

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

July 1, 1998

In re Charge of John Mark Wilk,)
UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 98B00021
)
VOLVO TRUCKS NORTH) MARVIN H. MORSE
AMERICA, INC.,) Administrative Law Judge
Respondent.)
_____)

THIRD TELEPHONIC PREHEARING CONFERENCE REPORT
AND ORDER DEFERRING DECISION ON OSC'S REQUEST FOR
RECONSIDERATION OF ORDER GRANTING IN PART AND
DENYING IN PART OSC'S MOTION TO COMPEL

I. Factual and Procedural History

On April 2, 1997, John Mark Wilk (Wilk or Complainant) filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). Wilk alleges that his former employer, Volvo GM Heavy Truck Corporation (Volvo), discriminated against him and other U.S. citizen workers on the basis of national origin and U.S. citizenship when it eliminated their positions as part of a corporate reorganization.

On November 5, 1997, OSC filed a Complaint on behalf of Wilk and others similarly situated with the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint alleges that Volvo violated 8 U.S.C. §1324b(a)(1) by systematically discriminating against U.S. citizens during its reorganization.

On November 13, 1997, OCAHO issued a Notice of Hearing.

On December 16, 1997, Volvo filed its Answer. Volvo admits that Wilk was a senior buyer, senior corporate buyer, and purchasing administration manager, but denies the remaining allegations and asserts the following affirmative defenses:

- failure to state a claim upon which relief can be granted;
- business necessity;
- failure to serve Volvo notice of the charge within ten (10) days by certified mail, in violation of 8 U.S.C. § 1324b(b)(1) and 44 C.F.R. § 301(e); and
- knowing and voluntary waiver of the right to sue.

The first telephonic prehearing conference took place on January 22, 1998.

On March 25, 1998, OSC filed a motion to compel discovery under 28 C.F.R. § 68.23(a).

On April 8, 1998, Volvo filed its opposition to OSC's motion, a response to Complainant's first request for production of documents, and responses to Complainant's first set of interrogatories.

The second telephonic prehearing conference was held on April 14, 1998. On April 15, 1998, I issued an order (7 OCAHO 994) denying in part and granting in part Complainant's motion to compel. The order disposed of certain disputed document and interrogatory requests, and directed the parties to submit memoranda of points and authorities addressing the following issues:

- (1) "attorney-client" privilege;
- (2) business necessity;
- (3) acceptance and retention of benefits; and
- (4) requisite numerosity and typicality in pattern and practice actions.

I also ordered Volvo to identify the benefits to which Wilk would have been entitled had he not signed the settlement agreement; to describe how the termination agreement exceeded or otherwise affected those benefits; and to relate how the settlement agreement was negotiated. I ordered OSC to specify which Volvo employees it seeks to join in the action.

Although the parties were to submit their respective memoranda by May 29, 1998, I granted extensions for filing until June 26, 1998.

On May 14, 1998, Complainant filed a motion for reconsideration and clarification of my original order, asking me to reconsider nine of Complainant's document requests and nine interrogatories.

The third telephonic prehearing conference was held as previously scheduled on Friday, June 26, 1998, at 10:00 a.m., EDT. Rhonda M. Dent (participating on behalf of Anita Stephens and Ginette L. Milanés, counsel for OSC,) and Frederic Freilicher agreed that counsel will participate at an in-person fourth prehearing conference to address, *inter alia*, discovery issues (the "discovery conference"). ***This conference will take place in the Hearing Room, Suite 2400, United States Department of Justice, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, Virginia, on Thursday, July 16, 1998, at 9:30 a.m., EDT.***

II. *The Ruling on Complainant's Request for Reconsideration Is Deferred Pending Parties' In-Person Discovery Conference and Subsequent Submission of an Agreed Discovery Plan*

This order defers ruling on OSC's request for reconsideration until after the parties have participated in an in-person discovery conference and filed an agreed-upon discovery plan with the court. The purpose of the conference is to facilitate dialogue regarding discovery and to draft discovery plans.

THE RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE ADMINISTRATIVE LAW JUDGES (ALJs) IN CASES INVOLVING ALLEGATIONS OF UNLAWFUL EMPLOYMENT OF ALIENS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES (Rules) contemplate that

in the Administrative Law Judge's discretion, the judge may direct the parties or their counsel to participate in a prehearing conference at any time prior to the hearing . . . when the Administrative Law Judge finds that the proceeding would be expedited by such a conference . . . [if] in the opinion of the Administrative Law Judge . . . such conferences can be conducted in a more expeditious or effective manner by . . . *personal appearance*.

28 C.F.R. §68.13(a) (1997) (emphasis added). Discovery disputes warrant an in-person conference and the production of an agreed-upon discovery plan. Continuous judicial recourse hinders expeditious resolution.

Discovery requests in OCAHO proceedings are governed by 28 C.F.R. §68.18 through §68.22.¹ Because OCAHO Rules do not specifically address in-person discovery conferences and the making of a discovery plan, the Federal Rules of Civil Procedure (FED. R. CIV. P.) are applicable for guidance and authority. “The Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these [OCAHO] rules”²

FED. R. CIV. P. 26 sets forth the general provisions governing discovery and the duty of disclosure. FED. R. CIV. P. 26(a)(1) establishes the “Initial Disclosures” that the parties shall voluntarily provide.³ FED. R. CIV. P. 26(f), added in 1980 to provide judicial intervention in disputes where abusive discovery is threatened,⁴ mandates an in-person discovery conference and discovery plan. FED. R. CIV. P. 26(f), “Planning for Discovery,” requires that

the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held . . . meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the [initial] disclosures required under [Fed. R. Civ. P. 26(a)(1)], and to develop a proposed discovery plan. The plan shall indicate the parties’ views and proposals concerning:

¹ “[P]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding” 28 C.F.R. §68.18(b) (1997). 28 C.F.R. §68.23 permits motions to compel responses to discovery and sanctions.

² 28 C.F.R. §68.1 (1997); *D’Amico v. Erie Community College*, 7 OCAHO 948, at 1–2 (1997), available in 1997 WL 562107, *11 (O.C.A.H.O.); *Caspi v. Trigild Corp.*, 6 OCAHO 907, at 3 (1997), available in 1997 WL 131354, *2 (O.C.A.H.O.); *Horne v. Town of Hampstead*, 6 OCAHO 884, at 3 (1996), available in 1996 WL 658405, *3 (O.C.A.H.O.); *Lardy v. United Airlines*, 6 OCAHO 843, at 3 (1995), available in 1995 WL 862135, *3 (O.C.A.H.O.).

³ [A] party shall, without awaiting a discovery request, provide to other parties:

- (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings identifying the subjects of the information;
- (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleading;
- (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered. . . .

Unless otherwise stipulated or directed by the court, *these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f).*

FED. R. CIV. P. 26(a)(1) (1998).

⁴ Fed. R. Civ. P. 26, Advisory Committee Notes, Subdivision (f) (1993 Amendment).

- (1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), or local rule, including a statement as to when disclosures under [26](a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
- (3) what changes should be made in the limitations on discovery imposed under these rules or by local rule; and what other limitations should be imposed. . . .

The attorneys of record . . . that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court **within 10 days after the meeting a written report outlining the plan.**

FED. R. CIV. P. 26(f) (1998) (emphasis added).

FED. R. CIV. P. 26(f) was revised in 1993 due to the “greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules” Fed. R. Civ. P. 26, Advisory Committee Notes, Subdivision (f) (1993 Amendment). The 1993 Amendments

envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a “discovery conference” and then enter an order establishing a schedule and limitations for the conduct of discovery. . . .

The revised rule directs that in all cases not exempted by local rule or special order the *litigants must meet in person and plan for discovery*. Following this meeting, the *parties submit to the court their proposals for a discovery plan* and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case. . . .

Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

FED. R. CIV. P. 26, Advisory Committee Notes, Subdivision (f) (1993 Amendment) (emphasis added).

The parties should review Fed. R. Civ. P. 26(a) and (f) and Form 35, "Report of Parties' Planning Meeting," located in the Appendix to the Federal Rules of Civil Procedure, prior to the scheduled in-person conference.

III. *The Parties Are Ordered To Confer In Person and To Draft Discovery Plans*

A. The Fourth Prehearing Conference, To Include the Discovery Conference, Will Be Held on Thursday, July 16, 1998, at 9:30 a.m., EDT; Prior To the Conference, the Parties Should Attempt To Draft Agreed-Upon Discovery Plans.

B. It Is Expected That Discovery Plans Will Be Finalized and Filed No Later Than 10 Days After the July 16, 1998, Prehearing Conference.

C. Any Disputes Pending Will Be Resolved After the Agreed-Upon Discovery Plan Is Filed With The Court.

SO ORDERED.

Dated and entered this 1st day of July 1998.

Marvin H. Morse
Administrative Law Judge