
Avagliano v. Sumitomo: District Court
Proceedings

Sumitomo Shoji America, Inc. v. Avagliano, 457
US 176 - Supreme Court 1982

9-17-1979

Lewis M. Steel Affidavit in Response to Defendant's Motion to Dismiss

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
LISA M. AVIGLIANO, et al., :
 :
 Plaintiffs, : 77 Civ. 5641 (CHT)
 :
 -against- : AFFIDAVIT
 :
 SUMITOMO SHOJI AMERICA, INC., :
 :
 Defendant. :
-----x

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

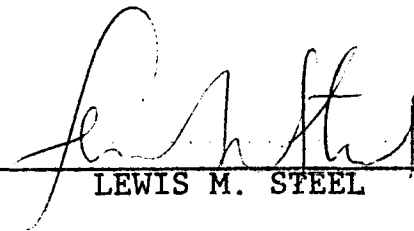
LEWIS M. STEEL, being duly sworn, deposes and says:

1. I am a member of the firm of Eisner, Levy, Steel & Bellman, P.C., counsel for plaintiffs. I submit this affidavit to further supplement the record in response to Sumitomo's motion for reconsideration of this Court's opinion and order dated January 5, 1979 denying defendant's motion for an order dismissing the complaint herein.

2. I attach hereto as Exhibit 1, a letter from the United States Department of State dated September 11, 1979 to Lutz Alexander Prager, Esq., Assistant General Counsel of the Equal Employment Opportunity Commission. This letter sets forth the Department of State's present view that paragraph 1 of Article 8 of the United States-Japan FCN does not cover locally incorporated subsidiaries of Japanese corporations. This is the paragraph upon

which Sumitomo has sought the dismissal of this action. For the information of the Court, I received a copy of the State Department letter from EEOC attorney Marcia Ruskin on September 14, 1979.

3. Plaintiffs also submit herewith a copy of an international law memorandum which was submitted in Spieß v. C. Itoh & Co. The memorandum was prepared by Professor Hans W. Baade for the law firm representing plaintiff in that case. It is submitted here in that it contains, from an international law perspective, guidance as to how the clauses in question in this case should be interpreted. The analysis of Professor Baade is particularly relevant in light of the new State Department documents submitted by defendant.



LEWIS M. STEEL

Sworn to before me this 17th
day of September, 1979.


PATRICIA M. COOPER
NOTARY PUBLIC

PATRICIA M. COOPER
Notary Public, State of New York
No. 31-4528757
Qualified in New York County
Commission Expires March 30, 1978/1980



DEPARTMENT OF STATE

Washington, D.C. 20520

September 11, 1979

Lutz Alexander Prager, Esq.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Prager:

In response to your letters of March 14 and June 21, the 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. (Civ. No. 75-H-267, S.D. Tex.) and two other cases more recently decided in the district court in New York (Avigliano v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (S.D.N.Y.) and Linskey v. Heidelberg Eastern, Inc., 77 Civ. 833 (E.D.N.Y.)).

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.

Thank you for the opportunity to comment on this issue.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "James R. Atwood". The signature is stylized, with the first name "James" written in a cursive script and "R. Atwood" in a more blocky, slightly cursive style.

James R. Atwood
Deputy Legal Adviser

9/18/75

Edward J. O'Neill

2900 Eatex Building

120 M. Lane

Houston, Texas 77002

Dear Ed

Enclosed is a copy of the latest EEOC memo. My memo says approximately the same thing. I have also submitted the Brode memo, and cross referenced to relevant sections. Regards
LMS