7-3-1979

EEOC Memo in Support of Plaintiff's Motion

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Lisa M. AVIGLIANO, et al.,

Plaintiffs,

v. 77 Civ. 5641 (CHT)

SUMITOMO SHOJI AMERICA, Inc.,

Defendant.

MEMORANDUM BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE, IN SUPPORT OF PLAINTIFFS' MOTIONS FOR RECONSIDERATION OR FOR PERMISSION TO APPEAL.

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We support plaintiffs' motions asking the Court to reconsider its refusal to dismiss Sumitomo's state tort counterclaims for abuse of process and prima facie tort or, alteratively, to certify the issue for appeal. We agree fully with their arguments but add two additional considerations, one substantive, one procedural.

1. In holding that §704(a) of Title VII, 42 U.S.C. 2000e-3(a), does not provide absolute protection against state tort claims, the Court relied on decisions which involve a different clause of §704(a) from the one applicable here. Section 704(a) protects both employee "self help" opposition outside Title VII's formal processes--the "opposition" clause--and employee participation in those processes --the "participation" clause.[1/] Because of the differences

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1/ Section 704(a) provides

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . .because [1] he has opposed any [continued]

in employee activity with which they are concerned their protections differ markedly. "Self help" opposition can take many forms, ranging from muted protest to hostile, disruptive activity. Once the protest exceeds permissible bounds, the employer must be free to protect itself in a reasonable manner. The cases on which the Court relied relate solely to such employee "self-help" opposition and employer reactions to it. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)(inflammatory and unlawful "stall-in"); Novotny v. Great American Federal Savings and Loan Ass'n, 584 F.2d 1235, 1259-61 (3d Cir. 1978)(protest at board of director's meeting); Hochstadt v. Worcester Foundation, 545 F.2d 222, 230 (1st Cir. 1976)(excessively hostile behavior at work); EEOC v. Kallir, Phillips, Ross, Inc., 401 F.Supp. 66, 70-73 (S.D.N.Y. 1975), aff'd, 559 F.2d 1203 (2d Cir. 1977), cert. denied, 434 U.S. 920 (1977)(alleged interference with employer-client relationship).

The present case involves not "self-help" but "participation" in channels expressly established by Congress for the purpose of investigating and resolving employee claims of employer misconduct:

1/ (footnote continued)

> practice made an unlawful employment practice by this title, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

> The considerations controlling the interpretation of the opposition clause are not entirely the same as those applying to the participation clause. The purpose of latter is to protect the employee who utilizes the tools provided by Congress to protect his rights. If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severly chilled.

Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978). Unlike the "opposition" cases on which the Court relied, the decisions cited in our briefs and plaintiffs' uniformly hold that participation in the processes established by Congress or the legislature are entirely privleged. See Cooper v. Pic-Walsh Freight Co., ___F.Supp.___[E.D. Mo., No. 75-403-C-(1) 1976]; Moran v. Simpson, 80 Misc.2d 437, 362 N.Y.S.2d 666 (Sup. Ct. Livingston Co., 1974); see also General Motors v. Mendicki, 367 F.2d 66 (10th Cir. 1966); Macy v. Trans World Airlines, 381 F.Supp. 142, 148 (D. Md. 1974); Power Systems, Inc., 329 N.L.R.B. No. 56, 99 LRRM 1652 (1978).

The Court's June 6 opinion blurs this distinction between "opposition" and "participation." Unlike disruptive and unlawful "self-help" opposition, against which the Act provides the employer no express protection and for which traditional state tort law may therefore provide a suitable remedy, Congress established comprehensive and exclusive safeguards against misuse of Title VII's mechanisms: deliberately false charges are subject to perjury; spurious claims will be promptly dismissed by the EEOC; and attorneys' fees provide a deterrent to and sanction for malicious

litigation.

Because the Court overlooked these distinctions, reconsideration is appropriate.

2. State tort counterclaims which are not compulsory as defined by Rule 13(a), F.R.Civ.P., should not be permitted to with litigation of the principal federal issue here. Thus, in Harris v. Steinem, 571 F.2d 119, 123-25 (2d Cir. 1978), in which defendant counterclaimed for libel contained in a complaint alleging violations of the securities laws and in plaintiff's subsequent statements concerning her suit, the court of appeals dismissed the counterclaims, saying:

> . . . we think that postponement of suits that will ordinarily not arise if plaintiff wins the main action and avoidance of the "danerous potentialities of counterclaims [in the nature of] malicious prosecutions as a defensive strategem," are strong policy reasons supporting that line of cases [requiring dismissal of such permissive counterclaims].

State decisions agree. Knapp Engraving Co. v. Keystone Photoengraving Corp., 1 A.D. 170, 148 N.Y.S. 2d 635 (1st Dept. 1965).

2/ Because the counterclaims here are not compulsory, and no diversity of citizenship exists between Sumitomo and the plaintiffs, this Court may well lack jurisdiction over the counterclaims. Harris v. Steinem, 571 F.2d 119, 123-125 (2d Cir. 1978).

CONCLUSION

Plaintiffs' motion to reconsider should be granted. Alternatively, plaintiffs should be permitted to take an immediate appeal.

Respectfully submitted,

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