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

IN RE CHARGE OF	)	
ALEJANDRO ROMERO	)	
	)	
UNITED STATES OF AMERICA	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 94B00198
WORKRITE UNIFORM	)	Case No. 94B00206
COMPANY, INC.	)	
Respondent.	)	
	)	

ORDER ON RECONSIDERATION AND ATTORNEY'S FEES
(April 20, 1995)

I. *Procedural History*

On March 2, 1995, I issued a Final Decision and Order Granting Respondent's Motion to Dismiss in this case. United States v. Workrite Uniform Co., Inc., 5 OCAHO 737 (1995). That Order held that the Office of the Chief Administrative Hearing Officer (OCAHO) lacks jurisdiction over the Complaint because the Office of Special Counsel (OSC) failed to satisfy the requirement of 8 U.S.C. § 1324b(d)(2) to notify the charging party (Romero) of its determination whether to file a complaint on his behalf within 120 days of receiving the charge.

On March 21, 1995, Respondent filed a Motion for Attorney's Fees which requests fee shifting on its behalf against both OSC and Romero.

Although the deadline for response has passed,[1] neither OSC nor Romero have responded to Respondent's Motion.

On March 24, 1995, Complainant filed a Motion to Reconsider and Vacate In Part Final Decision and Order Or In The Alternative Motion for Clarification. Respondent filed its Opposition on April 10, 1995.

OSC's Motion requires me to determine whether a final Administrative Law Judge (ALJ) § 1324b decision is subject to reconsideration. In two cases, ALJs found a lack of authority to grant reconsideration. Lewis v. Ogden Services, 2 OCAHO 384 (1991) ("[r]equests for reconsideration are not contemplated by the Rules"); accord United States v. Mojave, Inc., 3 OCAHO 502 (1993) (citing to and relying on Lewis). Cf. Trivdei v. Northrop Corp., 4 OCAHO 603 (1994) (rejecting brief filed after final decision, without discussing authority to consider such a filing).

Subsequent to Lewis, amendments to the Rules resulted in a distinction between the authority of the ALJ to amend a final decision in §§ 1324a and c cases as contrasted to § 1324b cases. The distinction reflects the difference in modes of appellate review between § 1324b cases and the others. The present text of 28 C.F.R. § 68.52(c)(4), as amended at 57 Fed. Reg. 57,672 (1992), overtakes and inferentially overrules Lewis and its progeny. Compare, authority of ALJ to "correct any clerical mistakes or typographical errors contained in a decision or order issued in a case arising under [§ 1324a or § 1324c] at any time within thirty (30) days after issuance" with "[i]n cases arising under" § 1324b an ALJ "may correct any substantive, clerical, or typographical errors or mistakes in a decision and order at any time within sixty (60) days after the issuance of the decision and order." 28 C.F.R. § 68.52(c)(4) (emphasis added).

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[1] A response would have been timely if filed by April 5, 1995. See 28 C.F.R. §§ 68.11(b) and .8(c)(2). See generally Rules of Practice and Procedure for Administrative Hearings (Rules), 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68]. On April 17, 1995, counsel for Complainant both telephonically and by facsimile advised this office that he had not received Respondent's Motion for Attorney's Fees. On April 17, 1995, OSC filed a motion for leave to file a response to Respondent's Motion. Although Respondent's Motion bears a certificate of service upon the Special Counsel, Honorable William Ho-Gonzalez, OSC counsel asserts failure to receive Respondent's Motion. However, in view of the disposition in this Order of Respondent's Motion, it is unnecessary to await a response from Complainant.

The preamble to the revised text of § 68.52(c)(4) is on point, stating that the amendment would allow for substantive changes to ALJ orders in § 1324b cases:

> The reason for this amendment is that an Administrative Law Judge should not be prevented from substantively changing an order within sixty (60) days when the Chief Administrative Hearing Officer has no review authority. Thus, when an error comes to the attention of an Administrative Law Judge within the requisite sixty (60) days, this amendment would obviate the need to appeal to the Court of Appeals for the appropriate circuit.

57 Fed. Reg. 57669, 57671 (1992).

Buttressing the conclusion by the change in the Rules, I am unaware of any inhibition during the 60 days following a § 1324b final decision and order upon the authority of an ALJ to grant reconsideration. Upon considering OSC's motion on the merits, however, as appears below, the motion is denied.

II. *Discussion*

A. Complainant's Motion to Reconsider

1. Application of the 120-day limitation period to pattern or practice complaints

OSC argues that Count II of the Complaint alleging a pattern or practice of document abuse under § 1324b should not have been dismissed because "the illegal conduct that was alleged in this count is ongoing and not affected by the Court's analysis of the 120-day period. . . ." Motion at 1. In effect, OSC claims that the time limitations in § 1324b(d)(1) and (2) which pertain to private parties who file charges with OSC have no applicability in situations where OSC files a pattern or practice charge.

The March 2, 1995 Final Decision and Order said that "[i]t cannot be supposed Congress had in mind such imprecise boundaries when it specified time limits on both the investigation/notification period and the period in which . . . OSC, if it so chooses, may file a complaint." Workrite, 5 OCAHO 737, at 5. As stated with regard to the 120-day notification requirement, if the 120-day period were merely a guideline, "OSC would be free to tarry . . ." before filing a pattern or practice complaint, "thereby indefinitely and ambiguously . . ." extending its investigatory period into perpetuity. Id.

OSC argues that subsection 2 of § 1324b(d), which "sets out the frame-work for the filing of a complaint by a private party (90 days after receipt of notification from the Special Counsel of the determination not to file a complaint within the 120-day period) . . .[, does not impose] a jurisdictional time limit for notification to the charging party of the Special Counsel's decision regarding the filing of a complaint." Motion at 5.

I am unwilling to agree with OSC that the time limits set out in § 1324b lack effect. This is especially true in light of the fact that OSC's pattern or practice charge in this case is premised on an individual's original charge of wrongdoing. Section 1324b does not excuse OSC from the 120-day limitation period in pattern or practice cases.[2] In fact, nothing in § 1324b distinguishes applicability of the time limits as to pattern and practice cases in contrast to other cases. Moreover, the pertinent regulation states that OSC shall, "within the 120-day period, or **at the end** of the 120-day period . . ." issue letters of determination to the charging party. 28 C.F.R. § 44.303(b) (emphasis added). The regulation does not provide for notice to issue after the 120-day period. I understand, therefore, that in promulgating the regulation, OSC recognized that Congress did not intend for the 120-day period to be extended in certain cases but not others. As such, I adhere to the previous holding that the 120-day as well as the 90-day limitation periods set out in § 1324b are applicable to OSC as well as to the individual, where the building block for the pattern or practice complaint is an individual's charge.

To the extent that OSC perceives a continuing pattern or practice of discrimination in violation of § 1324b within timely reach of ALJ jurisdiction, it is at liberty to file a fresh complaint without implicating liability dependent on Romero's charge.

2. United States v. Norfolk Shipbuilding & Drydock Corp
   Inapplicable

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[2] Title 8 U.S.C. § 13243b(d)(2) specifies that the "Special Counsel's failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge to bring a complaint before an . . ." ALJ. In contrast, § 1324b makes no provision for filing a complaint where OSC fails to notify a charging party within the 120-day period. The negative implication of omission as to the notification requirement while countenancing delay in filing a complaint within the identical measuring period is that delay in notification does adversely affect OSC's right to bring a complaint, or else § 1324b would have provided otherwise.

OSC's second argument relies on a previous OCAHO ruling which addressed the issue whether the 120-day period is a strict time limitation. United States v. Norfolk Shipbuilding & Drydock Corp., OCAHO Case No. 92B00120 (Dec. 16, 1992) (unpublished). The Norfolk respondents argued that the 120-day notification deadline is a statute of limitations, breach of which ousts OCAHO jurisdiction over a subsequent complaint. However, OSC correctly notes that in Norfolk the ALJ held that the 120-day requirement of § 1324b(d)(2) is not a jurisdictional bar to filing a complaint.

OSC's reliance on Norfolk is misplaced for at least two reasons. First, the Administrative Procedure Act (APA), the provisions of which are binding on OCAHO proceedings,[3] states that:

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[3] Cases under § 1324b are required to be heard by ALJs. 8 U.S.C. § 1324b(e)(1). Applicability of the APA does not depend alone on inclusion in the substantive statute of the 5 U.S.C. § 554(a) terminology, "adjudication required by statute to be determined on the record after opportunity for hearing." Steadman v. Securities and Exchange Comm., 450 U.S. 91, 96 n. 13 (1981). Indeed, "the 'on the record' requirement . . . is satisfied by the substantive content of the adjudication." Id. Cases under § 1324b require an opportunity for hearing "in person or otherwise" and an opportunity also to "give testimony"; require a preponderance of the evidence to support a finding of liability; and are subject to review exclusively in the United States circuit courts upon filing of the record with the appropriate court. 8 U.S.C. §§ 1324b(e)(1), g(2)(A) and (i)(2). The Steadman Court found substantial evidence review by the Court of Appeals particularly telling in resolving under the statute before it that an opportunity for hearing should be understood as an opportunity for hearing on the record, because, inter alia, "[o]therwise effective review by the Court of Appeals would have been frustrated." Steadman, 450 U.S. 96 n. 13. Omission of the term of art "on the record" does not detract from the conclusion that assignment of hearings exclusively to ALJs necessarily implicates the APA, specifically 5 U.S.C. § 554. The responsibilities vested in ALJs by § 1324b, including the unique proviso that judges hearing § 1324b complaints be "specially designated by the Attorney General as having special training respecting employment discrimination," § 1324b(e)(2), comprise a proxy for the talismanic terminology, pointing unerringly to the requirement to comply with the adjudication requisites of the APA. Early OCAHO jurisprudence concluded that the hearing requirements of § 1324b, per se, implicate the APA. See, e.g., Romo v. Todd Corp., 1 OCAHO 25, 145 (Third Post-Hearing Order) (stating that "IRCA, at Section 102 (8 U.S.C. 1324b), by providing that hearings on complaints concerning unfair immigration-related employment practices 'shall be considered before' administrative law judges, and by providing for a hearing on the record, implicitly but imperatively brought into play the provisions of the Administrative Procedure Act. . ."). See also GARY J. EDLES & JEROME NELSON, FEDERAL REGULATORY PROCESS: AGENCY PRACTICES AND PROCEDURES § 5.411 (2d ed. 1990).

N.B.: Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to (continued...)

> A final order [or] opinion . . . that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if-
>
> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2) (emphasis added).[4]

Norfolk, an unpublished decision not available to the general public, is not binding or authoritative. Consequently, it affects only the parties involved in that case.

As to the merits of it's argument, however, OSC overlooks the distinction that Norfolk did not focus on the phrase added to § 1324(b)(d)(2) by the Immigration Act of 1990, Pub. L. 101-649. By that amendment, Congress added to § 1324b(d)(2) the following underlined language:

> If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity **or a pattern or practice** of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the Special Counsel **shall notify** the person making the charge of the determination not to file such a complaint **during such period**. . . .

(emphasis added).

In lieu of focusing on the underlined statutory language added four years after enactment of § 1324b, reflecting a specific congressional purpose, Norfolk cites to regulatory text, and omits the phrase "within

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[3](...continued)
the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume I, however, are to pages within the original issuances.

[4] Furthermore, OCAHO adherence to 5 U.S.C. § 552(a)(2) is explicitly adhered to by the Chief Administrative Hearing Officer. See OCAHO Vol. 1, at vii (Forward). In addition to the APA prohibition against precedential utilization of unpublished opinions, many courts, including the United States Court of Appeals for the Ninth Circuit (which has appellate jurisdiction over this case) have adopted rules prohibiting citation of unpublished cases. For example, Ninth Circuit Rule 36-3 provides that "[a]ny disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." None of the exceptions apply so as to render Norfolk a precedent.

such 120-day period . . ." when quoting to § 1324b(d)(2). For the preceding reasons, I conclude that Norfolk is neither binding nor persuasive.

3. Prejudicial Effect of Failure to Notify

OSC also argues that I should follow Title VII precedent to the effect that nonprejudicial delay may be considered in determining whether OSC acted reasonably in issuing its notification to the charging party on a date after the 120-day period. OSC misses the point of the holding in the March 2, 1995 Final Decision and Order which concludes in terms that the 120-day period is a statute of limitation. As such, absent equitable tolling, it is strictly construed and not affected by factors such as prejudice or lack of prejudice. See 5 OCAHO 737, at 7.

4. The OSC Request for Clarification

Against the possibility that the Final Decision and Order might survive the effort at reconsideration, OSC asks for clarification as to what "notify" means within the context of § 1324b(d)(2). OSC states that "[r]equiring notice to be effected within the 120-day period raises obstacles over which neither it nor OCAHO has control, e.g. the speed of mail delivery, the availability of the charging party to receive letters." Motion at 17. The concerns mentioned by OSC are problems which arise with any statute of limitations. Generally, however, the date of service of process determines compliance with a limitations period. As explicitly provided in 28 C.F.R. § 68.8(c)(1), "[s]ervice of all pleadings other than complaints is deemed effective at the time of mailing. . . ." Therefore, barring some type of equitable claim, for purposes of determining compliance with the 120-day limitation period, service of process would determine when a party is notified for purposes of satisfying § 1324b(d)(2).

B. Respondent's Motion for Attorney's Fees

1. As to OSC

Title 8 U.S.C. § 1324b(h) grants discretionary power to the ALJ to allow a prevailing party attorney's fees "if the losing party's argument is without reasonable foundation in law and fact." OCAHO case law

such as Grodzki v. OOCL[5] suggests doubt that I would grant Respondent its attorney's fees. In any event, a recent Ninth Circuit decision obliges me to deny Respondent's request. General Dynamics Corp. v. United States, No. 93-70585, at 2301 (9th Cir. March 1, 1995).

In General Dynamics, the ALJ "determined that the reasons advanced by General Dynamics for favoring English contract workers were legitimately based on nondiscriminatory business reasons." Id. at 2302. The ALJ, however, denied the employer's request for attorney's fees.

On appeal, the Ninth Circuit affirmed the result, holding that in enacting § 1324b, "Congress has not made the United States liable for attorney's fees when the government is the losing party in an administrative adjudication initiated under § 1324b." Id. at 2303. As Workrite is within the Ninth Circuit, I am bound by the General Dynamics rejection of the claim for attorney's fees on the basis that § 1324b failed to waive sovereign immunity for fee shifting. Accordingly, Respondent's request for attorney's fees is denied.

2. As to Romero

Dismissal of Romero's Complaint on procedural grounds as untimely precludes judicial inquiry into Respondent's contention that the Complaint is "rife with contradictions and inconsistencies." Respondent's Motion at 4. Romero's tardiness, although several days longer than that in Grodzki, 1 OCAHO 295, does not oblige me to conclude that his Complaint is "without reasonable foundation in law and fact." In exercise of my discretionary authority, I decline to shift fees against Romero. 8 U.S.C. § 1324b(h).

III. *Conclusion*

For the reasons stated above, I deny Complainant's Motion to Reconsider the Final Decision and Order and also deny Respondent's Motion for Attorney's Fees.

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[5] 1 OCAHO 295, 1956-7 (1991) (rejecting fee shifting and holding that the fact that the Complaint was "tardy by one day" and therefore time-barred does not mean that it was frivolous to bring the suit).

SO ORDERED.

Dated and entered this 20th day of April, 1995.

MARVIN H. MORSE
Administrative Law Judge