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Memorandum of Law in Opposition to Motion for Order Reopening Record on Appeal and to Strike Material Submitted by EEOC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMITOMO SHOJI AMERICA, INC., Defendant-Appellant,	)	
v.	)	No. 80-7418
LISA M. AVIGLIANO, et al., Plaintiffs-Appellees.	)	MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR ORDER REOPENING RECORD ON APPEAL AND TO STRIKE MATERIAL SUBMITTED BY EEOC.

PRELIMINARY STATEMENT

On September 26, 1980, the Equal Employment Opportunity Commission filed an amicus curiae brief in this case. Simultaneously, the Commission sent to the Court and attorneys of record copies of a diplomatic note of September 9, 1980, from the Department of State to the Danish government, construing language in the treaty of friendship, commerce and navigation between the United States and Denmark which is similar to the language in the Japanese Treaty at issue in this case. Sumitomo has objected to the submission of the note to the court arguing 1) that the note is not part of the record on appeal and 2) that the Commission improperly influenced the State Department to issue the note in an attempt to influence the outcome of this appeal. Both of these arguments are unfounded.

1. Sumitomo argues that the September, 1980, note is improperly before this Court because it was not presented to the district court and is not a part of the "record on appeal." This argument is based on the erroneous characterization of the note as evidentiary material, subject to the provisions of Rule 10(e), F.R.A.P.

The note, however, is not evidentiary in nature as it makes no factual representations as to matters in the record before the district court. 1/ It is a legal opinion regarding treaty language similar to that before this Court, by the agency of the Executive Branch which administers all FCN treaties, and, as such, is deserving of some deference. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933). The interpretation of a treaty involves a legal matter and not a question of fact, Strong v. United States, 518 F.2d 556 (Ct.Cl. 1975), cert. denied, 423 U.S. 1015 (1975); Citizen Band of Potawatomi Indians v. United States, 391 F.2d 614, 618 (Ct.Cl. 1967), cert. denied, 389 U.S. 1046 (1968), and therefore the weight to be given to the State Department's opinion is within the discretion of this Court.

Since it is a legal opinion, the note's submission to the Court is not governed by Rule 10(e); it is to be presented to

1/ On several occasions (e.g., Memorandum of Law in Support of Motion to Strike at p. 7 n*; Reply Affidavit of L.P. Hicks at ¶ 1), Sumitomo has erroneously stated that the Commission's brief identifies the note as "reflect[ing] a change in the State Department interpretation of the treaty. . . ." In fact, the brief clearly points out that the note merely reaffirms a change seen one year earlier in the September 1979 letter from James R. Atwood, Deputy Legal Advisor, Department of State, to Lutz Alexander Prager, Assistant General Counsel, EEOC. See EEOC brief at 8-9, 11.

the Court at the earliest possible time, regardless of the stage of the proceedings. In this respect the note is more akin to an intervening court decision or an opinion letter issued by the administrative agency empowered to issue such opinions.

2. Sumitomo's suggestion that the Commission has acted improperly because it reviewed the contents of the note prior to its being sent to the Danish Embassy is without merit and should be disregarded.

The Commission is responsible for the coordination of all federal fair employment laws, President's Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (May 9, 1978). In this capacity the Commission acts as advisor to other federal agencies with respect to the interpretation of Title VII. It was in this capacity that the Commission reviewed the language of the note for consistency with Title VII. See October 3, 1980 affidavit of L. Prager, ¶¶ 2,3,4. The Commission cannot, and did not in this instance, dictate to the State Department its interpretation of the relationship between the Civil Rights Act and the FCN Treaty. It was proper, however, for the Commission to review for consistency statements made by another federal agency regarding Title VII. This is the role Mr. Prager openly performed in "clearing" the September 1980 note.

Further, Sumitomo's suggestion that the Commission dictated to the State Department the terms or the timing of the release of the note is completely without foundation and is contradicted

by the affidavit of the Commission attorney who reviewed the note. See October 3, 1980 affidavit of L. Prager, ¶ 5; October 3, 1980 affidavit of M. B. Ruskin.

CONCLUSION

For the foregoing reasons, Sumitomo's motion should be denied.

Respectfully submitted,

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