12-10-1979

Petition for Permission to Appeal Pursuant to 28 U.S.C. §1292 (b)

Lewis M. Steel '63

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

WENDER, MURASE & WHITE

Attorneys for

Office and Post Office Address

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 79-8460 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

-against-

LISA M. AVIGLIANO, et al.,

Respondents.

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. §1292(b)

WENDER, MURASE & WHITE

Attorneys for Petitioner

Office and Post Office Address, Telephone

400 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) 832-3333

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

rec 12/10/79

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

SUMITOMO SHOJI AMERICA, INC., :

Petitioner, :

- against - : No. 79-8460

LISA M. AVIGLIANO, et al., :

Respondents. :

----------x

PETITION FOR PERMISSION TO

APPEAL PURSUANT TO 28 U.S.C. §1292(b)

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Petitioner, Sumitomo Shoji America, Inc. ("Sumitomo"), respectfully represents to this Court:

1. Introductory Statement

This petition for permission to appeal is filed pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure. This action is pending in the United States District Court for the Southern District of New York before the Honorable Charles H. Tenney. By this petition, Sumitomo seeks permission to appeal an Order of the District

Court dated June 5, 1979, to the extent that such Order denied Sumitomo's motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing plaintiffs' claims purportedly brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.). Such June 5, 1979 Order was certified for appeal by the Court below by Order dated August 9, 1979, as amended on November 29, 1979.

2. Procedural Background

Because an unusual procedural background precedes this petition, a brief description of the relevant procedural history of this action should aid the Court.

Plaintiffs purport to state claims against Sumitomo pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as well as 42 U.S.C. §1981 and the Thirteenth Amendment to the United States Constitution. Plaintiffs challenge whether Sumitomo, a New York corporation, may fill its executive, managerial and specialist positions with Japanese nationals. Sumitomo claims that it has a right to employ Japanese nationals for those positions pursuant to the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (the "Treaty") and complementary provisions of the Immigration and Nationality Act, 8 U.S.C. §1101 et.seq. Sumitomo therefore moved the District Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing plaintiffs' claims on the basis that its hiring practices are protected by the Treaty and that the complaint otherwise fails to state a claim.

By Opinion and Order dated June 5, 1979 (the "June 5 Order", a copy of which is annexed hereto as Exhibit "A"),* the Court below granted Sumitomo's motion insofar as it sought dismissal of plaintiffs' claims of sex and national origin discrimination pursuant to 42 U.S.C. §1981, but denied Sumitomo's motion insofar as it sought dismissal of plaintiffs' claims pursuant to Title VII.**

Sumitomo sought an immediate appeal under 28 U.S.C. §1292(b) and moved the District Court for an order certifying for appellate review the primary question posed by its motion to dismiss, that is, whether Sumitomo is exempted by the Treaty from sanctions contained in Title VII against its allegedly discriminatory employment practices. By Opinion and Order dated August 9, 1979 (the "August 9 Order", a copy of which is annexed hereto as Exhibit "B"), the Court below amended its June 5 Order and certified for appeal the question of the relationship of the civil rights laws to the Treaty as a controlling question of law as to which there is substantial ground for difference of opinion, the immediate appeal of which may materially advance the ultimate termination of this litigation.

Thereafter, on August 15, 1979, the Department of State released documents supporting Sumitomo's position on its

---

* Reported at 473 F. Supp. 506.

**The Court noted, 473 F. Supp. 506, 508 at fn.1, that prior to determination of such motion plaintiffs apparently dropped their Thirteenth Amendment claim.

motion to dismiss (the "State Department Documents"). Accordingly, on August 16, 1979, Sumitomo requested the Court below to reconsider its denial of Sumitomo's motion in light of the new and material evidence contained in the State Department Documents.

Upon being advised that the Court below would not be sitting until after the ten day period for Sumitomo to apply to this Court for permission to appeal, and in order to assure there would be no waiver of Sumitomo's right to make such application, petitioner applied to this Court for permission to appeal the June 5 Order and joined therewith a motion for a stay of all proceedings on appeal until the Court below would have time to consider the State Department Documents.

By two Orders dated August 17, 1979 this Court denied Sumitomo's motion for a stay, and also denied its petition for permission to appeal, expressly providing however that such denial was "... without ruling on the merits without prejudice to the motion's being renewed after Judge Tenney has had an opportunity to consider [the State Department Documents]."*

The District Court treated the matter as a remand. Pursuant thereto, further memoranda of law and copies of the State Department Documents were submitted to the District

---

*Copies of such Orders, Nos. 3379 and 3380, are annexed hereto as Exhibit "C".

Court. Then, by Opinion and Order dated November 29, 1979 (the "November 29 Order", a copy of which is annexed hereto as Exhibit "D"), the District Court again denied Sumitomo's motion to dismiss plaintiffs' Title VII claims, albeit on the basis of reasoning somewhat different from that on which it relied in its June 5 Order. The District Court's November 29, 1979 Order also amended its August 9 Order, leaving effective the operative language relating to certification.

Sumitomo, therefore, submits this renewed petition as permitted by this Court's Order No. 3379 of August 17, 1979.

3. Statement of Facts Necessary to Understanding of Controlling Question of Law

All plaintiffs (with the exception of one permanent resident alien) are United States citizens, are female, and are past or present employees of Sumitomo who applied for and were hired by Sumitomo in secretarial positions. Plaintiffs claim that Sumitomo, incorporated in New York as a wholly owned subsidiary of a Japanese corporation, hires only male Japanese nationals to fill executive, managerial and sales positions.

Sumitomo denies that it discriminates, but contends in any event that because it is 100% Japanese owned, it is an intended beneficiary of the right of freedom of choice in employment provision of Article VIII(1) of the Treaty, which provides, in pertinent part, that

> "[n]ationals and companies of either Party shall be permitted to engage, within the

> territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." 4 U.S.T. at 2070.

Sumitomo asserts that such freedom of choice in employment provisions of the Treaty, and related provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., have the purpose of permitting corporations of each country to assign their home country nationals to executive, managerial and specialist positions in both branches and subsidiaries they have established in the other country, and that its employment of Japanese nationals in positions specified by the Treaty does not violate any law, both because the Treaty permits such hiring practices, and because an allegation of discrimination based on nationality does not, in any event, state a claim under Title VII.

Plaintiffs do not dispute that the Japanese nationals assigned to Sumitomo by its parent company in Japan enter the United States as nonimmigrant "treaty trader" aliens under E-1 visas, as authorized by the Department of State and the Immigration and Naturalization Service ("INS"), solely for the purpose of permitting their employment by Sumitomo in the United States in the key positions specified by the Treaty. Rather, it is plaintiffs' contention that because Sumitomo is incorporated in New York, it is therefore a "United States" entity, not entitled to claim the benefit of the right of freedom of choice in employment granted by the Treaty.

4. Controlling Question of Law

In its August 9 Order, as amended, the Court below stated that the controlling question of law presented in this case is the "...relationship between the Treaty and the civil rights law" (Ex. "B" at 2). This controlling question raises two discrete issues:

First, whether Sumitomo, as a wholly-owned subsidiary of a Japanese corporation, is an intended beneficiary of the Treaty right granting freedom of choice in employment, and therefore has standing to assert such right.

Second, assuming standing, whether the right of freedom of choice in employment granted by the Treaty permits Sumitomo to fill key positions specified in the Treaty with Japanese nationals.

Because these questions, if resolved in the affirmative, would dispose of this litigation, they constitute controlling questions of law within the meaning of 28 U.S.C. §1292(b).

5. Substantial Basis for Difference of Opinion on the Question of Law Involved

That there is substantial basis for difference of opinion on the questions of law here involved is not susceptible of doubt.

Prior to the return date of Sumitomo's motion to dismiss, neither plaintiffs, nor Sumitomo, nor the Equal Employment Opportunity Commission (the "EEOC") as amicus

curiae, was able to cite a single judicial authority which addressed directly the issue of whether a United States subsidiary of a Japanese corporation may assert the Treaty's employment rights. Since the date of submission of Sumitomo's motion, the three District Courts which have considered the applicability of the same or similar Treaty provisions, and related provisions of the Immigration and Nationality Act, have reached divergent conclusions concerning the purpose, intent and effect of those provisions and their relationship to United States civil rights laws. The sole area of agreement among such Courts is that the question of the availability of such provisions as a defense to an action under the civil rights laws is appropriate for immediate appeal under 28 U.S.C. §1292(b).

Thus, in Spiess v. C. Itoh & Co. (America), Inc., 469 F. Supp. 1 (S.D.Tex. 1979), the District Court denied a similar motion to dismiss a complaint filed pursuant to the civil rights laws, holding that under Article XXII(3) of the Treaty, a New York subsidiary of a Japanese corporation would be defined a "company of the United States", and hence was precluded from invoking any benefits at all of the Treaty, including the freedom of choice in employment provision of Article VIII(1). Spiess, supra, 469 F. Supp. at 9. That Court subsequently certified for immediate appeal its denial of the motion to dismiss. (Id., 469 F. Supp. at 9-11). By

order dated June 4, 1979, the United States Court of Appeals for the Fifth Circuit granted permission for immediate appeal under 28 U.S.C. §1292(b).

In Linskey v. Heidelberg Eastern, Inc., et al., 470 F. Supp. 1181 (E.D.N.Y. 1979), the District Court construed a virtually identical right of freedom of choice in employment provision of the 1951 Treaty of Friendship, Commerce and Navigation between the United States and Denmark. The District Court in Linskey, without expressly ruling on the issue of standing permitted the corporate defendant therein, also a New York subsidiary of a foreign corporation, to invoke that treaty's hiring right provision, but held that such provisions did not immunize the alleged employment practice there under attack from judicial scrutiny. Then, by order dated August 15, 1979 (___ F. Supp. ____), the District Court in Linskey certified the question of whether the employment right provisions of the U.S.-Denmark treaty would provide a defense to an action alleging national origin and age discrimination.*

In this action, on the other hand, the Court below in its June 5 Order initially followed the reasoning of the Court in Spiess, supra, and held that under Article XXII(3) of

---

*Sumitomo views Judge Constantino's recognition of a locally incorporated subsidiary's standing to assert hiring rights as consistent both with decisions of the Immigration and Naturalization Service, see, e.g. Matter of N.S., VII I&N Decs. 426, 428 (March 28, 1958); Matter of Z&R, VII I&N Decs. 482 (Vol. 23, 1959), and with State Department regulations, see, Department of State Foreign Affairs Manual, Vol.9-Visas, Note 8 accompanying 22 C.F.R. §41.40(a).

the Treaty Sumitomo is a "company of the United States" and therefore lacks standing to interpose the Treaty as a defense. However, after treating this Court's August 17, 1979 Order as a remand and reviewing the State Department Documents, on reconsideration the Court below rejected its earlier interpretation of Article XXII(3) of the Treaty and concluded that

> "... Article XXII(3) [of the Treaty] was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty." [emphasis added.] November 29th Order at 15.

Despite acknowledgment of such intent, and recognition of the fact that the State Department Documents "... lend some support to Sumitomo's contentions ..." (November 29 Order at 3), and "... render a decision less certain ...." (Id. at 15), the Court below held once again that a locally-incorporated subsidiary of a Japanese company is "ineligible for freedom-of-choice protection [of Article VIII of the Treaty] within the territories of the United States." Id. at 19.*

The divergencies reflected in the decisions of the three United States District Courts which have considered the controlling question of law herein are equally reflected in three separate communications addressed to the EEOC by the Department of State. In the first such communication, a March

---

* The Court below reached this result by reliance on a "plain-term reading" of Article XXII(3) of the Treaty, reasoning that even if not applicable to exclude a locally-incorporated subsidiary from standing to assert rights under other articles of the Treaty, Article XXII(3) does operate to exclude such standing under Article VIII (November 29 Order at 19).

15, 1978 letter from a junior staff attorney at the Department of State addressed to the EEOC in response to inquiries made by the EEOC, that staff attorney said in substance that there was no relationship at all between the Treaty and the civil rights laws.

Apparently not satisfied with that response, the EEOC addressed a new inquiry to the Department of State regarding the relationship of the Treaty to Title VII. By letter dated October 18, 1978, a Deputy Legal Adviser of the Department of State opined among other things to the EEOC that:

> "[W]e...believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their 'executive personnel' positions with Japanese nationals admitted to this country as treaty traders...."
>
> * * *
>
> "[W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form." 73 Am. J. Int'l L. No. 2, 281, 282-283 (1979).

Thereafter, and again at the invitation of the EEOC, the Department of State issued still another letter to the EEOC, this one dated September 11, 1979. The latest document adopts in part still another interpretation of the Treaty provisions at issue and, in particular, opines without reasoning

or analysis that the freedom of choice in employment provisions of the Treaty are not available to locally incorporated subsidiaries. See, November 29 Order at 6.

Thus, the three pertinent District Court decisions are in conflict with each other, the three relevant letters from the State Department attorneys addressing the question are each at odds with each other, and documents produced from the State Department's own files also place the District Courts' resolutions of the issue in doubt.

As to the second facet of the controlling question of law -- whether the freedom of choice in employment provision of the Treaty protects Sumitomo's hiring of Japanese nationals for the positions specified in the Treaty -- the division of authority is equally pronounced. Although the Court below now states it has not yet addressed that issue (November 29 Order at 20), it notes an apparent conflict between the decision of the Court in Linskey, supra (which saw no protection in the U.S.-Denmark treaty against age and national origin discrimination claims) and authorities such as Herman Walker, the man who formulated most of these modern treaties. Walker, in "Provisions on Companies in United States Commercial Treaties," 50 Am. J. Int'l. Law, 373, 386 (1956), expressly notes that such treaties do give greater than mere national treatment in granting hiring rights. This proposition was also expressly recognized by the Department of State in its October 17, 1978 Opinion, supra, wherein the Deputy Legal Advisor stated that:

> "Article VIII(1) of the FCN Treaty...was intended to ensure that U.S. companies operating in Japan could hire U.S. personnel for critical positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention..." 73 Am. J. Int'l. L. No.2, 281,282.

This view as expressed by the State Department has not been changed or modified in any subsequent letter, and is supported as well by Walker, the State Department Documents, and long-standing and continuing policies and practices of the State Department and the INS.

Such a division of authority within the State Department, which has responsibility for administering the Treaty, as well as the conflict of views between the State Department and the Court in Linskey, which spoke to the issue on the merits, also provides a showing of difference of opinion making this case appropriate for certification. August 9 Order at 4.

5. An Immediate Appeal May Materially Advance the Termination of this Action

Plaintiffs have brought this action as a putative nation-wide class action. The Court below has already found that both pre-trial discovery and trial on the merits in this action will prove long, arduous and expensive to all of the parties:

> "Although...there has been no class certification yet in the case at bar, the Court expects that the litigation will be sufficiently complicated that it would be a waste

> of judicial time to try it with the novel jurisdictional question in limbo." August 9 Order at 4. See also, Spiess, supra, 469 F. Supp. at 9.

Such an immediate appeal would, as well, serve as both controlling authority and guiding precedent in other cases e.g. Linskey, supra, and Spiess, supra, where like issues are present, thus expediting the disposition of those actions as well as the instant one.

Finally, the resolution of such controlling questions of law will also have an immediate bearing upon hiring practices of United States controlled entities operating in the numerous other countries with which the United States has similar treaties, as well as the reciprocal rights of foreign-controlled entities from those countries planning to do business or already doing business through subsidiaries as well as branches here.*

CONCLUSION

Because the Order of the Court below involves issues of law which, if resolved as Sumitomo requests, would dispose of the entire controversy herein, those issues are controlling questions of law, an immediate appeal of which may materially advance the termination of this litigation for purposes of 28

---

* A commentary on this action and on Spiess, supra, has noted that these cases pose "an entirely novel question", and that Sumitomo's assertion of the right of freedom of choice in employment granted by the Treaty "raises an issue of much greater significance than the meaning of a single provision in the Japanese Treaty." Schwartz, "Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers", 31 Stan. L. Rev. No. 5, 947, 947-948 (May, 1979).

U.S.C. §1292(b) and R. 5 Fed.R.App.Proc. Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702 (5th Cir. 1961); see generally, 9 Moore's Federal Practice ¶205.05 at 1110; 7B Moore's Federal Practice §1292 at JC 435, et. seq., and cases cited thereat.

Further, as each Court which has thus far considered the issue has concluded, the relationship of the Treaty to the civil rights law is a question as to which there exists a substantial basis for difference of opinion. August 9 Order supra; Linskey v. Heidelberg, supra; Spiess v. C. Itoh, supra. Thus, this case meets the specific criteria enumerated by 28 U.S.C. §1292(b), and also involves other features (e.g., facilitating disposition of other pending cases) which make an immediate appeal desirable. Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 223 (S.D.N.Y.) aff'd 528 F.2d 31 (2d Cir. 1975).

Wherefore, petitioner prays for permission to appeal under §1292(b) of Title 28, United States Code, from the Order hereinabove described.

Dated: New York, New York
December 10, 1979

Respectfully submitted,

WENDER, MURASE & WHITE

By J. Portis Hicks
(A Member of the Firm)
Attorneys for Petitioner Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
(212) 832-3333

Lisa M. AVIGLIANO et al., Plaintiffs,

v.

SUMITOMO SHOJI AMERICA, INC., Defendant.

No. 77 Civ. 5641 (CHT).

United States District Court, S. D. New York.

June 5, 1979.

Action was instituted on complaint for alleged discriminatory employment practices and on counterclaims for abuse of legal process and tortious interference with business activities. On cross motions for dismissal, the District Court, Tenney, J., held that: (1) claims that plaintiffs had been discriminated against by corporate defendant in their positions as past and present female secretarial employees because they were not Japanese nationals could not be equated with discrimination based on race and, hence, were not actionable under the equality of rights statute even assuming national origin discrimination was not indistinguishable from racial discrimination, and (2) corporate defendant was not entitled to seek punitive damages against plaintiffs by way of counterclaim for alleged wrongful conduct on part of plaintiffs in commencing an allegedly spurious and frivolous action, but corporate defendant did state a cause of action in its common language for alleged abuse of process in state and federal administrative and

judicial proceedings and for alleged intentional infliction of temporal damages without a legal motive, commonly referred to as prima facie tort.

Motions granted in part and denied in part.

See also, D.C., —— F.R.D. ——.

1. Civil Rights ⇐13.10

Section, D.C. —— F.R.D. ——.

Corporate defendant, as a corporation incorporated under the laws of New York, was, according to very terms of the treaty of friendship, commerce and navigation between the United States and Japan, a company of the United States, not of Japan, and as such was without standing in discriminatory employment action to invoke as a defense the freedom-of-choice provision granted by the treaty to companies of Japan within the territory of the United States. 42 U.S.C.A. § 1981.

2. Civil Rights ⇐9.14

Provisions of the equality of rights statute did not apply to alleged sex discrimination which corporate defendant allegedly practiced against plaintiffs as past and present female secretarial employees. 42 U.S.C.A. § 1981.

3. Civil Rights ⇐9.14

Claims that plaintiffs had been discriminated against by corporate defendant in their positions as past and present female secretarial employees because they were not Japanese nationals could not be equated with discrimination based on race and, hence, were not actionable under the equality of rights statute even assuming national origin discrimination was not indistinguishable from racial discrimination. 42 U.S.C.A. § 1981.

4. Civil Rights ⇐13.17

Corporate defendant could not request punitive damages through a counterclaim by reason of plaintiffs' "frivolous and spurious" institution of discriminatory employment suit "in bad faith, vexatiously, willfully and wrongfully." Fed.Rules Civ.Proc. rule 12(b), 28 U.S.C.A.; Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e–5(k).

5. Process ⇐171

Counterclaim alleging that plaintiffs' purpose of bringing discriminatory employment claim before administrative and judicial tribunals was to coerce corporate defendant into acceding to their demands for work assignments for which they were unqualified and for payment of additional compensation to which they were not entitled was sufficient to state a cause of action for tort of abuse of process.

6. Federal Civil Procedure ⇐1835

Court was required to accept allegations of counterclaim as true for purposes of motion to dismiss.

7. Process ⇐171

Corporate defendant was entitled in discriminatory employment suit to prove contention in its counterclaim for abuse of process that true intent of plaintiff was not legitimately to invoke processes of administrative agencies and courts, but to coerce defendant into yielding to their demands for promotion and higher pay.

8. Torts ⇐4

Intentional infliction of temporal damages without a legal motive, commonly referred to as a prima facie tort, is a tort recognizable at law and requires infliction of intentional harm, resulting in damages, without excuse or justification, by acts or a series of acts that would otherwise be lawful.

9. Torts ⇐26(1)

Counterclaim wherein discriminatory employment defendant alleged that by institution of vexatious federal and state administrative and judicial proceedings and by disruptive and harassing activity in office, plaintiffs deliberately and without justification inflicted temporal and economic harm upon defendant was sufficient to state a cause of action for intentional infliction of temporal distress without a legal motive, commonly referred to as a prima facie tort.

10. Federal Civil Procedure ⇐1741

Counterclaims filed by corporate defendant in discriminatory employment ac-

tion were not subject to being dismissed on ground that filing of charges before Equal Employment Opportunity Commission and bringing of action were absolutely privileged. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e–3(a).

Eisner, Levy, Steel & Bellman, P.C., New York City, for plaintiffs; Lewis M. Steel, New York City, of counsel.

Wender, Murase & White, New York City, for defendant; Jiro Murase, J. Portis Hicks, Edward H. Martin, Lance Gotthoffer, New York City, of counsel.

Equal Employment Opportunity Commission, Washington, D.C., for amicus curiae; Abner W. Sibal, Gen. Counsel, Joseph T. Eddins, Jr., Associate Gen. Counsel, Lutz Alexander Prager, John D. Schmelzer, Washington, D.C., of counsel.

Ronald G. Copeland, Regional Counsel, New York City, Local Counsel, for E.E.O.C.

OPINION

TENNEY, District Judge.

In this civil rights case, plaintiffs charge discrimination on the bases of sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1974), and of 42 U.S.C. § 1981 (1970).[1] They seek class action status. Plaintiffs are past and present female secretarial employees of defendant Sumitomo Shoji America, Inc.[2] ("Sumitomo"). Sumitomo is an "integrated trading company"[3] incorporated in New York as a wholly owned subsidiary of a Japanese corporation. The parent corporation is not a party to this action. Plaintiffs, seeking injunctive and compensatory relief, claim that they have been restricted to clerical jobs and not trained for or promoted to executive, managerial or sales positions for which Sumitomo favors male citizens of Japan. Jurisdiction is based upon 28 U.S.C. § 1331 and § 1343.[4]

Sumitomo denies that the company discriminates and now moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims asserted under Title VII and section 1981. Sumitomo claims that the provisions of Title VII and of section 1981 must yield to the right of freedom of choice in employment assured by the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. 2863 (entered into force Oct. 30, 1953) ("the Treaty"). In addition to positing that Sumitomo is insulated from federal review of its employment practices by the Treaty, Sumitomo claims that plaintiffs' allegations of discrimination based on sex and national origin fail to state a claim under 42 U.S.C. § 1981.

Sumitomo also interposes four counterclaims, invoking this Court's ancillary jurisdiction essentially to seek redress for plain-

1. The complaint also includes a claim under the thirteenth amendment to the United States Constitution. As this claim apparently has been dropped, the Court sees no need to consider its merits.

2. The plaintiffs are eleven women, all of whom claim to be citizens of the United States except for one who claims to be a citizen of Japan. The complaint offers no other details of plaintiffs' claims.

3. "Integrated trading companies" engage primarily in the purchase and resale of goods, mainly in import and export markets. According to the Affidavit of J. Portis Hicks, sworn to May 18, 1978, there are fewer than a dozen integrated trading companies and these account for more than 50% of Japan's imports and exports.

4. Reference in the jurisdictional statement to 28 U.S.C. §§ 2201 and 2202 (the Federal Declaratory Judgment Act) remains a mystery to the Court, which can discern no basis for this relief. Plaintiffs seek judgment (1) enjoining the defendant from engaging in the alleged unlawful employment practices, both current and future; (2) directing the defendant to promote plaintiffs to executive and other managerial and sales positions and to institute a training program to upgrade plaintiffs and to take affirmative action to remedy the effects of past discriminatory practices; (3) for compensatory and punitive damages; and (4) for the cost of the action with reasonable attorney's fees. Unless plaintiffs wish to enlighten the Court, the demand for declaratory relief will be stricken.

tiffs' alleged abuse of legal process and tortious interference with Sumitomo's business activities. Plaintiffs cross-move for dismissal of the counterclaims pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that none states a claim upon which relief can be granted and that the Court lacks subject matter jurisdiction. For the reasons discussed below, the motions to dismiss plaintiffs' section 1981 claim and Sumitomo's first counterclaim are granted, and the motions to dismiss the Title VII claim and the remaining counterclaims are denied.

The Treaty

On April 2, 1953 the United States and Japan entered into a Treaty of Friendship, Commerce and Navigation. The purpose of the Treaty is

> [to strengthen] the bonds of peace and friendship traditionally existing between them and [to encourage] closer economic and cultural relations between their peoples . . . by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges . . . based in general upon the principles of national and most-favored-nation treatment unconditionally accorded . . .[5]

4 U.S.T. at 2066. The effect of the Treaty is to assure that nationals of one party are not discriminated against within the territory of the other party.[6]

Article VIII(1) of the Treaty provides, in pertinent part, that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.* at 2070. Sumitomo, in moving to dismiss the discrimination claims against it, frames the issue before this Court as whether Title VII and section 1981 of the Civil Rights Act of 1964 must yield to the right of freedom of choice in executive and other specialist personnel granted by Article VIII(1) of the Treaty. However, the Court finds that the issue before it is even more fundamental; that is, whether Sumitomo can invoke the aegis of the Treaty as sanction for its employment practices. The initial inquiry concerns the nationality of Sumitomo.

[1] Article VIII(1) of the Treaty provides that Japanese and American corporations may engage within the territory of the other certain personnel of their choice. Article XXII, the definitional section of the Treaty, states in paragraph 3 that:

> [a]s used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party.

Id. at 2079–80.[7] This is entirely consistent with traditional rules of corporate law which, for most purposes, treat a corporation as an entity distinct from its shareholders and accord to the corporation the citizenship of its place of incorporation:

> The theory of "corporate personality" permits a corporation to be regarded as a "person" with an existence—in the state of incorporation—separate from the nat-

5. Preface, Treaty of Friendship, Commerce and Navigation Between The United States of America and Japan (April 2, 1953).

6. *See United States v. R. P. Oldham Company*, 152 F.Supp. 818 (N.D.Cal.1957).

7. This provision has been paraphrased by the court in *United States v. R. P. Oldham Company, supra*, 152 F.Supp. at 823:

> [B]y the terms of the Treaty itself as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.

> ural persons who own it. . . . [F]or purposes of federal court jurisdiction . . . a corporation is "deemed" to be a citizen of the state by which it was created.

Hornstein, *Corporate Law and Practice* § 281 (1959) (*citing Louisville, Cincinnati, and Charleston R. R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555, 11 L.Ed. 353 (1844)). Sumitomo is incorporated under the laws of New York. Therefore, according to the very terms of the Treaty, Sumitomo is a company of the United States, not of Japan, and as such has no standing to invoke the freedom-of-choice provision granted by Article VIII(1) to companies of Japan within the territory of the United States.

This conclusion is supported by two district court decisions in which the 1953 Japanese-American Treaty was raised by way of defense. In *United States v. R. P. Oldham Co.*, 152 F.Supp. 818 (N.D.Cal.1957), a wholly owned American subsidiary of a Japanese corporation was one of five corporations indicted for conspiracy in restraint of commerce in Japanese wire nails. The defendant argued that Article XVIII of the Treaty, which dealt with antitrust violations, denied the federal court jurisdiction by providing the exclusive remedy. Not only did the district court hold that Article XVIII provided a supplemental rather than exclusive remedy, but it also found that, even were Article XVIII an exclusive remedy, the California-incorporated subsidiary lacked standing to invoke this provision. The nationality of the defendant was determined by the terms of Article XXII and the traditional principles of corporate law. Moreover, the *Oldham* court found this conclusion not inconsistent with the policies underlying the Treaty:

> If [the defendant] had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.

United States v. R. P. Oldham Co., supra, 152 F.Supp. at 823.

In *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1 (S.D.Tex.1979), Judge Bue of the Southern District of Texas recently held that the 1953 Treaty did not provide the New York-incorporated subsidiary of a Japanese corporation with immunity from Title VII and section 1981. The motion before Judge Bue was essentially identical to that before this Court. Non-Japanese employees of a wholly owned domestic subsidiary of a Japanese corporation filed suit against their employer alleging racially discriminatory employment practices. The defendant C. Itoh & Co. (America), Inc. ("Itoh-America") moved to dismiss, arguing that under the Treaty it has an absolute right to hire personnel of its choice. In a well reasoned opinion, Judge Bue held:

> Given the Treaty's own definitional terms, Itoh-America is a company of the United States for purposes of the interpretation of Article VIII(1), . . . which applies only to companies of one party within the territories of the other party . . . . Itoh-America is a United States company for purposes of Title VIII and, like other United States companies, is subject to suit on the grounds that its employment practices are racially discriminatory.

Id. at 9.[8]

To avoid the conclusion that it has no standing to invoke the Treaty, Sumitomo

8. Itoh-America contended, as does Sumitomo, that subsequent developments and expansion of the concept of standing renders obsolete the *Oldham* analysis of the standing of corporate subsidiaries. *Citing Calnetics Corp. v. Volkswagon of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), both Itoh-America and Sumitomo argue that the *Oldham* test has been implicitly overruled by a liberalized standard. In *Calnetics*, a private antitrust action was commenced against a United States-incorporated subsidiary of a West German corporation and its wholly owned American-incorporated air conditioning subsidiary. The district court found that the defendants had violated the antitrust laws and ordered, *inter alia*, a seven-year import ban in the United States of Volkswagons with factory-installed air conditioning.

relies upon a four-page letter submitted on November 17, 1978 by the United States Department of State to the Equal Employment Opportunity Commission ("EEOC"). The EEOC, which has submitted an amicus curiae brief here in opposition to Sumitomo's motion to dismiss,[9] had posed certain questions to the State Department. To one, "[d]oes the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders," [10] the State Department replied, in pertinent part:

> The phrase "of their choice" should be interpreted to give effect to [the intention that United States companies operating in Japan could hire United States personnel for critical positions, and vice versa], and we therefore believe that Article VIII(1) permits U. S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. . . .

Letter from Lee R. Marks, Deputy Legal Adviser, Department of State, dated October 17, 1978, to Abner W. Sibal, General Counsel, EEOC.

To another question, "[i]s the situation different if the company doing business in the United States is not incorporated in the United States," the State Department replied, in pertinent part:

> [W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

Sumitomo relies upon these statements to confirm its "preferential right and privilege to hire non-immigrant Japanese nationals" under the Treaty. The Court has carefully considered the State Department letter and is mindful of the Supreme Court's admonition in *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218 (1960), that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *See also Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S.Ct. 191, 78 L.Ed. 315 (1933). However, in the absence of analysis or reasoning offered by the State Department in support of its position,[11] this Court does not find in the

The Ninth Circuit reversed the finding of antitrust violations and questioned the remedy imposed because the effect might be to discriminate against West German products in contravention of the German-American Treaty of 1954. Judge Bue has distinguished *Calnetics*, and this Court concurs in his analysis:

> Read in a light most favorable to Itoh-America, *Calnetics* stands for the proposition that a United States incorporated subsidiary of a foreign corporation has standing to raise the claim that the Treaty rights of its parent may be affected by court ordered relief. . . . In *Calnetics* the Court of Appeals determined that the import ban ordered by the trial court might discriminate against the products of VW-Germany in contravention of that company's Treaty rights. By contrast . . . Itoh-Japan [the parent company of Itoh-America] has no Article VIII(1) right to staff Itoh-America. Accordingly . . . even if Itoh-America has standing to invoke the Treaty rights of Itoh-Japan, it can claim no shield against application of Title VII to its own employment practices.

Spiess v. C. Itoh & Co. (America), Inc., supra, 469 F.Supp. at 9.

9. The EEOC also filed an amicus brief in support of plaintiffs' motion to dismiss the counterclaims. *See* text *infra*.

10. *See* text *infra*.

11. It is disturbing that, in concluding that companies doing business and companies incorporated in the United States are to be treated equally under the Treaty, the State Department quotes only the first portion of the definitional section: "Article XXIII [sic] defines 'companies' as 'corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.' " The State Department neglects to quote the following sentence, which states that companies formed under the applicable laws of one of the parties are deemed companies thereof.

letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1), or to reject established principles of corporate law and the precedents in the Fifth and Ninth Circuits.[12]

Sumitomo also contends that it retains Japanese identity by virtue of United States regulations and guidelines adopted in connection with Article I of the Treaty, which enables nationals of either the United States or Japan to enter the territories of the other and to remain therein for specified purposes. In connection with Article I of the Treaty, section 1101(a)(15) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, provides:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . .
>
> . . . . . .
>
> (E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . .

The Department of State has promulgated regulations that an alien must satisfy in order to obtain a treaty trader visa pursuant to section 1101(a)(15)(E)(i). Among these is that if the employer is not an individual, it "must be . . . an organization which is principally owned by a person or persons having the nationality of the Treaty country." 22 C.F.R. § 41.40 (1977). The parameters of this regulation are further described in 9 FOREIGN AFFAIRS MANUAL PART II, which states: "the nationality of the employing firm is determined by those persons who own more than 50% of the stock of the employing corporation regardless of the place of incorporation."[13]

Sumitomo seizes on the regulatory standard to urge that nationality for purposes of the Treaty should be determined by the State Department guidelines, explaining that it is by interaction with Article I that the Article VIII "freedom of choice" provision is implemented. As Sumitomo is a wholly owned subsidiary of a Japanese company, by this test Sumitomo also would be a Japanese company. The Court agrees with Judge Bue who, when presented with the same argument, found that "resort to the treaty trader guidelines to determine corporate nationality for purposes of interpretation of the Treaty provisions is unwarranted in the face of the clear definitional provisions included in Article XXII(3) of the Treaty itself." *Spiess v. C. Itoh & Co., supra*, 469 F.Supp. at 6.[14] The purpose of

12. Subsequent to the filing of the district court's Memorandum and Opinion in *Spiess v. C. Itoh & Co. (America), Inc., supra*, the opinion letter submitted by the Department of State to the EEOC was brought to the attention of that court, and a motion was filed requesting certification of the March 1, 1979 Order to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

Reconsidering his decision in light of the State Department letter, Judge Bue reaffirmed his holding that Itoh-America is a company of the United States under the terms of the Treaty and concluded that the opinion letter did not warrant reversal of the court's prior order. Nevertheless, certification was granted because

> [t]he Court concludes that the March 1 Order involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the ultimate determination of this litigation.
>
> *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F.Supp. 9 (S.D.Tex. Apr. 10, 1979).

Accordingly, the following question was certified to the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10.

13. The Manual is distributed to all State Department consular offices and to the offices of District Directors of Immigration.

14. The State Department guidelines are promulgated for the purpose of determining an individual's immigration status; they are not designed for the purpose of defining a corporation's juridical status. Two decisions from this district lend support to this conclusion.

the Treaty is to assure that Japanese companies operating in the United States, and vice versa, will not be discriminated against in favor of domestic corporations. Sumitomo is a domestic corporation and as such has neither standing nor need to invoke the aegis of the Treaty. Accordingly, the motion to dismiss the discrimination claims on the basis of the Treaty is denied.

The Section 1981 Claims

[2] The second issue before the Court is whether the provisions of 42 U.S.C. section 1981 [15] apply to claims alleging discrimination based on sex and national origin. The law in this circuit, as in others, is clear that section 1981 does not apply to sex discrimination. *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 377 F.Supp. 481 (S.D.N.Y.1974), *rev'd on other grounds*, 512 F.2d 856 (2d Cir. 1975); *O'Connell v. Teachers College*, 63 F.R.D. 638 (S.D.N.Y.1974). *See also Vera v. Bethlehem Steel Corp.*, 448 F.Supp. 610 (M.D.Pa.1978); *Apodaca v. General Electric Co.*, 445 F.Supp. 821 (D.N.M.1978).

However, there is a split of authority among the courts which have considered the question whether claims of discrimination based on national origin are actionable under section 1981—a question, it appears, that the Second Circuit has not yet addressed. *Compare, e. g., Apodaca v. General Electric Company, supra; Vera v. Bethlehem Steel Corp., supra; Martinez v. Hazelton Research Animals, Inc.*, 430 F.Supp. 186 (D.Md.1977); *Budinsky v. Corning Glass Works*, 425 F.Supp. 786 (W.D.Pa.1977); *Kurylas v. United States Department of Agriculture*, 373 F.Supp. 1072 (D.D.C.1974), *aff'd*, 169 U.S.App.D.C. 58, 514 F.2d 894 (1975), *with LaFore v. Emblem Tape & Label Co.*, 448 F.Supp. 824 (D.Colo.1978); *Ortega v. Merit Insurance Co.*, 433 F.Supp. 135 (N.D.Ill.1977).

In *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D.Pa.1975), the court reviewed carefully the legislative history of section 1981 and concluded that the section applies to discrimination based on race and alienage only. It then characterized the alleged discrimination against Spanish surnamed individuals as based on national origin and held that no action lay under section 1981. The court held

> that the provisions of 42 U.S.C. § 1981 *are limited in their application to discrimination, the effect of which is to deny to any person within the jurisdiction of the United States any of the rights enumerated in that section, to the extent that such rights are enjoyed by white citizens of this nation. Discrimination on other grounds, such as religion, sex, or national*

In *Tokyo Sansei v. Esperdy*, 298 F.Supp. 945 (S.D.N.Y.1969), an action for review of the determination of the district director of the Immigration and Naturalization Service ("INS") was brought by individuals who had been denied treaty trader status. Their corporate employer, a wholly owned subsidiary of a Japanese corporation, joined in the action as a plaintiff. The district court upheld the administrative determination denying treaty trader status and noted that

> The question [whether the employer has standing] is substantial. It seems likely that without the individual plaintiffs, the corporation, however great its incidental "interest" as a business matter, could not maintain the suit. And with the individuals in the case, the corporation, strictly speaking, is unnecessary . . . .

Id. at 948 n.4.

Similarly, in *Nippon Express U.S.A., Inc. v. Esperdy*, 261 F.Supp. 561 (S.D.N.Y.1966), a subsidiary of a Japanese express company sought review of the denial by the INS district director of an application made by the corporate employer on behalf of an alien employee for continuation of her status as a treaty trader. The district court concluded that

> [t]he Immigration and Naturalization Service has the responsibility for deciding [treaty trader status]. There is no merit to plaintiffs' contention that the Japanese employer itself may confer that status upon any employee it chooses.

Id. at 565.

15. Section 1981 provides:

> All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

origin, to which white citizens may be subject, as well as white non-citizens, non-white citizens, or non-white non-citizens, is not proscribed by the statute.

68 F.R.D. at 15 (emphasis in original).[16]

[3] A few courts have held that if national origin discrimination is motivated by or indistinguishable from racial discrimination, a claim will be actionable under section 1981.[17] However, even were this Court to find the *Jones* analysis unpersuasive, on the facts of the instant action it could not equate plaintiffs' claims that they have been discriminated against because they are *not* Japanese nationals with discrimination based on their race. Indeed, from a superficial perusal of the plaintiffs' names it appears that at least one of the plaintiffs is non-Caucasian. As plaintiffs have, and are exercising, an adequate remedy for redress under Title VII, there is no need for them to strain to fit their grievances into the mold of racial discrimination. The Court concludes that the plaintiffs' allegations of discrimination based on sex and national origin are insufficient to sustain a cause of action under section 1981 and that these claims should be dismissed.

The Counterclaims

Plaintiffs cross-move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Sumitomo's amended counterclaims for failure to state a claim upon which relief can be granted. Sumitomo counterclaims, first, for attorney's fees pursuant to 42 U.S.C. § 2000e–5(k) and punitive damages by reason of plaintiffs' "frivolous and spurious" institution of this lawsuit "in bad faith, vexatiously, willfully and wrongfully"; second, for damages by reason of plaintiffs' alleged abuse of the federal administrative and judicial process; third, for damages by reason of plaintiffs' common-law abuse of process; and fourth, for damages by reason of plaintiffs' tortious interference with Sumitomo's business operations.

For the reasons discussed below, the motion is granted as to the first counterclaim only. The remaining counterclaims, overlapping as Sumitomo's theories may be, satisfy the low threshold required to withstand a Rule 12(b) motion.

I. Attorney's Fees

Sumitomo, predicating its first counterclaim on section 706(k) of Title VII, 42 U.S.C. § 2000e–5(k), seeks recovery for attorney's fees expended to date and punitive damages for plaintiffs' wrongful conduct in commencing an allegedly spurious and frivolous Title VII action. Plaintiffs move to dismiss this counterclaim on the ground that section 706(k) will not support an independent claim for relief.

[4] The question whether a defendant can request section 706(k) relief by way of counterclaim appears to be a novel one. The Court concludes that he cannot. Section 706(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." To treat this section as creating a separate cause of action is to ignore the words of the statute, which provide for reasonable attorney's fees

16. Although the Supreme Court has not yet considered whether an allegation of national origin discrimination may be actionable under section 1981, it has extended the protection of that provision to "racial discrimination in private employment against white persons." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287, 96 S.Ct. 2574, 2582, 49 L.Ed.2d 493 (1976).

17. A number of courts have permitted Hispanic individuals to sue under section 1981 upon evidence that the alleged discrimination was racial in character. *See Enriquez v. Honeywell, Inc.*, 431 F.Supp. 901 (W.D.Okl.1977); *Martinez v. Hazelton Research Animals, Inc.*, 430 F.Supp. 186 (D.Md.1977); *Cubas v. Rapid American Corp., Inc.*, 420 F.Supp. 663 (E.D.Pa.1976). However, in *Budinsky v. Corning Glass Works*, 425 F.Supp. 786 (W.D.Pa.1977), an employee's allegation of discrimination based on his Slavic national origin failed to state a cause of action under section 1981. Similarly, an allegation of discrimination by a Polish-American failed to state a cause of action under this provision in *Kurylas v. United States Department of Agriculture*, 373 F.Supp. 1072 (D.D.C.1974), *aff'd*, 169 U.S.App.D.C. 58, 514 F.2d 894 (1975).

to the "*prevailing party*," in the context of an existing action or proceeding "*as part of the costs*" thereof. This language necessarily implies a finality that this litigation does not yet approach. Accordingly, the first counterclaim is not yet justiciable and does not state a claim upon which relief can be granted. It will be stricken without prejudice to Sumitomo's right to make later application to the Court for reasonable attorney's fees if the Title VII action is found to be frivolous or without foundation.[18]

II. Abuse of Process

[5] The second and third counterclaims are based upon plaintiffs' alleged abuse of process in state and federal administrative and judicial proceedings. The gravamen of the tort of abuse of process is "misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish," Prosser, *Torts* § 121, at 856 (4th ed. 1971), or, stated in another way, the tortious use of "legal process to attain some collateral objective." *Board of Education v. Farmingdale Classroom Teachers*, 38 N.Y.2d 397, 402, 380 N.Y.S.2d 635, 641, 343 N.E.2d 278, 282 (1975). Sumitomo alleges that plaintiffs' purpose in bringing proceedings before administrative and judicial tribunals has been to coerce Sumitomo into acceding to their demands for work assignments for which they were unqualified and for payment of additional compensation to which they were not entitled. Such allegations clearly satisfy the intentional elements of the tort of abuse of process.

[6, 7] For purposes of a motion to dismiss, the court must accept the allegations of the complaint as true. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Hence Sumitomo is entitled to prove that the true intent of the plaintiffs was not legitimately to invoke the processes of the administrative agencies and the courts, but to coerce Sumitomo into yielding to their demands for promotion and higher pay. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

III. Prima Facie Tort

[8] The intentional infliction of temporal damages without a legal motive—commonly referred to as prima facie tort—is a tort recognizable at law. *Smith v. Fidelity Mutual Life Insurance Co.*, 444 F.Supp. 594 (S.D.N.Y.1978); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946). Its elements are: (1) the infliction of intentional harm (2) resulting in damages (3) without excuse or justification (4) by acts or series of acts that would otherwise be lawful. All must be established for the cause of action to be upheld. *Sommer v. Kaufman*, 59 A.D.2d 843, 399 N.Y.S.2d 7, 8 (1st Dep't 1977).

In *Board of Education v. Farmingdale Classroom Teachers, supra*, the Board of Education brought an action against a teachers association and its attorney for abusing legal process by subpoenaing, with intent to injure and harass the school district, 87 teachers to compel their appearances at an initial hearing before the public employees' relations board and refusing to stagger the appearances, so that the school district was forced to hire 77 substitutes. The New York Court of Appeals held that the complaint stated a cause of action for both abuse of process and prima facie tort. Discussing the prima facie tort claim, the court stated:

> The operative fact here is that defendants have utilized legal procedure to harass and oppress the plaintiff who suffered a grievance which should be cognizable at law. Consequently whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action.

18. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 701, 54 L.Ed.2d 648 (1978), the Supreme Court defined the circumstances under which an attorney's fee should be awarded when the defendant is the prevailing party:

> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

38 N.Y.2d at 406, 380 N.Y.S.2d at 644, 343 N.E.2d at 284.

[9] Sumitomo's fourth counterclaim alleges that by the institution of vexatious federal and state administrative and judicial proceedings and by disruptive and harassing activity in the office, plaintiffs deliberately and without justification inflicted temporal and economic harm upon Sumitomo. The Court concludes that this allegation satisfies the elements of prima facie tort and states a claim upon which relief can be granted.

IV. Section 704(a)

[10] Finally, both plaintiffs and the EEOC, as amicus curiae, assert that the counterclaims must be dismissed because the filing of charges before the EEOC and the bringing of a Title VII suit are absolutely privileged. As the basis for this theory, they cite section 704(a) of Title VII, which forbids "discrimination against . . . employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796, 93 S.Ct. 1817, 1821, 36 L.Ed.2d 668 (1973).[19]

The Supreme Court has declined to resolve the issue whether "the protection afforded by § 704(a) extends only to the right of access [to the EEOC and federal courts] or well beyond it." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 71 n.25, 95 S.Ct. 977, 989 n.25, 43 L.Ed.2d 12 (1975). However, the Court has stated that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it." *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 803, 93 S.Ct. at 1825. In attempting to define the limits of protected conduct under section 704(a), lower courts have relied upon the *McDonnell Douglas* language to conclude that illegal activity and activity that unreasonably interferes with the employer's legitimate interests are not immunized by this provision. *See Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235, 1261 (3d Cir. 1978); *Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976). In *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F.Supp. 66, 71–72 (S.D.N.Y.1975), the court stated:

> Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his charge may be so excessive and so deliberately calculated to inflicts needless economic hardship on the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of section 704(a) when they progress to the point of deliberate and unlawful conduct against the employer.

The Court concludes that the cases cited above are dispositive of plaintiffs' contentions of immunity. Sumitomo alleges not only that plaintiffs instituted spurious administrative and judicial proceedings, but also that plaintiffs have been disruptive in the office, have endeavored to sabotage Sumitomo's business, have engaged in calculated acts of insubordination, have urged other employees to violate their fiduciary duties to Sumitomo and have harassed and coerced those who would not, and have attempted to "purloin" confidential corporate documents. Affidavit of J. Portis Hicks, sworn to July 11, 1978, ¶ 9. Allegations of such aggressive and hostile tactics, which must be accepted as true for purposes of a Rule 12(b) motion, cannot be dismissed on the basis of section 704(a).

Accordingly, plaintiffs' section 1981 claims and defendant's section 706(k) counterclaim for attorney's fees are dismissed. All other motions are denied.

So ordered.

19. 42 U.S.C. § 2000e–3(a). That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

77 Civ. 5641 (CHT)

OPINION

APPEARANCES

For Plaintiffs: EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013
Of Counsel: LEWIS M. STEEL, ESQ.

For Defendant: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022
Of Counsel: J. PORTIS HICKS, ESQ.
LANCE GOTTHOFFER, ESQ.

Amicus Curiae: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506
Of Counsel: ISSIE L. JENKINS
Acting General Counsel
JOSEPH T. EDDINS
Associate General Counsel
LUTZ ALEXANDER PRAGER, ESQ.

TENNEY, J.

In this action for redress of alleged employment discrimination both parties have filed applications directed at the Court's Opinion and Order dated June 5, 1979 which denied dismissal of the instant Complaint and certain of the counterclaims and dismissed one counterclaim and one jurisdictional base asserted by the plaintiffs. The defendant seeks an immediate appeal under 28 U.S.C. § 1292(b), asking the Court to certify for appellate review the primary question posed in its original motion to dismiss; that is, whether the defendant is exempted under the terms of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan ("the Treaty") from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory employment practices. The plaintiffs also make applications to the Court, first for a certification under section 1292(b) of the question whether their allegation of sex and nationality discrimination constitutes a valid cause of action under 42 U.S.C. § 1981, and second for reargument of this Court's refusal to dismiss certain of defendant's counterclaims sounding in common law tort. The Court finds that only the question of the relationship between the Treaty and the civil rights law is suitable for section 1292(b) treatment. Therefore, the certification will be granted

only as to that question and all other applications will be denied.

Section 1292(b) requires that a district judge

> making in a civil action an order not otherwise appealable under [section 1292 who is of] the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . shall so state in writing in such order.

The question whether defendant's employment practices are insulated from redress through civil rights actions is a pure question of law. If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation. Since there is a dearth of authority on the matter, this Court deems it prudent to follow the lead of Judge Bue of the United States District Court for the Southern District of Texas, who in Spiess v. C. Itoh & Co. (America), Inc., 469 F. Supp. 1 (S.D. Tex. 1979), faced almost the identical question as is here posed and certified the following question to the United States Court of Appeals for the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10. Although in contrast to Spiess there has been no class certification yet in the case at bar, the Court expects that the litigation will be sufficiently complicated that it would be a waste of judicial time to try it with the novel jurisdictional question in limbo. Moreover, because the Court studied and rejected a Department of State opinion letter which construed the Treaty favorably to the defendant, see Opinion and Order at 9; cf. Spiess v. C. Itoh & Co. (America), Inc., supra; the instant matter now reflects the tension generated by the principle that "[c]ourts are to give substantial weight to the construction . . . which is placed upon the treaty by the political branch" although "they are not required to abdicate what is basically a judicial function." Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne, 242 F. Supp. 129, 136 (E.D.N.Y. 1965). Therefore, the Court deems it wise to seek the instruction of the United States Court of Appeals for the Second Circuit and certifies that the interpretation of the Treaty poses a controlling question of law upon which the Court and the Department of State differ, the resolution of which will materially advance the prosecution of this case.

As for plaintiffs' application to certify the question whether 42 U.S.C. § 1981 applies to these civil rights claims, the Court seeks no reason to grant interlocutory appeal. Any reversal on the section 1981 issue could not be made in a

vacuum and construction of the Treaty could not be avoided in reaching that decision. Therefore, immediate appeal on section 1981 would be a superfluity, for if the court of appeals finds that the Treaty does not immunize the defendant from employment discrimination suits then the Title VII avenue will be adequate for plaintiffs to press their claims, and if the Treaty is found to protect the defendant then such immunization will be invoked whether the civil rights claim is filed pursuant to Title VII or to section 1981.

Finally, the plaintiffs again ask for dismissal of counterclaims 2, 3, and 4, seeking under Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York ("General Rules") to convince the Court that its refusal to dismiss those counterclaims was error. Although the Court sees nothing in plaintiffs' Memorandum of Law on Reargument that might be called "matters or controlling decisions which counsel believes the court has overlooked," General Rule 9(m), in a Memorandum of Law submitted by the Equal Employment Opportunity Commission ("EEOC") as amicus curiae the agency argues that Harris v. Steinem, 571 F.2d 119 (2d Cir. 1978), controls here, and in their Reply Memorandum of Law the plaintiffs adopt the EEOC position. The Court does not agree that Harris is dispositive. There the complaint alleged a violation of federal securities law, and the defendants counterclaimed for libel purportedly commited in the complaint itself and on sub-

sequent occasions in published statements by the plaintiff. The district court found that the libel charge was a compulsory counterclaim, was therefore ancillary to the court's federal question jurisdiction over the complaint, and consequently was jurisdictionally valid despite the fact that it had no independent base of federal jurisdiction. The court of appeals disagreed, holding that the libel charge was not a compulsory counterclaim measured by the rule that analyzed "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." Id. at 123. Contrasting the issues to be proved in a securities case with those to be proved in libel, the Harris court found no overlap and called the logical relationship between complaint and counterclaim "at best attenuated," id. at 124, and dismissed for lack of jurisdiction.

This Court sees a distinction between, on the one hand, facts involving a sale of stock and a subsequent, purportedly libelous statement and, on the other hand, a claim of employment discrimination accompanied by an allegation of continuing retaliatory activity provoked by the policy complained of. In this case the defendant claims that

> prior to commencing [this action] . . . [the plaintiffs] entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' unreasonable demands for assignment to work for which they were not qualified and for payment of additional

> compensation to which they were not entitled, and to retaliate against Sumitomo for its refusal to make such assignments or pay such additional compensation, by injuring Sumitomo in its business and trade.

Answer and Counterclaim, ¶ 19. Defendant goes on to complain that "as part of carrying out their conspiracy, plaintiffs in bad faith vexatiously, willfully and wrongfully commenced sham administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York, and before the United States Equal Employment Opportunity Commission." Id., ¶ 20. These are allegations that state a claim for malicious abuse of process, not--as in Harris--malicious prosecution. A counterclaim for malicious prosecution would be barred regardless of its compulsory or permissive nature because the tort is not actionable until the termination of the main action favorably to the defendant. By contrast, the tort of malicious abuse of process may be pleaded at any time because it does not rest on the course of a court proceeding. Moreover, the Harris court found that its counterclaim fell "within the well-established narrow line of decisions involving counterclaims based solely on the filing of the main complaint and allegedly libelous publication thereafter." Id. at 125. There is no such special niche for these counterclaims. They purport to involve pre-suit harassment by the plaintiffs and, beyond complaining of the motive behind bringing the instant case, the defendant complains of previous actions before governmental agencies brought

for allegedly coersive purposes. Intimating no judgment on the merits of the counterclaims the Court adheres to its original finding that they have a logical relationship to the main action and meet the threshold test for stating a valid claim upon which relief can be granted.

The defendant's question concerning the relationship of Title VII to the Treaty is hereby certified; all other applications are denied.

So ordered.

Dated: New York, New York
August 9, 1979

CHARLES H. TENNEY

U.S.D.J.

#3379

4

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and

Sumitomo Shoji America, Inc.,

Petitioner,

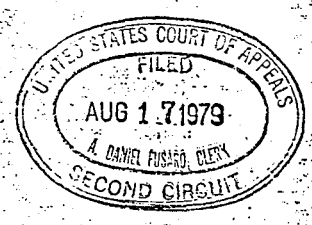
v.

Lisa M. Avigliano, et al.,

Respondents

79-8460

79-8460



It is hereby ordered that the motion made herein by counsel for the

~~appellant~~ ~~appellee~~ petitioner ~~respondent~~

by notice of motion dated August 16, 1979 for leave to appeal pursuant to 28 USC §1292(b)

be and it hereby is ~~granted~~ denied without ruling on the merits without prejudice to the motion's being renewed after Judge Tenney has had an opportunity to consider the Hicks affidavit (Exhibit I)

~~It is further ordered that~~

Thomas Meskill

Robert J. Ellis USDJ.

Wilfred Feinberg USDJ.

Circuit Judges

#3380

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and

Sumitomo Shoji America, Inc.,

Petitioner,

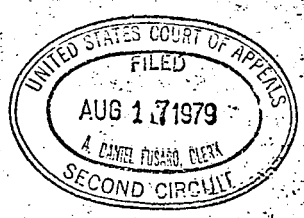
v.

Lisa M. Avigliano, et al.,

Respondents.

79-8460

79-8460



It is hereby ordered that the motion made herein by counsel for the ~~xxxxxxxx~~ ~~xxxxxx~~ petitioner ~~respondentxx~~

by notice of motion dated August 16, 1979 for a stay

be and it hereby is ~~granted~~ denied as moot.

It is further ordered that

Thomas J. Meskill
Robert J. Ward USDJ.
USDJ.
Circuit Judges

(CORRECTED COPY 12/6/79)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,

Plaintiffs,

77 Civ. 5641 (CHT)

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

OPINION

APPEARANCES

For Plaintiffs: EISNER, LEVY, STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013

Of Counsel: LEWIS M. STEEL, ESQ.

For Defendant: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

Of Counsel: JIRO MURASE, ESQ.
J. PORTIS HICKS, ESQ.
EDWARD H. MARTIN, ESQ.
LANCE GOTTHOFFER, ESQ.

Amicus Curiae: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D.C. 20506

Of Counsel: LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER

By: MARCIA B. RUSKIN, ESQ.

Local Counsel:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
90 Church Street, Rm. 1301
New York, New York 10007
By: HARAIN D. FIGUEROA, ESQ.

TENNEY, J.

Defendant Sumitomo Shoji America, Inc. ("Sumitomo") has moved for reargument of the Court's denial of its motion to dismiss the claims against it, Opinion and Order dated June 5, 1979, reported at 473 F. Supp. 506 (S.D.N.Y. 1979). In its June 5 decision, the Court held, inter alia, that Sumitomo, as a United States subsidiary of a Japanese corporation, is not exempt under Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1975] 4 U.S.T. 2063, T.I.A.S. 2863 (effective October 30, 1953) ("the Treaty"), from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory employment practices. 473 F. Supp. at 509-13. The provision on which Sumitomo sought, and still seeks, to rely provides in pertinent part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Article VIII(1). In not allowing Sumitomo--a United States sub-

sidiary--to rely on that provision, the Court looked primarily to Article XXII(3) of the Treaty. Paragraph 3 provides:

> As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

(Emphasis added).

In moving for reargument of the June 5 decision, Sumitomo relies on documents recently released by the Department of State that purportedly bear on the intent of the negotiators of the Treaty. The Court grants the motion to reargue, but concludes that oral argument is unnecessary. The Court finds that the documents lend some support to Sumitomo's contentions, but does not find them sufficiently persuasive to alter its June 5 decision.

BACKGROUND

Additional Procedural Background

Pursuant to 28 U.S.C. § 1292(b), Sumitomo sought an immediate appeal of the Court's decision. The Court agreed to an immediate appeal, but limited its certification to the issue of Sumitomo's standing under the Treaty's freedom-of-choice provision. Opinion and Order dated August 9, 1979, reported

at ___ F. Supp. ____ (S.D.N.Y. 1979). Prior to filing a notice of appeal, Sumitomo requested this Court to withdraw its certification because the Department of State had on August 15 released documents that Sumitomo wanted the Court to consider. Letter from J. Portis Hicks to the Court, dated August 16, 1979. Because the ten-day period for filing a notice of appeal after certification was about to elapse, see Federal Rule of Appellate Procedure 5(a), Sumitomo filed its notice of appeal without waiting for action from this Court, but requested that the court of appeals stay any action until this Court had had a chance to consider the Department of State documents. On August 17, the court of appeals denied Sumitomo permission to appeal, but did so without ruling on the merits and without prejudice to renewal of the appeal after this Court had had the opportunity to consider the documents--in effect, a remand of the action to this Court. Order dated August 17, 1979 in No. 79-8460. Sumitomo subsequently moved for reconsideration of the Court's June 5 decision denying it standing under Article VIII(1). All parties have since been given the opportunity to file briefs on the effect of the Department of State documents on the Court's decision.

In its previous motion to dismiss, Sumitomo relied on an October 17, 1978 letter from the Department of State to the Equal Employment Opportunity Commission ("EEOC"). In the Department of State's view of the Treaty, as expressed in that

letter, Sumitomo has the freedom of choice to fill all of its top management positions with Japanese nationals without being subject to Title VII sanctions. The Department of State drew no distinctions "between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company." See 473 F. Supp. at 511. The Court, in considering this letter, was mindful that the meanings given treaties by government departments charged with their negotiation and enforcement are given great weight. Id., quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1960). Nevertheless, it rejected the meaning given the Treaty by the Department of State. "[I]n the absence of analysis or reasoning offered by the State Department in support of its position, this Court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1)" or to reject established principles of corporate law and applicable precedents. Id. at 511-12 (footnote omitted).

During the course of the briefing on this motion for reargument, the Department of State indicated that it had changed its view on whether the first sentence of Article VIII(1) of the Treaty (freedom-of-choice provision) covers United States subsidiaries of foreign corporations. Letter from James R. Atwood, Department of State Deputy Legal Adviser, to Lutz

Alexander Prager, EEOC Assistant General Counsel, dated September 11, 1979, attached, e.g., as Exh. 1 to Affidavit of Lewis M. Steel, sworn to September 17, 1979. Because of the importance of this letter in the consideration of this motion, it is set out at length:

> [T]he Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in Spiess v. C. Itoh & Co. [, 469 F. Supp. 1 (S.D. Tex.), appeal docketed, No. 79-2382 (5th Cir. 1979),] and two other cases more recently decided in the district court in New York (Avigliano v. Sumitomo Shoji America, Inc., [473 F. Supp. 506 (S.D.N.Y. 1979),] and Linskey v. Heidelberg Eastern, Inc., [470 F. Supp. 1181 (E.D. N.Y. 1979))].
>
> The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the Itoh case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Arguments

The positions of Avigliano, Sumitomo, and the EEOC may be stated briefly as follows. Avigliano argues that Sumitomo has no rights under the freedom-of-choice provision in Article VIII(1). Its foreign owner gave up those rights, as far as Sumitomo is concerned, when it chose to operate in the United States as a locally incorporated subsidiary rather than as a branch. The documents, in Avigliano's view, indicate that the Treaty was designed to ensure only national treatment for foreign controlled companies. They show that the intent behind the Treaty was not to exempt such companies from United States civil rights laws.

The EEOC, in its amicus brief, argues that the September 11 Department of State letter should be given great weight by the Court. The documents should not alter the conclusion reached by the Court in its June 5 Opinion and Order: Sumitomo's rights are governed by Article XXII(3), which provides that companies constituted under the laws of a particular country shall be deemed companies of that country. Accordingly, Sumitomo may be granted no greater or lesser rights than any other domestically created company. Moreover, Article VIII(1), even were it applicable, would not allow discrimination in favor of or against Japanese nationals or anyone else. Article VIII(1) and Title VII and section 1981 are consistent: all three prohibit discrimination against anyone.

Sumitomo argues that the Court should disregard the September 11 Department of State letter because it, like the October 17, 1978 letter expressing a contrary view, offers no authority or reasoning in support of its position. Sumitomo argues that the Court should instead rely on the Department of State documents to establish the intent of the Treaty negotiators. It relies on these documents to establish that Sumitomo has standing under Article VIII(1), as an intended beneficiary, to assert freedom of choice in hiring certain personnel. The confusion, according to Sumitomo, results from the drafters' failure to distinguish clearly between provisions defining corporate nationality and those granting specific rights. Corporate nationality is not the intended test for determining standing under the Treaty, Sumitomo continues; Sumitomo--though technically a United States company--is entitled to specific rights under the Treaty, as purportedly demonstrated by the documents, because it is foreign-owned.

Documents

The documents released by the Department of State address negotiation and enforcement of this Treaty and similar treaties with other countries. The first document on which Sumitomo relies is a Department of State Airgram, signed "Kissinger" and dated January 9, 1976, to the American Embassy in Tokyo ("Kissinger Airgram"), Exh. A to Sumitomo Memorandum.

The subject was the proper interpretation of Article XXII(3) of the Treaty. Because of the differing interpretations of the Kissinger Airgram, the Court sets it out in its entirety:

> Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.
>
> Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.
>
> In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3...meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."
>
> Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted,

> the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.
>
> For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that [the Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.
>
> KISSINGER

Kissinger relied on a law review article by Herman Walker, Jr., "who formulated modern . . . form of [Friendship, Commerce and Navigation Treaty] and negotiated many FCNs." Id. Walker set out the definition of corporate status as found in Article XXII(3) of the Treaty. "Provisions on Companies in United States Commercial Treaties," 50 Am. J. Int'l Law 373, 380-81 & n.34 (1956). He thereafter explains that

> [t]he adoption of the simple test [of status and nationality by place of incorporation] has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgment of a fact--the existence and legitimate paternity of an association--is not confused with problems associated with the functional rights and activities of alien-bred associations. . . .

Id. at 383.

Kissinger also relied, as Sumitomo now does, on a Memorandum of Conversation from the Office of the United States Political Adviser for Japan, Tokyo, Despatch No. 13, April 8, 1952 ("Despatch No. 13"), Exh. E to Sumitomo Memorandum. In Despatch No. 13, at 5, quoted in small part in the Kissinger Airgram, the following portion of a discussion of Article XXII appears:

> [The Japanese representative] asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 meant anything more than the recognition of the existence of a juridical person.
>
> [The U.S. representative] replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

Sumitomo also relies on a statement of a United States negotiator concerning treaty trader employees. The negotiator

stated that Japanese treaty trader employees "would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm." Despatch No. 13, at 4. Sumitomo points to this language to demonstrate that the negotiators did not intend to distinguish between branches and subsidiaries regarding employment of treaty trader executives under the Treaty. It quotes from a document addressing a similar provision in a treaty then being negotiated between the United States and the Federal Republic of Germany.

> There is no intent . . . to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. . . . The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under . . . applicable regulations.

Department of State Instruction No. A-852 to HICOG, Bonn, January 21, 1954, at 1, Exh. 9 to Affidavit of Lance Gotthoffer, sworn to September 10, 1979 ("Gotthoffer Aff.").

Avigliano and the EEOC, in addition to arguing on the basis of the above documents, refer to other Department of State documents for the proposition that the Treaty negotiators did not seek to give foreign companies greater rights than those accorded domestic companies, but rather to ensure national treatment by barring employment discrimination against aliens. E.g., Foreign Service Despatch No. 2529 from HICOG, Bonn to Department of State, March 18, 1954, at 1, Exh. 11 to Gotthoffer Aff. (the major special purpose of the freedom-of-chose provision "is to preclude the imposition of 'percentile' legislation").

DISCUSSION

Introduction

The issue on this motion for reconsideration is a narrow one. The Court is addressing the effect of the recently released Department of State documents on its June 5, 1979 Opinion and Order. Specifically, by examining these documents, the Court seeks to determine whether, in the intent of the Treaty negotiators, Article XXII(3) bars Sumitomo from standing under the first sentence of Article VIII(1) or whether Sumitomo is otherwise barred from standing under that sentence. The issue whether Article VIII(1), if applicable, would insulate Sumitomo from review of any or all of its employment practices is beyond the scope of this opinion.

In determining whether Sumitomo has standing under the freedom-of-choice provision of Article VIII(1), the Court examines the Department of State documents and the terms of the Treaty to infer the intent of the parties to the agreement. Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963). The Court should "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." Id.

The Department of State looked to the intent of the negotiators because it found that the "manner of coverage of subsidiaries is in many instances complex." Letter dated September 11, 1979, set out supra. After "an extensive review of the negotiating files" on the Friendship, Commerce and Navigation Treaties, the Department of State concluded that Sumitomo lacks standing under the first sentence of Article VIII(1). Sumitomo's rights are instead governed by Article VII(1) & (4), which provides for national and most-favored-nation treatment. Id. The Court does give some weight to the Department's view on a manner within its purview, see Kolovrat v. Oregon, supra, but not decisive weight in this case. The Department undoubtedly gave the question serious and thoughtful attention, but the letter indicates neither the documents on which the Department relies nor its analysis. In the absence of either, the letter little aids the Court in its determination.

The issue of Sumitomo's standing under Article VIII(1) must be resolved on the terms of the Treaty and the documents--against the backdrop of the Court's prior decision. The documents raise doubt about the intent of the negotiators on the narrow question before the Court; accordingly, they render a decision less certain. Nevertheless, the Court concludes that Sumitomo, while not denied all protection under the Treaty, does not have standing to rely on the freedom-of-choice provision.

Sumitomo's Standing Under the Treaty Generally

The terms of the Treaty support the proposition that Article XXII(3) was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty. The negotiators appear to have intended a distinction between the status and nationality attributes of a company as governed by Article XXII(3) and rights a company may claim under the Treaty's substantive provisions. In other words, Article XXII(3) cannot be read to the exclusion of the Treaty's other provisions. For example, Article VI(4) provides that

> enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into

> public ownership and to the placing of such enterprises under public control.

Subsidiaries also have rights under Article VII(1) & (4). Under Article VII(1), nationals and parties can

> organize companies under the general company laws of such other Party, and . . . acquire majority interests in companies of such other Party; and . . . control and manage enterprises which they have established or acquired. Moreover, enterprises which they control . . . shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Paragraph 4 of Article VII provides that "[n]ationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article."

The documents also support the distinction between a company's rights under the Treaty's substantive provisions and a company's nationality and status under Article XXII(3). Kissinger concluded that Article XXII(3) established a "procedural test" of an entity's status to determine "whether or not to recognize it as a 'company' for purposes of the Treaty." Kissinger Airgram. In his view, one then looks to the substantive provisions of the Treaty to determine the company's rights. Id. He concluded on the basis of this distinction that Japan could not deny treaty rights to a United States sub-

sidiary set up in Japan. The substantive rights he chose as examples, however, do not support his conclusion directly. The examples all refer to the Treaty rights of nationals and companies, not to rights of the subsidiaries that they control. See id. Nevertheless, the distinction between "company" in the "procedural" and "substantive" senses lends support to Sumitomo's contentions.

In determining the intent of the Treaty negotiators, Kissinger looked to Herman Walker, a principal formulator and negotiator--according to Kissinger-- of many Friendship, Commerce and Navigation Treaties. In the law review article quoted above--which was personal and not on behalf of the Department of State, 50 Am. J. Int'l Law at 373 n.--Walker set out the distinction between a company's civil attributes (status and nationality) and its functional or substantive ones. In a section entitled "Utilization of the Domestic Company Device," he gave a brief history of the right to organize and operate domestic companies. Id. at 386-88. He concluded that the treaties current at the time he was writing --including the Treaty with Japan at Article VII(1)--have revised the previous approach to rights regarding domestic companies in three ways. One revision was assuring the "'controlled' domestic company . . . national treatment; discrimination against it in any way by reason of its domination by alien interests is not permissible." Id. at 388.

During negotiation of the Treaty, a United States representative suggested the same distinction between civil and substantive attributes by stating the limited purpose of Article XXII(3): "The recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party." Despatch No. 13, at 5. The same document suggests that subsidiaries have rights to hire treaty traders, id. at 4, as does Department of State Instruction No. A-852. The statements regarding treaty traders do not bear directly on the rights of the subsidiaries themselves, but they do suggest that subsidiaries have a place within the scheme of the Treaty and its implementing regulations. See generally discussion at 473 F. Supp. at 512-13.

Sumitomo's Claim of Standing Under Article VIII(1)

Articles VI(4) and VII(1) & (4), by their terms, give "enterprises in which nationals and companies . . . have a substantial interest" and enterprises controlled by nationals and companies, respectively, substantive rights. The drafters knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so. The freedom-of-choice rights are given to "nationals and companies of either Party . . . within the territories of the other Party." Because the provision does not by its own terms

extend to locally incorporated subsidiaries,[1/] the Court must look to Article XXII(3) to determine whether "nationals and companies" can be read to include subsidiaries. That Article provides that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed parties thereof." By this language Sumitomo is a United States company. It is not a Japanese company and is thereby ineligible for freedom-of-choice protection within the territories of the United States.

The documents do not enable Sumitomo to escape this plain-term reading of the provision. They do not establish that the negotiators intended to give locally incorporated subsidiaries rights under the freedom-of-choice provision. A liberal reading of the Kissinger Airgram and its background suggest that he might have given a locally incorporated subsidiary rights under the freedom-of-choice provision. He did not, however, explicitly conclude that a subsidiary has such rights, nor did he refer to any documents that would establish such a right running to Sumitomo. In his law review article, Walker explained the difference between the civil attributes and the functional rights of a company, but he does not indicate that domestic subsidiaries have standing under Article VIII(1). He indicates only that such companies are entitled to national treatment--discrimination against it is impermissible. 50 Am. J. Int'l Law at 380-83, 385-88. Despatch No.

13 does not even discuss Article VIII(1), and its discussion of Article XXII(3) merely supports the proposition--discussed above--that that article does not by its own terms exclude subsidiaries from all substantive rights under the Treaty. Sumitomo has failed to point out any documents that directly support its claims under Article VIII(1).

Correction of August 9, 1979
Opinion and Order

On page 3 of its Opinion and Order dated August 9, 1979, ___ F. Supp. at ___, the Court stated:

> If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation.

The Court need not, and does not, reach the question whether Article VIII(1), were it available to Sumitomo, would exempt Sumitomo from judicial review against any or all of plaintiffs' discrimination claims. The Court has no view on that issue, but in the language quoted above it suggested otherwise. Accordingly, it deletes the quoted language from its August 9, 1979 Opinion and Order.[2/]

Additionally, the word "seeks" on page 4 (second line from the bottom) of the August 9, 1979 Opinion and Order should be changed to "sees."

CONCLUSION

In summary, the Department of State documents support the conclusion that Article XXII(3) does not bar Sumitomo from standing under the Treaty generally. However, the Court reaffirms its conclusion that the terms of the Treaty do not give Sumitomo standing under Article VIII(1) and further concludes that the documents do not establish otherwise.

Finally, the Court directs that its August 9, 1979 Opinion and Order be amended in the manner indicated herein.

So ordered.

Dated: New York, New York
November 29, 1979

CHARLES H. TENNEY
U.S.D.J.

LISA M. AVIGLIANO, et al.,
Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,
Defendant.

77 Civ. 5641 (CHT)

FOOTNOTES

1/ Although nationals and companies have some employment rights in connection with enterprises in which they have financial interests, the subsidiaries themselves are not in any plain terms given employment rights.

2/ Much of the EEOC's brief is directed to the argument that the Treaty generally and Article VIII(1) specifically would not entitle Sumitomo, if it had standing, to more than national treatment. Walker, however, stated that the Treaty's employment rights "technically [go] beyond national treatment," 50 Am. J. Int'l Law at 386; but cf. Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1184-87 (E.D. N.Y. 1979) (under freedom-of-choice provision in treaty with Denmark, foreign corporation does not have absolute privilege to hire specialized personnel regardless of American laws prohibiting employment discrimination), but the Court does not reach the issue of the substantive scope of the Treaty's employment rights.