

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

Jimmy-Jack Jackai, Complainant v. Frito-Lay, Inc., Respondent; 8 USC 1324b Proceeding; OCAHO Case No. 88200165.

Appearances: **YONA ROZEN**, Esq. (Gillespie & Rozen), Dallas, TX, for the Complainant.

R. SLATON TUGGLE III, Esq.

JEFFREY A. VAN DETTA, Esq., and

DUANE C. ALDRICH, Esq. (Kilpatrick & Cody),
Atlanta, GA, for the Respondent.

Before: **RICHARD J. LINTON**, Administrative Law Judge

ORDER DISMISSING COMPLAINT (SETTLED)

On October 27, 1988 Jimmy-Jack Jackai, the Complainant, filed a complaint (subsequently amended) in this case against Frito-Lay, Inc., the Respondent. The Notice of Hearing issued December 22, 1988. After certain reschedulings and postponements, by order dated April 3, 1990 I set the case for hearing in Dallas, Texas on July 10, 1990. By motion dated June 13, 1990 the office of the statutory Special Counsel (OSC) filed a motion to intervene for the limited purpose of addressing certain legal matters which recently were focused as issues if the case proceeded to trial.

By joint motion served June 21, 1990, Jackai and Frito-Lay, announcing that they have reached a full settlement of the case and that they have agreed to dismissal of the case ``with prejudice,' have moved to dismiss the case under 28 CFR 68.12(a)(2). Observing that the settlement and anticipated dismissal will eliminate the reasons for its motion to intervene, OSC, by motion dated and served June 20, 1990, moved to withdraw its motion to intervene. In their joint motion to dismiss the case, Jackai and Frito-Lay assert that they do not oppose OSC's motion to withdraw.

Although 28 CFR 68.12(a)(2) is ambiguous, I read the regulation as recognizing that the administrative law judge (ALJ) has some

discretion in approving a dismissal. A contrary reading would mean that the parties have an absolute right to a dismissal, with the ALJ's approval being nothing more than a ministerial rubber-stamp of the parties' decision. In rare cases (not here) that interpretation could leave a represented party (not to mention a pro se party) at the mercy of colluding lawyers. (Again, every indication here is that Jackai, a college graduate, and Frito-Lay, a large corporation, have each been well represented.) I do not think the Attorney General so intended, and 28 CFR 68.26, the Administrative Procedure Act, and IRCA give ALJs broad powers.

The parties have not attached a copy of the settlement agreement to their joint motion to dismiss. They assert it is not attached because they have agreed that the terms of that settlement are to remain confidential. They allege, however, that ``pursuant to their settlement agreement, Mr. Jackai has agreed to dismiss this action with prejudice, with each party bearing its own costs, in return for the receipt of good and valuable consideration from Frito-Lay, Inc.''

Although the joint motion to dismiss does not specifically request that I dismiss with prejudice, a routine granting of the motion to dismiss could imply approval of the ``with prejudice'' phrase of the motion. I intend no such approval. Dismissal with prejudice is a discretionary ruling. Even though 28 CFR 68.12(a)(2) does not call for the ALJ to be satisfied with the substance of a settlement, as in section 68.12(c) with consent findings, or expressly provide that an ALJ in his or her discretion may conduct a hearing to determine the fairness of the settlement and other items, id., I conclude that an ALJ may exercise his or her discretion in the same fashion respecting settlements under section 68.12(a)(2) for the reasons I expressed earlier. No copy of the settlement agreement having been submitted with the joint motion to dismiss, and no reasons advanced for dismissing with prejudice (other than the fact of settlement and the parties' assertion that they have agreed it should be dismissed with prejudice), I decline to exercise by discretion. Thus, the dismissal shall not be ``with prejudice.''

Based on the joint motion to dismiss and 28 CFR 68.12(a)(2), I FIND that the parties have announced reaching a full settlement of the case, that the parties have agreed to dismissal of the case, and that OSC's motion to withdraw its motion to intervene should be granted. ACCORDINGLY,

I GRANT OSC's motion to withdraw its motion to intervene, APPROVE the joint motion to dismiss, CANCEL the hearing, DISMISS the complaint, and CLOSE the proceeding.

SO ORDERED: At Atlanta, Georgia this June 28, 1990.

RICHARD J. LINTON
Administrative Law Judge