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.

FINAL DECISION AND ORDER

ROBERT B. SCHNEIDER, Administrative Law Judge

DATED: October 24, 1990.

SYNOPSIS

Complainants alleged violations of section 1324b of Title 8 of the United States Code. Complainants' Motion for Summary Decision was denied. Respondents TLC, GLI, and Bus Wash, Inc., filed cross-motions for Summary Decision, and all of them were granted. Respondent Bortisser Travel's Motion to Dismiss was granted. Respondents TLC and GLI filed requests for attorneys' fees, and their requests were granted in a reduced amount.

CONTENTS

Appearances: **JAIME BANUELOS**, In Pro Se
MARCO T. CENTENO, In Pro Se, on behalf of the Complainants
IRA BERNSTEIN, Esquire, for Respondent Transportation Leasing Co.
BERNADETTE WOLFE, Esquire, for GLI Holding Company
ROBERT E. DOLAN, Esquire, for Respondent Bush Wash, Inc.
GREGORY KENNEDY, Esquire, for Respondent Bortisser Travel Services

Before: ROBERT B. SCHNEIDER, Administrative Law Judge

FINAL DECISION AND ORDER

I. Procedural History

This is a section 1324b case in which twenty-four separately named Complainants allege unfair immigration-related employment practices against four separately named Respondents. The Complaint was originally filed on July 7, 1989. Since that time, numerous pre-hearing motions have been filed by various parties and decided.

Presently pending before me are cross-motions for summary decision by all Respondents except Bortisser Travel Service.[1]

One of the Motions for Summary Decision was filed by Complainants on April 19, 1990. Complainants' Motion is apparently supplemental to its self-styled ``Countermove for Summary Decision in Opposition to Motion by Respondents GLI Holding Company and Greyhound Lines, Inc., For Summary Decision,'' as filed on or about November 29, 1989. I intend on reading these separately filed motions together. On May 8, 1990, Complainants filed ``Responses to Transportation Leasing Company Answer to Complainants Summary Decision and Opposition to Transportation Leasing Company Memorandum and Motion for Summary Decision.'' Also, on May 8, 1990, Complainants filed an ``Opposition to Bus Wash, Inc., for Summary Decision'' and, in the same document, ``Request for Subpoena of Documents.''

[1] Respondent Bortisser, a defunct corporation with no assets, is no longer a party to this proceeding because on September 10, 1990, I issued an order, pursuant to 28 C.F.R. § 68.19(c), to dismiss with prejudice the Complaint against Bortisser.

Respondent GLI Holding Company (hereinafter ``GLI'') filed a Motion for Summary Decision on November 20, 1989. GLI also filed a ``Response by GLI Respondents to Complainants' Counter Motion for Summary Decision'' on December 14, 1989. Finally, on May 7, 1990, GLI filed an ``Opposition to Complainants' Most Recent Motion for Summary Decision.''

On May 3, 1990, Respondent Transportation Leasing Company (``TLC'') filed a Motion for Summary Decision. TLC also filed an ``Opposition'' to Complainants' Motion for Summary Decision.

On May 7, 1990, Respondent Bus Wash, Inc. (hereinafter ``Bus Wash''), also filed a Motion for Summary Decision. On May 9, 1990, Respondent filed its Memorandum to Complainants' Motion for Summary Decision.

Two of the Respondents have also made requests for attorneys' fees. Respondent GLI filed a memorandum of law in support of attorneys' fees on June 22, 1990. Respondent TLC also filed a Motion in support of its request for attorneys' fees on June 22, 1990. Complainant filed opposition on June 26, 1990.

II. Factual Summary

I have not previously summarized the facts in this case. There is a somewhat complicated background history to the charges alleged by Complainants in this case.

Complainants in this action, Jaime Banuelos and twenty-three others, have filed the instant private actions charging four separate Respondents with unfair immigration-related employment practices. A sale of corporate assets by Respondent TLC (formerly Greyhound Lines, Inc.) on or about March 19, 1987, resulted in entity decisions which Complainants assert were discriminatory, and prohibited by section 1324b of Title 8 of the Unites States Code.

Proper identification of the parties is essential to understanding the nature of the dispute herein. Complainants, before March 19, 1987, were all employed by a subsidiary of the Greyhound Corporation (``old'' Greyhound) in the Los Angeles terminal's bus cleaning operation. Thus, all of the Complainants were former employees, in one bus cleaning and maintenance capacity or another, of ``old'' Greyhound.

As stated, there are four Respondents in this case.

1) Transportation Leasing Company (``TLC'') (``old Greyhound'');
2) GLI Holding Co. and subsidiary Greyhound Lines, Inc. (``GLI'') (``new Greyhound'');
3) Bortisser Travel; and,
4) Bus Wash, Inc.

What is currently Respondent TLC was formerly known as Greyhound Lines, Inc., a subsidiary of ``old'' Greyhound, the Greyhound Corporation. On March 19, 1987, TLC (at the time it was still ``old'' Greyhound) sold the corporate assets of the bus line, including the corporate logo, to Respondent GLI, ``new'' Greyhound. Concurrent with the sale, TLC terminated all of its nonsupervisory employees, including Complainants.

``Old'' Greyhound employees were advised by letter dated March 5, 1987, that GLI Holding would not hire them under their old collective bargaining agreements. GLI decided to subcontract out the bus cleaning work that Complainants had previously performed for ``old'' Greyhound.

Effective March 19, 1987, GLI hired an independent contractor, Bortisser Travel Service, to perform the Los Angeles bus cleaning operations. According to its affidavits filed in support of its Motion for Summary Decision, GLI exercised no control over the hiring of employees by Bortisser for the Los Angeles bus cleaning operations.

On May 5, 1988, GLI terminated Bortisser's services and entered into a service agreement with Bus Wash, effective July 1, 1988. Respondent Bus Wash asserts, by affidavit, that it was, and is, an entity completely and wholly separate and distinct from GLI. The Service Agreement reveals that GLI reserved no control over Bus Wash with respect to how services should be provided, or how the subcontractors' employees should be hired, supervised, disciplined or terminated.

Around July 1, 1988, Bus Wash caused a notice to be posted in the Los Angeles bus terminal notifying former Bortisser employees, ``and all other interested individuals, of the opportunity to apply for employment with Bus Wash, Inc.''

According to the affidavit filed with its Motion for Summary Decision, Respondent Bus Wash asserts that only three, and possibly a fourth, of the named Complainants applied for a bus cleaning job with Bus Wash and that, for legitimate nondiscriminatory reasons, none of these individuals were hired.

III. Legal Standards Relevant to Deciding a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' 28 C.F.R. section 68.36 (1989); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

It is well established that a court must exercise sound judicial discretion in deciding a Rule 56 motion. See, Wright & Miller & Kane, Federal Practice and Procedure, vol. 10A, section 2728, at 178. Among the factors of discretionary consideration that a court must examine is the quantum and quality of relevant and admissible evidence that the parties will be expected to produce at hearing. A United States Supreme Court decision allows courts to require that claimants present more persuasive evidence to defeat summary decisions when the factual context renders the claim implausible. See, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Evidence in opposition to a motion that is clearly without any force is insufficient to raise a genuine issue or to preclude the application of summary decision. See, e.g., Huggins v. Teamsters Local 312, 585 F. Supp. 148 (D.C. Pa. 1984) (``Mere inferences, conjectures, speculation or suspicion are insufficient to establish a material fact upon which to base the denial of summary judgment.''); Kelly v. American Federation of Musicians & Employers' Pension Welfare Fund, 602 F. Supp. 22 (D.C.N.Y. 1985), aff'd, 795 F.2d 79 (2nd Cir. 1985) (``In response to defendant's evidentiary support of its summary judgment motion, it was incumbent on plaintiff to come forward with suitable opposing affidavits, and absent factual corroboration, the court could not consider plaintiff's conclusory statements in his two letters as sufficient rebuttal.''); Mid-South Grizzlies v. National Football League, 550 F. Supp. 558 (D.C. Pa. 1982), aff'd, 720 F.2d 772 (3rd Cir. 1983), cert. den., 104 S. Ct. 2657, 467 U.S. 1215 (1984) (``A party should not be permitted to proceed to trial in the hope of developing evidence to support its claim.''); Carlander v. Dubuque Fire & Marine Ins. Co., 87 F. Supp. 65 (D.C. Ark. 1949) (``When a careful consideration of the facts reveals no genuine issue of fact, the motion for summary judgment may be granted, even though captious, immaterial or imaginary issues of fact may be found.''); see, also, Weakland, ``Summary Judgment in Fed-

eral Practice: Super Motion v. Classic Model of Epistemic Coherence,'' 94 Dick. L. Rev. 25 (1989); cf. Yamamoto, ``Efficiency's Threat to the Value of Accessible Courts for Minorities'' 25 Harv. C.R.-C.L. L. Rev., 341 (1990) (``Altered summary judgment standards bear the potential for decreasing a minority plaintiff's chances of publicly presenting their perspective and highlighting underlying social issues.'' Id. at 376.

IV. Legal Analysis

A. Complainants' Motion for Summary Decision

From the inception of this case, I have tried to understand exactly the nature of the unfair immigration-related employment practices alleged by pro se Complainants. The numerosity of parties, while cumbersome, has not, in itself, precluded such understanding so much as the tenacious opacity of Complainants' regrettably unfocused pleadings.

Apparently, the basis for Complainants' Motion is its contention (as actually appears at page 16 of said Motion):

> Respondent have (sic) no meritorious defenses in building argumentations over a deceive (sic) premises of ownership and subcontracting (sic) making the illusion of a new company for the implementation of Unfair Immigration Related Employment Practices. Coon v. Grenier. . . .

It is my firmest intention, especially with a new and publicly confusing law, to consider with appropriate flexibility the submissions of non-lawyers who believe that they are entitled to judicially enforceable remedies on account of wrongs that they perceive themselves to have suffered. Such consideration, however, cannot be at the expense of the inherent rights of respondents to insist that I resolve disputes according to a proper assessment of competent evidence. Nor am I convinced that every perceived wrong that arises from the often-strained relationship between employers and employees is necessarily legally cognizable by courts.

In this regard, I have, without any doubt, tried to analyze Complainants' submissions in this case with reasonable consideration for their limitations in pursuing legal remedies. As was well-stated by sensitive counsel for Respondent GLI, however, I cannot continually attempt to extrapolate and infer arguments that Complainants might be trying, however inarticulably, to express without erring against the legitimate due process rights of Respondents. All of this regrettably said, however, I have closely read Complainants' pleadings, and I have done my best to construe their arguments and concerns.

Nevertheless, through the 26 pages of their strained ``argument,'' I have found that Complainants simply do not present me with

anything resembling evidence which indicates that there is ``no genuine issue of material fact,'' and that they are entitled to judgment as a matter of law. See, 28 C.F.R. § 68.36.

In this regard, I must state at the outset that it is my considered conclusion that Complainants have not adequately established, under the analytic framework promulgated in analogous Title VII case law, a prima facie case setting forth the order and allocation of proof necessary to evaluate whether Complainants were knowingly and intentionally subjected to disparate or differential treatment on the basis of their protected citizenship status. 28 C.F.R. part 44.200(a); see e.g., McDonnell-Douglas Corp. v. Green, 411 U.S. 792, at 802 (1973);[2] Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985); see also, Wisniewski v. Douglas County School District, OCAHO Case No. 88200037 (October 17, 1988).

In addition, Complainants make repeated arguments that the sale of corporate assets described above was a ``sham,'' and that, in reality, ``old'' Greyhound (TLC) and ``new'' Greyhound (GLI) are the same entity. In support of this contention, Complainants argued, accurately, that the California state tax employer numbers on the 1989 W-2 forms for GLI employees in California listed ``old'' Greyhound's tax employer number and not, as would have been correct, the employer number of GLI Holding. This appears to be the only piece of ``evidence'' offered by Complainants to support their contention that GLI is a successor entity to ``old'' Greyhound.

I am not persuaded by these contentions, even if I were to admit into evidence the W-2 forms that they proffer, I would probably give them little weight as supporting their theory that GLI Holding is a ``successor entity.'' Aside from the fact that they have not been authenticated, and that they contain photo-statically obscured information, I am ultimately persuaded that the discrepancy of tax identification numbers is best explained as computer-generated

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[2]According to the analytic ``minuet'' suggested by McDonnell-Douglas, the basic allocation and order of proof of disparate treatment cases presenting indirect evidence requires that the complainant:

(1) establish a prima facie case;

(2) the employer must then articulate a legitimate, non-discriminatory reason for its actions;

(3) and, finally, the complainant must prove that this proffered reason is a pretext for intentional discrimination.

This approach, though a most useful framework, is not, in light of subsequent Supreme Court decisions, to be applied mechanistically. See, United States Postal Service Board of Governors v. Aikens, 460 U.S. 411 (1983); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); see also, Schlei & Grossman, Employment Discrimination Law, 2nd Ed., and, Five-Year Supplement, ed. by Cathcart & Ashe (1989).

``'oversight'' as described in the sworn affidavit of Richard Hirz, Manager of Payrolls for Greyhound Lines, Inc., or GLI.

Most importantly, however, and as applied to all Respondents, it is my view that Complainants have not presented requisite evidence to specifically show that the reason they were not re-hired to perform bus cleaning and maintenance operations after the sale of old'' Greyhound was because of discriminatory intent by Respondent on account of national origin or citizenship status as prohibited by section 1324b of Title 8 of the United States Code. Thus, it is my considered view that Complainants have not presented me with enough evidence to warrant proceeding to hearing on genuinely triable issues of material fact. See, June Wisniewski v. Douglas County School District, OCAHO Case No. 88200037 (October 17, 1988) (in which ALJ Morse held: ``Disposition of a complaint on motion for summary decision, authorized by 28 C.F.R. 68.36, is not a result casually reached. Mindful of the relative strengths of the parties and of complainant's unrepresented status, I cannot, however, deny the motion unless satisfied that there is a genuine issue of fact for hearing. I am not so satisfied. There is simply no issue of fact as to any conduct by the respondent which implicates the citizenship status of complainant.'' Id., at 7. See, also, Mid-South Grizzlies v. National Football League, 550 F. Supp. 558 (D.C. Pa. 1982), aff'd, 720 F. 2d 772, cert. den., 104 S. Ct. 2657, 467 U.S. 1215 (1984) (``Although a party's right to trial should be carefully guarded, the filing of a . . . complaint cannot insure a right to trial or defeat a motion for summary decision, absent any significant probative evidence supporting the party's claims and a party should not be permitted to proceed claim.'').

In effect, dissecting Complainants' pleadings did not legitimate them. Though I cannot be sure that there was not some buried version of factual truth in Complainants' contentions, I am certain that they did not come close to making an adequate showing necessary to uphold the serious allegation of what, in their minds, amounted to a discriminatory conspiracy. See, Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 106 S. Ct., 1348, 1356, 475 U.S. 574, 586 (1986). Accordingly, Complainants' Motion for Summary Decision is denied.

B. Respondent GLI's Motion for Summary Decision

Respondent GLI premises its Motion for Summary Decision on its contention that it is not a successor entity to ``old'' Greyhound and is not properly a party to this suit. The second ground support-

ing summary decision, as tendered by GLI, is that Complainants' charges are untimely against GLI.[3]

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[3]Respondent GLI argues that Complainants' charges against it were untimely under section 1324b(d)(3). Section 1324b(d)(3) provides that:

No complaint may be filed respecting any unfair immigration-related practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel.

Respondent GLI argues that since none of the Complainants filed timely charges with the Office of Special Counsel (``OSC'') they are also, under a literal reading of section 1324b(d)(3), precluded from effectuating their own private right to action before an administrative law judge. OSC, however, advised the untimely Complainants by letter that they still had a private right of action to file their charges with an administrative law judge. Some of the OSC determination letters are in english, and some are in spanish. The english language letters advise untimely applicants that they can pursue their private right of action with an administrative law judge, and cited to the regulations at 28 CFR section 44.303(c)(3). It is possible that this cite is a typographical error because no such regulatory section exists in any of the annually published regulations, including the 1988 regulations which were operative at that time. The spanish language letters advise untimely applicants that they may pursue their private right of action pursuant to 28 CFR section 44.303(c)(2) which provides that:

If the Special Counsel issues a letter of determination indicating there is no reasonable cause to believe that the charge is true . . . the charging party . . . may immediately, or any time within 90 days of the end of the 120-day period, file a complaint directly before an administrative law judge. (emphasis added)

It is not clear the this regulation should apply to applicants who did not file timely charges, especially when one compares it to 28 CFR § 44.301(d)(1). 28 CFR § 44.301(d)(1) provides that:

If the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice.

It is not clear that ``with prejudice'' is referring only to further filings with Special Counsel, or whether it extends, as well, to filings, pursuant to a private right of action, with the administrative law judge. Helpful commentators, apparently editorializing from a perspective most sympathetic to employers, appear to take the position, consistent with that argued by Respondent GLI, that a failure to file a timely charge with OSC ``means that no further proceedings may be brought under this law.'' See, Frye & Klasko, Employers' Immigration Compliance Guide, section 4.05(2)(v), at 4-26 (1990).

The statutory language of section 1324b(d)(2) governing private rights of action (``Private Actions_If the Special Counsel . . . has not filed a complaint''_) does not limit itself to dismissals by OSC but arguably contemplates the broadest possible range of reasons for OSC's decision not to file a complaint, including, as here, a failure by complainants to file within the 180 day time period. This argument would presumably fail, however, because the private right of action specified in section 1324b(d)(2) is expressly ``subject to paragraph 3'' which, as Respondent GLI argues, reads that ``No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of filing the charge with the Special Counsel.'' Section 1324b(d)(3) (emphasis added). Thus, it is not clear to me why, or on what grounds, OSC advised the untimely Complainants

After reviewing the record as a whole, I am persuaded that (1) GLI is not a successor entity to ``old'' Greyhound; (2) that it purchased, on or about March 19, 1987, the bus line operations from ``old'' Greyhound; (3) that it decided, on or about March 19, 1987, to subcontract out to an independent company the bus cleaning operations of the bus lines, and that as a result, it would not be in a position to hire formerly terminated bus cleaning workers from ``old'' Greyhound; and (4) that Complainants have presented no credible evidence that these corporate decisions by GLI were in any way a ``pretext'' for an illegal motive, i.e., an intent to discriminate on account of national origin or citizenship status. See, McDonnell-Douglas Corp. v. Green, supra; and see, footnote 2, supra.

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that they had a private right of action to pursue their charges with the administrative law judge.

Alternatively, however, there is, at least theoretically, a possible argument supporting an application of the doctrine of equitable tolling in this case. See, e.g., Zipes v. Trans World Airlines, Inc. 455 U.S. 385 (1982); In Re Charge of Zeki Yeni Komsu, United States of America v. Mesa Airlines, Inc., OCAHO Case No. 88200001 (July 24, 1989). Without going into an exhaustive analysis, it is my view, that some tolling may be appropriate in this case for various equitable reasons. First, and consistent with the analysis in Mesa Airlines, supra, it is clear that at least some of the Complainants were pursuing legal remedies tangentially related to this cause of action in other forums, in particular with the Equal Employment Opportunity Commission, during the initial 180 day period. Second, it is clear that at least some of the Complainants were advised by Special Counsel that, even though Special Counsel did not agree to represent their case, these individuals were free to file a timely private right of action pursuant to 28 CFR 44.303(c)(2). In other words, Special Counsel did not view their applications as being time-barred. Presumably the reason their applications were not time-barred is because they identified a different date as the origin of their cause of action, i.e., not the date of termination, but the date of refusal to hire. Insofar as Respondent GLI's argument does not appear to apply to these individuals, this case would have to have gone forward on the merits for those individuals. If Respondent GLI had wanted to distinguish these individuals pursuant to a Motion for Improper Joinder, I would have considered it at the appropriate time. In this regard, and most importantly, I view all of the parties to be seeking a disposition in this dispute which does not hinge on the summarial obscurities of procedural technicalities, but grounds itself instead on the considered elicitation and deliberation of the actual merits, if any, that support Complainants' allegations in this case. That Complainants have been dismissed, however correctly, from one forum after another because of their tenacious ineptitude at complying with the hypertechnical procedural requirements inherent to the administration of justice in our overburdened system only strengthens my resolve to hear out the asserted facts, if any, underlying their charges. It is my view that, in the end, this degree of consideration, however inconvenient or more technically complicated, is what all of the parties are seeking. Thus, I intend on deciding Respondent GLI's well-argued Motion for Summary Decision not on its technically correct timeliness grounds, but rather on the more substantive, and definitive, grounds that Complainants have failed to present a ``geniune issue of material fact.''

Accordingly, GLI's Motion for Summary Decision persuades me that, with respect to its participation in the case, there is no genuine issue of material fact, and that it is entitled to judgment. See, 28 C.F.R. § 68.36.

C. Respondent Transportation Leasing Company's Motion for Summary Decision

In its Memorandum in Support of its Motion for Summary Decision, Respondent TLC argues that it did not discriminate against Complainants by terminating their employment on March 18, 1987. Respondent TLC also argued that the other alleged acts of discrimination were performed, if at all, by entities independent and unrelated to TLC. Finally, Respondent TLC also argues that Complainants' charges against TLC are ``time barred.''[4]

With respect to its first contention, Respondent TLC argues that Complainants were terminated from employment as bus cleaning personnel in conjunction with TLC's sale of assets, suspension of bus operations throughout the United States, and name change. In an affidavit attached to its memorandum, TLC's President and Chief Executive Officer, Nicholas Rago, states that Complainants were given timely notice of their termination in a letter dated February 13, 1987, and that the date of the termination was effective on March 18, 1987. Mr. Rago's affidavit also states that TLC reserved no control over the employment of Complainants after the sale of assets to GLI, nor did it advise or direct the hiring of employees for these companies, all of which are independent entities unrelated to TLC.

As stated above, it is my view that Complainants have not presented sufficient factual evidence that the sale of corporate assets by ``old'' Greyhound to ``new'' Greyhound did not occur on or about March 19, 1987, or that the parties to that sale were not entities wholly independent of each other. In this regard, I find that the factual statements made by TLC's President and CEO, Mr. Rago, to be true, and dispositive of TLC's participation in the sale of the corporate assets of ``old'' Greyhound on or about March 19, 1987.

Nevertheless, allegedly discriminatory ``discharges'' are as proper a matter of consideration as allegations of ``refusal to hire'' for illegally discriminatory reasons under the statute governing this proceeding. See, section 1432b. Courts have held that a firm-wide reduction in force, necessitated by economic considerations, is good cause for discharge. See Gianaculas v. Trans World Airlines, 761

[4]It should be noted that I considered TLC's technically meritorious ``timeliness'' issue, but for the reasons discussed in footnote 3, I chose to decide their Motion for Summary Decision on substantive grounds. See, footnote 3, supra.

F.2d 1391 (9th Cir. 1985). Moreover, it has been held that a claim of discriminatory discharge should be summarily dismissed when the claimant fails to show that the stated reason for the termination, or discharge, is a ``pretext'' for an illegal bias. See, Pfeifer v. U.S. Shoe Corp., dba Freeman Shoe Co., 676 F. Supp. 969 (C.D. Ca. 1987).

Similarly, I conclude that Complainants, herein have failed, as stated above, to show that the legitimate, non-discriminatory reasons proferred by TLC for their discharge is a ``pretext'' for an unfair immigration-related employment practice as prohibited by section 1324b. Thus, it is my view that there is no genuine issue of material fact in Complainants' section 1324b allegations against TLC, and therefore, TLC is entitled to summary decision.

D. Respondent Bus Wash, Inc.'s, Motion for Summary Decision

Respondent Bus Wash argues that at least 12 of the Complainants' charges are ``untimely'' as to Bus Wash and that ``as a matter of law, Bus Wash, Inc., has not discriminated against Complainants.''

As was stated above, Bus Wash entered into a Service Agreement with Greyhound Lines, Inc. (GLI), on or about July 1, 1988. Pursuant to the Service Agreement, Bus Wash agreed to provide certain bus washing and janitorial services at a bus terminal facility at 208 East Sixth Street, Los Angeles, California. Previously, as was stated, GLI had subcontracted out the bus cleaning operations to Bortisser Travel Services, a service agreement that ended on May 5, 1988. The allegations of illegal discrimination levied against Bus Wash arise from Bus Wash's hiring of employees on or about July 1, 1988, when Bus Wash took over the bus washing and janitorial services at the Greyhound Bus maintenance facility, generally known as the Greyhound Shop, in Los Angeles.

According to the affidavit of Pete Delacruz, General Manager for the Los Angeles Bus Wash operation, as attached to Respondent Bus Wash's Motion, Bus Wash `'caused a notice to be posted at the bus terminal notifying former Bortisser employees and any other interested individuals that Bus Wash was hiring employees to render the bus washing and janitorial services'' under the Service Agreement entered into on or about July 1, 1988. The affidavit of Mr. Delacruz goes on to say that, as General Manager, he is only aware that three of the named Complainants in this proceeding, and possibly a fourth, actually applied for employment with Bus Wash at the time that Bus Wash took over the bus cleaning and janitorial services from Bortisser.

The names of the four individuals are Raphael Hernandez, Victor Orozco, Tomas Jimemez and Maria de Los Angeles Casas.

According to the affidavit of Mr. Delacruz, Bus Wash, Inc., was unable to contact Mr. Hernandez regarding the disposition of his application for employment; Mr. Orozco allegedly turned down an offer for employment; the records of Bus Wash do not indicate the disposition of Mr. Jimemez' or Ms. Casas' applications for employment.

In its ``Opposition to Bus Wash, Inc., for Summary Decision,'' Complainants do not, in my view, factually contest the accuracy of Mr. Delacruz' statements, but instead make vague legal assertions regarding:

> Constructive Discrimination is also against the IRCA Section 102 of the Act. (sic) working conditions at Bus Wash, Inc. were intolerable as a result many former workers of Bortisser Travel Service or Transportation Leasing Company did not reapply but the ones that applied were rejected.

The most serious flaw in this argument is that the majority of the named Complainants did not even try to apply for a job with Bus Wash. Even if I were to consider a theory of liability premised on ``constructive discharge'' as operative in these proceedings, and I might under the appropriate set of facts,[5] it clearly does not apply here since none of the Complainants were ever actually employed by Bus Wash and, as stated, the majority of them did not even try to apply. Cf. Arnett v. Morton Salt Co., 895 F.2d 1412 (6th Cir. 1990) (per curiam) (plaintiff had obligation to give a job where he was assured there would be no heavy lifting a try, rather than speculate that it was a sham); also, Darnell v. Campbell County Fiscal Court, 731 F. Supp. 1309 (E.D. Kentucky 1990). While it is certainly unclear what Complainants mean when they say that working conditions were so ``intolerable'' at Bus Wash that they decided not even to apply for work, such a decision, while undoubtedly difficult for them personally, is simply not a subject of inquiry for which these IRCA proceedings were statutorily prescribed.

Of the four bus cleaning Complainants who apparently did apply for work, however, only one of them submitted an affidavit to support Complainants general contentions. Specifically, the ``Declaration of Rafael Hernandez,'' as filed on November 23, 1989, asserts

[5]Though not yet addressed by an OCAHO decision, or, as far as I know, raised by the Office of Special Counsel, the doctrine of ``constructive discharge'' continues to be developed by the courts as a plausible and potentially fruitful theory of liability to show prohibited employment discrimination. Several circuits, including the Ninth Circuit, require that the plaintiff alleging discrimination on a theory of constructive discharge prove that the employer made working conditions so intolerable that a reasonable person would have been forced to resign. See, Satterwhite v. Smith, 744 F.2d 1380, 36 FEP 344 (9th Cir. 1984) (The Ninth Circuit reiterated that the proper focus in evaluating a claim of constructive discharge was upon the reasonable employee's perspective, not the employer's intent.).

that ``in order to be hire (sic) or re-hired at Bus Wash, Inc. Missouri Corporation, the new workers were required to sign a renunciation of citizen rights electing a union.''

I have read carefully the Declaration of Mr. Hernandez. He is a naturalized citizen of the United States. In several places in his Declaration, Mr. Hernandez asserts that he believes that various Respondents sought to hire non-citizens for the positions for which he applied. Mr. Hernandez does not state what the specific factual basis of his ``belief'' is that these Respondents, especially Bus Wash and GLI, had a policy of seeking to hire preferentially non-citizens, nor does Mr. Hernandez make a specific legal argument as to how, if at all, section 1324b applies to his individual situation. In this regard, whatever the personally troubling ``dislocations'' that were suffered by Mr. Hernandez due to the ``continuous terminations and rejections'' brought about by the sale of Greyhound Lines, Inc., I find and conclude that there is not a sufficiently specific or relevant factual record before me to warrant proceeding to a hearing pursuant to section 1324b.

Since I have jurisdiction only over unfair immigration-related employment practices as prohibited by section 1324b, I find and conclude that Complainants, including Mr. Hernandez, have not met their burden of proof to show that a genuine issue of material fact exists as would be necessary to proceed to a hearing in this matter. See, June Wisniewski v. Douglas County School District, OCAHO Case No. 88200037 (October 17, 1988), supra; see also, Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, (D.C. Pa. 1982), aff'd, 720 F.2d 772, cert. den. 104 S. Ct. 2657, 467 U.S. 1215 (1984), supra.

Accordingly, Respondent Bus Wash, Inc.'s, Motion for Summary Decision is granted.

E. Attorneys' Fees

Respondents GLI and TLC have requested attorneys' fees. See, section 1324b(h); and, 28 C.F.R. § 68.50(c)(1)(v).

The applicable statute pertaining to attorney fee awards provides that:

> In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact. Section 1324b(h).

I have previously applied this statutory language in a situation wherein Complainant, as represented by counsel, voluntarily agreed to dismiss the Complaint and the central issue was whether Respondent was, therefore, a ``prevailing party.'' See, Ken Tang v.

Telos Corporation and Jet Propulsion Laboratory, OCAHO Case No. 88200065 (November 10, 1988). In Telos, I found that the respondent was not a ``prevailing party,'' and was not entitled to an award of attorneys' fees.[6]

In another, more recent OCAHO decision, ALJ Morse denied a ``prevailing'' respondent's request for attorney's fees. See, Michael Williamson v. Autorama, OCAHO Case No. 89200540 (May 16, 1990). In Autorama, ALJ Morse dismissed the Complaint for lack of jurisdiction. In this regard, it is not clear to me that the respondent in Autorama was, in a technical sense, a ``prevailing party.''[7] Cf., Ken Tang v. Telos Corporation and Jet Propulsion Laboratory, supra, at 5-7.

Nevertheless, there can be no question that, in the case at bar, Respondents GLI and TLC, pursuant to the granting of their respective Motions for Summary Decision, are clearly ``prevailing parties.'' Thus, having met the threshold requirement of there being a situation of a clearly identifiable ``prevailing party'' and ``losing party,'' it is my view that it is appropriate to apply to this

[6]In dicta, my Telos decision suggests that an analogy be drawn between attorneys' fees determinations in section 1324b cases and such determinations as rendered pursuant to the Equal Access to Justice Act (EAJA). I do not wholesale reject this attempted analogy but, with current hindsight, I now question its analytic usefulness. There are simply better and more precise ways to analyze attorney fees questions in section 1324b proceedings than I suggested, in dicta, in the early Telos decision. See, infra.

[7]ALJ Morse, in Autorama, appears to take an expansive view of the situations in which attorney fees awards to ``prevailing'' respondents in section 1324b cases may be applicable. Relying in part on a ``signing statement'' by former President Reagan, ALJ Morse apparently views the mere filing of a Complaint to be, potentially, the subject of an award of attorney fees to ``prevailing'' respondents. See, Autorama, at 7. Aside from whether or not presidential ``signing statements'' are reliable sources of statutory interpretations, it is my view that, notwithstanding ALJ Morse's recognition of the ``need for caution in awarding attorneys' fees lest those who most need IRCA's protection become vulnerable for what was intended to be an expansion of civil rights remedies'' the potential effects of Autorama could be read to ``chill'' potential Complainants, especially those who are proceeding pro se. In this regard, it is my current view that a respondent is not a ``prevailing party'' simply because the ALJ has rendered a decision which dismisses, on jurisdictional grounds, a Complaint as charged by a pro se complainant. Accordingly, I disagree, in this regard, with the implied reasoning, if not the conclusions, of Autorama's otherwise thorough attorneys' fees discussion; and in particular, I reject an interpretation of the ``signing statement'' (assuming, arguendo, that it has any meaningful herme neutic validity), which would apply attorney fees analyses to ``all cases,'' including, as ALJ Morse apparently sees
it, to threshold dismissals for lack of jurisdiction against pro se complainants. In my view, ``cases,'' for the limited purpose of conducting section 1324b(h) analyses, mean proceedings decided on the merits, and, as such, result in clearly identifiable ``prevailing parties'' and ``losing parties.'' See, section 1324b(h).

case an attorneys' fees analysis pursuant to the language (``without reasonable foundation in law or fact'') of section 1324(h).

As I stated in my earlier ``Order Summarizing Telephonic Conference and Scheduling Hearing on Fees,'' it is my view that the most relevant analogous source delineating standards for determining attorneys' fees requests by prevailing respondents is Title VII case law, not FRCP Rule 11 sanctions case law as urged by Respondents. See, Mitchell v. Los Angeles County Superintendent of Schools, 861 F.2d 198, 202 (9th Cir. 1988) (implicitly criticizing prevailing defendants for ``casting their contention more as a quest for sanctions under FED. R. CIV. p. 11 than a request for attorneys' fees'' under the governing statute, section 1988); see also, Yamamoto, ``Efficiency's Threat to the Value of Accessible Courts for Minorities,'' 25 Harv. C.R.-C.L L. Rev. 341, 363 (1990) (critiques the degree to which Rule 11 has a ``markedly disproportionate impact on civil rights cases . . . and combines with other factors to inhibit access to the courts for litigants with marginal claims''); Tobias, ``Rule 11 and Civil Rights Litigation,'' 37 Buffalo. L. Rev 485 (1989).

For this reason, I intend on utilizing, consistent with other OCAHO ALJs, the analogous Title VII standard for determining whether to award attorneys' fees to prevailing defendants. In this regard, the most appropriate language giving content to the standards used to decide attorneys' fees requests under Title VII is whether the non-prevailing complainant's cause of action is ``frivolous, groundless and without foundation, even though not brought in bad faith.'' See, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694, 700, 15 EPD 8041 (1978) (``a . . . court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in bad faith'').

The Court's analysis in Christiansburg of the background of attorneys' fees in civil rights actions is illuminating. Therein the Supreme Court found the intent of Congress to be twofold:

> First, Congress desired to `make it easier for a plaintiff of limited means to bring a meritorious suit' . . . but second, and equally important, Congress intended to `deter the bringing of lawsuits without foundation' by providing that the `prevailing party'_be it plaintiff or defendant_could obtain legal fees.'
>
> If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the [Civil Rights Act], it also wanted to protect defendants from burdensome litigation having no legal or factual basis. Id. at 420 (emphasis added).

The holding of Christiansburg, and its adoption of divergent standards for awarding attorneys' fees to prevailing plaintiffs and

defendants, rests on the recognition of the divergent purposes of such awards in civil rights litigation. An award to a meritorious plaintiff is intended to make it ``easier for a plaintiff of limited means to bring a meritorious suit,'' whereas an award to a meritorious defendant is intended to ``deter the bringing of lawsuits without foundation.'' Id. at 420 (citations omitted) (emphasis added); see also, Braxton v. Bi-State Development Agency, 561 F. Supp 889, 890-91 (E.D. Mo. 1983), aff'd, 728 F.2d 1104 (8th Cir. 1984); Wilson v. Continental Manufacturing Co., et. al., 599 F. Supp. 284 (E.D. Mo. 1984), 38 EPD 35,499.

It is also clear, however, that it is ``only in exceptional cases that defendants should be awarded attorneys' fees in civil rights cases.'' See, Mitchell v. Los Angeles County Superintendent of Schools, 803 F. 2d 844, 848 (9th Cir. 1986), cert. denied, 108 S. Ct. 168, 98 L.Ed.2d 122 (1987).

The Ninth Circuit has affirmed the award of attorneys' fees to prevailing defendants, Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980), has upheld the district court's denial of attorneys' fees, Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981), and has reversed an award of attorneys' fees granted by the district court, Mayer v. Wedgewood Neighborhood Coalition, 707 F.2d 1020 (9th Cir. 1983). Ninth Circuit decisions have also explained that the strong policy considerations favoring an award of attorneys' fees to a victorious civil rights plaintiff do not apply in favor of a successful defendant. Silver v. KCA, Inc., 586 F.2d 138 (9th Cir. 1978). Otherwise, the Circuit has not provided specific guidance to the district courts on the application of Christiansburg to prevailing defendant's request for attorneys' fees. See, Goldrich, Kest & Stern v. City of San Fernando, 617 F. Supp 557 (C.D. Ca. 1985).

Of greatest relevance to this case is legal precedent that is responsive to requests for attorneys' fees by prevailing defendants against pro se Complainants. See e.g., Miller v. Los Angeles County Board of Education, 827 F.2d 617 (9th Cir. 1987), 44 EPD 37,524. In Miller, where the Ninth Circuit vacated a District Court's award of attorneys' fees against a pro se Title VII plaintiff, the court specifically found that the failure to take into account the pro se status constitutes legal error.

> The Christiansburg standard is applied with particular strictness in cases where the plaintiff proceeds pro se. Hughes v. Rowe, 449 U.S. at 15-16. . . . pro se plaintiffs cannot simply be assumed to have the same ability as a plaintiff represented by counsel to recognize the objective merit (or lack of merit) of a claim. Id.; Reis v. Morrison, 807 F.2d 112, 113 (7th Cir. 1986). Thus, the Christiansburg standard should be applied in pro se cases with attention to the plaintiff's ability to recognize the merits of his or her claims. (emphasis added.)

The Ninth Circuit, in Miller, goes on to state that ``repeated attempts by a pro se plaintiff to bring a claim previously found to be frivolous militates in favor of awarding attorneys' fees to a prevailing defendant.'' Id. Relying, in part, on Eleventh Circuit precedent, see, Farris v. Lanier Business Products, Inc. [40 EPD 36,183], 626 F. Supp 1227, 1228 (N.D. Ga.), aff'd, 806 F.2d 1069 (11th Cir. 1986), the Ninth Circuit concludes that ``in such a situation, it is entirely appropriate to hold the plaintiff responsible for knowing that the claim is groundless.''

Thus, I intend on adopting and adapting to my own purposes, the basic criteria in Miller, following Christiansburg, to decide the request for attorneys' fees herein. Specifically, I will analyze the record in light of:

1) what exactly was pro se Complainant's factual basis for proceeding with this section 1324b action?

2) whether, under an objective reasonableness standard, the specific facts alleged by pro se Complainants constituted a legally sufficient basis for proceeding with this section 1324b action?

3) whether pro se Complainants, as required by Miller, had the ``ability to recognize the merits of (their) claims''?

4) whether, as suggested by Miller, it is appropriate to hold pro se Complainants responsible for knowing that their allegations of unfair immigration-related employment practices were groundless in light of their previous repeated attempts to file other claims thereafter found to be frivolous?

In applying these four factors to making a determination of whether a plaintiff's claim was factually frivolous, unreasonable, or with foundation, I recognize that I must not ``engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.'' See, Christiansburg, 434 U.S. at 421-22. As I stated in a previously issued Order, a finding that there is ``no genuine issue of material fact'' does not ipso facto mean that Complainants did not have a ``reasonable basis in law and fact'' for initiating this proceeding, or for filing the various and numerous pleadings that were filed. See, ``Order Summarizing Telephonic Conference and Scheduling an Evidentiary Hearing,'' at 2 (July 20, 1990).

What reasonably relevant facts did Complainants assert in this proceeding that pertain to the two Respondents who have requested fees? As stated, the attempt to lift a clearly identifiable fact from out of the morass of innuendo and conspiratorial speculation that permeates Complainants' pleadings is a virtually Solomonic task.

In reaching my decision of whether to grant a fees request to Respondents in this case, however, I intend on applying the four factors suggested above to an integral fees analysis that distinguishes between GLI's and TLC's separate requests.

Respondent GLI's Entitlement to Attorneys' Fees

As I see it, Complainants did not have a reasonable basis in fact for proceeding in this case against Respondent GLI[8] because GLI never hired, employed, recruited, referred for a fee, or otherwise interfered with the hiring[9] of Complainants.

After combing the record, the only ``fact'' that supports Complainants' contentions against GLI is a computer generated mistake in the federal W-2 wage and tax statements that GLI provides to its employees. As submitted by Complainants', it is factually true that these W-2 forms do incorrectly give TLC's state employer number in California.

The question, as I see it, is whether this ``fact'' constitutes a reasonable basis (insofar as it stands entirely alone as support for Complainants' convoluted contentions), for insisting that GLI defend itself in this action. While it is factually true that an error was made on the W-2 form, I find that it is unreasonable to have, in effect, bootstrapped this regrettable, but common kind of data entry ``mistake'' into a hyperbolic allegation of unfair immigration-related employment practice based on citizenship status. The computer-generated mistake did not, in and of itself, constitute a reasonable basis for proceeding against GLI in this case, especially when at least some of the Complainants (in particular Mr. Centeno) were told in numerous administrative and judicial ways that

[8]It should be recalled that Complainants' only theory for adding GLI to this case was its stubborn contention that the purchase of the bus company by Greyhound Lines, Inc., from TLC was some kind of, as they repeatedly said, ``sham transfer'' of corporate assets. Under this doggedly held theory, GLI is therefore a successor employer to TLC and liable for the conduct of the other Respondents in this action. As will be discussed, infra., this theory was repeatedly dismissed after consideration by other federal agencies and courts.

[9]I held in a recent decision that ``a person or entity may be charged in a section 1324b proceeding, even though that person or entity did not actually hire, . . . and was not even in a position to actually hire, recruit or refer for a fee, if it can be shown that such a person or entity ``interfered with an individual's employment opportunities with another employer.'' See, Ahmad S. Elhajomar v. City and County of Honolulu, a Municipality; and State of Hawaii, OCAHO Case No. 89200269 (October 4, 1990); see also, Mitchell v. Frank Howard Memorial Hospital, 853 F.2d 762 (9th Cir. 1988); 47 CCH EPD 38,237; Sibley Memorial Hospital v. Wilson, 488 F.2d 1298, 1308 (DC Cir. 1973).

the theory of joinder, as premised on their allegations of a ``sham'' transfer of corporate assets, was inadequate.[10]

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[10]At the evidentiary hearing on August 17, 1990, I heard testimony from Complainants Marco Centeno, Jaime Banuelos and Victor Orozco and received into evidence numerous documents relating to, inter alia, other legal actions filed by Complainants against Respondents before other courts and administrative agencies. The testimony given at the evidentiary hearing and documentary evidence filed in this case clearly shows that prior to Complainants' filings with Special Counsel in this case, Marco Centeno and Jaime Banuelos, the two lead Complainants, filed a number of other legal actions against Respondents with other federal agencies, including the NLRB and EEOC, as well as the Federal District Court, the Ninth Circuit Court of Appeals, and even the Los Angeles Superior Court. See, ``Transcript of Proceedings,'' Respondent TLC's Exhibit 1. Because of a similarity of factual and legal arguments to the case at bar, a brief description and analysis of these other proceedings is helpful in understanding whether or not Complainants had a reasonable basis in fact or law to proceed against Respondent GLI.

Mr. Centeno first filed separate charges against Greyhound Lines, Inc. (Case #21-CA-25706-1), and ``old'' Greyhound Lines, Inc., and Don Bortisser Travel Agency with the National Labor Relations Board (NLRB) on September 14, 1987, alleging that these companies terminated him and other employees because of their union activities. Centeno also alleged that the sale of the bus operations was a ``sham,'' the same allegation Complainants have raised herein. Id. at II B. 1-3.

On October 27, 1987, the Regional Director of the NLRB determined that Centeno's allegations in both cases were without merit and the charge was dismissed ``due to insufficient evidence.'' Id. at II B. 5-6.

After the Regional Director of Region 21 in Los Angles determined that his charge was without merit, Centeno appealed to the Office of General Counsel of the NLRB in Washington, D.C., to review the decision of the Director. On December 31, 1987, the General Counsel sustained the Regional Director's decision. Id. at II B. 12.

On January 5, 1988, Centeno filed a motion with General Counsel requesting reconsideration of their December 31 decision. Again, General Counsel rejected Centeno's allegations, Id. at II B. 13. In a letter dated February 10, 1988, sent to Centeno, General Counsel advised Centeno that it would not change its prior decision because, inter alia, ``neither the evidence adduced by the investigations nor your allegations in your appeals or your motion and its supplements established that the sale of the assets of your previous Employer to the new Employer constituted a sham transfer.'' Id. at II B. 14. (emphasis added.) Moreover, General Counsel stated in its letter to Centeno regarding the stockroom position that ``the investigation demonstrated that you have never been employed by the new employer [GLI], as either a rank and file employee, or as a supervisor. You did not work as a supervisor for the former Employer. The investigation failed to contravene the new employer's evidence that it had limited its selection for stockroom work to individuals who were current or former supervisors.'' Id.

It is also important to note that Centeno filed charges with the NLRB against his own union. Id. at II B. 3. As part of its investigation, and, for the most part, as justification for its determination that the union did properly represent the employees, the NLRB considered the fact that the union's attorneys went to Phoenix, Arizona, Greyhound's headquarters, and investigated the circumstances of the sale, including reading the sale documents. The union attorneys concluded that the sale was not a sham or a fraud and did not pursue any legal action.

While it is certainly true that a legally untrained pro se Complainant ``cannot simply be assumed to have the same ability as a plaintiff represented by counsel to recognize the objective merit (or lack of merit) of a claim,'' the Ninth Circuit has held, consistent with other circuits, that ``repeated attempts by a pro se plaintiff to bring a claim previously found to be frivolous militates in favor of awarding attorney fees to a prevailing defendant.'' See, Miller v. Los Angeles County Board of Education, supra. (``In such a situation, it is entirely appropriate to hold the plaintiff responsible for knowing that the claim is groundless.''); citing, Farris v. Lanier Business Products, Inc., 626 F. Supp. 1227, 1228 (ND Ga.), aff'd 806 F.2d 1069 (11th Cir. 1986), 40 CCH EPD 36,183.

By charging, and continuing to proceed against Respondent GLI even after GLI had filed, on November 20, 1989, a thorough and clear memorandum of law and fact which supported its defense that it was not a proper party to this section 1324b action, Complainants exhibited the kind of unreasonableness which this attorneys' fees provision in the statute was intended to deter. As I stated in an earlier Order,

> It costs a great deal of money to undertake legal action in this country, and claims, however difficult to articulate, should never be undertaken for purely retaliatory or even vengeful motivations, especially when premised on speculative or dubious legal theories which have already been ruled on by competent authorities. The unrelenting pursuit of claims found to be frivolous must ultimately be accounted for when time, money, and the expenditure of resources (by all parties as well as by all the various governmental agencies and courts that have considered these claims) is so non-renewably valued.

Accordingly, I conclude that Complainants did not have a reasonable basis in law and fact for proceeding in its allegations of unfair immigration-related employment practices against Respondent GLI under section 1324b. Therefore, Respondent GLI is entitled to attorneys' fees because Complainants knew or should have known that (1) the sale of corporate assets was not a ``sham''; and (2) GLI never hired, employed or interfered with the hiring or employment of

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These same theories and allegations were charged, inter alia, again, first in Los Angeles Superior Court, and then, upon removal and consolidation with yet another case filed by Mr. Centeno, before the Honorable Andrew A. Hauk, U.S. District Judge for the Central District of California. The District Court, on October 13, 1988, summarily granted defendants' motion to dismiss with prejudice ``as to all causes of action.'' Id. at III, 7. Though long after this proceeding, the Ninth Circuit Court of Appeals affirmed the District Court's decision in an unpublished decision filed on May 15, 1990. See, ``Transcript of Proceedings,'' ALJ Exhibit 20. In its unpublished decision, the Ninth Circuit states that ``Centeno lacks standing to sue for discrimination in pay based on his race or ethnicity because Centeno was never hired or employed by GLI. . . .'' Id. (emphasis added)

them, and (3) they did not present, when given numerous opportunities to do so by me, any other relevant evidence to indicate that Respondent GLI in any way discriminated against them on account of their citizenship status in violation of section 1324b.

Respondent TLC's Entitlement to Attorneys' Fees

Respondent TLC's Motion for Attorneys' Fees is premised in part on the same theory discussed above_that the sale of corporate assets in March 1987 was a ``sham''_but it is also distinguishable in that Complainants allege that TLC ``discharged'' them in a way prohibited by section 1324b. Applying the four criterial factors suggested above, I conclude that Complainants did not have a reasonable basis in law and fact for alleging that Respondent TLC terminated their employment on account of citizenship status or otherwise committed an unfair immigration-related employment practice as prohibited by section 1324b.

First, insofar as Complainants proceeded against Respondent TLC based on their ``belief'' that TLC never, in fact, sold its corporate assets and corporate logo (for Greyhound Lines, Inc.) my conclusion is the same as it is for Respondent GLI.

Second, I also conclude that Complainants did not present me with sufficient factual evidence or legal authority to support their contentions that they were terminated from employment with Respondent TLC on account of their citizenship status. At the evidentiary hearing on August 17, 1990, I specifically tried to elicit from Complainants, through the testimony of their designated spokesman, Mr. Centeno, what actual facts Complainants based their allegations against Respondent TLC:

JUDGE SCHNEIDER: Okay. What were the facts or evidence that you all had before you as the basis for alleging citizenship discrimination against these Respondents. Tell me what evidence you had.

MR. CENTENO: The evidence that I have or I had was that they were employing_they were employing people that I knew that they, themselves, told me that they did not have the necessary documents. And they were employed, and I wasn't.

JUDGE SCHNEIDER: Did these people work for old Greyhound when it is was terminated?

MR. CENTENO: No.

JUDGE SCHNEIDER: Well, you just got through telling me that they did.

MR. CENTENO: Now, then I misunderstood.

Tr. at 104-05.

Aside from the regrettable but characteristic nature of Mr. Centeno's ``misunderstanding'' in this testimonial sequence, it is clear that he was not alleging that Complainants were terminated or discharged on account of citizenship status. Moreover, none of these testimonial allegations are supported by affidavit or other sworn statements which might corroborate their contentions. In attempting to make sense of Complainants' confusing allegations against Respondent TLC, it appears that they are not based on any showing of an illegal discharge, per se, but premised instead on the false assumptions inherent in their conspiratorial lumping together of all the Respondents, i.e. that Respondents TLC, GLI, Bortisser Travel and Bus Wash are somehow all the same entity. As stated throughout this decision, and as repeatedly analyzed and decided in numerous other forums,[11] Complaints simply do not present a

[11] As discussed in footnote 10, it must be made clear that these same Complainants filed numerous other charges, not fully discussed in footnote 10, against these same Respondents. For example, some of the Complainants filed charges with the Equal Employment Opportunity Commission (EEOC). See, ``Transcript of Proceedings,'' Respondent's Exhibit 1, at I, A-B.

Prior to March 7, 1988, Complainant Banuelos filed a charge with the EEOC against Greyhound Bus Lines alleging that he was unlawfully discharged on March 19, 1987, from his position as Service Maintenance Man with Greyhound Bus based upon his age of 40. He further alleged that other employees of Greyhound, who were over 40, were also discharged because of their age and were therefore unlawfully discriminated against by their employer. Id. On March 7, 1988, Banuelos was advised by EEOC that his ``discharge on 3/19/87, (sic) was a consequence of the sale of the assets of Greyhound Lines Inc. to GLI Holding Co. headed by Fred Currey. Evidence revealed that upon sale, all the Service Maintenance Workers/Hostlers with the teamsters Union Local 495 were discharged regardless of age. The new company made a business decision to subcontract all bus cleaning work performed by Service Maintenance Works/Hostlers in its Los Angeles facility, to the Bortisser Travel Service. Since the subcontractor went into operation, it has gained total control and responsibility for the recruitment and hiring of its own Service Maintenance Workers/Hostlers. Therefore, all the Service Maintenance Workers/Hostlers since 3/19/87, have been employees of the subcontractor, Bortisser Travel Service. While there may be Service Maintenance Workers hired after your discharge by the `old' Greyhound Lines Inc., the Bortisser Travel Service remained solely responsible for the hiring of its employees after the subcontract deal was consummated.'' Id., at IA.

As stated previously in footnote 10, Complainants, after having exhausted their administrative remedies, filed similar allegations, inter alia, which were consolidated in federal District Court. As stated above, these charges were dismissed, with prejudice, ``as to all causes of action,'' and affirmed on appeal by the Ninth Circuit. Id. at III; and, ALJ Exhibit 20. Finally, it must also be noted that Complainants' charges were all rejected by Special Counsel because they were either untimely or without merit. While Special Counsel's opinion not to represent a party in a section 1324b proceeding is not conclusive, it should serve as some notice to a private party to evaluate carefully its legal position before asserting its statutorily permissible, but not always advisable, private right of action.

reasonable basis in law and fact to support this tenaciously held allegation.

As stated above, I definitely took into consideration pro se Complainants' limited capacity to recognize the merits, or lack of merits, of their claims, and I conclude that, in light of their having been repeatedly told that their allegations against TLC were without merit for numerous reasons, they were in a position to recognize, even without legal training, that their claims were without a reasonable basis in law and fact. See, Miller v. Los Angeles County Board of Education, supra (``repeated attempts by a pro se plaintiff to bring a claim previously found to be frivolous militates in favor of awarding attorneys' fees to a prevailing defendant.'' In such a situation, it is entirely appropriate to hold the plaintiff responsible for knowing that the claim is groundless.''); citing, Farris v. Lanier Business Products, Inc., 626 F. Supp. 1227, 1228 (ND Ga.), aff'd, 806 F.2d 1069 (11th Cir. 1986), 40 CCH EPD 36,183.

Moreover, Complainants failure to present any admissible evidence to corroborate their testimonial speculation that some entity, subsequent to the sale of corporate assets in March 1987, hired persons unauthorized to work in the United States, is even further indication of the paucity of its claim against Respondent TLC.

Thus, for these reasons, I conclude that Complainants' allegations against TLC were unreasonable, groundless, and wholly without merit because, (1) despite numerous opportunities to make a record to support their allegations, Complainants completely failed to offer any credible evidence that TLC discharged them on account of their citizenship status, and, (2) their theory that TLC was the same entity as GLI, Bortisser, and Bus Wash, etc., was completely unsubstantiated and was officially rejected by administrative and federal court decisions.[12] Accordingly, I feel constrained to find that Respondent TLC is entitled to attorneys' fees in order to achieve one of the purposes of section 1324b(h) to deter meritless civil rights suits and to protect defendants from burdensome litigation having no factual or legal basis. See, e.g., Colucci v. New York Times Company, 533 F. Supp. 1011 (S.D.N.Y. 1982).

Determining Amount of Attorneys' Fees

Deciding what is a reasonable amount of attorneys' fees to award a prevailing party is a matter primarily within the discretion of

[12]Therefore, I find no merit in Complainants' garbled contention, as premised on their disparaged ``sham'' transfer of corporate assets theory, that TLC had any obligation, whatsoever, to ``re-hire'' them.

the court, limited only by broad guidelines.[13] See, Rutherford v. Pitchess, 713 F.2d 1416, 1420 (9th Cir. 1983); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976); see also, Employment Discrimination Coordinator, section 45,185, at 45,122, (1990). Formulas suggested by courts to assist in the determination of reasonable fees do not impinge on the imaginative or interpretive discretion of a judge, nor can such formulas be fairly calculated with literal mathematical precision in all cases.

I do not intend, however, on applying the traditional ``lodestar'' approach to this case because (1) I accept generally the reasonableness of the fees request by Respondents TLC ($13,860.00) and GLI ($13,482.50),[14] and (2) as a practical matter, it would be an exercise in futility to calculate the fee by the ``lodestar'' in that whatever sum is determined by that method would be, in my view, far beyond what important equitable considerations such as pro se Complainants' earning capacity, and their financial resources and ability to pay the sum awarded would indicate is appropriate. See e.g., Colucci v. New York Times Company, 533 F. Supp. 1011 (S.D.N.Y. 1982) (The assessment of fees must be fair and reasonable based upon the particular circumstances of the case. The factors to be considered in fixing the fee include the plaintiff's earning capacity, his financial resources and ability to pay the sum awarded; . . . in sum, the equities of the situation are to be considered to assure that although the deterrent purpose of the statute is enforced, a losing party is not subjected to financial ruin); see also, Spence v.

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[13]One traditional approach to determining a fair amount of attorneys' fees utilizes the ``lodestar'' formula, which is the product of a reasonable hourly rate times the reasonable number of hours expended, and then making adjustments to that rate according to experienced decision-makers on this question. See e.g., Kerr, supra, 526 F.2d at 70; see also, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); 7 CCH EPD sect. 9079.

While it will generally serve as my starting point in deciding such fee requests if they should arise again, I do not believe that it is appropriate to apply the ``lodestar'' in the case at bar. Infra.

[14]Though, as stated, I generally accept the reasonableness of the fees request submitted by the Respondents, I note that were I to have initiated an analysis of the amount submitted I would have tried to ascertain the degree to which their research and writing overlapped with defenses raised and plead in other proceedings, presumably a grounds for reducing somewhat the number of hours that would reasonably need to be expended. See, e.g., Prandini v. National Tea Co., 585 F.2d 47, 18 CCH EPD 8,764 (3rd Cir. 1978) (a court may reduce the amount of attorneys' fees based on duplication of effort in different but related Title VII suits if the same hours were billed in both cases). It should also be noted, however, that Respondent TLC's request for fees in a related action on appeal to the Ninth Circuit was denied summarily by a panel of the Ninth Circuit on September 11, 1990. See, Centeno v. TLC, et. al., No. 88-6641 (9th Cir. 1990).

Eastern Airlines, Inc., 547 F. Supp. 204 (S.D.N.Y. 1982); Wilson v. Continental Mfg. Co., 599 F. Supp. 284, 38 CCH EPD section 35,499 (N.D. Iowa 1982). (A relevant adjustment consideration used by courts to reduce a prevailing defendant's fee is plaintiff's financial status.)

Equitable principles have traditionally governed a court's discretion in awarding attorneys' fees, Hall v. Cole, 412 U.S. 1, 4-5, 93 S. Ct. 1943, (1973), even when the award is made pursuant to statute. See,
Bradley v. Richmond School Board, 416 U.S. 696, 721, 94 S. Ct. 2006 (1974); see also, Rapisardi v. Democratic Party of Cook County, 583 F. Supp. 539 (N.D. Ill. 1984); Faraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025, 1028 (2nd Cir. 1979) (``An express grant of Congressional authority to award fees presumes continued application of equitable considerations in appropriate cases, both to effectuate the broader legislative purpose and to do justice in the particular case.'').

In addition to the financial considerations outlined above, I find that an additional equitable concern, as applied with particular acuity in the context of a new anti-discrimination law's slow development, is the potential ``chilling'' effect of an award of attorneys' fees to a prevailing defendant. See, e.g., Goldrich, Kest & Stern v. City of San Fernando, 617 F. Sup. 557 (C.D. Ca. 1985); see also, U.S. General Accounting Office, ``Immigration Reform: Employer Sanctions and the Question of Discrimination,'' GAO/GGD-90-62 (1990). I do not hesitate to say that this factor, even in the context of this most troubling case, has given me great cause to stop and consider the ramifications, beyond this case, of deciding to award fees against pro se parties who were asserting a private right of action pursuant to section 1324b.

An additional equitable fee adjustment consideration, as I see it, is the extent of a Complainants' ``good faith'' in pursuing an allegation of unfair immigration-related employment practices. See. e.g., Faraci v. Hickey-Freeman Co., Inc., 607 F.2d at 1029. As applied herein, I conclude that there is no clear evidence in the record to conclude that Complainants, despite their ``unreasonableness,'' acted in bad faith in bringing this action. See, e.g., Rapisardi v. Democratic Party of Cook County, et al., supra.

Accordingly, having considered (1) Complainants' pro se status; (2) the potential ``chilling'' effects of an award of attorneys' fees against them; (3) the lack of clear evidence to indicate vindictive ``bad faith,'' and most importantly; (4) their current financial statuses, including earning capacities, assets, savings, and general capabilities to pay such fees, see, Financial Affidavits, Exhibits 1-18, I conclude that a fair (in terms of serving the statutory purpose to

deter the relentless and hyperbolic filing of frivolous lawsuits [15]) and equitable (giving close consideration to all of the factors that may contribute to mitigating the fee amount) amount of attorneys' fees in this case is $10,150.00, to be paid by Complainants either jointly or severally, to Respondent TLC, in the amount of $5150.00, and to Respondent GLI in the amount of $5000.00.

Ultimate Findings of Fact and Conclusions of Law

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

(1) As previously found and discussed, I determine that no genuine issue of material fact has been shown to exist with respect to the allegations in the Complaint, and that, therefore, pursuant to 28 C.F.R. section 68.36, Respondents GLI, TLC and Bus Wash, Inc., are entitled to a Summary Decision.

(2) That Complainants' Motion for Summary Decision did not present requisite evidence to indicate that there is a genuine issue of material fact supporting its contention that all of the Respondents intentionally subjected Complainants to disparate treatment on the basis of their protected citizenship status, and is therefore denied.

(3) That a sale of corporate assets from Greyhound Lines, Inc. (``old Greyhound'', now Transportation Leasing Company), to GLI Holding Company (in what became Greyhound Lines Inc., GLI, or ``new'' Greyhound) occurred on or about March 19, 1987.

(4) That, as a consequence of the sale, Respondent TLC (at the time that it was still named Greyhound Lines, Inc.) terminated all of its non-supervisory employees.

(5) That, Complainants presented no evidence to indicate that Respondent TLC's decision to terminate them was not based on a legitimate non-discriminatory reason.

[15] It is my view, after wading through literally dozens of pleadings, attempting to organize this case in telephonic calls, and finally meeting in person with these Complainants at a formal evidentiary hearing, that these Complainants would, unless fairly deterred, continue to relentlessly pursue their specious legal theories in yet another forum. Although I obviously respect the decision of the Ninth Circuit not to award TLC's fees request for its appellate representation (which related to legal proceedings that occurred prior to the case at bar), I nevertheless also believe that there comes a time when a tenacious litigant must be ordered to realize that enough is enough, that not every perceived systemic or individual sense of wrongdoing is legally cognizable or otherwise judicially/administratively remedied.

(6) That, there is no genuine issue of material fact regarding Complainants' allegations of unfair immigration-related employment practices against Respondent TLC.

(7) That, Respondent TLC's Motion for Summary Decision is granted.

(8) That, Respondent GLI is not a ``successor entity'' to ``old Greyhound.''

(9) That, Respondent GLI never hired, employed, or interfered with the hiring, or employing of Complainants on account of their citizenship status.

(10) That, there is no genuine issue of material fact regarding Complainants' allegations of unfair immigration-related employment practices against Respondent GLI.

(11) That, Respondent GLI's Motion for Summary Decision is granted.

(12) That, Respondent Bus Wash, Inc., met its burden of proof in showing that there is no genuine issue of material fact regarding Complainants' allegations that Bus Wash, Inc.'s, decision not to hire them was on account of their citizenship status or otherwise an unfair immigration-related employment practice in violation of section 1324b.

(13) That, Respondent Bus Wash, Inc.'s, Motion for Summary Decision is granted.

(14) That, Respondents GLI and TLC, as prevailing parties, requested attorneys' fees pursuant to section 1324b(h). Their separate requests both reasonably documented the amount of and time expended on defending their clients in this proceeding. Respondent GLI requested $13,482.50 in fees. Respondent TLC requested $13,860.00 in fees.

(15) That, the standard for determining whether to award attorneys' fees is whether there was a reasonable basis in fact and law for proceeding with a section 1324b action.

(16) That, more narrowly, the prevailing standard for determining whether to award attorneys' fees to prevailing respondents is whether the non-prevailing complainants actions were ``unreasonable, frivolous or groundless'' even if there is no actual finding of bad faith.

(17) That, Complainants' action against Respondent GLI did not have a reasonable basis in fact or law because (1) they knew or should have known that their decision to proceed against GLI was premised on a theory that had been charged, heard, and rejected by several prior administrative and judicial forums; and, (2) that GLI never hired, employed, or otherwise interfered in the hiring or employing of Complainants.

(18) That, the determination of amount of attorneys' fees is a discretionary decision that may require, but does not necessitate, the application of the ``lodestar'' formula, as well as relevant equitable considerations such as the financial status of the party against whom such fees are being ordered.

(19) That, Complainants have the financial capacity to pay individually or collectively a fee in the amount set out herein without subjecting them to financial jeopardy or ruin.

(20) That, Respondent GLI is entitled to attorneys' fees in the amount of $5,000.00.

(21) That, Complainants' action against Respondent TLC did not have a reasonable basis in fact and law because (1) they knew or should have known that their decision to proceed against TLC was premised on a theory that had been charged, heard, and rejected by several prior administrative and judicial forums; and, (2) they failed to present any evidence that showed that TLC discharged them on account of their citizenship status as prohibited by section 1324b.

22) That, Respondent TLC is entitled to attorneys' fees in the amount of $5,150.00.

23) That, pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and ``shall be final unless appealed'' within sixty (60) days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED: This 24th day of October, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge