2-7-1980

Petition for Rehearing or Rehearing En Banc

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

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

-against-

LISA M. AVIGLIANO, et al.,

Respondents.

PETITION FOR REHEARING OR REHEARING EN BANC

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

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

SUMITOMO SHOJI AMERICA, INC.,	:	
Petitioner,	:	No. 79-8460
-against-	:	
LISA M. AVIGLIANO, et al.,	:	
Respondents.	:	

PETITION FOR REHEARING OR
REHEARING EN BANC

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:

INTRODUCTION

This petition is filed pursuant to Rules 35 and 40, Fed. R. App. Proc., and requests rehearing or rehearing en banc of this Court's denial of Sumitomo's petition for permission to appeal pursuant to Rule 5, Fed. R. App. Proc. and 28 U.S.C. §1292(b) (the "Petition"). The Petition was filed on December 10, 1979 and supplemented on December 28, 1979. It was denied, without opinion, by a panel comprised of Circuit Judges Oakes, Van Graafeiland and Newman, by Order dated January 24, 1980 (a copy of such Order is annexed hereto as Exhibit "A").

In its Petition, Sumitomo sought permission to appeal an Opinion and Order of the United States District Court for the Southern District of New York (Tenney, J.), dated June 5, 1979, reported at 473 F. Supp. 506, as supplemented by an Opinion and Order dated November 29, 1979 (such Opinions and Orders are referred to hereinafter collectively as the "June 5 Order"). The June 5 Order denied, in part, a motion by Sumitomo made pursuant to Rule 12(b)(6), Fed. R. Civ. Proc., for an order dismissing the complaint. The June 5 Order was certified for appeal by Judge Tenney by Order dated August 9, 1979.*

STATEMENT OF THE CASE

The relevant facts are not in dispute. They are set forth in the Petition, already on file with this Court, and in the Opinions and Orders of Judge Tenney, copies of which are annexed to the Petition. There, it can be seen that plaintiffs, all females, applied for and were hired by Sumitomo in secretarial positions. They bring this litigation as a putative nationwide class action. They claim that Sumitomo violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e) et seq.), alleging that Sumitomo hires only male Japanese nationals for executive, managerial and other key positions.

Sumitomo moved to dismiss the complaint for failure to state a claim. To the extent relevant hereto, such motion was

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*The August 9, 1979 Order granting certification was amended by Judge Tenney's November 29, 1979 Order. While the procedural background of the Petition was unusual, it may be seen therein, at pp. 2-5, that it was filed in a timely manner.

predicated on provisions of 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 in particular the right of freedom of choice in employment granted by Article VIII(1) of the Treaty, which provides:

> 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. 4 U.S.T. at 2070.

The relationship of this Treaty hiring right to federal civil rights laws has been the subject of five recent decisions by United States federal courts. With the exception of the panel herein, each court has agreed that immediate appellate review of this question should be had pursuant to 28 U.S.C. §1292(b).*

Sumitomo submits that the issue certified for appeal by Judge Tenney is particularly appropriate for an immediate appeal under 28 U.S.C. §1292(b) and that this Court should thus rehear the Petition and grant Sumitomo permission to appeal. Moreover,

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* In Spiess v. C. Itoh & Co., 469 F. Supp.1 (S.D. Texas 1979), the Court on similar facts certified the question of whether the Treaty provides U.S. subsidiaries of Japanese corporations with the right to hire key personnel of their choice irrespective of U.S. laws proscribing discrimination in employment, Id., at 10. The Fifth Circuit accepted such appeal by Order dated June 4, 1979. In Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979, certification granted August 15, 1979; permission to appeal denied by this Court by Order dated January 23, 1980), the Court certified whether a similar provision of a treaty between the United States and Denmark gives either a Danish parent company or its U.S. subsidiary like rights. Finally, in the instant action the Court, by its Order of August 9, 1979, certified the question of the relationship between the Treaty and the civil rights laws. To date, no appellate court has ruled on the merits of such issue.

because the questions presented by the June 5 Order are of exceptional importance, Sumitomo suggests there should be a review en banc of the denial of its Petition.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY CERTIFIED THE JUNE 5 ORDER

In his supplemental Order of November 29, 1979, Judge Tenney acknowledged that newly released State Department documents which he considered therein put into further doubt his initial June 5, 1979 Order denying Sumitomo's motion to dismiss. See copy of November 29, 1979 Order, annexed as Ex. "D" to Petition, at p. 15. While refusing for a second time to dismiss the complaint, Judge Tenney left effective his August 9 Order certifying for appeal the question of the relationship of the Treaty to the civil rights laws.

Judge Tenney correctly granted certification pursuant to 28 U.S.C. §1292(b). The question presented is a purely legal issue. If resolved in Sumitomo's favor, virtually all claims herein will be dismissed. Accordingly, there can be no question that the June 5 Order presents a controlling question of law the immediate resolution of which may materially advance the ultimate termination of the litigation. 9 Moore's Federal Practice, ¶205.04 at 1109-10 (1975).

The record shows as well that the controlling question is one as to which there is a substantial ground for difference of opinion. There is a dearth of authority on the issue. Three District Courts (in Linskey, Spiess, and this action), as well as

one Court of Appeals (the Fifth Circuit in Spiess), have agreed there should be immediate appellate resolution of the question.

Furthermore, the District Court decisions on the merits of the issue are in conflict. Judge Bue in Spiess, supra, concluded that locally incorporated subsidiaries are "companies" of the United States under the Treaty, and therefore lack standing to assert any of the Treaty rights at all. Judge Tenney initially followed this view in his June 5 Order, then rejected it in his supplemental November 29, 1979 Order, holding there that locally incorporated subsidiaries have standing to assert some Treaty rights, but not the right of freedom of choice in employment provided by Article VIII(1). In contrast, Judge Constantino, in Linskey v. Heidelberg, supra, treated a locally incorporated subsidiary of a Danish company as having standing to assert comparable provisions of the treaty with Denmark.

Further confusion has been engendered by the conflicting views expressed by the United States Department of State. First, in response to an inquiry made by the United States Equal Employment Opportunity Commission, a junior staff attorney wrote a letter dated March 15, 1978 suggesting that the Treaty has no relation at all to claims under the civil rights laws. The Department of State withdrew that letter. On October 17, 1978 it issued a formal opinion by its then Deputy Legal Advisor which expressed the view that locally incorporated subsidiaries have standing to assert the hiring rights granted by Article VIII(1) of the Treaty, and that Sumitomo has freedom of choice to fill all of its key positions with Japanese nationals without being subject

to Title VII sanctions. Then, however, on September 11, 1979, a new Deputy Legal Advisor issued a conflicting opinion, this time to the effect that the Treaty was not intended to give locally incorporated subsidiaries standing to claim such rights. This last opinion was issued in the face of negotiating documents relating to the Treaty and other friendship, commerce and navigation treaties released by the Department of State which Judge Tenney found lent support to the contrary. See, November 29, 1979 Order, Ex. "D" to the Petition, at pp.16-17.

Still further, the June 5 Order also conflicts with the interpretation given to such treaties by at least one other sovereign nation. See, October 17, 1979 letter of Danish Ministry of Foreign Affairs, a copy of which is attached to Sumitomo's Supplement to Petition filed with this Court on December 28, 1979.

On the other hand, Herman Walker, the diplomat who negotiated many of the modern friendship, commerce and navigation treaties, has written that standing to claim under such treaty provisions does not depend upon whether a locally formed subsidiary is deemed a "company" of the United States, and that such treaty provisions give rights greater than those enjoyed by ordinary domestic companies. Walker, "Provisions on Companies in United States Commercial Treaties", 50 Am.J.Int'l Law 373, 380-83 and 386 (1956). Walker's views on standing under the Treaty thus accord fully with the October 17, 1978 State Department letter, and with Judge Constantino, but differ from those expressed by Judge Bue, Judge Tenney, and the State Department's new Deputy Legal Advisor.

Therefore, Judge Tenney correctly determined that his June 5 1979 Order met the 28 U.S.C. §1292(b) requirement that there be substantial ground for difference of opinion. Accordingly, this Court should grant a rehearing of Sumitomo's Petition and permit the appeal which it seeks.

POINT II

THE ORDER DENYING PERMISSION TO APPEAL SHOULD BE REHEARD EN BANC

Sumitomo recognizes that this Court may deny permission to appeal even if the issue certified by the district court meets the criteria of 28 U.S.C. §1292(b). 7B Moore's Federal Practice, at JC-434. However, if the panel's denial of permission to appeal herein reflects such a discretionary determination, then Sumitomo suggests that rehearing en banc is appropriate because of the exceptional importance of the issue involved. The June 5 Order raises important questions the resolution of which by this Court would affect this and other class actions under the civil rights laws. The Order of the panel is of uncertain and doubtful result since it leaves in effect an order of a District Court on which there is substantial disagreement,* and there is no reason for this Court not to hear the matter en banc. A rehearing en banc should thus be ordered. Eisen v. Carlisle and Jacquelin, 479

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* See generally Note, "Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers," 31 Stan. L. Rev. 947, 948-49 and 975-76 (1979) for a discussion of the novelty and importance of the Treaty question, and the likelihood that it will be the subject of frequent litigation in the future if not resolved now.

F.2d. 1005, 1022-26 (2d Cir. 1973, Oakes, dissenting); reversed on other grounds 417 U.S. 156 (1974); Walters v. Moore-McCormack Lines, Inc., 312 F.2d 893,894 (2d Cir. 1963).

That the questions raised by the June 5 Order are exceptionally important cannot seriously be doubted. The June 5 Order interprets United States treaty obligations under international law but expresses doubt as to whether it reaches the correct result.* In this Circuit there are already two District Court decisions -- in Linskey and the present action -- which resolve the issue of standing differently. Absent a resolution on appeal, there is no reason to think that there will not be additional differences of opinion on the subject among judges in this Circuit.**

The United States Court of Appeals for the Fifth Circuit has accepted such question for resolution in the Spiess action. The decision of that Court may not be issued for some time, and may conflict with the June 5 Order herein, and/or the decision of Judge Constantino in Linskey. Such potential conflicts can be avoided if this Court resolves the matter now.

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* This Court has on other occasions accepted for interlocutory appeal certified questions arising under treaties. See, e.g., Reed v. Wiser, 555 F.2d 1079 (2d Cir.) cert. denied, 434 U.S. 922 (1977); Day v. Trans World Airlines Inc., 528 F.2d 31 (2d Cir.) cert. denied 429 U.S. 890 (1976); Husserl v. Swiss Air Transport Company, Ltd., 485 F.2d 1240 (2d Cir. 1973).

** Further, a decision on the issue by this Court will guide state courts also being called upon to consider employment discrimination claims. That this Court's decision may serve as guidance outside the confines of the instant litigation militates in favor of immediate appellate resolution. Walters v. Moore-McCormack Lines, Inc., supra.

Resolution of the Treaty issue by this Court will also provide important instruction to the many foreign entities doing business in the United States pursuant to like treaties, and to United States entities similarly doing business abroad. These entities must know whether they should in the future forego using the form of a locally incorporated subsidiary and instead establish themselves as branch operations, or even whether to reorganize their present subsidiaries as branches of the foreign parent, in order to obtain treaty rights. It seems illogical to suggest that these investment decisions, which also have important tax consequences, both here and abroad, should be left without guidance for years.

Moreover, if this action goes forward, it will engender expenditures of time, money and judicial resources which may well prove to be unnecessary. Plaintiffs have brought this litigation as a "nationwide class action". No motion for class certification has yet been made, and discovery is in its incipient stages.* Sumitomo has employees, including managerial personnel, located throughout the United States. The normal problems attendant to class discovery are aggravated since some of Sumitomo's Treaty Trader employees who would testify in respect of plaintiffs' claims have returned to Japan pursuant to applicable law and are no longer employed by Sumitomo. These witnesses will have to be

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* Defendant has partially answered a set of interrogatories served by plaintiffs and defendant has served interrogatories on plaintiffs which have not been answered. No other discovery has been taken.

deposed in Japan. Many documents and records are kept by Sumitomo in the Japanese language, and thus translation costs will be incurred by the parties.

If Sumitomo's hiring practices are protected by the Treaty, then all this burden and expense can be avoided. It thus neither furthers the interests of justice, nor the policies of §1292(b), to leave appeal of the Treaty question for a later date.

This is not a case where certification by a District Court was made lightly, or deemed only marginally appropriate. In two carefully considered opinions, Judge Tenney made it clear that he has genuine doubts as to the correct resolution of the Treaty issue, and that he wishes guidance from this Court, before all concerned go through potentially useless burden and expense of a class action litigation. Sumitomo submits that Judge Tenney's certification was well-considered, and that this Court should on rehearing, or pursuant to rehearing en banc, grant Sumitomo's Petition for permission to appeal.

Dated: New York, New York
February 7, 1980

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

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79-8460

Files 18-5591-Aug 2d C.C. BV

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 twenty-fourth day of January, one thousand nine hundred andeighty.

Sumitomo Shoji America, Inc.,

Petitioner,

v.

Lisa M. Avigliano, et al.,

Respondents.

79-8460

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated December 10, 1979 for leave to appeal pursuant to 28 U.S.C. §1292(b)

be and it hereby is denied.

DENIED.

JAMES L. OAKES

ELSWORTH A. VAN GRAAFEILAND

JON O. NEWMAN Circuit Judges

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Judith M. Hall, being duly sworn, deposes and says deponent is not a party to the action, is over 18 years of age and resides at 66 East 93rd Street, New York, New York 10028.

On February 7, 1980 deponent served the within Petition for Rehearing or Rehearing En Banc upon:

Equal Employment Opportunity
Commission
26 Federal Plaza
New York, New York 10007

Marcia Ruskin, Esq.
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

at the addresses set forth hereinabove, by depositing a true copy of the within enclosed in a post paid properly addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Judith M. Hall
Judith M. Hall

Sworn to before me this
7th day of February, 1980

Maria Chiodi

MARIA CHIODI
Notary Public, State of New York
No. 03-4680212
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1980