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A Blurry Line On Employment Discrimination Protection

Law360, New York (February 26, 2015, 10:00 PM ET) -- In a novel case, a New York federal court judge recently denied an employer's motion to dismiss a Section 1981 alienage discrimination class action. The lawsuit alleges that Northwestern Mutual Life Insurance Company violated that act by implementing a policy of hiring only U.S. citizens and lawful permanent residents.

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Background

In Juarez v. Northwestern Mutual Life Insurance Co., the plaintiff, Ruben Juarez, a Mexican national living in New York City was a Deferred Action for Childhood Arrivals ("DACA") employment authorized individual. Through DACA, President Obama in 2012 authorized the U.S. Department of Homeland Security to exercise discretion in granting deferred action to qualified immigrant youth and authorize them to remain in the U.S., obtain an employment authorization document (EAD), and obtain a social security number. The EAD authorizes the holder to work for any employer, has a two-year validity period, and is renewable. In other words, it makes an individual legally authorized to work in the U.S. for a specified period of time, and it can be extended without sponsorship from the employer. Juarez applied for an internship at Northwestern Mutual, but an HR representative told him that regardless of his DACA status, he could not work for the company because "you have to be a U.S. citizen or have a green card."

The Decision

A class action followed claiming that Northwestern Mutual's hiring policy is discriminatory on its face and violates 42 U.S.C. §1981 — a federal civil rights statute. Section 1981 makes it illegal for employers to discriminate on the basis of race or alienage in making and enforcing contracts, including employment contracts.

Northwestern Mutual tried to have the claim thrown out, but Judge Katherine Forrest of the Southern District of New York denied its request because Section 1981's protection against job discrimination "extends to all lawfully present aliens," not just green-card holders. Therefore, Juarez's allegation that Northwestern Mutual's policy excluded a lawfully present individual (i.e. those with a DACA immigration status) from potential employment was sufficient to state a Section 1981 claim.

Judge Forrest was also not persuaded by the fact that Northwestern Mutual's policy clearly invited other non-U.S. citizens authorized to work in the U.S. (i.e. legal permanent residents, also referred to as Green Card holders) to apply for employment. She cited a Second Circuit ruling in Brown v. Henderson, which held that a plaintiff need not plead

discrimination against all members of a protected class in order to state a viable claim under Title VII. The analysis was no different under Section 1981: "A defendant is not insulated from § 1981 liability for intentional discrimination against some members of a protected class merely because not every member of the class becomes a victim of discrimination."

What This Means for You

As this case demonstrates, employers should be mindful of hiring policies that could negatively affect those individuals who are legally eligible to work in the U.S., but who are not U.S. citizens or lawful permanent residents. Employers should train human resources personnel to recognize the variety of status or work authorizations by which individuals who are not U.S. citizens are legally authorized to work here. This requirement will take on even more importance in light of President Obama's executive order on immigration, signed on Nov. 20, 2014, which may potentially authorize additional classes of individuals who will be eligible to work in the U.S.

In general, an employer may make hiring decisions by distinguishing only between lawfully present and unlawfully present individuals (or immigrants). But even when confronted with certain job applicants with time-limited work authorizations, we do not believe that this decision prohibits employers from asking applicants whether they will require sponsorship from the employer to work for that specific employer and thereafter refusing to hire them on that basis. Under the anti-discrimination provision of the Immigration and Naturalization Act, nonimmigrant visa holders may not claim a violation of that law for failure to hire based on their need for sponsorship from the hiring employer to be legally allowed to work for that employer.

We do not think they could claim a Section 1981 violation either. People without legal authorization to work for the hiring employer would lack standing as a protected class against that employer since the reason for the failure to hire would not be a candidate's alienage, but rather the fact that the candidate does not possess legal authorization to work for the hiring employer.

The outcome of the Juarez case remains to be seen, but the ultimate decision will have implications for DACA recipients and potentially for future beneficiaries of the president's Nov. 20 executive order on immigration.

—By Angel Feng, Mintz Levin Cohn Ferris Glovsky and Popeo PC

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