

97-7277

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

IDA MORELLI,

Plaintiff-Appellant,

-against-

CEDEL,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellate jurisdiction of this Court is based on 28 U.S.C. § 1291, this being an appeal from a final decision of the United States District Court for the Southern District of New York.

PRELIMINARY STATEMENT

On February 14, 1997, the District Court, by the Honorable Michael B. Mukasey, granted appellee Cedel's motion, brought pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss appellant Morelli's amended complaint. Morelli v. Cedel, 96 Civ. 2874, 1997 U.S. Dist. LEXIS 1356, 1996 WL 61499 (S.D.N.Y. Feb. 12, 1997). Judgment pursuant to that decision was entered on February 18, 1997 by the Clerk of the Court.

A timely notice of appeal was filed on March 5, 1997, and review was sought in this Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The appellant presents the following issues for review in this appeal:

1. Whether the district court erred in dismissing Morelli's cause of action under ERISA since she attached to the amended complaint a signed separation agreement which contained a promise to pay her a

pension, she alleged she did not receive her pension, and record evidence showed that Cedel maintained a pension plan for its employees since 1990 and Morelli was vested in that plan but did not receive her pension after she was fired.

2. Whether the District Court erred in determining that it did not have subject matter jurisdiction over an ADEA claim brought by a citizen of the United States against a large, multinational foreign corporation doing business in the United States and engaged in a business affecting commerce in the United States, for employment discrimination which occurred within the territorial limits of the United States.

STATEMENT OF THE CASE

The appellant, Ida Morelli, brought this suit pursuant to 29 U.S.C. §621 (the Age Discrimination in Employment Act, hereinafter "ADEA") *et seq.*, and 29 U.S.C. §1001 (the Employment Retirement and Security Act, hereinafter "ERISA") *et seq.*, and pendent state claims, alleging that on January 18, 1994, her federal and state rights were violated by Cedel when she was terminated from her position and Cedel did not pay her pension (42-43A, 48A).¹

¹ All citations are to the Joint Appendix.

Prior to serving its answer or either side commencing discovery, Cedel moved to dismiss all of Morelli's federal and state claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) [54A], asserting that Cedel, "did not have any pension or retirement plans for its New York employees" and that "on July 1, 1994, Cedel implemented, for the first time, a 401(k) plan for its New York employees ...[which] was implemented and became effective nearly six (6) months after [Morelli's] employment with Cedel's New York regional office was terminated." Cedel also argued that the district court lacked subject matter jurisdiction over Morelli's ADEA claim because Cedel employed fewer than twenty employees in the United States during the relevant time period. (71A).

The district court granted Cedel's motion to dismiss (8A). Judgment pursuant to the decision granting Cedel's motion to dismiss was entered by the Clerk of the Court on February 18, 1997 (7A). A timely Notice of Appeal was filed on March 5, 1997 (5A).

STATEMENT OF FACTS

Appellant, Ida Morelli, is a 57-year old female citizen of New York (43A). Appellee, Cedel, is a 27 year-old international securities and precious metals clearing house (111A, 126A), incorporated in Luxembourg (126A) and maintaining representative offices in New York (44A, 119A), London, Tokyo and Hong Kong (119A). As of the end of

1990, Cedel's own equities and reserves were valued at over 90 million U.S. Dollars (119A), and securities deposited with Cedel were valued at 454.2 billion U.S. Dollars (119A). During the relevant time period, Cedel had hundreds of employees worldwide (105A, 120A, 139A).

The record is silent as to the number of Cedel's overseas employees who were citizens of the United States.

On June 29, 1984, Cedel hired Morelli as an assistant to Philippe Humbert, who had been assigned to open the New York office. In 1993, Cedel "constructively" discharged Humbert and replaced him with a younger man, Denis Sabourin. On January 18, 1994, Sabourin fired Morelli, demanding she sign an agreement waiving all rights stemming from separation of her employment in return for three months severance pay, three months medical coverage and her pension. When plaintiff was fired, she was the only employee in the New York office over the age of 40. Morelli claims that prior to being fired she "performed her job well." Morelli was replaced by Michael Goonan, who at that time was 36 years old (9A-10A).

To support her age discrimination claim, Morelli asserted that Sabourin made statements "evidencing bias in favor of younger employees." For example, Sabourin stated that two bankers were "young with fresh new ideas, . . . just what I like, new blood with new ideas." Also, Sabourin complimented Morelli on her performance at a

conference by stating that she was "so energetic . . . [she] looked like an eighteen year old." Morelli alleges that executives from Cedel's Luxembourg headquarters made comments evidencing bias against older employees and that at the time Morelli was fired, Cedel required job applicants to provide their age for Cedel's pre-employment questionnaire (10A).

Morelli's ERISA claim

To support her ERISA claim, Morelli annexed as Exhibit "1" to her amended complaint a fully executed separation agreement, dated January 18, 1994, given to her by Cedel and signed by Sabourin and herself. ¶ 18 of Morelli's amended complaint alleged,

"Mr. Sabourin informed Mrs. Morelli that if she signed the agreement she would receive three month's severance pay, three months medical coverage, and her pension. He further informed her that if she refused to immediately sign the agreement, she would be summarily fired without severance pay, medical benefits, or her pension. As a result, Mrs. Morelli immediately signed the agreement in the presence of Mr. Sabourin and gave the agreement to him. A copy of the agreement is annexed as Exhibit "1" to this Complaint." (46A).

The separation agreement contained Cedel's written promise to pay Morelli from its "Pension Plan: . . . an unique and tax protected sum of USD on April 30, 1994." (52A).

¶ 20 of Morelli's amended complaint alleged,

"To date, Mrs. Morelli has not received the pension distribution to which she is entitled and which was promised to her in the signed agreement." (47A).

Count Three of Morelli's amended complaint alleged, "Defendant's conduct herein in failing to pay Plaintiff her pension violates ERISA." (48A).

The district court held that, "Such vague assertions failed to state a claim under [29 U.S.C.] § 1132 (a)(1)(B)." (20A).

In reaching its decision, the district court also relied (20A) upon an affidavit from the office manager of Cedel's New York Office, submitted in connection with Cedel's motion, which claimed,

"Prior to July 1, 1994, Cedel did not have any pension or retirement benefits plans for its New York employees. However, on July 1, 1994, Cedel implemented, for the first time, a 401(k) plan for its New York office employees." (71A).

The district court accepted Cedel's assertion as true. (20A). The district court then stated that, "Plaintiff does not deny that the 401(k) plan is the relevant plan (Pl. Mem. at 10)," pointing out that,

"Although plaintiff did not attach the pension plan to her complaint, she has brought a claim under ERISA and I may consider the plan on a motion to dismiss 'where the plan is incorporated into the complaint by reference ... (citations omitted, holding that) on a Rule 12(b)(6) motion, a court may consider documents attached to the complaint or incorporated by reference, matters of which judicial notice may be taken, or documents in plaintiff's possession of

which plaintiff had knowledge and relied on in bringing suit." (21A).

Morelli's counsel's Affidavit in Opposition to Defendant's Motion annexed Cedel's 1990 Annual Report and a pre-complaint, pre-litigation letter from one of Cedel's attorneys.

The 1990 Annual Report, at 127A, contained details of Cedel's pension plan:

"(g) Pension Plan

The Company has concluded a non-contributory pension plan covering all employees having more than thirty months service. The plan provides for the beneficiaries to receive an annuity as a supplement to their legal pension The last actuarial valuation of the plan was established at December 31, 1990." (127A).

The Annual Report's statement of Cedel's pension plan did not distinguish among domestic, foreign, overseas, or United States employees, and described an entirely non-contributory pension plan (employees were not required to make any contribution to the plan described) for all of its employees with over thirty months' service. Morelli, who had been hired in 1984, had substantially more than thirty months' service as of December 31, 1990.

The Affidavit in Opposition to Cedel's motion to dismiss also annexed a letter from one of Cedel's attorneys sent in response to Morelli's counsel's inquiry why she had not yet received the pension

promised in the separation agreement, which, according to the separation agreement, was to have been paid to her on April 30, 1994. The letter, dated July 12, 1994, was consistent with the signed separation agreement and contradicted Cedel's subsequent litigation posture that Morelli was not a participant in, nor entitled to any benefits under the pension plan. The letter contained the following statement:

"With respect to Ms. Morelli's pension plan rights, I explained to you last week that the Plan did not become effective until July 1, 1994. Accordingly, Cedel could not distribute pension funds to Ms. Morelli, or any other Plan participant, prior to that date. Ms. Morelli will be contacted shortly by Guardian, the administrator of the Plan. She will be given a number of options from which to choose in connection with the distribution of the USD 22,304.00 in her account." (140A-141A)

Although at the time of this letter there was no pending administrative complaint, no pending litigation, and no apparent dispute as to the validity or amount of Ms. Morelli's pension claim (only a question as to why she had not yet received it), the district court held,

"Plaintiff's reliance in her memorandum and affidavit on a letter from defendant's counsel which was sent in the course of settlement negotiations is a violation of Rule 408 of the Federal Rules of Evidence which states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to

validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." (23A).

The district court then held, "Because plaintiff is neither a participant, nor entitled to any benefits under the plan, her ERISA claim must be dismissed." (23A).

Subject Matter Jurisdiction

On September 6, 1994, Morelli filed a charge of discrimination against Cedel with the New York State Division of Human Rights ("DHR") (10A, 62A-67A). On February 29, 1996, the DHR issued a Determination and Order (10A). On September 20, 1996, the EEOC found that, "Respondent is an employer within the meaning of the Age Discrimination in Employment Act, ADEA, and timeliness, deferral and all other jurisdictional requirements have been met." (107A). Morelli therefore fully complied with the administrative prerequisites to commencing this action. Morelli filed this action on April 19, 1996, and an amended complaint on May 31, 1996 (10A).

Cedel moved to dismiss Morelli's ADEA claim pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Cedel argued that it employed only ten employees in New York in 1993 and eleven in 1994 (11A, 70A-71A), therefore it did not meet the ADEA's definition of employer and Morelli's complaint must be dismissed for lack of subject matter jurisdiction (11A). Cedel did not inform the district court of

the number of citizens of the United States that it employed overseas. Because there was no discovery, Morelli was unable to make any allegations in this regard. Neither did Cedel inform the district court of the size of its workforce, nor the magnitude of its business operations. Morelli did not deny that Cedel had fewer than twenty employees in its New York Office during 1993 and 1994. Rather, Morelli relied on the facts that, (1) the ADEA prohibitions apply to discriminatory acts in places over which the United States has sovereignty, and the conduct complained of took place within the United States and directly affected a citizen of the United States working for one of Cedel's representative offices in the City of New York (30A-31A), (2) the EEOC had found Cedel to be an employer within the meaning of the ADEA (104A), (3) Cedel, an international securities and precious metals clearing house (111A, 126A), with other 450 billion U.S. Dollars on deposit, and equity and reserves valued at over 90 million U.S. Dollars, employed hundreds of employees worldwide during the relevant time period, therefore, Cedel met the jurisdictional prerequisite of 29 U.S.C. § 630(b). (11A, 104A-105A, 107A, 138A-139A).

The Court below dismissed Morelli's ADEA claim for lack of subject matter jurisdiction, holding, inter alia,

"the protections of the ADEA do not apply to a foreign company's foreign operations" (17A-18A). Congress chose to limit the ADEA's reach; § 630(b) exempts small employers from the prohibition of the ADEA. Whatever the

reason for that limitation, its existence reveals a Congressional decision not to give the broadest possible remedial reach to the ADEA." (18A-19A).

SUMMARY OF ARGUMENT

The district court erred in dismissing Morelli's ERISA claim. The court misread the pleadings and overlooked record evidence that Cedel maintained a pension plan for its employees since 1990, that Morelli was vested in that plan, and did not receive her pension after she was fired, despite a written agreement to pay her pension. Therefore, Morelli stated a cause of action under ERISA for Cedel's failure to pay her pension.

The district court erred in dismissing Morelli's ADEA claim for lack of subject matter jurisdiction. The district court has jurisdiction over an ADEA claim brought by a citizen of the United States against a large, multinational foreign corporation doing business in the United States, and engaged in a business affecting commerce in the United States, for employment discrimination which occurred within the United States.

ARGUMENT

POINT ONE

PLAINTIFF'S AMENDED COMPLAINT AND THE DOCUMENTS PROVIDED TO THE COURT ON THE MOTION WERE SUFFICIENT TO STATE AN ERISA CLAIM

Fed. R. Civ. P. 6(a) requires that a pleading be only, "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 6 (e)(1) requires that, "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading ... are required." Rule 6(f) requires that, "All pleadings shall be construed to do substantial justice."

To support her ERISA claim, Morelli annexed as Exhibit "1" to her amended complaint a fully executed separation agreement, dated January 18, 1994, given to her by Cedel and signed by Sabourin and herself. ¶
18 of Morelli's amended complaint alleged,

"Mr. Sabourin informed Mrs. Morelli that if she signed the agreement she would receive three month's severance pay, three months medical coverage, and her pension. He further informed her that if she refused to immediately sign the agreement, she would be summarily fired without severance pay, medical benefits, or her pension. As a result, Mrs. Morelli immediately signed the agreement in the presence of Mr. Sabourin and gave the agreement to him. A copy of the agreement is annexed as Exhibit "1" to this Complaint." (46A).

The separation agreement contained Cedel's written promise to pay Morelli from its "Pension Plan: . . . an unique and tax protected sum of USD on April 30, 1994." (52A).

¶ 20 of Morelli's amended complaint alleged,

"To date, Mrs. Morelli has not received the pension distribution to which she is entitled and which was promised to her in the signed agreement." (47A).

Count Three of Morelli's amended complaint alleged, "Defendant's conduct herein in failing to pay Plaintiff her pension violates ERISA." (48A).

The district court held that, "Such vague assertions failed to state a claim under [29 U.S.C.] § 1132 (a)(1)(B)." (20A).

This was error. These allegations state a cause of action under ERISA. Morelli alleged that she was entitled to a pension, and attached to her amended complaint a signed separation agreement referencing her pension and promising it would be paid by April 30, 1994. She alleged that she had not been paid her pension. Thus, while the district court was correct in citing Sanson v. General Motors Corp., 966 F.2d 618, 621 (11th Cir., 1992), for the proposition that, "Only a participant or beneficiary can file a civil action under ERISA[,]" (20A), Morelli's pleading sufficed to state a claim under ERISA. Her amended complaint established that she was a participant in

a pension plan by attaching a signed agreement that she would receive a pension on a specific date, and further alleged that she had not received that pension. This sufficed to state a claim. See, Schonholz v. Long Island Jewish Medical Center, 858 F. Supp. 350 (E.D.N.Y. 1984) [former employee stated ERISA claim against employer for benefits under severance pay plan; employee alleged that plan was not revoked after termination of her employment and that she was not paid benefits under plan].

The district court erred in ruling that Morelli did "not allege that she is a participant in or beneficiary of an employee pension benefit plan" and, "does not even allege the existence of such a plan" (20A), (the district court is wrong, see, 46A and 52A) and then holding that, "[b]ecause plaintiff is neither a participant, nor entitled to any benefits under the plan, her ERISA claim must be dismissed" (23A).

In reaching its conclusion, the district court misread the amended complaint. It overlooked the import of the facts that were actually pleaded. It accepted as true a Cedel employee's affidavit in support of its motion to dismiss which contained allegations inconsistent with Cedel's own description of its pension plan as contained in its Annual Report. Further, the affidavit was inconsistent with the signed separation agreement between Cedel and Morelli. The affidavit was also inconsistent with Cedel's written, pre-complaint, pre-litigation

statement that there was a specific, undisputed sum of United States Dollars (\$22,304.00) that would be distributed to Morelli from its pension plan, which, for mere administrative reasons, had not yet been distributed to her.

The "401 (k)" plan

Assuming, arguendo, that the 401 (k) plan annexed as an exhibit to Cedel's affidavit in support of its motion to dismiss, was Cedel's only pension or retirement plan for its New York employees at the time it fired Morelli, a review of the 401 (k) plan (73A-102A), indicates that she was covered by that plan. The "Effective Date" of the plan is January 1, 1994 (74A). Morelli was still employed by Cedel on that date. To determine whether or not Morelli was vested in the plan, the exhibit states that for "Vesting," "all Years of Service will be counted." (93A). The plan required six or seven years of service (depending upon the Plan Year) in order to be 100% vested. (92A). As a ten year employee, Morelli was fully vested prior to her termination.

Cedel's Annual Report

In any event, Cedel's affidavit, which claimed that, "Prior to July 1, 1994, Cedel did not have any pension or retirement benefits plans for its New York employees" (71A) is contrary to Cedel's own 1990 Annual Report, which refers to "a non-contributory pension plan covering all employees having more than thirty months service...."

(127A). Morelli submitted Cedel's 1990 Annual Report in opposition to Cedel's motion to dismiss (105A, 139A). The 1990 Annual Report, Cedel's affidavit and 401 (k) plan were all submitted outside of the pleadings. Yet, the district court apparently only considered the 401 (k) plan. This was error.

Cedel's letter

The district court also failed to consider the letter from Cedel, viewing it as an inadmissible settlement offer and refusing to consider it in rebuttal to Cedel's affidavit which had asserted that Morelli was neither a participant in, nor entitled to a pension. There are three reasons the district court was wrong in finding the letter was proffered in violation of Fed R. Evid. 408.

First, Cedel's letter had not been sent to Morelli's counsel to attempt to compromise a claim, but to explain that the pension, explicitly promised in the separation agreement, had not yet been paid due to an administrative delay. The letter set forth the exact amount ("USD 22,304.00 in her account") of her pension. As evidenced by the contents of the letter, while there may have been some other disputes between the parties,² there was no dispute as to either the validity or

² Morelli had not yet filed either an administrative complaint, or a federal court complaint. The separation agreement had provided that Morelli would be paid her pension on April 30, 1994. As of July 12, 1994, the date of Cedel's letter, she had not yet been paid her pension. After nearly two more months went by without receiving her

amount of her pension. Thus, the portion of the letter relied upon was not precluded by Fed. R. Evid. 408.

Second, in its motion to dismiss, Cedel took a position contrary to the separation agreement and the letter (and contrary to its Annual Report), and asked the district court to rely on an affidavit which annexed a 401 (k) plan purporting to be Cedel's only plan for its New York employees. The affidavit further represented that Morelli was not vested in that 401 (k) plan and not entitled to any pension or retirement benefits whatsoever. By viewing Cedel's July 12, 1994 letter as having been sent in the course of settlement discussions and inadmissible for any purpose, the district court missed the point. Morelli's counsel had apparently written and spoken to Cedel's counsel regarding the pension and received written and verbal assurances that the pension was held up for mere administrative reasons having nothing to do with the validity or amount of her pension. Thus, when Cedel subsequently took the litigation position that Morelli was not entitled to any pension at all, we properly referenced Cedel's letter, which contained an unqualified factual assertion that Morelli was entitled to a pension, the amount of which was not in dispute:

"With respect to Ms. Morelli's pension plan rights, I explained to you last week that the Plan did not become effective until July 1, 1994. Accordingly, Cedel could not

pension, Morelli filed a complaint with DHR.

distribute pension funds to Mrs. Morelli prior to that date. Mrs. Morelli will be contacted shortly by Guardian, the administrator of the Plan. She will be given a number of options from which to choose in connection with the distribution of the USD 22,304.00 in her account." (141A).

The district court should not have permitted Cedel to hide behind the shield of Fed. R. Evid. 408. See, in the context of the attorney-client privilege, United States v. Blizerian, 926 F.2d 1285, 1292 (2d Cir.), cert. denied, 502 U.S. 813 (1991) ("[T]he privilege may implicitly be waived when [a] defendant asserts a claim that in fairness requires examination of protected communications."), and Pray v. The New York City Ballet, No. 96-5723 (RLC) (HBP) Memorandum Opinion and Order dated May 16, 1997, in which the district court permitted depositions of the New York Ballet's counsel despite the assertion of attorney-client privilege, holding that the defendant may not rely on the investigation as a defense and shield information from plaintiffs merely because their investigators happen to be attorneys. By analogy, Cedel cannot defend based on an affidavit stating there is only a 401 (k) plan and that Morelli has no entitlement to a pension whatsoever, and shield contrary information from the court merely because such contrary information was communicated to plaintiff's counsel from defendant's lawyers. Once Cedel offered evidence outside of the pleadings, in effect inviting the district court to treat the motion as one for summary judgment, Morelli was obligated and entitled to respond. The same public policy that pierces the attorney-client

privilege must be allowed to pierce Fed. R. Evid. 408, if indeed Rule 408 comes into play at all.

Finally, the letter was not offered to "prove" liability or damages. The only issue before the district court was whether Morelli should have been permitted to proceed on her ERISA claim. A determination of the admissibility of the letter should have been deferred until the conclusion of discovery, when the circumstances surrounding the letter, and the details of the pension plans referenced in the separation agreement and in Cedel's Annual Report had been fleshed out.

POINT TWO

THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER MORELLI'S ADEA CLAIM

Cedel argued that it employed only ten employees in New York in 1993 and eleven in 1994 (11A, 70A-71A), therefore, it did not meet the ADEA's definition of employer and Morelli's complaint must be dismissed for lack of subject matter jurisdiction (11A). Cedel did not inform the District Court of the number of citizens of the United States that it employed overseas. Neither did it inform the Court of the size of its workforce, nor of the magnitude of its business operations. Morelli did not deny that Cedel had fewer than twenty employees in its New York Office during 1993 and 1994. Rather, Morelli argued that, (1)

ADEA prohibitions apply to discriminatory acts in places over which the United States has sovereignty, (2) the EEOC had found Cedel was an employer within the meaning of the ADEA (104A), and, (3) Cedel employed more than twenty employees worldwide (it employed hundreds of employees worldwide), therefore, Cedel met the jurisdictional prerequisite of 29 U.S.C. § 630(b). (11A, 104A-105A, 107A, 138A-139A).

Whether a foreign employer's overseas employees are counted in determining whether that employer falls within the § 630(b) definition of "employer," has never been determined by this or any other Circuit.³

³ Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915, *aff'd*, 21 F.3d 502 (2d Cir. 1994), and Brownlee v. Lear Siegler Management Services Corp., 15 F.3d 976, *cert. denied*, 512 U.S. 1237 (1994) are sometimes incorrectly cited as having deciding this issue. Robinson involved an American working overseas for a foreign corporation. In dismissing for lack of subject matter jurisdiction, the district court merely held that a foreign corporation not controlled by a United States corporation may not be sued for its conduct overseas, even when that conduct affects a citizen of the United States working overseas (Robinson's workplace was Korea). 827 F. Supp 915, 918, 920. In Brownlee, the court merely held there was no basis to impute a principal's acts to an agent for an otherwise neutral business decision, and therefore the agent could not be sued for the acts of the Saudi Arabian principal. 15 F.3d 976, 977.

Rao v. Kenya Airways, Ltd., No. 94 Civ. 6013, 1995 WL 366305, 1995 U.S. Dist. LEXIS 8416 (S.D.N.Y. Jan. 30, 1995), the first in the line of cases actually holding that foreign employees may not be counted as employees under § 630(b), relied on Robinson and Brownlee for the proposition that employees of foreign corporations in foreign countries are not counted. However, that was not what those cases held: Robinson and Brownlee merely reaffirmed *inter alia* that the ADEA may not be applied extraterritorially to prohibit foreign companies from doing what may be lawful on foreign soil. Thus, the foundation of the Rao line is itself flawed and none of the cases based on Rao are analytically sound.

In a very real sense, that should have been a non-issue in the context of this case, where a gigantic, foreign employer discriminated against a United States citizen on United States soil.

The district court reviewed the legislative history and purpose of the ADEA's 1984 amendments and cited a line of fairly recent district court decisions in dismissing Morelli's ADEA claim for lack of subject matter jurisdiction: Rao v. Kenya Airways, Ltd., No. 94 Civ. 6013, 1995 WL 366305 at *2, (S.D.N.Y. Jan. 20, 1995), Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915, 921 (E.D.N.Y. 1993), affirmed, 21 F.3d 502 (2d Cir. 1994); Robins v. Max Mara, U.S.A., Inc., 914 F. Supp. 915, 921 (S.D.N.Y. 1996), Kim v. Dial Service International, Inc., No. 96 Civ. 3327, 1997 WL 5902, at *3 (S.D.N.Y. Jan. 8, 1997), and Feit v. Biosynth Int'l, Inc., No. 95 C 6774, 1996 WL 99726, at *2 (N.D.Ill. March 4, 1996)]⁴. For the reasons discussed below, the district court's decision was wrong and its judgment must be reversed.

The district court explicitly relied on the "small employer" exception in reaching its erroneous conclusion.

⁴ Our research has uncovered two subsequent district court decisions in this line of cases. Both cite the decision below in their line of authority: Minutillo v. Aqua Signal Corporation, 1997 U.S. Dist. LEXIS 3960 (N.D. Ill, 1997) and Russell v. Midwest-Werner & Pfleiderer Inc., 955 F. Supp. 114 (D. Kan. 1997).

As noted in the previous footnote, this entire line of authority is flawed.

In dismissing Morelli's ADEA claim for lack of subject matter jurisdiction on the basis that "the protections of the ADEA do not apply to a foreign company's foreign operations" the district court held the ADEA had a limited remedial reach, as evidenced by the small employer exemption:

"the protections of the ADEA do not apply to a foreign company's foreign operations" (17A-18A). Congress chose to limit the ADEA's reach; § 603(b) exempts small employers from the prohibition of the ADEA. Whatever the reason for that limitation, its existence reveals a Congressional decision not to give the broadest possible remedial reach to the ADEA." (18A-19A).

The district court's curious reliance upon Congress' intention to exempt small employers from the reach of the ADEA to support its narrow reading of the statutory definition of employer was flawed. (18A-19A). With over 450 billion U.S. Dollars on deposit, equity and reserves of nearly 100 million U.S. Dollars, and hundreds of employees in a far-flung international securities and precious metals enterprise (11A, 104A-105A, 107A, 138A-139A), Cedel is hardly a "small business."

The twenty employee floor was not designed to protect foreign employers. Congress set a twenty employee floor so as not to subject small businesses to the rigors of the ADEA.⁵ The ADEA does not require

⁵ The floor debate over the ADEA's analogous statute, Title VII, as described in Tomka v. The Seiler Corporation, 66 F.3d 1295, 1314 (1995), indicates that the costs associated with defending against discrimination claims was a factor in the decision to implement a

that those twenty employees be in the "protected class," to wit; over the age of 40. It only requires that there be at least twenty employees in order that there be jurisdiction over the employee, so that "small employers" would not become subject to suit under the statute. Employees under the age of 40 are not "employees" protected by the ADEA, yet they are counted for purposes of ADEA jurisdiction. Nevertheless, the district court missed that point and held that since foreign employees are not protected by the ADEA, they cannot be counted. In this regard, the district court confused employees who should be "counted" with employees who are "protected."

The district court's analysis was flawed

minimum employee requirement. In discussions over a proposed change to the minimum employee threshold, the burdens placed upon a small business forced to comply with federal regulations and defend against a discrimination suit were explicitly addressed. See 110 Cong. Rec. S. 13092 (1964) (Remarks of Sen. Cotton); 110 Cong. Rec. S. 13088 (1964) (Remarks of Sen. Humphrey); 110 Cong. Rec. S. 13092-93 (1964) (Remarks of Sen. Morse). None of these factors favor an exemption that would exclude Cedel from the ADEA.

As noted in Tomka, other factors also considered by Congress included the protection of intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the constitutionality of the statute under the Commerce Clause. See, e.g., 110 Cong. Rec. 7088 (1964) (Remarks of Sen. Stennis); 110 Cong. Rec. S. 7207-17 (Remarks of Sen. Clark). None of these factors favor Cedel either.

Indeed, in limiting the amount of punitive damages awarded under the analogous Civil Rights Act of 1991, companies with over 300 employees are subject to near the maximum punitive damage amount. While Congress may have wanted to limit the exposure of small companies, Cedel is not a small company.

In its syllogism, the district court mixed and matched parts of the ADEA without regard to the legislative intent behind the statute and its amendments, and reached an illogical result as a consequence, to wit; that the ADEA did not protect a citizen of the United States, working in the United States, from the unlawful acts of a large, multinational foreign employer on United States soil.

The district court reasoned that, since the ADEA does not apply to the foreign operations of a foreign company [citing 29 U.S.C. § 623(h)(2)], its foreign employees employed abroad are not "employees," [citing 29 U.S.C. § 630(f), which says no such thing], therefore foreign employees should not be counted as "employees" under § 630(b) to determine whether an employer has the minimum number of employees (16A).

In reaching this conclusion, the district court examined the 1984 amendments to the ADEA which extended its coverage to United States citizens working abroad for United States companies or their foreign subsidiaries, and reasoned, from the absence of language expressly protecting United States citizens employed by foreign companies within the United States, that foreign employees of those countries should not be counted toward the statutory minimum even if those companies have

subsidiaries or offices in the United States (17A).⁶ Thus, the district court reached its negative conclusion by *non sequitur* reasoning. In so doing, the district court overlooked the express language of the statute, its purpose, the rationale of the 1984 amendments, and completely ignored United States sovereignty.

⁶ 29 U.S.C. § 630 (f) was amended in 1984 specifically to include American citizens working abroad within the definition of employees. This was not done to exclude foreign workers from the count in § 630 (b). The "expressed purpose" of the 1984 amendment, and the last sentence of § 630 (f), was "to 'mak[e] provisions of the [ADEA] apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.'" EEOC v. Arabian American Oil Co., 499 U.S. 244, 259 (1991). All seven of the federal courts of appeals that have examined this issue have held that before the 1984 amendments, the ADEA did not protect American citizens employed by American companies abroad. See e.g. Lopez v. Pan Am World Servs., Inc., 813 F.2d 1118, 1119 (11th Cir. 1987) (citing cases from the District of Columbia, Third, Fourth, Fifth, Seventh and Ninth Circuits). Nothing in the history of this amendment indicates any Congressional intention to impact on the employee count required by § 630 (b). The amendment was simply to extend the ADEA's remedial purpose by making explicit that United States citizens employed by a U.S. employer in a workplace in a foreign country are protected by the ADEA. P.L. 98-459, pp. 36-37, 1984 U.S. Code Cong. & Adm. News, pp. 3009-3010.

29 U.S.C. § 623 (h) was amended in 1984, also, "to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protection of the Age Discrimination in Employment Act. . . ." P.L. 98-459, pp. 27-28, 1984 U.S. Code Cong. & Adm. News, p. 3000).

Again, the amendment was consistent with the ADEA's remedial purpose. There is nothing in the statute or its history to indicate that Congress ever even considered the possibility that a citizen of the United States would be unprotected by the ADEA while working in the United States for a foreign employer of the size and magnitude of Cedel.

The ADEA defines an employer covered by the Act as:

"a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"

29 U.S.C. § 630(b) (1994).

This statute is clear and unambiguous. The plain meaning of a statute is normally controlling, "except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." Samuels, Kramer & Co. v. C.I.R., 930 F.2d 975, 979 (2d Cir.) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, (1982), cert. denied, 502 U.S. 957 (1991); see also, 2A Sutherland Statutory Construction, § 46.07 (5th ed. 1992). In such cases, it is the "intentions of the legislators, rather than the strict language, that controls." Id., Tomka v. The Seiler Company, 66 F.2d 1285, 1313 (2d Cir. 1995). "In the absence of an indication to the contrary, words in a statute are assumed to bear their "ordinary, contemporary, common meaning." Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993) (internal quotation marks and citation omitted). In common parlance, an employer "has" an employee if he maintains an employment relationship with that individual. See 1 The New Shorter Oxford English Dictionary 1198 (1993) (def. 2: defining "have" to mean

to "possess in a certain relationship"); American Heritage Dictionary 828 (3d ed. 1992) (def. 2: defining "have" to mean "to occupy a particular relation to"; giving as an example "had a great many disciples"); Webster's New International Dictionary 1145 (2d ed. 1950) (def. 2: defining "have" to mean "to possess, as something which appertains to, is connected with, or affects, one"; giving as an example "to have an ungrateful son")." Walters v. Metropolitan Educational Enterprises, Inc., 117 S.Ct. 660, 1997 WL 9783, at *4, 1997 U.S. Lexis 462 (1997). Implicit in the Supreme Court's rationale was its reaffirmation that the statutes prohibiting discrimination are remedial in nature. Since the plain reading of the statute is consistent with the intention of the drafters, the plain reading must be upheld; the district court was simply wrong in its analysis and conclusion.

The ADEA is a remedial statute enacted to thwart the invidious practice of age discrimination in employment. Gazder v. Air India, 574 F. Supp. 134 (S.D.N.Y. 1983). As such it should be read in a manner that shrouds the protected class with the most coverage. Id. "In our interpretation of [the] ADEA, we must, therefore, seek to effectuate, not interfere with, the Act's 'remedial and humanitarian' goal of eliminating age discrimination in employment." Id. at 136.

The history of the statute evidences Congress' clear intention that the age discrimination prohibitions not apply overseas if the employer is a foreign person not controlled by an American employer. Congress was, "cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country." P.L. 98-459, pp. 27-28, 1984 U.S. Code Cong. & Adm. News, pp. 3000-3001, 3009). While the ADEA's prohibitions may not apply to foreign employers' actions affecting their own foreign employees, that is quite different from holding that a foreign employer is not an employer at all merely because most of its workforce is overseas. According to a plain reading of the statute, any employer⁷ with over twenty employees is subject to the ADEA for its actions that take place within the territorial jurisdiction of the United States.

The district court's analysis is also contrary to that of the U.S. Equal Employment Opportunity Commission. In policy guidelines issued in 1989, the EEOC stated its view that the ADEA "applies to an employer

⁷ "It has consistently been held that [the statute analogous to the ADEA] Title VII is remedial in nature and should be given the broadest interpretation consistent with its purpose. In addition, it has been held that liberal construction should also be given to the definition of 'employer' so as to carry out the Congressional purpose of eliminating inconvenience, unfairness and humiliation of discrimination."

"The Flimsy Yardstick: How Many Employees Does it Take to Defeat a Title VII Discrimination Claim?" Jacqueline Louise Williams, 18 Cardozo L. Rev. 221, 243 (September 1996).

that is a foreign firm operating in the United States unless a treaty is involved." EEOC Policy Guidance, N-915.039, Empl. Prac. Guide (CCH) ¶ 5183 (March 3, 1989).

Courts have held that foreign companies are subject to the ADEA to the extent that they have employees in the United States. EEOC v. Kloster Cruise Ltd., 888 F. Supp. 147 (S.D. Fla. 1991). In Helm v. South African Airways, 84 Civ. 5404, 1987 WL 13195, at *7, 1987 U.S. Dist. LEXIS 5671, (S.D.N.Y. 1987), the district court held that the ADEA did apply to a South African company's operations in the United States with respect to its American employees. The district court held that ADEA prohibitions applied to "discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control. Id., at 21. The district court noted that it is the employee's place of employment that governs the ADEA's applicability. ("We find nothing in the ADEA or its legislative history to indicate that the 1984 amendments were intended to exclude American citizens working within the United States from coverage.") Id.

The court went on to explain the 1984 amendments:

"The 1984 amendments to the ADEA were generally intended to extend the Act's coverage to Americans employed abroad by American companies or their subsidiaries Congress was careful not to impose its labor standards on another country Accordingly, Congress did not extend ADEA's protection to foreign nationals working abroad for American companies or their subsidiaries . . . It is inconceivable that Congress

intended to respect the sovereignty of other nations and abandon that of the United States by subjecting American citizens, working inside the United States, to foreign law."

Id. at 21.

In enacting the ADEA, Congress intended the widest possible coverage, stopping only where a claim of jurisdiction would encroach upon another country's sovereignty. Imposing additional restrictions, such as limiting the universe of employees for calculation purposes, particularly where no such limitation exists in the text of the statute, severely undercuts Congress' humanitarian and remedial intent in enacting the ADEA. There is no good reason to permit a gigantic, foreign multi-national corporation, engaged in commerce within the United States, to avoid liability for its own conduct, within the territorial limits of the United States, which violated United States law, to the detriment of a citizen of the United States who was employed by that corporation.

CONCLUSION

For the reasons stated herein, the Judgment should be reversed and the matter remanded to the district court for the commencement of discovery and for further proceedings in light of this Court's opinion.

New York, New York
May 30, 1997

Respectfully,

ECKHAUS & OLSON,

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CERTIFICATE OF SERVICE

I, MARC A. STADTMAUER, an attorney, do hereby swear and affirm that I caused a copy of the foregoing Corrected Brief of Plaintiff-Appellant and Joint Appendix to be served on counsel for defendant-appellee, Gary D. Friedman, Esq., Mayer Brown & Platt, 1675 Broadway, New York, New York 10019 by mail on July ____, 1997.

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