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U.S. Legal News for Japanese Companies

Client Advisories

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This newsletter reports on U.S. legal matters relevant to Japanese companies from the spring of 2024. In addition to our usual coverage, in this edition we take a special look at New York employment cases. Please let us know if you find this type of coverage useful. If we receive positive feedback, we will try to include more "special looks" in future editions of this newsletter.

Special Look: New York Employment Cases Involving Japanese Companies

- The FCN Treaty Protects Certain Hiring Decisions

In *Sumitomo Shoji Am., Inc. v. Avagliano*,[1] past and present female secretaries of Sumitomo Shoji America, Inc. ("Sumitomo America") brought a class action in New York federal court. The plaintiffs alleged that Sumitomo America discriminated in its hiring practices because it hired only male Japanese citizens to fill executive, managerial, and sales positions. Sumitomo America moved to dismiss the complaint. Without admitting the plaintiffs' allegations, Sumitomo America argued that such hiring practices would be permitted under the Friendship, Commerce and Navigation Treaty of 1953 between the United States and Japan (the "FCN Treaty").[2]

The FCN Treaty grants each nation's companies the right to do business in the other nation's territory. It provides, in relevant part, that such companies "shall be permitted to engage, within the territories of the other [nation], accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[3] The district court refused to apply this provision to Sumitomo America because it was a U.S. company and not a Japanese company. On appeal, the Second Circuit Court of Appeals concluded that the FCN Treaty applied to locally incorporated subsidiaries of foreign corporations. The United States Supreme Court reversed. It agreed with the district court that, as a U.S. company, Sumitomo America could not invoke the FCN Treaty.[4]

In *Sumitomo,* the Supreme Court left open the question of whether a U.S. subsidiary could invoke the FCN Treaty rights of its Japanese parent in an anti-discrimination action brought against the subsidiary. This question was answered affirmatively in *Schanfield v. Sojitz Corp. of America*.[5] In that case, a former employee sued Sojitz Corporation of America, alleging that he was denied promotion to higher-ranking executive jobs open to rotational employees from the Japanese parent.[6] The court applied the FCN Treaty to bar Mr. Schanfield's claim, holding that a U.S. subsidiary

could invoke the FCN Treaty "on behalf of the Japanese parent if the parent corporation dictated the conduct at the subsidiary that is alleged to be discriminatory." [7]

The *Schanfield* court cautioned, however, that the FCN Treaty does not give Japanese companies a "license to violate American laws prohibiting discrimination in employment." [8] It noted that the FCN Treaty protects hiring decisions based on citizenship, but not hiring decisions based on national origin or race. [9] Further, Japanese companies should keep in mind that the FCN Treaty speaks only to managerial and technical positions. It does not protect hiring decisions for other types of positions. [10]

- Japanese Parent Companies Can Be Liable for a U.S. Subsidiary's Discrimination

Japanese companies should also be aware that, in certain circumstances, a Japanese parent may be liable if its U.S. subsidiary discriminates against its employees. In *Brown v. Daikin Am. Inc.*, [11] an American employee sued after he was terminated as part of a workforce reduction. Mr. Brown alleged that Daikin America Inc. ("Daikin America") terminated seven American employees and none of the Japanese employees on rotation from the parent, Daikin Industries Ltd. ("Daikin Japan"). Mr. Brown sued both Daikin America and Daikin Japan for discrimination. [12]

The trial court granted the defendants' motion to dismiss. First, the court found that, since Mr. Brown was an employee of Daikin America, he had no claim against Daikin Japan. The trial court also found that there could be no finding of discrimination because Mr. Brown and the Japanese rotational employees were not similarly situated. [13]

The Second Circuit Court of Appeals vacated the trial court's decision on both grounds. With respect to Daikin Japan, the Second Circuit held that a parent may be considered an employer of its subsidiary's employees if the two entities are sufficiently integrated to be treated as a "single employer." [14] To find such a "single employer," there must be: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. [15] Mr. Brown had alleged that Daikin Japan closely directed the operations of Daikin America, Daikin Japan's approval was required for all significant actions by Daikin America, Daikin Japan immunized Japanese rotational employees from discharge by directing Daikin America to discharge only employees who were not Japanese, and Daikin Japan prohibited Daikin America from reassigning or discharging Japanese rotational employees. The Second Circuit found these allegations sufficient to keep Daikin Japan in the case. [16]

With respect to whether the plaintiff and the Japanese rotational employees were similarly situated, the Second Circuit looked at whether they were "subject to the same standards governing performance evaluation and discipline." [17] The Second Circuit found that Mr. Brown's complaint plausibly alleged that this was the case. Among other things, Mr. Brown alleged that he had worked in a group with three Japanese rotational employees, two of whom had reported to the same supervisors as he did. [18]

Although the Second Circuit permitted Mr. Brown's claims to continue, they were never decided, since shortly after the opinion was issued, the parties settled the case. Nevertheless, *Brown* continues to be an important case, which subsequent courts have cited when finding foreign parent companies liable for discrimination. [19]

- Mizuho Bank Wins Dismissal of Retaliation Claim Based on Use of Japanese Language

More recently, in *Kurtanidze v. Mizuho Bank, Ltd.*, [20] Mr. Kurtanidze, a white male from Eastern Europe, alleged that Mizuho Bank's New York office terminated him because of his race. He also alleged that Mizuho retaliated against him by excluding him from business discussions. Among other things, he claimed that Mizuho's senior employees held meetings in Japanese so that he could not participate. Mizuho moved to dismiss both claims. [21]

The court denied Mizuho's motion to dismiss Mr. Kurtanidze's termination claim. The court construed this claim to allege discrimination based on Mr. Kurtanidze's race and not his citizenship (*i.e.*, the fact that he was not from Japan). It found that certain statements that Mizuho's manager made to Mr. Kurtanidze — *e.g.*, that he should be "more like a

Japanese employee" and that "Japanese employees prioritize work" — were ethnically degrading and could therefore constitute prohibited discrimination based on ethnic characteristics. [22]

The court granted Mizuho's motion to dismiss the retaliation claim. With respect to Mizuho's use of the Japanese language, the court held that, because a classification made on the basis of language was not on the basis of race or national origin, Mizuho's failure to prohibit its workers' use of the Japanese language did not violate antidiscrimination law. [23]

- ispace technologies U.S., inc. Settles Race-Discrimination Lawsuit

On April 26, ispace technologies U.S., inc., the U.S. arm of the Japanese company ispace, inc., and Kyle Acierno, the former CEO of the U.S. entity, announced that they had agreed to settle Acierno's race-discrimination lawsuit filed in Colorado federal court. [24] The terms of the settlement have not been disclosed. Mr. Acierno alleged that he was discriminated against for not being Japanese, retaliated against for speaking out, and ultimately terminated because, among other reasons, the Japanese are "afraid of Americans." [25] He also alleged that: (1) Japanese engineers refused to take orders from non-Japanese team leads; (2) Japanese employees engaged in an organized attempt to have non-Japanese managers removed or demoted; and (3) upper-level Japanese employees used racist, derogatory and discriminatory terms in private chat conversations to refer to non-Japanese employees and discussed how to get them terminated. [26]

Arbitration

- Federal Court Upholds $46 million Arbitration Award in Favor of Daiichi Sankyo

On April 1, a federal court in the State of Washington upheld an arbitration award requiring Seagen Inc. to pay Daiichi Sankyo Co., Ltd. ("DSC") nearly $46 million in attorneys' fees and costs for bringing time-barred claims. [27] The judge also ordered Seagen to pay prejudgment interest expected to total more than $869,000, plus additional post-judgment interest. [28] Seagen commenced the arbitration in 2019, claiming that DSC had misappropriated proprietary knowhow that Seagen had shared under a 2008 collaboration agreement. Seagen's CEO testified that he "paid little attention to DSC" until 2019 when he was informed that a certain DSC product was likely to receive FDA approval and become a "significant competitor" to Seagen. [29] Only then did he instruct his legal team to investigate whether the product fell under the collaboration agreement. [30] The arbitrator found that Washington's six-year statute of limitations for written contract disputes barred Seagen's claim. [31]

Trademark Litigation

- Nike and BAPE Settle Trademark Infringement Lawsuit

According to a notice of voluntary dismissal filed April 29, Nike settled its case against USAPE LLC, also known as A Bathing Ape or BAPE, accusing the Japanese fashion brand of copying the Nike Airforce 1 and Air Jordan sneakers and infringing Nike's trademarks. The terms of the settlement were not disclosed, except that both sides agreed to bear their own fees and costs. [32]

Cross-Border Transactions

- Japan's Ono Pharmaceutical to Pay $2.4 Billion for Deciphera

On June 11, Ono Pharmaceutical Co., Ltd. announced the successful completion of a tender offer to acquire all the outstanding shares of common stock of Deciphera Pharmaceuticals, Inc. for a total of approximately $2.4 billion. [33] In a press release from April, Ono's CEO Gyo Sagara stated, "We expect that this acquisition of Deciphera will not only

expand ONO's target oncology portfolio, but also accelerate ONO's business development in the United States and Europe." [34]

- Japanese Crypto Exchange to Go Public in U.S.

On May 8, Monex Group Inc., a Japanese holding company that owns Japanese cryptocurrency exchange Coincheck, Inc., announced that its Dutch subsidiary Coincheck Group B.V. had filed a registration statement with the U.S. Securities and Exchange Commission ("SEC") for a proposed combination with Thunder Bridge Capital Partners IV, Inc., a special purpose acquisition company or SPAC. [35] If the SEC and Nasdaq approve the Coincheck merger, and if it is successfully completed, the combined company will be renamed Coincheck Group N.V. and trade under the symbol "CNCK." The combination is expected to close later this year. [36]

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1. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982). ↩
2. *Id.* at 178-79. ↩
3. *Id.* at 181 (quoting Friendship, Commerce and Navigation Treaty between the United States and Japan, 4 U.S.T. 2063 (Apr. 9, 1953), art. VIII(1)). ↩
4. *Id.* at 179-80. ↩
5. *Schanfield v. Sojitz Corp. of Am.*, 663 F. Supp. 2d 305 (S.D.N.Y. 2009). ↩
6. *Id.* at 330. ↩
7. *Id.* at 331. ↩
8. *Id.* at 332. ↩
9. *Id.* at 332-33. ↩
10. *E.g.*, *Bakeer v. Nippon Cargo Airlines, Co., Ltd.*, No. 09 CV 3374 RRM, 2011 WL 3625103, at *37 (E.D.N.Y. July 25, 2011). ↩
11. *Brown v. Daikin Am. Inc.*, 756 F.3d 219 (2d Cir. 2014). ↩
12. *Id.* at 224. ↩
13. *Id.* at 225. ↩
14. *Id.* at 226. ↩
15. *Id.* ↩
16. *Id.* at 228. ↩
17. *Id.* at 230. ↩
18. *Id.* at 230-31. ↩
19. *E.g.*, *Downey v. Adloox Inc.*, 238 F. Supp. 3d 514, 523-24 (S.D.N.Y. 2017). ↩
20. *Kurtanidze v. Mizuho Bank, Ltd.*, No. 23 Civ. 8716 (PAE), 2024 WL 1117180 (S.D.N.Y. Mar. 13, 2024). ↩
21. *Id.* at *2. ↩
22. *Id.* at *9. ↩
23. *Id.* at *10. ↩
24. Notice of Settlement, *Acierno v. Ispace Technologies U.S. Inc.*, No. 1:23-cv-01464 (D. Colo. Apr. 26, 2024). ↩
25. Complaint, *Acierno v. Ispace Technologies U.S. Inc.*, No. 1:23-cv-01464, at *2 (D. Colo. June 8, 2023). ↩
26. *Id.* ¶¶ 43, 47, 51. ↩
27. *Seagen Inc. v. Daiichi Sankyo Co., Ltd.*, No. C22-1613JLR, 2024 WL 1375829, at *10 (W.D. Wash. Apr. 1, 2024). ↩
28. *Id.* ↩
29. *Seattle Genetics, Inc. (Seagen) v. Daiichi Sankyo Co., Ltd.*, ICDR Case No. 01-19-0004-0115, Award (Nov. 17, 2023), ¶62. ↩
30. *Id.* ↩
31. *Id.* ¶67. ↩
32. Stipulated Dismissal, *Nike Inc. v. USAPE LLC*, No. 1:23-cv-00660 (S.D.N.Y. Apr. 29, 2024). ↩
33. Press Release, Ono Pharmaceutical, Co., Ltd., *Ono Announces Results of Tender Offer to Acquire Deciphera Pharmaceuticals and Completion of Acquisition of Deciphera (a Wholly Owned Subsidiary of Ono)* (June 11, 2024), https://www.ono-pharma.com/en/news/20240611.html. ↩

34. Press Release, Ono Pharmaceutical, Co., Ltd., *ONO Enters into a Definitive Agreement to Acquire Deciphera Pharmaceuticals* (Apr. 30, 2024), https://www.ono-pharma.com/en/news/20240430.html. ↩
35. Press Release, Monex Group, *Announcement by Monex Group regarding the public filing etc. of Coincheck Group B.V. to become publicly listed on Nasdaq through a De-SPAC transaction with Thunder Bridge Capital Partners IV, Inc.* (May 8, 2024), https://www.monexgroup.jp/en/news_release/irnews/auto_20240508583430/pdfFile.pdf. ↩
36. Press Release, Nasdaq, *Thunder Bridge Capital Partners IV, Inc. Announces Public Filing of Registration Statement with the SEC for Proposed Business Combination with Coincheck, Inc., a Subsidiary of Japan's Monex Group* (May 7, 2024), https://www.nasdaq.com/press-release/thunder-bridge-capital-partners-iv-inc.-announces-public-filing-of-registration. ↩

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