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

September 6, 2001

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 99B00037
FAIRFIELD JERSEY, INC., FAIRFIELD TEXTILES CORP., Respondents.	)	

ORDER GRANTING IN PART AND DENYING IN PART OSC'S RENEWED MOTION TO STRIKE AFFIRMATIVE DEFENSES

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (2001) (INA), in which the Office of Special Counsel (OSC) is the complainant and Fairfield Jersey, Inc. and Fairfield Textiles Corp. are the respondents. Discovery is closed and a hearing is scheduled for October 10-11, 2001, in Newark, New Jersey.

I previously issued an order (unpub.) striking certain affirmative defenses raised in Fairfield's answer and granting leave to replead, after which Fairfield filed a First Amended Answer denying the material allegations and asserting four affirmative defenses. OSC moved to strike two of those defenses. Subsequently I issued an order denying Fairfield's motion for partial summary decision with respect to an issue raised by the first defense. United States v. Fairfield Jersey, Inc., 9 OCAHO no. 1069 (2001).[1] OSC's motion to strike will be granted in part and denied in part.

[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

(continued...)

II. THE FIRST DEFENSE: LIMITATIONS

Fairfield's first defense asserts that the Complaint must be dismissed because it fails to comply with the time limitations set forth in 8 U.S.C. § 1324b. It goes on to state that the pattern and practice allegations set forth in Counts III and IV of the complaint must as a matter of law be limited to violations occurring within 180 days prior to the filing of OSC's complaint. This defense is predicated upon the theory that these counts necessarily arose from the Special Counsel's independent investigation authority rather than from the Carhuayo investigation, and that they are therefore restricted by 8 U.S.C. § 1324b(d)(3) and 28 C.F.R. § 44.304 (2001) to violations occurring within 180 days prior to the filing of the complaint. This defense was previously stricken because, inter alia, no facts were alleged to support it.[2] The theory was again explicitly rejected for lack of support in the order denying Fairfield's motion for partial summary decision, 9 OCAHO no. 1069 at 5, in which I found that Fairfield was not entitled to summary decision as to this defense.

Nevertheless, because Fairfield may potentially have a viable defense based on § 1324b(d)(3) as to some claims of violations occurring more than 180 days prior to the filing of the Carhuayo charge, the limitations defense will not be stricken at this time. OSC contends in support of its motion to strike that the limitations defense is insufficient as a matter of law because its complaint has claimed a continuing pattern and practice violation. Fairfield argues in opposition that the continuing violation theory does not extend the statute of limitations "under the factual circumstances present in this case." What those factual circumstances are, however, has yet to be fully elaborated. OSC's assertions as to the continuing nature of the violation may or may not be proved. In the event that OSC is able to prove the existence of a continuing violation, Fairfield's first defense may turn out to be unavailing. If OSC is unable to show a continuing violation, some[3] of its claims may be limited to those involving violations occurring within 180 days of the filing of the Carhuayo charge. Until the facts are more fully developed at the hearing, the limitations defense will stand, although not on the theory asserted.

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[1](...continued)
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 omitted from the citation.

[2] Rules applicable to OCAHO proceedings, 28 C.F.R. Pt. 68, direct that a statement of facts supporting each affirmative defense asserted is required in an answer. 28 C.F.R. § 68.9(c)(2).

[3] I am not persuaded that either party has adequately addressed the question of whether the filing limitations period also defines the period for all forms of potential relief. See 9 OCAHO no. 1069 at 5-8.

III. THE FOURTH DEFENSE: GOOD FAITH

The good faith defense was also previously stricken on the dual ground of failure to file the factual statement required by 28 C.F.R. § 68.9(c)(2) and for legal insufficiency. The amended answer sets out a factual statement in which Fairfield asserts that its conduct was motivated by a good faith attempt to comply with the provisions of 8 U.S.C. § 1324a respecting the hiring of unauthorized workers. The factual statement goes on to detail Fairfield's previous experience of losing a number of workers in 1991, its subsequent participation in the INS' telephonic inquiry program from 1991-97, and the fact that upon the termination of this program in 1997 it became a participant in the Employment Verification Pilot Program. Fairfield states that these facts and circumstances demonstrate its good faith attempts to comply in all respect with the prohibition against hiring illegal or undocumented aliens.

As a general rule, an employer's desire to comply with § 1324a is not, however, a reason to exempt the employer from liability for violations of § 1324b; indeed, Congress added the nondiscrimination provisions to the statute precisely in order to avoid having employers use the verification process in an attempt to justify discrimination against protected individuals. As was observed in Nguyen v. ADT Eng'g, Inc., 3 OCAHO no. 489, 915, 915-16 (1993),

> Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. § 1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in this country. "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986).

Far from excusing discrimination resulting from attempts to comply with the employment eligibility verification system, the overriding purpose of § 1324b is to deter such discrimination by attaching consequences to it. It would therefore be totally incongruous to find that Congress intended a broad defense resulting in the protection of discriminatory practices where the statute is designed to achieve equality of occupational opportunity. The earliest cases arising under § 1324b noted that an employer's misunderstanding of the sanctions provisions does not justify discrimination. For example, in United States v. Marcel Watch Corp., 1 OCAHO no. 143, 988, 1011 (1990), it was observed that:

> Failure by a prospective employer to reasonably understand or perform its obligations under Section 101 [the employer sanctions provision] is no warrant for avoiding culpability under Section 102 [the antidiscrimination provision].

Accord, United States v. Louis Padnos Iron & Metal Co., 3 OCAHO no. 414, 181, 187-88 (1992); DeWitt, 1 OCAHO no.189, 1235, 1250-51 (1990). The same principle was recently affirmed in the Third Circuit, within which this case arises, in Getahun v. OCAHO and DuPont Merck Pharm., 124

F.3d 591, 596 (3rd Cir. 1997), wherein the Court pointed out that DuPont Merck's excessive documentary inquiries were not protected by § 1324a ("the fact that DuPont Merck was performing its obligation to verify employment eligibility did not insulate it from a charge of document abuse").

Nevertheless, Fairfield urges that as to violations of § 1324b(a)(6), a different standard must be applied. In support of its good faith defense, Fairfield says it must be permitted to assert this defense because OCAHO caselaw has created ambiguities about the recently amended intent standard in § 1324b (a)(6), citing, inter alia, United States v. Patrol & Guard Enters., Inc., 8 OCAHO no. 1040, 603 (2000). Fairfield claims that OSC will try at a hearing to foreclose its ability to introduce evidence as to the basis of its conduct. The assertion of this defense thus appears to stem from an abundance of caution as to whether Fairfield will be permitted at the hearing to offer evidence it believes will negate the element of intentional discrimination. But employers in these proceedings are routinely permitted, indeed required, to offer nondiscriminatory explanations for their employment decisions. The employer may have the burden of moving forward, but this fact does not operate to shift the burden of proof, nor does it convert the presentation of a nondiscriminatory reason into an affirmative defense. I am not inclined to reallocate the traditional assignment of the burden of proof in § 1324b proceedings by labeling as an affirmative defense the negative of an element of the plaintiffs burden of proof as to the issue of intentional discrimination. Cf. Apprendi v. New Jersey, 530 U.S. 466, 485 (2000). Neither would I anticipate precluding any respondent from offering rebuttal evidence at a hearing if the evidence is otherwise relevant and appropriate.

Contrary to Fairfield's fears and notwithstanding the recency of the 1996 amendments to § 1324b(a)(6), the concept of intentional discrimination is not a novel one in employment discrimination law. Decades of Title VII jurisprudence have construed and explained that term, and Fairfield has offered no reason to believe that Congress intended the term to have any different meaning in § 1324b(a)(6) than it has in any other case. Indeed, the only Circuit thus far to examine the effect of the amendment expressly held that the amendment simply clarified what the law had meant since its inception. Robison Fruit Ranch, Inc., v. United States, 147 F.3d 798, 801 (9th Cir. 1998).

Liability under § 1324b, like that under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2001), has never depended upon a showing of bad faith and is thus not necessarily negated by a broad claim of good faith. Neither the remedial provision of Title VII nor the provision of the National Labor Relations Act upon which it was modeled, 29 U.S.C. § 160(c) (2001), treats a broad claim of good faith as a permissible defense to backpay liability under those statutes. Early attempts to engraft a generalized "good faith" defense in such cases were unequivocally rejected. As the Court explained in Albemarle Paper Co. v. Moody, 422 U.S. 405, 423 n. 16 (1975),

> The backpay remedy of the NLRA on which the Title VII remedy was expressly modeled [footnote omitted] is also fully available even where the 'unfair labor practice' was committed in good faith. See, e.g., NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S.,

> at 265, 90 S.Ct. 417, 421, 24 L.Ed.2d 405; American Machinery Corp. v. NLRB, 5 Cir., 424 F.2d 1321, 1328-1330 (CA5 1970); Laidlaw Corp. v. NLRB, 7 Cir., 414 F.2d 99, 107 (CA7 1969).

For this reason, the Court rejected the notion that an award of backpay should be conditioned on a showing of "bad faith," because this standard would open an enormous chasm between injunctive and backpay relief. Albemarle Paper, 422 U.S. at 422-23 (footnotes omitted).

Several courts have used "good faith" in similar contexts not as the natural converse to liability for intentional discrimination, but rather as the converse to malice or reckless indifference. E.g., Hopwood v. Texas, 78 F.3d 932, 959 (5th Cir.), cert. denied, 518 U.S. 1033 (1996) (punitive damages under § 1981); Barber v. Nabors Drilling U.S.A., Inc., 130 F.3d 702, 710 (5th Cir.1997), reh'g denied, 137 F.3d 1353 (5th Cir. 1998) (punitive damages under the Americans with Disabilities Act); see also BLACK'S LAW DICTIONARY 693 (6th ed. 1990) ("good faith" includes, among other things, "absence of malice").

More recently, in Kolstad v. American Dental Ass'n., 527 U.S. 526, 533-34 (1999), it was held that while good faith efforts at Title VII compliance may protect an employer from punitive damages, it cannot operate to extinguish primary liability for backpay and other appropriate relief. Relying on the reasoning in Smith v. Wade, 461 U.S. 30 (1983) (liability under 42 U.S.C. § 1983), the Court explained the difference between the standard for compensatory relief and for an award of punitive damages in Title VII cases, noting that the latter requires proof of "malice or reckless indifference" to the rights guaranteed by Title VII. Kolstad, 527 U.S. at 534. Thus an employer who intentionally engaged in conduct which violated the law but was unaware that it violated the law would be liable for compensatory damages, Id., but would not be held vicariously liable for punitive damages for acts of an agent where those acts were contrary to the employer's good faith efforts to comply with Title VII. Id. at 544.

Kolstad elaborated a defense originally developed in Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) and Faragher v. Boca Raton, 524 U.S. 775, 807 (1998), wherein the Court attempted to reconcile traditional agency principles of vicarious liability with the strictures of Title VII. The defense is available in a hostile environment case when an employer can show by a preponderance of the evidence both that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Burlington, 524 U.S. at 765. Burlington expressly states, however, that "[n]o affirmative defense is available ... when the supervisor's harassment culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment." Id.

Congress has explicitly created good faith affirmative defenses in a number of employment-related

statutes based upon narrowly drawn exceptions specifically set forth in the governing legislation. Such a defense is conspicuously absent from § 1324b. These narrowly tailored statutory defenses do not protect an employer's own misunderstanding of the statute; they are instead more analogous to an estoppel, designed to protect employers or others from a particular agency's mistaken interpretations of statutory requirements. The defenses thus contain a requirement of detrimental reliance on agency advice and do not come into play until after there has been a failure to comply with the relevant statute due to an erroneous agency interpretation upon which the employer detrimentally relied. Courts have construed even these statutory defenses extremely narrowly. In Albemarle Paper, for example, the court examined section 12(b) of Title VII and concluded that,

> Title VII itself recognizes a complete, but very narrow, immunity for employer conduct shown to have been undertaken 'in good faith, in conformity with, and in reliance on any written interpretation or opinion of the (Equal Employment Opportunity) Commission.' 42 U.S.C. s 2000e-12(b). It is not for the courts to upset this legislative choice to recognize only a narrowly defined 'good faith' defense.

422 U.S. 405, 423 n.17.

Similar statutory defenses under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2001), the Walsh-Healy Act, 41 U.S.C. § 35 et seq. (2001), and the Bacon-Davis Act, 40 U.S.C. § 276a et seq. (2001), have been narrowly read as well. Section (a) of the Portal to Portal Act, 29 U.S.C. § 259 (2001), provides that with respect to those statutes,

> . . . no employer shall be subject to any liability ... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation [of the designated agency official].

The Portal Act defense was designed to protect an employer who took action based on an interpretation of law by a government agency, even if the interpretation turns out to be wrong. EEOC v. Home Ins. Co., 672 F.2d 252, 263 (2nd Cir. 1982). It was not designed to make the employer its own judge of whether it violated the statute. Instead, it requires the employer to specifically plead and prove three interrelated elements: (1) that its action was taken in reliance on a ruling of [the Secretary of Labor, the Wage and Hour Administrator or other appropriate official], (2) that it was in conformity with that ruling, and (3) that it was in good faith. See, e.g., Spring v. Washington Glass Co., 153 F. Supp. 312, 318 (W.D. Pa. 1957).

Section 260 of the Portal Act provides a less stringent defense which permits, but does not require, the discretionary withholding of liquidated damages. 29 U.S.C. § 260. It is available only for the purpose of mitigating liquidated damages, and not as a defense to primary liability. It provides that:

> . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

Id.

This result is consistent with the view that an employer's good faith under appropriate circumstances may operate to rebut willfulness, malice or recklessness of the sort sufficient to justify punitive or liquidated damages while not affecting the employer's primary liability for the underlying violation.

There are nevertheless also circumstances where good faith has been considered as a defense to liability, even in the absence of statutory authority. See Burlington, 524 U.S. 742, and Faragher, 524 U.S. 775 (shaping a new affirmative defense to certain hostile environment sexual harassment claims, but carefully limiting the defense to cases where no "tangible employment action" was taken against the employee).

It has also been held that due process concerns may be implicated where an agency's own regulations give rise to detrimental reliance. United States v. Pennsylvania Indus. Chem. Co. (PICCO), 411 U.S. 655 (1973) (overturning the conviction of a corporation which was affirmatively misled by a regulation of the Army Corps. of Engineers to believe its conduct was lawful). It is not clear whether PICCO has any application in a civil case, or, if so, whether it survives such cases as Heckler v. Community Health Servs., 467 U.S. 51 (1984) and Office of Personnel Management v. Richmond, 496 U.S. 414, 426-27 (1990) (noting dispute over whether PICCO was an estoppel case). This issue need not be resolved here because Fairfield has made no claim that it detrimentally relied on any specific agency regulation. It simply describes its good intentions and the history of its experience with INS.

Review of these cases persuades me that the creation of affirmative defenses not expressly set forth in a statute must be approached with caution. Where Congress took steps to enact a new statutory good faith affirmative defense to certain violations of § 1324a, I would not lightly presume that it intended to create a similar defense to certain violations of § 1324b but simply neglected to say so. In the absence of Congressional action to enact a statutory defense, I decline to hold that an employer may become exempt from liability as to § 1324b based upon generalized claims that it sought in good faith to comply with § 1324a. To do otherwise would be to engraft a new substantive rule upon the statute by creating from whole cloth an immunity nowhere contemplated in the governing legislation.

IV. CONCLUSION

I need not decide in this case whether there may ever be facts and circumstances sufficient to justify the creation of a good faith affirmative defense to alleged violations of § 1324b. I decide only that, assuming arguendo there may be such facts and circumstances, they have not been presented here.

ORDER

OSC's motion to strike is denied as to Fairfield's first defense. The motion is granted as to the fourth defense, which is hereby stricken.

SO ORDERED.

Dated and entered this 6th day of September, 2001.

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Ellen K. Thomas
Administrative Law Judge