12-6-1979

Corrected Pages to Judge Tenney's 11/29/1979 Opinion

United States District Court, Southern District of New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al.,

Plaintiffs,

-against-

SUMITOMO SHOJI AMERICA, INC.,

Defendants.

77 Civ. 5641 (CHT)

O R D E R

Pursuant to Federal Rule of Civil Procedure 60(a), the Opinion and Order of this Court, dated November 29, 1979, is hereby amended by substituting the attached corrected pages for previous pages numbered 2, 8, 12, 13, 14 and 18.

So ordered.

Dated: New York, New York
December 6, 1979

Charles H. Tenney
U.S.D.J.

Local Counsel:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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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-

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.

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.

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