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

November 16, 2012

ROSARIO CORMIA, Complainant, v. HOME CARE GIVER SERVICES, INC. AKA HOME CARE ONE, Respondent.	)))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 11B00132

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

This is an action pursuant to the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (2006). Rosario Cormia filed a complaint against Home Care Giver Services, Inc., aka Home Care One (Home Care or the company), in which she alleged that the company discriminated against her based on her national origin by firing her on January 10, 2011. Home Care filed an answer denying the material allegations of the complaint and stating by way of defense that it is exempt from the provisions of the statute. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed a complaint-in-intervention and prehearing procedures were undertaken. The parties' Joint Discovery Plan and Schedule was approved on February 23, 2012. OSC subsequently withdrew its complaint-in-intervention without objection.

Presently pending is Home Care's Motion for Summary Decision in response to which Cormia filed a memorandum in opposition. Both parties are represented by counsel.

II. BACKGROUND INFORMATION

The complaint-in-intervention identifies Rosario Cormia as a naturalized United States citizen

who is originally from Bogota, Columbia. Home Care Giver Services, Inc. is a Florida corporation that provides home health aides, certified nursing assistants, LPNs, and RNs to customers for assistance in their homes. Cormia's charge says that her place of employment was at 601 N. Congress Avenue, Suite 405, Delray Beach, Florida 33445, and that she was hired by the company to handle incoming calls from prospective customers and provide other administrative services. Her supervisor was Marvella Brezenoff, Manager of Operations. Cormia was fired on January 10, 2011 for reasons disputed by the parties. The company said she was replaced by Chiquita Burton and Iret Kraham.

On February 22, 2011, Cormia filed a discrimination charge with the Office of Special Counsel and on June 22, 2011 she received notice that she had the right to file a complaint with this office within ninety days of her receipt of the letter. Cormia filed her complaint on September 15, 2011 and it appears that all conditions precedent to the institution of this proceeding have been satisfied.

III. THE MOTION AND RESPONSE

The company's motion does not address the merits of Cormia's complaint and addresses only one issue. Notwithstanding the caption as a motion for summary decision, the relief sought in the motion is a dismissal for lack of jurisdiction because "the jurisdictional minimum of four employees does not exist." In support of its position the company sets out a quotation it says is taken from the deposition of the owner, Anthony Persico, stating that, "The number of employees is I believe its (sic) three right now. We were at two for awhile, but the last, oh, I'd say four years we have been at three and two." While reference is also made to the deposition of Manager Marvella Brezenoff, no portions of either deposition accompanied the motion as exhibits.

The only document attached to the motion is a questionnaire from the Office of Special Counsel, together with the company's responses. There is a notation at the top of the questionnaire stating that documents and supplemental information will follow, but what the documents or information consisted of is unelaborated and no payroll records or other evidentiary materials accompanied the motion. The motion asserts further that OSC "refused to disclose how the United States defines or counts employees for jurisdictional purposes under 8 U.S.C. § 1324b," that "[u]nder any reasonable definition of 'employee,' there is no evidence to contradict the proof . . . that there were no more than three employees . . . at the time of the alleged discrimination," and that accordingly there is no genuine issue of material fact that would show jurisdiction.

Cormia's response contends that there are indeed factual issues and asserts that using the broad definitions of employment in 8 U.S.C. § 1324a(4) (2006), Marvella Brezenoff's husband, Eugene Brezenoff, and their son, Logan, should also be considered as employees of Home Care because they performed work there and received compensation during her employment. She said Gene

Brezenoff was working the day she was fired and witnessed the firing. Cormia's response also referred to Marvella Brezenoff's deposition but neither quoted it nor attached any portions of it. Her own affidavit was attached, in which she stated that both Gene Brezenoff and the Brezenoffs' older son at times during her tenure there performed work and received compensation for their services.

IV. STANDARDS APPLIED

A. Scope of Coverage of the Governing Statute

Entities and persons who employ three or fewer employees are totally exempt from coverage under 8 U.S.C. § 1324b. 8 U.S.C. § 1324b(2)(A). The statute is silent, however, as to the particular time period as of which the determination is to be made of how many employees a particular employer has and the manner in which those employees should be counted. Instead, Congress gave the Attorney General the power to promulgate regulations to effectuate and enforce § 1324b, as well as the power to delegate that authority. 8 U.S.C. § 1103(g). The Attorney General delegated that authority to OSC. *See Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 67 (1994).[1] The agency subsequently promulgated such regulations; the final rule was made effective November 5, 1987, Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37402-01 (Oct. 6, 1987) (codified as amended at 28 C.F.R. pt. 44 (2011)). The regulations themselves, like the statute, are silent as to the precise time and manner for calculating how many employees an employer has. 28 C.F.R. § 44.200(b)(1)(i). However, the Preamble which accompanied publication of the final rule read in pertinent part as follows:

> Unlike title VII, section 102 does not contain the 20 calendar week durational minimum. In light of the language and legislative history of the IRCA antidiscrimination provisions, the Special Counsel will calculate the number of employees referred to in paragraph (b)(1)(i) of § 44.200 by counting all part-time and full-time employees employed on the date that the alleged discrimination occurred. The Department, therefore, will not use the 20 calendar week requirement contained

[1] 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.

> in title VII in counting employees for purposes of determining coverage by section 102. 52 Fed. Reg. at 37402.

The rule thus established no durational employment requirement for an employer to be covered under the statute. It directs instead that the count of employees is to be made as of the date the alleged discrimination occurred and that all who are employed on that date, whether full-time or part-time, and whether permanent or seasonal, are to be counted. *See Sanchez v. Ocanas Farms*, 9 OCAHO no. 1115, 3 (2005). The preferred method of counting employees is the so-called "payroll method" set out in *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 206-07 (1997).

B. Whether the Number of Employees is a Jurisdictional or a Merits Question

It is not necessary to find that every failure of a litigant to establish some threshold fact equates to an ouster of jurisdiction. Because the absence of a valid cause of action does not ordinarily implicate subject matter jurisdiction, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), "drive-by jurisdictional rulings" to the contrary should not be accorded any precedential effect. *Id.* at 91; *see United States v. Mar-Jac Poultry*, 10 OCAHO no. 1148, 7 (2012). As explained in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (holding that for purposes of Title VII [of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.] the number of employees is an element of the plaintiff's claim for relief), a threshold limitation on a statute's scope should be treated as jurisdictional only when the legislature clearly says that it is jurisdictional. When Congress does not rank a statutory limitation as jurisdictional, it should be treated as nonjurisdictional. *Id.* at 516.

At least since *Arbaugh*, OCAHO case law has accordingly not treated the number of employees as a jurisdictional issue. *See Programmers Guild, Inc. v. Value Consulting*, 10 OCAHO no. 1135, 6 (2010). The difference is significant because, unlike a dismissal for lack of jurisdiction, a summary decision is a judgment on the merits. *See Reyes-Martinon v. Swift & Co.*, 9 OCAHO no. 1068, 8-9 (2001); *see also Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1188 (11th Cir. 2003). Definitional or procedural limitations on the scope of a statute, such as employee numerosity or satisfaction of conditions precedent, ordinarily should not be treated as jurisdictional in nature absent a clear statement to the contrary.[2]

C. Summary Decision

[2] The so-called "clear-statement" principle was recently reiterated in *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). *See Henderson v. Shinseki*, 131 S. Ct. 1197, 1203-04 (2011); *see also Morrison v. Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869, 2876-77 (2010); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245-48 (2010); *Union Pacific R.R. Co. v. Bhd of Locomotive Eng'rs*, 130 S. Ct. 584, 596 (2009) (cautioning against profligate use of the term "jurisdictional").

OCAHO rules provide for the entry of summary decision when the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and that the moving party is entitled to summary decision as a matter of law. 28 C.F.R. § 68.38(c). The party seeking summary decision bears the initial burden of showing the absence of a material factual dispute. *Celotrex, Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of material fact is genuine only if it has a real basis in the record. *Matsushita Elec. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986).

Materials offered in support of such a motion must be of evidentiary quality, and affidavits must set forth such facts as would be admissible in evidence. *See Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 3 (2002); *United States v. IBP, Inc.*, 8 OCAHO no. 1021, 295, 300 (1999). OCAHO case law makes clear that argument of counsel and unsupported factual allegations made in a brief or memorandum are not evidence and may not be considered as such. *United States v. Chen*, 9 OCAHO no. 1092, 4 (2003); *United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216, 225 n.5 (1996). While the procedural rules do not authorize a qualitative double standard for treating the papers of the moving and the nonmoving party differently, in practice a more lenient standard is often applied to the materials of the party opposing summary decision notwithstanding the strictures of the rules. *Parker*, 9 OCAHO no. 1081 at 5-6.

V. DISCUSSION AND ANALYSIS

It must be noted at the outset that Home Care has not tendered evidentiary materials that satisfy the standards of admissibility set out in 28 C.F.R. § 68.38(b). Factual allegations made in the company's legal memorandum are not evidence, and the only exhibit offered, the response the company made to OSC's questionnaire, is unsworn, unauthenticated, and largely conclusory in nature. While Home Care's motion makes reference to "the proof obtained and verified by the United States," moreover, it did not furnish competent evidence to show what that "proof" consisted of, nor did it provide copies. While reference is made to Persico's belief that there have been two or three employees over the last four years, the motion fails to focus on the critical date of January 10, 2011, and fails in addition to explain precisely what the company means by the term "any reasonable definition" of the word "employee."

While Cormia's response characterizes a person's status as an employee as being a question of fact, the issue is, rather, a mixed question of law and fact. *United States v. Santiago's Repacking, Inc.*, 10 OCAHO no. 1153, 6 (2012). While each of the parties apparently has its own definition of the term in mind, neither party made any reference to OCAHO case law as providing a standard to be used in determining who is an employee. As explained in *Ocanas Farms*, while an employment relationship may be established by means other than the payroll

method, the existence or absence of an employment relationship cannot be established by fiat simply by a party declaring it to be so. 9 OCAHO no. 1115 at 10-11.

ORDER

Home Care's request for dismissal for lack of jurisdiction is denied. This office has jurisdiction over Cormia's claim. Because Home Care failed to demonstrate either that there is no genuine issue of material fact or that it is entitled to judgment as a matter of law, the company's motion for summary decision is also denied.

The parties are advised to notify this office on or before December 14, 2012 whether discovery has been completed and to provide a minimum of three alternative dates and times (Eastern Standard Time) on a Tuesday, Wednesday, or Thursday, when they will be available for a telephonic prehearing conference to establish a schedule for further proceedings.

SO ORDERED.

Dated and entered this 16th day of November, 2012.

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Ellen K. Thomas
Administrative Law Judge