

affected facilities. Under the Communist model there is only one union, the All-China Federation of Trade Unions, which is actually an extension of the Communist Party apparatus.

As part of its transition from a communist to a socialist market economy, the government in recent years allowed joint venture companies with foreign investor interests to fix their own salary and wage scales. However, the new regulations from the China Labor Bureau now require that collective bargaining as to wages and salaries must also take place with the trade unions at each enterprise.

In essence, another step was added to the process. Until an employer reaches agreement with the labor union at its enterprise and then obtains final approval from the local or regional branch of the Labor Bureau, the employer cannot determine or make changes in what it pays workers. Further, the regulations provide that the scales set at joint ventures cannot be any lower than the minimum wage paid at state-owned enterprises in the region, and if above that level, the joint venture must pay as much as the state is paying although there is no ceiling on what a joint venture can pay. In addition to the extra delays in finalizing wage and salary schedules, the impact of these new regulations may now put joint venture firms at a competitive disadvantage in terms of having to pay at least as much as the state-owned enterprises, if not more, to their workers, thus adversely affecting production costs.

C. China—Dismissal of Workers

The Communist Party, obviously aware of the large number of Chinese workers employed by non-state-owned firms in South China's Guangdong province near Hong Kong, took steps to insulate workers from random dismissal by enacting local rules under China's Labor Law. On December 15, 1997, a sweeping decree was issued by the Guangdong Department of Labor setting forth a series of regulations that prevent all private domestic and overseas-owned companies from dismissing certain classes of workers, regardless of work performance. The groups of workers affected are all long-time employees, either over the age of forty having worked for a firm more than 20 years or age fifty-five and older with at least ten years seniority. Exemptions to the no-dismissal policy, however, may be sought by employers from the Guangdong Department of Labor on the basis that such firing is imperative, a process that most likely will take some time in light of experience with Chinese bureaucratic procedures. The new regulations also prevent such firms from terminating any employees active in the Communist Party All-China Federation of Trade Unions, a move clearly designed to protect the state's network of political agents that control the labor unions at the local plant level under the communist infrastructure.

D. China—Employment of Foreigners

Under regulations promulgated in 1996, a foreign-invested enterprise (FIE) operating in China is required to apply for and obtain an Employment License for Foreigners (the Employment License) in order to legally hire foreign personnel. The Ministry of Labor (MOL) only allows employers to hire foreign personnel to fill positions that have special requirements for which there are currently no suitable domestic applicants.[24] The rules were purposefully designed to make it difficult for foreign companies to employ foreign personnel in their Chinese operations

24. *See Administrative Regulations on the Employment of Foreigners in China* (jointly promulgated on January 22, 1996, by the MOL, MPS, and MOFTEC), *reprinted in* China Laws for Foreign Business (CCH), 2 Business Regulations ¶¶ 12-630 [hereinafter *Employment of Foreigners Regulations*].

and to encourage the employment of Chinese nationals. Not only do the new rules compound the administrative burden and the cost of doing business in China, foreign companies have been forced to employ local Chinese citizens in positions that could be filled by the company's trained expatriate staff. However, foreign companies have refused to hire a Chinese citizen to fill a position requiring specialized skills or allowing access to sensitive information.

In order to obtain an Employment License, an employer is required to submit an application that sets forth the reasons for recruiting the specific individual, the needs of the employer, and personal information of the foreign individual (including nationality, sex, level of education and profession, health condition, marital status, and information concerning prior employment experience in China).[25] The application is accompanied by various documents, including the curriculum vitae of the foreign individual, a letter of intent of the employer concerning the appointment, a report prepared by the employer setting forth the justification for the proposed recruitment of the foreign employee, the credentials of the foreigner concerning the work to be performed (i.e., engineering license or diploma, medical degree, or other credentials), and a health certificate of the foreigner.[26] The MOL and its local affiliates are responsible for issuing the Employment License. An FIE is required to submit its application, joint venture contract, and articles of association for approval.[27]

An Employment License is not necessary to employ the Chief Representative of a representative office. A representative office, which is covered by special employment rules, may apply directly for an Employment Permit without justifying the need for the employment.[28] An Employment License is also not necessary for a foreign specialist hired or funded directly by the Chinese Government, foreign workers with specialized skills employed in offshore petroleum operations,[29] and foreigners employed as performers or musicians holding a permit issued by the Ministry of Culture.[30]

A foreigner obtaining approval to work in China must apply overseas to a Chinese embassy, consulate, or visa office to obtain a Work Visa. After the foreigner enters China, the employer has fifteen days to submit an Employment Registration Form for Foreigners to obtain an Employment Permit for the foreign party. The registration form must be accompanied by the Employment License, the employment contract between the employer and the foreigner, and the foreigner's passport.[31] An Employment Permit is only valid within the area specified in the Permit. A foreigner issued an Employment Permit is required to present the Permit to the public security authority to apply for a Residence Certificate within thirty days of entering China.[32]

A foreigner must have the appropriate professional skills or vocational training required for the position, no criminal record, a confirmed position with an employer, a valid passport, and

25. *See id.* art. 11. The application is attached to the regulations as Appendix 2. The approved form for the Employment License is attached as Appendix 1 to the regulations.

26. *See id.*

27. *See id.* art. 13. Chinese enterprises must obtain preliminary approval of vocational authorities before submitting an application for an Employment License of Foreigners. The vocational authorities are required to assess the labor market demands. *See id.* arts. 11, 12. An FIE does not require approval from vocational authorities to recruit a foreign individual. Private citizens in China are prohibited from employing foreigners. *See id.* art. 34.

28. *See id.* art. 10.

29. Foreign workers in the offshore petroleum industry are required to hold a special work permit. *See id.* art. 9(2).

30. *See id.* art. 9.

31. *See id.* art. 16. The Employment Registration Form for Foreigners is attached to the regulations as Appendix 3.

32. *See id.* art. 17.

be at least eighteen years of age.[33] The foreign employee must hold a valid work visa for entry into China. After entering the country, a foreign employee may only commence work after obtaining an Employment Permit and a Residence Certificate.[34] Without a Permit and a Residence Certificate, a foreigner is prohibited from legally working in China.[35]

The regulations provide that a foreigner and an employer are required to enter into a written labor contract. A foreign employee's wages cannot be lower than the minimum wage in the locality,[36] and the maximum term of the contract is five years which may be renewed.[37] The Employment Permit automatically expires at the end of the contract term or is terminated for reasons set forth in the parties' agreement. In the event of termination, the employer is required to surrender the employee's Employment Permit and Residence Certificate and to assist the employee in his or her departure from China.[38] If an employee intends to change professions or employers or to move to a different region of China, he or she is required to obtain approval.[39]

Any dispute between the employer and the foreigner may be resolved consistently with the parties' contract or through the dispute resolution provisions of China's Labor Law.[40] Employers are required to submit to the annual inspection of Employment Permits by the MOL or its affiliates.[41] A violation of the regulations may result in deportation of the foreign employee with deportation costs borne by the employer or the foreigner. The employer and the foreigner are also subject to fines and penalties for violations of the regulations.[42]

III. U.S. Developments on International Employment Law Issues

This year, federal courts considered the application of U.S. anti-discrimination law to international employers. Recent decisions confirm the principle previously set forth in the relevant statutes and case law that anti-discrimination laws do not cover foreign employers or foreign employees.

The Third Circuit considered the issue of whether a foreign parent corporation could be liable under the Age Discrimination in Employment Act (ADEA) in *Denty v. SmithKline Beecham Corp.*[43] The plaintiff, Denty, worked in Philadelphia for the wholly-owned American subsidiary of SmithKline Beecham plc, a British corporation headquartered in the United Kingdom. Denty alleged that he was told he would be promoted to one of five positions that SmithKline Beecham plc was adding in the United Kingdom and Australia. Denty further claimed he was denied a

33. *See id.* art. 7. A "foreigner" is defined as any person "not of Chinese nationality." *See id.* art. 2. The regulations specifically exclude the employment of individuals that are residents of Taiwan, Hong Kong, or Macao, and does not apply to employment relationships in Taiwan, Hong Kong, or Macao. *See id.* arts. 32, 33.

34. *See id.* art. 8.

35. The employment of spouses of diplomatic personnel and international organizations is addressed under different regulations issued by the Ministry of Foreign Affairs.

36. *See Employment of Foreigners Regulation, supra* note 24, art. 22.

37. *See id.* art. 18.

38. *See id.* art. 21. If the foreigner's residence status is revoked as a result of a violation of Chinese law, the employer is required to terminate the labor contract and assist with the employee's departure from China. *See id.* art. 25.

39. *See id.* art. 24.

40. *See id.* art. 26.

41. *See id.* art. 27. The annual inspection takes place within thirty days after the end of each year of employment of the foreigner. An Employment Permit is automatically invalid if the employer does not submit to the annual inspection.

42. *See id.* art. 30.

43. 109 F.3d 147 (3d Cir. 1997).

promotion because of his age and that SmithKline Beecham plc filled the positions he sought with younger men. The promotion decisions at issue were made by SmithKline Beecham plc executives in the United Kingdom and not by the American subsidiary for which Denty worked in Philadelphia.

The Third Circuit affirmed summary judgment for SmithKline Beecham plc. The court stated that the ADEA does not apply to a foreign corporation when the foreign corporation controls an American corporation and the desired employment is with the parent abroad. The court emphasized that the foreign parent, SmithKline Beecham plc, was the decision maker in the employment decision at issue.

The court rejected the Equal Employment Opportunity Commission's argument that its approach would place Denty in a "black hole." The court noted that in seeking a position with a British company, Denty was protected by British law which does not prohibit age discrimination against individuals forty years of age or older.[44] Further, the court reasoned that Congress did not intend for the ADEA to apply to foreign corporations that are not controlled by American employers because of the principle of sovereignty.[45] The Third Circuit similarly dismissed Denty's claim under the Pennsylvania Human Relations Act (PHRA) because there was no evidence that the Pennsylvania Legislature intended for the PHRA to apply to employment decisions made by foreign corporations for positions located outside the United States.[46]

The U.S. District Court for the Southern District of New York held twice this year that a foreign parent corporation's employees do not count towards the number of employees of its American subsidiary required to trigger certain provisions of the ADEA or Title VII of the Civil Rights Act of 1964 (Title VII). In *Morelli v. Cedel*,[47] the court dismissed plaintiff's ADEA claim for lack of subject matter jurisdiction where the plaintiff worked in New York for the regional office of a Luxembourg company. The court held that the ADEA did not cover the New York office because it employed fewer than twenty employees, the ADEA's jurisdictional minimum under its definition of employer. The court rejected the plaintiff's argument that the foreign employees of the company worldwide should count toward the jurisdictional minimum. The court reasoned that foreign employees working abroad for the employer are not employees as defined by the ADEA and therefore do not count under the ADEA's definition of employer. Similarly, in *Greenbaum v. Svenska Handelbanken, NY*,[48] the court held that the employees of the plaintiff's former employer's foreign parent corporation did not count as her former employer's employees for the purpose of determining the appropriate punitive damages cap under Title VII. The court noted that its conclusion was consistent with decisions considering whether foreign employees should count for jurisdictional purposes.[49]

44. *See id.* at 151, n.7.

45. In contrast, the ADEA has applied to U.S. citizens working overseas for American employers or American-controlled employers since Congress passed the Older Americans Act Amendments of 1984.

46. *See Denty*, 109 F.3d at 151, n.7.

47. 73 Fair Empl. Prac. Cas. (BNA) 920, 70 Empl. Prac. Dec. (CCH) ¶ 44,685.

48. 979 F. Supp. 973 (S.D.N.Y. 1997).

49. *See id.* at 984.