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

November 20, 2006

AZIZ AITYAHIA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 06B00009
SABENA AIRLINE TRAINING CENTER, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Aziz Aityahia (Aityahia), an asylee from Algeria, applied for a job as a flight instructor at Sabena Airline Training Center, Inc. (SATC or Sabena), a flight training facility in Scottsdale, Arizona. He didn't get the job, and later filed this action alleging that Sabena discriminated against him in violation of the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006). Administrative Law Judge Ann Z. Cook held a telephonic case conference in April 2006, after which she issued a scheduling order setting an initial period of time for the parties to explore the possibility of settlement. The case was subsequently reassigned to me on July 7, 2006. On July 31, 2006, this office received a letter from Sabena's counsel dated July 28, 2006, indicating that the parties believed a resolution of the matter had been reached, that they were seeking agreement on the form of the documentation, and that they hoped to file a stipulation for dismissal shortly upon execution of the formal agreement.

However, the settlement documents were never filed with this office. Instead, Sabena filed a Motion to Dismiss/Enforce Settlement Agreement which contends that a binding oral settlement had been reached but that Aityahia refused to execute the necessary documents to memorialize the agreement. The motion was accompanied by an affidavit and exhibits. Aityahia did not respond to the motion and the time for responding elapsed.[1] Accordingly, I issued a Notice and

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2006). A party has ten days from the date of service in which to respond to a motion. 28 C.F.R. § 68.11(b) (2006). Where service has been made by ordinary mail, five days are added to the period. *Id.* § 68.8(c)(2). The

Order to Show Cause to Aityahia advising him that unless he filed countervailing evidence the motion would be resolved summarily. Aityahia responded to the Notice by letter but submitted no evidentiary materials.

II. MATERIALS CONSIDERED

Sabena's motion was accompanied by a memorandum of points and authorities, an affidavit, and Exhibits 1, 2, 2A, and 3. Exhibit 1 is a letter from Sandra J. Creta to Aityahia dated May 4, 2006. Exhibit 2 is a letter from Creta to Aityahia dated May 24, 2006, together with an unexecuted Stipulation for Dismissal and an unexecuted Settlement Agreement and General Release. Exhibit 2A is another letter from Creta to Aityahia dated June 26, 2006, together with copies of the same unexecuted settlement documents. Exhibit 3 is a letter from Aityahia to Creta dated July 27, 2007 (sic), with a copy of Creta's letter of May 24 attached. In addition to these materials, I have also considered the record as a whole, including the pleadings, attachments thereto, correspondence, and all other materials of record.

III. FACTS ESTABLISHED BY THE RECORD

In the absence of countervailing evidence, the unrebutted factual assertions in Sabena's evidentiary materials are taken as true. The Affidavit of Sandra J. Creta states that the affiant is an attorney with Quarles & Brady Streich Lang, LLP, and that she has personal knowledge of the facts stated. The affidavit says further that Creta had periodic telephone conversations with Aityahia on SATC's behalf in April and May 2006, and that she conveyed an offer on May 3 to pay him $7500 in exchange for a full release of his accrued claims. The affidavit says further that Aityahia called her the next day and asked to have the offer in writing and that she accordingly conveyed it to him by letter that same day.

Exhibit 1, dated May 4, 2006, indicates that it is intended to memorialize conversations between the parties on May 3 and 4, and that it is a confidential settlement communication. It says in pertinent part:

> Sabena Airline Training Center, Inc. (SATC) will pay you $7,500 as a full and final settlement of all disputes that you may have with SATC as of this date. In exchange for this amount, SATC requests that you execute a settlement agreement that includes a complete release of all claims.

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instant motion was served on August 16, and Aityahia's response would thus have been due by August 31, 2006.

> Please contact me at your convenience to let me know if you will accept this offer.

The affidavit states further that Aityahia called Creta on or about May 18, 2006, and accepted the offer without qualification. Creta then informed Aityahia that she would send a letter to this office reporting the settlement and would prepare a written agreement to memorialize the terms. Creta's affidavit says that on May 24, 2006, she mailed Aityahia the proposed documents. (Ex. 2). The agreement she sent stated in pertinent part that SATC would issue a check for $7500 to Aityahia in return for a waiver and general release of all claims arising prior to the effective date of the agreement. The cover letter says in pertinent part:

> Attached please find a proposed form of settlement agreement and release in this matter, along with a proposed stipulation of dismissal. Please review them and contact me with any questions or requested changes. If no changes are necessary, please execute the agreement and the stipulation for dismissal and return them to me.

The affidavit says that Creta then heard nothing from Aityahia, so on June 26, 2006, she sent him the documents again, with another letter asking him again to review them. (Ex. 2A). The letter states in pertinent part:

> To date, I have not heard from you whether the form of release is acceptable to you. Please review the attached documents and contact me with any questions or requested changes at your earliest convenience. If no changes are necessary, please execute the agreement and the stipulation for dismissal and return them to me.

The affidavit says that on July 10, 2006, Aityahia called Creta and said he had been seeking to retain an attorney to review the agreement, but had decided not to retain counsel. He told her that he thought he might have claims against SATC for defamation and wanted to alter the terms of the agreement to permit him to pursue those other claims. He sought to alter the release provision to apply only to his OCAHO claim. Creta says she explained to Aityahia that he could still bring other claims for any conduct occurring after the settlement date. He said he would not release all his claims for $7500. Creta says she told Aityahia that although she believed a settlement had been reached, she would present his proposed revised effective date to her client in an effort to resolve the issue.

On July 12, 2006, Creta sent Aityahia a letter reminding him of the specific terms of their oral agreement and asking him to honor that agreement by signing the release. On July 27, 2006, Aityahia responded by sending a letter to Creta asking for a change in the release date to apply only to claims arising prior to January 6, 2006, and for a modification to the release limiting it to the claim he filed with the Office of Special Counsel (OSC). (Ex. 3). The instant motion followed shortly thereafter.

Aityahia's letter in response to my Notice and Show Cause order proffered no evidentiary

materials, but said in pertinent part:

> In response to your Notice and Order to Show Cause, I would like to stress that I have sent a letter to S.A.T.C., on July 27, 2006 (erroneously dated 2007) with some changes that I requested to be made in order to finalize to (sic) settlement.
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> In fact when the settlement was reached, Sandra J. Creta and I had a phone conversation in which she said she was going to send me the settlement documents and that if there was anything that I needed to be changed I could contact her for that and that is what I did on July 27, 2006.
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> Because I am acting as my own lawyer handling this case and another one with the EEOC, I must make sure that my rights are not violated and that I am not being taken advantage of.

IV. QUESTION PRESENTED

The question presented by the instant motion is whether an enforceable oral settlement was reached, notwithstanding the parties' subsequent inability to agree upon a written formulation. More specifically, the salient issue is whether there is any disputed issue of material fact as to the validity or interpretation of the settlement so as to require a hearing, or, if not, whether the motion is susceptible to summary resolution.

V. APPLICABLE STANDARDS

An accrued cause of action under 8 U.S.C. § 1324b may be waived as part of a settlement agreement, although as a matter of public policy any prospective waiver of such claims would probably not pass muster. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (stating no prospective waiver of claims under Title VII). It is also well established in OCAHO jurisprudence that oral settlements may under appropriate circumstances be binding in a cause of action derived from 8 U.S.C. § 1324b. *United States v. Westin Hotel Co.*, 4 OCAHO no. 701, 975, 976-77 (1994).[2] A party who knowingly and voluntarily agrees orally to the terms proposed

[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 accordingly omitted from the citation. Published decisions may be accessed in the Westlaw

is bound thereby, and an administrative law judge has the authority to compel a recalcitrant party to execute an agreement to which that party has previously consented. *Stubbs v. Savannah Hotel Assocs.*, 8 OCAHO no. 1025, 380, 385 (1999) (citing *United States v. Boatright*, 4 OCAHO no. 634, 401, 402 (1994)). A party who has orally agreed to a valid settlement is thus not free to change his mind later and repudiate the agreement when presented with the necessary documents for signature. *Id.* at 385. A settlement agreement is a contract, and general contract principles are applied in determining whether a settlement has been reached. *United States v. Ace Mfg. Co.*, 8 OCAHO no. 1011, 218, 221 (1998).

Although case law under analogous statutes in the federal courts is not technically binding in this forum, I consider such authority for its persuasive value. It is notable that there is a split of authority in the federal circuits in regard to the question of whether to apply federal law or the law of the forum state to determine questions related to settlement of cases under federal remedial statutes. *See generally* Barbara Lindemann & Paul Grossman, *Employment Discrimination Law*, 1320, n.236 (3d ed. Supp. 2002) (citing, inter alia, *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. 1981) ("[F]ederal courts are competent to determine whether a settlement exists without regard to state law") and *Makins v. District of Columbia*, 277 F.3d 544, 548 (D.C. Cir. 2002) (applying local law to determine enforceability of release), vacated on other grounds, 389 F.3d 1303 (D.C. Cir. 2004)). Cases in the Ninth Circuit, in which this case arises, are not entirely consistent either. *Compare Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 461 (9th Cir. 1989) (finding federal law applies both to the interpretation and validity of a release of Title VII claims) *with Botefur v. City Eagle Point*, 7 F.3d 152, 155-56 (9th Cir. 1993) (stating conditions affecting the validity of a release of significant federal rights are eminently a matter of federal law, but the interpretation of a settlement agreement, even one involving a federal cause of action, is governed by principles of state contract law). As explained in *Botefur*, when federal law is the source of a rule, it may also be necessary to consider when to "borrow" or incorporate local law, which, in the civil rights context, is appropriate only under limited circumstances. *Id*.

Both the Ninth Circuit and the state of Arizona accept the validity of oral settlement agreements. *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1138 (9th Cir. 2002); *Althaus v. Cornelio*, 58 P.3d 973, 978 (Ariz. Ct. App. 2002). In determining when a release has been knowingly and voluntarily made, the Ninth Circuit considers the so-called "*Coventry* factors." *See Stroman*, 884 F 2d. at 462. These include clarity and lack of ambiguity in the agreement, the plaintiff's education and business experience; whether there was non-coercive atmosphere, and whether the employee had the benefit of legal counsel. *See Id.* Where parties to an oral agreement resolve to execute a written document, Arizona courts apply an objective standard to determine whether the parties

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database "FIM-OCAHO" or on the website at http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published.

intended the written agreement to be a memorialization of the oral agreement or whether they intended to be bound only by the written instrument. *Tabler v. Indus. Comm'n of Ariz.*, 47 P.3d 1156, 1159 (Ariz. Ct. App. 2002).

VI. DISCUSSION AND ANALYSIS

It appears from the record that after several telephone conversations with Aityahia, Creta made an oral offer to him on Sabena's behalf on May 3, 2006, to pay $7500 for a release of all his then existing claims. At Aityahia's request, Creta put that offer in writing and sent him a letter on May 4, 2006, setting out these terms. (Ex. 1). The letter states that it is to memorialize their conversations of May 3 and 4, and asks Aityahia to "contact me at your convenience to let me know if you will accept this offer." No deadline was imposed for Aityahia to respond, and he took a few weeks before calling Creta on May 18, 2006, to tell her he accepted those terms. There was nothing tentative or conditional about Aityahia's acceptance that day, and he has not contended that there was.

Exhibit 2 reflects that on May 24, 2006, Creta sent Aityahia the proposed documentation, and when he made no response for more than a month, she sent him the same documents again on June 26, 2006. Both letters asked him to review the form of the documents. On July 10 Aityahia called and sought to change one of the terms of the settlement. Creta told him she would inquire as to whether her client would accept the change he requested, but evidently Sabena would not, because Creta's next letter asked Aityahia to honor their oral agreement and sign the release.

Sabena's position is basically that a valid oral settlement had been agreed upon, but that Aityahia subsequently developed a case of "buyer's remorse." Aityahia has not contended otherwise; his letter explicitly acknowledges the telephone conversation he had with Creta "when the settlement was reached," and the fact that she was to send him the settlement documents for review. It was not until after she sent those documents twice, first on May 24 and then again on June 26, that Aityahia called and requested that the terms of the agreement be changed. While Aityahia's letter in response to the show cause order suggests that Creta's letters invited him to make changes, Creta's affidavit states that she did not offer him the opportunity to renegotiate the terms of the agreement, but rather offered him only the opportunity to review and comment on the form of the documentation. Her letters to him reflect that she asked him to review the form of the documents, not to make whatever changes he chose to the substantive provisions.

For purposes of this motion, all factual controversies are to be resolved in favor of the nonmoving party, but this requires that there actually be a factual controversy, i.e., that the parties have submitted evidence of contradictory facts. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (stating factual issues are resolved for the nonmoving party "only in the sense that . . . the facts specifically averred by that party contradict facts specifically averred by the nonmovant"). Here Aityahia does not dispute Creta's account of their conversation on May 18, nor has he

articulated any ground which would permit him to rescind their oral agreement unilaterally. That Aityahia misconstrued Creta's subsequent letters as providing an opportunity for him to change a material term of the agreement rather than just to review the form of the documents represents at best a unilateral mistake on his part.

This is not a case in which the settlement was made contingent upon execution of the settlement documents or upon the negotiation of additional terms. *See Callie v. Near*, 829 F.2d 888, 890-91 (9th Cir. 1987). No part of the oral agreement the parties made was conditioned on finalization of the written formulation. Neither is this a case in which there are conflicting accounts as to what was said in the course of the negotiations. *See Stubbs*, 8 OCAHO at 381-82 (reflecting that parties had submitted conflicting affidavits). Rather, the settlement offer which Aityahia accepted on May 18 was clear and unambiguous: Creta's letter of May 4, 2006, set out an offer of substantial consideration in exchange for a release of all his then-existing claims, and Aityahia's telephone acceptance of that offer on May 18 was unequivocal. In the words of Justice Oliver Wendell Holmes, "the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs--not on the parties' having meant the same thing, but on their having said the same thing." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 463 (1897). I conclude that the parties here said the same thing, and that they consummated an enforceable oral agreement that precludes Aityahia from pursuing this claim further.

The facts and circumstances surrounding the consummation of the agreement here give no hint of any element of fraud, duress, coercion, mutual mistake, unconscionability, or other reason to permit setting aside the agreement. There have been no facts and circumstances shown to suggest that Aityahia's acceptance of Sabena's offer was other than knowing and voluntary, notwithstanding his pro se status. Aityahia is clearly fluent in English; he has sufficient education and training to qualify for a position as a flight instructor; the narratives and e-mails attached to his complaint are intelligent and well-written. There was nothing inherently coercive about the negotiating situation which took place by telephone and at arm's length; Aityahia was not given any particular deadline or put under pressure to make a decision about Sabena's offer; he did not have to make his decision at his worksite or in an otherwise coercive environment. While Aityahia was not represented by counsel, he told Creta that he had sought, but ultimately decided not to retain an attorney.

I conclude that there is no issue of material fact requiring a hearing, that there is no issue as to the validity or interpretation of the agreement, that the agreement is binding on both the parties, and that its terms should be incorporated in a final order.

VII. ENFORCEMENT INFORMATION

An action for the breach of a private settlement agreement is ordinarily a contract action, not an

action for violation of a federal law, so that such an action ordinarily provides no basis for federal jurisdiction. *See generally Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). In contrast here, however, an action for enforcement of a Final Order of this forum in a case arising under §1324b is committed to the United States District Court in the district where the events underlying the case occurred, or where the respondent resides or transacts business, unless the order is appealed as provided in 8 U.S.C. § 1324b(g)(1). *See* 8 U.S.C. § 1324b(j); 28 C.F.R. § 68.57 (2006).

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In consideration of the record as a whole, I make the following findings and conclusions:

A. Findings of Fact

1. Aziz Aityahia is a native and citizen of Algeria and an asylee in the United States.

2. Sabena Airline Training Center, Inc. operates a flight instruction school in Scottsdale, Arizona.

3. On June 1, 2005, Sabena Airline Training Center, Inc. interviewed Aziz Aityahia for a flight instructor position and did not hire him.

4. Aziz Aityahia filed a complaint with this forum on January 26, 2006.

5. Sandra J. Creta, counsel for Sabena Airline Training Center, Inc., orally offered Aziz Aityahia $7500 in exchange for a full release of claims against her client.

6. Sandra J. Creta sent Aziz Aityahia a letter reiterating her client's offer.

7. On May 18, 2006, Aziz Aityahia called Sandra J. Creta and accepted the offer.

8. Aziz Aityahia's acceptance was knowing and voluntary.

9. Sandra J. Creta prepared a Settlement Agreement and General Release and a Stipulation for Dismissal.

10. Sandra J. Creta mailed Aziz Aityahia the settlement documents in May and again in June asking him to review the form of the documents and sign them.

11. On July 10, 2006, Aziz Aityahia called Sandra J. Creta and told her he would not sign the documents and that he wanted to change the terms of the agreement.

12. Sabena Airline Training Center, Inc. filed a Motion to Dismiss/Enforce Settlement Agreement on August 17, 2006.

B. Conclusions of Law

1. This is an action arising under the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006).

2. Under OCAHO's case law, oral settlement agreements are valid if the parties have knowingly and voluntarily agreed to the settlement's terms. *United States v. Westin Hotel Co.*, 4 OCAHO no. 701, 975, 976-77 (1994).

3. A valid oral settlement agreement came into being between the parties when Aziz Aityahia orally accepted Sabena Airline Training Center, Inc.'s offer to pay him $7500 in exchange for a full release of his accrued claims against the company.

4. There is no issue of material fact requiring a hearing, and no issue as to the settlement agreement's validity or interpretation.

5. The settlement agreement is binding on the parties.

6. Aziz Aityahia is precluded from pursuing this matter, and the complaint must be dismissed.

To the extent any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

The parties to this matter made a binding oral agreement in which Aityahia agreed to release all accrued claims he had against Sabena in exchange for the sum of $7500. Aityahia is directed to sign and return the release of claims within ten days. Sabena is directed within the same time to pay Aityahia the sum of $7500. The complaint is dismissed.

SO ORDERED.

Dated and entered this 20th day of November, 2006.

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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 sixty days after the entry of such Order.