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

February 20, 1996

JOSE DANILO CRUZ, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding OCAHO Case No. 95B00102
ABLE SERVICE CONTRACTORS, INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

I. *Procedural History*

On June 21, 1995 Complainant Cruz filed a complaint against Respondent Able Service Contractors, Inc., alleging discrimination on the basis of national origin and unlawful retaliatory discharge. Specifically, with respect to the retaliatory discharge, Complainant asserts that he was discharged because he had distributed and requested permission to post literature informing co-workers of their immigration related employment rights under the anti-discrimination provision of the Immigration Reform Control Act (IRCA), 8 U.S.C. §1324b. Complaint ¶14.

Respondent served its answer to the complaint and a motion to dismiss on July 20, 1995. On September 1, 1995, Complainant filed a response to the motion. The parties requested a prehearing conference in this matter, and such conference was scheduled and held on September 20, 1995. The parties submitted a list of authorities prior to the conference, and I heard oral argument on the motion to dismiss during the conference. During the conference the parties agreed that the Respondent employed more than 14 employees during the relevant time period. Consequently, based on the explicit statutory language limiting this tribunal's jurisdiction of national origin dis-

crimination claims to employers employing between 3 and 14 employees, I concluded that I lacked jurisdiction over Complainant's national origin discrimination claim and granted Respondent's motion with respect to that claim. *See* Tr. at 31; PHCR at 2.[1]

However, two issues remained for the motion to dismiss:

> (1) Whether this tribunal has jurisdiction of a claim for retaliatory discharge when the charge of national origin discrimination has been dismissed; and
>
> (2) Whether a complaint alleging that an employee was fired for distributing and requesting to post literature informing employees of their immigrant related employment rights states a claim for which relief may be granted under 8 U.S.C. §1324b.

See Tr. at 48, 53; PHCR at 3.

Following the prehearing conference, and pursuant to leave of the Court, Complainant filed an amended complaint which deleted any allegation concerning national origin discrimination and clarified its allegation with respect to retaliatory discharge. The amended complaint specifically states that Complainant was not intimidated, coerced or retaliated against because he filed or planned to file a complaint or to keep him from assisting someone else to file a complaint. Amended Complaint ¶3. Complainant states that he was fired after he repeatedly attempted to distribute literature informing his co-workers about their immigrant related employment rights. *Id.* at ¶4. Specifically, he avers that he was fired because he was distributing and requested permission to post literature informing co-workers of their immigrant related employment rights and that this activity is protected under 8 U.S.C. §1324b(a)(5). *Id.* at ¶6. He further contends that he was a volunteer outreach worker for a local Central American human rights organization which trains volunteers to distribute literature regarding immigrant related employment rights, *Id.* at ¶7, and that his supervisors were aware of his distribution activities and that the company did not approve of such activity. *Id.* at ¶9. Finally, pursuant to my February 12, 1996 Order, on February 15, 1996, Complainant filed a Second Amended Complaint in which he alleges that the organization for which he distributed literature

[1] The following abbreviations are utilized throughout this Order: Prehearing Conference Transcript—Tr.; September 21, 1995 Prehearing Conference Report—PHCR; OSC Amicus Brief dated October 30, 1995—OSC Br.; Complainant's brief dated November 13, 1995—C. Br.; Respondent's Brief dated December 1, 1995—R. Br.

(CARECEN) had received a grant from the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) to educate employers and employees about their rights and responsibilities under the anti-discrimination provisions of IRCA. *See* Second Amended Complaint ¶3.[2] Complainant further asserts that he received a stipend from CARECEN for his participation as a civil rights promoter and distributed literature to Respondent's employees with the names, addresses and telephone numbers of OSC and CARECEN. *Id.* at ¶¶5, 6.

During the conference I permitted the parties to submit further briefing on the remaining issues and set a briefing schedule. On October 10, 1995, OSC requested leave to file a brief as amicus curiae. Respondent did not oppose this motion, and, on October 5, 1995, I granted the motion, allowing OSC to file the amicus brief on or before October 31, 1995. OSC filed its brief on October 30, 1995. Both parties also have filed briefs, and therefore the motion to dismiss is now ripe for adjudication.

II. Standard Governing Motions to Dismiss

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the amended complaint are true. *See* PHCR at 2. In deciding a motion to dismiss, the complaint must be construed liberally and viewed in the light most favorable to the Complainant. The motion to dismiss should not be granted unless Complainant can prove no set of facts in support of his claim that would entitle him to relief. *Martin Marietta Corp. v. International Telecommu nications Satellite Organization*, 991 F.2d 94, 97 (4th Cir. 1993); *Bent v. Brotman Medical Center Pulse Health Service*, 5 OCAHO 764, at 3 (1995); *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO 638, at 9 (1994). However, the motion to dismiss may be granted if, even assuming that Complainant's factual assertions are true, the complaint fails to state a cognizable claim. *See Carter v. Burch*, 34 F.3d 257, 261 (4th Cir. 1994).

Hence the facts as alleged in the amended complaint must be accepted as true for the purpose of this motion. Thus, I accept as true for the purpose of deciding this motion that the

[2] The Second Amended Complaint incorporates by reference paragraphs 1 through 10 of the Amended Complaint. *See* Second Amended Complaint ¶1.

Complainant is a citizen of El Salvador and is an alien authorized to work in the United State, Complaint ¶¶2, 4, and that he was hired by Respondent as a custodian on May 20. 1990. *Id.* at ¶¶11, 12. It is also assumed for this motion that he was knowingly and intentionally fired on September 27, 1994 because he distributed and requested permission to post literature informing co-workers of their immigrant related employment rights. *Id.* at ¶14; Amended Complaint ¶¶4, 6. During the relevant time periods Complainant was a civil rights promoter for a local Central American human rights organization that trains volunteers to distribute literature regarding immigrant related employment rights. Amended Complaint ¶7; Second Amended Complaint ¶2. The organization, CARECEN, was a grantee of OSC. Second Amended Complaint ¶3. CARECEN's grant with OSC was for the purpose of recruiting, training and supporting civil rights promoters responsible for educating employers and employees about their rights and responsibilities under the anti-discrimination provisions of IRCA. *Id.* CARECEN's training program consisted of 32 hours of instruction, including presentations from a number of experts, and was followed by an outreach campaign. *Id.* at ¶4. As a civil rights promoter, Complainant received a stipend for his participation in the training and outreach program. *Id.* at ¶5. Complainant engaged in the on-going activity of distributing flyers and pamphlets regarding immigration related employment rights to his co-workers from April 1994 until he was fired. Amended Complaint ¶8. This literature contained the names, addresses and telephone numbers of OSC and CARECEN, and included information on how to file a complaint with OSC regarding unfair immigration related employment practices. Second Amended Complaint ¶7. Complainant distributed this literature before and after work, and during breaks. OSC Charge Form attached to Complaint ¶9.[3] Finally, Respondent's supervisors were aware of Complainant's outreach activities and informed Complainant that Respondent did not approve of such activity. Amended Complaint ¶9. For purposes of this motion, I cannot credit Respondent's assertions that Complainant was fired because he harassed other employees. *See* Answer ¶¶2–5 at 2.

[3] Attached to the complaint is a written narrative in Spanish, along with an English translation. The narrative states that Complainant distributed information about IRCA before and after work hours and during breaks.

III. The Parties' Positions

The statutory language relied on by Complainant is contained in 8 U.S.C. §1324b(a)(5) which provides in pertinent part as follows:

> 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.

Complainant clearly has stated in the amended complaint that he was not intimidated, threatened coerced or retaliated against because he filed or planned to file a complaint or to keep him from assisting someone else to file a complaint. Amended Complaint ¶3. Complainant grounds his complaint on the portion of 8 U.S.C. §1324b(a)(5) which prohibits interference "with any right or privilege secured under this section." Complainant asserts that his activities in distributing literature are a protected right or privilege. In asserting that the distribution of literature is a protected activity, Complainant, at ¶10 of the Amended Complaint, refers to 8 U.S.C. §1324b(l), which provides in pertinent part that:

> [T]he Special Counsel . . . shall conduct a campaign to disseminate information respecting the rights and remedies prescribed under this section and under Title VII of the Civil Rights Act of 1962 [42 U.S.C.A. 2000e *et seq.*] in connection with unfair immigration-related employment practices. Such campaign shall be aimed at increasing the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies under this section and such title.

Section 1324b(l) further provides that the Special Counsel may contract with public and private organizations for outreach activities under the campaign.

Respondent asserts that the motion to dismiss should be granted because "dissemination of information regarding the anti-discrimination provision of [Section 1324b] is not an intrinsically protected activity under 8 U.S.C. §1324b(a)(5)," and that, accordingly, Complainant's charge that Respondent retaliated against him for distributing such literature fails to allege an unfair immigration related employment practice. R. Br. at 1–2. Respondent also contends that dismissal of the Complainant's national origin claim defeats this tribunal's jurisdiction of the Complainant's related cause of action for retaliation.

IV. Jurisdiction of Retaliation Charge

I will consider the jurisdictional issue first because if I lack jurisdiction of Complainant's cause of action there is no need to decide whether the complaint states a claim upon which relief can be granted. In support of its jurisdictional argument Respondent cites *Yohan v. Central State Hospital*, 4 OCAHO 593 (1994), which holds that because OCAHO did not have jurisdiction over the complainant's national origin and citizenship status discrimination, jurisdiction was lacking over complainant's claim that his employer retaliated against him for the purpose of interfering with rights and privileges secured under 8 U.S.C. §1324b.[4]

The decision did not cite any authority for this ruling and did not explain the ruling. The ruling would suggest that the meaning of the words "interfering with any right or privilege secured under this section" in Section 1324b(a)(5) relates to an underlying cause of discrimination and without that underlying cause, there is no basis for an action under this part of Section 1324b(a)(5).

Yohan is factually distinguishable from the present case. In discussing the alleged retaliation, the Judge stated:

> complainant asserts that respondent intimidated complainant for the purpose of interfering with a right secured under IRCA, 8 U.S.C. §1324b. In particular, complainant asserts that respondent repeatedly warned him not to argue about the unfair treatment to which complainant was allegedly subjected. . . . In addition, complainant contends that respondent told him that he did not have any rights or privileges because he is not a citizen, and that respondent could have complainant deported.

Id. at 9. The *Yohan* ruling is distinguishable from the present action because that portion of the complaint dismissed in *Yohan* involved "intimidation" rather than firing and because the decision in *Yohan* did not consider additional "rights or privileges" under 8 U.S.C. §1324b, like OSC's obligation to conduct a campaign to educate employers, employees and the general public concerning employer and employee rights, responsibilities, and remedies under Section 1324b and the right to contract with public and private organizations for outreach activities under the campaign. *See* 8 U.S.C. §1324b(l)(2)(A).

[4] However, the Judge retained jurisdiction of the retaliation claim that the employee was fired because he intended to file a complaint with OSC and OCAHO. *Yohan,* 4 OCAHO 593 at 10.

Additionally, I note that the holding in *Yohan* (that OCAHO does not have jurisdiction of retaliation claims in the absence of national origin/citizenship status discrimination) is contrary to the weight of authority. Several cases have held that even if there is no jurisdiction of the underlying national origin/citizenship status discrimination claim, that does not affect jurisdiction over the complainant's related cause of action for retaliation. *See, e.g. Adame v. Dunkin Donuts*, 5 OCAHO 722, at 5 (1995); *Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638, at 22–23 (1994); *Fakunmoju v. Claims Administration Corp.,* 4 OCAHO 624, at 14 (1994).

This interpretation of the "any right or privilege" language of 8 U.S.C. §1324b(a)(5) is consistent with the majority of OCAHO rulings on the issue of jurisdiction to maintain a retaliation claim. It has repeatedly been held that OCAHO has subject matter jurisdiction over a claim of retaliation when that particular claim implicates a right or privilege secured under Section 1324b, *or* involves a proceeding under that section. *See, e.g., Forden v. Griessbach*, 5 OCAHO 735, at 16 (1995); *Bent v. Brotman Medical Center*, 5 OCAHO 764, at 4 (1995) . Restrict ing retaliation claims to cases where a complainant can state a viable national origin or citizenship status discrimination claim necessarily limits OCAHO jurisdiction over retaliation to cases involving proceedings under Section 1324b, and discounts the significance of the statutory language implicating rights or privileges, the case law interpreting that language and other rights provided for by Section 1324b.

As the provision of Section 1324b relating to retaliation refers to "*any* right or privilege secured under this section," it follows that if participation in distributing literature regarding rights and responsibilities under Section 1324b is protected by the Act, then an allegation that an individual was fired for engaging in that protected participation is a claim of which this Judge has jurisdiction. Accordingly, it is necessary to determine the second primary issue raised here, whether the facts alleged in the complaint and taken as true for purpose of resolving this motion state a claim of retaliation under 8 U.S.C. §1324b(a)(5) where the alleged protected conduct is the distribution of such literature.

V. Viability of Retaliation Claim

To establish a prima facie case of retaliation under Section 1324b, Complainant must show that: (1) he engaged in a protected activity;

(2) Respondent was aware of the protected activity; (3) he suffered adverse treatment following the protected activity; and (4) a causal connection exists between the protected activity and the adverse action. *See United States v. Hotel Martha Washington Corp.,* 5 OCAHO 786 (1995). Specifically, the activity referred to in the amended complaint constituted the Complainant's on-going distribution of literature regarding immigration related employment rights, before and after work and during breaks, for an organization with a contract with OSC to perform outreach educational functions regarding rights and responsibilities under 8 U.S.C. §1324b. Further, Complainant's assertion that his supervisors were aware of and disapproved of his distribution activities must be accepted as true for the purpose of deciding this motion. Accordingly, the issue here is whether, taking the facts as alleged in the amended complaint, the conduct was protected activity under the Act so as to state a claim for retaliatory discharge. Both parties and OSC agree that this is an issue of first impression.

Complainant relies on the statutory provisions at 8 U.S.C. §§1324b–(a)(5) and 1324b(l), quoted above, in asserting his claim of discrimination. In asserting that Respondent's motion to dismiss for failure to state a claim upon which relief can be granted should be denied, Complainant states that he relies on "established principles of statutory construction and the broad interpretation which courts have given to other remedial employment rights statutes to argue that IRCA protects his activities and that he has stated a claim upon which relief can be granted." C. Br. at 20–21.

OSC asserts that the Motion to Dismiss should be denied because its interpretation of the anti-retaliation provision should be accorded deference. Specifically, OSC states that:

> the interpretation of the provision adopted by the administrative agency charged with enforcement of the statute should be accorded deference. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *see also Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501 (1978); *Miller v. Youakim*, 440 U.S. 125 (1979). This is particularly true when Congress explicitly noted its intent to follow the administrative agency's interpretation of the statute by codifying its anti-retaliation regulation into the Act.

OSC Br. at 13. OSC states that the anti-retaliation provision of IRCA was a codification of a then-existing regulation promulgated by the Attorney General, by and through OSC. *Id.* at 6.

I do not agree with OSC's assertion that I must accord its statutory interpretation deference. The cases cited by OSC in support of its request for judicial deference support the principle that courts will give judicial deference to the interpretation given a statute or regulation by the agency charged with its enforcement. *See Udall*, 380 U.S. at 801; *Miller*, 440 U.S. at 144; *Beth Israel Hospital*, 437 U.S. at 501. However, in *Chevron v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, the United States Supreme Court explained that a court reviewing an agency's construction of a statute which it administers is confronted with two questions: whether Congress has directly spoken to the precise question at issue, and, if not, whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 842–843.

The standards regarding deference in the context of Section 1324b have been previously addressed. *See Romo v. Todd,* 1 OCAHO 25, 115 at 133 (1988), *aff'd,* 900 F.2d 164 (9th Cir. 1990). In that case, while Judge Morse deferred to the Department of Justice regulation, he did not defer to OSC's interpretation of that regulation. *Id.* at 132. Indeed Judge Morse clearly stated that OSC has no special relationship to OCAHO. *Id.* at 145.

This issue of deference was further addressed in *Mir v. Federal Bureau of Prisons* (FBP), 3 OCAHO 510, at 10 (1993), where FBP argued that the Administrative Law Judge was bound by an opinion of the Office of Legal Counsel in the United States Department of Justice. Judge Morse noted that in a striking departure from traditional legislation involving the Administrative Procedure Act, 5 U.S.C. §551 *et seq.,* IRCA hearing authority is conferred directly on the Administrative Law Judge, rather then on the agency. *Id.* Moreover, in Section 1324b cases, there is no administrative review. Rather a final order of the Judge is appealable directly to United States circuit court of appeals. Thus, Judge Morse rejected FBP's effort to subordinate the role and function of the OCAHO Judge to another part of the Department of Justice. I entirely concur, and I reject any similar effort to subordinate the Judge's authority to OSC.

The deference given by courts to interpretations of statutes pursuant to the *Chevron* doctrine and an agency's regulations is to the agency's interpretation, which can be conveyed by regulation or adjudication. Thus, it is the Attorney General's interpretation, not OSC's interpretation, that is entitled to deference. Ultimately, if the decision is appealed to the Federal circuit court of appeals, it is

the Administrative Law Judge's interpretation which is entitled to deference.

A different outcome would come from a situation where Congress establishes a split enforcement mechanism where an administrative law judge worked for one agency and the prosecuting counsel worked for another. *See, e.g., Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144 (1991). In *Martin,* the Court noted that under the Occupational Safety and Health Act Congress separated enforcement and rulemaking from the adjudicative powers, assigning these function to two independent administrative authorities, whereas usually they are combined in one administrative authority. *Id.* at 151. It was the split mechanism which necessitated a determination as to which entity should be accorded deference. As is normally the case, deference was accorded the head of the agency's interpretation. *Id.* at 157. However, in according this deference the Supreme Court made clear that it was limiting its holding to the division of powers under the Occupational Safety and Health Act. *Id.*

As previously stated, enforcement of Section 1324b falls under the more traditional model with the prosecutorial and adjudicative functions falling under one administrative authority, the Department of Justice. Therefore, deference is owed only to the decisions and regulations of the Attorney General. Accordingly, while I have given careful consideration to OSC's brief, I will interpret the statute without according deference to OSC's interpretation.

The starting point for interpreting a statute is the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania*, *Inc.,* 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* Furthermore, it is assumed "that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. James,* 478 U.S. 597, 604, (1986), quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). In addition, in construing a statute, courts are obliged to give effect to all words. *Reiter v. Sonotone Corp.,* 442 U.S. 329, 339 (1979).

The retaliation provision of IRCA at 8 U.S.C. §1324b(a)(5) provides that:

> 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).

The use of the word "or" indicates that Congress intended two sets of distinct actions to give rise to actionable retaliation claims; namely an individual preparing, filing or testifying regarding an actual charge or complaint *or* an individual availing himself of any unspecified "right or privilege" secured under 8 U.S.C. §1324b.

Complainant asserts that his participation in distributing literature regarding Section 1324b falls under the category of "any right or privilege secured under this section" portion of Section 1324b(a)(5) and that, accordingly, he has stated an actionable retaliation claim. Section 1324b(a)(5) refers to "any" right or privilege. The use of the word "any" indicates that Congress did not intend the retaliation provision of IRCA to be narrowly construed. The United States Supreme Court has stated that "Congress' choice of the language 'any damage' and 'liability of any kind' . . . undercuts a narrow construction" of a statute. *United States v. James,* 478 U.S. at 605.

Both Complainant and OSC argue that as a remedial provision Section 1324b(a)(5) should be liberally or broadly construed. C. Br. at 25 citing *McDonald v. Thompson*, 305 U.S. 263, 266 (1938); OSC Br. at 13 citing *EEOC v. Kallir, Philips, Ross, Inc.,* 401 F. Supp. 66, 72 (S.D.N.Y. 1975). Complainant specifically asserts that:

> [i]n the anti-retaliation provisions of both 8 U.S.C. §1324b and Title VII, as well as other remedial worker protection statutes, Congress provided for those circumstances that could be anticipated as well as any number of other unspecified circumstances where an employee might be retaliated against for actions that should also be legally protected. . . . In determining the boundaries of protection, courts look to the purpose of statutes as defined by Congress.

C. Br. at 25.

Both Complainant and OSC refer to anti-retaliation provisions in other remedial employment discrimination statutes for guidance in interpreting 8 U.S.C. §1324b(a)(5). OSC states that "[b]ecause the Immigration Reform and Control Act of 1986 . . . , was intended to expand and was modeled on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq., see* H.R. Rep. No. 1000, 99th Cong., 2d Sess., at 87, case law under Title VII provides useful guidance in interpreting provisions of §1324b." OSC Br. at 7, n. 4 citing *Fakunmoju v.*

Claims Administration Corp., 4 OCAHO 624 (1994), *aff'd,* 53 F.3d 328 (4th Cir. 1995); *United States v. Mesa Airlines,* 1 OCAHO 74 at 22 (1989). In referencing comparable anti-retaliation provisions, Complainant refers specifically to the Fair Labor Standards Act (FLSA), 29 U.S.C. §215(a)(3); Title VII, 42 U.S.C. §2000e–3; the National Labor Relations Act (NLRA), 19 U.S.C. §158; the Occupational Safety and Health Act (OSHA), 29 U.S.C. §660(c); the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1140; and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(d) (1988). Upon reviewing these provisions and the case law referenced pursuant to the various statutes, it is evident that courts consistently have liberally construed remedial anti-retaliation provisions to encompass a broad range of conduct. *See, e.g., EEOC v. White & Sons Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989) (the 11th Circuit ruled that despite the fact the charging parties had not yet filed formal charges with the EEOC, and the fact that the charging parties did not perform an act explicitly in the FLSA's anti-retaliation provision, their discharge can be considered retaliatory in nature because they made unofficial complaints regarding unequal pay which was considered an assertion of rights protected by the statute, which is remedial in nature); *Sumner v. U.S. Postal Service,* 899 F.2d 203 (2d Cir. 1990) (the Second Circuit ruled in a Title VII action that "[i]n addition to protecting the filing of formal charges of discrimination . . . [Section 2000e–3] . . . protects as well informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in *general." Id. at* 209. These specific activities are not mentioned in Section 2000e–3); *Marshall v. Whirlpool Corporation*, 593 F.2d 715 (6th Cir. 1979*), aff'd,* 445 U.S. 1 (1980) (the Sixth Circuit ruled, and the United States Supreme Court affirmed, that the language in OSHA at 29 U.S.C. §660(c)(1)[5] should be liberally construed and that a construction worker who was fired for having spoken to a reporter about the existence of asbestos dust at his jobsite was protected under this

[5] OSHA provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or *because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter*" (emphasis added). This latter language in OSHA is similar to the language in 8 U.S.C. §1324b(a)(5) prohibiting retaliation for the purpose of interfering with any right or privilege under that section.

anti-retaliation provision even when he did not file an OSHA complaint until after he was discharged.).

Neither Complainant nor OSC have cited any ruling by a circuit court which finds that distribution of literature regarding anti-employment discrimination rights is a protected activity under any of these statutes. However, Complainant does discuss an unpublished opinion of the district court for the Eastern District of Pennsylvania which afforded an employee protection from retaliation for posting information regarding rights under the FLSA about overtime. *See Nairne v. Manzo*, 1986 WL 12934 (E.D.Pa.1986) & 1987 WL 9145 (E.D.Pa. 1987). In *Nairne,* an employee testified that her employer reacted angrily to the posting, denied that he was required to pay overtime, and was rude and hostile toward her until he terminated her three months later. The court ruled that the posting was protected activity despite the fact that the FLSA did not provide for it and despite the court's ruling that the employer was not in fact required to pay overtime. *Id.* Complainant asserts that the reasoning in *Nairne:*

> is especially compelling in the instant case where 8 U.S.C. §1324b includes a section authorizing a campaign of dissemination of information about the rights of employees . . . Section 215(a)(3) is more restrictive than 8 U.S.C. §1324b(a)(5). The former only specifies that protection from retaliation is provided to those who file complaints or participate in formal proceedings, while the latter includes protection for this activity as well as for asserting other unspecified 'rights' and 'privileges.'

C. Br. at 33–34.

While this Eastern District of Pennsylvania ruling has no precedential impact, the determination that Section 215(a)(3) of the FLSA[6] protects employees for "informal complaints," like posting the information regarding overtime rights under the FLSA, demonstrates the broad interpretation courts give remedial statutes involving anti-retaliation.

Respondent asserts that the dissemination of information to employees regarding their immigrant related employment rights as

[6] Section 215(a)(3) of the FLSA makes it unlawful for any person: "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . "

part of an educational campaign under Section 1324b(l) is not a protected activity under 8 U.S.C. §1324b(a)(5). R. Br. at 9. Respondent correctly asserts that the language utilized in Section 1324b(l) clearly describes Congress' purpose regarding the campaign to educate employers and employees about their 1324b rights and responsibilities. Respondent also asserts that several remedial statutes regarding employment discrimination specifically require posting of notices and that this Court should not interpret Section 1324b as suggested by Complainant in the absence of such specific statutory authority . *See, e.g.,* the sections regarding the posting of notices in the employment law statutes at 42 U.S.C. §2000e–10 (Title VII); 42 U.S.C. §12115 (Americans with Disabilities Act); 29 U.S.C. §627 (Age Discrimination in Employment Act)[7]. Such a provision was not included in IRCA. However, while the sections of these other employment discrimination statutes regarding posting notices require different conduct from employers than IRCA, the absence of such a provision does not render Section 1324b(l) without meaning. While IRCA differs from the ADA, ADEA, and Title VII in that it does not require an employer to post notices, that does not mean that an employer may fire an employee who posts notices or distributes information about IRCA on his own time, before and after work and during breaks for an organization that has a contract with OSC to distribute information about IRCA. As Respondent stated: "[t]he language utilized by Congress to describe the purpose of 8 U.S.C. §1324b(l) is clear and without ambiguities. Very specifically this section calls for a 'campaign to disseminate information respecting the rights and remedies prescribed under this section. . . .' The educa-

[7] Title VII provides, in pertinent part: "Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, (sic.) summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint." *See 42* U.S.C. §2000e–10(a).

The Americans with Disabilities Act provides, in pertinent part "Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e–10 of this title." *See* 42 U.S.C. §12114.

The Age Discrimination in Employment Act provides: "Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter." *See* 29 U.S.C. §627.

tional campaign is aimed at informing employers and employees about IRCA's anti-discrimination provisions. No more, no less than that." R. Br. at 10. While I agree that this mandate is clear, I do not agree with Respondent's interpretation of it. Included in the authorization for the educational campaign is that OSC "may, to the extent deemed appropriate and subject to the availability of appropriations, contract with public and private organizations for outreach activities under the campaign." 8 U.S.C. §1324b(l)(2)(A).

The flaw in Respondent's argument is that it reads the first clause of Section 1324b(a)(5) out of the statute. Respondent disputes Complainant and OSC's interpretation of the statutory language prohibiting an employer from retaliating against an individual "for the purpose of interfering with any right or privilege secured under this section." But Respondent does not offer the Court its explanation of what the language does prohibit. Congress obviously meant to proscribe some type of conduct in addition to the conduct covered by the second clause dealing with the filing of complaints. Reading Section 1324b as a whole, I conclude, as urged by Complainant and OSC, that Sections 1324b(a)(5) and 1324b(l) must be read together, so that the logical interpretation of the former is that it protects an individual disseminating information about IRCA for OSC. A contrary interpretation would tend to defeat the purpose of the Act.[8]

In addition to the previously discussed arguments raised in support of its Motion to Dismiss, Respondent contends that Complainant lacks standing to bring this action because he failed to submit a written statement in support of his allegation of harassment to the Respondent when it was conducting an investigation of allegations of such harassment. Respondent cites no case law in support of this contention. Section 1324b(a)(5) states that it is an unfair immigration-related employment practice to retaliate against any individual and that "an individual so . . . retaliated against shall be considered . . . to have been discriminated against." The only limitations on who has standing to file a retaliation complaint are requirements that the individual file a timely charge with OSC and receive timely notice from OSC of the individual's right to bring a private action with this Office. There is no allegation that Complainant's OSC charge and complaint were untimely and there is no support

[8] Indeed, if I were to adopt Respondent's interpretation, an employer could fire an employee who was distributing literature about IRCA under contract with OSC pursuant to 8 U.S.C. 1324b(l).

for Respondent's lack of standing argument. Therefore, I find that Complainant does have standing to bring his claim of retaliation.

Respondent also asserts that I should take into consideration the documentation and statements previously considered by OSC in issuing its March 21, 1995 notice to Complainant that it would not file an OCAHO complaint on his behalf. The only motion pending before me is a motion to dismiss. Motions to dismiss are disfavored by courts and require that the court in ruling on the motion liberally construe the complaint and view it in the light most favorable to the non-moving party. In addition, unless I convert the motion to dismiss into a motion for summary decision I may not consider anything outside the pleadings in ruling on the motion. Finally, Respondent has again provided no authority for the proposition that I should consider documents utilized by OSC in investigating Complainant's initial charge. I am aware of no OCAHO case law providing for the use of such documents.

The combination of the use of the above-discussed language in Section 1324b(a)(5), the comparable anti-retaliation provisions in other employment law statutes and the cases decided under those statutes, compels me to deny the motion to dismiss. In so doing, I construe the "any right or privilege under this section" to include rights, privileges and conduct permissible under 1324b but not necessarily related to the filing of a complaint or a charge. In analyzing 8 U.S.C. §1324b(l), it is evident that Congress intended OSC to carry out an educational campaign to inform employers and employees of their Section 1324b rights and responsibilities. Pursuant to Section 1324b(l)(2)(A), in conducting that educational campaign, OSC has the right to contract with public and private organizations to conduct outreach activities. Complainant has alleged that he was distributing literature before and after work and during breaks for an outreach organization with a contract with OSC. Educating people regarding Section 1324b is clearly intended to be a function of the Act, and one of the means of educating people is through such outreach campaigns.

I would add that my ruling is limited and narrow. I express no view as to any whether 8 U.S.C. §1324b(a)(5) prohibits an employer from firing an employee who is posting notices or distributing literature about IRCA when such employee is not acting for an organization under contract with OSC pursuant to 8 U.S.C. §1324b(l); or when an employer fires an employee who is posting or distributing

information on company time. I find only that Complainant here has stated a viable claim because he alleges that:

(1) he was fired on September 27, 1994 because he distributed and requested permission to post literature informing co-workers of their immigrant related employment rights;

(2) during the relevant time periods, Complainant was a volunteer outreach worker for a local Central American human rights organization that had a contract with OSC to distribute literature regarding immigrant related employment rights;

(3) Complainant distributed this literature before and after work and during breaks; and

(4) the distribution of flyers and pamphlets to co-workers continued from April 1994 until he was fired, and that his supervisors were aware of and disapproved of such conduct.

Complainant also specifically denies that he provoked his co-workers or harassed or threatened other employees during his employment with Respondent.

It will be Complainant's burden to prove the factual allegations in the complaint by a preponderance of the evidence, and if he fails to do so, Respondent will prevail. Specifically, Complainant will have to establish a prima facie case by a preponderance of the evidence. If Complainant is able to do so, the burden then shifts to Respondent to produce a legitimate non-discriminatory reason for Complainant's discharge, thereby rebutting the presumption of retaliation raised by the prima facie case. Finally, if Respondent produces a legitimate nondiscriminatory explanation, Complainant will have the ultimate burden of proving retaliation by demonstrating that Respondent's reason is pretextual. The sequence of proof and burdens is similar to that utilized under Title VII. *Ross v. Communications Satellite Corporation,* 759 F.2d 355, 365 (4th Cir. 1985); *Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638, at 19 (1994).

VI. Conclusion

Accordingly, for all the reasons discussed above, I find that I have jurisdiction of the alleged retaliation claim and that Complainant has stated a claim upon which relief can be granted and therefore Respondent's Motion to Dismiss is denied.

In accordance with the requirements of the First Prehearing Order, issued on August 7, 1995, the Complainant and Respondent, no later

than thirty (30) days from the date of this Order, shall file either an agreed-upon joint procedural schedule or separate proposed procedural schedules, including specific proposed dates for completing discovery; for serving motions, including any motion for summary decision,[9] stipula tions, exhibit and witness lists, and summaries of proposed testimony of witnesses; and for exchanging exhibits.

ROBERT L. BARTON, JR.
Administrative Law Judge

[9] During the September 20, 1995 Prehearing Conference Respondent stated that it intended to file a motion for summary decision if its motion to dismiss was not granted. Tr. at 55–57.