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Administrative Law—Discriminatory Visa Requirement Not Bona Fide Occupational Requirement

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THE COURT OF APPEALS, 1960 TERM

ADMINISTRATIVE LAW

DISCRIMINATORY VISA REQUIREMENT NOT BONA FIDE OCCUPATIONAL REQUIREMENT

The Arabian American Oil Company (Aramco) was permitted to make inquiries concerning the religious affiliation of prospective employees through an exemption granted by the State Commission Against Discrimination (SCAD) under Section 296(1)(c) of the New York Executive Law.[1] The justification for the exemption was the fact that Jewish employees could not obtain visas from the government of Saudi Arabia to permit them to work in the oil fields of that country. In *American Jewish Congress v. Carter*,[2] application was made to annul this determination by SCAD and to reopen the matter so that a new determination could be made. Special Term annulled SCAD's determination[3] and the Appellate Division affirmed.[4] The Court of Appeals found that "probable cause" existed for "crediting the allegations of the complaint," that this was not a "bona fide occupational qualification,"[5] and ordered the commissioner to take steps toward the elimination of this unlawful discriminatory practice, or to refer the matter to the entire commission for a hearing.[6] Although the Commission has the authority to make an independent determination, in view of the Court's decision it seems highly improbable that it will find Aramco's discriminatory practice to be exempt as a bona fide occupational qualification.

If an administrative agency acts within the permissible limits of the law, and reasonable support for its conclusions can be found in the record, its

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1. N.Y. Exec. Law § 296(1)(c):
It shall be an unlawful discriminatory practice: For any employer . . . to use any form of application for employment . . . which expresses . . . any limitation . . . as to age, race, creed, color, or natural origin . . . unless based upon a bona fide occupational qualification.
2. 9 N.Y.2d 223, 213 N.Y.S.2d 60 (1961).
3. 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959).
4. 10 A.D.2d 833, 199 N.Y.S.2d 157 (1st Dep't 1960).
5. Supra note 1.
6. N.Y. Exec. Law § 297:
If such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion . . . In case of failure to eliminate such practice, or in advance thereof if in his judgment circumstances so warrant . . . (he shall require the employer) . . . to answer the charges of such complaint at a hearing before three members of the commission, sitting as the commission, . . . If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order to cease and desist . . . If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice . . . [it shall dismiss the complaint].

determination should be conclusive.[7] Therefore, the Court of Appeals in order to set aside the Commission's determination should have found that it was without basis. Saudi Arabia does not issue visas to members of the Jewish faith.[8] Almost all of Aramco's operations are in Saudi Arabia.[9] As a result Aramco is unable to use any Jewish employees. Although the policy of Saudi Arabia is contrary to the law of New York,[10] the exemption is a realistic acceptance of the fact that neither the United States, nor New York State, nor Aramco, nor anyone else can effect a change in the domestic policies of Saudi Arabia.

When Section 296(1)(c) was enacted, it can be assumed that the legislature realized conditions would arise which would require discrimination, and that it intended that exemptions be granted when they could be properly justified. The Near East contains about two-thirds of the world's oil deposits and the loss of access to the Saudi Arabian supply would be disastrous to the United States and its allies.[11] In order for Aramco to continue to tap this supply, it must also refrain from hiring Jews to work the Saudi Arabian oil fields. This situation has the earmarks of a compelling justification for granting the exemption.

While it is recognized that these oil supplies are important to the United States, the State Department refused to intervene in the case.[12] Thus the decision of the Court cannot be considered to be contrary to the foreign policy of the United States. The Court could with reason, in the face of the compelling facts in favor of Aramco, find this discriminatory practice to be without justification. Aramco is not merely a victim of Saudi Arabia's policy, but actively assists it, albeit unwillingly, by carefully screening the employment applications. The respondent argues that Aramco has no need to know whether or not a prospective employee is Jewish. The American Jewish Congress says that it would have no objection if employees were hired conditionally pending the acquisition of a visa.[13] In other words, the American Jewish Congress is requesting that Saudi Arabia be forced to do its own discriminating, and that Aramco should not be allowed to act as its agent in this matter.

The exemption granted to Aramco appears to be without precedent. It is well settled that exemption when granted must be material to job performance.[14]

7. Swalbach v. State Liquor Authority, 7 N.Y.2d 518, 526, 200 N.Y.S.2d 1, 7 (1960); Barton Trucking Corp. v. O'Connel, 7 N.Y.2d 299, 314, 197 N.Y.S.2d 138, 150 (1959).
8. Appellant's Brief, 7740 Cases & Points, Case 1, p. 6.
9. Id. at 51.
10. N.Y. Exec. Law § 290 provides in substance that it is the policy of New York State to eliminate discrimination as to race, creed, color, or natural origin in employment and other matters of public concern.
11. Eisenhower, Message to Congress, Department of State Publication 6440, Near and Middle East Series 22 (January 1957).
12. Macomber, Assistant Secretary of State, Letter of July 29, 1959 to Sen. Bartlett, contained in Respondent's Brief, 7740 Cases & Points, Case 1, p. 65.
13. Respondent's Brief, 7740 Cases & Points, Case 1, p. 41.
14. SCAD, Report of Progress, 1946 p. 18; 1948 p. 61; 1950 p. 47; 1952 pp. 36-37.

The religion of an engineer is not relevant to his professional qualifications, but only becomes relevant as the result of the domestic policies of the place of employment. There is no evidence that the Legislature of New York intended the exemption to be used to allow discrimination on this basis.

It will be conceded that the Court might have been justified in finding for Aramco, and that the result of this decision will place Aramco in a predicament. In the event that Aramco cannot produce a more compelling justification, it is doubtful that SCAD on reinvestigation will allow the exemption. The amount of harm resulting to Aramco will then depend entirely on the number of applications for employment it receives from members of the Jewish faith. Against this we can balance the social benefit derived from terminating a policy of discrimination which is contrary to the letter and spirit of New York law. New York is not a province of Saudi Arabia and owes no allegiances to it. New York should not be forced to violate its principles of justice, or allow its citizens to flaunt its laws, or to surrender any of its sovereignty merely because a foreign power desires to enforce its own domestic policies which happen to be in conflict with those of New York.

J. D. R.

THE PUBLIC AUTHORITY AND SOVEREIGN IMMUNITY

The growth and expansion of government has created many administrative difficulties. The conventional form of governmental institution was not suited to the handling of many of the vast enterprises carried on by governmental units. To facilitate administrative efficiency, we have developed the public authority, an organization halfway between government and private business and endowed with the virtues of both. The dual personality of the public authority or public corporation has posed some serious problems especially in the area of sovereign immunity.

Benz v. New York State Thruway Authority[15] illustrates the types of problems encountered in the area of sovereign immunity and the public corporation. The plaintiff brought a suit in equity against the Thruway Authority for rescission or reformation of a contract for the sale of her land to the Authority. The Thruway Authority appeared specially to contest the Supreme Court's jurisdiction over person and subject matter. The gist of the Authority's argument was that, as an arm or agency of the State, it possessed sovereign immunity[16] and could not be sued in any court, unless it waived its immunity. The State had only waived its immunity to be sued in the Court of Claims,[17] which does not have equity jurisdiction; therefore, the Supreme Court was without jurisdiction. The Supreme Court dismissed the complaint and the Appellate Division[18] and the Court of Appeals affirmed.

15. 9 N.Y.2d 486, 215 N.Y.S.2d 47 (1961).
16. United States v. Lee, 106 U.S. 207 (1882); Railroad Company v. Tennessee, 101 U.S. 337 (1879); Briggs v. Light Boats, 11 Allen (Mass.) 157 (1865).
17. N.Y. Court of Claims Act § 8.
18. 11 A.D.2d 906, 205 N.Y.S.2d 1004 (4th Dep't 1960).