5-5-1978

EEOC Memo as Amicus Curiae in Support of Plaintiff's Motion to Dismiss Defendant's Counterclaims

Lewis M. Steel '63

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al. Plaintiffs, v. SUMITOMO SHOJI AMERICA, Inc. Defendant.	No. 77 Civ. 5461 (CHT) MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSI AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF MOTION TO DISMISS DEFENDANT'S COUNTERC

STATEMENT

This Title VII action is brought by eleven women who are current or former employees of Sumitomo. Their complaint alleges that the company discriminates on the basis of sex and national origin. All eleven filed charges with the EEOC and the New York State Division of Human Rights.

Sumitomo's answer denies that the company discriminates and contains a $325,000 counterclaim. The counterclaim, invoking the Court's ancillary jurisdiction, alleges that the eleven plaintiffs have entered into a conspiracy to "coerce" Sumitomo to raise their pay; improve their work assignments; and retaliate against Sumitomo when it did not do so. (Answer, ¶ 19). The only overt

acts in which the conpirators are alleged to have engaged in are 1) the filing of charges of discrimination with the Commission, (Id. ¶20); 2) the filing of charges with the Division of Human Rights (Id.) and 3) the bringir of this suit. (Id. ¶21). The counterclaim alleges that the charges are "baseless" and that the suit is brought in "bad faith." (Id. ¶20, 21). By filing the charges and bringing suit, the counterclaim alleges that the plaintiffs have "abused process." (Id. ¶22).

Plaintiffs' have moved to dismiss the counterclaim.

ARGUMENT.

Stripped to basics, the counterclaim alleges that the plaintiffs filed their charges and brought this suit in bad faith, knowing their allegations to be false; at most, this is a claim under state common law for malicious prosecution or abuse of process. As such, the counterclaim fails to state a cause of action. The filing of charges with the EEOC and the New York Division of Human Rights are absolutely privileged. In addition, the tort of malicious prosecution cannot be asserted as a counterclaim but must be brought in a separate action and only after the plaintiff in the suit giving rise to the tort has lost; malicious prosecution does not apply to non-adversarial administrative

procedures and so does not apply to plaintiffs' charges; and neither the beginning of administrative proceedings nor the filing of suit can constitute the tort of abuse of process.[1/]

1. The Filing of Charges and the Bringing of Title VII Suits are Absolutely Privileged.

Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a),[2/] makes all forms of employer retaliation against persons who have filed charges or who have participated "in any manner" in a "proceeding" under Title VII unlawful. It is patterned after similar provisions in other federal labor statutes. See National Labor Relations Act, 29 U.S.C. §158(a)(4) and (B)(2); (2) Fair Labor Standards Act, 29 U.S.C. §215(a). These sections prohibiting

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1/ Although the counterclaim is couched in terms of conspiracy, "there is no substantive tort of conspiracy." Goldstein v. Siegel, 19 A.D. 2d 489, 244 N.Y.S. 2d 378, 382 (1st Dept. 1963). Absent an underlying tort, therefore, the "conspiracy" allegation cannot save the counterclaim from being dismissed.

2/ Section 704 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 title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

retaliation are to be broadly construed. NLRB v. Scrivener, 405 U.S. 126 (1962).

Section 704(a) and its counterparts are designed to encompass every type of retaliatory conduct which tends to coerce employees to forego their statutory rights. Under these provisions, employer interference which chills statutory rights and "operate[s] to induce aggrieved employees to accept substandard conditions" must fall, Mitchell v. De Mario Jewelry, 361 U.S. 288, 292 (1960), because "Congress has made it clear that it wishes all persons with information about such [unlawful] practices to be completely free from coercion against reporting them" to the appropriate federal agency. Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967).

An employer's threat that if its employees invoke Title VII's mechanisms it will demand huge penalties--here, $375,000--is inherently coercive. As the Supreme Court recently noted, the threat of being assessed large costs for invoking Title VII remedies "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." Christianburg Garment Co. v EEOC, ___U.S.___, 98 S.Ct 694, 701, 54 L.Ed. 2d 648, 657 (1978). Faced with the

threatened prospect of such costs, the Court, has also noted:

> [E]mployees understandably might decide that matters had best be left as they are. We can not read the act as presenting those it sought to protect with what is little more than a Hobson's choice.

Mitchell v. Demario Jewelry Co., supra, 361 U.S. at 336.

Although most decisions involving §704(a), or its anologues, have involved employer self-help, a few have involved employers' attempts to enlist the courts in their retaliatory conduct. Locally, in Moran v. Simpson, 80 Misc. 2d 437, 362 N.Y.S. 2d 666 (Sup. Ct. 1974), the court interpreted §296(7) of the New York Human Rights Law (Executive Law §296(7)), which is nearly identical to §704(a),[3/] as barring a defamation action for allegations made in a charge to the Division of Human Rights. In Moran, a black man had filed a charge with the Division alleging that a tavern denied him equal treatment because of his color. After the State Division of Human Rights

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3/ Section 296(7) states:

> It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

issued a no cause decision, the tavern sued for defamation. In dismissing the defamation action, the court said that since the charging party had engaged only in protected activity and "the plaintiff's lawsuit is bottomed on an act pronounced to be wrong by statute, it can not survive the defendant's motion for dismissal." Id. at 668.[4/] Similarly, in Television Wisconsin, 224 NLRB 722, 779 (1976), the Board held a union's filing of a state court action against members who had filed a decertification petition with the NLRB to be retaliation constituting an unfair labor practice. The Board stated that since the purpose of the state court litigation was "to restrain and coerce the defendants" the action was barred. The Board indicated that suits "calculated to restrain employees or employers in the exercise of rights guaranteed by the Act" are not permitted. Id. at 780.

Even where Congress has not provided detailed formal mechanisms for the resolution of employer-employee disputes but has left their resolution to privately nego-

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4/ In this connection, the plaintiffs here were doubly protected in filing charges with the New York Division of Human Rights: once by §296(7) and again by §704(a) since in New York, Title VII compels persons who wish to invoke its protection to file charges with the state before filing with the EEOC and §704(a) protects participation in "any proceeding" under the Title.

tiated contracts, statements made during contract negotiations or during the processing of a grievance are absolutely privileged. For example, in General Motors v. Mendicki, 367 F.2d 66 (10th Cir. 1966), the court held that statements made during collective bargaining sessions could not be the subject of state libel actions. The court said that this result was necessary so that the Congressionally preferred means of resolving labor disputes would remain "untrammelled by fear" of tort suits, (there libel) Similarly, in Macy v. Trans World Airlines, 381 F. Supp. 142, 148 (D. Md. 1974), the court held that statements made pursuant to a collective bargaining agreement were absolutely privileged and could not be the basis of a defamation and libel action.

Title VII did not leave resolution of disputes to privately negotiated procedures but established formal mechanisms for employees with real or imagined grievances to use. Section 704(a), 42 U.S.C. 2000e-3(a), expressly protects these procedures so that they will be invoked "untrammelled by fear." The plaintiffs here have invoked those procedures and no others. Accordingly, plaintiffs' conduct is absolutely privileged and cannot form the basis of a tort suit.

Even though §704(a) confers an absolute privilege on charges and Title VII suits, an employer is not unprotected from frivolous, harassing, and bad faith claims.

a) Insofar as employees incorporate frivolous claims in administrative charges, the employer is protected from notoriety by Title VII's confidentiality provisions which prohibit EEOC disclosure of the charge or the results of its investigations to the the public. See §§706(b) and 709(e), 42 U.S.C. 2000e-5(b), and 8(e). If the claims in the charge are in fact frivolous, the employer is also protected from government interference in its affairs because the Commission is obligated to dismiss the charge and can take no further action. See §706(b). If the frivolous nature of the claim is not obvious from the face of the charge, the only inconvenience which the employee suffers takes the form of its assistance--usually by making its personnel records accessible--in an EEOC investigation. Such an investigation will quickly disclose the frivolous nature of the claim and will spare the employer from any disruption to its business.

b. Insofar as employee bad faith or harassment

takes the form of litigation, the employer is also protected--and the use of similar tactics by other employees discouraged--by the availability of attorneys' fees. If the suit has been brought in bad faith, or is "frivolous, unreasonable, or without foundation," the assessment of fees under §706(k), 42 U.S.C. 2000e-5(k), constitutes a substantial deterrent. In fact, the attorneys' fees provision is intended to serve that purpose. Christianburg Garment Co. v. EEOC, supra, 98 S.Ct at 700, 54 L.Ed 2d at 656 quoting Grubbs v. Butts, 548 F.2d 973, 975 (D.C. Cir. 1976) ("Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party' . . .could obtain legal fees"). See also Carrion v. Yeshiva University, 535 F.2d 722, 728-29 (2d Cir. 1976).

In sum, the counterclaim here alleges acts--the filing of charges and the bringing of suit--which are made absolutely privileged by §704(a). It therefore states claims for which no relief can be granted; as such, it must be dismissed.

2. The Allegations In The Counterclaim Do Not State a Claim For Abuse Of Process.

Although Sumitomo's counterclaim is barred by §704(a) the allegations in the counterclaim also do not constitute

a claim for abuse of process. There is no Federal common law tort of abuse of process. If such a tort arises at all in a suit brought under federal law it is a tort which exists only by virtue of state law.

Among the essential elements to a prima facie case of abuse of process are:

> (1) There must be regularly issued process, civil or criminal, compelling the performance or forebearance of some prescribed act;
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> (2) . . .the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse. . . ;
>
> (3) . . .defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process.

Board of Education v. Farmingdale Classroom Teachers Assoc., 38 N.Y. 2d 397, 403, 380 N.Y. S.2d 635, 642 (N.Y. 1975). Sumitomo here has failed to allege a prima facie case of abuse of process under New York law.

a. The company fails to allege that it was subjected to process and thereby compelled to perform or forebear from some act leading to unlawful interference with its person or property. See The Savage Is Loose v.

United Artists, 413 F.Supp. 555, 562 (S.D.N.Y. 1976). In Dorak v. County of Nassau, 329 F.Supp. 497, 501 (E.D.N.Y. 1970), affirmed, 445 F.2d 1023 (2nd Cir. 1971), the court defined process as "attachment, execution, or sequesteration proceedings, the arrest of the person or criminal prosecution, [or garnishment]." The plaintiffs here caused none of these to issue against Sumitomo.[5/] A summons and complaint, which is all that has issued here, is not process within the scope of the tort.[6/] Drago v. Buonagurio, 89 Misc. 2d 171, 391 N.Y. S. 2d 61 (Sup. Ct. 1977).

5/ In Phillips v. Murchison, 383 F.2d 370 (2nd Cir.) cert. denied, 390 U.S. 958 (1970), the court held New York no longer required interference with plaintiff's person or property for an abuse of process action. Murchison relied on an intermediate appellate court decision, Williams v. Williams, 275 N.Y.S. 2d 425 (2nd Dept. 1966), which was subsequently reversed in relevant part by the New York Court of Appeals, Williams v. William 23 N.Y. 2d 592, 298 N.Y.S. 2d 473 (N.Y. 1969).

The New York Court of Appeals held that "there must be an unlawful interference with one's person or property. . . for abuse of process. . . ." Williams v. Williams, supra 298 N.Y.S. 2d 476-477. Murchison's holding based on a case which was latter modified, therefore, has no precedential effect.

6/ Similarly, in New York, process does not mean administrative action. The New York courts have held an action for abuse of process must be based upon the misuse or abuse of process issued by or filed in court. Glaser v. Kaplan, 5 Ad 2d 829, 170 N.Y.S. 2d 522 (2nd Dept. 1958); See also, 1 N.Y. Jur., Abuse of Process §6 (1958).

b. To establish the tort of abuse of process there must be a claim and proof that the party activating the process intended to harm the opposing party and it has thereby obtained an unfair collateral advantage over the opposing party. Board of Education v. Farmingdale Classroom Teachers Assoc., 38 N.Y. 2d 397, 403, 380 N.Y.S. 2d 635, 642 (N.Y. 1975).

Sumitomo here alleges simply that this suit was brought in order to coerce it to meet what it deems to be plaintiffs' unreasonable and excessive demands. But, although all law suits by nature are coercive, under New York law, "the mere institution of a civil action which has occasioned a party trouble, inconvenience, and expense of defending will not support an action for abuse of process." 1 N.Y. Jur., Abuse of Process §2 (1958).

Moreover, Sumitomo makes no allegation that the filing of charges or the bringing of this suit achieved their alleged purposes. On the contrary, it seems evident that they have not. In Dorak v. County of Nassau, 329 F.Supp. 497, 501 (S.D.N.Y. 1970), this court held:

> . . .if the improper object for which the process is sought to be used is not alleged to have been achieved, a complaint for abuse of process is not adequate. . . .

The court added:

> Where the process is used to force the giving up of a right, but the right is not given up, the damages necessary to the cause of action have not occurred.

Inasmuch as essential elements of the tort have not been alleged--and, under the facts here could not be--the counterclaim fails to state a claim for abuse of process.

3. The Allegations In The Counterclaim Do Not State A Claim For Malicious Prosecution.

If the counterclaim can be construed to allege the tort of malicious prosecution, it also fails. In New York, no claim for malicious procution lies until after the suit giving rise to the claim has been decided in favor of the defendant in that suit. Thus, in National Fittings Co. of New York v. Durst Mfg. Co., 28 Misc.2d 168, 210 N.Y.S. 2d 455, 457 (Sup. Ct. 1960), the court noted: "it is 'Hornbook' law in this state that to sustain a claim for malicious prosecution . . . it must be shown that the proceedings terminated in favor of the complaining party." Absent this allegation, there is no cause of action since "the defendant's right to sue. . .has not yet come into being." Id. at 457.

The proposition that no action for malicious prosecution lies until the original suit has ended, necessarily implies that a claim of malicious prosecution can never be included as a counterclaim in the original action. As this Court said in Ivey v. Daus, 17 F.R.D. 319, 323 (S.D.N.Y. 1955):

> Since plaintiff cannot possibly allege such termination at this stage of the proceedings, it follows that plaintiff's counterclaim for malicious prosecution cannot possibly state a claim upon which relief can be granted.

The Court reaffirmed this holding two years later in Slaff v. Slaff, 151 F.Supp. 124, 125-126 (S.D.N.Y. 1957)):

> If the counterclaim be considered as an attempt to allege a claim in the nature of malicious prosecution . . .it is fatally defective. . . .It is a prerequisite to such a claim that the prosecution or action which is alleged to have been maliciously brought must have previously been determined in favor of plaintiff.8/

7/ These cases are in accord with New York law. There is only one case to the contrary, Herendeen v. Ley Realty Co., 75 N.Y.S. 2d 836, a 1947 New York county case. Although it has not been expressly overruled, no New York or federal court has followed it.

8/ Were it possible to plead a counterclaim for malicious prosecution, the counterclaim here fails to allege one important element of the tort. In New York, no action for malicious prosecution will lie unless "a defendant is . . .interferred with, as by injunction, attachments arrest or some other provisional remedy." Ivey v. Daus, 17 F.R.D. 319, 322 (S.D.N.Y. 1955).

CONCLUSION

For the foregoing reasons, Sumitomo's counterclaim must be dismissed for failure to state any cause of action.

Respectfully submitted,

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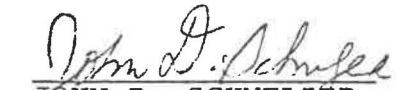

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Equal Employment Opportunity Commission's Memorandum as Amicus Curiae in Support of Plaintiff's Motion to Dismiss Defendant's Counterclaim were today mailed to the following counsel of record.

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