

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

October 14, 1998

YADIRA AZUCENA OCAMPO	)	
SOTO,	)	
Complainant,	)	
	)	OCAHO Case No. 98D00086
v.	)	8 U.S.C. §1324b Proceeding
	)	
TOP INDUSTRIAL, INC.,	)	
Respondent.	)	
_____		)

**ORDER DENYING REQUEST FOR ATTORNEY’S FEES**

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Daniel T. Streeter, Esq., for Complainant*  
*Michael A. Gutenplan, Esq., for Respondent*

*I. Procedural History*

On June 1, 1998, in OCAHO Case No. 98B00038, I issued a Final Decision and Order Dismissing Complaint, *Soto v. Top Industrial, Inc.*, 7 OCAHO 999 (1998),<sup>1</sup> which disposed of the unfair immigration-related employment practice action filed by Yadira Azucena Ocampo Soto (Complainant). Complainant alleged that her former employer, Top Industrial, Inc. (Respondent or Top Industrial), discriminated against her based on her national origin and citizenship status in violation of 8 U.S.C. §1324b. Because the Complaint was not timely filed<sup>2</sup> and the circumstances sur-

<sup>1</sup> Citations to OCAHO precedent in bound Volumes I–VI, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAW, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, *seriatim*. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume VI, however, are to pages within the original issuances.

<sup>2</sup> See *Soto v. Top Industrial, Inc.*, 7 OCAHO 999, at 4–6 (1998) (holding claim was not timely filed per 8 U.S.C. §1324b(d)(2) (a private complaint alleging violation of 8 U.S.C. §1324b must be filed directly with the Office of the Chief Administrative

rounding the untimely filing did not warrant equitable tolling of the statutory deadline,<sup>3</sup> the Complaint was dismissed.

On August 24, 1998, Respondent filed a letter-pleading, dated August 18, 1998, requesting an award of attorney's fees and costs related to the action dismissed on June 1, 1998. Respondent's request for attorney's fees was timely filed.<sup>4</sup> Respondent asserts its claim to fee shifting on the basis that it is the prevailing party and "suggests that the Complainant's argument, as a matter of law, was '. . . without reasonable foundation in law and fact,' based on the ground that the subject Complaint was not timely filed." Respondent's counsel delineates that he "expended approximately 15.0 hours of time . . . at a discounted rate of \$160.00 per hour [, and] . . . [Respondent] incurred costs (photocopying fees, postage, etc.) approximating \$50.00, for a total of \$2,450.00 in fees and costs incurred."<sup>5</sup>

Also on August 24, 1998, Complainant filed a copy of an August 20, 1998, letter addressed to Respondent's counsel in response to the letter-pleading. Complainant contends that Respondent's letter-pleading is an improper *ex parte* communication.<sup>6</sup> Opposing the

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Hearing Officer (OCAHO) *within 90 days after the date of receipt of OSC's notice* that it determined not to file such a complaint) because Complainant admitted that she failed to file her Complaint within 90 days after receipt of OSC's determination letter).

<sup>3</sup> See *Soto v. Top Industrial, Inc.*, 7 OCAHO 999, at 6–10 (1998) (holding equitable tolling inapplicable to "garden variety claims of excusable neglect" and to individuals seeking relief who are represented by counsel).

<sup>4</sup> The authority for fee-shifting in an unfair immigration-related employment practice case, 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(c)(2)(v), contains no time requirement within which a request must be filed. In contrast, attorney's fee awards in employer sanctions and document fraud cases are authorized by application of the Administrative Procedure Act, 5 U.S.C. § 544, at 8 U.S.C. § 1324a(e)(3)(B) and § 1324c(d)(2)(B), thereby triggering 5 U.S.C. § 504 (Equal Access to Justice Act), subject to the 30 day limit of 5 U.S.C. § 504(a)(2). 28 C.F.R. § 68.52(c)(1)(vi); 28 C.F.R. § 68.52(c)(3)(iii). See *United States v. G.L.C. Restaurant, Inc.*, 3 OCAHO 439 (1992), available in 1992 WL 535576 (O.C.A.H.O.).

<sup>5</sup> 8 U.S.C. § 1324b(h), referring only to an award of attorney's fees, does not contemplate an award for costs.

<sup>6</sup> Prohibited *ex parte* communications occur between one of the parties to an adjudication and the adjudicator to the exclusion of other parties who do not receive notice of the communication. See *Harris v. Hawaii*, 6 OCAHO 922, at 1216 (1997), available in 1997 WL 242217, at \*2 (O.C.A.H.O.); *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 854, at 283–84 (1996), available in 1996 WL 382254, at \*1 (O.C.A.H.O.); *United States v. Carmona-Anica*, 5 OCAHO 770, at 386 (1995), available in 1995 WL 509451, at \*1 (O.C.A.H.O.); *United States v. Erlina Fashions, Inc.*, 4 OCAHO 656, at 589, 590, n.1 (1994), available in 1994 WL 526369, at \*3, \*4, n.1 (O.C.A.H.O.);

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request for fee shifting, Complainant asserts that Respondent is not “entitled to attorney’s fees under Section 1324b of Title 8” because Complainant “was fully entitled to make the claim she did” and because the matter was not fully litigated nor did it receive “procedural review.”

On August 26, 1998, OCAHO designated the request for attorney’s fees as OCAHO Case No. 98D00086.

## II. *Statutory and Regulatory Background*

Attorney’s fees are awarded in an unfair immigration-related employment practice action based on a two-part test: (1) determination of prevailing party status; and (2) qualification of the action as unreasonable. Title 8 U.S.C. §1324b(h) provides in part that an administrative law judge [(ALJ)], in the judge’s discretion, may allow a prevailing party, other than the United States, a reasonable attorney’s fee, if the losing party’s argument is without reasonable foundation in law and fact.

Upon a finding of both factors of the two-part test, the pertinent rules of practice and procedure, 28 C.F.R. pt. 68, require examination of “the actual time expended and the rate at which fees and other expenses were computed” by the attorney for reasonableness. 28 C.F.R. §68.52(c)(2)(v).

### A. *Respondent Is the Prevailing Party*

Relevant OCAHO<sup>7</sup> and federal case law make clear that Top Industrial is the prevailing party. The Supreme Court of the United States in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983),<sup>8</sup>

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*Wije v. Barton Springs/Edwards Aquifer Conservation Dist.*, 4 OCAHO 645, at 487 (1994), available in 1994 WL 479267, at \*1 (O.C.A.H.O.). Respondent’s communication is **not** an *ex parte* communication as demonstrated by: (1) the reference on page 2 of the letter-pleading that a copy was sent to Complainant’s counsel, Daniel T. Street-er; and (2) the OCAHO filing on August 24, 1998, of Complainant’s response to the letter-pleading which indicates that Complainant received and initiated its response prior to my receipt of the letter-pleading, clearly showing that the letter-pleading was not a prohibited communication.

<sup>7</sup> OCAHO case law supports the finding that Respondent is the prevailing party when the Complaint is dismissed in Respondent’s favor. See *Werline v. Public Serv. Elec. & Gas Co.*, 7 OCAHO 955, at 1 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 2–3 (1997); *Wije v. Barton Springs/Edwards Aquifer Conservation Dist.*, 5 OCAHO 785, at 528 (1995), available in 1995 WL 626204, at \* 23 (O.C.A.H.O.).

<sup>8</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988).

and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 793 (1989),<sup>9</sup> defined the prevailing party as the one who succeeds or prevails “on a significant issue in litigation” and achieves “some of the relief they sought . . . .” In *Texas State Teachers*, the Court found that “[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.” 489 U.S. at 792–93. Parties “who prevailed on a significant issue in the litigation and . . . obtained some of the relief sought . . . are thus ‘prevailing parties’ within the meaning of [the statute].” *Id.*, at 793.

Respondent achieved the relief it sought<sup>10</sup> and prevailed on a significant issue when I dismissed the Complaint as untimely. Respondent’s legal relationship with Complainant was “materially altered” when I dismissed the Complaint. Contrary to Complainant’s assertions, it is not controlling that the case did not reach a merits determination. “It is well settled that a case need not proceed to a final judgment on the merits in order for a party to ‘prevail.’” *Huesca v. Rojas Bakery*, 4 OCAHO 654, at 558 (1994), available in 1994 WL 482552, at \*6 (O.C.A.H.O.). See also *Grodzki v. OOCL*, 1 OCAHO 295, at 1956–57, n.5 (1991), available in 1991 WL 531713, at \*6–7, n.5 (finding Respondent the “prevailing party” even though the ALJ did “not reach the merits of Complainant’s citizenship discrimination claim.”). I find that as Respondent satisfies the prevailing party test established in *Texas State Teachers*, it is the prevailing party.

#### B. Complainant’s Claims Did Not Lack Reasonable Foundation in Law and Fact

Although Respondent is the prevailing party, I do not grant fee shifting because I do not find Complainant’s argument to lack reasonable foundation in law and fact.<sup>11</sup> Respondent’s letter-pleading

<sup>9</sup> *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. § 1983, 1988).

<sup>10</sup> Answer, ¶2, at 3 (“Respondent requests that . . . [a] judgment of dismissal be entered in favor of Respondent”).

<sup>11</sup> OCAHO precedent supports determining Respondent the prevailing party but denying Respondent an award of attorney’s fees. See *Salcido v. New-Way Pork Co.*, 3 OCAHO 425 (1992), available in 1992 WL 535564 (O.C.A.H.O.); *Prado-Rosales v. Montgomery Donuts*, 3 OCAHO 438 (1992), available in 1992 WL 535575 (O.C.A.H.O.); *Huesca v. Rojas Bakery*, 4 OCAHO 654 (1994), available in 1994 WL 482552

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suggests that the Complainant's argument, as a matter of law, was “. . . *without reasonable foundation in law and fact,*” **based on the ground that the subject Complaint was not timely filed.**

Letter-pleading, ¶4, at 1 (emphasis added). As noted below, OCAHO case law rejects Respondent's contention that a Complaint dismissed as untimely, is, therefore, without reasonable basis in law and fact.

“That Complainant was unsuccessful in [her] quest for relief in this forum does not mean that [her] argument lacked reasonable foundation in law and fact. It is not frivolous to bring a suit which is tardy . . . and therefore held to be time-barred.” *Grodzki v. OOCL (USA), Inc.*, 1 OCAHO 295, at 1956–57 (1991), available in 1991 WL 531713, at \*6 (O.C.A.H.O.). “[T]he fact that Complainant did not comply with the statutory 90-day deadline for filing [her] Complaint, after receiving notice from OSC, does not support a finding that [her] pursuit of [her] Complaint lacked reasonable foundation by law and fact.” *Salcido v. New-Way Pork Co.*, 3 OCAHO 425, at 276 (1992), available in 1992 WL 535564, at \*10 (O.C.A.H.O.). Accordingly, Respondent failed to adequately demonstrate that Complainant's argument was sufficiently lacking reasonable basis in law and fact to satisfy the requirement enumerated in 8 U.S.C. §1324b for award of attorney's fees to a prevailing party.

As stated in the June 1, 1998, Order, “Because I dismiss this Complaint on the ground that it is untimely, I do not reach the question of whether [Complainant's] silence connotes lack of §1324b standing, nor do I speculate or inquire further so as to resolve the ambiguities of her immigration history and status.”<sup>12</sup> Not having addressed the merits of the underlying action, I am unable on this record to determine whether Complainant's arguments were sufficiently devoid of a reasonable foundation in law and fact to render fee shifting appropriate. Accordingly, Respondent's request for an award of attorney's fees is denied.

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(O.C.A.H.O.); *Chao v. McDonnell Douglas Corp.*, 6 OCAHO 824 (1995), available in 1995 WL 848949 (O.C.A.H.O.); *Grodzki v. OOCL (USA) Inc.*, 1 OCAHO 295 (1991), available in 1991 WL 531713 (O.C.A.H.O.).

<sup>12</sup> *Soto v. Top Industrial, Inc.*, 7 OCAHO 999, at 5 (1998).

III. *Ultimate Findings, Conclusion and Order*

I have considered the filings by both parties. All motions and requests not specifically ruled upon are denied. In addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. Respondent is the prevailing party;
2. On the basis of the record in OCAHO Case No. 98B00038, Complainant's arguments cannot be held to lack reasonable foundation in law and fact;
3. Respondent's request for attorney's fees is denied.

Pursuant to 8 U.S.C. §1324b(g)(1), this Order Denying Request for Attorney's Fees is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i).

**SO ORDERED.**

Dated and entered this 14th day of October, 1998.

Marvin H. Morse  
Administrative Law Judge