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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding CASE NO. 93B00054
ROBISON FRUIT RANCH, INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS, DENYING RESPONDENT'S SECOND MOTION TO DISMISS, GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT AND HOLDING IN ABEYANCE COMPLAINANT'S MOTIONS TO COMPEL AND MOTION FOR PROTECTIVE ORDER

I. *Abbreviated Procedural History*

This Complaint, filed with the Office of the Chief Administrative Hearing Officer on March 9, 1993, pursuant to the Office of Special Counsel's (OSC) independent investigatory authority, alleges that Respondent engaged in a pattern or practice of document abuse in violation of Section 274B(a)(6) of the Immigration and Nationality Act (Act). Specifically, Complainant charges that Respondent engaged in an unfair immigration related employment practice in that its "regular and standard operating procedure during the hiring process (was) to demand that every person present a social security card or document containing a social security number" for the purpose of completing the Form I-9. Respondent filed its Answer on April 9, 1993 along with a Motion To Dismiss. Complainant's opposition motion and its memorandum in support thereof was filed on April 23, 1993.

On August 26, 1993, Complainant filed a Motion To Amend the Complaint with Amended Complaint. On September 9, 1993, as previously agreed at the August 20, 1993 prehearing telephonic conference, Respondent filed a brief in support of its dismissal motion. On September 20, 1993, Respondent filed its opposition to Complainant's Motion to Amend and its Second Motion To Dismiss. Complainant filed its Motion to Strike Respondent's Opposition to Complainant's Motion to Amend on October 4, 1993.

II. *Respondent's Motions to Dismiss*

Respondent's motions argued that Complainant had not stated a claim upon which relief could be granted and that this case should be dismissed as:

1. the Complaint was defective because it lacked specificity, i.e., neither the identity of specific, protected individuals nor the dates of the alleged discriminatory acts were mentioned;

2. the Complaint was not timely filed; and,

3. Respondent's actions with regard to requesting a social security card during the hiring process was exempted as a violation of 8 U.S.C. 1324b(a)(6) of the Act, pursuant to 8 U.S.C. 1324b(a)(2). 26 C.F.R. 31.6011(b)-2(b)(1),(c)(2).

In its brief, Respondent has vigorously argued that OSC has no statutory, regulatory or implied authorization to prosecute a "pattern or practice Section 1324b case" and has included much discussion on its interpretation of some of the legislative history pertaining to 8 U.S.C. 1324b. Its position is that only a charging party, upon its own Complaint, may raise a pattern or practice allegation.

Complainant opposes this argument by citing to and discussing previous OCAHO decisions which have held that OSC does have the authority to bring a pattern and practice suit. See U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed as untimely, 951 F.2d 1186 (10th Cir. 1991); U.S. v. General Dynamics, OCAHO Case No. 93B00054 (5/6/93); U.S. v. A. J. Bart Inc., OCAHO Case No. 92B00147 (7/15/93). Complainant further argued that Respondent's interpretation of the legislative intent with regard to this issue was "misguided".

I have thoughtfully reviewed the parties' interpretations of the legislative history, the statute and case law. Although I agree with Respondent that 8 U.S.C. 1324b does not specifically authorize OSC to prosecute pattern or practice cases, the OCAHO judicial opinions interpreting the legislative intent with regard to this issue have found that this authority was indeed intended by Congress. U.S. v. Mesa Airlines, U.S. v General Dynamics; U.S. v. A.J. Bart.

As Respondent has noted, there is a difference, though, between this case and the other OCAHO cases that have dealt with OSC's authority to bring a pattern and practice charge. Those cases were initiated by a charging party; this case was not. It has been represented that this complaint was filed under OSC's independent investigatory powers after its investigation of charging parties' allegations of discriminatory termination by Respondent. OSC's investigation determined the allegations to be unfounded, but led OSC to uncover the alleged document abuse.

It has always been my opinion and understanding that Congress had intended the 1986 Immigration and Reform and Control Act to have a broad, remedial purpose. See U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89). Courts have firmly established a policy of liberally construing remedial statutes so as to "suppress the evil and advance the remedy". 3 Singer, Southerland Statutory Construction, sec. 60.01 (5th ed. 1992); see, e.g., Westinghouse Elec. Corp., v. Pacific Gas & Electric Co., 326 F.2d 575 (9th Cir. 1964). The judicial construction, though, must stay within the reasonable bounds of the legislative intent. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

For argument's sake, should I follow Respondent's position, and find that OSC does not have the authority to pursue a pattern or practice case under 8 U.S.C. 1324b where there is no original charging party, then should OSC become aware of such immigration-related employment practice, there would be no forum where the discrimination could be remedied. It is my opinion that to cut off OSC's ability to bring this sort of action, as Respondent proposes, and require OSC to stand on the side-line where there may be a case of blatant disregard for the provisions of 8 U.S.C. 1324b, offends common sense when considering the full remedial intent of the statute.

Thus, although Respondent's arguments are well-taken, it is my considered opinion that Congress intended to allow OSC, which I have previously held represents the public interest, to prosecute pattern and practice cases in situations where there is an original charging party,

see U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), and in cases where OSC is proceeding under its independent investigatory powers, as in the instant case. U.S. v. McDonnell Douglas Corporation, 3 OCAHO 507 (4/5/93). To find otherwise would, in my opinion, destroy an important protection and/or remedy that Congress intended to implement with 8 U.S.C. 1324b where there is alleged citizenship and/or national origin discrimination.

Respondent continues its argument for dismissal based on the fact that Complainant has not cited specific dates or individuals in the Complaint and that the Complaint is not timely. Complainant counters by citing to U.S. v. Mesa Airlines where the Administrative Law Judge stated:

> At the initial, "liability" stage of a pattern or practice suit the government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed.

Id. at 50 (quoting Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)).

Complainant also argues that its Complaint is timely as there is no time limitations set in the statute for it to conduct its independent investigations and the implementing regulations state that, where there is a reasonable belief that an unfair immigration-related employment practice has occurred, the Complaint must be filed within 180 days of that occurrence. 28 C.F.R. 44.304(b). Complainant represents that it will prove at hearing that such practice did occur within 180 days of the filing of the Complaint.

In U.S. v. Villatoro-Guzman, OCAHO Case No. 93C00033 (7/22/93) at 18, I examined the requirements for specificity in a complaint. I stated:

> The Supreme Court has considered the issue of what will suffice in setting forth a claim sufficient to defy dismissal. In examining the standard of specificity required to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a), the Court, in Conley v. Gibson, 355 U.S. 41 (1957), denied a Respondent's argument that the Complaint should be dismissed because it failed to set forth specific facts in support of its general allegation and stated:
>
> > The decisive answer...is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests....Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more

> precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues....The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. (citation omitted).

Id. at 47.

> The Supreme Court has not deviated from this standard and has recently quoted from the above language in Leatherman v. Tarrant County Narcotics Unit, 113 S.Ct. 1160, 1993 U.S. Lexis 1941 at 9 (1993)("The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."). It should be noted that the pleading must contain "sufficient detail...so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery". Davis v. Passman, 442 U.S. 228, 238, 99 S.Ct. 2264, 2273, n.15 (1979). In fact, the accepted rule is that dismissal for failure to state a claim is only appropriate when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99. 102 (1957).

Although it might have been preferable for OSC to include specific dates in the Complaint, I find that OSC has alleged that Respondent's discriminatory acts were current at the time of the filing of the Complaint and, thus, has met the specificity requirement. Should Respondent wish more exact information, it may use discovery. I also do not find Respondent's argument alleging an untimely filing of the Complaint to be persuasive.

Further, I agree with the Administrative Law Judge in U.S. v. Mesa Airlines that at the initial liability stage of a pattern and practice case, Complainant need not set forth the identity of each person who it will ultimately seek relief for.

Respondent's last argument, that its actions were protected as they are within the statutory exemption of 8 U.S.C. 1324b(a)(2)(C), is a question of fact and, thus, must be decided after the presentation of the parties' evidence.

For all the above reasons, I find that Respondent's position regarding dismissal of this case is not persuasive. Respondent's motions to dismiss are denied.

III. *Motion to Amend Complaint*

Complainant has moved this Court to allow it to amend its Complaint so that its allegations of pattern or practice of document abuse will also include Respondent's request that non-U.S. citizens produce INS-issued documents during the I-9 process. Complainant asserts that this allegation is based, in part, on admissions by knowledgeable employees of Respondent's.

Complainant supports its position in that the regulations allow me, in my discretion, to allow amendment of the Complaint at any time prior to the issuance of a final order, as long as prejudice to the public interest and the parties is avoided. Complainant argues that Respondent will not be prejudiced and that this amendment will not unduly delay the outcome of this case as Respondent has not yet produced the majority of the documents requested in discovery.[1]

Further, Complainant represents that there will be no additional lengthy discovery because the evidence needed to support the new allegations is already subject to the discovery requests. Complainant also argues that the issue at hand is Respondent's violation of 8 U.S.C. 1324b(a)(6), document abuse, and that the new allegation is contained in that issue.

Respondent presented several arguments in opposition to this motion. First, its argument that its motion to dismiss should be considered prior to consideration of this motion is moot. Respondent's argument that OSC did not have the jurisdiction to bring a pattern and practice complaint, untied to specific charging individuals, has been considered and rejected.

Respondent further argues that granting Complainant's motion to amend will severely prejudice its rights in that OSC has exceeded its jurisdiction. Granting the motion, Respondent continues, would allow OSC to circumvent the requirement that actual discrimination against an individual occur in order to violate the statute. I find that Respondent's argument is in direct contradiction to 8 U.S.C. 1324b(a)(6) which defines document abuse as an unfair immigration-related employment practice and, thus, is actionable by OSC.

Respondent further argues that 28 C.F.R. 68.9(e) requires that supplemental pleadings set forth transactions, occurrences or events in

[1] These documents are the subject of Complainant's pending motions to compel.

order for the administrative law judge to permit the amendment and that Complainant did not meet this requirement. Respondent has incorrectly mixed the standards for granting a motion to amend and allowing a supplemental motion. 28 C.F.R. 68.9(e). The relevant regulatory language states:

> If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge, may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint....The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events which have happened or new law promulgated since the date of the pleadings and which are relevant to any of the issues involved.

Complainant has filed a motion to amend; it has not filed a supplemental pleading. See 68.9(e). Based on the record before me, I find that neither the Respondent's rights nor the public interest will be prejudiced by the granting of this motion.

Respondent's last argument asserts that Complainant's amendment is not based in fact, but is based on answers to hypothetical questions given at a deposition of one of Respondent's employees. A copy of the allegedly relevant part of the deposition was submitted for my review. Based on my review of that portion of the deposition, the parties' arguments and the procedural posture of this case, I do not find Respondent's argument persuasive. As such, I am granting Complainant's Motion to Amend and will hold it to its burden of proof.

IV. *Complainant's Pending Motions*

Pending before me are Complainant's Motions to Compel Discovery and its Motion for Protective Order. With the issuance of this Order, I am withholding ruling on these motions as I believe that the parties can now move on with discovery in a cooperative manner and can resolve any outstanding issues in these motions.

As such, I direct the parties to proceed with discovery with dispatch and to file a joint status report within thirty (30) days of this Order.

IT IS SO ORDERED this 11th day of January , 1994, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge