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

ALEJANDRA AVILA, Charging Party, and UNITED STATES OF AMERICA, Complainants, v. SELECT TEMPORARIES, INC., D/B/A SELECT PERSONNEL SERVICES, Respondent	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 01B00050 Judge Robert L. Barton, Jr.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL DISCOVERY

(*May 24, 2002*)

I. INTRODUCTION

On March 28, 2002, Complainant United States of America (Complainant) filed a motion to compel Select Temporaries, Inc., d/b/a Select Personnel Services (Respondent) to fully answer Complainant's First Set of Interrogatories and Complainant's First Request for Production of Documents. On April 8, 2002, Respondent filed its opposition to the motion to compel. In an order dated April 12, 2002, I found that Complainant had not complied with the good faith conferment requirement of Rule 68.23(b)(4) of the Office of the Chief Administrative Hearing Officer (OCAHO) Rules of Practice, or with my February 28, 2002, Order Governing Prehearing Procedures (OGPP). In my April 12 order, I held the motion to compel in abeyance until Complainant complied with the requirements of Rule 68.23 and the OGPP, and ordered a personal conference in which both parties would meaningfully discuss the merits of the dispute.

On May 2, 2002, the parties filed a Joint Certification of Good Faith Conferment in which the discovery dispute was narrowed. The Joint Certification stated that Interrogatory Nos. 2, 5, 7, 9, 12, and 15, and Document Production Request Nos. 1, 4, 5, 6, and 8 were no longer at issue. The Joint

Certification concluded that the parties are "unable to resolve discovery requests Interrogatory No. 3 and Document Production Requests Nos. 7, 9, and 10." Having already briefed the issues raised by these discovery requests, the parties concluded that they were now "ripe for judicial review."

As previously arranged with the parties, a telephone prehearing conference in this case was conducted on May 22, 2002, at 9:30 a.m. Eastern Standard Time. The parties were notified of the conference by telephone and by the written Notice of Telephone Prehearing Conference issued on May 9, 2002. The primary purpose of the conference was to consider Complainant's motion to compel discovery and Respondent's separate motions for a protective order and to compel discovery. A court reporter was present to record the conference, and an official transcript of the same will be prepared.

Linda White Andrews, Esq., trial counsel for the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), appeared for Complainant. Also present for Complainant were Jane Schaffner and Gladys Chavez. Robert Wallace, Esq., and Teresa Kenney, Esq., appeared for Respondent.

II. DISCUSSION

This discovery dispute arises in the context of an immigration-related disparate treatment discrimination case. Specifically, Count I of the Complaint alleges that on August 18, 2000, Respondent discriminated on the basis of national origin and/or citizenship and committed an unfair documentary practice against the Charging Party by requesting "more or different documents than are required" under 8 U.S.C. § 1324a(b), when it required her to produce her resident alien card for employment eligibility verification. Count II further allleges that Respondent retaliated against the Charging Party by "blacklisting" her when she voiced her opposition to the alleged discrimination.

A. Interrogatory No. 3

On November 7, 2001, Complainant issued its First Set of Interrogatories. The interrogatory in dispute, Interrogatory No. 3, requested that Respondent identify all individuals who were not hired by Respondent, were not allowed to continue working for Respondent, and/or whose employment was terminated by Respondent because of their failure to produce employment eligibility (I-9) documentation requested by Respondent, from January 1, 2000, to the present. Respondent objects to this discovery request as irrelevant to the subject matter of this case. Respondent contends that this is a disparate treatment case regarding one alleged discriminatory act, and the broad discovery Complainant seeks is improper.

1. Relevance of an employer's general pattern of discriminatory treatment in an individual disparate treatment case

As Complainant points out, evidence of an employer's general pattern of discriminatory treatment is relevant in an individual disparate treatment case. This notion is well accepted in the Court of Appeals for the Ninth Circuit (Ninth Circuit), the governing federal circuit in this California-based action. In Diaz v.

American Telephone & Telegraph, 752 F.2d 1356 (9th Cir. 1985), a Mexican-American filed a Title VII action alleging that he was denied a promotion on the basis of race or national origin. Id. at 1358. During discovery, defendant AT&T refused to provide Diaz with certain employment statistics and Diaz filed a motion to compel that discovery. Id. Simultaneously, however, AT&T filed a motion for summary judgement on the basis that another Mexican-American received the promotion that Diaz was seeking. Id. Without ruling on Diaz's motion to compel discovery of the statistics, the district court granted AT&T's motion, ruling that as a matter of law, the promotion of another Mexican-American precluded Diaz from establishing a *prima facie* case of discrimination. Id. The Ninth Circuit reversed, holding that the fourth element of the traditional McDonnell Douglas test is not dependent upon an examination of whom, if anyone, was promoted instead of the plaintiff. Id. at 1359. Rather, the fourth element of McDonnell Douglas is ordinarily met when, as in this case, an employer continues to consider other applicants whose qualifications are comparable to the plaintiff's after refusing to consider or rejecting the plaintiff. Id.

More important, the Ninth Circuit also addressed Diaz's motion to compel discovery of the statistical data regarding AT&T's hiring and promotion patterns in its Western Region. The court explained that statistical evidence is "unquestionably relevant" in a Title VII disparate treatment case for two reasons. Id. at 1362. First, statistical information, although it might not be directly probative of any of the four specific McDonnell Douglas elements, is helpful in establishing a prima facie case. Id. Thus, when a plaintiff is denied statistical data needed to substantiate the inference of discrimination, summary judgment is "patently inappropriate." Id at 1362-63. Second, a plaintiff is also entitled to use statistical evidence to show that a defendant's articulated nondiscriminatory reason for the employment decision in question is pretextual. Id. at 1363 (citing McDonnell Douglas v. Green, 411 U.S. at 804-05). The same statistical evidence introduced to help establish a prima facie case may also be again considered in determining whether the defendant's explanation for the employment decision was pretextual. Id. n.8 (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981)).

Most important, the Ninth Circuit explained *why* such statistical data is relevant:

> Statistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue. In some cases, statistical evidence alone may be sufficient to establish a *prima facie* case.

Id. at 1363 (citations omitted) (underscoring added). While this statement specifically concerns statistical data, it has broader implications. That is, evidence that "can be used to establish a general discriminatory pattern," whether it is statistics, employment applications, or the testimony of other employees, is relevant to an individual disparate treatment case. Accordingly, the Ninth Circuit concluded that "Diaz is entitled to attempt to prove that such a pattern exists." Id.

Subsequent to Diaz, the Ninth Circuit reaffirmed the idea that an employer's general discriminatory pattern is relevant to an individual disparate treatment case. In Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995), a former waitress at a motel restaurant filed a Title VII lawsuit alleging quid pro quo sexual harassment because she was fired the day after refusing the owner's sexual advances. Heyne, 69 F.3d at 1477. The district court granted the defendant's motion in limine to exclude evidence of the owner's alleged sexual harassment of five other female employees. Id. At trial, the owner stated that he discharged the plaintiff because she was late for work on two consecutive days, and the jury returned a verdict in favor of the defendant. Id. The plaintiff appealed, arguing that the district court erred by refusing to admit the testimony of other female employees who claimed to have been harassed by the owner. Id. at 1478. The Ninth Circuit reversed and remanded, finding an abuse of discretion and prejudicial error.

According to the Ninth Circuit, the plaintiff was entitled to show that the owner's stated reason for firing her was pretextual, and that the real reason for her firing was her refusal of his sexual advances. Id. at 1479. This could have been accomplished through the testimony of the other female employees who were allegedly harassed. Id. Thus, "an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." Id. Similarly, "evidence of the employer's discriminatory attitude *in general* is relevant and admissible to prove . . . discrimination." Id. at 1479-80 (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 n.2 (1983)) (emphasis in original). The case was remanded so that evidence of the owner's alleged sexual harassment of other female workers could be used to prove his motive or intent in firing the plaintiff. Id. at 1480.

The district courts in the Ninth Circuit have applied the rule that an employer's general pattern of discriminatory treatment is relevant to an individual disparate treatment case. For example, in Jackson v. Montgomery Ward & Co., 173 F.R.D. 524 (D. Nev. 1997), a Title VII plaintiff filed a motion to compel discovery seeking information regarding other racial harassment or discrimination complaints against the employer. Jackson, 173 F.R.D. at 525. The court held such information relevant to the plaintiff's showing of pretext: "[D]iscovery of prior complaints of discrimination is permitted in order to prove that the reasons articulated for an adverse employment action are a pretext for discrimination." Id. Accordingly, the court granted the motion to compel. Id. at 529. See also Weiss v. Safeway, Inc., 189 F.R.D. (D. Ore. 1999) (personnel record of manager that possibly contained instances of similar discriminatory behavior held discoverable).

2. Relevance of post complaint discovery

Respondent has suggested that the discovery of facts that postdate the Complaint is irrelevant, citing Daly v. Sprague, 675 F.2d 716, 723-24 (5th Cir. 1982). R's Reply at 4. Respondent's citation to Daly is not persuasive. That opinion does not hold as a matter of law that the discovery of facts postdating the complaint should be denied as irrelevant. Rather than making such a general pronouncement of law, the Fifth Circuit in Daly merely affirmed, on an abuse of discretion standard of review, the district court's

determination that the discovery sought was not relevant to that particular proceeding under FED. R. CIV. P. 26. Id. at 723.

Moreover, a federal district court decision within the Ninth Circuit concludes that facts postdating an employment discrimination complaint are relevant, particularly where an employer's policies and practices are relevant to the case. See United States v. City of Torrance, 164 F.R.D. 493 (C. D. Cal. 1995). There, the United States filed suit alleging, *inter alia*, that the city's police and fire departments "have pursued and continue to pursue" discriminatory policies against minorities. Torrance, 164 F.R.D. at 494. The complaint was filed on July 14, 1993, and fact discovery was scheduled to end on February 28, 1995. Id. The defendants refused to provide information and documents subsequent to December 31, 1993, on the ground that such discovery was beyond the relevant time period. Id. The United States argued that it was entitled to information and documents "to the present" because the complaint alleged policies and practices that were ongoing. Id. The court noted that Rule 26(b) is liberally interpreted to permit wide-ranging discovery and explained that documents postdating January 1, 1994, were "relevant to both plaintiff's claims and defendant's defenses." Id. (quoting Joseph D.B. King v. E.F. Hutton & Co., 117 F.R.D. 2, 5 (D.D.C. 1987) ("[D]ocuments which bear a date after the filing of a complaint may relate to events occurring prior to the filing of the complaint.")). Accordingly, discovery postdating the filing of the complaint was ordered. Id. at 496. There is no general rule that discovery of facts postdating an employment discrimination complaint is improper. Rather, it appears that such information is often relevant to the issue of the employer's discriminatory or disparate treatment of others, and is clearly relevant.

3. Ruling

Upon reviewing the Ninth Circuit law, I reject Respondent's argument that Interrogatory No. 3 is not relevant or discoverable in this case. As Complainant points out, this request might reveal relevant information regarding Respondent's hiring patterns. Information that is relevant is certainly discoverable. Where, as here, information regarding the employer's hiring patterns is relevant, post-complaint information may be probative as to Respondent's hiring practices.

Complainant's motion to compel discovery regarding Interrogatory No. 3 is therefore granted. However, since Complainant has been unable to explain persuasively why it needs such data to the present time, I am going to limit this discovery to the date it was served, November 7, 2001, and not to the present. Furthermore, Respondent has the option of producing business records in accordance with FED. R. CIV. P. 33(d). Respondent must serve its response by June 14, 2002.

B. Document Production Requests No. 7, 9, and 10

1. Document Production Request No. 7

I deny Complainant's motion to compel discovery regarding Document Production Request No. 7. This request seeks all documents relating or referring to any job applicants who applied for work on August 18, 2001. Respondent objects on the basis of relevance. At the conference, Complainant

submitted that the year 2001 is a mistake, and that the request was meant to be for August 18, 2000, the date of the alleged discrimination. Despite the fact that Complainant issued this mistaken discovery request in November 2001, over six months ago, and Respondent has continued to object to it, Complainant has not amended this request for production. I sustain Respondent's objection and deny the motion to compel this a response to Request No. 7.

2. Document Production Request No. 9

Complainant's Document Production Request No. 9 seeks the I-9 forms for all employees hired from August 1, 2000, to the present, including copies of documents presented by employees to establish eligibility to work. As with Interrogatory No. 3, Respondent contends that this is a disparate treatment case regarding one alleged discriminatory act, and the broad discovery Complainant seeks is improper. As discussed above, however, I find that Ninth Circuit law holds that information regarding the employer's hiring patterns in a disparate treatment case is relevant, and that post-complaint information may be probative. Complainant's motion to compel an answer to Interrogatory No. 3 is granted. However, I am going to limit this discovery to the date it was served, November 7, 2001, and not to the present. Respondent may comply with Document Production Request No. 9 by making the pertinent business records available for inspection and copying. This discovery shall be completed by June 14, 2002.

3. Document Production Request No. 10

Although the joint filing states that Complainant's Document Production Request No. 10 is in dispute, the Complainant's motion to compel does not mention it, and during the conference Complainant acknowledged that this discovery dispute was not part of the motion to compel. Therefore, I issue no ruling on Request No. 10.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE