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

July 28, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00196
HOTEL MARTHA WASHINGTON CORPORATION, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. *Procedural Background*

On November 14, 1994, the United States of America, acting by and through the Office of Special Counsel for Immigration Related Unfair Employment Practices ("OSC" or "complainant"), filed the three (3)-count Complaint at issue, alleging that the Hotel Martha Washington Corporation ("Hotel" or "respondent") violated the retaliation provisions of the Immigration Reform and Control Act of 1986 (IRCA), as amended. 8 U.S.C. § 1324b(a)(5).

More specifically, the Complaint alleged that respondent violated the retaliation provisions by having included an "Abuse of Process" count in a state court lawsuit filed against three (3) individuals whom respondent believes provided OSC with information concerning an alleged IRCA violation by respondent.

On November 16, 1994, the Office of the Chief Administrative Hearing Officer ("OCAHO") issued a Notice of Hearing which informed respondent that it was required to file an answer to the Complaint within 30 days of its receipt of that Notice.

On January 4, 1995, complainant filed a Motion for Default Judgment based on respondent's failure to have filed a timely responsive pleading.

On January 12, 1995, respondent filed an Answer, in which it asserted 15 affirmative defenses, together with accompanying exhibits.

On February 7, 1995, complainant filed a Motion to Stay Discovery and a Motion for Summary Decision.

On February 9, 1995, the undersigned granted complainant's Motion to Stay Discovery.

On February 24, 1995, respondent filed a Motion for Extension, requesting an additional two (2) weeks in which to respond to complainant's Motion for Summary Decision due to the uniqueness of the issues presented. That Motion was granted on that date and by way of an appropriate order respondent was granted until March 10, 1995, a date selected by respondent, to respond to complainant's Motion for Summary Decision.

On March 21, 1995, respondent filed a pleading captioned Cross-Motion in which respondent opposed complainant's Motion for Summary Decision and requested that the undersigned dismiss the Complaint and grant respondent other specified relief.

On March 23, 1995, complainant filed a pleading captioned Opposition to Respondent's Cross-Motion and Motion to Strike Respondent's Responses to Complainant's Motion for Summary Decision, requesting that respondent's Cross-Motion be stricken as having been untimely filed and that complainant's Motion for Summary Decision be granted.

For the following reasons, that portion of respondent's Cross-Motion which constitutes a response to complainant's Motion for Summary Decision is hereby stricken and complainant's Motion for Summary Decision is being granted.

II. *Response to Motion for Summary Decision Stricken*

Complainant correctly asserts that respondent's reply to the Motion for Summary Decision with its accompanying Cross-Motion has not been timely filed. In the February 24, 1995 order the undersigned extended respondent's deadline for filing its response to the motion by the two (2)-week period which the respondent had requested in its

Motion for Extension. In that motion respondent specifically stated that it "respectfully moves this Honorable Court for an Order that grants Respondent two weeks, until March 10, 1995, to respond to the Government's inter alia Motion for Summary Decision." (Emphasis added). Respondent, after having been granted this extension, proceeded to disregard the provisions of the order and filed its response in an untimely manner.

Respondent's response to the Motion for Summary Decision, incorporated in what it has captioned a "Cross-Motion," is dated March 10, 1995, but that pleading was not signed by respondent's attorney, Mr. Ravi Batra. The Memorandum in Support of Respondent's Cross-Motion, submitted with the unsigned motion, is also dated March 10, 1995, but was signed by Mr. Batra. However, in the "Affirmation of Service" submitted with the documents, Mr. Batra affirms "under penalty of perjury: [o]n March 13, 1995, I served a true copy of the annexed Respondent's Cross-Motion and Memorandum in Support of Respondent's Cross-Motion by depositing it in a postage prepaid wrapper in the exclusive custody of the United States Postal Service, addressed to" the undersigned and complainant's counsel.

Complainant further correctly points out that in OCAHO proceedings, pleadings are not deemed to have been filed until received by the administrative law judge. See 28 C.F.R. § 68.8(b). Respondent's pleading was not received by the undersigned until March 21, 1995. Respondent has offered no justification for its failure to abide by the March 10, 1995 filing deadline. This failure is wholly inexcusable as March 10, 1995 was the date respondent had requested in its Motion for Extension. Accordingly, that portion of respondent's "Cross-Motion" which constitutes a response to complainant's Motion for Summary Decision is hereby stricken since it was not filed in a timely manner.

III. *Legal Standards for Summary Decision*

"The Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed 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. § 68.38(c). A fact is material only if it must be resolved to decide the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-587 (1986).

In a motion for summary decision, the moving party has the initial burden of identifying those portions of the Complaint "that it believes demonstrates the absence of genuine issues of material fact." United States v. Davis Nursery, Inc., OCAHO at 8 (1994) citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-325 (1985). Once the moving party has carried its burden, the non-moving party must demonstrate specific facts showing there is a genuine issue for trial. Id.

IV. *Findings of Fact and Conclusions of Law*

A. Material Facts Established

The following facts are established through respondent's admissions in its Answer, by the contents of its attached Exhibits, as well as the pleadings in that complaint which respondent filed in state court:

> Respondent employed more than three (3) employees on the date of the alleged retaliatory acts, and is therefore subject to the provisions of IRCA. See 8 U.S.C. § 1324b(a)(2)(A).

Respondent posted memoranda at its place of business on May 4 and 6, 1994, which instructed hotel employees to bring specific employment authorization documents to the respondent's personnel office. OSC informed respondent in a letter sent by facsimile copy that it had initiated an independent investigation to determine whether that documentation request constituted a violation of 8 U.S.C. § 1324b(a)(6).

Resultingly, on May 13, 1994, respondent filed a lawsuit in the New York Supreme Court against numerous individuals, including the three (3) individuals against whom complainant alleges respondent has retaliated, which included an "Abuse of Process" count against those three (3) individuals, alleging that they had caused OSC to commence its investigation of respondent for the purpose of intimidating respondent. In that pending state court proceeding, respondent seeks nominal, compensatory and exemplary damages in the amounts of $1, $10,000 and $5,000,000, respectively.

That suit was filed before OSC had completed its investigation and thus prior to OSC's having filed with this Office the alleged unfair immigration-related employment practice at issue.

B. Discussion

1. Jurisdiction

As noted earlier, respondent's conduct is covered under the anti-discrimination provisions of IRCA since at all times relevant to this action it employed more than three (3) employees. See 8 U.S.C. § 1324b(a)(2)(A).

Coverage under the retaliation provision of IRCA requires a finding that the particular cause of action implicates rights and privileges secured, or involves proceedings, under 8 U.S.C § 1324b. Yohan v. Central State Hospital, 4 OCAHO 593, at 9 (1994). Title 8 U.S.C. § 1324b(a)(5) states:

> It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. (Emphasis added).

As the retaliation provisions of 8 U.S.C. § 1324b apply to actions against "any person," respondent's contention that this Court lacks jurisdiction because the three (3) individuals allegedly committed wrongful acts against respondent, that one of the individuals is allegedly an unauthorized alien, and that one of the individuals is not an employee of respondent is without merit since it has been demonstrated that each was retaliated against for asserting rights or privileges under IRCA.

2. Retaliation Under IRCA

In order to prove a prima facie case of retaliation under 8 U.S.C. § 1324b(a)(5) the individual alleging the violation must show that:

> (1) he/she engaged in protected participation or opposition;
>
> (2) the employer was aware of the activity;
>
> (3) the party alleging the violation suffered adverse treatment following the participation; and
>
> (4) a causal connection exists between the protected activity and the adverse action.

Fakunmoju v. Claim Admin. Corp., 4 OCAHO 624, at 16 (1994); Yefremov v. New York Department of Transportation, 3 OCAHO 562, at 47 (1993) (citations omitted).

In its state court suit, respondent alleges that the three (3) individuals in question "had an investigation started by the U.S. Department of Justice [OSC], not for any legitimate purpose, but to intimidate the

Plaintiff [the Hotel]." See Respondent's Exhibit "A" to Answer with Affirmative Defenses at ¶ 143. Respondent therefore admits the first two (2) elements of the retaliation cause of action: that the three (3) individuals alleging retaliation participated in protected activity (respondent believed that they assisted in the OSC investigation, which is protected activity under IRCA), and that it was also aware of their participation in protected activity. Additionally, the plain language of the statute protects individuals who "assisted, or participated in any manner in an investigation . . . under this section" from retaliation. 8 U.S.C. § 1324b(a)(5). Respondent's expressed belief that the three (3) individuals participated in the investigation is therefore sufficient to meet the first two (2) elements of the cause of action.

The third element of the retaliation cause of action, that the three (3) individuals suffered adverse treatment following the protected participation, is satisfied by the fact that all incurred attorneys' fees in the course of defending the "abuse of process" charge. Complainant's Memorandum in Support of Motion for Summary Decision at Exhibits 1 and 2.

The fourth element, a causal connection between the protected activity and the adverse treatment, is also satisfied. The "abuse of process" claim was filed seven (7) days after respondent was notified by OSC that it had initiated an investigation. Moreover, the only alleged "process" which the three (3) allegedly abused was the protected activity of participating in the OSC investigation. Therefore, respondent's state court pleading sufficiently demonstrates the requisite causal connection between the participation in the investigation (the protected activity) and the "abuse of process" claim (the adverse treatment).

3. Respondent's Affirmative Defenses and "Cross-Motion" Lack Merit

Respondent asserted 15 affirmative defenses in its Answer, none of which raise any genuine issue of material fact.

Respondent's first affirmative defense concerns an alleged burglary at the Hotel which is irrelevant to these proceedings. Respondent's first affirmative defense also suggests that the retaliation allegations exceed the scope of OSC's independent investigation, which began as a document abuse investigation. Title VII and IRCA jurisprudence demonstrate that incidents of discrimination not included in an administrative charge may not be considered in a subsequent proceeding unless such alternate claims are reasonably related to those originally

charged. Lardy v. United States, Decision and Order, 4 OCAHO 595, at 47 (January 11, 1994) citing Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1475-76 (9th Cir. 1989); Ong v. Cleland, 642 F.2d 316, 319-20 (9th Cir. 1981); see also Stewart v. Immigration and Naturalization Service, 762 F.2d 193, 198 (2d Cir. 1985); Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (2d Cir. 1984). As the retaliatory conduct stemmed directly from the Hotel's belief that the three (3) individuals provided investigatory information, it is reasonably related to and within the scope of the original investigation. Therefore, respondent's first affirmative defense is without merit.

Respondent's affirmative defenses numbered 3, 4, 7, 9, 12 and 14 in the Answer request dismissal of the Complaint for the following reasons: 3. failure to state a claim upon which relief can be granted; 4. failure to state a prima facie case; 7. because equity so demands; 9. that there has been no injury to the charging parties; 12. that the Hotel's conduct does not meet the requirements of retaliation under law and equity; and 14. that an employer has the statutory and common law right to act vigorously in its own defense. Based on the above fact findings and of the determination that complainant's retaliation charge is valid, these affirmative defenses fail to raise any issue of material fact. Therefore, summary decision is still appropriate.

Affirmative defenses numbered 2, 5 and 8 in the Answer allege that this proceeding is unconstitutional and unlawful. These broad assertions are unsupported by law or fact. Furthermore, complainant's investigation and filing of the Complaint in this matter was initiated and conducted pursuant to federal statutory requirements. See 8 U.S.C. § 1324b(c)(2) and (d)(1). Accordingly, these alleged defenses raise no issues of material fact and summary decision remains appropriate.

Affirmative defenses 10 and 11 assert that the Hotel had been retaliated against by the three (3) individuals in the course of providing investigative information to OSC. These alleged defenses are without merit because the providing of information to aid in an OSC investigation is a protected activity. See 8 U.S.C. 1324b(a)(5). As that conduct is the very participation activity which is protected under IRCA, these alleged defenses are clearly unfounded.

Affirmative defenses 6 and 13 relate specifically to the alleged burglary discussed under respondent's first affirmative defense above, and to the status of one of the individuals as an unauthorized alien. As previously noted, jurisdiction exists for all three (3) of the individuals

against whom complainant alleges retaliation. Furthermore, participation in an investigation is protected under the statute, without regard to the motivation of the individuals providing such information. As in the discussion of the first affirmative defense, the alleged wrongful acts of these individuals are irrelevant to these proceedings and these alleged affirmative defenses accordingly raise no issue of material fact.

In its March 21, 1995 pleading captioned Cross-Motion, respondent requests: (1) the dismissal of the complaint as untimely; (2) the disqualification of complainant's counsel; (3) to vacate the stay of discovery issued February 7, 1995 and to compel certain discovery from complainant; (4) to recover attorney's fees; and (5) to order OSC to separate its investigative and prosecutorial roles.

Respondent also contends that the filing of the Complaint was untimely because it was filed more than 120 days from the time OSC became aware of respondent's state court abuse of process action.

Title 8 U.S.C. § 1324b provides that:

> (d) Investigation of charges
>
> (1) By Special Counsel
>
> The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe the charge is true and whether or not to bring a complaint with respect to the charge before and Administrative Law Judge. . . .
>
> (3) Time limitations on complaints
>
> No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel.

The statute contains no time limitations on OSC's authorization to conduct independent investigations or file complaints based on such independent investigations. However, the implementing regulations state:

> The Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from the date of the filing of the complaint.

See 28 C.F.R. § 44.304(b).

Respondent's assertion that OSC did not file its Complaint within the requisite time, after having become aware of the retaliatory conduct, is unfounded. Respondent concedes that OSC became aware of the state court action on June 10, 1994. The Complaint was filed November 14, 1995, less than 180 days after that date. Accordingly, the Complaint was timely filed and respondent's request that these proceedings be dismissed on that ground is being denied.

In view of the findings in this Order, and owing to mootness, respondent's requests that the discovery stay be lifted and that discovery proceed are denied, also.

Respondent's request that complainant's counsel be disqualified is unsupported by the factual and procedural history of this action. Respondent repeatedly alleges without factual support that complainant's counsel "extended a 'professional courtesy', (sic.) a/k/a a 'contract hit'., (sic.) to those who, directly or indirectly, 'abused the process' of OSC to intimidate the Respondent . . ." Cross-Motion at 6. OSC's investigation was authorized under 8 U.S.C. § 1324b. Respondent's unsubstantiated allegations regarding counsel's conduct are completely unfounded and inappropriate. The rules of practice and procedure that govern this proceeding set forth the standards of conduct of those appearing before this Agency in the following wording:

> (a) All persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity, and in an ethical manner.
>
> (b) The Administrative Law Judge may exclude from proceedings parties, witnesses and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications.

28 C.F.R. § 68.35.

Respondent has alleged no facts which constitute a viable reason for disqualifying complainant's counsel. As this request is wholly meritless it is hereby denied.

Respondent further requests that an order be entered separating OSC's investigatory and prosecutorial functions. The undersigned has neither the power nor the desire to grant this request. OSC's statutory authority to investigate unfair immigration-related employment practices and file complaints based on those investigations is found in the provisions of 8 U.S.C. § 1324b. The management and structure of OSC has no bearing on the outcome of this proceeding. Further, respondent

has offered no legal support for its requested separation of functions. Accordingly, as this request is unsupported and exceeds the undersigned's authority, it is denied.

Respondent request for attorney's fees is also without merit since at this stage of the proceedings respondent cannot be found to be the prevailing party. Since that request is both premature and unfounded, it is denied.

4. Conclusion

In view of the foregoing, complainant's Motion for Summary Decision is hereby granted.

D. Remedies

Complainant requests that upon a finding of liability for these retaliation violations, respondent be ordered:

(a) To cease and desist from the type of retaliation described in the Complaint;

(b) To pay a civil penalty of $2,000 for each individual retaliated against;

(c) To educate its personnel concerning their responsibilities under 8 U.S.C. § 1324b; and

(d) That such additional relief be ordered as justice may require.

Motion for Summary Decision at 14; Complaint at 5-6.

Title 8 U.S.C. § 1324b(g) provides that upon the finding of liability for a violation of the unfair immigration-related employment practices provisions, an Administrative Law Judge shall:

> issue and cause to be served . . . an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.
>
> (B) Contents of order
>
> Such an order also may require such a person or entity -- . . .
>
> (iv) to pay a civil penalty of not less than $250 and not more than $2,000 for each individual discriminated (subject to certain inapplicable alternate penalty amounts), . . .

(vi) to educate all personnel involved in hiring and complying with this section or section 1324a of this title about the requirements of this section or such section.

1. Cease and Desist Request Discussed

Before respondent can be ordered to cease and desist from the unfair immigration-related employment practice namely, the retaliatory abuse of process lawsuit against the three (3) individuals named in the Complaint, it is necessary to show both retaliatory motive on respondent's part as well as the fact that the abuse of process claim lacks a reasonable basis. See Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731, 748 (1983).

In Bill Johnson's, the Supreme Court, in a factually analogous setting, held that both an employer's retaliatory motive and lack of reasonable basis were essential prerequisites to the issuance of a cease and desist order to halt the prosecution of an employer's retaliatory lawsuit. Id.

Accordingly, it is found that the respondent's abuse of process lawsuit against the three (3) individuals was filed with a retaliatory motive. Therefore, the only consideration remaining prior to the issuance of a cease and desist order is whether that lawsuit was reasonably based.

For there to have been a reasonable basis in the abuse of process lawsuit it would be necessary that these facts, taken in the light most favorable to respondent, support the elements of such a claim. The elements of the state abuse of process cause of action which the respondent would have to prove are:

(1) that regularly issued process, either civil or criminal, has issued;

(2) an intent to do harm without excuse or justification; and

(3) use of process in a perverted manner to obtain a collateral objective.

See Perry v. Manocherian, 675 F. Supp. 1417, 1429 (S.D.N.Y. 1987) citing Curiano v. Suozzi, 62 N.Y.2d 113, 116, 469 N.E.2d 1324, 480 N.Y.S.2d 466, 468 (1984); Tedeschi v. Smith Barney, Harris Upham & Co., 548 F. Supp. 1172 (S.D.N.Y. 1982).

The court in Perry explained that for a viable abuse of process claim the claimant "must show that the process issued interfered with his person or property, such as by attachment or arrest." Perry, 675 F. Supp. at 1429. In that case, the court found that the claimant did not prove the requisite elements since they alleged only that an action had

been filed against them for malicious reasons in order to coerce a settlement. Id.

In the present action there is no allegation that any civil or criminal process has been issued which involves these three (3) individuals. Specifically, while they provided information to aid in OSC's initial investigation of potential document abuse, they did not file a direct action against the respondent Hotel. In Perry, "the . . . issuance of a summons and complaint" was deemed insufficient to meet the elements of an abuse of process claim. Id. Here, the three (3) individuals did not proceed even that far, as no pleading was in fact filed against the respondent in order to trigger the abuse of process action.

Since no process was issued, the abuse of process claim lacks a reasonable basis as the respondent cannot establish the requisite elements of the cause of action. Accordingly, as the lawsuit was filed for retaliatory motives and lacks a reasonable basis, it is appropriate to issue an order that respondent cease and desist from the unfair immigration-related employment practice, consisting of the retaliatory abuse of process lawsuit against the three (3) individuals named in the Complaint.

2. Civil Money Penalty Analyzed

Title 8 U.S.C. § 1324b(g)(2)(B)(iv)(i) provides for the assessment of a civil penalty of $250 to $2,000 for each individual against whom discrimination is practiced. Under § 1324b, the amount of the civil penalty assessed is within the discretion of the Administrative Law Judge. Complainant seeks the maximum civil penalty of $2,000 for each of the three (3) individuals discriminated against, or a total of $6,000.

Complainant asserts that the imposition of the maximum penalty is fair and appropriate under these facts since the Hotel's retaliatory conduct has been shown to be egregious. Motion for Summary Decision at 18-19. Complainant states that such a penalty will have a deterrent effect on the respondent, as well as upon other similarly situated employers and that the violation is sufficiently serious to warrant the maximum penalty.

Complainant's argument is well taken. Retaliatory conduct in response to individuals exercising protected participation under § 1324b is extremely serious as it vitiates the purpose of the statute. The provisions of § 1324 are intended to discourage national origin and

citizenship status discrimination. Retaliatory conduct discouraging employees and individuals from assisting others with, or asserting their own, charges of unfair immigration-related employment practices obviously thwarts those statutory expressions. See United States v. Southwest Marine Corp., 3 OCAHO 429, at 23 (1992).

Accordingly, complainant's request that a $6,000 civil penalty assessment is found to be fair and appropriate.

V. *Order*

Pursuant to the above findings of fact and conclusions of law, it is found that respondent's inclusion of an abuse of process charge in its May 13, 1994 lawsuit filing constitutes retaliation, an unfair immigration-related employment practice in violation of the provisions of 8 U.S.C. § 1324b(a)(5). In accordance with the provisions of 8 U.S.C. § 1324b(g) and the finding that respondent has violated the provisions of 8 U.S.C. § 1324b(a)(5) in the manner alleged in the Complaint, respondent is hereby ordered:

1. To cease and desist from the discriminatory practices set forth in the Complaint, the maintaining of the abuse of process lawsuit against the three (3) individuals named in the Complaint;

2. To pay the sum of $6,000 as the appropriate civil penalty assessment, or $2,000 for each of the three (3) violations at issue, in connection with this 8 U.S.C. § 1324b(a)(5) violation; and

3. To educate all personnel involved in hiring and complying with 8 U.S.C. § 1324b or 8 U.S.C. § 1324a about the requirements of such sections.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.