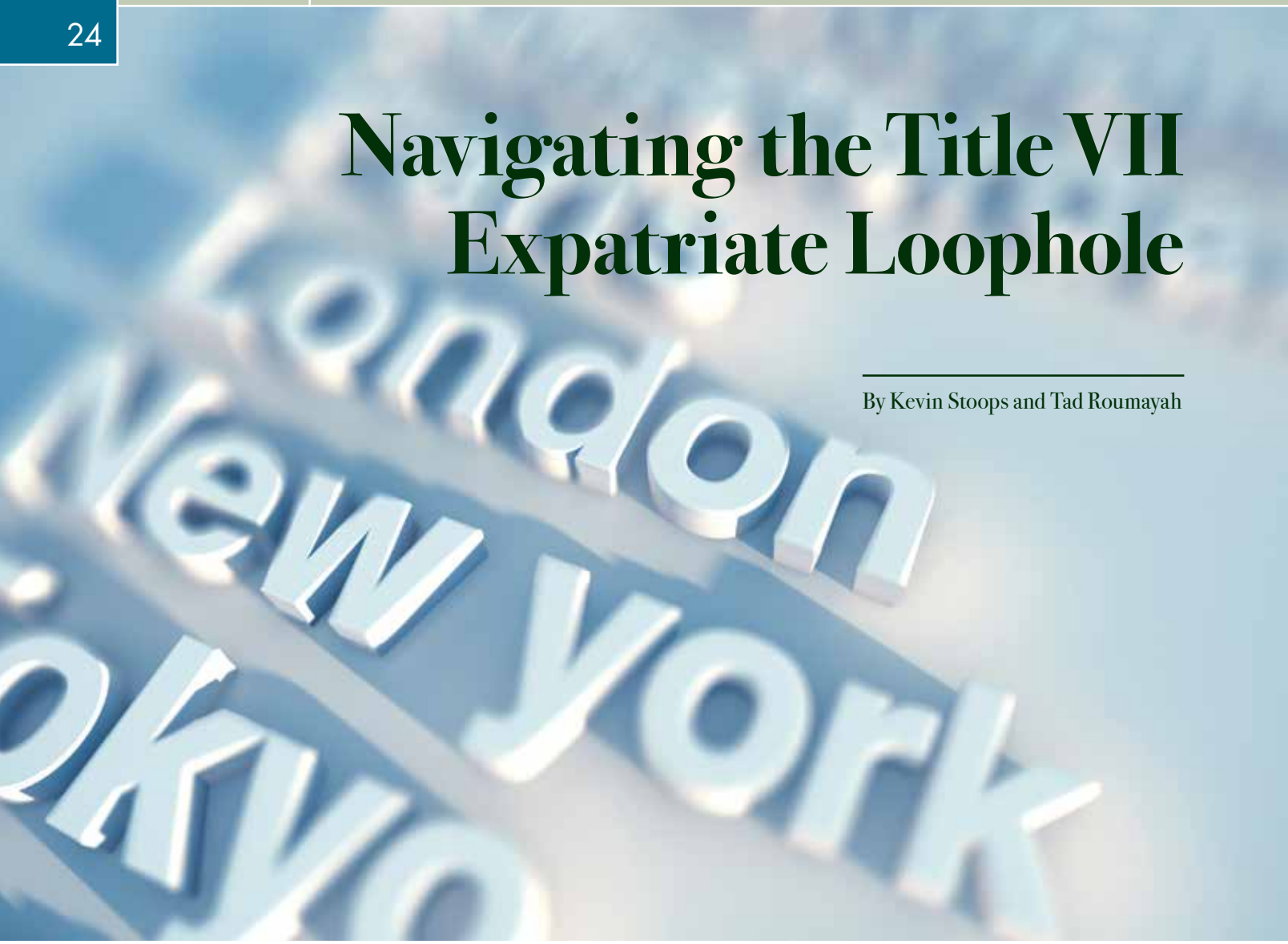

Navigating the Title VII Expatriate Loophole

By Kevin Stoops and Tad Roumayah

At a time when the world is flat and foreign postings for U.S. workers are commonplace, many of those employees may not realize that the protections of certain federal employment laws don't extend beyond U.S. boundaries.

Title VII of the Civil Rights Act of 1964[1] applies to any company—foreign or domestic—that elects to do business in the United States,[2] and protects employees located in the U.S. against discriminatory conduct. While this seems straightforward, the act does not apply to employees who are U.S. citizens but maintain their physical place of employment *outside* the U.S.

Subsections of Title VII state that U.S. citizens who are expatriated to the foreign parent corporation of their U.S. employer, or to an affiliate organization of their U.S. employer (but not controlled by the employer), enjoy no protections against employment-based discriminatory treatment.[3] This loophole allows corporations to evade liability for discriminatory conduct against U.S. citizens employed *outside U.S. borders*. This situation often comes into play with multinational companies that maintain international subsidiaries and affiliates. These companies routinely transfer employees from one business entity to another across the globe to serve the parent company's various multinational needs. Unfortunately, these expatriate assignments can drastically affect employees' employment rights.

Allowing these multinational corporations to implement an organizational structure that circumvents U.S. civil rights protections inflicts a major blow against Title VII's overarching goal of eradicating employment discrimination for all U.S. workers. It is clear that legislative action is necessary to close the

FAST FACT

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loophole and broaden Title VII's scope to protect all U.S. citizens employed by foreign parents or affiliates of U.S. companies *regardless of the employee's physical place of employment.*

Fortunately, U.S. expatriate employees currently have two substantiated arguments they may make in their attempts to avoid the gap and invoke Title VII protections.

"Center of gravity" and "primary work station" tests

It is undisputed that Title VII liability extends to all employers—regardless of where the employer is located/incorporated—that employ individuals *in the United States.*[4] But how is it determined whether an individual is employed in the United States?

Historically, courts have relied on two different tests to determine whether an individual is employed *inside* or *outside* the U.S.: the "center of gravity" test and the "primary work station" test.[5]

The primary-work-station test focuses on where the work is actually performed, disregarding other factors such as the location where the employee was hired or trained and the location of the employee's supervisors.[6] By contrast, the center-of-gravity test looks to the "totality of the circumstances," but contemplates a nonexhaustive list of criteria to consider, including:

- Where the employment relationship was created, including where the terms of employment were negotiated
- The parties' intent regarding location of employment
- The locations of the reporting relationships
- Where the employee performed his or her duties and received benefits, as well as the relative amount of time he or she spent at each location, if more than one
- The location of the employee's domicile[7]

The primary-work-station test, though seemingly straightforward, has come under fire from the courts, which have largely determined that the center-of-gravity test provides a more comprehensive determination of employment location for purposes of ascribing Title VII liability. For example, in *Rodriguez v Filtertek, Incorporated*,[8] the Western District of Texas found:

> [T]he primary-work-station test is vague and overly simplistic in its determination of employment within the United States. The test assumes that an employee *has* a primary work station—an assumption that may be invalid given the nature of our global economy with its mobile workforce.[9]

The most significant case on this issue is *Torrico v IBM Corporation*[10] out of the Southern District of New York. *Torrico* involved a plaintiff employee asserting that he remained employed in the U.S. throughout a three-year assignment to Chile.[11] The court found the primary-work-station test insufficient, stating that it "oversimplif[ies] the analysis of what constitutes 'employment in a foreign country'"

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and almost always "involve[s] situations in which employment in the United States was never contemplated."[12] The court further stated:

> Whether Torrico was "employ[ed]" abroad or was employed in the United States and merely temporarily deployed to Chile is a question of fact which cannot be answered simply by noting that he spent the bulk of his time in Chile for the three years leading up to the alleged discriminatory termination.[13]

Ultimately, the *Torrico* court used the center-of-gravity test and determined that summary judgment was improper because a reasonable jury could conclude that the plaintiff employee remained employed in the U.S. despite his foreign assignment.[14] The court relied on various factors, including:

- The plaintiff was employed in the U.S. for a period before being assigned to Chile.
- The plaintiff's compensation and benefits continued to be paid by the U.S. entity.
- The plaintiff's assignment was for a temporary period.
- The plaintiff entered into an agreement regarding his assignment that contemplated his return to the U.S. when his assignment was complete.[15]

Likewise, the Texas court in *Rodriguez* adopted the center-of-gravity test in analyzing whether the plaintiff employee, who served as controller of the defendant employer's Juarez, Mexico plant, could pursue a Title VII discrimination action. In finding a genuine issue of material fact as to the employee's place of employment, the court reasoned:

> First, as to the location of the creation of the employment relationship, the record fails to establish where the employment relationship was created or where the terms of the relationship were negotiated.
>
> Second, with regard to intent of the parties concerning location of employment, Plaintiff was hired as an accountant and promoted to Controller at the Juarez facility—this suggests that the parties intended Plaintiff to work primarily at the Juarez facility. However, there is no direct evidence of such intent.
>
> Third, as to location of reporting relationships, Defendants have presented evidence that Plaintiff did not report to any supervisor in Texas and Plaintiff has not disputed this fact. Instead, the evidence suggests that she reported directly to a supervisor in Illinois and indirectly to the Juarez facility's General Manager. . . . There is no evidence supporting the presence of a supervisor in Texas. This factor clearly weighs against Plaintiff.
>
> Fourth, Plaintiff's work as Controller at the Juarez facility indicates that she was employed at the Juarez facility. However, Plaintiff states that she regularly visited El Paso, inspecting goods in El Paso warehouses before they were delivered to the Juarez facility. . . . And Defendants have provided no evidence setting out how much time Plaintiff actually spent working in Juarez as opposed to Texas.
>
> And Fifth, as to Plaintiff's domicile, Plaintiff's home is in El Paso, Texas.[16]

Accordingly, under the center-of-gravity test, an employee can be characterized as *employed in the United States*—and enjoy Title VII protection—even when he or she is assigned to work abroad for a period of years. The test takes a pragmatic approach to determining the nexus of the employee's work duties and responsibilities as opposed to the overly simplistic approach of the primary-work-station test.

Consequently, employees facing defenses based on Title VII's application to employment *outside the United States* should advocate for analysis under the center-of-gravity test as set forth in *Torrico* and its progeny.

Was the foreign employer "controlled" by a U.S. entity?

Inevitably, situations will arise in which an individual is undisputedly employed *outside the United States* under either the primary-work-station or center-of-gravity test. In these situations, the employee's

best—and perhaps only—chance of invoking Title VII protection is through its "control" prong. The appropriate argument is that the foreign employer is *controlled* by a U.S. entity.[17] Courts have routinely found Title VII liability under the control prong in situations in which the employee works for a foreign subsidiary of a U.S. parent company.[18]

Title VII's express language does not restrict liability to that limited corporate/employment relationship exclusively. This fact, coupled with Title VII's liberal construction,[19] may open the door for employees to argue that Title VII applies to situations in which the U.S. entity controlled the discriminatorily motivated adverse employment decision. This is true even when the U.S. entity is *not* the parent of the actual foreign employer but instead is the foreign employer's subsidiary or affiliate company.

Such an outcome is consistent with the reasoning courts have applied when interpreting the control-prong exclusion. In this regard, courts have held that, "the critical question to be answered is: 'What entity made the final decisions regarding employment matters relating to the person claiming discrimination?'"[20] The answer to this question could involve a U.S. entity that, while merely a subsidiary or affiliate of the actual foreign employer, controlled the discriminatory conduct.

In today's global economy, U.S. citizens frequently move from one foreign location to another for a multinational employer. Unfortunately, these employees may be left without Title VII protection during their foreign assignment. Such an outcome is inconsistent with Title VII's goal of eradicating employment discrimination for all U.S. workers. The positive news is that U.S. courts have upheld the center-of-gravity test and the control prong of Title VII, providing employees with protection against the Title VII expatriate loophole. ■

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ENDNOTES

1. 42 USC 2000e *et seq.*
2. See, e.g., *Ward v W & R Voortman*, 685 F Supp 231, 233 (MD Ala, 1988).
3. 42 USC 2000e-1(c)(2) provides:

   > Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

   Section 2000e-2 prohibits discriminatorily motivated terminations, demotions, refusals to hire, and other adverse employment decisions. Section 2000e-3 prohibits employment-based retaliation connected to employee's protected Title VII activity.
4. See *Hansen v Danish Tourist Board*, 147 F Supp 2d 142, 148 (ED NY, 2001); *Ward*, 685 F Supp at 232.
5. Neither the Sixth Circuit nor any of the Michigan federal district courts have analyzed either test or determined which test to follow.
6. *Herrera v NBS, Inc*, 759 F Supp 2d 858, 865 (WD Tex, 2010), citing *Shekoyan v Sibley Int'l Corp*, 217 F Supp 2d 59, 68 (D DC, 2002).
7. *Id.* at 865–866, citing *Gomez v Honeywell Int'l, Inc*, 510 F Supp 2d 417, 423 (WD Tex, 2007).
8. *Rodriguez v Filtertek, Inc*, 518 F Supp 2d 845 (WD Tex, 2007).
9. *Id.* at 851.
10. *Torrico v IBM Corp*, 213 F Supp 2d 390 (SD NY, 2002) (analyzing a similar foreign employment provision in the ADA).
11. *Id.* at 399–403.
12. *Id.* at 401.
13. *Id.* at 403.
14. *Id.* at 404.
15. *Id.*
16. *Rodriguez*, 518 F Supp 2d at 851.
17. Specifically, the Title VII foreign employer exclusion provision does not extend Title VII liability to situations in which the discrimination is perpetrated by the "foreign operations of an employer that is a foreign person *not controlled* by an American employer." 42 USC 2000e-1(c)(2).
18. See, e.g., *Watson v CSA, Ltd*, 376 F Supp 2d 588 (D Md, 2005).
19. See *Armbruster v Quinn*, 711 F2d 1332, 1336 (CA 6, 1983) ("The primary purpose of the Civil Rights Act, and Title VII in particular, is remedial….To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction.").
20. *Duncan v American Int'l Group, Inc*, unpublished memorandum decision of the US District Court for the SD of New York, issued December 23, 2002 (Docket No. 01 Civ. 9262), p *3.