

FILED
Clerk
District Court

JUL 11 1995

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

GLEN DALE HUNTER,

Plaintiff

v.

MICRO PACIFIC DEVELOPMENT INC.,
dba Grand Hotel,

Defendant

Civil Action No. 94-00027

ORDER RE DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the court on Friday, June 30, 1995, for hearing of defendant's motion for summary judgment. Plaintiff appeared by and through his attorney, G. Anthony Long; defendant appeared by and through its attorneys, Theodore R. Mitchell and Jeanne Rayphand. The court previously received two amicus briefs, one from the United States and one from the Commonwealth of the Northern Mariana Islands. Both plaintiff and defendant requested and were granted until Friday, July 7, 1995, to file responses to portions of the amicus briefs. This time limit was subsequently extended, at the request of both parties, until Monday, July 10, 1995, at 3:00 p.m.

THE COURT, having considered the written and oral arguments of counsel, and

1 being otherwise advised, rules on defendant's motion for summary judgment as follows:

2 The Applicability of the Treaty Within and To the Commonwealth

3 The initial issue is the applicability within and to the Commonwealth of the
4 Northern Mariana Islands of the Treaty of Friendship, Commerce and Navigation¹ entered
5 into between the United States and Japan and effective October 30, 1953. The court
6 concludes that the Treaty does apply, by virtue of both general principles of international
7 law and by the terms of the Covenant.²

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9 Generally, when one party to a treaty acquires new territory, the treaty
10 automatically applies to the newly-acquired territory. See e.g. Disconto Gesellschaft v.
11 Umbreit, 208 U.S. 570, 581, 28 S.Ct. 337 (1908)(pre-Empire treaty recognized by both
12 governments as still in force after the formation of the German Empire); Terlinden v.
13 Ames, 184 U.S. 270, 282-85, 22 S.Ct. 484 (1902)(treaty dating from 1852 not
14 terminated by subsequent formation of German Empire). Under this principle, the terms
15 of the Treaty became applicable to the Commonwealth on November 3, 1986, when, by
16 virtue of the proclamation³ of President Reagan, the Trust Territory of the Pacific
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21 ¹ 4 U.S.T. 2063 (Apr. 2, 1953).

22 ² "Covenant to Establish a Commonwealth of the Northern Mariana Islands in
23 Political Union with the United States of America," Pub.L. 94-241, 90 Stat. 263 (Mar. 24,
24 1976), codified at 48 U.S.C. § 1981.

25 ³ Presidential Proc. No. 5564, 51 Fed.Reg. 40399 (Nov. 3, 1986).

1 Islands⁴ ended as to the Northern Mariana Islands and the Commonwealth came instantly
2 into being under the sovereignty of the United States.

3 This conclusion is buttressed by Covenant §§ 101 and 102. Section 101 provided
4 that the Northern Mariana Islands became a self-governing commonwealth upon the
5 termination of the Trusteeship Agreement (in November, 1986). Section 102 provided
6 in relevant part that "those provisions of the Constitution, treaties and laws of the United
7 States applicable to the Northern Mariana Islands, will be the supreme law of the
8 Northern Mariana Islands." The court finds that the United States-Japan Friendship
9 Treaty at issue here automatically became applicable to the CNMI on the date the
10 Commonwealth came under United States sovereignty.
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13 Do the Terms of the Treaty Supersede Commonwealth "Local Preference" Hiring Laws?

14 The Treaty, together with the Covenant and those provisions of the United States
15 Constitution and laws applicable to the Northern Mariana Islands, is the "supreme law of
16 the Northern Mariana Islands" pursuant to Covenant § 102. Commonwealth labor laws,
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21 ⁴ The court believes it would be error to begin analysis of this issue with the mention
22 of the Trust Territory of the Pacific Islands in Article XXIII of the Treaty. The Trust
23 Territory of the Pacific Islands was never under United States sovereignty and no
24 presidential proclamation ever extended the provisions of the Treaty to the Trust
25 Territory. It was the act of the people of the Northern Mariana Islands, as expressed in
26 Covenant §§ 101 and 102, in choosing to become a part of and live under the sovereignty
of the United States that automatically extended the Treaty's applicability to the
Commonwealth.

1 when in conflict, are superseded by applicable Treaty terms.⁵ Summary judgment is
2 GRANTED on the issue of whether or not the Treaty supersedes Commonwealth labor
3 laws which conflict with it. It does. However, each instance of a party claiming Treaty
4 rights will have to be adjudicated on its own facts until the Commonwealth provides
5 guidance, legislatively or by administrative rule-making, to investors, employers,
6 prospective employees, and this court.
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8 May a Subsidiary Assert the Treaty Rights of Its Parent Company?

9 Defendant Micro Pacific Development is a Commonwealth corporation and a
10 subsidiary of Nagoya Railroad Company, Ltd. of Japan. Nagoya Railroad Company owns
11 51.7% of the common stock of Micro Pacific Development. Defendant argues that it must
12 be allowed to assert its parent's Treaty rights, or else such rights are essentially
13 meaningless, because defendant claims that its alleged discriminatory conduct toward
14 plaintiff was caused by the assignment from its parent company of a person to occupy the
15 position of front desk supervisor at the hotel.
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17 In Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 102 S.Ct. 2374
18 (1982), the Court construed Articles VIII(1) and XXII(3) of the United States-Japan
19 Treaty of Friendship, Commerce and Navigation. Petitioner Sumitomo was a wholly-
20 owned subsidiary of its Japanese parent company. Respondents alleged that Sumitomo's
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23 ⁵ While it is true that the Commonwealth controls its own immigration pursuant to
24 Covenant § 503(a), this is a separate issue and one not squarely before the court at this
25 time. It is to be hoped that the Commonwealth will take steps to protect its rights under
26 Covenant § 503(a) by quickly addressing the new immigration issues raised by the Treaty.

1 practice of hiring only male Japanese citizens to fill executive, managerial, and sales
2 positions violated both 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, et seq. (Title VII).

3 The Court began its analysis with the language of the Treaty itself, following the
4 well-established precedent that the language controls unless its literal application would
5 lead to a result inconsistent with the intent or expectations of the signatories.
6

7 Section VIII(1) of the Treaty provides in pertinent part:

8 Companies of either Party shall be permitted to engage, within the
9 territory of the other Party, accountants and other technical experts,
10 executive personnel, attorneys, agents and other specialists of their
11 choice.

12 Article XXII(3) provides:

13 As used in the present Treaty, the term "companies" means corporations,
14 partnerships, companies and other associations, whether or not with
15 limited liability and whether or not for pecuniary profit. Companies
16 constituted under the applicable laws and regulations within the
17 territories of either party shall be deemed companies thereof and shall
18 have their juridical status recognized within the territories of the other
19 Party.

20 The Court found that, because Sumitomo had been incorporated in New York,
21 it was "a company of the United States," and not a company of Japan, pursuant to Article
22 XXII(3). Thus, it could not invoke the rights provided in Article VIII(1), which "are
23 available only to companies of Japan operating in the United States[.]" Sumitomo Shoji,
24 457 U.S. at 183-84. Both governments supported the Court's interpretation. Id. The
25 Court further held that:

26 "[t]he purpose of the [Friendship] Treaties was not to give foreign
corporations greater rights than domestic corporations, but instead to

1 insure them the right to conduct business on an equal basis without
2 suffering discrimination based on their alienage. * * * These local
3 subsidiaries are considered for purposes of the Treaty to be companies
4 of the country in which they are incorporated; they are entitled to the
rights and subject to the responsibilities of other domestic corporations."

5 Id. 457 U.S. at 189.

6 The Court in Avagliano left open the question of whether a subsidiary
7 corporation, admittedly not a "Japanese company" in the technical sense used in Article
8 XXII(3) of the Treaty, could nonetheless assert the Treaty rights of its parent company.
9 457 U.S. at 190 n.19.⁶ In addressing this question, defendant here urges the court to
10 adopt the approach used in Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

11 In Fortino, the Seventh Circuit held that the subsidiary company must be allowed
12 to assert its parent's Treaty rights if the parent company dictated the subsidiary's
13 discriminatory conduct. Fortino, 950 F.2d at 393. Not to allow the subsidiary to do so
14 would be to treat discrimination based on national origin (prohibited by federal law) the
15 same as discrimination based on national citizenship (allowed by the Treaty). The court
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18 ⁶ The Court stated:

19 We express no view as to whether Japanese citizenship may be a bona
20 fide occupational qualification for certain positions at Sumitomo [Shoji
21 America] or as to whether a business necessity defense may be available.
22 There can be little doubt that some positions in a Japanese controlled
23 company doing business in the United States call for great familiarity
with not only the language of Japan, but also the culture, customs, and
business practices of that country.

24 The Court noted that the court of appeals had found the evidentiary record
25 insufficient to determine whether Japanese citizenship was a bona fide occupational
26 qualification for any of Sumitomo's positions within the reach of Article VIII(1).

1 held that a judgment that forbade the subsidiary from giving preferential treatment to
2 expatriate executives sent by its parent company would effectively prevent the parent
3 company from assigning its executives to the subsidiary, thus abrogating the terms of the
4 Treaty. Id. Accordingly, the court of appeals held that the subsidiary must be allowed
5 to assert the Treaty rights of the parent "at least to the extent necessary to prevent the
6 treaty from being set at naught." Id. The court agrees that this approach would at least
7 allow introduction of evidence of the normal parent-subsidiary relationship and whether
8 or not the employee in question was assigned to the subsidiary by the parent company.

10 Defendant maintains that the male Japanese citizen now occupying the position
11 of front desk supervisor was assigned to the position by its parent company in Japan.
12 Plaintiff counters that the position was advertised locally and that the advertisement gave
13 no indication that any special qualifications were necessary beyond the high school
14 education and two years experience specified in the advertisement. Because there is a
15 genuine issue of material fact surrounding the extent to which the parent company was
16 responsible for the allegedly discriminatory conduct of its subsidiary, summary judgment
17 is DENIED.
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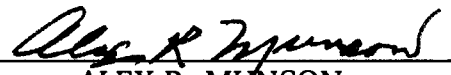
19 Is the Position of Front Desk Supervisor Covered by the Treaty?
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21 For reasons similar to those given in the preceding paragraph, summary judgment
22 on this question must be DENIED. While there is nothing before the court to indicate
23 that the position of front desk supervisor is a position falling within the ambit of the
24 Treaty, in the absence of any guidance from existing Commonwealth law, each case will
25

1 need to be decided on its own particular facts, and the court will hear evidence on this
2 issue.⁷

3 For the reasons stated above, defendant's motion for summary judgment is
4 GRANTED as to the issue of the applicability of the Treaty within and to the
5 Commonwealth, GRANTED as to the question of whether the Treaty supersedes
6 conflicting Commonwealth labor laws, GRANTED as to the proposition that a subsidiary
7 has at least a limited right to attempt to assert the Treaty rights of its parent company
8 but DENIED due to the genuine issues of material fact remaining for decision regarding
9 the parent company's role in assigning personnel to defendant, and DENIED as to the
10 claim that the position of front desk supervisor is covered by the Treaty, since there
11 remain genuine issues of material fact.
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14 DATED this 11th day of July, 1995.

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17 ALEX R. MUNSON
18 Judge
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24 ⁷ It is to be hoped that the Commonwealth will soon address this issue, in order to
25 protect the rights established for it by the Covenant and to aid the court when this issue
26 again is presented.