UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 24, 1997

GAYLON D. SHEPHERD	)	
Complainant,	)	8 U.S.C. § 1324b Proceeding
	)	
v.	)	OCAHO CASE NO. 97B00163
	)	
STURM, RUGER & CO., INC.	)	
Respondent.	)	

FINAL DECISION AND ORDER OF DISMISSAL

PROCEDURAL HISTORY

Gaylon D. Shepherd of Prescott, Arizona, filed a complaint[1] with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 15, 1997, in which he asserted that on May 6, 1995, he applied for the job of shell removal with respondent Sturm, Ruger, & Co., Inc. of Southport, Connecticut. Shepherd checked a box on the complaint form indicating that respondent refused to accept the documents he presented to show he can work in the United States. The documents allegedly rejected were identified as "Statement of Citizenship" and "Affidavit of Constructive Notice." He also checked a box alleging that he had been discriminated against on the basis of his citizenship status but checked neither "yes" nor "no" in the boxes asking whether or not he was hired, fired, or retaliated against. He alleged further that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on May 15, 1997 and that he seeks back pay from January 16, 1996. The significance of the latter date is unexplained. On June 9, 1997 OSC sent Shepherd a letter stating that he had raised no issue within its jurisdiction but authorizing him to file a complaint with OCAHO within 90 days. He did so.

On September 25, 1997 Sturm, Ruger & Co., Inc. filed an answer to the complaint together with a motion to dismiss and a motion for attorney's fees. The answer admitted accepting delivery of the referenced documents but refusing to accept them as authorizing Sturm, Ruger & Co., Inc. to discontinue withholding federal income and FICA taxes from Shepherd's pay. The motion to dismiss further states that Shepherd was hired by Sturm, Ruger & Co., Inc. on or about June 29, 1995, and that he has continuously been employed since that time. Sturm, Ruger further asserts that the complainant "is little more than a fishing expedition for the claimant and the National

[1] The complaint was signed by John B. Kotmair, Jr., Director of the National Worker's Rights Committee. Kotmair filed his Notice of Appearance for Shepherd on October 6, 1997 indicating that Shepherd was "an associate" of the Committee.

Worker's Rights Committee to find a forum to entertain their efforts to promote an apparent tax revolution." For this reason it requests that attorney's fees be awarded against both the claimant and the National Worker's Rights Committee, noting that

> If the complainant and the National Worker's Rights Committee have an argument with the way the tax laws are written by Congress or administered by the Internal Revenue Service, let them deal with Congress and the IRS. But, please, do not let them with impunity file such specious claims in administrative fora against employers who are merely following the laws as written. To do so would encourage further similar time consuming and expensive-to-defend complaints against other innocent employers.

THE APPLICABLE STATUTORY PROVISION

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. § 1324a, as well as a prohibition against certain unfair immigration-related employment practices based on the national origin or citizenship status of an applicant for employment. 8 U.S.C. § 1324b. In 1986 Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer has since then been obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a covered worker's identity and employment eligibility under § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v)(1996), and to complete a form I-9 for each such new employee.

The specific provision at issue in this proceeding, 8 U.S.C. § 1324b(a)(6), was added to the INA by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents, and to ensure that the choice among the documents on the approved list would be the employee's choice, not the employer's. It provides that certain documentary practices, informally referred to as "document abuse," may be treated as discriminatory hiring practices.[2]

> For purposes of paragraph (1),[3] a person's or other entity's request, for purposes

---

[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 § 421, 110 Stat. 3009, 3670 (1996), made significant changes in this provision with respect to events occurring on or after September 30, 1996. Because the events in question here occurred in 1995, IIRIRA does not apply.

[3] Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

> of satisfying the requirements of section 1324a(b)[4] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§ 1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§ 274a.2(b)(1)(v)(A), (B), and (C). List A documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports showing work authorization and various INS forms, including INS Forms N-560 or N-561, Certificate of United States Citizenship.[5] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, and various State Department or INS Forms. When a document from the lists set out in § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document for that purpose if it appears on its face to be genuine.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair immigration-related employment practice under this provision if: 1) a document from List A or one document each from both List B and List C are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system.

DISCUSSION

OCAHO case law has repeatedly addressed similar claims filed by the National Worker's Rights Committee and its associates protesting an employer's or prospective employer's refusal to honor a "Statement of Citizenship" and "Affidavit of Constructive Notice" as exempting the complainant from withholding, and/or an employer's legitimate request for a social security number as a condition of employment . In each instance, these claims have been dismissed as posing no issues cognizable under the INA. The cases are unanimous and unambiguous. Johnson v. Florida Power Corp., 7 OCAHO 981 (1997); Hamilton v. The Recorder, 7 OCAHO

---

[4] Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

[5] IIRIRA also made prospective reductions to the number of acceptable List A documents. P.L. 105-54, 111 Stat. 1175, signed by President Clinton on October 6, 1997, extended by six months the September 30, 1997 deadline to implement the reduction.

968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Horst v. Juneau Sch. Dist. City and Borough of Juneau, 7 OCAHO 957 (1997); Manning v. Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Pub. Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc.,[6] 6 OCAHO 892 (1996), aff'd sub nom. Toussaint v. OCAHO, 127 F.3d 1097 (3d Cir. 1997).

The documents to which Shepherd's complaint refers are not documents acceptable for the purpose of satisfying the requirements of the employment eligibility verification system and an employer therefore has no obligation to accept them for this purpose. The withholding of federal income tax and FICA deductions from an employee's pay is not an immigration-related employment practice at all. The filing of the instant complaint in this forum in the face of the overwhelming controlling authority to the contrary is frivolous, unreasonable, and without foundation.

Sturm, Ruger may submit its affidavit and related material in support of its request for attorney's fees by January 15, 1998. Shepherd's response will be timely if received on or before February 16, 1998.

SO ORDERED.

---

[6] While neither Kotmair nor the National Worker's Rights Committee appear of record in Toussaint, the allegations are substantially similar.

Dated and entered this 24th day of December, 1997.

_____

Ellen K. Thomas
Administrative Law Judge

APPEAL INFORMATION

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, I have served copies of the foregoing Final Decision and Order of Dismissal on the following parties at the addresses indicated:

John D. Trasvina, Esq.
Special Counsel
Office of Special Counsel for Immigration-
Related Unfair Employment Practices
P.O. Box 277728
Washington, D.C. 20038-7728

John B. Kotmair, Jr.
Director
National Worker's Rights Committee
12 Carroll Street, Suite 105
Westminster, MD 21157

Robert L. Danaher
Sturm, Ruger & Company, Inc.
One Lacey Place
Southport, CT 06490

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041

_____

Cynthia A. Castañeda
Legal Technician to
Ellen K. Thomas
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041