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Judge Tenney's Opinion Certifying Interlocutory Appeal to 2nd Circuit

Charles H. Tenney

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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

#48964

APPEARANCES

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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 committed 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.