

**Jina Cha v Korea Trade Ctr.**

2009 NY Slip Op 32493(U)

October 22, 2009

Supreme Court, New York County

Docket Number: 111678/08

Judge: madden

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SCANNED ON 10/27/2009

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon Joer A. Miller  
*Justice*

PART 11

Index Number : 111678/2008  
CHA, JINA  
vs.  
KOREA TRADE CENTER  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 4-23-09  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**FILED**  
OCT 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: October 22, 2009

[Signature]  
J.S.C.

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Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----x  
JINA CHA,

Plaintiff,

- against -

KOREA TRADE CENTER a/k/a "KOTRA,"

Defendant.

-----x  
JOAN A. MADDEN, J.:

Index No. 111678/08

**FILED**  
OCT 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this is an action for gender and pregnancy discrimination under the New York State Human Rights Law, Executive Laws § 292, et seq., (the Human Rights Law), and under New York City's Human Rights Law, Administrative Code of the City of New York, § 8-102, et seq., (the City's Human Rights Law), defendant moves for summary judgment dismissing the complaint based on Defendant's claim of immunity under the Foreign Sovereign Immunities Act, 28 USC § 1602, et seq. Plaintiff opposes the motion, which is denied for the reasons below.

Background<sup>1</sup>

Plaintiff Jina Cha (Ms. Cha), a naturalized United States citizen was employed by defendant Korea Trade Center (Kotra), a non-profit organization located at 460 Park Avenue, Suite 402, New York, New York, from February 2000 until she was terminated on January 31, 2006. Ms. Cha was originally hired by Kotra as a secretary in Kotra's New York office. In 2001, Ms. Cha was promoted to the Marketing Department as a marketing manager/consultant. Ms. Cha received salary increases based on her performance in every year of her employment except

\_\_\_\_\_  
<sup>1</sup>The following facts are based on the allegations in the complaint.

2005, the year immediately preceding her termination. Ms. Cha had the most marketing experience of anyone in her position, and received a lower salary compared to her male counterparts, except for one male employee who had only been with Kotra for six months at the time that Ms. Cha was promoted to the Marketing Department. In the fall of 2005, Ms. Cha received a performance evaluation, and was told that she would not receive a raise because of her performance. In past years, even employees who performed poorly had received raises.

In June 2005, Kotra hired several new male employees, who received raises and year-end incentive bonuses despite the fact that they had not been employed for a full year when these perquisites were distributed. Only one employee other than Ms. Cha did not receive a raise in 2005, but this employee had been hired under a different contract than Ms. Cha's.

Before the performance evaluations for the second half of the year had been completed, Cho Ki Chang (Chang), Kotra's Deputy Director, informed Ms. Cha that her bonus for 2005 would be reduced by 50%. Ms. Cha later learned that her incentive bonus had been given to the male employee who had less tenure than she had, and who was not eligible for a bonus under the terms of Kotra's employee handbook.

During Ms. Cha's six years of employment with Kotra, she had signed only one performance warning as a result of a Management By Objective evaluation, whereas several male employees had to sign numerous warnings, without being terminated. Nevertheless, Chang informed Ms. Cha that, because of her rankings in the second half of 2004 and the first half of 2005, he was going to inform Kotra headquarters, in Korea, of her poor performance, and stated that she would be fired effective January 31, 2006. Ms. Cha was informed that Chang planned to fire her and intended to have her replaced with a male because he did not like to work with women. Chang made Ms. Cha feel very uncomfortable on several occasions by telling her that

she did not belong with Kotra. On or about December 7, 2005, Chang stated to Ms. Cha, "Aren't you going to have a baby?" Ms. Cha believed that this question and others that followed were personal and improper.

On or about January 6, 2006, Chang complained about a research department manager and another staff member's pregnancies, and he stated that he was worried that Kotra's customer service ranking would decrease. Ms. Cha was fired by Kotra several weeks later.

In the first and second causes of action in the complaint, Ms. Cha alleges that she is an employee under § 292 (6) of the New York State Human Rights Law, and that she is a person under § 8-102 (1) of the New York City Administrative Code. Kotra is alleged to be an employer under § 292 (5) of the state Human Rights Law, and an employer and a covered entity under § 8-102 (5) and (17) of the New York City Administrative Code.

In both causes of action, Kotra is alleged to have taken tangible employment actions against Ms. Cha, including the denial of opportunities to earn bonuses, and the creation of a hostile work environment, amounting to willful discrimination and wrongful termination on the basis of her gender and pregnancy. Kotra is also alleged to have discriminated against Ms. Cha, because of her gender and pregnancy, in the terms, conditions and privileges of her employment. Ms. Cha claims that she incurred substantial damages as a result of Kotra's conduct, including emotional distress, back pay, front pay, benefits, and compensatory damages. Ms. Cha also alleges that Kotra's discriminatory actions were taken with malice, or reckless indifference to plaintiff's statutory rights, and seeks an award of punitive damages based thereon.

Kotra moves to dismiss the complaint based on a lack of subject matter jurisdiction and/or

a lack of personal jurisdiction,<sup>2</sup> asserting its absolute immunity from suit pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 USC §§ 1603 and 1604. In particular, Kotra argues that it is a foreign state within the meaning of FSIA since it is an instrumentality or an agency of the Korean government. Kotra also argues that the statutory exemption under FSIA for foreign states engaged in “commercial activity” is inapplicable since it is not a profit-making entity.

In support of its position, Kotra relies on the affidavit of its Executive Director, Gang Suk Suh (Suh), and various documentary evidence. Suh states that he has been associated with Kotra since 1989, and that he worked for Kotra in New York City since 2007. According to Suh, Kotra is not owned by any persons, companies, corporations, or any other entity other than the government of the Republic of Korea, which funds Kotra, and is the entity with ultimate responsibility for Kotra’s supervision, control, the appointment of key management personnel, and is the ultimate beneficiary of any profits which could potentially be earned by Kotra.

Suh further states that Kotra is not intended to be a profit-making entity, and that any short-term profits which might accrue to Kotra from time to time are required to be retained by Kotra to fund its future operations, or else are required to be remitted to the government of Korea, and that no profit or dividend distributions of any kind to private persons or entities are permitted. Suh also states that Kotra is not a citizen of any country other than the Republic of Korea, and that Kotra’s sole purpose is to advance Korea’s governmental policy of encouraging and facilitating foreign trade and investment, and that Kotra itself is not engaged in commerce.

In support of his statements, Suh submits various documents including the Korea Trade-Investment Promotion Agency Act (“Act”), as amended through November 7, 2003, which Suh

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<sup>2</sup>To the extent the motion to dismiss Kotra moves to dismiss based on the purportedly lack of personal jurisdiction, the motion must be denied since Kotra admits that there is personal jurisdiction in paragraph 5 of its answer.

states serves as the by-laws for Kotra. Suh notes that under Articles 1 and 5 of the by-laws, Kotra was established for the purpose of contributing to the Korean economy and is financed by the Korean government.

He also relies on a letter dated October 27, 2008 from the Korean Consulate General located in New York City which states that it is an official communication of the Government of the Republic of Korea, relating to the legal character of Kotra. The letter describes Kotra as a non-profit Korean government agency which was established under the Act for the purpose of promoting development of national economy by providing services to Korean industries and enterprises in numerous areas such as, among others, research of overseas market, assembly and distribution of trade information, holding, participation, and observation of trade exhibitions, inducement of foreign investment in Korea. The letter also states that Kotra's capital funding is provided by the Korean government, that all its losses are borne by the Korean government, that no private person or entity shares in any potential profit which might accrue to Kotra, and that Kotra is supervised by the Minister of Commerce, Industry and Energy of the Korean government.

In opposition to the motion, Ms. Cha argues that even if Kotra is an instrumentality or an agency of the Korean government, that two exemptions under FSIA apply in the present case since Kotra implicitly waived its immunity by representing to its employees in an employee handbook that they were protected by all applicable anti-discrimination laws (28 USC § 1605 (a) (1)), and her employment by Kotra constitutes "commercial activity" as defined in 28 USC § 1605 (a) (2).

#### Discussion

"The FSIA creates the sole basis for jurisdiction over a suit against a foreign state, and at the same time bestows sovereign immunity upon the defendant foreign state unless it falls within

one of the enumerated exceptions to the presumption of immunity.” *Zveiter v Brazilian Natl. Supt. of Merchant Mar.*, 833 F Supp 1089, 1091 (SD NY 1993) (internal citations omitted).

On a motion seeking dismissal pursuant to FSIA, the court must first determine whether the defendant is a foreign state, within the meaning of the statute, and if so, next determine whether the action falls within any of the exceptions to immunity provided under 28 USC § 1605. *Id.* at 1091.

The FSIA definition of a “foreign state” includes the agencies and instrumentalities of a foreign government. *Id.*; 28 USC § 1603 (a). There is no specific test for determining whether an entity is an instrumentality or agency of a foreign state under the FSIA, but various factors have been found to be relevant in making that determination, including whether a foreign state created the entity for a national purpose and actively supervises that entity. *Filler v Hanvit Bank*, 378 F3d 213, 217 (2d Cir), *cert denied* 543 US 1022 (2004). Here, Kotra has made a sufficient showing that it is an agency or instrumentality of the Republic of Korea based on the affidavit of Suh, Kotra’s by-laws, and the letter from the Consulate describing the legal status of Kotra as a government agency.

When it has been found that an entity is “a foreign state,” a party seeking to establish jurisdiction over the foreign state bears the burden of producing evidence that one of the statutory exemptions to immunity applies, but the defendant foreign state bears the ultimate burden of persuasion on the question. *City of New York v Permanent Mission of India to the United Nations*, 446 F3d 365, 369 (2d Cir 2006) *cert granted* 549 US 1177, *affd and remanded* 551 US 193 (2007), *on remand* 533 F Supp 2d 457 (SD NY 2008).

The absolute immunity granted to foreign states by the FSIA is subject to the statutory exceptions set forth in 28 USC § 1605 through § 1607. At issue here is whether Kotra implicitly

waived its immunity by representing to its employees that they were protected by all applicable anti-discrimination laws, 28 USC § 1605 (a) (1) , and whether it can be said that Kotra was involved in “commercial activity ” as defined in 28 USC § 1605 (a) (2).

The courts have held that a foreign state will be found to have implicitly waived immunity when it agrees that the laws of a particular country should govern a contract. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013 [2d Cir 1991]; *Smith v Socialist People’s Libyan Arab Jamahiriya* (101 F3d 239, 243 [2d Cir 1996] *cert denied* 520 US 1204 [1997]).

In this case, Ms. Cha has met her burden of showing that Kotra exhibited an intent to waive its immunity under the FSIA by recruiting United States citizens to work in its New York office, and by preparing an employee handbook that provided protection under anti-discrimination laws, including detailed anti-discrimination and harassment policies, complaint procedures, and forms for the employees to file a complaint. Plaintiff has attached a copy of Kotra’s employee handbook. Affirmation of Brendan Chao, Esq., dated March 31, 2009, exh. “2.” Pages two through five of the handbook set forth Kotra’s policy regarding “Equal Employment Opportunity.”<sup>3</sup> The three and one-half page policy statement begins:

KOTRA is an equal employment opportunity employer.  
Employment decisions are based on merit and business needs, and not on race, color, citizenship status, national origin, ancestry, gender, sexual orientation, age, religion, creed, physical or mental disability, marital status, veteran status, political affiliation, or any other factor protected by law. . . .

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<sup>3</sup>The introductory page of the handbook states that the handbook is “only a guideline and is not an employment contract or promise of any kind [and that] although this handbook describes the general rules and policies of [Kotra] it is not binding on Kotra.” Neither party addresses the meaning of the introduction or its impact on Ms. Cha’s argument that Kotra implicitly waived immunity based on the anti-discrimination policy in the handbook.

It also states that:

Equal employment opportunity notices are posted near employee gathering places as required by law. The notices summarize the rights of employees to equal opportunities in employment and list the names and addresses of various governmental agencies that may be contacted in the event that a person believes they have been discriminated against.

Kotra has not offered a response to Ms. Cha's claim that it implicitly waived its immunity under the FSIA by its representation to its employees that they were protected by anti-discrimination laws of the United States. This failure to come forward with evidence to rebut Cha's claim of waiver on this basis constitutes a failure to sustain its burden of proving, by a preponderance of the evidence, that the alleged exception does not apply. *Freund v Republic of France*, 592 F Supp 2d 540, 552-553 [SD NY 2008].

Moreover, even assuming *arguendo* that there was no implied waiver of immunity based on the representations in the handbook, the court finds that the "commercial activity" exemption applies. This exemption, provided under 28 USC § 1605 (a)(2), states that "a foreign state shall not be immune from the jurisdiction of United States federal or state courts in any action in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . ." Under the FSIA, "commercial activity may be 'either a regular course of conduct or a particular commercial transaction or act,' the 'commercial character of [which] shall be determined by reference to' its 'nature' rather than its 'purpose.'" *Saudi Arabia v. Nelson*, 507 US 349, 356 (1993), quoting 28 USC § 1603(d). In determining whether an activity is commercial in nature "the question is not whether the foreign government is acting with a profit motive, or instead with the aim of fulfilling uniquely sovereign objectives.

Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are types of actions by which a private party engages in to conduct trade, traffic or commerce. *Republic of Argentina v Weltover, Inc.*, 504 US 607, 614 (1992)(internal citations omitted).

In interpreting the commercial exemption the courts have found that it applies when the conduct of a foreign state as an employer in the United States gives rise to claims of employment discrimination by American citizens or permanent residents of the United States. Thus, in *Zveiter v Brazilian Nat. Supt. of Merchant Mar.* (833 F Supp 1089), the District Court held that the employment of plaintiff, who was a citizen of both the United States and Brazil,<sup>4</sup> as a secretary in the New York office of an instrumentality of the Brazilian government constituted commercial activity exempt under FSIA. The court explained, that “[a]lthough it ‘scemed unwise to attempt an excessively precise definition’ of commercial activity, it was intended that ‘[a]ctivities such as a foreign government’s ... employment or engagement of laborers, clerical staff or public relations or marketing agents ... would be among those included within the definition.’” *Zveiter v Brazilian Nat. Supt. of Merchant Mar.*, 833 F Supp at 1093. The court also wrote that “[t]he employment of a secretary is hardly within the unique sphere of sovereign authority.” *Zveiter v Brazilian Nat. Supt. of Merchant Marine*, 833 F Supp at 1093.

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<sup>4</sup>Although in its initial decision the *Zveiter* court stated that plaintiff was an American citizen only, defendants moved for reargument based on evidence that plaintiff was also a citizen of Brazil. Upon reargument, the court adhered to its determination writing that since “plaintiff obtained her employment with defendants [in the United States] entered into her employment agreement with the defendants [in the United States] and worked for them [in the United States]... the nexus between her American citizenship giving rise to this action is far greater than the connection between her concomitant Brazilian citizenship with the employment relationship....” *Zveiter v Brazilian Nat. Supt. of Merchant Mar.*, 841 F Supp 111, 112 [SD NY 1993].

In reaching this conclusion, the court relied, in part, on the legislative history of FSIA and in particular, the Report of the House Judiciary Committee which states that “the employment of American citizens or third country nationals [as civil service personnel] by the foreign state in the United States’ in contrast to the employment of citizens of foreign sovereigns ‘would be commercial.’” *Id.*, at 1093, quoting, H.R. Rep. No. 94-1487, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 16 (1976), U.S. Code & Cong. & Admin. News, 1976, pp. 6604, 6614.

In *Hanson v. Danish Tourist Board*, 147 FSupp2d 142 (ED NY 2001), the District Court denied the defendant Danish Tourist Board’s motion to dismiss an action brought by a Danish citizen and permanent resident of the United States, alleging claims of discrimination based on age and gender, after finding that the activities at issue were commercial. Specifically, the court wrote that “the actions that form the basis for Hansen’s complaint do not reflect the exercise of ‘powers particular to sovereigns’” *Id.* at 151, quoting *Nelson*, 507 US at 360. Instead, defendant’s activities, as alleged in the complaint, “are basic employment decisions akin to those made by many small businesses. As such, they reflect an exercise of ‘powers that can also be exercised by private citizens.’” *Id.*, quoting, *Weltover*, 504 US at 614.

Based on *Zveiter* and *Hanson*, the court finds that notwithstanding evidence submitted by Kotra showing that it was not intended to be a profit-making entity, that its employment of Ms. Cha, an American citizen, to work in its New York office, and its activities related to her employment were commercial in nature, and therefore the commercial activity exception applies. Moreover, while Kotra submits evidence that Ms. Cha identified her nationality as Korcan on her employment application, Ms. Cha states in her uncontroverted affidavit that she was born in Korea in 1977, she moved to the United States in 1986, was educated here and is a United States citizen. She also states that she was never employed outside of the United States.

Next, contrary to Kotra's position, the holding in *Kato v Ishihara* (239 F Supp 2d 359 [SD NY 2002], *aff'd* 360 F3d 106 [2d Cir 2004]), is not controlling here. In *Kato*, the Second Circuit held that the commercial activity exception was inapplicable to a suit against the Governor of Tokyo and the Tokyo Metropolitan Government (TMG), based on claims of sexual harassment and retaliation alleged to have occurred in TMG's New York office. TMG was held not to have been involved in "a 'commercial activity' under the FSIA when it provided "general business development assistance, including product promotion, to Japanese businesses seeking to engage in commerce in the United States." 360 F3d at 112. The court wrote that "the fact that a governmental instrumentality like TMG is engaged in the *promotion of commerce* does not mean the instrumentality is thereby engaged in *commerce*." *Id.* (emphasis in the original).

While the Second Circuit's interpretation of the commercial exception in *Kato* is narrower than that of the District Courts in *Zveiter* and *Nelson*, integral to the *Kato* court's conclusion that TMG was immune from suit was its determination that Kato's employment was governmental in nature since Kato was a Japanese citizen and a Japanese civil servant. Thus, in support of its conclusion that Kato's employment was governmental in nature, the court cited the legislative history of the FSIA "identifying the employment of civil service personnel as an example of governmental rather than commercial activity." *Id.* at 110 (internal citations omitted). The court explained that although "Kato was employed in activities related to marketing and businesses...[she] was concededly a 'civil servant' under Japanese law and subject to the many protections afforded the Japanese civil service." *Id.* at 111. As a Japanese civil servant who had worked in New York as part of the normal rotation of such employees, the court concluded that Kato's employment was governmental. In contrast to the plaintiff in *Kato*, Ms. Cha is an American citizen and not a civil servant of a foreign state, and thus it cannot be said

that her employment is governmental as opposed to commercial in nature.

Accordingly, as the implied waiver of immunity and the commercial activities exemptions to the FSIA are applicable here, the motion for summary judgment dismissing the complaint for lack of subject matter jurisdiction must be denied.

In view of the above, it is

ORDERED that the defendant's motion for summary judgment is denied; and it is further

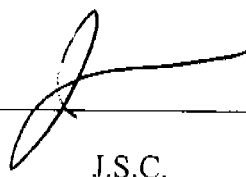
ORDERED that this action shall continue; and it is further

ORDERED that the parties shall appear for a preliminary a conference in Part 11, room 351, 60 Centre Street, New York, NY at 9:30 am on November 5, 2009.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: October 22, 2009

ENTER:



J.S.C.

**FILED**  
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