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

June 4, 1996

TERENCE McCAFFREY, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00093
LSI LOGIC CORPORATION, Respondent.	)	

ORDER DENYING MOTION TO AMEND COMPLAINT

Procedural Background

On June 1, 1995, Terence McCaffrey (McCaffrey or complainant) filed a complaint[1] with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that he was discriminated against on the basis of his United States citizenship when LSI Logic Corporation (LSI or respondent) failed to hire him for the position of product engineer, hiring an alien instead, in violation of the Immigration Control and Reform Act of 1986, as amended, 8 U.S.C. §1324b (IRCA).

On November 24, 1994, McCaffrey had initiated a charge with the Office of Special Counsel (OSC), which was accepted as complete on January 5, 1995.[2] On March 24, 1995, OSC notified him that it had decided not to file a complaint based on his charge and that he had the right within 90 days to file his own complaint. He did so, and

[1] This case was originally assigned to Administrative Law Judge (ALJ) McGuire. It was reassigned to me on October 2, 1995.

[2] The charge originally named the Alien Certification Unit, California Employment Development Department as Respondent. The company advertising the job was subsequently identified as LSI Logic Corporation, respondent in this action.

this action was begun. On June 19, 1995, the complaint was served upon respondent , together with a Notice of Hearing. Timely answer was made and discovery was commenced. A telephonic pre-hearing conference was held on October 19, 1995, and a preliminary scheduling order was issued on November 9, 1995. A second prehearing conference was held on April 29, 1996, which principally dealt with ongoing discovery disputes. On December 4, 1995, complainant filed his Motion to Amend the Original Complaint, and on January 11, 1996,[3] respondent filed its Opposition. The motion is accordingly ripe for ruling.

At the prehearing conference on April 29, 1996, I indicated to the parties my intention to deny the motion to amend. The purpose of this order is to set forth more fully in writing the reasons why I do so.

The Proposed Amendments

Two amendments were requested by this motion. The first is to add allegations that respondent engaged in a pattern and practice of discrimination and also engaged in document fraud. McCaffrey proposes to add to his complaint the following language:

> Complainant alleges that the Respondent has, since at January 1, 1992, engaged in systematic and continuing violations of 8 U.S.C. §1324b, engaging in unfair immigration related practices, discriminating against United States citizens and Permanent Resident aliens in employment hiring, and in filing fraudulent documents.

The second requested amendment relates to the first in that it seeks to add specifics broadening the scope of the relief sought to include:

> That the Judge order the Respondent to cease and desist engaging in unfair immigration-related employment practices, to cease and desist from filing fraudulent documents and to document compliance for a period to be established;
>
> That the Judge order the Respondent to offer the Complainant the Product Engineer position, as specified in the position description, on the same basis as other Product Engineer applicants (with back pay as included in the original Complaint) and to similarly offer employment to others found to be unlawfully and adversely affected by Respondent's unlawful conduct;

[3] All documents received by me between December 18, 1995 and January 11, 1996 are date-stamped January 11, 1996. Official notice is taken of a federal government shutdown during this period.

> That the Judge order the Respondent to pay civil penalties for each violation of the law discriminating against U.S. Citizens and Permanent Resident Aliens, in an amount to be established within the allowable range;
>
> That the Judge order the Respondent to pay a civil penalty for each instance of Document Fraud, in an amount to be established within the allowable range; and,
>
> That the Judge order the Respondent to pay all of his attorney fees incurred in pressing this complaint, in an amount to be established based on documentation supplied as required by applicable rules, at the conclusion of this Complaint adjudication process.

That the Judge issue an order finding in favor of the Complainant.

As grounds for the proposed amendments complainant asserted that he has received documents in the course of discovery which lead him to conclude that respondent engaged in a continuing course of unfair immigration-related employment practices and document fraud, and also that he has recently learned of the specific types of relief possible and wishes to include them.

As grounds for denial of leave to amend, respondent has asserted 1) the proposed amendment is outside the scope of both the initial complaint and the underlying charge, 2) failure to exhaust administrative remedies, 3) prejudice to respondent, 4) the proposed pleading itself is deficient in that it pleads only conclusions and states no facts, and 5) failure to state a claim upon which relief can be granted.

Respondent asserts that allowing amendment would be highly prejudicial because complainant seeks to transform his individual case into "a virtual class action" involving at least three years of hiring activity over a variety of positions company-wide. The prejudicial results respondent anticipates include a deleterious effect of requiring more extensive discovery, undue complication of the case, and alteration of the scope and nature of the complaint.

Applicable Law

OCAHO rules provide for amendments to complaints or other pleadings if and whenever a determination of a controversy on the merits will be facilitated thereby. 28 C.F.R. §68.9(e). This rule is analogous to and modeled upon Rule 15 of the Federal Rules of Civil Procedure, and accordingly it is appropriate to look for guidance to

the caselaw developed by the federal district courts in determining whether to permit requested amendments under that rule. OCAHO jurisprudence has long followed the guidance provided by the federal rules, as is directed by 28 C.F.R. §68.1. *See, e.g., United States v. Mr. Z. Enters.*, 1 OCAHO 162 (1990).

Rule 15(a) provides that leave to amend shall be freely granted when justice so requires, but does not enumerate the many purposes for which leave to amend may be sought. Rather, it is left to the discretion of the courts to balance various considerations posed by the specific circumstances in each case and to impose conditions if necessary or appropriate, or to narrow the scope of an amendment if it considers the request too broad. *See generally*, 6 C. Wright, A. Miller, and M.K. Kane, Federal Practice and Procedure §§1486–87 (2nd Ed. 1990).

In ruling on such motions, the Supreme Court has directed that a liberal approach should be taken.

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

The Ninth Circuit has held that this policy should be applied with "extreme liberality," *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987), and has especially emphasized the importance of affording even greater liberality to *pro se* litigants. *Noll v. Carlson,* 809 F.2d 1446, 1448 (9th Cir. 1987). As there has been no suggestion here of bad faith, dilatory motive, or repeated requests, and it appears that complainant moved promptly after obtaining the additional information in the course of discovery, I will consider principally the factors of futility and potential prejudice, including any prejudice to non-parties, as well as the other factors raised by respondent.

The precise question of the applicability of the strict procedural requirements of Rule 23 of the Federal Rules of Civil Procedure to a pattern and practice case under 8 U.S.C. §1324. whether brought by

an individual[4] or by OSC,[5] has not yet been fully developed in OCAHO jurisprudence. Whether or not the rule applies, however, the sound policies which it embodies deserve consideration whenever one party seeks to assert the rights of other absent parties and I give consideration to those factors as well.

I. *Futility of Amendment*

Because some of the matters sought to be alleged raise issues beyond the scope of my authority, or otherwise could not survive a motion to dismiss, I deal with those matters initially.

The test for futility of a proposed amendment is whether or not the proposed amendment would survive a motion to dismiss. *Jones v. Community Redevelopment Agency of Los Angeles*, 733 F.2d 646, 650 (9th Cir. 1984). As I conclude in several respects that the proposed amendments clearly would not, I will initially deny the request to amend summarily as to those portions of the proposed amendment which do not meet this test. For purposes of this analysis, I look not to the merits of the allegations, but simply to their legal sufficiency to withstand a motion to dismiss. Dismissal is appropriate under the standards applicable to a motion to dismiss only where there is no set of facts which could be proved in support of a claim which would entitle the pleader to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

A. *Allegations of Filing Fraudulent Documents*

Complainant's allegation of filing fraudulent documents gives no indication of what documents are asserted to be fraudulent or where they were filed. In response to this portion of the proposed amendment, alleging that respondent filed fraudulent documents, LSI points out that there is *"absolutely nothing in IRCA's anti-discrimi-*

[4] Compare *Banuelos v. Transportation Leasing Co.,* 1 OCAHO 156 at 1104–06 to *Walkerv. United Air Lines,* 3 OCAHO 450 at 1, n.1 (1992) and 4 OCAHO 686 at 46, n.31 (1994), *Lardy v. United Air Lines, Inc.*, 6 OCAHO 843 at 6–7 (1996) (denying leave to intervene). Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

[5] See *United States v. Zabala Vineyards*, 6 OCAHO 830 at 17 (1995).

nation provisions that address (sic) the issue of "'filing fraudulent documents'". (emphasis in original).

While it is true that §1324b does not address the issue of filing fraudulent documents, 8 U.S.C. §1324c does make it a violation for any person or entity knowingly to forge, counterfeit, alter, or falsely make a document for the purposes of satisfying a requirement of the Act, and provides a procedure for making complaints of violations. Enforcement proceedings for violations of 8 U.S.C. §1324c involving allegations of document fraud are commenced by submitting a written complaint to the INS office having jurisdiction over the business or residence of the potential violator or the location where the violation occurred. The complaint must contain detailed factual allegations relating to the potential violation, including the date, time, and place of the alleged violation, and the specific act or conduct alleged to constitute a violation of the Act. 8 C.F.R. §270.2(a). After INS investigates the allegation of document fraud, it may commence a proceeding by issuing a Notice of Intent to Fine (NIF). A respondent contesting the NIF may thereafter file a request for hearing before an administrative law judge (ALJ).

There is, however, no provision in 8 U.S.C. §1324c or elsewhere which authorizes a private individual to initiate a complaint before an ALJ alleging the filing of fraudulent documents. Rather, such a complaint must initially be made to the INS office having jurisdiction over the business or residence of the potential violator or the location where the violation occurred. Absent even partial performance of these conditions precedent, I would have no jurisdiction over complainant's assertions of filing fraudulent documents.

There is thus no set of facts which would entitle complainant to any relief under this theory, and I would be obliged to dismiss complainant's allegations of document fraud for failure to state a claim upon which relief may be granted. The proposed amendment would be futile as vulnerable to a motion to dismiss, and no further specifications would cure the defect. *Schreiber Distributing Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir. 1986).

Leave to amend to allege filing fraudulent documents will be denied.

B. *Potential Claims of Permanent Resident Aliens*

Complainant seeks to expand the scope of this case beyond his initial claim of failure to hire him as a product engineer, by amend-

ing to include claims of discrimination since January 1, 1992, affecting both U.S. citizens and permanent resident aliens. As he is not himself a permanent resident alien, he appears to be without standing to assert any claims on behalf of that group. *General Telephone Co. Of the Southwest v. Falcon*, 457 U.S. 147 (1982). Far from having a common interest, moreover, United States citizens and permanent resident aliens may have conflicting interests in the issue involved in this case as these two groups may be in competition for the same limited number of jobs. Each job filled with a member of one group is one fewer job potentially available to members of the other.

I note also at the outset and as a general matter that one may not simply allege discrimination and rely on the nature of the allegation itself to satisfy the adequacy of representation requirements. *East Texas Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395 (1977). There should be some showing that a putative representative has the same interest and suffered the same injury as the class of persons whose interests he seeks to raise or represent. Common questions of law and fact should predominate. *Lockwood Motors, Inc. v. General Motors Corp.,* 162 F.R.D. 569 (D. Minn. 1995). Where, as here, the allegations do not include any specific information about the nature of the jobs at issue, the qualifications, the hiring processes, or when the events occurred, it is impossible to ascertain which, if any, of the acts sought to be alleged in the proposed amendment arise out of the same conduct, transaction, or occurrence as is alleged in the original complaint.

It is clear to a certainty, however, that any proposed amendment seeking to assert claims on behalf of resident aliens, a group to which complainant himself does not belong, would be futile, would not survive a motion to dismiss, and would not be susceptible to cure by further specification.

Leave to amend to assert claims of resident aliens will be denied.

C. *Claims of U.S. Citizens Who Could Not Themselves Have Filed Timely Charges*

IRCA provides:

> [N]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of filing of the charge with the Special Counsel.

8 U.S.C. §1324b(d)(3).

The law is clear, moreover, that with a few rare exceptions where a charge alleges continuing violations, only a timely charge may serve as a predicate to a pattern and practice case. Alleged discriminatory acts which have not been the subject of a timely charge would be vulnerable to a motion to dismiss because the scope of a case is ordinarily limited to persons who could have filed timely charges in the 180-day period prior to the filing of the subject charge. The purpose of the limitation is to protect against the prosecution of stale claims. *Walker, supra*, 4 OCAHO 686, at 22 (1994).

In *United Air Lines Inc. v. Evans*, 431 U.S. 553, 558 (1977), the Court observed:

> A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

For this reason it is generally held that similarly situated individuals are those who either filed timely charges or could have filed timely charges on the same date as the person whose charge forms the basis for the action. *See, e.g., Walker v. Mountain States Tel. & Tel. Co.,* 112 F.R.D. 44, 47 (D. Colo. 1986).

Leave to amend to add claims of persons who could not have filed timely charges will be denied.

II. *Potential for Prejudice*

A. *Prejudice to Respondent*

Respondent argues that the increased cost of discovery—both financial costs and time costs—would create a substantial burden, demanding additional time and resources with no corresponding benefit since no other specific individual has been identified as similarly situated.

For the reasons stated, *supra*, the amendment as proposed was facially overbroad to the extent it sought to include claims of document fraud and claims of discrimination against persons based on resident alien status, or claims of persons who could not themselves have filed timely charges within the 180-day period prior to November 24, 1994, the date of McCaffrey's charge. The persons whose claims could theoretically be asserted here by the proposed amendment are those of other persons who could have filed their own charges within 180 days prior to November 24, 1994. (It is unknown how many such individuals, if any, there are, or what jobs they may have applied for.)

The scope of a discrimination case pursuant to 8 U.S.C. §1324b is, moreover, ordinarily limited to matters fairly within, or like and related to, the administrative charge and the scope of the administrative investigation upon which the action is based. *Ong v. Cleland*, 642 F.2d 316 (9th Cir. 1981). Even reading the original charge with the utmost liberality it cannot be construed to raise a pattern and practice claim. McCaffrey concedes as much when he states he only learned of the basis for his proposed amendment in the course of discovery.

The requirement of exhaustion of administrative remedies is not an empty formality. Its purpose is to put a respondent on notice and to afford an opportunity within a reasonable time to resolve the matter at the administrative stage. *See, e.g., Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990) (scope of Title VII action depends upon scope of EEOC charge and investigation). *Accord, EEOC v. Farmer Bros. Co.*, 31 F.3d 891 (9th Cir. 1994).

Respondent's concerns about increased burdens in discovery cannot be taken lightly even without the overbroad allegations. Where, as here, no facts or overt acts are stated in the proposed amendment,[6] it is difficult to assess precisely what the impact would be of injecting the new claims proposed. I do note, however, that this case is already almost a year old and its progress in discovery has been characterized by multiple disputes, requests for protective orders, inability to reach factual stipulations, and various novel or unconventional approaches to litigation. The injection of new issues at this

[6] A pleading ordinarily must state the elements of the claim sufficiently to give fair notice to the opposing party. Conclusory allegations unsupported by facts, are insufficient to state a claim. *Jones, supra*. Because this defect may be susceptible to cure by further amendment, I do not rely upon it in denying leave to amend.

point would, I am persuaded, not only alter the focus of the litigation and distract its further progress with additional tangential disputes, it would all but eliminate the prospect of orderly and efficient resolution of McCaffrey's own claim.

Pro se representation in itself generally imposes additional burdens both on the opposing party and on the decision maker because of the unfamiliarity of *pro se* litigants with the rules of procedure and the rules of discovery. The goal of expeditious resolution of disputes often suffers as a result. This case has been no exception. These extra burdens must be accepted because the complainant has the unqualified right to represent himself. He does not have any such right to raise or represent the rights of others, and there are sound reasons why he should not.

B. *Prejudice to Third Parties*

Although the allegations are framed in terms of a pattern and practice of discrimination, the proposed amendment is silent both as to any proposed notice to members of the alleged affected class of United States citizens and permanent resident aliens, and as to the question of class certification. Although penalties are sought and relief for others is requested in the form of jobs, no back pay is requested for any person other than the claimant himself.

In fact, there has been a general reluctance on the part of courts to burden *pro se* parties with the responsibility of protecting the rights of absent class members, or to permit lay persons, without counsel, to maintain suits affecting the rights of others. In *Banuelos, supra*, where unrepresented claimants sought certification of a class action, it was observed by the ALJ that laymen have not ordinarily been permitted to act as attorneys for a class, citing Schlei and Grossman, Employment Discrimination Law, at 1238 (1983), and *Martin v. Middendorf*, 420 F. Supp. 779, 780–81 (D.D.C. 1976). Indeed, even where counsel is present, courts have taken pains to be certain that the particular attorneys have the qualifications, experience, and resources to ensure vigorous prosecution on behalf of any proposed class, as well as the ability to undertake the extra costs and complexities necessarily associated with class-type cases. *Gilbert v. First Alert, Inc*., 904 F. Supp. 714 (N.D. Ill. 1995), amended 165 F.R.D. 81 (N.D. Ill. 1996). Even a licensed attorney is not permit-

ted to be both a class representative and class counsel. *Kramer v. Scientific Control Corp.,* 534 F.2d 1085, 1090 (3d Cir.*), cert. denied* 429 U.S. 836 (1976).

The risk of unintended consequences such as *res judicata* affecting the potential claims of unidentified persons is alone sufficient to deter lay representatives from pursuing cases other than their own.

Conclusion

Adding the broad, nonspecific allegations sought to be raised by the proposed amendment here would not be conducive to judicial economy, and would delay the just, speedy, and inexpensive resolution of the case. Notwithstanding the extreme liberality taken by the Ninth Circuit in deciding motions to amend, practical considerations of manageability require denial of this motion.

SO ORDERED:

Dated and entered this 4th day of June, 1996.

ELLEN K. THOMAS
Administrative Law Judge