Can Embassies Be Sued by Their Employees?

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By Gary J. Shaw

The federal courts across the United States have different ways of determining when a foreign state, acting as an employer at an embassy or consulate in the United States, is immune from legal claims brought by its employees.

The answer turns not on the nature of the claims but on the employee's position at the embassy. This article will touch on sovereign immunity as it relates to foreign states and their embassy staff as well as the different approaches adopted by U.S. courts.

To be clear, this is not a purely academic exercise with little connection to the real world. Foreign states have embassies and consulates throughout the United States, especially in Washington, D.C., and the claims raised against them, such as gender discrimination and sexual harassment, can be very serious. Depending on where the embassy or consulate is located, sovereign immunity might bar these claims.

FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (FSIA) is a federal statute regulating the treatment of foreign states and their agencies in U.S. courts. Under the FSIA, foreign states are generally immune from suit, which means that they cannot be sued regardless of the claim or injury to the other party.

There are exceptions to that immunity, however, which are spelled out in the act. If a plaintiff can demonstrate to the court that the matter falls within one of these exceptions, then the foreign state is generally not immune.

A frequently invoked exception involves a foreign state's commercial activities. If the claim is based on a "commercial activity" of a foreign state carried out in the United States, then the state is not immune from suit. To determine whether an activity is commercial, courts look at whether the foreign state is acting like any other private party in a commercial transaction. If the answer is yes, then the commercial activity exception likely applies, and the foreign state is not immune.

Imagine, for example, that a foreign state purchases a car in the United States for use at an embassy. The act of buying a car is a commercial activity that private parties engage in all the time. Should the foreign state default on paying for the car, the seller would be able to bring a claim under the commercial activity exception.

By contrast, if a foreign state were to implement a public assistance program for its citizens living in the United States and, in doing so, the embassy limited assistance based on race, gender, or sexual orientation, the foreign state would arguably be immune from any claims of discrimination because public assistance programs are quintessentially governmental activities.

Employment in this context is tricky because it can be seen both as a commercial activity and as a governmental activity. Private parties employ people daily, thus fitting the definition of a commercial activity. But the individuals employed by the foreign state are frequently engaged in governmental activities that are protected under the FSIA. The question for the courts is whether the employee served a commercial or governmental function.

WHAT DO THE COURTS SAY?

In California, over which the U.S. Court of Appeals for the Ninth Circuit has authority, the courts take a categorical approach based on whether the employee is part of the foreign state's "diplomatic" or "civil service" personnel. If the employee falls into one of these categories, they are presumed to be performing governmental functions, and the foreign state is likely immune from suits arising out of their employment. On the other hand, an employee who is not part of a foreign state's diplomatic or civil service ranks — including administrative staff — can likely file suit against their employer under the commercial activity exception.

The approach in New York, located in the Second Circuit, is different. In the Second Circuit, courts focus more on the employee's day-to-day function rather than their title as a diplomat or civil servant. If the employee serves a commercial purpose — that is, one common to private commercial employers — then the employee's position is likely to be seen as commercial, and the foreign state would not be immune from suit. On the other hand, if the employee performs a governmental function, then FSIA immunity will preclude suit.

The two different approaches have led courts to reach contrary conclusions on immunity in cases with very similar facts. In a case against Canada, for instance, the Ninth Circuit found that a trade officer for a Canadian consulate in California could sue for sex discrimination under the commercial activity exception because she was neither a civil servant nor a diplomat. *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996). In a case against Japan, however, the Second Circuit found that a trade officer could not sue for sex discrimination because her role was governmental. *Kato v. Ishihara*, 360 F.3d 106 (2d Cir. 2004). In both cases, the plaintiff-employee held the same position and raised substantially similar claims.

The D.C. Circuit takes a third approach, combining the two discussed here, which is particularly important given the number of foreign states with a presence in Washington, D.C. The

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D.C. Circuit will first look at whether the employee is part of the civil service or diplomatic service. But unlike the Ninth Circuit's categorical approach, the District takes a more "flexible and inclusive approach" that considers a list of general and nonexclusive factors.

If, based on these factors, the court determines that the employee is part of a foreign state's civil service or diplomatic service, then the state is presumed immune. But if not, the analysis continues. The D.C. Circuit will then assess whether the employee serves a governmental function, and if that is the case, then the state is immune in any event. *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007).

This two-step approach gives the foreign state an advantage because it has two opportunities to establish immunity. The state can first claim immunity by arguing that the plaintiff-employee is a civil servant or diplomat based on a multitude of factors. If that argument fails, the state can argue that the employee nevertheless serves a governmental function. Either way, the foreign state is immune. The effect is to put a double hurdle in front of employees. For their case to proceed, they must show that (1) they are not a civil servant or diplomat and (2) their role is nongovernmental.

FINAL THOUGHTS

Foreign states and their employees often have competing interests. While states want no review of their sensitive, sovereign matters by a foreign (U.S.) court, employees simply want the courts to redress their very serious grievances. The right approach must balance these opposing objectives and, at the same time, be consistent and predictable across the United States.

In addition, and perhaps more importantly, the right approach must ensure justice for employees while respecting the foreign state's sovereignty. Striking that balance is not a simple matter, as the different approaches show.

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ployers should not violate them by engaging in activities that would discriminate among types of medical procedures and lead to needless liability. Because abortion is neither a business purpose nor health care, the employer has no obligation to either aid or abet an abortion or cover travel or medical costs associated with it.

The cautionary tale for employers is to provide accurate definitions; write policies that do not encourage, aid, or abet illegal activities; and avoid discriminatory practices. By taking these reasonable steps, employers can minimize risk.

Linda Schlueter is president and founder of Trinity Legal Center, which filed an amicus brief in the Dobbs *case. She is the author of the two-volume national treatise* Punitive Damages.