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

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 01B00026
SWIFT & COMPANY, Respondent	)	Judge Robert L. Barton, Jr.

ORDER DENYING RESPONDENT'S MOTION TO ESTABLISH DISCLOSURE DATE

(*September 6, 2001*)

Swift & Company (Respondent) has filed a motion requesting that the Court impose a deadline of December 1, 2001, for the United States of America (Complainant) to identify all individuals–by name, address and telephone number–whom it alleges are victims of Respondent's discrimination. Further, Respondent requests that Complainant be barred from seeking relief on behalf of any individual not identified by the deadline. The motion is DENIED.

I. BACKGROUND

On February 12, 2001, Complainant filed a four-count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent has engaged in a pattern or practice of citizenship-status discrimination and document abuse, in violation of sections 274B(a)(1)(B) and 274B(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1324b(a)(1)(B) and 1324b(a)(6). Respondent filed its Answer to the Complaint on March 9, 2001. On May 3, 2001, this Court issued an Order Governing Prehearing Procedures (OGPP) in which it imposed a deadline of May 21, 2002, for the parties to complete their pre-trial discovery.

Both parties have now propounded interrogatories and requests for production of documents. In addition, Respondent has filed a motion to compel further responses to its first set of interrogatories. Respondent's motion is currently being held in abeyance pending Complainant's submission of a supplemental response on September 11, 2001.

On August 24, 2001, Respondent filed a Motion to Establish Disclosure Date, with supporting brief, in which it requests that the Court impose upon Complainant a deadline of December 1, 2001, to provide Respondent with the name, address and telephone number of each individual on whose behalf it intends to seek relief under the Complaint. In addition, Respondent asks that Complainant be compelled to place each individual identified into one (or more) of ten "categories of victims." These categories are broken down according to both the nature of the alleged violation and the real or perceived citizenship status that motivated the allegedly discriminatory acts. Respondent's motion also requests that Complainant be foreclosed from seeking relief on behalf of any individual not identified and categorized by the proposed deadline. In support of the motion, Respondent asserts that it has been hampered in its efforts to engage in meaningful settlement discussions and to prepare a coherent defense by Complainant's unwillingness to identify all alleged victims of discrimination in a timely manner. Respondent points out that the Complaint alleges a very broad pattern or practice of discrimination, but that in the past six months Complainant has identified only a handful of alleged victims. Respondent cites a number of cases supporting the notion that trial courts possess broad authority to regulate and control the discovery process. Respondent also cites several OCAHO decisions as supporting the proposition that Complainant is obliged to identify the alleged victims of a pattern or practice of discrimination well in advance of trial.

On September 4, 2001, Complainant filed a brief in opposition to Respondent's motion. In its brief, Complainant argues that Respondent's motion represents an improper effort to circumvent the May 21, 2002, discovery deadline established by this Court's OGPP. Specifically, Complainant asserts that Respondent's motion is based upon the unwarranted assumption that the information it seeks will not be provided by Complainant through the conventional discovery process. As Complainant points out, it has already agreed to supplement its response to Respondent's first set of interrogatories on September 11, 2001. Accordingly, Complainant objects to Respondent's motion as constituting an unwarranted invocation of Court assistance in securing information available through conventional discovery. Furthermore, Complainant points out that the imposition of a December 1, 2001, deadline would be unfairly prejudicial to it. Specifically, Complainant indicates that it has heretofore scheduled its discovery requests on the basis of its expectation that the Court's May 21, 2002, discovery deadline would govern. Finally, Complainant challenges Respondent's assertion that the delay in identifying alleged victims has in any way prejudiced Respondent's ability to mount a defense or engage in settlement negotiations.

II. ANALYSIS

Respondent has cited a number of federal court cases supporting the authority of trial courts to delimit and regulate the discovery process, and Complainant does not appear to challenge the notion that this Court has power to establish discovery closure dates, as well as deadlines for the filing of motions to compel. Respondent's motion, however, requests far more than the mere establishment of a discovery deadline. It requests a special order from the Court, directed at only one party to the litigation, accelerating the pre-existing discovery deadline (with respect to specific types of information) by more than five months. While I conclude that OCAHO Administrative Law Judges (ALJs) possess the authority to issue such orders under certain extraordinary circumstances, I also conclude that such an order is totally unwarranted in this instance.

A. Authority of OCAHO ALJs to Deviate From Pre-existing Discovery Schedules

The authority of an OCAHO ALJ to deviate from, and even accelerate, pre-existing discovery deadlines is derivative from the ALJ's broader authority to control discovery and to impose sanctions upon recalcitrant litigants. The OCAHO Rules of Practice and Procedure (OCAHO Rules), set forth at 28 C.F.R. Part 68, contain several provisions authorizing ALJs to exert considerable control, if necessary, over the discovery process. For example, 28 C.F.R. § 68.18(a), the general discovery rule, states that parties may obtain discovery by a variety of methods, but that "the frequency or extent of these methods may be limited by the Administrative Law Judge upon his or her own initiative . . . ." Similarly, 28 C.F.R. § 68.18(c)(2), dealing with protective orders, authorizes the ALJ to protect parties from oppression by ordering that "discovery may be had only on specified terms and conditions, including a designation of the time, amount, duration, or place[.]" Finally, 28 C.F.R. § 68.28(a)(3) states that one of the ALJ's "general powers" is the power to "[c]ompel the production of documents and appearance of witnesses in control of the parties[.]" This last rule, which is separate from the specific discovery provisions, does not require that such an order be pursuant to a motion, but instead authorizes the ALJ to compel such disclosures *sua sponte*. In the same vein, the OCAHO Rules give ALJs considerable authority to impose sanctions upon parties who engage in dilatory or obstreperous conduct, whenever it occurs. The rule governing sanctions for failure to comply with an order compelling discovery, 28 C.F.R. § 68.23(c), gives the ALJ power to draw adverse inferences against the recalcitrant party, to preclude the recalcitrant party from introducing certain evidence or testimony, to conclude that the recalcitrant party has waived various objections, and to strike pleadings or parts of pleadings. Even more coercive are 28 C.F.R. §§ 68.35(b) and 68.37(b). The former provision authorizes ALJs to exclude parties or their representatives from participation in proceedings for, among other things, "continued use of dilatory tactics," while the latter provision gives the ALJ authority to dismiss complaints or requests for hearing in their entirety if a party fails to respond to the ALJ's orders or fails to appear for hearing.

By granting the ALJ such broad authority to sanction parties who fail to conform their conduct to accepted standards of professionalism, it follows that the OCAHO Rules also by implication give ALJs such lesser powers as may be necessary to secure compliance without having to resort to extreme sanctions.

Normally, parties can be trusted to act professionally with respect to discovery. The OCAHO Rules provide the full panoply of discovery tools, as well as motions to compel and motions for protective order, and parties are expected to operate within the confines of those Rules if possible. Thus, a Court may normally rely upon the parties to conform their discovery schedules to the ultimate discovery closure dates established at the outset of a proceeding. If, however, either or both of the parties prove unable or unwilling to proceed with discovery in a professional manner (by, for example, repeatedly failing to meet discovery deadlines or by raising specious objections to discovery requests in a manner that suggests a dilatory motive), an OCAHO ALJ may take it upon himself or herself to impose intermediate discovery deadlines so as to avoid the possibility of having to impose more coercive sanctions or having to extend the ultimate discovery closure date. For reasons of efficiency, ALJs should be very reluctant to micromanage discovery in this manner; however, they have the power to do so if necessary. Cf. Ross v. Kansas City Power and Light Co., 197 F.R.D. 646, 647 (W.D. Mo. 2000) (trial court refused, as a prudential matter, to "micromanage the discovery process" and instead imposed sanctions on both parties' counsel for failing to conduct discovery in a professional manner). Indeed, as a general rule, such an extraordinary remedy should only be employed when conventional discovery tools have been exhausted or when the ALJ suspects that the delays associated with filing and responding to motions to compel will prevent discovery from being completed by the discovery closure date.

B. Respondent's Motion

While the Court could order the acceleration of discovery and the establishment of a specific disclosure date for one party, or both parties, to provide responses to discovery, I find that Respondent's present motion to establish disclosure date is unsustainable, and must be DENIED. Although the discovery process does appear to have run into some delay, it has not "bogged down" to such an extent that the May 21, 2002, discovery closure date is in serious jeopardy. Indeed, as Complainant points out in its opposition, an order requiring Complainant to identify individuals and place them within Respondent's ten "categories of victims" would essentially require it to duplicate its answers to some of Respondent's pending interrogatories. For example, Interrogatories 16, 17, and 18 of Respondent's second set of interrogatories, which were served on August 29, 2001, after the filing of the Motion to Establish Disclosure Date, appear to seek the same information as (and in fact to require more information than) paragraphs 1.B, 1.C. and 1.H of the motion. Complainant's answers to the second set of interrogatories will be due within thirty days, and thus it is expected that Respondent will receive this information well before December 1, 2001.

Furthermore, a motion to compel discovery with respect to Respondent's first set of interrogatories is currently pending before this Court, and Complainant has provided assurances that it will supplement its responses to Respondent's first set of interrogatories on September 11, 2001.
Moreover, this Court's August 29, 2001, Order makes clear that Complainant has an ongoing duty to supplement its responses at intervals agreed to by the parties.

Complainant's objections to Respondent's first set of interrogatories were based, *inter alia*, on non-frivolous claims of privilege or protection under the attorney work-product doctrine, and cannot reasonably be characterized as mere dilatory tactics. Moreover, there is no evidence that Complainant has engaged in bad faith or obstreperousness during the discovery process; indeed, the record shows that Complainant has reciprocated Respondent's courtesy and allowed Respondent reasonable extensions of time to comply with its own significant discovery obligations.

In the absence of compelling evidence suggesting that the conventional discovery process has ceased to function, I am not disposed to accelerate discovery deadlines. Moreover, I am particularly reluctant–in the absence of bad faith–to impose a strict discovery timetable on one party, while maintaining a relatively lenient schedule for the other. In organizing its discovery schedule, Complainant has, quite reasonably, relied upon the May 21, 2002, discovery closure date. Specifically, Complainant states that it has sought to avoid burdening Respondent with such voluminous discovery requests that settlement discussions would become impracticable. If an accelerated discovery closure date is imposed, Complainant would be punished for having failed to conduct a more aggressive, combative strategy, and Respondent would reap an unfair windfall benefit. Moreover, if a December 1, 2001, deadline were imposed, a moral hazard would be created because Respondent could then control, by the pace of its responses, how many individuals Complainant could identify by the deadline. While such a situation could, of course, lead to an extension or vacatur of the deadline, it seems more sensible not to impose such a deadline in the first place.

I am mindful of the OCAHO case law, cited by Respondent, stating that "OSC should be prepared in future cases, at a minimum well before hearing if not at the time of filing its complaint, to identify with particularity the number and identity of all individuals on whose behalf a pattern or practice complaint is premised." See U.S. v. Zabala Vineyards, 6 OCAHO no. 830, 72, at 89 (1995); U.S. v. Volvo Trucks North America, Inc., 7 OCAHO no. 994, 1088, at 1101 n.3 (1998); U.S. v. Patrol & Guard Enters., Inc., 8 OCAHO no. 1040, 603, at 626 (2000). I agree with this proposition, at least to the extent that it suggests that Complainant must disclose the identities of "aggrieved individuals" before the hearing. Complainant will not be permitted to conduct a trial by ambush, revealing the identities of aggrieved persons at the hearing or at the eleventh hour before hearing. However, I do not agree with Respondent that December 1, 2001, is an appropriate date for requiring Complainant to disclose the identities of *all* aggrieved individuals.

As I have stated in prior orders, Complainant must identify individuals in response to Respondent's discovery requests, and must periodically supplement this information throughout the discovery period. The same rule will apply to Respondent's discovery responses. Thus, if either party acts intransigently in response to discovery (and I have no reason whatever to suspect that either party will do so), I may be compelled to accelerate the discovery deadline with respect to certain types of vital information so as to prevent interference with the rest of the procedural schedule. Thus far, however, normal discovery procedures appear to be functioning reasonably well, if not perfectly.

III. CONCLUSION

In conclusion, Respondent's motion is DENIED.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE