
District Court Proceedings

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

2-24-1987

Transcript: Settlement Agreement Hearing

United States District Court, Southern District of New York

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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 LISA M. AVAGLIANO, et al.,

6 Plaintiffs,

7 v.

8 SUMITOMO SHOJI AMERICA, INC.,

9 Defendants.

10 PALMA INCHERCHERA,

77 Civ. 5641 (CHT)

82 Civ. 4930 (CHT)

11 Plaintiff,

12 v.

13 SUMITOMO CORP. OF AMERICA,

14 Defendant.

15 -----X
16 Before:

17 HON. MICHAEL H. DOLINGER,

18 Magistrate

19 New York, N. Y.

20 February 24, 1987 - 10:20 a.m.

21 APPEARANCES:

22 STEEL BELLMAN & LEVINE, P.C.,

23 351 Broadway

24 New York, N. Y. 10013

25 Attorneys for Plaintiffs and Class

BY: LEWIS M. STEEL, Esq., and

RICHARD F. BELLMAN, Esq.,

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Attorneys for Defendants

BY: RONALD MICHAEL GREEN, Esq., and

GREGORY K. HIESTAND, Esq.,

of Counsel

1 THE MAGISTRATE: This hearing is for the purpose
2 of formalizing the presentation by the parties of a
3 settlement agreement, which they have entered subject
4 to the approval by the court, and to hear any objections
5 by members of the class, if there are such objections.

6 Mr. Steel, I have received from your office
7 several documents in support of the proposed settlement,
8 and I think perhaps, for the record, at this point you
9 should indicate what papers you have submitted to the
10 court.

11 MR. STEEL: Your Honor, first, I have submitted
12 an affidavit in support of the proposed consent decree,
13 which essentially sets forth the history of both the action
14 and the negotiating history. That is the 38-page
15 affidavit.

16 I have also provided the court with an
17 evidentiary affidavit in support of the proposed consent
18 decree. I've indicated that the exhibits weren't
19 attached. I do have the exhibits now, and I've indicated
20 again that they should be filed under seal (handing).
21 They are referred to in some detail in the papers.

22 And I have also referred to the depositions,
23 and copies of those depositions are also here.

24 And if I could, I will leave you with the
25 original of the evidentiary affidavit, I gave you a

1 court's copy, that you can file with those documents
2 (handing).

3 The other document which we filed is a memorandum
4 in support of the proposed consent decree. That's what
5 we have submitted to the court, your Honor.

6 I think the copies of the depositions should
7 also be filed under seal as well.

8 THE MAGISTRATE: Okay.

9 Mr. Green, could you advise me what papers you
10 are relying on in support of your application for approval
11 of the agreement?

12 MR. GREEN: Your Honor, the defendants rely
13 upon, and have submitted to the court in concert with
14 counsel for the class, a joint stipulation of undisputed
15 facts an affidavit regarding the mailing of all notices
16 by an attorney with the firm of Epstein, Becker, Borsody
17 & Green, counsel for the defendants, an affidavit of
18 David W. Rolls, a principal in the consulting firm
19 of Towers, Perrin, Forster & Crosby, known as TPF&C,
20 my own affidavit with exhibits, and a memorandum of law
21 in support of the motion for the court's approval of the
22 consent decree.

23 THE MAGISTRATE: Up to today, has counsel for
24 plaintiff's received any objections to the proposed decree?

25 MR. STEEL: We have not received any objections,

1 your Honor. We have received one letter which we would like
2 to call to the court's attention.

3 THE MAGISTRATE: Very well.

4 MR. STEEL: We received a letter dated
5 February 19, 1987 from a Gloria Quiroga, who is a former
6 Sumitomo Corporation of America employee in the Dallas
7 office. She was terminated by SCOA on January 5, 1987,
8 this year, and according to our information she was a
9 14-year employee and also, according to our information,
10 an employee who was in good status at the corporation. Her
11 work had been excellent, and she had been promoted to the
12 level of administrator, which is the non-exempt position
13 immediately below the old exempt ranks.

14 The letter is somewhat disturbing to us, and
15 that's why we thought we would bring it up to you.

16 Apparently what Ms. Quiroga did after being
17 discharged is she wrote to the president of SCOA,
18 Mr. Tauro, on January 16, 1987, and in effect gave some
19 history of her situation and indicated that the company
20 had always utilized the seniority system, et cetera --
21 there was a closing of a rolled-steel division in
22 Dallas which precipitated this particular matter -- and
23 she discussed the fact that in her view she should have
24 been kept on.

25 She received a response dated January 29, 1987

1 from the vice president in charge of human resources,
2 Mr. Stripay, indicating to her that while seniority was
3 a factor, it is only one of many factors and he was
4 very sorry about this situation, but the termination
5 would remain in effect.

6 Now, I think you should have a little history
7 of this particular former employee class member and her
8 contacts with our firm.

9 We first heard from Ms. Quiroga in a letter
10 we received January 23, 1987, and her letter is dated
11 January 16, 1987, and it is a very brief letter, so I'll
12 read it into the record:

13 "I, Gloria Quiroga, former employee of
14 Sumitomo Corporation of America, Dallas office, believe
15 I am a member of the class included in the class action
16 suit brought against Sumitomo Corporation of America and
17 being presented to court for approval on February 24,
18 1987.

19 "I hereby notify you of my address so that
20 I may secure my monetary share of the settlement.

21 "Since I have not received any notice of the
22 above, I would appreciate a more complete description
23 of the settlement decree."

24 I responded on January 23, sending her a summary
25 of the settlement and indicating to her that I would have

1 her name and address put on the mailing list, and
2 indicating that if she had any further questions, that
3 she should give a call.

4 And I then informed Epstein Becker to have the
5 mailing list corrected.

6 So I didn't hear from her from my response
7 until on or about February 19, 1987, when she first brought
8 to my attention the fact of the discharge and on the same
9 date sent me a letter, which I then received the next
10 day. The mails are interesting. One time it takes five
11 days and one time it takes one day.

12 In any event, that letter, I suppose, from
13 a lawyer's technical point of view, in distinction from
14 the letter she sent to Mr. Tauro, which on its face
15 appeared to be complaining about the fact that she was
16 let go and some other women clericals were kept, states, and
17 I'll read one paragraph so that you get the flavor. It
18 says:

19 "I have seniority, as the other secretaries
20 have been at SCOA four years and two years."

21 So at that point she is talking again, I
22 take it, about the two other women in the office.

23 The next paragraph then says: "The Dallas office
24 closed its steel department on December 16, 1986.

25 My boss, Mr. S. Yamahiro, a male Japanese employee, was

1 transferred to the Houston office, but I was terminated
2 on January 5, 1987. I feel they have not treated me
3 fairly. I had the title of administrator, and aside from the
4 steel department duties I also handled general affairs
5 and personnel."

6 The letter then talks about what happened
7 from June of '86 on to her discharge. But I read you the
8 parts that I, frankly, find somewhat disturbing, because
9 it seems to me that at least implicit in that paragraph
10 is a claim of sex discrimination. She is talking about
11 her treatment vis-a-vis a male employee's treatment.
12 And, as I say, I received this on February 20, 1987.

13 I've tried to consult with counsel for SCOA to
14 see if there could be some possible resolution of this
15 which would make it unnecessary for me to bring this up
16 at the hearing, and I have been unable to achieve any kind
17 of resolution.

18 Our problem with this, frankly, is that this
19 particular former employee falls within a crack in the
20 decree in that the decree is structured in such a way that
21 after January 19, 1987, people, in effect, are bound by
22 the decree. If they had filed a charge or complaint
23 before January 19, then they would have various options,
24 which appear on pages 6 and 7 of the proposed decree.

25 And, frankly, when we entered into the decree

1 and into that provision, we not only had no idea that
2 the company had just terminated an employee. The decree
3 was signed, I believe, on January 7 and the discharge is
4 January 5. We were operating with a past history in which
5 it literally was impossible to get terminated without
6 doing something extraordinary.

7 In effect, the company operated under a
8 Japanese system, or at least indicated that to us, in
9 which employees who got over their probationary period
10 essentially, unless they did something extraordinary,
11 could remain with the corporation.

12 And so, when we entered into the provision
13 saying that January 19 was the cut-off date, that was
14 the date that the notices were going out, I think both
15 parties were operating under the assumption that what we
16 were attempting to cut off is a last-minute flurry of
17 complaints, based on real or imagined grievances, of
18 people who had never filed anything, done anything, in
19 any way asserted any of their rights for many, many
20 years.

21 And therefore it seems appropriate, and the
22 provision has been utilized in other decrees, to not
23 encourage at the very last minute a flurry of new EEOC
24 complaints which would then keep litigation going to the
25 detriment of the company and to the detriment of the

1 parties attempting to create a harmonious situation to go
2 forward with the implementation of the decree.

3 So this situation seems to be about as sui generis
4 a situation as we could possibly imagine. As a matter of
5 fact, we didn't imagine it before entering into the decree,
6 and we weren't told about it. And had we been told about
7 it, I'm sure we would have attempted to negotiate an
8 exception for this type of rare and unusual situation.

9 This employee, of course, is caught in a
10 position where she literally would have had to, by
11 accident, from January 5 to January 19, 1987, decided
12 on her own that maybe there was some reason for her to go
13 to EEOC and file a sex discrimination charge.

14 There is no way she could have known about the
15 cut-off, and in my experience, people just don't do that.
16 Most of the time, they don't go to an attorney for a
17 month or two months, or some period of time, before
18 they really think about what their grievance is and what
19 it might have been based on, and motivate themselves to
20 take some kind of action.

21 Now, this situation is annoying to us, more
22 than annoying, very disturbing to us, for the following
23 reasons: We think that the settlement is absolutely
24 appropriate and should be accepted by this court, and we
25 think, on behalf of the class, that if we took any other

1 position, we would not be acting appropriately. Virtually
2 all of our feedback from class members has been very
3 enthusiastic, very supportive of this decree.

4 We've set forth some of that material in my
5 affidavit, but nothing from the writing of the affidavit
6 to date in any way changes that view, that feedback
7 that we have had from class members about this decree.

8 So therefore, we certainly would not in any
9 way, shape, manner or form attempt to undermine what
10 appears to us to be a very beneficial decree for our class
11 members.

12 And we also believe that because this particular
13 employee may have some kind of individual claim, it is
14 not even appropriate for us, and the decree talks about
15 those people who do opt out and says that class counsel
16 won't represent them, again, to avoid the possibility of
17 conflict between individuals and class members.

18 So we think it absolutely inappropriate for us
19 to evaluate the basis of this letter: Does it state a
20 claim? Should this particular employee file? If she did
21 file, what chance of success would she have? The
22 normal lawyer's analysis of any complaint. We don't think
23 it is an appropriate role for us to be playing in any
24 event, although the way the decree is written, this person
25 is cut off because of that January 19, 1987 cut-off period

1 of time.

2 What we suggest, therefore, with regard to this
3 particular situation is that the court consider this
4 situation under paragraph 10 of the order setting forth
5 this hearing, in which the court retains jurisdiction
6 of this action and will consider all further applications
7 arising out of or connected with the proposed settlement
8 herein.

9 We feel that what would be appropriate here is
10 that this particular former employee, and she alone, be
11 given an option, after notification, within thirty days to
12 come in under the option provisions and indicate to the
13 court whether or not she wants to accept whatever remedy
14 she has under the decree. And that makes it even more
15 complicated because she's got \$6,000 -- I can't say it
16 is 6,000, but she is a 14-year employee. She would be
17 at the higher end of the range between \$1,500 and \$6,000,
18 which is the range of what the former employees would get.
19 She is going to be up there in that range.

20 And what we would like is for the court, in
21 the exercise of its discretion, to give this particular
22 employee the right to come to court under paragraph 4 of
23 the decree, within a fixed period of time after
24 notification, and inform the court as to how she intends
25 to proceed and then exercise the options that are set forth

1 in the decree.

2 In other words, what we would like to do is, due
3 to the unique set of circumstances, create an exception
4 on that January 19, 1987 cut-off date as to her alone,
5 to allow her to come in and exercise within a fixed
6 period of time whatever options would be available to class
7 members who had filed before the date, under the decree.

8 And I must say additionally that the company,
9 as both Mr. Green's affidavit and my affidavit make
10 clear, must have known, due to the heavy negotiations that
11 were going on, the many drafts, et cetera, et cetera, which
12 were going back and forth, that unless she was notified
13 as to that January 19, 1987 date, or unless we were
14 notified in a way in which we could notify her, that they
15 were going to immunize a discharge.

16 And, as I say, we have no opinion one way or
17 another whether she has any rights whatsoever under this
18 situation, and I could conceive very easily of the
19 company defending, under her letter to Mr. Tauro, saying:
20 "You are complaining that with your seniority you should
21 have been given one of the jobs of the two other women
22 secretaries, and there is nothing of a Title VII nature
23 that arises out of that type of complaint."

24 I absolutely do anticipate that that would be
25 the way the company would respond to that. It may well be

1 correct. We just find ourselves in a position that we
2 wanted to bring it to the attention of the court and ask
3 for that type of relief.

4 THE MAGISTRATE: Is it your view that that sort of
5 relief is authorized by either the consent decree or any
6 order of this court?

7 MR. STEEL: Well, yes. I don't think that
8 that relief is a modification of this decree, for two
9 reasons: One, the sui generis nature of her situation is
10 really outside the scope of what the decree is all
11 about, what it was trying to resolve. That's number one.
12 Number two, the decree, paragraph 4, page 7, talks about
13 January 24, 1987 as being the cut-off date for all
14 claims which have been or could have been advanced in
15 this lawsuit as of that date against SCOA.

16 I'm not even sure, as I stand before you
17 today, from a lawyer's point of view if, in good faith,
18 that claim could be advanced. A lawyer would have to
19 talk to this particular former employee and find out if
20 there is a basis for any claim and make some kind of
21 evaluation.

22 So it seems to me that this is a situation that
23 perhaps falls within the cracks of the crack. And for
24 those two reasons it seems to me to be entirely
25 appropriate. And, of course, there has been no disclosure

1 to us before the January 19, 1987 --

2 THE MAGISTRATE: One thing I'm puzzled about in your
3 reading of 4(a), just quickly scanning it here, is that
4 it would seem to have the effect of foreclosing any
5 claims that might have been in existence up to today.
6 Or am I misreading it?

7 MR. HIESTAND: That's correct, your Honor.

8 MR. STEEL: But the cut-off as of the 19th,
9 if you look at (c), that's why this person is in that
10 crack, the purpose of that being, from the company's
11 point of view, to which we agreed in bargaining, that the
12 company did not want notices to go out to all sorts of
13 people who would say, "Aha, I've been sitting back on my
14 rights for two years but now, all of a sudden, I better
15 rush down to EEOC and stir up some additional litigation."
16 That's the purpose of that.

17 And the situation that we are responding to
18 has nothing to do with that particular situation. As I
19 say, it has to do with a situation where, if we would
20 have been put on notice about it, we wouldn't be here
21 before you on that issue, I assure you. There would
22 have been a side letter or some other agreement covering
23 this particular employee.

24 So that we really don't view what we are asking
25 you to do as modifying the decree, and we think that,

1 in light of the last sentence in paragraph 10, and in
2 light of the court's jurisdiction, what we are asking for
3 is appropriate.

4 What we would want would be a very limited window
5 in which this person could do what she wanted. She could
6 consult with somebody and either do something or not do
7 something and inform you.

8 THE MAGISTRATE: So you are not at this point
9 proposing that the court specifically read the
10 decree as allowing her to make a claim under its procedures,
11 but as simply affording her the opportunity to come into
12 this proceeding for the purpose of being heard, if she
13 wants to?

14 MR. STEEL: I think that is the easiest
15 resolution, yes. Alternatively, of course, I would ask
16 you to read the decree as allowing her, under the particular
17 facts, to come in and assert a claim within a fixed time
18 period.

19 Frankly, I don't think giving her time in
20 any event would hold up the implementation of the decree
21 because she would be coming in essentially under an
22 exception, merely allowing her the right to exercise
23 whatever options are available under paragraph 4. She
24 has not objected to the decree itself.

25 THE MAGISTRATE: So you are not suggesting, then,

1 that the approval of the decree need await resolution of
2 whatever problem she may have.

3 MR. STEEL: That's right. I'm not suggesting
4 that.

5 Other than that individual situation, we ask
6 that the court accept this decree and approve it. We
7 do note that both sides have submitted characterizations
8 of what the decree does and doesn't do. We believe that
9 our characterization is considerably broader than
10 Mr. Green's characterization. We stand by ours. We
11 hope, if the decree is approved, that the distinction in
12 categorizations or the different categorizations don't
13 lead to problems. But if they do, we assume they will be
14 worked out one way or another.

15 Thank you.

16 THE MAGISTRATE: Mr. Green?

17 MR. GREEN: Your Honor, I'll respond first
18 to Mr. Steel's comments concerning Gloria Quiroga, which,
19 as I advised him, as I will now advise the court, I think
20 are inappropriate for him to advance as class counsel.

21 If we begin with his concluding remarks,
22 that he wishes Ms. Quiroga to have the opportunity to
23 consider filing her own action, since under the decree
24 that would divest class counsel of representative status
25 on her behalf, I'm not at all sure why he is pursuing a

1 position of advocacy on her behalf. She has not objected
2 to this decree. She has not attempted to opt out of this
3 decree. She has had notice of this action posted in a
4 facility where she has been employed for 14 years, since
5 November 19, 1985.

6 She received notice pursuant to Mr. Moll's
7 affidavit of mailing to the same address she gave
8 Mr. Steel. It was never returned to us. She knew full
9 well of her opportunity to be here today and
10 with your Honor.

11 She has elected not to do so.

12 In the letter that Mr. Steel read to the court,
13 she only asked for information with respect to how much money
14 she is going to get now that she is not among the 200-odd
15 women in the class currently employed by Sumitomo but
16 among the nearly 1,000 women, some 250 of whom will be
17 getting substantial cash payments as former employees.

18 She will be receiving, I agree with Mr. Steel,
19 probably more than virtually any former employee, based
20 on her service with the company, and it may very well be
21 in excess of five or six thousand dollars, if she executes
22 a release waiving any and all claims.

23 However, nothing in this decree represents a
24 waiver of any rights she might have to challenge her
25 termination as a wrongful dismissal under the law of

1 Texas, or as a violation of the federal or any Texas age
2 discrimination in employment statute. It pertains only to
3 claims of sex discrimination.

4 THE MAGISTRATE: Well, are you saying that if she were
5 to decline to sign a waiver at this point and does in
6 effect give up the 6,000 or whatever the figure is in the
7 settlement, that she would retain her right to claim under
8 Title VII?

9 MR. GREEN: No. The waiver would bar her
10 asserting any claims under Texas state common law, age
11 discrimination in employment statutes or otherwise. But it
12 is clear that the cut-off date, the 26th of February,
13 bars her claiming any violation of Title VII with respect
14 to her previous employment with Sumitomo. And I doubt that
15 she was unaware of that. I'm sure her counsel advised her
16 of that.

17 The fact that, unique to my experience certainly,
18 an action of this size has no objectors and no opt-outs,
19 despite a ten-year history of litigation, bears ample
20 testimony to the overall fairness of this settlement.

21 If she now must count herself among the 70-odd
22 percent of class members who are former employees, and
23 the only claim she makes in the correspondence to her
24 counsel and to Mr. Tauro is not that she disputes that
25 a department was terminated, the rolled steel department,

1 not that she challenges the business decision that the
2 head of that department moved to Houston and she had no
3 interest in following him, but merely that her two
4 fellow class members, one of whom was older, both of whom
5 were women, had less seniority and one of those women should
6 have been displaced in deference to her.

7 Whatever the merits of that claim may be, I
8 certainly suggest that doesn't warrant the exercise of your
9 extraordinary jurisdiction in this case, although I must
10 say that your order, I believe, limits the ability you
11 wish to have to modify this decree only to those
12 circumstances when the parties agree.

13 We represent that the relief that Mr. Steel
14 seeks would represent a modification to the waiver release
15 provisions of the decree, to which we do not consent.

16 THE MAGISTRATE: Well, Mr. Steel presents two
17 alternatives, of which he is, I gather, more emphatically
18 suggesting the first, which is simply that the individual be
19 given perhaps a more clearly-defined opportunity to be
20 heard rather than simply as to whether she wants to come
21 in here and raise a fuss about her particular problem,
22 putting aside the question, of course, whether she has any
23 legal mechanism for obtaining relief in this court under
24 this decree. And Mr. Steel says that that is entirely a
25 separate matter from the approval of the decree.

1 What problem do you see with simply allowing her
2 to be heard from, without prejudice to your right to claim
3 that she has been, in effect, foreclosed from any actual
4 remedy?

5 MR. GREEN: Your Honor, I do not suggest for a
6 moment that the court cannot listen to any class member
7 for the duration of this decree with respect to any issue
8 they claim arises under the decree. I wouldn't suggest
9 for a moment that we could foreclose her communicating with
10 the court.

11 My suggestion here is that the court not rule that
12 the decree as written ought to be modified to allow
13 special dispensation to any one class member.

14 THE MAGISTRATE: It seems to me, from what I've heard,
15 that it would be inappropriate at this stage to make such a
16 ruling, wholly apart from the question of whether we ought
17 to simply allow her to communicate with the court and see
18 whether she wants to make such an application. And in
19 that case, I'm sure that your arguments would be listened
20 to attentively by the court as to whether or not (a)
21 it would constitute a modification and (b) whether it
22 would be an appropriate modification, under the terms of
23 the decree.

24 MR. GREEN: That's fine.

25 My closing comment merely goes to the point also

1 raised by Mr. Steel, that it is true that we each have
2 somewhat different views with respect to certain provisions
3 of the decree which may or may not be amplified by some of
4 the letter agreements which we have executed. I'm confident
5 that, and I know Mr. Steel is, we'll be able to work out
6 our differences as they may arise during the life of the
7 decree but, in any event, join him in suggesting that our
8 differences, as they may appear in the characterization
9 of the decree, will not warrant any delay in your
10 acceptance of the approval of it.

11 THE MAGISTRATE: Are there present in court any
12 individuals who wish to be heard from, apart from
13 counsel who have already spoken, with respect to the terms
14 of the decree and whether it should be approved by the
15 court?

16 Very well. I will then accept your various
17 submissions.

18 Parenthetically, Mr. Steel, if you could, supply
19 me with a copy of the letter, so that I can at least
20 understand the basis for inviting Ms. Quiroga, if I think
21 it appropriate, into the case, at least for the purpose
22 of hearing what she has to say --

23 MR. STEEL: I'll do that, your Honor. What I
24 intend to do is send her a letter. The end of her
25 letter asks me to tell her whether I think she was treated

1 unfairly, and I'm going to tell her that I'm not in a
2 position to comment on that, that if she wants to have
3 somebody else take a look at it, she should feel free
4 to do that.

5 And it seems to me that I should say that if she
6 wishes to contact you about it, she should do that within
7 ten days of receipt of the letter. It seems to me that
8 there should be some short cut-off.

9 THE MAGISTRATE: I agree. I think ten days is
10 appropriate.

11 MR. STEEL: I'll send it in overnight mail.

12 THE MAGISTRATE: Fine.

13 MR. GREEN: Your Honor, may I be heard just
14 briefly?

15 THE MAGISTRATE: Yes.

16 MR. GREEN: Although we didn't discuss this at
17 our most recent conference with you, Mr. Steel and I share
18 a common concern. To the extent that it is possible
19 for you to act expeditiously, we would encourage you to do
20 so, principally because all the Sumitomo employees are
21 awaiting certain pay adjustments, which are being held
22 up until the decree becomes effective.

23 THE MAGISTRATE: Fine.

24 MR. GREEN: Thank you.

25 MR. STEEL: I would join in that.

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