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Brief Amicus Curiae of the Attorney General of the State of New York

Attorney General of the State of New York

No. 80-2070
No. 81-24

IN THE

Supreme Court of the United States

October Term, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,

against

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief Amicus Curiae of the Attorney General of the State of New York

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Questions Presented.

1. Does Title VII of the Civil Rights Act of 1964 limit the right of Japanese companies operating in the United States through American subsidiaries to employ "executive personnel * * * of their choice," as provided by the Treaty of Friendship, Commerce and Navigation between the United States and Japan?

2. Assuming *arguendo* that the American subsidiary of a Japanese corporation enjoys freedom of choice in employment rights under the Treaty, is customer preference a valid factor warranting application of Title VII's narrow "bona fide occupational qualification" exception?

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Brief *Amicus Curiae* of the Attorney General of the State of New York.

The Attorney General of the State of New York submits this *amicus curiae* brief pursuant to Rule 36(4) of the Rules of this Court to insure the fullest possible implementation of Federal civil rights law in this State.

This matter involves a challenge to the employment practices of Sumitomo Shoji America, Inc. (hereafter "Sumitomo"), a wholly-owned subsidiary corporation located in New York, incorporated under New York law and employing primarily New York residents. New York's interest in this case, however, goes far beyond its responsibility to protect its residents from discrimination by Sumitomo. This Court can take judicial notice of the fact that New York State's population is tremendously heterogeneous, since New York City has long been the point of entry for immigrants from virtually every nation on earth. Perhaps because of this diverse population New York enjoys a long tradition of civil rights legislation. Its own Civil Rights Law, enacted in 1909, was the first comprehensive statute of its kind in the nation, insuring the protection of the civil rights of all New York residents.

Because of this tradition, embodied in various civil rights statutes, the State of New York has taken an active role in the struggle to eradicate employment discrimination on the basis of race, religion, national origin or sex. The continued vitality of Title VII of the Civil Rights Act of 1964, with which New York's Human Rights Law is closely interrelated, is crucial to that struggle.

Summary of Argument.

The Treaty of Friendship, Navigation and Commerce between the United States and Japan (hereafter "Treaty") does not grant Japanese corporations a license to ignore American laws prohibiting employment discrimination. The right of such corporations under the Treaty to employ

executive personnel of their choice is subject to the same limitations imposed upon the employment practices of American corporations by Title VII of the Civil Rights Act of 1964.

By including customer preference as one factor determinative of Title VII's "bona fide occupational qualification" exception, the Court below has effected an unwarranted expansion of this narrow exception which could seriously undermine Title VII's purposes. This expansion is not only unwarranted by the facts of this case, but is also contrary to both established judicial precedent and the guidelines promulgated by the Equal Employment Opportunity Commission concerning the bona fide qualification exception.

Nature of the Case.

The petitioner, Sumitomo, incorporated under the laws of the State of New York, is a wholly-owned subsidiary of a Japanese trading company. It is engaged primarily in the sale and resale of goods in import and export markets. The cross-petitioners, with one exception, are United States citizens and past or present female clerical employees of Sumitomo.

In this action, cross-petitioners claim that Sumitomo's admitted practice of placing only male Japanese nationals in executive, managerial and/or sales positions constitutes discrimination on the basis of sex and national origin, in violation of Title VII of the Civil Rights Act of 1964 (42 USC, § 2000e, *et seq.*). The petitioner asserts that its employment practices are protected by what it characterizes as an "unqualified" Treaty right to employ "executive personnel * * * of their choice".

ARGUMENT.

POINT I.

The Treaty right of Japanese companies operating in the United States to employ executive personnel of their choice is not absolute, but subject to the same employment discrimination prohibitions applicable to American corporations under Title VII of the Civil Rights Act of 1964.

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides in part:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *"

Article VIII(1) of the Treaty provides:

> "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, * * * executive personnel * * * and other specialists of their choice."

The petitioner asserts that this provision confers upon Japanese companies operating in the United States an "unqualified right" to employ "executive personnel * * * of their choice", undiminished by Title VII's prohibition against discrimination in employment (Pet Br, p 20). This argument is premised upon what petitioner perceives to be a fatal inconsistency between its Treaty right to freedom

of choice in employment and Title VII's prohibition against discrimination. Viewing the Treaty and statute as irreconcilable, petitioner cites well-established authority holding that, absent express statutory language, Courts will not imply legislative abrogation of Treaty rights (Pet Br, p 31).

It is equally well-settled, however, that "[w]hen there are two acts and treaties upon the same subject, the rule is to give effect to both if possible" (*United States v. Borden Co.*, 308 US 188, 189 [1939]). Applying this principle, we submit that the express language of the Treaty in its entirety is easily harmonized with Title VII.

As the Court below recognized (638 F2d at 554), the overriding purpose of this and other Friendship, Commerce and Navigation treaties is to insure that foreign corporations doing business in this country receive the same treatment as American citizens. Thus, Article VII(1) of the Treaty guarantees that "companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities within the territories of the other Party". Accordingly, the Treaty provides that such companies "shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party".

When this purpose is read in conjunction with Article VIII(1), there is no conflict with Title VII. The Treaty merely guarantees Sumitomo and other Japanese companies doing business in America the same freedom of choice enjoyed by United States corporations. Sumitomo

is free to hire any employee it chooses, as long as it does not unlawfully discriminate in the process.*

This conclusion is reinforced by an examination of the background of the Treaty, as set forth by the Court below (638 F2d at pp 558-559). Citing documents relating to the Treaty's formulation, that Court noted that Article VIII's "freedom of choice" provision was "primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens" *(id.)*. Thus, Article VIII was intended to eliminate discrimination, not, as petitioner ironically argues, to give foreign corporations license to violate the anti-discrimination laws of their host countries.

POINT II.

The Court below erred in holding that customer preference can be determinative in establishing a "bona fide occupational qualification" (bfoq) exception under Title VII, since such an unwarranted expansion of this narrow exception could seriously undermine the statute's purpose.

The broad prohibitions against employment discrimination contained in section 703(a) (1) of Title VII are qualified by section 703(e), which provides that:

*Petitioner argues in the alternative that even if Title VII were fully applicable, its employment practices do not violate that statute, since they are based on Japanese citizenship, not national origin (Pet Br, pp 14-18). This argument is based on an overly-expansive reading of this Court's decision in *Espinoza v. Farah Manufacturing Co.*, 414 US 86 (1974). Although this Court did hold in *Espinoza* that citizenship discrimination is not illegal *per se* under Title VII, it went on to state unequivocally that "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin" (*id*, p 92). The Court below did not pass upon this issue. It is clear, however, that petitioner's claim must at least be subject to scrutiny at trial upon remand to determine if in fact its employment practices have the purpose or effect of national origin discrimination.

> "(1) [n]otwithstanding any other provision of this sub-chapter it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * * (42 U.S.C. §2000e-2[e])"

The Court below held that petitioner was subject to the constraints of Title VII and correctly observed that petitioner could avail itself of the bfoq exception by establishing that the employment of Japanese nationals was "reasonably necessary to the successful operation of its business" (638 F2d at p 559). It further stated, however, that, as applied to petitioner, an unprecedented expansion of this exception was justified by "Treaty rights and unique requirements of a Japanese Company doing business in the United States" *(id.)*. Thus, the Court included "acceptability to those persons with whom the company or branch does business" as one of the factors determinative of the bfoq exception. This expansion of the bfoq exception to include customer preference is contrary to established precedent and could seriously erode the effectiveness of Title VII.

This Court has ruled in *Dothard v. Rawlinson,* 433 US 321, 334 (1977), "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination based on sex." Heeding this admonition, Federal courts have long held that customer preference is not a defense to an employment policy which makes a distinction upon impermissible grounds (see, e.g., *Fernandez v. Wynn Oil Company,* 653 F2d 1273 [9th Cir, 1981]; *Diaz v. Pan American Airways, Inc.,* 442 F2d 385 [5th Cir, 1971], cert den 404 US 950 [1971]).

Fernandez, supra, is most apposite to the case at bar, for there the corporation, an international petro-chemical manufacturer, argued for a relaxation of the bfoq exception to include customer preference in international contexts. This argument was flatly rejected by the Ninth Circuit, which stated (*id,* p 1277):

> "Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. *No foreign nation can compel the non-enforcement of Title VII here.*" (Emphasis supplied.)

The troubling implications of accepting the unprecedented expansion of bfoq to include customer preference could well extend far beyond the context of this case. Surely the restaurant owner who avers in offering a bfoq defense that his customers will not eat food served by black hands will be summarily dismissed from every court in this land. Yet the decision of the Court below would open the door to such future challenges to Title VII.

Acknowledgement of the legitimacy of customer preference as an excuse for employment discrimination would not only be a fatal first step in curtailing the effectiveness of Title VII, it is also directly contrary to the EEOC guidelines concerning the bfoq exception in both sex and national original contexts. Those guidelines provide:

> "(1) The commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> * * *

"(ii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in paragraph (a) (2) of this section.

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress. (29 CFR § 1604.2)

* * *

"The exception stated in Section 703(e) of Title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed. (29 CFR § 1606.4)"

The EEOC has resolutely adhered to these guidelines,* and this Court has repeatedly held that they are entitled to great weight (*Dothard v. Rawlinson, supra,* 433 US 321, 334 n 19; *General Electric v. Gilbert,* 429 US 121, 142-43 [1976]; *Griggs v. Duke Power Co.,* 401 US 424 [1971]). The EEOC's interpretation of the bfoq exception is reasonable and sensitive to the purposes of Title VII; nevertheless, the Court below has without explanation disregarded its narrow construction of this exception.

*For example, in a case in which an employer refused to hire a woman who applied for a position as an armored car guard, the EEOC rejected the argument that loss of customer confidence in the employer's ability to provide adequate security should justify a bfoq exception. EEOC Decision No. 70-11, 1973 EEOC Dec 4048 (1969). Similarly, the preference of male customers for male employees to accompany them to football games and hunting trips and the preference of wives that their husbands not work with single women in situations requiring sleeping or working in close quarters were held by the EEOC to be insufficent to establish a bfoq defense. EEOC Decision No. 71-2338, 1973 EEOC Dec 4437 (1971); EEOC Decision No. 72-0644, 1973 EEOC Dec 4565 (1971).

This break with established precedent and administrative interpretation is unwarranted by the facts of this case, and, indeed, was not even urged by petitioner in the courts below. The Court of Appeals states that Article VIII of the FCN Treaty and the "unique requirements of a Japanese company doing business in the United States" account for the expansion of the bfoq exception to include customer preference.

Concerning its "unique requirements", however, petitioner's attorney stated in an affidavit in support of the motion to dismiss in the District Court only (Joint App, p 70a):

> "Thus, it is imperative that the managers, executives and 'traders' (a more appropriate term than 'salesperson' for the functions performed by those who buy and sell goods for a *sogo shosha*) comprehend sophisticated questions of international finance, international investment, international trade, shipping and related business matters, as well as local and foreign potential market conditions for a wide variety of products—chemicals, fertilizers, steel products, machinery, industrial plans, textiles, airplane parts, rubber raw materials, energy, ceramics, etc. It is equally imperative that such persons, whether working for the parent corporation or for its branches, representative offices or subsidiaries, intimately comprehend the Japanese marketplace and Japanese business practices, culture and language."

Noticeably absent from this detailed list is "acceptability to those persons with whom the company or branch does

business," the standard enunciated by the Court below. Thus, while the Second Circuit asserts that its standard is necessary to accommodate the unique situation of Sumitomo, the company itself has never contended that accommodation to its customers' preferences is given weight in determining whom it employs in a management capacity.

Furthermore, Sumitomo's list of imperative qualities does not recognize either citizenship or sex, and no reasonable argument can be made that other-than-Japanese citizens or females are incapable of acquiring the skills Sumitomo requires in its management employees.

Upon remand, therefore, the District Court should be instructed that any bfoq exception alleged by Sumitomo be evaluated in light of its historically narrow construction, and that acceptability of employees to business associates or customers is not a proper factor in evaluating the applicability of that exception.

CONCLUSION.

The decision of the Court of Appeals should be modified to eliminate customer preference as a determinative factor in the bfoq exception, and as so modified affirmed.

Dated: Albany, New York
February 20, 1982

Respectfully submitted,

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