

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

November 20, 1991

UNITED STATES OF AMERICA,)
Complainant)
)
v.) 8 U.S.C. 1324a Proceeding
) OCAHO Case No. 91100085
ULYSSES, INC. AND ULYSSES)
RESTAURANT GROUP, INC. AND)
OTTIS GUY TRIANTIS,)
INDIVIDUALLY AND GUS OTTIS)
TRIANIS, INDIVIDUALLY, ALL)
T/A WELLINGTON'S)
RESTAURANT,)
Respondents)
_____)

ORDER GRANTING COMPLAINANT'S MOTION FOR SANCTIONS

On July 12, 1991, complainant filed a pleading captioned First Motion to Compel Discovery, in which it averred that on May 31, 1991, respondents received complainant's First Request for Production of Documents, as well as complainant's First Set of Interrogatories and First Request for Production of Documents.

In that motion, complainant requested that respondents be ordered to respond to those discovery requests, in accordance with the provisions of the pertinent procedural regulation, 28 C.F.R. §68.23(a).

On July 18, 1991, complainant's motion was granted and respondents were ordered to respond fully to complainant's discovery requests within 15 days of their acknowledged receipt of that order.

On August 19, 1991, respondents filed the required discovery replies, which consisted of answers to interrogatories, production of documents, and responses to complainant's requests for admissions.

Following receipt of those discovery replies, complainant filed a Second Motion to Compel Discovery, together with a supporting memorandum, in which complainant acknowledged that respondents had submitted answers to the interrogatories and requests for admissions, and that respondents had provided some documents in response to the request for documents, however, complainant argued that most of respondents' answers were either inadequate or incomplete.

As a result, complainant requested that the undersigned order respondents to completely and adequately reply to the interrogatories, requests for admissions, and request for production of documents, in accordance with the provisions of 28 C.F.R. §68.23.

After reviewing respondents' submitted responses to the interrogatories, requests for admissions, and requests for production of documents, the undersigned concluded that the responses were inadequate and incomplete.

Accordingly, on September 27, 1991, the undersigned issued an Order Granting Complainant's Second Motion to Compel Discovery, in which respondents were ordered to fully comply by having furnished to complainant the pertinent documents, answers to the interrogatories, and requests for admissions within 15 days of their acknowledged receipt of that order.

Respondents were further advised therein that in the event that any or all of the respondents failed to comply fully with the provisions of that order, sanctions, from among those enumerated at 28 C.F.R. §68.23, would be ordered.

On October 18, 1991, because respondents had not responded to the September 27, 1991 order, complainant filed a Motion for Sanctions, in which it requested that the undersigned impose sanctions because of respondents' failure to comply with the orders of July 10, 1991, and September 27, 1991.

As of this date, respondents have not provided any of the discovery replies and materials which they had been ordered to provide in the undersigned's September 27, 1991 Order Granting Complainant's Second Motion to Compel Discovery.

Resultingly, consideration of complainant's Motion for Sanctions is in order.

In that motion, complainant requests that the undersigned impose sanctions from those enumerated at 28 C.F.R. §68.23, as well as those provided for in the pertinent section of the Federal Rules of Civil Procedure (FRCP). Specifically, complainant moves that the following sanctions be imposed:

A. That the court infer and conclude that those answers to the interrogatories which were insufficient, unresponsive or unanswered would have been adverse to all respondents. 28 C.F.R. §68.23(c)(1).

B. That the court treat respondents' evasive or incomplete answers to interrogatories as a failure to answer. FRCP 37(a)(3).

C. That the court rule that for the purposes of this proceeding the matter or matters concerning which the order granting complainant's first and second motions to compel be taken as having been established adversely to all respondents. 28 C.F.R. §68.23(c)(2).

D. That the court require the respondents to pay the reasonable expenses which complainant has incurred, including attorney's fees, in obtaining the court's orders granting its first and second motions to compel discovery. FRCP 37(a)(4).

E. That the court rule that the respondents may not introduce into evidence or otherwise rely upon testimony by respondents, their officers or agents, nor may respondents introduce into evidence or otherwise rely upon documents or other evidence, in support of or in opposition to any claim or defense. 28 C.F.R. §68.23(c)(3).

F. That the court rule that the respondents may not be heard to object to the introduction and use of secondary evidence to show what the answers to the interrogatories or other evidence would have shown. 28 C.F.R. §68.23(c)(4).

G. That the court hold the respondents in contempt for their disregard of the court's order. FRCP 37(b)(1) and (b)(2)(D).

H. That the court penalize respondents by assessing a monetary penalty for each day respondent fails to comply with the discovery orders. FRCP 37(b) (2).

The rules of practice and procedure which apply to this adjudicatory proceeding, which involves allegations of unlawful employment of aliens and/or unfair immigration-related employment practices under IRCA, are those codified as 28 C. F.R. 68.1-68.54.

Those rules were promulgated by the Attorney General in accordance with the rulemaking authority provided for in section 102(a) of the INA, 8 U.S.C. §1103(a), effective November 24, 1989 (54 F.R. 48593), and as last amended by an interim rule (56 F.R. 500049), effective October 3, 1991.

The initial section of those rules, 28 C.F.R. §68.1, provides that they are generally applicable to adjudicatory proceedings before administrative law judges of this office in connection with unlawful employment cases, unfair immigration-related employment practice cases, and document fraud cases under sections 274A, 274B, and 274C of the INA, respectively.

Section 68.1 of the rules further provides that to the extent that those rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling.

More germane to this order, that section of the rules also provides that the Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by those rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.

In its Motion for Sanctions, complainant requests that eight(8) sanctions be imposed, four(4) of which are authorized by the wording of 28 C.F.R. § 68.23(c)(1), (2), (3) and (4), and four(4) which are provided for under Rule 37 of the FRCP.

The latter requested sanctions would: (1) treat respondents' failure to fully answer the propounded interrogatories in effect as a failure to answer, FRCP 37(a)(3); (2) require that respondents pay complainant's reasonable expenses, including attorney's fees, in connection with obtaining the July 18, 1991 and September 27, 1991 orders herein granting complainant's Motions to Compel Discovery, FRCP 37(a)(4); (3) hold the respondents in contempt for having failed to comply with those orders, FRCP 37(b)(1) and (b)(2)(D); and (4) penalize respondent by assessing a monetary penalty for each day respondents fail to comply with the discovery orders, FRCP 37(b)(2).

The foregoing four(4) sanctions requested by complainant which are based upon the FRCP may not be granted since it has been held that administrative law judges are without authority to impose sanctions which, as here, are not among those procedural sanctions listed in 28 C.F.R. §69.23(c). U.S. v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 274, at 10, 11 (December 5, 1990)

That ruling also announced that the wording of 28 C.F.R. §68.1 provides that the FRCP are only to be "used as a general guideline in any situation not provided for or controlled by these rules, * * *". Since a party's failure to comply with discovery orders, as here, is covered by the wording of 28 C.F.R. §68.23(c), reference to the FRCP is not in order.

Further in reliance upon that ruling, complainant's request for those sanctions which include monetary penalties, contempt citations, an award of reasonable expenses, including attorney's fees, among others not specifically provided for in the provisions of 28 C.F.R. §68.23(c), must be denied.

In view of the foregoing, the following four (4) sanctions, all of which are provided for in 28 C.F.R. 28.23(c), are hereby being ordered:

1. That the undersigned infers and concludes that the answers to the interrogatories which were insufficient, unresponsive, or unanswered would have been adverse to all respondents. 28 C.F.R. §68.23(c)(1).

2. That for the purposes of this proceeding, the matter or matters concerning which the Orders Granting Complainant's First and Second Motions Compelling Discovery is/are taken as having been established adversely to all respondents. 28 C.F.R. §68.23(c)(2).

3. That the respondents may not introduce into evidence or otherwise rely upon testimony by respondents, their officers or agents, nor may respondents, their officers or agents introduce into evidence or otherwise rely upon documents or other evidence, in support of or in opposition to any claim or defense. 28 C.F.R. §68.23(c)(3).

4. That the respondents may not be heard to object to the introduction and use of secondary evidence by complainant in order to show what the withheld admissions, documents, answers to the interrogatories, or other discovery replies would have shown. 28 C.F.R. §68.23(c)(4).

JOSEPH E. MCGUIRE
Administrative Law Judge