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Employment Discrimination Based on Immigration Status: Recent Cases Involving H-1B Visas

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Abstract The worldwide economic downturn has seen a reversal in previous trends toward offshore staffing and an increase in protectionism toward home country labor. However, employers in the U.S. face potential legal liability if they favor American citizens over authorized foreign guest workers in layoffs, pay decisions, and other such actions. Thus far, employers have succeeded in defending most discrimination claims involving citizenship or immigration status—which often are made by out-of-work plaintiffs unable to afford legal representation—on technical grounds such as faulty pleading, failure to exhaust administrative remedies, filing with the wrong administrative agency, or mischaracterizing immigration claims as ones involving national origin status. These results notwithstanding, a closer reading of the cases suggests that substantive liability may be a matter of growing concern as plaintiffs or their counsel learn to correct such errors. The issues are important to both sides of the employment relationship in today's global labor market; foreign guest workers will want to better understand their responsibilities and rights, while businesses will want to better manage their legal risks. Because little if any scholarly research has addressed these matters, an exploratory case law review is presented in an effort to identify trends in fact patterns that have generated such issues. Based on the results, practical recommendations are offered for improving the management of U.S. employment relationships that involve foreign guest workers.

Key words Employment discrimination · Citizenship · Immigration status · H-1B visas

"H-1B visa holders must find jobs or go home" [news headline]

The ongoing economic downturn has seen a reversal in previous trends toward offshore staffing (see, e.g., "Globalisation under strain: Homeward bound," 2009), and an increase worldwide in global protectionism toward home country labor forces (see, e.g., "Foreign

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labour sparks strikes across Britain," 2009; "France: A time of troubles and protest," 2009). In the U.S., immigration issues have received renewed attention upon passage of an Arizona state law that makes it a crime to be in the country illegally and directs local police to inquire into individuals' immigration status if there is "reason to suspect" that this is the case. Although anecdotal coverage in the popular press suggests that the U.S. population at large may be split on policy issues raised by this law, the resulting potential for racial and ethnic profiling has spawned a backlash among federal legislators and civil rights activists alike. Nonetheless, prospects for comprehensive immigration reform in the near future appear to remain slim.

Meanwhile, much has been written about the plight of unauthorized foreign workers in low-paying, undesirable jobs such as those in agriculture and meat or seafood processing (see, e.g., Cunningham-Parmeter, 2009; Elmore, 2007; Rodriguez, 2007; White, 2007).[1] However, little attention has been paid to the possibility that authorized foreign guest workers in more desirable higher-level jobs also may become victims of discrimination, as where American employers seek to prefer U.S. citizens over H-1B visa holders in implementing layoffs, large scale reductions in force, and related staffing decisions.

A review of federal court cases over the last 10 years suggests that employers generally have succeeded in escaping liability for claims involving citizenship or immigration status in these situations, but often on highly technical grounds such as blown filing deadlines, failure to exhaust remedies with the EEOC or some other administrative agency, or mischaracterization by *pro se* (self-representing) plaintiffs of an immigration or citizenship claim as one involving national origin status arguably cognizable under Title VII. Nonetheless, liability for such claims could be a matter of growing concern as more foreign guest workers and/or their legal counsel succeed in overcoming technical barriers to litigating the substantive merits of their claims. In fact, even this introductory review of the relevant case law raises some basic questions that seem ripe for further research and analysis. For example:

* Will the global economic downturn reflect an increase in claims in the U.S. for employment discrimination involving citizenship and immigration status by displaced H-1B visa holders in hi-tech and other industries employing skilled specialty workers?
* Will such claims tend to supplant those formerly made by U.S. citizens of unfair displacement in favor of less costly foreign guest workers?
* Are foreign guest workers holding H-1B visas particularly vulnerable to unfair layoffs due to the possibility of deportation and/or the inability to afford access to legal representation once they lose their jobs?
* What can global businesses operating in the U.S. do more proactively to manage these risks and avoid legal liability when taking otherwise necessary measures to reduce their head count and overall labor costs?

The issues raised here are of global interest and potential importance to both employers and employees that are or who may be involved in the U.S. labor market in the future; foreign guest workers will want to be better informed of and able to protect their legal rights, while employers utilizing foreign guest workers will want to take proactive management steps to lessen their consequent legal risks. Before examining recent cases in

[1] Indeed, even *authorized* foreign guest workers in these jobs are not free from issues involving the legality of their employment status, nor are their employers or labor contractors; for example, in *Olvera-Morales v. Int'l Labor Mgmt. Corp. et al*. (2008), the plaintiff, a woman of Mexican citizenship recruited in her native country to process vegetables in the U.S. under the H-2B program, filed sex discrimination charges under Title VII of the Civil Rights Act claiming she was denied more beneficial H-2A status in favor of men with lesser qualifications.

an effort to develop insights and practical suggestions for managers wishing to limit their organizations' legal exposure, a brief overview of the potentially confusing discrimination law and related contextual policy issues in this area is provided.

Potential Confusion over Discrimination Liability Involving H-1B Visas

INA/IRCA Citizenship or Immigration Status versus Title VII National Origin Status

Because a fair number of recent immigration discrimination claims appear to have failed at least in part because they have been mischaracterized as national origin claims, it is important to understand substantive differences in the content of such claims, as well as procedural differences in the jurisdiction of various administrative agencies that exist to redress such claims. First, the Immigration and Nationality Act [INA], as amended by the Immigration Reform and Control Act [IRCA], bars discrimination in employment based on citizenship or immigration status by employers of more than 4 employees. The IRCA also makes it illegal to require more or different documents than are legally acceptable to verify employment eligibility, to refuse to accept such documents if they appear to be genuine, or to intimidate, coerce, threaten, or retaliate against someone who files discrimination charges or cooperates in the investigation of such charges. Although perhaps not widely known, the Justice Department's Office of Special Counsel [OSC] for Immigration-Related Unfair Employment Practices has jurisdiction for handling these types of claims, as well as related national origin claims against employers of 4–14 employees if such claims arise out of the same set of facts underlying the immigration-related claims (general information regarding these matters is available online at www.justice.gov).

On the other hand, Title VII of the Civil Rights Act of 1964, which applies only to employers of 15 or more employees, also prohibits discrimination in employment based on national origin, meaning a worker's place of birth or that of his or her ancestors. This includes discrimination based on ethnicity, language or accents, or because someone or their ancestry may appear to be from a certain part of the world even if they are not. The EEOC has administrative jurisdiction over such complaints. It does *not*, however, handle claims based on citizenship or immigration status, nor does Title VII apply to such claims (national origin discrimination under Title VII, which is not the main focus of this paper, is addressed more fully elsewhere—see, e.g., Klaeren 2008; Robinson 2009; general information also is available online at www.eeoc.gov). It is perhaps this substantive overlap regarding national origin discrimination and conflicting administrative jurisdiction—such claims are to be brought before the OSC against employers of 4–14 workers, but are to be brought before the EEOC against employers of 15 or more workers—that has brought potential confusion to the area and posed problems for holders of H-1B visas who believe they are victims of discrimination based on their citizenship or immigration status.

As to specific immigration status, the H-1B program allows an employer to temporarily employ foreign guest workers in the U.S. on a nonimmigrant basis in a "specialty occupation" where there is an insufficient supply of qualified American citizens for a particular type of job, as certified by the employer in its application for the visa. A "specialty occupation" requires the theoretical and practical application of a body of specialized knowledge, and a bachelor's degree or its equivalent in that specialty (e.g., computer science, medicine, health care, biotechnology, or education). H-1B status inexplicably also can apply to fashion models, but most often has been used for professional jobs in high technology or other industries where professional skills, experience, or special expertise may be required.

Contextual Policy Issues surrounding Contemporary Immigration Discrimination Cases

In better economic times, the annual government allotment of H-1B visas often was exhausted mid-year, leading to calls from hi-tech industry to increase the yearly allocation (see, e.g., Hahm 2000). Since onset of the global recession, however, it has been more common to find politicians introducing protectionist measures such as the H-1B and L-1 Visa Fraud and Abuse Prevention Act (2007) or the H-1B and L-1 Visa Reform Act (2009), and to find employers looking for ways to decrease labor head count and related salary and benefit costs. These efforts may include rescission of pending job offers, hiring freezes, salary reductions, and layoffs of H-1B visa holders as well as other workers. Perhaps out of loyalty to domestic workers or due to public relations pressures, employers may see an incentive to target H-1B visa holders for layoff because of their relative vulnerability to deportation and consequent practical difficulties with redressing immigration discrimination violations (H-1B visa holders who lose their jobs—and incomes—also lose their legal right to remain in the U.S., and may find it hard to afford legal representation). This suggests the possibility that immigration-related litigation, and potential employer liability, will come to reflect a growing number of claims by out-of-work H-1B visa holders, whereas such litigation formerly had been comprised mostly of claims brought by U.S. workers complaining of improper displacement by less costly foreign guest workers.

Method

Because little if any scholarly research has addressed these issues, an exploratory case law review was undertaken in an effort to identify the situations that have generated immigration discrimination cases involving H-1B visas. In order to gain insights into potentially problematic fact patterns for employers, as well as to examine legal disposition of the claims generated by them, both federal District Court (trial court) and Circuit Court (appellate court) cases were reviewed. The LEXIS database was used to identify published employment discrimination cases involving H-1B visa holders decided during the most recent 10 year period. 15 geographically dispersed cases were found, of which 13 were from the District Court level; of these, nine were brought by *pro se* (self-representing) plaintiffs (it is rare for federal Circuit Court appeals to be undertaken without the assistance of counsel). The cases are presented in chronological order to help illuminate possible correspondence with events in the context of the global financial crisis, including the U.S. sub-prime mortgage meltdown in 2005 and the much-publicized Wall Street systemic failures in late 2008. Thus presented, the cases will be further examined as to the legal basis of the claims asserted, their outcomes, and the reasons for their results, with a view toward identifying relevant trends and better understanding emerging sources of liability in this area.

Case Law Review

The time line under consideration begins with *Shah et al. v. Wilco Systems* (2000). Shah, a U.S. citizen, claimed that Wilco, a U.K. software company doing business in New York and elsewhere in the U.S., violated the INA and the Fair Labor Standards Act [FLSA] by recruiting foreign workers to replace more expensive domestic labor. Shah claimed she was asked by the company to assist in recruiting Indian workers under a program called

"Operation Delhi Belly" because "Americans don't make quality workers—they're stupid, they're too expensive, and difficult to control." Amid allegations that foreign workers were paid less—in one case, $48,000/yr compared to local prevailing salaries of $75,000 plus $25,000 bonuses annually for comparable jobs in the area—because the company thought they could not leave their jobs due to H-1B status, Shah also alleged retaliation for objecting to such practices (abuse of the H-1B program) that found her without a desk or computer when she returned to New York from Wilco's London office. Despite the potential substantive merit of these claims, relief was denied and the claims dismissed for failure to exhaust administrative remedies with the Department of Labor on the FLSA wage claims, and with the Justice Department's OSC on the INA citizenship claims. For a highly similar case from New York in which analogous claims by an American software developer representing himself also were dismissed for failure to exhaust available remedies with the appropriate administrative agencies, see *Biran v. JP Morgan Chase* (2002).

Watson v. Electronic Data Systems et al. (2004) presents another claim by a U.S. citizen employed in the information technology industry that he was terminated to be replaced by a less costly non-immigrant H-1B visa holder. Watson, also proceeding *pro se*, alleged that EDS fraudulently misrepresented the conditions necessary to support a grant of H-1B visas to less qualified foreign workers, to the detriment of native-born Americans, as part of a reduction in force, and asked that the court invalidate such visas and deport all H-1B visa holders. Citing the decision in *Shah* (above), a magistrate assigned to hear the case found that U.S. immigration laws under applicable precedent do not confer a private cause of action for challenging the decisions of the Labor Department or its discretion in handling even arguably fraudulent visa applications, and therefore recommended that the case be dismissed for lack of subject matter jurisdiction.

Similarly, in *Venkatraman v. REI Systems* (2004), the Fourth Circuit Court of Appeals upheld summary dismissal of discrimination claims based on race, national origin, and immigration status by an American software engineer of East Indian origin. Like Watson above, Venkatraman claimed that REI misrepresented a shortage of qualified U.S. citizens while seeking to hire foreign workers under the H-1B program. He also claimed he was paid less than white employees, and fired by REI when he complained about this unequal treatment. However, the appeals court upheld the lower court's dismissal of plaintiff's Title VII claims for failure to exhaust available administrative remedies with the EEOC, and its dismissal of his immigration claims on the now-familiar grounds that no private cause of action exists to redress allegedly improper grants of H-1B status to others. Analogous grounds were relied upon in *Ficq v. Texas Instruments* (2004) to dismiss race, ethnicity, national origin, and immigration claims by another U.S. citizen who alleged *pro se* that he was fired in a RIF while foreign workers were protected.

Thus far, the plaintiffs in these cases have been U.S. citizens complaining of improper displacement by cheaper foreign workers whom they argued should not have been granted H-1B status in the first place. *Shankar v. ACS-GSI* (2006) thus represents a possible turning point in the time line under consideration, in that a foreign guest worker rather than an American citizen is now the plaintiff. In that case, Shankar, a native of India, had worked for another U.S. company before obtaining a job with ACS and corresponding transfer of his H-1B visa to that new employer. He was later laid off after the project to which he had been assigned lost funding, then found another job in a different area of ACS, but subsequently stepped down, claiming hostile environment and forced resignation due to his national origin (Shankar originally represented himself, but later got help from a student lawyer in the U.S. while away in India due to the illness of his father). He also alleged various immigration and contract-related offenses by ACS, including failure to pay him

fully under an alleged oral five-year employment agreement or to provide him with return transportation to India as purportedly promised. However, Shankar, like his American counterparts discussed above, also found his Title VII claims (national origin discrimination and retaliation) dismissed for failure to exhaust administrative remedies with the EEOC, his contract claims dismissed for lack of evidence sufficient to rebut the state law presumption of at-will employment, and his immigration law claims dismissed for inadequate support beyond conclusory oral statements and suppositions. Nonetheless, it is noteworthy that timely legal action and the assistance of counsel might well have led to potential success on the contract or retaliation claims, although the outcomes remain speculative under the circumstances.

Another case in which claims of unequal fulfillment of alleged immigration-related promises or obligations failed, here due to the employer's credible showing of dire financial need to reduce costs and legitimate performance-based reasons for terminating the plaintiff along with eight other employees, is *Sodipo v. Caymas Systems* (2007). In that case, Sodipo alleged, on his own behalf, that one of several other foreign nationals had their visa application handled on an expedited basis whereas he was only treated to the "traditional, slower" method. However, on the evidence presented, the court found that the plaintiff had been treated exactly the same as other such employees, and that he suffered no adverse consequences even assuming there had been some arguable difference in treatment (*Sodipo* is one of the few cases found that proceeded to substantive resolution). And see *Ndiaye v. CVS Pharmacy* (2007), in which yet another *pro se* plaintiff, who had been fired for physically assaulting her supervisor, had claims of retaliation for complaining to the DOL about the employer's actions regarding her H-1B visa dismissed on grounds including timeliness issues (failure to meet the one-year limitations period set forth in the INA) and the now well-established absence of a private cause of action on immigration-related matters (based on these findings, the assigned magistrate recommended dismissal of the case for lack of jurisdiction, another example of a successful technical defense by the employer).

The case of *Huang v. Washington Mutual Bank* (2008) also involved an H-1B visa holder who complained *pro se* (he later obtained counsel) of discrimination and retaliation based on race, national origin (China), and adverse treatment after reporting the employer for allegedly illegal conduct involving his immigration status. Although the court dismissed his lawsuit for lack of jurisdiction based on an enforceable compulsory arbitration provision in Huang's employment agreement, and the merit of his underlying claims remains unreported, Huang was at least able to have them heard through the arbitration process. Whatever the outcome, it should be noted that the employer was able to avoid public airing of the dispute, as well as the presumably higher litigation expense typically associated with formal court proceedings, through arbitration.

Next is the case of *Andonissamy v. Hewlett-Packard* (2008), in which the Seventh Circuit Court of Appeals upheld the trial court's summary dismissal of numerous claims by plaintiff, a systems engineer, H-1B visa holder, and French citizen of Indian ethnicity. After being fired, Andonissamy alleged national origin-based hostile work environment and retaliation for reporting same, as well as wrongful denial of FMLA leave, based in part on comments by a supervisor that he was an "Indian racist bastard" and that jobs like his "should be reserved for Americans." The plaintiff, however, was unable to sustain these claims in the face of well-documented difficulties getting along with coworkers and other performance problems, as well as lack of a demonstrated connection between protected conduct and any adverse consequences. While the employer was successful, apparently due to the credibility of its performance documentation compared with the plaintiff's testimony,

it is probable that the direct evidence of national origin animus presented made the case more difficult to defend than it might have been.

Liu v. BASF (2009) likewise presents facts problematic for the employer that might have supported a valid immigration discrimination claim, but which appears to have been incorrectly pleaded as a Title VII national origin claim. Liu, a Chinese national working under an H-1B visa that was about to expire, sued BASF for national origin discrimination when it allegedly failed to pursue extension of his authorized work status while mishandling efforts to secure him a green card as promised. Liu's position was eliminated along with those of nine other employees, but all the other employees were offered transfers to another facility, thus prompting Liu's claim of differential treatment based on national origin. However, the court observed that all nine of those offered new jobs indeed were still authorized to work in the U.S., and that these employees included two American citizens of Chinese ancestry as well as one Chinese citizen with a green card. It thus concluded that claims regarding national origin were without merit (there was no evidence that employees of other national origins were treated any differently in BASF's pursuit of their green cards), and that Liu's termination was rather a consequence of his immigration status (loss of his temporary legal right to work and remain in the U.S. upon expiration of his H-1B visa). Although the employer successfully defended Liu's national origin claim on the merits, it seems probable that an immigration status claim timely filed with the OSC might have caused more difficulties for the employer, particularly if alleged promises to help Liu obtain his green card (permanent resident employment status) were supported with credible evidence at trial.

The plaintiff fared somewhat better in *Karakozova v. University of Pittsburgh* (2009). Karakozova, a Russian citizen and H-1B visa holder, was employed as a research assistant in UP's School of Pharmacy but was told by her supervisor, Dr. Yong Tae Kwon, that her contract would expire due to lack of funding (consequent lack of employment would result in expiration of her H-1B status). When Karakozova learned that she would be replaced in the same job by a researcher of Korean descent whose ethnicity matched that of Dr. Kwon, she alleged national origin discrimination and asked the court *pro se* to enjoin her termination and consequent expiration of her visa until she could pursue administrative remedies with the EEOC under Title VII. Perhaps due to the strong showing of national origin-based animus on the facts, the court did so, noting the need to preserve the *status quo* pending resolution of her Title VII claims lest she face deportation in the interim (thus rendering her national origin claim moot). The court also advised plaintiff to seek legal counsel and to pursue employment elsewhere to support possible continued validity of her H-1B status. While there is no indication as to how Karakozova ultimately fared on her Title VII claims, it is noteworthy that courts typically do not grant injunctive relief absent a showing of probable success on the merits. It is also noteworthy that this case, which represents one of the few partial victories for the plaintiff in any of the recent cases found that involved H-1B visas, was based on a properly styled national origin claim rather than a misdirected immigration status discrimination claim.

Tseng v. Florida A&M University (2009) presents another case involving university employment and another possible near miss for the employer, this time in the context of a tenure-track faculty position. Tseng, a citizen of Taiwan, alleged *pro se* that he had better qualifications for the position but was passed over in favor of Dr. Hongmei Chi, a female Chinese national, thus raising a case of national origin discrimination under Title VII. Tseng originally was employed as a visiting professor, and FAMU's policy was ambiguous as to whether those on H-1B status could be employed for up to 6 years through repeated yearly contracts as "temporary" workers or were indeed eligible for tenure-track positions given

the 6-year maximum term under the H-1B program. In a factually complex case that also involved issues of Tseng's experience level, English fluency and accent relative to those of Chi, as well as alleged favoritism by the department chair for Chi, with whom he collaborated on publishable research, the court found nothing pretextual in the university's decision that Chi was simply better qualified, noting that both communication and research collaboration skills were relevant to a tenure-track academic position. (The record was further complicated by disputed allegations that the university had issued a directive that tenure-track appointments would no longer be made to "persons who are not U.S. citizens or permanent residents," which may well have raised legitimate issues under applicable immigration laws if properly brought before the OSC. Of course, both Tseng and Chi would have been rejected under such a directive, thus undermining any claim by either for national origin discrimination, and it is also possible that Tseng would not have been allowed to challenge such a directive in any event given the nonexistence of a private cause of action to question a broad range of immigration-related matters.)

Another case involving a Chinese national, *Zhang v. Honeywell Int'l* (2009), presented allegations of discrimination based on race, gender, national origin, age, and disability when the plaintiff was terminated, again due to looming expiration of her H-1B visa in the face of pending job loss. Zhang had applied for numerous other positions with Honeywell but was unsuccessful, and claimed that improper factors were to blame. After most of her *pro se* allegations were dismissed for failure to exhaust administrative remedies with the EEOC, Zhang filed national origin and citizenship status discrimination charges with the OSC, as well as retaliation claims. When the OSC dismissed most of these charges, she appealed to the Office of the Chief Administrative Hearing Officer [OCAHO]. The OCAHO upheld dismissal of most of Zhang's claims, but let stand the citizenship status discrimination charge. Zhang then filed multiple further lawsuits, including the present one, which also appealed the negative disposition of her other claims. After an extensive review of the record in all prior proceedings, the court upheld Honeywell's actions as necessary to comply with applicable immigration laws, noting that the INA would have subjected the employer to civil and criminal penalties had it continued to employ a non-authorized worker after expiration of her H-1B visa. Further, the court noted that "the only discernable evidence of discrimination comes from the fact that Plaintiff was not hired and that she happens to be of a certain gender, belong to a certain racial group, and her country of origin is China," finding no evidence that such factors played any role in the employer's decisions. However, in apparent deference to Zhang's immigration issues pending with the OCAHO, the court concluded that "to the extent Ms. Zhang has other unresolved grievances with Honeywell related to Honeywell's visa practices, those issues are beyond the scope of this litigation and are not actionable under either Title VII, the ADEA, or the ADA." The employer's fate thus would appear to depend on whether Zhang was able to present evidence of improper treatment (e.g., unequal consideration for jobs or assistance with obtaining a green card; cf. *Liu*, above) under the immigration laws, claims over which the OSC has sole jurisdiction. The case also illustrates the difficulties an employer may encounter in documenting the validity of its selection practices when challenged with immigration-related improprieties; were the plaintiff able to show that she was rejected for jobs for which she was arguably qualified in order to deprive her of employment, and thus her H-1B status, Honeywell's defense of Liu's immigration claims before the OSC would likely have been far more problematic.

Finally, in *Roche v. La Cie, Ltd.* (2009), Roche, a French citizen employed in the U.S. under an H-1B visa, survived a round of layoffs, assumed additional work responsibilities formerly handled by others, then sought a commensurate raise in salary, which was denied.

He then threatened to quit if his demands were not met, prompting his boss at La Cie to "accept his resignation." Although immigration status was not directly involved, Roche did allege wage discrimination under the Fair Labor Standards Act and hostile environment based on national origin under Title VII. The court let stand an arguable retaliation claim, although it dismissed Roche's national origin claims in light of numerous raises he had received prior to his termination and lack of credible evidence that similarly situated non-French employees were treated more favorably in pay or otherwise. While ultimate disposition of the retaliation claim is unknown, it is worth noting that such claims can survive resolution of the underlying "source" claim of discrimination or hostile environment independent of whether the latter claims are or are not successful. Because retaliation claims typically turn on the credibility of evidence as to whether the plaintiff's underlying source complaints triggered their own stream of adverse treatment, such claims, when properly pleaded, are difficult to resolve on summary judgment short of trial, and can prove both costly and disruptive for the employer whatever the outcome.

Discussion

This research set out to investigate employee rights and potential employer liability for discrimination in situations involving H-1B visas for companies doing business in the U.S. Specifically, the research sought to examine the possibility that the global economic downturn would reflect an increase in claims for employment discrimination involving citizenship and immigration status by displaced H-1B visa holders, who may be particularly vulnerable to layoffs due to the possibility of deportation and the inability to afford legal representation once they lose their jobs. It was posited that the frequency of such claims might well overtake that of those by U.S. citizens claiming they had been wrongfully displaced by employers in preference for less costly foreign guest workers. An exploratory approach to the case law review was undertaken due to the lack of extant scholarly literature that addresses these issues. The cases were examined both chronologically and by type of claim, legal basis, outcome, and reasons for the results, with a view toward identifying possible emerging trends and better understanding the multiple and often confusing sources of potential legal liability in this area (see Table 1).

At first blush, the cases reviewed suggest that employers generally have had little to worry about other than litigation expense over the past 10 years in defending a variety of claims involving H-1B visas. However, although even partial plaintiff successes were rare over the time line reviewed, the cases did present fact patterns that might have been more problematic for the employer had they been properly litigated from a technical/procedural standpoint. As anticipated, the last decade indeed has seen a general shift away from cases brought by U.S. workers claiming unfair displacement in favor of less costly foreign guest workers (five cases during the 2000–2004 time period) and toward cases brought by more vulnerable H-1B visa holders claiming unfair displacement in favor of U.S. citizens (10 cases during the 2005–2009 time period). Also as anticipated, the case review disclosed a substantial number of claims filed in the trial courts by *pro se* plaintiffs (9 of 13; *Biran*, *Watson*, *Ficq, Shankar, Sodipo, Ndiaye, Karakozova, Tseng*, and *Zhang*; see Table 1), many of which were dismissed on technical grounds such as failure to exhaust administrative remedies, failure to file charges with the proper tribunal, or failure to do so within applicable time limits. In fact, only one case in the entire sample (*Zhang*) found the plaintiff eventually bringing immigration-related issues to the attention of the OSC, the proper forum for such claims. This raises the question whether employer successes in avoiding

Table 1 Recent Federal Discrimination Cases Involving H-1B Visas.

Year	Case Name	Main Claim(s)	Basis of Claim(s), Outcome, and Reason(s)	*Pro Se*?
2000	*Shah et al. v. Wilco Systems*	I; FLSA	U.S. citizen claiming employer sought to recruit less costly foreign nationals to replace domestic workers and retaliated against her for objecting to such practices unsuccessful; case dismissed for failure to exhaust administrative remedies with OSC & DOL, respectively	No
2002	*Biran v. JP Morgan Chase*	I	U.S. citizen presenting circumstances similar to *Shah*, above, unsuccessful; case dismissed for failure to exhaust proper administrative remedies	Yes
2004	*Watson v. Electronic Data Systems*	I	U.S. citizen claiming employer abused H-1B program and replaced him with less costly foreign guest worker unsuccessful; magistrate recommends dismissal for lack of subject matter jurisdiction on grounds that immigration laws provide no private cause of action to challenge DOL determinations regarding availability of qualified domestic workers or other requirements for issuing valid H-1B visas	Yes
2004	[a]*Venkatraman v. REI Systems*	NO; I	U.S. citizen of East Indian national origin claiming employer paid him less than white workers with similar jobs and abused the H-1B program by replacing him with less costly foreign guest worker unsuccessful for failure to exhaust administrative remedies with EEOC and absence of private cause of action to redress allegedly improper grants of H-1B status to others	No
2004	*Ficq v. Texas Instruments*	NO; I	U.S. citizen claiming employer replaced him during RIF while protecting less costly foreign guest workers unsuccessful for failure to exhaust administrative remedies and absence of private cause of action to challenge allegedly improper grants of H-1B status to others	Yes
2006	*Shankar v. ACS-GSI*	NO; I	Foreign national claiming forced resignation (constructive discharge) due to his national origin (India) and various immigration-related offenses by employer unsuccessful for failure to exhaust EEOC administrative remedies and inadequate factual support for the immigration and visa status claims	Yes
2007	*Sodipo v. Caymas Systems*	I	Foreign national claiming employer failed to fulfill promises to assist with immigration status unsuccessful due to employer's showing of legitimate performance and financial reasons for laying off plaintiff on the facts presented	Yes
2007	*Ndiaye v. CVS Pharmacy*	I	Foreign national claiming retaliation for complaining to the DOL about employer's handling of her H-1B visa application unsuccessful due to lack of timeliness and absence of a private cause of action to object to the DOL's and/or employer's immigration-related actions	Yes
2008	*Huang v. Washington Mutual Bank*	NO; I	Chinese citizen claiming national origin discrimination and retaliation for complaining about employer's handling of immigration issues unsuccessful; case dismissed for lack of court jurisdiction given the presence of an enforceable compulsory arbitration agreement	Yes
2008	[a]*Andonissamy v. Hewlett-Packard*	NO	French citizen of Indian ethnicity claiming national origin discrimination, retaliation,	No

Table 1 (continued)

Year	Case Name	Main Claim(s)	Basis of Claim(s), Outcome, and Reason(s)	*Pro Se*?
			and hostile environment harassment unsuccessful on the merits; judgment sustaining employer's defense that plaintiff was terminated due to difficulties with co-workers and other performance based issues upheld on appeal	
2009	*Liu v. BASF*	NO	Chinese citizen claiming national origin discrimination for alleged failure to pursue extension of authorized work status unsuccessful; plaintiff's position was eliminated along with those of 9 other employees, including American citizens of Chinese ancestry and a Chinese citizen with a green card, all of whom were still legally authorized to work in the U.S.	No
2009	*Karakozova v. Univ. of Pittsburgh*	NO	Russian citizen working for Korean boss under H-1B visa claiming national origin discrimination partially successful in gaining stay of termination to pursue administrative remedies with EEOC; plaintiff had been told her job would be eliminated for lack of funding but later found she would be replaced by worker also of Korean descent	Yes
2009	*Tseng v. Florida A&M University*	NO	Taiwanese citizen working under expiring H-1B visa claiming to have been passed over for tenure track position in favor of Chinese national with inferior qualifications unsuccessful on the merits; record supported finding that Chinese candidate had superior language fluency and research collaboration skills, all relevant to the job	Yes
2009	*Zhang v. Honeywell Int'l*	NO; I; C	Chinese national working under expiring H-1B visa claiming employer considered improper factors in failing to find her ongoing employment unsuccessful for failure to exhaust EEOC administrative remedies; partially successful on appeal of some negative decisions by OSC (citizenship claim allowed to proceed; result not reported)	Yes
2009	*Roche v. La Cie, Ltd.*	NO; FLSA	French citizen working under H-1B visa claiming wage discrimination and hostile environment based on national origin unsuccessful on the merits; plaintiff had threatened to quit if not given a raise—employer then "accepted his resignation" (Title VII retaliation claim allowed to stand; result not reported)	No

C Citizenship Status, *I* Immigration Status, *NO* National Origin Status, *FLSA* Fair Labor Standards Act (compensation)

EEOC Equal Employment Opportunity Commission, *DOL* Department of Labor, *OSC* Justice Dept. Office of Special Counsel

[a] Denotes cases resolved at the appellate [federal Circuit Court] level, where *pro se* litigants are rare

liability for citizenship, immigration, and related national origin claims in these cases were largely a function of poor pleading or faulty litigation strategy by relatively unsophisticated parties lacking the financial resources to retain legal counsel.

Of course, it is also possible that the claims presented lacked substantive merit (only one national origin claim and one immigration claim—those in *Karakazova* and *Zhang*, respectively—appear to have had potentially legitimate legal bases), or that good management practices such as well documented performance appraisals setting forth legitimate non-discriminatory reasons for terminating the plaintiff (*Andonissamy*) or well drafted compulsory arbitration provisions keeping the plaintiff out of court (*Huang*) helped employers avoid potential liability in situations that otherwise might have been more troublesome. However, as more of these cases are filed by visa holders who fear immediate deportation upon loss of employment (e.g., *Liu*, *Karakazova*, and *Tseng*), one would expect to see increased efforts to obtain legal representation among the litigants, and thus, fewer cases dismissed on purely technical grounds. Employers therefore may want to examine these issues more proactively as part of their overall human resource strategies, particularly when implementing layoffs and large scale reductions in force, to help ensure that their hiring, retention, compensation, and termination decisions are based on factors dealing solely with documented ability or performance differentials and not based on appearance, national origin, citizenship, immigration status, or other improper factors.

Practical Recommendations for Avoiding Liability when Employing Foreign Guest Workers

Although the number of cases found involving H-1B visas in this exploratory study was fairly small, a review of those cases supports the following recommendations for management:

- Use enforceable at-will language and arbitration clauses in job offers, employee handbooks, and other documentation of employment conditions to keep problematic issues out of more costly, more formal, and more public court proceedings (see, e.g., *Huang*, in which potentially valid national origin claims were stayed pending enforcement of a compulsory arbitration clause in the plaintiff's signed offer letter; and see *Shankar,* in which at-will status, in that case presumed under state law but which could have been strengthened with explicit at-will language in applicable employment documents, helped defeat alleged contractual obligations regarding transportation costs and assistance with immigration status upon loss of employment with the defendant);
- Avoid actual or implied promises regarding minimum length of employment, expense reimbursement, or assistance obtaining green cards that may be hard to fulfill in the face of changing economic circumstances, rapidly changing technology, or the availability of better qualified workers either domestically or abroad (see, e.g., *Liu*, *Shankar*, and *Sodipo*, where such factors were at the core of plaintiffs' complaints);
- Avoid "citizen only" or "green card only" hiring practices unless required by law or federal contract provisions (see, e.g., *Tseng,* where the alleged existence of such practices created an arguable violation of immigration anti-discrimination laws on their face, and thus, potential problems for the employer despite documented performance issues that otherwise justified its failure to grant the plaintiff university tenure);
- Train managers and employees to avoid potentially loaded language involving race, ethnicity, national origin, citizenship, or immigration status (see, e.g., *Andonissamy,* in which evidence of comments by a supervisor that plaintiff was an "Indian racist

bastard" and that jobs like his "should be reserved for Americans" may have weakened an otherwise strong defense case);

■ Train managers to avoid knee-jerk reactions such as unwarranted or excessive disciplinary actions, layoffs, unfavorable reassignments, or other potentially retaliatory employment actions after an employee files a lawsuit or complaint with the EEOC, DOL, OSC, or arbitration tribunal to avoid generating independent retaliation liability that can survive even favorable resolution of the underlying source claims (see, e.g., *Roche*, in which the court let stand plaintiff's retaliation claim even though it dismissed Roche's other claims for lack of credible evidence to support them; and see *Andonissamy, Huang, Ndiaye, Shankar,* and *Zhang,* all but one of which (Andonissamy, an appellate-level case) involved pro se plaintiffs, and all of which presented potentially viable retaliation claims that might have caused difficulty for the employer had they not been barred by various procedural or jurisdictional defects);

■ Develop a thorough business plan for RIFs that includes credible evidence of financial hardship and business necessity to support a legitimate, non-discriminatory reason for laying off H-1B visa holders, as well as other employees, who may otherwise be able to allege citizenship, immigration, or other illegal bases for their dismissal (see, e.g., *Sodipo*, in which the employer's credible showing of dire financial need to reduce costs justified laying off the plaintiff along with eight other employees; see also *Shah*, one of the earlier cases brought by a U.S. citizen claiming improper displacement by a less costly foreign guest worker, in which financial motivations for Shah's termination were used to support the plaintiff's allegations of improper, immigration-related bias);

■ Set and follow established internal procedures for considering displaced workers for new positions within the organization to avoid any implication that H-1B visa holders were singled out for layoff due to their vulnerability to deportation once they lose their jobs, and offer inplacement assistance equally to all displaced workers in good faith (see, e.g., *Shankar* and *Zhang,* in which evidence of such efforts by the employer to find continued employment for plaintiffs could have further strengthened already defensible cases);

■ Base all staffing decisions, including those involving attempts to place foreign guest workers in alternative employment to avoid loss of their H-1B immigration status, on valid, well documented measures of qualifications or performance, not on ethnicity, appearance, name, accent, or citizenship status (see, e.g., *Andonissamy, Ndiaye, Sodipo*, and *Tseng*, in which evidence of performance-based reasons for adverse employment actions helped belie plaintiffs' claims of improper animus on the part of the employer);

■ Have all adverse staffing decisions involving layoffs, terminations, or reductions in force reviewed by legal counsel or human resource professionals before they are implemented to minimize the risk of liability for immigration-related and other types of discrimination.

Conclusion

The fact that H-1B visa holders lose their right to remain in the U.S. and face deportation upon job loss presents the possibility that foreign guest workers may become unfair targets of opportunity for employers implementing layoffs and reductions in force in today's global

economy. Although a review of the recent case law discloses that employers thus far have been largely successful in defending litigation involving H-1B visas, future such claims may be brought with greater frequency by more sophisticated litigants with knowledgeable legal representation. Employers who wish to limit their potential liability in this area and increase their chances of continuing to enjoy past successes will want to include proactive planning and regular consideration of these issues in their hiring and firing decisions that involve foreign guest workers.

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