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

October 27, 2011

OLISAEMEKA EZE, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 10B00091
WEST COUNTY TRANSPORTATION AGENCY, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2006), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which Olisaemeka Eze is the complainant and the West County Transportation Agency (West County or WCTA) is the respondent. Eze filed a complaint alleging that the respondent West County failed to hire him because of his citizenship status and refused to accept documents to show that he could work in the United States. Respondent filed a timely answer after which discovery and other prehearing procedures were conducted.

On June 9, 2011, I issued an order granting in part and denying in part Eze's motion for summary decision, denying WCTA's motion to dismiss and taking under advisement WCTA's motion for summary decision, denying as moot WCTA's request for official notice, and setting out a scheduling order for additional filings.

Thereafter Eze filed a timely submission addressing the order together with the Declaration of Araceli Martinez-Olguin and exhibits consisting of A) the deposition of Olisaemeka Eze taken January 26, 2011 (31 pp.); and B) a transmittal letter and deposition errata sheet (12 pp.). Eze also filed a Notice of Motion and Motion for Modification of Schedule for Additional Filings.

WCTA filed its Opposition to Motion for Modification, after which Eze filed a Motion for Leave to file a Reply Brief in Support of his Motion for Modification of Schedule, together with his

proposed brief. WCTA filed its opposition to this motion as well.

Pursuant to the order of June 9, 2011, WCTA filed its supplemental materials on August 8 and Eze filed his responsive materials on August 29, 2011. Also pending is Eze's second request for administrative notice, to which WCTA filed a response.

II. BACKGROUND INFORMATION

Olisaemeka Eze is a citizen of Nigeria and a lawful permanent resident of the United States. West County describes itself as a "joint powers entity" that provides bus service to member school districts located within Sonoma County California. It employs approximately 130 individuals in such jobs as bus driver, state certified driver-instructor, mechanic, laborer, shop helper, clerk, aide, office technician, service person, dispatcher, and other support staff.

While there are a number of factual disputes between the parties, there are some basic and essential facts upon which they agree. It is undisputed that Eze went to WCTA's offices on Friday, June 19, 2009 in response to a newspaper advertisement West County had placed seeking candidates for the position of automotive parts clerk. Eze was given a copy of West County's generic employment application form to fill out. As Eze was filling out the first page of the application he came to Question 8, which asks, "Upon employment, can you furnish proof of citizenship?" The question is followed by a short line for the applicant to write in a response, below which appear the words, "yes or no." Eze had a brief conversation with Justin Gregori, WCTA's Manager of Operations, and another staff member about the reason for such a question, and Gregori told Eze that he would have to speak with the director who was not there, but would be back on Monday. Eze then left, taking his application form with him. He returned to West County's offices again on Monday, June 22, 2009 and spoke briefly with Katie McGraw, Office Operations Technician, and then at greater length with Michael (Mike) Rea, the agency's Executive Director. Eze did not submit his employment application that day either, but it has been made a part of the record.

Eze thereafter filed charges with both the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) and the Equal Employment Opportunity Commission (EEOC) on September 21, 2009. OSC sent him a letter on April 14, 2010 advising him that he had the right to file a complaint within 90 days of his receipt of the letter. Eze's complaint was filed on July 13, 2010 and it appears that all conditions precedent to the institution of this proceeding have been satisfied. The current status of Eze's EEOC charge is not reflected in the record.

III. THE ORDER OF JUNE 9, 2011

The previous order decided one narrow issue in Eze's favor: it found that Question 8 on West County's employment application form was facially discriminatory because it divided employment applicants into two classifications based on whether they are citizens or noncitizens of the United States, and thus created an unnecessary barrier to potential noncitizen applicants. The order did not resolve any other issues. Because Eze's motion for summary decision made no reference to the specific allegations he made in his complaint respecting discriminatory failure to hire and document abuse, the order gave him until July 8, 2011 to clarify his position with respect to these allegations and to bring forward any additional evidence he had to support them, as well as to justify his entitlement to any remedy he sought beyond that of fair consideration for employment.[1]

The order also provided that WCTA would in turn have the opportunity to supplement its evidence to support its assertion that Eze would not have been interviewed or hired as an automotive parts clerk even had his application been given fair consideration. *See United States v. Mesa Airlines*, 1 OCAHO no. 74, 462, 504 (1989).[2] WCTA was therefore given until August 8, 2011 to present additional evidentiary materials. Finally, Eze was given until August 29, 2011 to respond to West County's filings.

IV. THE SUBSEQUENT FILINGS

A. Eze's Filing

Eze filed a response explaining that he considered the "core" of his complaint to be the failure to consider him, and that he did not intend to press a claim for failure to hire him. He observed that

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[1] The order also gave Eze the opportunity to elaborate any grounds to justify naming Rea in his official capacity as a party respondent when Rea was not named in the underlying OSC charge. Eze's complaint also named "Does 1 through 5 in their official capacities." The identities of these individuals have not been disclosed and no specific allegations about them have been made.

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

any lack of clarity or impression to the contrary may be attributable to the preprinted OCAHO complaint form which does not provide any space to make a claim of failure to consider. Eze accordingly declined to submit any additional evidence, saying that because his claim is limited to failure to consider him he has no obligation to show that he is qualified for the job, and that any evidence of his qualifications or the qualifications of the other applicants is "neither relevant nor appropriate."

Eze also contended that his claim of document abuse is already fully supported in the record by his deposition testimony, and argued that Rea is a necessary party to this proceeding. With respect to relief, Eze said he was seeking a cease and desist order and other injunctive relief, civil money penalties, posting, education of respondent's personnel, back pay, front pay, and attorney's fees. He is not, however, seeking employment as an automotive parts clerk, although this is one of the remedies requested in his complaint.

B. West County's Filing

West County challenged Eze's assertion that his action could be limited to failure to consider him, and argued that there is no recognized distinction between claims of failure to consider and failure to hire and that such a distinction is untenable. WCTA contends that its evidence in any event shows that even in the absence of discrimination Eze would not have been among the candidates selected to be interviewed and thus would not have been hired as an automotive parts clerk. It also argued that a ruling in its favor would be dispositive of the document abuse allegations as well, and that Rea, far from being a necessary party, would merely be a redundant defendant.

In support of its contentions WCTA submitted evidence consisting of the declaration of Michael Rea dated August 5, 2011, together with exhibits A) a paper screening form summarizing the scores of all the applicants (2 pp.); and B) an alphabetical list of candidates together with application forms for the 14 individuals selected for interview (110 pp.). The declaration asserts that Rea created a matrix to evaluate the 76 applications WCTA received for the position of automotive parts clerk. The candidates to be interviewed were selected by first grading each of the paper applications on a scale of 0-10 in each of five categories: school transportation experience, parts experience, clerical experience, education, and presentation (which referred to how the candidate assembled the application itself, including any supplementary materials). Fourteen candidates whose applications achieved total scores of 15 points or higher were invited to interview; 13 were actually interviewed.

The declaration then asserts that if Eze's application[3] were to be assessed using the same criteria,

[3] Although Eze never submitted his completed application form, it is attached to his EEOC charge as well as to the OCAHO complaint.

it would have received some points for clerical experience, education, and presentation, but that Eze's score would have been 0 for school transportation experience and 0 for parts experience and thus, like 62 of the other candidates, his application would not have survived the paper screening.

C. Eze's Responsive Filing

Eze again did not file evidentiary materials. He rejected WCTA's argument that there is no independent cause of action for failure to consider standing alone, and reiterated his position that when an applicant is not considered, evidence of the relative qualifications of the candidates should not be examined at all. He contended again that he is entitled to the full range of relief available under 8 U.S.C. § 1324b without the necessity of presenting any evidence of his qualifications. Eze concluded by stating that if WCTA is found liable, he "stands prepared to provide further evidence about the remedies the Agency should order." He also urged in a footnote that if evidence of qualifications were to be considered, discovery should be reopened.

Eze also reiterated his position that his claim of document abuse was established in the record, but said if this question could not be decided in his favor it could not be resolved without additional proceedings. He also reiterated his position that Michael Rea in his official capacity is a necessary party respondent to this proceeding notwithstanding the fact that he was never named in the underlying OSC charge. Eze made no reference to the "Does 1-5 in their official capacities" set out in his complaint.

V. APPLICABLE LAW

As explained in the previous order, OCAHO cases have long held that it is the entire selection process, not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment. *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999); *United States v. Lasa Marketing Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990) (observing that active discouragement, based on citizenship, of complainant's attempt to apply for a position can substantially impair employment opportunity). *See also Williams v. Lucas & Assocs*., 2 OCAHO no. 357, 423, 429-430, 432 (1991) (discussing the practice of "prescreening" job applicants).

For that matter, it is also long established in Title VII[4] jurisprudence as well that discrimination can occur at any point in the hiring process, whether or not it is characterized as a "separate" cause of action. In *Muntin v. California Parks & Recreation Department*, 671 F.2d 360, 362-63 (9th Cir. 1982), for example, it was found as a matter of law that where the Department would

[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et sequitur.

not initially consider women for employment as deckhands, the defendant classified applicants in a way that deprived the plaintiff of employment opportunities because of her sex. The court observed that while no explanation would be sufficient as a matter of law to negate a finding of discrimination, the employer could still limit the remedies available by showing that the plaintiff would not have been hired even absent the discrimination. *Id.* at 363. *See also Ostroff v. Emp't Exch., Inc.*, 683 F.2d 302, 304 (9th Cir. 1982) (injunction should issue regardless of qualifications, but Ostroff cannot recover lost wages if she would not have been referred or hired absent the discrimination); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981) (finding plaintiff entitled to an injunction against future discrimination, but other remedies would depend upon whether he would have been hired in the absence of discrimination); *Marotta v. Usery*, 629 F.2d 615, 618-19 (9th Cir. 1980).

Similarly in *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258-59 & n.2 (8th Cir. 1984), where early in the process certain questions were asked of a female applicant and those same questions were not asked of male applicants, the court noted that questions about pregnancy and childbearing were unlawful per se absent a bona fide occupational qualification. For that reason the district court was instructed to enter a judgment in favor of the plaintiff and issue an injunction prohibiting continued or future discrimination against the plaintiff. *Id.* at 259. As to any other remedies however, it was observed that the employer was entitled to limit relief by showing that the plaintiff would not have been hired anyway. *Id.* at 259-60 (citing cases). *See also East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (citations omitted):

> Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.

More recent case law is in accord. It demonstrates that where a plaintiff chooses to focus on the initial screening process rather than on a final hiring decision, a violation is still actionable but the remedies available may be limited. *See Jackson v. Verizon Wireless*, 676 F. Supp. 2d 728, 738 (S.D. Ind. 2009) (noting that an injunction would issue if Jackson were screened out of consideration on the basis of his race, but Verizon could still show that he would not have been chosen even in a fair process because he was not the most qualified). As Judge Tinder pointed out in *Shipley v. Dugan*, 874 F. Supp. 933, 937 (S.D. Ind. 1995), nondiscrimination statutes are offended by discrimination <u>at any point in the selection process</u>. Thus if the plaintiff had been screened out based on an impermissible characteristic, this would entitle her to an injunction to ensure full and fair consideration in the future regardless of her qualifications, but back pay or other forms of relief might be precluded if the defendant could show that the plaintiff would not have been hired in any event. *Id.* at 937-38, 942.

VI. DISCUSSION AND ANALYSIS

A. Failure to Consider/Hire Claim

The parties have devoted much of their attention to the question of whether or not there is a "separate" cause of action under Title VII for failure to consider. I do not resolve that issue inasmuch as its resolution is unnecessary to this decision. Because Question 8 was found to be discriminatory on its face, injunctive relief is appropriate to ensure that this artificial barrier to potential noncitizen employment applicants is eliminated from WCTA's employee screening process and that neither Eze nor similarly situated applicants will be discouraged from applying for employment. When a person or entity is found to have engaged in an unfair immigration-related employment practice, the law provides that an order must issue requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A). Other remedies, however, are discretionary. 8 U.S.C. § 1324b(g)(2)(B).

Remedies should be tailored to the specific practices they are designed to address, and a complainant is entitled only to remedies commensurate with the deprivation he suffered. *Iron Workers Local 455 v. Lake Const. & Dev. Corp.*, 7 OCAHO no. 964, 632, 697-98 (1997). When a candidate is unlawfully excluded from consideration, full relief ordinarily will mean only that the individual is entitled to fair consideration. Eze nevertheless urges that because Question 8 denied him fair consideration he is entitled not only to various forms of injunctive relief, but also to back pay, front pay, and attorney's fees without having to show that he was qualified for the job.

Such an approach confuses issues of liability with issues of remedy. While Eze is correct in contending that if he was not considered at all, his comparative qualifications are irrelevant when it comes to the question of liability, *see Ostroff*, 683 F.2d at 304, he is mistaken in suggesting that his qualifications are not relevant to the question of what, if any, relief is appropriate. Before back pay or other forms of additional relief may be ordered, it must be determined whether, absent the unfair exclusion, the candidate would have been selected. *See Nanty*, 660 F.2d at 1333. West County must therefore have the opportunity to show that Eze would not have been hired even in the absence of discrimination. *Mesa Airlines*, 1 OCAHO no. 74 at 499-504; *Marotta*, 629 F.2d at 618-19. This inquiry necessarily requires examination of the relative qualifications of the applicants.

1. Whether WCTA's Evidence is Sufficient

Rea's declaration asserts that prior experience with automobiles and auto parts inventory management was highly desirable for the job of automotive parts clerk because such experience would make transitioning to school bus parts much smoother. Examination of the applications of the individuals selected to be interviewed makes clear that there was no candidate in that group whose application did not reflect significant automotive and/or heavy equipment parts

experience; some applicants had decades of experience in the automotive industry, whether as a parts clerk, a parts buyer, a parts manager or service manager, a precision tune manager, an autobody estimator, an inventory or counterperson, a sales manager, or a sales and stocking person.

Exhibit A reflects that only one candidate received a score of more than 3 on presentation or more than 5 on education. Scores for presentation ranged from 0 to 4, with most applicants receiving scores of 1 or 2. The scores for clerical experience and for school transportation experience ranged from 0 to 8, and the scores for parts experience ranged from 0 to 9. The total scores of the individuals who were invited to interview ranged from 15-30. No applicant who had a score of less than 5 on the factor of parts experience was invited to interview. The Rea declaration assesses Eze's clerical experience as 5, education as 4 (or, with the benefit of the doubt, 5), and presentation as 1 or 2. But while Eze's scores are reasonably competitive with respect to clerical experience and education, his scores on school transportation experience and parts experience would both be 0 because his application reflects no experience in either of these areas, and no experience working with vehicles either as a mechanic or in the auto parts business. Thus his maximum total score would be 10 -12.

Whether the standard of proof to be applied is by a preponderance of the evidence or by clear and convincing evidence,[5] the question here is not a close one: there is no reasonable possibility that Eze would have been among the candidates invited to be interviewed, and there is no prospect at all that he would have been hired as an automotive parts clerk when every application having a score of 0 to 4 on parts experience similarly failed to make the initial cut. Eze does not contend that he would have been hired; his filing of July 8, 2011 expressly states in the conclusion that he does not claim he would have been hired for the position had he applied. His claim of failure to hire will accordingly be dismissed.

2. Whether Additional Proceedings Are Necessary

Eze's puzzling offer in his filing of August 29, 2011 to provide "further evidence about the remedies the Agency should order" is untimely made. The order of June 9 gave Eze the opportunity to do precisely that: it specifically requested that he provide evidentiary support for his claims and that he "justify his entitlement to any remedy he seeks beyond that of fair consideration for employment." He did neither. He said instead there was no need for him to

[5] *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996) asserts that the clear and convincing standard of proof set out in *Nanty* was overruled by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The dissent points out, however, that the majority opinion is advisory in nature, *O'Day*, 79 F. 3d at 765, and asserts to the contrary that *Nanty* was unaffected by *Price Waterhouse* because the two cases addressed different issues in different types of cases. *Id.* at 767.

offer evidence, and he provided no justification for the remedies he sought although he continued to insist that he was entitled to a full range of injunctive relief, civil money penalties, posting, education of respondent's personnel, back pay, and front pay, as well as his attorney's fees.

Eze's filing of August 29 also urged in a footnote that discovery should be reopened because he did not depose Rea in depth about the screening process nor did he seek discovery as to the qualifications of the other candidates. A motion to reopen discovery is not appropriately made in a footnote contained in a reply. This request is in any event untimely made; discovery has long since closed without objection from either party and without any timely request for extension. A represented complainant's tactical choices as to what evidence to pursue or explore in discovery cannot provide a justification for reopening discovery at this late date.

B. Document Abuse Claim

Eze's initial submission urges that his claim of document abuse is established in the record; his reply reiterates this position but suggests in addition that if his motion is not successful this claim is not susceptible to summary resolution. WCTA asserts that a decision in its favor on the hiring issue necessarily encompasses a decision in its favor with respect to the claim of document abuse. Each of these contentions is erroneous.

The regulatory scheme and the regulations[6] implementing the employment eligibility verification system provide the framework within which claims of document abuse must be assessed. *Lee v. AirTouch Commc'ns*, 6 OCAHO no. 901, 891, 896 (1996). As explained in *United States v. Patrol & Guard Enterprises, Inc.*, 8 OCAHO no. 1040, 603, 617-18 (2000), the verification process is not engaged at the point of the initial contact between a potential applicant and a potential employer; the employment eligibility verification form is to be completed only after a hiring decision is actually made. Because the complainant in *Patrol & Guard* was denied the opportunity even to complete an application, "the interaction had not reached the stage where document abuse within the scope of § 1324b(a)(6) could have occurred." *Id.* at 617.

This is because an employer's duty to examine an employee's documents in order to complete Form I-9 arises only at the time of the actual hiring event: document abuse occurs when, for the purpose of satisfying the requirements of 8 U.S.C. §1324a(b), a person or entity requests more or different documents or refuses documents that reasonably appear to be genuine proffered at that point to establish an individual's identity and eligibility for employment. *See* 8 U.S.C. § 1324b(a)(6). Eze's claim of document abuse consists of an allegation that during his visit to WCTA's offices he offered to show Rea and Gregori his green card. I credit these allegations and take them as true for purposes of this inquiry. But like the complainant in *Patrol & Guard*, Eze never filed an employment application form at all, and the eligibility verification system

[6] *See* 8 U.S.C. § 1324a(b) (2006); 8 C.F.R. § 274a.2 (2011).

itself was never engaged. There was thus no occasion for WCTA to have to examine Eze's document because he never reached the hiring stage. *See Cook v. Pro Source, Inc.*, 7 OCAHO no. 960, 559, 570 (1997) (verification process takes place at the time of hire).

Contrary to Eze's contention, a potential job applicant's gratuitous offer to show his green card before even submitting an application form is not sufficient to trigger a duty for a potential employer to examine the document pursuant to the employment eligibility verification system. That duty arises after an offer of employment is made and accepted, not before. Eze's claim of document abuse accordingly fails to state a claim upon which relief may be granted, and must be dismissed as well.

C. Attorney's Fees

While Eze's motion was granted with respect to the deterrent effect of Question 8, it must be denied with respect to his remaining claims of failure to hire and document abuse, and WCTA's motion will prevail with respect to those claims. An opportunity will be provided for either party to file a petition for fees on or before November 28, 2011 in the event the party believes, after reviewing the relevant case law, that it can satisfy the requirements for an award of attorney's fees. Responses must be filed on or before December 28, 2011.

Any such request must explain whether the requestor is the prevailing party under *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 603-04 (2001), and address the question of potential limitations on attorney's fees under *Farrar v. Hobby*, 506 U.S. 103, 114-16 (1992) and other relevant case law. Appropriate supporting materials must accompany any application for fees, including an itemized statement from the attorney or representative stating the actual time expended and the rate at which fees and other expenses were computed. 28 C.F.R. § 68.52(d)(6).

The burden of proof is on the requesting party to establish 1) that it is a prevailing party, 2) that the losing party's argument is without reasonable foundation in law and fact,[7] and 3) that the actual time expended was reasonable and that the rate at which fees were computed is in accord with the prevailing market rate in the appropriate geographical area for lawyers of reasonably comparable skill, experience and reputation. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 18 (2009).

[7] The statutory language makes no distinction between the parties as to the standard to be applied. 8 U.S.C. § 1324b(h). OCAHO cases nevertheless follow the "double standard" in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978), for attorney's fees in employment discrimination cases. *See Shortt*, 10 OCAHO no. 1130 at 18. Thus there are two different standards, depending upon whether the applicant is the complainant or the respondent.

VII. FINDINGS AND CONCLUSIONS

A. Findings of Fact

1. Olisaemeka Eze is a citizen of Nigeria and a lawful permanent resident of the United States.

2. West County Transportation Agency is a "joint powers entity" that provides bus service to member school districts located within Sonoma County California.

3. West County Transportation Agency has approximately 130 employees in such jobs as bus driver, state certified driver-instructor, mechanic, laborer, shop helper, clerk, aide, office technician, service person, dispatcher, and other support staff.

4. At all times relevant to this matter, Michael Rea has been the Executive Director of West County Transportation Agency.

5. West County Transportation Agency placed a newspaper advertisement for the position of automotive parts clerk and directed interested applicants to apply in person at its offices by June 22, 2009.

6. Eze went to West County Transportation Agency's offices on Friday, June 19, 2009 with the intention of applying for the position of automotive parts clerk.

7. On June 19, 2009 Eze was given a copy of West County Transportation Agency's generic employment application form to fill out.

8. Question 8 on West County Transportation Agency's generic employment application form asks, "Upon employment, can you furnish proof of citizenship?"

9. On June 19, 2009 Eze had a brief conversation with Justin Gregori, West County Transportation Agency's Manager of Operations, and another staff member about the reason for Question 8, and Gregori told Eze that he would have to speak with the Executive Director who would be back on Monday.

10. Eze returned to West County Transportation Agency's offices on Monday, June 22, 2009 and spoke briefly with Katie McGraw, Office Operations Technician, and then at greater length with Michael (Mike) Rea, West County's Executive Director.

11. Eze did not submit his employment application to West County Transportation Agency either on June 19 or on June 22, 2009.

12. Eze offered to show his employment authorization card ("green card") to Michael Rea and another staff member.

13. West County Transportation Agency received 76 completed applications for the automotive parts clerk position.

14. Michael Rea created a matrix for grading each of the paper applications on a scale of 0 -10 in each of five categories: school transportation experience, parts experience, clerical experience, education, and presentation of the application materials, after which these scores were combined into one total score for each application.

15. West County Transportation Agency invited 14 candidates whose applications each received a total score of 15 points or higher to interview for the position of automotive parts clerk, of whom 13 were actually interviewed.

16. West County Transportation Agency determined that prior experience with automobiles and auto parts inventory work was highly desirable for the automotive parts clerk position.

17. The employment application completed by Olisaemeka Eze would have received scores of 0 for both school transportation experience and parts experience, because his application reflected that he had no experience working with vehicles either as a mechanic or in the auto parts business.

18. No candidate was selected to be interviewed for the position of automotive parts clerk who did not have significant automotive and/or heavy equipment parts experience and whose application failed to attain a score of at least 5 of the factor of parts experience.

19. The employment application completed by Olisaemeka Eze would have received a score of 5 for clerical experience, a score of between 4 - 5 for education and a score of between 1 - 2 on presentation, for an overall application score of 10 - 12.

20. Based on his completed application, Olisaemeka Eze would not have been among the candidates invited by West County Transportation Agency to interview for the position of automotive parts clerk.

21. Eze filed charges with both the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) and the Equal Employment Opportunity Commission (EEOC) on September 21, 2009.

22. OSC sent Eze a letter on April 14, 2010 advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of his receipt of the letter.

23. Eze filed a complaint with this office in which he alleged that West County Transportation Agency failed to hire him because of his citizenship status and refused to accept documents to show that he could work in the United States.

B. Conclusions of Law

1. Olisaemeka Eze is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(B).

2. West County Transportation Agency is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. All conditions precedent to the institution of this proceeding have been satisfied.

4. OCAHO cases have long held that it is the entire selection process, not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment. *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999); *United States v. Lasa Marketing Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990).

5. Olisaemeka Eze is entitled to summary decision as to whether Question 8 on West County Transportation Agency's employment application was facially discriminatory because it divided employment applications into two classifications based on whether the applicant was a United States citizen or a noncitizen.

6. Olisaemeka Eze is entitled to injunctive relief to ensure that the artificial barrier to potential noncitizen employment applicants is eliminated from West County Transportation Agency's employee screening process.

7. Remedies should be tailored to the specific discriminatory practices they are designed to address, and a complainant is entitled only to remedies commensurate with the deprivation he suffered. *Iron Workers Local 455 v. Lake Const. & Dev. Corp.*, 7 OCAHO no. 964, 632, 697-98 (1997).

8. Clear and convincing evidence demonstrates that there was no reasonable possibility that Eze would have been among the candidates selected for interview or that he would have been hired as an automotive parts clerk because there were a number of better qualified candidates.

9. WCTA is entitled to summary decision as to Olisaemeka Eze's claim of failure to hire.

10. The regulatory scheme and the regulations implementing the employment eligibility verification system provide the framework within which claims of document abuse must be assessed. *Lee v. AirTouch Communications*, 6 OCAHO no. 901, 891, 896 (1996).

11. The employment eligibility verification process is engaged only after a hiring decision is actually made and the I-9 form is to be completed, not at the point of the initial contact between a potential applicant and a potential employer. *United States v. Patrol & Guard Enterprises, Inc.*, 8 OCAHO no. 1040, 603, 617-18 (2000)

12. The interaction between Olisaemeka Eze and WCTA did not reach the stage when document abuse within the scope of 8 U.S.C. § 1324b(a)(6) could have occurred.

13. WCTA is entitled to summary decision as to Olisaemeka Eze's claim of document abuse.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

Eze's motion for summary decision is granted in part, and Question 8 on West County's employment application is found on its face to be an unnecessary barrier to noncitizen employment applicants. Eze's motion for summary decision is otherwise denied. WCTA's motion for summary decision is granted in part, and the remainder of Eze's allegations are dismissed. All other pending motions are denied as moot.

WCTA is hereby ordered to cease and desist from using an employment application form that classifies employment applicants according to whether they are citizens or noncitizens. Nothing in this order limits WCTA's ability to use an employment application form that inquires as to whether an applicant is authorized for employment in the United States. WCTA is in addition ordered to comply with the provisions of 8 U.S.C. § 1324b, and to educate all personnel with hiring responsibilities about the requirements of §§ 1324b and 1324a(b). Any party may file an application for attorney's fees on or before November 28, 2011. Responses will be due on or before December 28, 2011.

SO ORDERED.

Dated and entered this 27th day of October, 2011.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

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