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

Jaime Banuelos, et al., Complainants v. Transportation Leasing Company (Former Greyhound Lines, Inc.), Bortisser Travel Service, G.L.I. Holding Company and Subsidiary Greyhound Lines, Inc., Bus Wash, Missouri Corporation, Respondents; 8 U.S.C. § 1324b Proceeding; Case No. 89200314.

ORDER DENYING COMPLAINANTS MOTION FOR DEFAULT JUDGMENT

I. Procedural Background

1. On July 7, 1989, Complainants filed a Complaint with the Department of Justice's Office of Chief Administrative Hearing Officer against Respondents Transportation Leasing Co.; GLI Holding Co. and its subsidiary Greyhound Lines, Inc.; Bortisser Travel Service; and Bus Wash Missouri Corporation alleging unfair immigration-related employment practice under Section 274B of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA). 8 U.S.C. § 1324b.

2. On August 7, 1989, the Office of Chief Administrative Hearing Officer advised Complainants by letter to file an amended complaint which would, inter alia, (1) name only those individuals as complaints (sic) who are alleged to have been discriminated against under Title 8 United States Code Section 1324b; (2) confine the allegations of violations to those which are contained in Section 1324b; and (3) all Complainants were directed to sign the Complaint.

3. On September 7, 1989, Complainants filed an amended Complaint alleging Respondents Transportation Leasing Company (Former Greyhound Lines, Inc.); Bortisser Travel Service; GLI Holding Co. and subsidiary Greyhound Lines, Inc.; and Bus Wash Missouri Corporation had discriminated against Complainants in violation of 8 U.S.C. § 1324b.

4. On November 2, 1989, Complainants filed a Motion for Default Judgment against all Respondents alleging that some Respondents

had not filed timely answers and that other Respondents had not filed any answer to the amended Complaint.[1]

II. Legal Standards Applicable to Adjudication of Motion for Default Judgment

The regulations governing this proceeding provide for a discretionary consideration of the appropriate applicability of rendering a judgment by default in instances wherein a party has not properly plead or otherwise contested the charged allegations. See, 28 C.F.R. § 68.8(b). This particular regulation provides, in pertinent part, that I ``may enter a judgment by default'' if I find that a Respondent has failed to file an answer within the time provided. Id. The ``time provided'' by the regulations is thirty days after the service, plus five days for mailing. See, 28 C.F.R. § 68.8(a).

The discretionary nature of default judgment adjudications is the general rule in federal courts. See, Fed. R. Civ. Pro., Rule 55(b)(2); see also, Wright, Miller & Kane, Federal Practice and Procedure, vol. 10, section 2685, at 420. Thus, when a Motion for Default is filed with this office, I am required to exercise ``sound judicial discretion'' in determining whether the judgment should be entered. See, e.g., Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977); Bonanza Int'l, Inc. v. Corceller, 480 F.2d 613 (5th Cir. 1973); cert. denied, 94 S. Ct. 587, 414 U.S. 1073 (1974).

Among the factors that I intend to consider in ruling on motions for default in these proceedings are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance need to be addressed; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; whether the grounds for default are clearly established or are in doubt; whether the failure to answer was caused by a good faith mistake or excusable neglect; and how harsh an effect a default judgment might have. See, Wright, Miller & Kane, supra.

As applied to the case at bar, I intend on analyzing the merits of Complainants' Motion for each separate Respondent.

III. Legal Analysis

A. Respondent Transportation Leasing Company

On November 13, 1989, Respondent Transportation Leasing Company (hereinafter referred to as ``TLC'') filed it opposition to Com-

[1]I should point out, respectfully, that Complainants' Motion for Default, as is true of all of the pleadings filed by Complainants in this case, is poorly written and difficult to comprehend; but, I am making every effort to translate fairly and accurately their allegations in support of their motion.

plainants' Motion for Default Judgment. Moreover, in addition to opposing Complainants' Motion for Default Judgment, TLC has argued that because Complainants' Motion for Default is frivolous, that I award TLC its costs and attorney fees.

In its response, TLC asserts that it was served by U.S. mail with the amended Complaint in this case on September 14, 1989.[2] TLC further states that on October 12, 1989, it answered the amended Complaint and served the Complainants through the U.S. mail. TLC further stated that its Answer was received by this office on October 16, 1989. Based upon the pleadings filed by TLC and the attached service of process, it is clear that TLC's Answer was timely filed in this case.

Since service of the complaint on Respondent TLC was effective on September 14, 1989, the date TLC received the Complaint, TLC had, pursuant to 28 C.F.R. § 68.5(c), until October 19, 1989, to answer. Since I find that TLC's Answer was filed on October 16, 1989, three days before the prescribed period, TLC's timely Answer precludes Complainants' entitlement against TLC to a judgment by default.

Finally, I do not agree with Respondent TLC that Complainants' Motion for Default was ``frivolous,'' nor am I necessarily of the view that the statutory provision regarding award of attorney fees applies to individual subsidiary motions as distinguished from the case taken as a whole. Even if I were to be of the view that attorney's fee motions could be applied to a matter's subsidiary motions, I do not view Complainants' Motion for Default as being wholly without ``reasonable foundation in law and fact.'' 8 U.S.C. § 1324b(h); see also, e.g., George Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983) (denial of an award of attorneys' fees to an employer prevailing in a national origin bias case was affirmed for lack of showing bad faith on part of unrepresented claimant).

B. GLI Holding Company and Greyhound Lines, Inc.

On November 15, 1989, Respondent GLI Holding Company and Greyhound Lines Inc. (hereinafter I will refer to both Respondents as GLIH/GLI), filed their response to the Motion for Default Judgment. In their response to the Motion, GLIH/GLI assert that they did not receive the amended Complaint filed in this case until September 14, 1989. In support of the date of service, Respondents have attached to their response a copy of the service of process

[2]Attached to its Response, as an exhibit, is a copy of the service of process showing service of the Complaint on September 14, 1989, by C.T. Corporation System.

transmittal form. Respondents further allege that they filed their joint Answer on October 17, 1989, thirty-three days after receipt of the amended Complaint. Respondents further state that October 14, 1989 (the 30th day), was a Saturday; and, therefore, without consideration of mailing, Respondents' Answer would have been due on Monday, October 16, 1989.[3]Respondents state that they mailed their Answer to this office on October 16. An overnight delivery service notice form attached to its pleadings show delivery of Respondents' Answer to this office on October 17, 1989.

I have reviewed the pleadings and service of process forms and find that the Respondents were served with the Complaint on September 14, 1989, that they mailed their Answer on September 16, 1989, and filed their Answer with this office on October 17, 1989. Since I have found that Respondents' GLIH/GLIs Answer in this case was filed on October 17, 1989, several days prior to the prescribed time for filing, Respondents' timely Answer precludes Complainants' entitlement to default judgment.

C. Bus Wash Missouri Corporation

On November 30, 1980, Bus Wash, Inc. (hereinafter referred to as ``BWI''), filed its opposition to Complainants' Motion for Default Judgment stating, inter alia, that:

1. On September 21, 1989, Respondent BWI was served with the amendment Complaint.

2. On October 23, 1989, Respondent BWI filed its Answer to the amended Complaint and served the Answer on Complainants through the United States Mail. Respondent BWI's Answer was filed with the Administrative Law Judge on October 24, 1989.

I have reviewed the pleadings filed in this case and find that Respondent BWI did file its Answer with this office on October 24, 1989. Since service of the Complaint on Respondent BWI was made on September 21, 1989, by United States mail, Respondent had until October 26, 1989 (30 days from receipt plus five days for mailing), in which to file a responsive pleading. Since Respondent BWI filed its Answer with this office on October 24, 1989, its Answer was timely filed and, therefore, Complainants are not entitled to a default judgment.

[3]The regulations provide that ``in computing any period of time . . ., the time begins with the day following the act, event, or default, and includes the last day of the period unless it is Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day.'' See, 28 C.F.R. § 68.5(a).

D. Bortisser Travel Service

The record in this case shows that after the Chief Administrative Hearing Officer (OCAHO) received a copy of the amended Complaint, OCAHO attempted to mail a copy of the Complaint to Respondent Bortisser Travel Service (hereinafter referred to as ``BTS''). The amended Complaint was first mailed by certified mail to BTS' address at: 1953 Gobberfiel Way, Glendora, California, but the envelope containing the complaint was returned stating ``unknown.'' OCAHO next mailed the amended Complaint by certified mail, return receipt requested, to the address at: 1614 East 7th Street, Los Angeles, California 90021. On September 22, 1989, the letter was delivered and signed for by an agent whose signature on PS Form 3811 is illegible.[4]However, since the delivery of the amended Complaint, numerous letters have been sent by this office to the Respondent at the 1614 East 7th Street address, which have been returned to this office stamped with a notation stating ``no longer working here.''

In this regard, I have serious doubts as to whether Respondent Bortisser was effectively served with the amended Complaint by Complainants. For this reason, I intend to deny Complainants' Motion as applied to Bortisser. See, e.g., Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985), cert. denied, 106 S. Ct. 1492, 475 U.S. 1096 (1986) (``The district court did not abuse its discretion in denying plaintiff's two motions for default judgment, when, in regard to the first motion, the parties disagreed whether a complaint was included in the documents served upon defendant and, in the second motion, that defendant's answer and response actually were filed . . . within the time set by the court.''); see, also, Wright, Miller & Kane, supra.

Accordingly, I am denying Complainants' Motion for Default Judgment as applied to all Respondents for the above-stated technical reasons; and am also denying Respondent TLC's Motion for Attorney's Fees.

SO ORDERED: This 5th day of March, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

[4]In view of the fact that this office has been unable to locate and serve Respondent BTS, I suggest that if Complaintants wish to make BTS a party to this action, that they provide this office with a corrected and reliable address for service of process.