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

May 1, 2003

GUY SANTIGLIA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 03B00008
SUN MICROSYSTEMS, INC., Respondent.	)	

ORDER DENYING LEAVE TO AMEND AND CLARIFYING SCOPE OF COMPLAINT

I. PROCEDURAL HISTORY

Guy Santiglia filed a complaint with this office in which he alleged that Sun Microsystems, Inc. (Sun) discriminated against him on the basis of his United States citizenship and national origin in violation of the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b. Sun filed an answer raising several affirmative defenses. A telephonic prehearing conference was held on January 28, 2003 and Santiglia thereafter filed his reply to the affirmative defenses. The record thus far reflects that prior to October 30, 2001 Santiglia was one of 26 IR Systems Technologists in the IT support group for the Sun campus at Santa Clara. As part of a global reduction in force (RIF), Frederick Peters, to whom those employees reported, was told to reduce his staff by four, and he did so. Santiglia was one of the four people Peters selected to be laid off; his complaint contended that he was unfairly selected, that he should have been rehired, and that Sun retaliated against him.

On March 10, 2003, Santiglia filed a document captioned "Amended Charge," consisting of seventeen pages with an attachment consisting of six pages. Sun responded with a document captioned "Motion to Dismiss Amended Charge and Motion to Restrict Original Complaint to Citizenship-Based Discrimination." Santiglia filed a response to the motion which makes clear that it is his complaint, rather than his OSC charge, that he now wishes to amend. Sun filed a reply to Santiglia's response, and the issues posed are ripe for decision.

OCAHO rules[1] make clear that the amendment of a complaint is not a matter of right. An Administrative Law Judge may allow amendment of a complaint upon such conditions as are necessary to avoid prejudicing the public interest or the parties, when a determination of a controversy on the merits will be facilitated thereby. 28 C.F.R. § 68.9(e). Santiglia's "Amended Charge" will accordingly be construed and treated as a Motion for Leave to Amend his complaint, and Sun's response will be construed and treated as a response in opposition to that motion. Subsequent responsive filings by both parties are considered as well, regardless of their nomenclature.

II. APPLICABLE STANDARDS

In addition to the threshold standard set out in Rule 68.9(e) that amendment must facilitate a determination on the merits, OCAHO cases considering when to permit amendment have also looked for guidance to the case law developed by the federal district courts under Rule 15(a) of the Federal Rules of Civil Procedure (FRCP). As pointed out in *United States v. Desert Palace, Inc.*, 9 OCAHO no. 1067, 3 (2001),[2] however, decisions under FRCP 15(a) are persuasive, but not necessarily binding, authority.

The leading case in the Ninth Circuit on the issue of leave to amend is *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987), which emphasized the policy of favoring amendments and the liberality with which that policy should be applied, even when an amendment seeks to add parties or claims. As a general matter, still greater liberality is afforded to pro se litigants in the circuit. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). The Supreme Court has also directed that absent sound reasons otherwise, a liberal approach should generally be taken in ruling on a motion to

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[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Part 68 (2002).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

amend:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'

Foman v. Davis, 371 U.S. 178, 182 (1962). The corollary is also true: in the presence of sound reasons for doing so, leave to amend should be denied.

III. THE PROPOSED AMENDED PLEADING

The amended pleading acknowledges that because Santiglia filed an EEOC charge of national origin discrimination, those particular allegations in his original complaint should not be a part of his complaint in this forum. Santiglia seeks to amend the identification of the parties in this case by adding to his name in the caption of his complaint the words "on behalf of himself and others similarly situated," and to amend the remainder to add a variety of new allegations which may generally be characterized as follows.

A. Allegations Respecting Other Persons

1. Other Employees Sun Terminated in the Layoff

The amended pleading alleges that in November 2001, Sun terminated in excess of 2,000 employees from its U.S. facilities and that it had at that time more than 1,000 H-1B foreign workers. Santiglia contends that the selection of individuals for termination was made in a discriminatory manner and that a preference was shown for H-1B workers. Four individuals besides Santiglia are specifically identified by name; three were in Santiglia's work group while the fourth evidently had a different job in a different work group and has filed his own charge with OSC. As to the remainder, there is no indication of where they were located or who made the selections. The amended pleading states that their "actual numbers and identities . . . can be determined through extensive discovery of Sun's employment records."

2. Other Persons Allegedly Not Hired by Sun

In addition, Santiglia alleges that unidentified numbers of United States citizens were not considered for hire while Sun filed labor condition applications for foreign nationals "in the months leading up to and after" the layoff. The locations, dates, and affected individuals are unidentified.

3. Allegations as to Sun's Contractors and Consultants

The amended pleading also alleges that in the hiring and termination of contractors and consultants Sun showed a preference for non-U.S. nationals. As one example, Santiglia referred to the termination of IR System Technologist contractors from Taos Mountain, Inc. who worked for Sun manager Michele Duke. Santiglia suggests that an unidentified number of unnamed contractors and consultants should also be treated as Sun employees for purposes of this case. Little information is provided about the contractors other than the suggestion that there may be "large numbers," that they may have been paid through third-party employers, and that Santiglia believes they were misclassified.

B. Allegations about Violations of H-1B Visa and Labor Law Rules and Regulations

The amended pleading sets forth allegations respecting violations of Department of Labor (DOL) rules and regulations governing the specifics of H-1B visas. In addition, it is alleged that acts in noncompliance with some of the rules respecting Labor Condition Applications were retaliatory as to Santiglia.

C. Fact Pleading Generally

With respect to his own individual claims, Santiglia's amendment sets out more extensive details elaborating upon his conversations about the RIF with his manager, Frederick Peters, and with Brett Kanazawa, the HR manager, the specifics of the RIF procedure, and the ways in which Santiglia believes he has been retaliated against.

IV. SUN'S RESPONSE

Sun raised several arguments in opposition. Sun contends that Santiglia has not exhausted his administrative remedies, either with respect to the allegations about the use of contractors or with respect to the claims of retaliation in both the original complaint and the amendment proposed, because no timely charge was made with OSC about these matters. Sun asserts further that there is no provision for an individual to file a charge as to persons other than himself, that this forum has no jurisdiction over the allegations concerning the H-1B program and/or the Department of Labor, and that some of the relief Santiglia seeks is not available in this forum.

V. DISCUSSION

The principal factors to be considered are whether the determination on the merits will be facilitated by the proposed amendments, whether the proposed amendments would be futile, and whether prejudice to the public interest or the parties will result from the amendments. Bad faith, undue delay, and dilatory motive are not in issue; neither has there been any previous request for amendment.

A. Whether Determination on the Merits Would be Facilitated

The amendments Santiglia now proposes seek to expand the scope of this case well beyond the allegations in his original complaint, which described only Santiglia's own individual claims. Santiglia basically seeks to change the nature of this case from an individual disparate treatment claim to a broad and complex pattern and practice action potentially affecting the rights of unspecified thousands of former employees, contractors, and consultants who held unidentified jobs at unidentified Sun facilities nationwide. No specifics are provided with respect to the hiring allegations in the proposed amended complaint either geographical or temporal, nor is there any indication as to the kinds of jobs or the number of decisionmakers which would be included in such a proceeding.

Sun is a multinational corporation with over 40,000 employees. While Santiglia's workplace was in Santa Clara, California, many Sun employees are located elsewhere; about 29,000 of them in the United States. Discovery alone in a case expanded as proposed could literally take years and involve substantial financial burdens to both parties; indeed, the appropriate scope of discovery is already in dispute and discovery has had to be stayed pending the outcome of this motion.

Even in the hands of experienced labor counsel, the challenges of nationwide class litigation of the scope proposed are quite formidable; it is for this reason that the federal courts routinely conduct a vigorous inquiry into the adequacy of representation in such cases under FRCP 23.[3] It is not only the qualifications, experience, and resources of counsel that are considered and evaluated, but also the

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[3] The degree to which FRCP 23 may be applicable to pattern and practice cases arising under 8 U.S.C. § 1324b has not been fully resolved. *See McCaffrey v. LSI Logic Corp.*, 6 OCAHO no. 867, 481, 490-91 (1996); *Lardy v. United Air Lines, Inc.*, 6 OCAHO no. 843, 196, 200-201 (1996) and 4 OCAHO no. 595, 31, 38 n.4 (1994); *Lardy v. United Air Lines*, 3 OCAHO no. 450, 555, 555 n.1 (1992); *United States v. McDonnell Douglas Corp.*, 2 OCAHO no. 351, 361, 374-75 (1991); *Mata v. Bear Creek Prod. Co.*, 1 OCAHO no. 220, 1481 (1990)*; Banuelos v. Transportation Leasing Co*, 1 OCAHO no. 156, 1103, 1105-06 (1990), *aff'd*, 5 F.3d 534 (9th Cir. 1993) (Table), *cert. denied*, 510 U.S. 1112 (1994). Regardless of whether the rule is technically applicable, the sound policies which it embodies are nevertheless entitled to consideration whenever litigation of this magnitude is contemplated.

ability of class counsel to undertake the extra costs associated with such a case. *Gilbert v. First Alert, Inc.*, 904 F.Supp. 714, 719 (N.D. Ill. 1995), *amended*, 165 F.R.D. 81 (N.D. Ill. 1996). Even a licensed attorney, moreover, is not permitted to act simultaneously both as a class representative and as class counsel. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1090 (3d Cir. 1976), *cert. denied, Arthur Anderson & Co. v. Kramer*, 429 U.S. 836 (1976); *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257, 260 (D. Cal. 1996).

Santiglia appears in this matter on his own behalf. Unlike the general rule in federal litigation that non-attorneys may represent themselves but not others, *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987), citing *McShane v. United States*, 366 F.2d 286, 288 (9th Cir. 1966), OCAHO rules not only permit a party to appear in propria persona, they also permit a lay person to appear on behalf of others under appropriate circumstances. 28 C.F.R. § 68.33(c). It is doubtful, however, that Santiglia, or any other first-time pro se litigant in this forum, is fully aware of the extra costs and complexities demanded in litigation of the scope he proposes, or that he is necessarily willing or able to commit the financial resources normally required to conduct such an expanded case to its conclusion. The burdens of maintaining a pattern and practice action are substantial; this is one of the many reasons why lay persons without counsel have generally not been permitted in OCAHO proceedings to undertake the additional responsibility for litigating the rights of others. *McCaffrey*, 6 OCAHO at 490-91; *Banuelos*, 1 OCAHO at 1105 (pointing out that laymen are not permitted to act as attorneys for a class in federal litigation).

Santiglia is proceeding without the assistance of counsel, as he has an unqualified right to do. 28 U.S.§ 68.33(c). Pro se representation, however, even in an individual case, imposes burdens not only on the pro se party but also on both the opposing party and the decision maker. *Banuelos*, 1 OCAHO at 1105. Pro se litigants are generally unfamiliar with the substantive and procedural aspects of the litigation process, and this fact in practice often requires a certain amount of forbearance on the part of other party owing to the pro se litigant's lack of professional experience. Few lay persons are familiar with OCAHO rules in particular, and even applying a high degree of diligence the rules are often misunderstood by laymen. Delay is the frequent and inevitable by-product. Some of the burdens resulting from the absence of counsel have already manifested themselves in this proceeding. That we find ourselves still addressing issues related to the initial pleadings months after the complaint was filed, for example, does not augur well for the pace of future progress or the prospects of prompt resolution.

Practical questions of manageability thus suggest that expanding this case as proposed would be an impediment causing delay rather than furthering just, speedy and inexpensive resolution.

B. Whether the Proposed Amendments would be Futile

The usual test for futility of a proposed amendment is whether or not the amendment would survive a motion to dismiss. *Jones v. Community Redevelopment Agency of Los Angeles*, 733 F.2d 646, 650 (9th Cir. 1984). Only where there is no set of facts which could be proved in support of a claim that would entitle the pleader to relief is dismissal appropriate. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For purposes of this analysis I do not look to the merits of the allegations but simply to their legal sufficiency to withstand a dismissal motion. The question is not whether the pleader will prevail, but whether he is even entitled to the opportunity to offer evidence at all. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984). It appears that under this standard some, but not all, of the amendments proposed would be futile.

1. Whether Administrative Remedies Have Been Exhausted

(a) The Scope of the OSC Charge

The scope of a discrimination case pursuant to 8 U.S.C. § 1324b is ordinarily limited to matters within, or like and related to, the administrative charge and the scope of the administrative investigation upon which the action is based. *Ong v. Cleland*, 642 F.2d 316, 318-20 (9th Cir. 1981); *Green v. Los Angeles County Superintendent of Sch.*, 883 F.2d 1472, 1475-76 (9th Cir. 1989). The purpose of exhausting administrative remedies is to put the respondent on notice and afford an opportunity to resolve the matter at the administrative stage. *See, e.g.*, *Sosa v. Hiraoka*, 920 F.2d 1451, 1458-59 (9th Cir. 1990) (noting that scope of Title VII action depends upon scope of EEOC charge and investigation). *Accord EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994). For this reason, the scope of the charge itself must be considered in order to determine whether the matters raised could reasonably be expected to grow out of the investigation of that charge.

Santiglia's OSC charge reflects that he made broad claims that Sun showed favoritism to foreign workers, both in the layoff on October 30, 2001, and with respect to hiring generally. The charge alleged that Sun engaged in unfair practices from October 30, 2001 to the present at Santa Clara, CA.; Sunnyvale, CA.; Newark, CA; Menlo Park, CA.; "and possibly other Sun locations" by showing favoritism to hiring foreign workers under the H-1B visa while many qualified Americans were available.

The charge was thus not limited to Santiglia's individual claims. The pattern and practice allegations were, however, lacking in specificity as to the perpetrators or the jobs involved, and, except for the layoff of October 30, 2001, the dates of any other alleged discriminatory acts. The allegation as to a pattern and practice of discriminatory hiring is framed in generalities and lacks a factual basis because it does not include a statement "sufficient to describe the circumstances, place, and date" of all the acts complained of, notwithstanding the requirement of 28 C.F.R. § 44.101(a)(4), that a charge should do so.

Attached to the charge are seven pages; three set out various ways in which Santiglia contended that Sun abused the H-1B visa program to the detriment of American workers, matters already addressed by the DOL. The remaining attachments consist of communications from two former Sun employees, neither of which is addressed to Santiglia.[4] Santiglia's OSC charge made no allegations regarding contractors or consultants, nor did it allege retaliation per se. While retaliation was alleged in Santiglia's original complaint, his assertions with respect to contractors and consultants surfaced for the first time in the proposed amendment.

As a threshold matter, while it is true that most pattern and practice actions are initiated by the Office of Special Counsel (OSC), there is nothing in 8 U.S.C. § 1324b(d)(2) which can be construed as a per se bar to a pattern and practice action initiated by an individual. *See United States v. Fairfield Jersey, Inc.*, 9 OCAHO no. 1069, 6 (2001). Section 1324b(d)(2) appears to contemplate as well the ability of Special Counsel to receive charges alleging a pattern and practice of discriminatory activity. Moreover, notwithstanding Sun's assertion that "there is no provision for an individual to file a charge or a complaint for anyone other than that individual," 8 U.S.C. § 1324b(b)(1) plainly does permit the filing of charges by a person on behalf of another person. Regulations, however, require that a person or organization filing on behalf of another must be authorized to act on the other's behalf. 28 C.F.R. § 44.300. There is no showing that Santiglia was authorized to file a charge on behalf of any other individual named person.

The Ninth Circuit has cautioned that the investigation that can reasonably be expected to result from a charge filed by an individual is not necessarily strictly limited by the literal terms of the charge. *Paige v. California*, 102 F.3d 1035, 1042 (9th Cir. 1996). It is well settled, for example, that acts occurring subsequent to the filing of the charge may be included if they grow out of or are reasonably related to the charge, *Couveau v. American Airlines*, Inc., 218 F.3d 1078, 1082 (9th Cir. 2000) (citing cases), although it is not always clear whether the later incidents actually did so. *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). OCAHO case law has generally followed the similar so-called "Sanchez Rule" as set out in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970) that the scope of a complaint is limited by the scope of the investigation which can reasonably grow out of the charge, not by which box is checked on the form. *Guzman v. Yakima Fruit & Cold Storage*, 9 OCAHO no. 1066, 9 (2001).

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[4] The first, a letter from a former employee to an investigator at an unnamed agency, is dated April 3, 2002 and states that the author was hired in December 2000 and that her job was eliminated in September, 2001. It alleges that Sun showed favoritism to workers from India. The second is an e-mail dated March 28, 2002 from a former employee who identifies himself as an HR professional. It states that he applied for a job but was turned down. Neither the date nor the job is identified. The e-mail is evidently to another former Sun employee. It says the work group the writer applied for consisted of a single ethnic group but that group is not identified.

At least as to incidents occurring subsequent to the filing of the charge, it cannot be concluded on this undeveloped record that the claims of retaliation in Santiglia's original complaint would not survive a motion to dismiss.[5] *Cf. Lyons v. England*, 307 F.3d 1092, 1104, 1116 (9th Cir. 2002) (reversing dismissal as to 1997 failure-to-promote claim not included in 1996 charge). *See also Vasquez v. County of Los Angeles*, 307 F.3d 884, 895 (9th Cir. 2002) (finding that where allegations of retaliation named two different decisionmakers, the exhaustion requirement was satisfied as to the decisionmaker named in the charge, not as to one unrelated to the charge); *Serpe v. Four-Phase Sys., Inc.*, 718 F.2d 935, 937 (9th Cir. 1983) (deciding that EEOC investigation of charges would have revealed plaintiff's claim that she was denied transfers because she was female). Courts are divided as to whether claims of retaliation are even subject to an exhaustion requirement. *See* LINDEMAN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 413-14 n.4 (3d ed. Cum. Supp. 2000).

Nevertheless it does appear reasonably clear that Santiglia's charge is not one likely to have triggered an investigation of issues about contractors or consultants, rather than employees. While it appears from Sun's response to OSC's inquiry (attached to Santiglia's Amended Charge as Exhibit A) that the primary focus of the investigation was on Santiglia's individual claims, the charge itself was broadly worded. It did not, however, include any allegations about contractors or consultants and there is no reason to believe the investigation would have reached beyond employees and applicants for employment with Sun itself.

(b) Individuals Who Could Not Have Filed Timely Charges

With rare exceptions, only a timely charge may serve as a predicate for a pattern and practice action. Any alleged discriminatory act which has not been made the subject of a timely charge is "merely an unfortunate event in history which has no present legal consequences." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977). Because 8 U.S.C. § 1324b(d)(3) prohibits the filing of a complaint as to any practice occurring more than 180 days prior to the filing of a charge with OSC, allegations outside that time period would not survive a motion to dismiss. For this reason it is generally held that the only individuals who have the potential to qualify as similarly situated to the charging party are those who did or could have filed similar timely charges on the same day as the person upon whose charge the complaint is premised. *Cf. Walker v. Mountain States Tel. & Tel. Co.*, 112 F.R.D. 44, 47 (D. Colo. 1986). To the extent that the amendments proposed purport to encompass the claims of any individuals who could not themselves have filed timely charges in the 180 days preceding April 9, 2002, any amendment to add those claims would be futile because discrete acts occurring prior to October 11, 2001 are time-barred. *See generally National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101

[5] Among Santiglia's claims is that Sun refused to hire him for any job during a period of several months after the RIF. Although the term retaliation is not invoked in the charge itself, the same failure to hire him is among the acts he says were taken in retaliation for his protesting the layoff.

(2002). Thus for example, the person who wrote the letter attached to Santiglia's charge (see n. 5), whose job was eliminated in September 2001, is not a person who could have filed a timely charge on April 9, 2002.

2. Alleged Violations of Other Laws or Regulations

With respect to Santiglia's allegations regarding the many ways in which Santiglia believes Sun has violated H-1B visa and labor law rules and regulations, these matters are within the jurisdiction of the DOL; it appears that they have for the most part already been considered and resolved. The ALJ's findings as to them are contained in the DOL Decision and Order of the Wage and Hour Division of the Employment Standards Administration dated February 19, 2003, Attachment H accompanying Sun's Motion to Dismiss Amended Charge. While Santiglia does appear to understand that the merits of this and his other complaints [to DOL's Office of Federal Contract Compliance Programs (OFCCP) (Notification of Results of Investigation, Exhibit A attached to the Answer); to EEOC and the California Department of Fair Employment and Housing (DFEH) (Attachments A, B, and C to Sun's Motion to Dismiss); or to agencies other than OSC] are not susceptible to reconsideration or resolution in this forum, he does not explain why he seeks to amend his complaint to include the allegations about DOL violations. Even if proven, those alleged violations would not entitle him to relief in this forum, and accordingly could not survive a motion to dismiss. This is not to suggest, however, that some of the facts alleged may not under appropriate circumstances be admissible as evidence in Santiglia's case if relevant. It appears from some of the detailed pleading in these and other proposed paragraphs about his own claims that Santiglia may simply be seeking to plead the evidence he intends to offer at a hearing. However notice pleading under OCAHO rules has never required and does not encourage a complainant to lay out at the pleading stage all the evidence he believes supports his case. Pleadings are sufficient when the allegations give adequate notice to the respondents of the charges made against them. *United States v. Irani*, 6 OCAHO no. 860, 379, 382 (1996); *United States v. Makilan*, 4 OCAHO no. 610, 202, 210 (1994). Elaborate fact pleading is strongly discouraged, and any amendment merely to elaborate upon assertions already made in the original complaint would be unwarranted.

C. Whether Prejudice Would Result

Prejudice has been characterized as the most important factor for consideration. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971) (emphasizing that trial court was "required" to consider potential prejudice). *United States v. Sunshine Bldg. Maint., Inc.*, 6 OCAHO no. 913, 1067, 1071-72 (1997). Prejudice may be to the existing parties, to third parties, or to the public interest.

While, as noted, lay representation is not precluded by OCAHO rules, 28 C.F.R. § 68.33(c), it is rare and has been confined only to limited circumstances. *See, e.g., United States v. Chaudry*, 3 OCAHO no. 588, 1911, 1911-12 (1993) (permitting respondent's brother, a non-attorney, to represent him), *Alvarez v. Interstate Highway Constr.*, 2 OCAHO no. 385, 706, 706-07 (1991) (permitting lay representation upon a showing that the non-attorney representative was authorized by the party and was familiar with the statute and regulations governing OCAHO proceedings), *aff'd*, 996 F.2d 310 (10th Cir. 1993) (Table). I am aware of no case, and Santiglia identifies none, in which a lay person was permitted to bring a pattern and practice action in a representative capacity without the assistance of counsel.

Among the reasons for the general reluctance in OCAHO jurisprudence to permit pro se parties to represent the interests of persons other than themselves is the risk of inadvertent unintended consequences to those third parties. *McCaffrey*, 6 OCAHO at 490-91 (citing possible preclusive effects). Those risks are higher where it affirmatively appears that the putative representative is unaware of the nature of the obligations involved in the representation of others.

Here, for example, Santiglia has been entirely silent with respect to the preliminary question of whether, how, or when he proposes to give notice to the many thousands of other people on whose behalf he seeks to proceed. Any attempt to affect the rights of others requires such notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79 (1974) (noting that plaintiff must bear cost of notice as "ordinary burden of financing his own suit"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover, although he identified four specific individuals by name, Santiglia gave no indication that he has even notified these four people of the fact that he has named them, much less that he has sought or that they have given their consent to representation by him.[6] At least one of those individuals has filed his own charge with OSC, and there has been no showing why that person is unable to represent his own interest. Although there is, as Santiglia points out, precedent in this forum for the consolidation of cases, consolidation is not imposed upon anyone surreptitiously without their knowledge, but by the express request of or with proper notice to the parties in accordance with 28 C.F.R. § 68.16.

When a lay person seeks to pursue a pattern and practice action, consideration must be given to the interests of all persons who might be affected by it. An analogous inquiry is made in the federal courts under FRCP 23 to ensure that a representative has the ability to fairly and adequately protect the interests of the whole class. Adequacy of representation is not a perfunctory inquiry and may pose complex questions where there is significant potential for competing or even antagonistic interests to

[6] The OFFCP investigative report, attached as Exhibit A to the Answer in this case, similarly indicates that Santiglia purported to file an OFCCP charge on behalf of three other persons who were evidently wholly unaware of that fact.

arise between members of a putative class during the course of litigation. Conflicts can arise, for example, when a large number of former employees end up in competition for a limited number of jobs available by way of relief. *Cf. General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 331 (1980). Similar concerns arise as to questions affecting other relief or settlement. Here, for example, although Santiglia seeks to act on behalf of literally thousands of people, he requests specific relief in the form of reinstatement, back pay, and benefits only for himself and one other person who was not even in his workgroup.[7] He requests no specific relief at all for the other three people Peters selected to be laid off from the IT support group as Santiglia was. Presumably those three are included in Santiglia's generalized request for "relief for other economic victims . . . as can be determined appropriate by this court." *See generally Molski v. Gleich*, 318 F.3d 937, 955-56 (9th Cir. 2003) (rejecting as unfair a settlement which released claims of absent class members with little or no compensation); *Staton v. Boeing Co.*, 313 F.3d 447, 468-69 (9th Cir. 2002) (discussing potential conflicts of interest).

Due process requires more than pro forma representation. I am not persuaded that the interests of the whole class can be adequately represented by Santiglia because there appears to be no recognition of other interests. Santiglia alleged, for example, in an attachment to his charge that Sun "bribed" some of the laid-off workers by paying them money to sign a waiver. There is no indication of the number of such persons beyond the characterization "many people." People who waived their claims in return for consideration may have interests directly antagonistic to Santiglia's. Moreover in view of the fact that Santiglia has also alleged elsewhere that he was discriminated against on the basis of his race and his sex in the layoff, there is reason to question the vigor with which he could represent the interests of affected nonwhites and females.

OCAHO rules, moreover, permit lay representation of others only upon the satisfaction of specific conditions. Written application must be made demonstrating that the individual possesses "knowledge of administrative procedures, technical expertise, or other qualifications necessary to render valuable service . . . and is otherwise competent to advise and assist in the presentation of matters in the proceedings." 28 C.F.R. § 68.33(c)(3). That there has been no attempt at all here to comply with that rule is illustrative of the kinds of problems that routinely result from pro se litigation. My observation of the proceedings and the degree of adherence to the applicable rules thus far reinforce my conclusion that Santiglia does not have sufficient knowledge of administrative procedures, technical expertise, or other qualifications to undertake the representation of persons other than himself. The potential for prejudice to the rights of others is sufficiently compelling to deny amendment on that ground alone.

VI. CONCLUSION

[7] This is the person who filed his own OSC charge, and who has not consented to representation by Santiglia.

Notwithstanding the extreme liberality ordinarily taken in deciding whether to permit amendment of a complaint, prudential considerations of judicial economy would counsel against expansion of this case as proposed. Concerns for the interests of others who might potentially be affected, moreover, militate against treating this as a pattern and practice action. Construing Santiglia's "Amended Charge" as a motion for leave to amend his complaint, the motion is denied.

Sun's motion to restrict the original complaint to citizenship-based discrimination is granted in part and denied in part. The allegations of national origin discrimination will be dismissed. The allegations respecting acts of retaliation will remain, pending a more fully developed factual record. If appropriate, a motion in limine may be filed after the close of discovery.

SO ORDERED.

Dated and entered this 1st day of May, 2003.

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Ellen K. Thomas
Administrative Law Judge