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

December 19, 2005

JUAN ANTONIO MARTINEZ, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00054
RAY'S BAR-B-QUE, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Juan Antonio Martinez filed a complaint in which he asserted that Ray's Bar-B-Que (Ray's) discriminated against him by terminating his employment on the basis of his national origin and citizenship status in violation of 8 U.S.C. § 1324b(a)(1) (2004) and by retaliating against him for the exercise of protected rights in violation of 8 U.S.C. § 1324b(a)(5). Ray's filed an answer in which it denied the material allegations of the complaint. After a period devoted to discovery and motion practice, a hearing was convened beginning at 9:30 a. m. on October 18, 2005 at McAllen, Texas. Witnesses were sworn, evidence was heard, and exhibits were admitted. A transcript was prepared consisting of 139 pages exclusive of the exhibits.

On November 15, 2005 the parties were notified that the transcript was available. They were given a period of time until December 1, 2005 in which to file motions for correction of the transcript pursuant to 28 C.F.R. § 68.48(b),[1] if necessary. No such motions were made. The parties were also given until December 15 to file posthearing briefs. Neither party did. The record was closed on December 15, 2005.

II. BACKGROUND FACTS

Few of the operative facts in this case are in dispute. Ray's Bar-B-Que (Ray's) is a buffet-style

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2004).

restaurant located at 1116 Pecan Boulevard in McAllen, Texas. It offers meals between the hours of 8 a.m. and 9 p.m. seven days a week, as well as providing catering services. Ray's currently has about seven employees. Its General Manager is Edward Vidaurre, the son-in-law of the owner for whom the restaurant is named. Albert Vidaurre, Edward's brother, also works at Ray's. Juan Antonio Martinez, Joe Cantu, Eduardo Garza, Donald Armin Alaniz, Becki Rodriguez, Silvia Montoya and Richard Dillon are all former employees of Ray's. Ricardo (Ricky) Ramirez currently works there as a cook.

Juan Antonio Martinez is a citizen of the United States who began working at Ray's in August of 2002 as a part-time cook. At that time Martinez also had a full time job as a cook at the Cornerstone Bar and Grill. When he started at Ray's, Martinez was trained by Ricardo Ramirez. Ramirez is an alien who has no legal authorization to live or work in the United States. Vidaurre said that Ramirez has worked for him on and off for about seven years, and acknowledged that he has known all that time that Ramirez was not authorized to live or work in the United States. Ramirez' wife, also known to be an alien not unauthorized for employment in the United States, worked at Ray's for a time as well.

About a month after Martinez started, Ramirez left Ray's to take a job somewhere else as a baker. Ramirez' wife also left her job at Ray's at the same time. Martinez' hours were then increased to full time with some overtime hours. Martinez started opening the restaurant in the morning and setting up in the kitchen, as Ramirez had previously done. Martinez' pay was increased to match his hourly earnings of $6.75 at his job at the Cornerstone Bar and Grill, which he had to quit in order to be able to increase his hours at Ray's.

Thereafter Martinez frequently worked seven days a week and more than eight hours in a day. Sometimes he worked double shifts. He continued to do this until the late spring of 2003 when Ramirez returned to work at Ray's, after which the hours assigned to Martinez and to the other cooks were significantly reduced. Martinez, Cantu, Garza, and Alaniz all testified as to the reduction in their hours after Ramirez came back. Cantu said his hours were cut so much he had to quit and move back into his mother's house. He said he went from 40-50 hours a week down to about 16 or 17. Garza too said he experienced such a drop in his hours that he only worked there for another month after Ramirez came back. He was told he wasn't on the schedule any more so he guessed that he was fired. Alaniz said that up until Ramirez came back he had been working overtime hours, but after that his hours were cut to the point that he had to get a second job. He said that he asked about the reason for the reduction in hours but that he never got a direct answer and that he did not leave Ray's on good terms.

Martinez continued to work at Ray's until about October 6, 2003. After that he did not find another job until December of 2003 when he started working at Jacqueline's Inc. (Jackie's) in Pharr, Texas, where he continued to work until May of 2005. He also worked at Rudy's Texas Bar-B-Que in McAllen for about six months in 2004. He currently works at Zarsky's Lumber Yard.

Abraham Leal is an investigator with the Wage and Hour Division of the Department of Labor. On April 13, 2004 the Division, through Abraham Leal, required Ray's to make payment to Martinez in the amount of $3,334.99 representing wages for unpaid overtime hours Martinez worked between September 21, 2002 and October 4, 2003 ($3611.25 gross wages less $276.26 deductions).

III. THE TESTIMONY PRESENTED

A. Complainant's Witnesses

Joe Cantu, Eduardo Garza, and Donald Armin Alaniz appeared at the hearing and testified as witnesses for Martinez. They described various irregularities in the payment of wages at Ray's. Cantu said he thought Ramirez was paid less than the other cooks. Martinez thought so too; he said that Ramirez told him when he left Ray's that he wasn't even making the minimum wage. Garza said there were other pay irregularities, such as the fact that he didn't get his overtime pay. Alaniz testified that he was paid for overtime "off the books" and in cash but at the regular pay rate, not time and a half. Martinez said that the overtime payment he received after the DOL investigation was a compromise amount. He thought it should have been more.

These witnesses agreed that when Ramirez left Ray's, Martinez became the person in charge of the kitchen. Martinez said that from his perspective everything was fine during this period and until Ramirez came back, but that after that Vidaurre started giving him warnings to the point where he had to start looking for another job. He said that in October he had to go to Mexico and needed the weekend off. He told Albert Vidaurre that he would be gone Saturday and Sunday, and Albert said it would be fine. But when he called in Saturday night he was told he had to work Sunday. He said that Monday morning they wouldn't talk to him and his name was no longer on the schedule. He understood this to mean that he had been fired.

B. Respondent's Witness

Edward Vidaurre was Ray's only witness. He said that he had 15-16 years of experience in the food service industry. He testified that while he would consult his father-in-law in the event of a major issue or an emergency such as a large delivery of bad brisket, for everyday management issues such as hiring the employees, payroll, ordering, and buying, he made those decisions himself and that he supervised the kitchen staff himself as well.

Vidaurre said that he generally starts new employees at $5.15 an hour, then after they show they can do the job they get an increase. Vidaurre initially said that when Ricardo Ramirez left Ray's in September 2002 he was making $5.15 an hour. He later said, however, that Ramirez started at the Mission store at $5.15 an hour, and when he came to McAllen his pay was increased to $5.50. This discrepancy in Vidaurre's testimony was not resolved and no payroll records were

offered in evidence. Vidaurre testified further that when Ramirez was rehired he was paid at the rate of $7.00 an hour and that is still his current rate of pay. It is unclear whether Ramirez is paid on or off the books and no records were offered to corroborate the testimony about his current pay rate.

Vidaurre said that Martinez lost the job through his own fault. He expressed several complaints about Martinez as an employee, for example, sometimes he was late, he came to work in shorts, and once he got arrested for public intoxication. He said that Martinez had started off as a good employee, but "faltered many times and I documented it many times." Vidaurre testified that he always wrote it in a ledger at work when employees came in late. When questioned specifically about that assertion, he said "I myself keep a ledger at work of who shows up, who doesn't show up, you know." He said his lawyer had the ledger, but no such ledger was offered in evidence. When asked if he had a copy of the documents showing when Martinez "faltered," Vidaurre said he thought his lawyer had them but no such documents were produced.

Vidaurre said that Martinez averaged about 60 hours a week. He also said that when Abraham Leal from Wage and Hour came to Ray's Martinez had already been paid in cash for those overtime hours but that there were no records to substantiate that payment had been made. Vidaurre said he was aware of the fact that Ramirez had no legal papers but added that Ramirez was the father of five United States citizen children.

IV. APPLICABLE LAW

Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2001), *Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251 (1990),[2] case law developed under that statute has long been held to be persuasive in interpreting § 1324b. *See, e.g.*, *Fakunmoju v. Claims Administration Corp.*, 4 OCAHO no. 624, 308, 322 (1994). Once a case has been fully tried on the merits, there is no need to focus on the familiar burden shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and the inquiry proceeds directly to the ultimate factual issue of whether or not the

[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 on the website at (http: //www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm # Published).

employer intentionally discriminated against the complainant. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). The burden of proof on that ultimate question remains at all times on the complaining party. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

Courts have recognized that an employment decision may be based on a mixture of legal and illegal motives. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309-10 (5th Cir. 2004). *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (when a protected characteristic was a motivating factor for an employment practice, the employer may be liable even though other factors also motivated the practice). When an employment decision is based on both a legitimate motive and an illegitimate motive, relief should be denied only if the employer would have made the same decision in the absence of the illegitimate motive. *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 355 (5th Cir. 2005).

V. DISCUSSION

A. Citizenship Status Discrimination

Vidaurre did not really dispute that the hours of the other cooks, including Martinez, were reduced significantly when Ramirez came back to work at Ray's or that those hours were assigned to Ramirez. Similarly, Vidaurre agreed that once Ramirez came back he was given the responsibility of opening the restaurant and setting up in the kitchen so that Martinez no longer did these tasks. Martinez said he flat out didn't believe that Ramirez was paid $7.00 an hour and I am skeptical about that as well. Vidaurre was insistent about the rate and said that he would pay Ramirez even more than that if he could. It does not appear that any other employee was paid so well.

Section 1324b(a)(4) permits, but does not require, an employer to prefer a citizen or national of the United States over an alien who is equally qualified. It does not permit an employer to give preferential treatment to an undocumented alien, regardless of whether or not the relative qualifications are equal. No exception is made based on the number of United States citizen children the alien has. Considering the record as a whole, it is evident that Ray's gave preferential treatment to Ricardo Ramirez, an undocumented worker, and gave less favorable treatment to Martinez and other lawful workers, and this was one of the principal factors leading to Martinez' discharge. OCAHO jurisprudence has observed that proof of a preference for unauthorized alien workers over qualified United States citizens may be evidence of discriminatory animus. *Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 691 (1997); *Lardy v. United Airlines Inc.*, 4 OCAHO no. 595, 31, 83 n.33 (1994).

I follow the reasoning set forth in *Rachid* and find that the mixed motive analysis is appropriate for analyzing cases arising under 8 U.S.C. § 1324b and for analyzing this case in particular. While there may be some merit to Vidaurre's complaints about Martinez as less than an ideal employee, I nevertheless find that Martinez would not have been terminated but for Ray's preferential treatment of Ricardo Ramirez, an illegal worker, and I conclude that liability is therefore established. Martinez said and I credit that Ray's did not complain about his work until after Ramirez returned. While there may have been additional reasons why Ramirez was given favored treatment it nevertheless appears more probable than not that Ray's was also motivated at least in part by the fact of Ramirez' undocumented status.

Given the incidence of under-the-table payments at Ray's and the evident willingness to employ illegal workers, the restaurant's employment practices appear to reflect a pattern of indifference to what the law requires and a lack of motivation to conform the conduct of the operation to those requirements. It is clear and undisputed that Ray's knew all along that Ramirez was unauthorized for employment in the United States. There was also some evidence that Ray's affirmatively sought to conceal the fact of Ramirez' employment from the Department of Labor and possibly from OSC as well. I conclude by a preponderance of evidence that citizenship status was at least in part a motivating factor in Ray's decision to give preferential treatment to Ricardo Rodriguez at the expense of lawful workers including Martinez. Unlike Martinez, Ramirez is unlikely to complain to the DOL or to anyone else about being paid "off the books," in cash, or at the regular rate for overtime hours. There was evidence that when Abraham Leal visited Ray's on behalf of the Wage and Hour Division, he interviewed the other employees and that Ramirez expressly declined to press for any overtime pay.

A finding of liability is corroborated by other considerations, including Ray's failure to produce Vidaurre's self-described ledger into which he supposedly entered all the times an employee was late or didn't show up for work. Although Vidaurre said he "documented" the many times Martinez "faltered," no such documentation was offered in evidence. In addition, I note that at the final prehearing conference only a month before the hearing it was represented that Richard Dillon, Silvia Montoya, and Becki Rodriguez, other coworkers of Martinez, were still employed at Ray's and that they would appear and give testimony to the effect that Martinez was a bad employee. Ray's amended witness list filed on October 4, 2005 contained the same representation. It was only at the hearing on October 18, however, that it was reported not only that none of these individuals would be produced to give testimony, but also that none of them was even employed at Ray's any longer. I draw a negative inference from Ray's failure to produce these witnesses or to report the termination of their employment until the day of the hearing.

B. Other Allegations - Retaliation and National Origin Discrimination

There was no evidence offered which supported the allegation of national origin based discrimination. The testimony was inconclusive with respect to the allegations of retaliation and

intimidation of witnesses. Alaniz testified to some suspicious activity but the testimony was vague and was not connected to any manager at Ray's. While there may be cause to entertain some suspicions, such suspicions do not provide a sufficient basis to reach any firm conclusions with respect to these allegations.

VI. RELIEF

A. Prospective Relief

A cease and desist order is mandatory and will be issued. Ray's will be required to comply with § 1324a(b) and § 1324b(a) and to retain the name and address of each individual who applies for work at the McAllen restaurant for a period of two years. It will also be required to post notices advising employees of their rights under § 1324b and of employer obligations under § 1324a.

Once a finding of discrimination is made, reinstatement is the preferred form of relief. This is not a case in which any consideration need be given to the impact of remedial measures on an innocent third party incumbent. There is no "innocent" incumbent in this case: the incumbent has no right to be employed in the United States and Ray's has no right to employ him. *See Iron Workers Local 455*, 7 OCAHO at 698. Notwithstanding the general preference for the reinstatement remedy, however, it is not being ordered in this case. The number of employees at Ray's is so small and the interaction among them so frequent that the prospect of a productive or harmonious working relationship were Martinez to return there is all but nonexistent. Accordingly three months of front pay will be awarded in lieu of reinstatement.

B. Back Pay Relief

There are two objectives at the remedial stage: deterrence and compensation. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Deterrence is best accomplished by attaching monetary consequences to discriminatory acts because economic penalties provide a more powerful deterrent than injunctive relief. A finding of violation is thus presumptive proof that some back pay is due. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 719 (1978).

Three elements must be considered when making an award of back pay: the appropriate time period, the items to be included in the gross award, and the amounts by which the award may be reduced. Ordinarily gross back pay would run from the date of discrimination, here October 6, 2003, until the date of the decision, minus interim earnings, with interest. In this case, however, it is undisputed that Martinez left his job at Jackie's voluntarily and for personal reasons so the back pay period will start on October 6, 2003, the date of discrimination, but will stop in May, 2005 when Martinez quit his job at Jackie's.

Neither party fully developed the record with respect to the back pay issue. Fringe benefits were

never discussed and it seems probable that there were none. The parties were in agreement about Martinez' base pay but they disputed the amount of overtime he typically worked in a week. No payroll records were submitted. I resolve any doubts as to this issue by adopting the 20 hour a week overtime figure established by Abraham Leal of the Wage and Hour division. The back pay remedy must otherwise be established based on the record made by the parties although that record is far from ideal.

Because the unauthorized worker, is, according to Vidaurre, being paid at the rate of $7.00 an hour, this is the rate at which the gross backpay will be calculated for Martinez. For purposes of this calculation his projected weekly earnings at Ray's will be based on $7.00 an hour for 40 hours, or $280.00 a week, plus 20 hours of overtime at $10.50 an hour, or $210.00 a week in overtime, for a total of $490.00 a week.

In calculating the appropriate relief, I have for convenience divided the time into three distinct periods. From October 2003 until December, 2003 when he started work at Jacqueline's, Martinez was unemployed. For this period he will be compensated at the rate of $490.00 a week for a total of $5,880.00 for 2003. Martinez earned $13,478.26 in 2004, $8,613.50 at Jacqueline's and $4,864.76 at Rudy's. He would have earned $25,480.00 had he been working at Ray's at the same rate as the undocumented worker. Compensation for 2004 will be the difference, or $12,001.74. From January until May, 2005 Martinez worked only at Jacqueline's where he earned $192.00 a week. Had he been working at Ray's instead of Ramirez for the same period he would have earned $490.00 a week, thus the differential is $298.00 a week. Compensation for 2005 will be made at that rate for 20 weeks or $5,960.00. Back pay will thus be awarded in the total amount of $23,841.74. Three months front pay in lieu of reinstatement will bring the total award to $29,721.74. Interest is to accrue on this sum in accordance with the rate set forth for the underpayment of taxes at 26 U.S.C. § 6621 of the Internal Revenue Code and will continue until full compliance is achieved.

VII. FINDINGS, CONCLUSIONS, AND ORDER

A. Findings of Fact

1. Ray's Bar-B-Que is a buffet-style restaurant located at 1116 Pecan Boulevard in McAllen, Texas.

2. Juan Antonio Martinez is a citizen of the United States.

3. Juan Antonio Martinez was employed at Ray's Bar-B-Que from August 2002 until about October 6, 2003.

4. Ray's Bar-B-Que currently has about seven employees.

5. The General Manager at Ray's Bar-B-Que is Edward Vidaurre,

6. Ricardo Ramirez is an alien not authorized for employment in the United States.

7. Ricardo Ramirez stopped working at Ray's in or around September 2003 and returned again in the spring of 2004.

8. Ray's Bar-B-Que reduced the hours of work for other cooks once Ricardo Ramirez returned to work there.

9. Ray's Bar-B-Que discharged Juan Antonio Martinez on or about October 6, 2003.

10. Ray's Bar-B-Que gave preferential treatment to Ricardo Ramirez to the detriment of other workers authorized to be employed in the United States, including Juan Antonio Martinez.

11. Ricardo Ramirez currently works at Ray's Bar-B-Que as a cook.

12. Ray's Bar-B-Que discriminated against Juan Antonio Martinez in part on the basis of his status as a United States citizen.

B. Conclusions of Law

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

2. Ray's Bar-B-Que is a person or entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. All conditions precedent to the institution of this action have been met.

4. Ray's Bar-B-Que discriminated against Juan Antonio Martinez on the basis of his citizenship in violation of 8 U.S.C. § 1324b(a)(1).

5. Insufficient evidence was presented to support Martinez' allegations of national origin based discrimination and retaliation.

6. This is a final decision and order pursuant to 8 U.S.C. § 1324b(g)(1) and will remain final unless appealed in accordance with § 1324b(i).

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

C. Order

Ray's Bar-B-Que is ordered to henceforth cease and desist from the unfair immigration-related employment practice found in this case including, without limiting the generality of the foregoing, the employment of illegal aliens in preference to United States citizens.

Ray's Bar-B-Que is directed to comply with the requirements of 8 U.S.C. § 1324a(b) and to retain for a period of two years from the date of this order the name and address of each individual who applies for hire at its McAllen restaurant.

Ray's Bar-B-Que is directed within thirty days of this order to post notices in a conspicuous place at the McAllen restaurant advising its employees about their rights under § 1324b and about employer obligations under § 1324a. The notices shall be displayed for a period of 180 days.

Within 30 days Ray's will pay to Juan Martinez the sum of $29,721.74.

Interest shall accrue on this sum in accordance with the rate set forth for the underpayment of taxes at 26 U.S.C. § 6621 of the Internal Revenue Code and will continue until compliance is achieved.

Ray's is cautioned that retaliation against any person for participation in this proceeding is expressly prohibited by 8 U.S.C. § 1324b(a)(6).

SO ORDERED.

Dated and entered this 19th day of December, 2005.

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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 seeks timely 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.