Foreign State Has No Sovereign Immunity against Workplace Injury Claim by American Consulate Worker

On June 10, 2019, the United States Court of Appeals for the First Circuit (Boston, Massachusetts) ruled that foreign states are *not* entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA) against workplace injury claims brought by U.S. citizens employed as clerical staff in consular offices in the United States.[1]

I. The FSIA and the Massachusetts Workers' Compensation Act

Under the FSIA, foreign states are immune from the jurisdiction of U.S. courts except in certain enumerated situations. One of those exceptions is known as the commercial activity exception, which applies in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state."[2] A separate provision known as the "non-commercial tort" exception applies to actions, "not otherwise encompassed" in the commercial activity exception, seeking money damages for personal injury caused by the tortious conduct of the foreign state or any of its officers or employees acting in their official capacity in the United States.[3] However, that exception does not apply if the claim is based upon "the failure to exercise or perform a discretionary function."[4]

At issue in the First Circuit's recent decision was whether either of these two exceptions authorized U.S. courts to assert jurisdiction over a work-related injury claim brought by an American employee of the Canadian consulate in Boston against the Government of Canada under the Massachusetts Workers' Compensation Act (MWCA).

The MWCA sets out different remedies for workplace injuries based on whether an employer qualifies as "insured" or not. To be "insured" under the statute, "an employer must (1) have insurance with an insurer, (2) hold membership in a workers' compensation self-insurance group certified by the state, or (3) be licensed as self-insured annually by the state."[5] Under the statute, employees are generally prohibited from bringing work-related injury claims directly against "insured" employers. If an employer is uninsured, employees may be able to obtain benefits from the Massachusetts Workers' Compensation Trust Fund (WCTF), a state-sponsored program for injured workers employed by uninsured employers who are subject to the state's

---

[1] *Merlini v. Canada*, No. 17-2211, 2019 U.S. App. LEXIS 17313 (1st Cir. June 10, 2019).

[2] 28 U.S.C. § 1605(a)(2).

[3] 28 U.S.C. § 1605(a)(5).

[4] 28 U.S.C. § 1605(a)(5)(A).

[5] *Merlini*, 2019 U.S. App. LEXIS 17313 at *4.

jurisdiction. Otherwise, employees may bring a direct claim for damages against the uninsured employer under the MWCA.

II. An American Clerical Worker Sues Canada for Damages Caused by an Injury that Occurred During Her Employment at Canada's Consulate

The Government of Canada employed Cynthia Merlini, a citizen of the United States and not Canada, for a clerical position at its consulate in Boston. She was not a member of Canada's foreign service. Her job responsibilities were comparable to those of an executive assistant "in any private firm" and did not include any official consular or diplomatic duties.[6]

While preparing tea and coffee service for a meeting at the consular offices, Merlini tripped over a misplaced phone cord, fell and struck a credenza. She was seriously injured by the accident and was no longer able to perform her job. Merlini initially received compensation for her injury under Canada's own national workers' compensation system. Canada later determined that Merlini was able to return to work and discontinued any further payments.

Merlini disagreed with that determination and asked Canada to reconsider its decision. After Canada denied her request, she applied for benefits from the WCTF. That application was ultimately denied, and Merlini sued Canada in federal district court for damages allegedly caused by her workplace injury. She brought her claim under the provision of the MWCA that allows direct claims against uninsured employers.

Canada moved to dismiss the case on several grounds, including sovereign immunity under the FSIA. Merlini contended that the commercial activity and noncommercial tort exceptions stripped Canada of its immunity. The district court granted Canada's motion. It found that Merlini's claim was based upon Canada's decision to provide workers' compensation benefits through its own national system rather than through any of the insurance options under the MWCA. Because the court deemed that decision to be a sovereign, discretionary act, it held that neither the commercial activity nor noncommercial tort exception applied.[7] Merlini appealed to the First Circuit.

III. The First Circuit Opens the Door to Workplace Injury Claims Brought by American Clerical Workers against Foreign States under the FSIA

On appeal, the First Circuit reversed the district court's decision. In determining that Canada was not entitled to sovereign immunity, the court of appeals found that the commercial activity exception applied. The court of appeals broke down the analysis

[6] *Id*. at *2.

[7] *Merlini v. Canada*, 280 F. Supp. 3d 254, 257-58 (D. Mass. 2017).

into two questions: (1) what conduct was Merlini's claim "based upon," and (2) was that conduct "commercial activity"?

First, the court identified the basis for Merlini's claim as "Canada's employment of her as a clerical worker doing routine clerical work in the Canadian consulate in Boston."[8] Canada apparently did not argue otherwise. However, the U.S. State Department appearing as an *amicus* argued that Merlini's claim was not based upon her employment by Canada, but upon the negligent conduct of one her fellow workers who had failed to secure the phone cord because that was the conduct that injured her. The United States argued that such tortious conduct is not commercial in nature and therefore the only exception that could apply was the noncommercial tort exception. The United States urged the court of appeals to return the case to the district court so Merlini could develop her negligence claim under that exception.

The First Circuit disagreed. Because the MWCA required only that Merlini prove that she was injured in the workplace in the course of her employment, the court concluded that her workplace injury claim was based upon her employment at the consulate. The court reasoned that it was unnecessary to divorce the specific injurious act from Merlini's employment relationship, especially since her cause of action arose under a provision of the MWCA that allowed her to bring a direct claim against her employer and that made her fellow employees' conduct irrelevant.

Next, the court addressed Canada's contention that the conduct upon which Merlini's claim was based was not "commercial activity." Canada argued that the circumstances of Merlini's employment and her accident were immaterial and that the only aspect of the employment relationship that was relevant for purposes of being liable under the MWCA was the employer's decision to operate without the requisite insurance. Canada further argued that its decision to provide workers' compensation benefits through its own national system was sovereign in nature. The United States supported that position as an alternative to applying the noncommercial tort exception, arguing that Canada opted out of the MWCA's insurance provisions "in a manner available exclusively to sovereigns – by enacting a statute creating an alternate and uniform compensation regime for all Canadian employees, wherever in the world they might be."[9]

The First Circuit again disagreed. Because it saw nothing in the MWCA that made an employee's claim contingent on "how" an uninsured employer chooses to compensate an injured employee, the court rejected the notion that Canada's insurance choice alone was relevant for determining the commercial nature of Canada's conduct.[10] But assuming it were, the court found that Canada's failure to obtain the requisite insurance

[8] *Merlini*, 2019 U.S. App. LEXIS 17313, at *15.

[9] *Id*. at *25.

[10] *Id*.

– "given the employment context in which it occurred" – was a choice that any private actor employing workers in Massachusetts could make. It did not matter whether Canada had a sovereign reason for choosing to compensate injured employees through its own national system, or whether Canadian law prohibited Canada from complying with the MWCA's provisions for being self-insured. All that mattered was that Canada chose to employ an American clerical worker without carrying the requisite insurance because, in that respect, Merlini's claim was "no different from the claims that other employees have brought against private employers that, like Canada, have not insured themselves in the manner" required by the MWCA.[11]

In sum, the First Circuit held that Canada's decision to employ an American worker in a clerical, non-foreign service position at its consulate in Boston without participating in the Massachusetts' workers compensation system constituted commercial activity, and that Merlini's workplace injury claim was based upon that activity and therefore satisfied the FSIA's commercial activity exception to sovereign immunity. Because the commercial activity exception applied, the noncommercial tort exception (and by extension its "discretionary function" exception) was inapplicable.

* * * *

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 17 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including governments and state-owned companies, multinational corporations and financial institutions, money managers, sovereign wealth funds, privately held businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

[11] *Id*. at *36.

Please feel free to contact any of the persons listed below if you have any questions on this important development:

Joseph D. Pizzurro
Partner
jpizzurro@curtis.com
New York: +1 212 696 6196

Robert B. Garcia
Partner
robert.garcia@curtis.com
New York: +1 212 696 6052

Kevin A. Meehan
Partner
kmeehan@curtis.com
New York: +1 212 696 6197

Julia B. Mosse
Partner
jmosse@curtis.com
New York: +1 212 696 6173

Juan O. Perla
Associate
jperla@curtis.com
New York: +1 212 696 6084