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

YOLANDA HERNANDEZ, ESTELA GUZMAN, AMPARO LAGUNAS AND MARIA HAYNIE, Complainants,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 95B00044
FARLEY CANDY CO., Respondent.	)	

ORDER GRANTING THE OFFICE OF SPECIAL COUNSEL'S MOTION TO INTERVENE
(June 1, 1995)

I. *Procedural History*

On March 7, 1995, Yolanda Hernandez, Estela Guzman, Amparo Lagunas and Maria Haynie (Complainants) filed a Complaint alleging that Farley Candy Co. (Farley or Respondent) engaged in unfair immigration-related employment practices in violation of § 102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. § 1324b. The Complaint, filed in the Office of the Chief Administrative Hearing Officer (OCAHO), includes an underlying charge previously filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) in accordance with 8 U.S.C. § 1324b(b)(1). Complainants filed their Complaint after being notified by OSC that it had not yet made a final determination as to the allegations contained in the charge. OSC's determination letter was dated December 6, 1994.

On April 4, 1994, OSC filed a Motion to Intervene as a party in this action and enclosed its proposed Complaint in Intervention.

In response to Respondent's request for an extension of time in order to file an opposition to the Motion to Intervene, I granted and extended

the time in which to respond and extended the time in which to file a timely answer to the Complaint in order to resolve beforehand the issue of OSC's proposed intervention.

On May 12, 1995, Respondent filed its Opposition to the Motion to Intervene (Opposition) in which it argued that OSC, as a governmental entity and division of the Department of Justice (DOJ), is precluded from intervening under the doctrine of judicial estoppel. Respondent contends this is so because the Immigration and Naturalization Service (INS), also a branch of DOJ, already investigated Farley for violation of the § 1324a prohibition against employment of unauthorized aliens. Respondent alleges that by attempting to intervene, OSC asserts "a position which is inconsistent with the position previously asserted by the INS." Opposition at 3.

II. *Discussion*

Respondent appears to be under a misconception as to the respective roles of INS and OSC in enforcing IRCA.[1] INS is charged with enforcement of IRCA's prohibition against the employment of unauthorized aliens, including the requirement of § 1324a that employers timely complete employment eligibility verification forms (Forms I-9) for each individual hired. OSC is responsible for investigating allegations of discrimination based on an individual's national origin or citizenship status, or retaliation, as prohibited by § 1324b. While the two sections of Title 8 are related, and § 1324b was enacted in response to concerns that § 1324a would result in unfair immigration-related employment discrimination by employers, the two sections enacted separate and distinct violations, the policing and enforcement of which were assigned separately to INS and OSC. For example, this dichotomy is evident in the OCAHO regulation specifically affording OSC but not INS the opportunity to seek

[1] That INS investigated Respondent for alleged § 1324a violations with regard to the same individuals who are Complainants in this case does not bar OSC from asserting its own cause of action under § 1324b. However, the same facts may provide a defense for Respondent to allegations of unfair immigration-related employment discrimination. Based on the pleadings to date, however, I cannot conclude that Respondent terminated Complainants solely on the basis of information provided to it by INS. The defense that Respondent reasonably relied on INS provided data to terminate Complainants remains an issue for subsequent resolution either on the basis of pleadings filed by the parties or evidence adduced at hearing, in the event a hearing takes place.

intervention in complaints alleging unfair immigration-related employment practices. See 28 C.F.R. § 68.15.[2]

The interplay of an employer's obligations under sections 1324a and 1324b respectively do not per se give rise to inconsistent practices on the part of INS and OSC as the agencies charged with enforcement of those obligations on behalf of the public. Nor does anything shown in the pleadings on the intervention motion practice effect an estoppel in law or fact against OSC. Respondent's claims in opposition to OSC intervention are not persuasive.

Accordingly, where OSC shows good cause and no prejudice appears to result to Respondent, OSC motions to intervene are generally favored. See, e.g., Jones v. De Witt Nursing Home, 1 OCAHO 137 (1990). Prior to making a decision on OSC's Motion to Intervene, however, a jurisdictional issue must be addressed.

Title 8, U.S.C. § 1324b(b)(2) obliges OSC to notify individuals making a § 1324b charge within 120 days (of filing the charge) of its decision not to file a complaint on their behalf; "failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period." See generally United States v. Workrite Uniform Co., 5 OCAHO 736 (1995), appeal filed, No. 95-70344 (9th Cir. 1995).

Workrite held that "the 120-day as well as the 90-day limitation periods set out in § 1324b are applicable to OSC . . ." and must be strictly construed as a statute of limitations. Workrite, 5 OCAHO 736 at 4. Although Workrite dealt with OSC's ability to file a complaint on behalf of another and not with intervention as here, it would appear that the principles espoused in Workrite are equally applicable to the case at hand.

Complainants' OSC charge is dated July 29, 1994. However, it is not clear whether this is the date on which OSC received the charge. Although OSC regulations provide that a charge is filed on the date it is postmarked, the file does not disclose the date of mailing. See 28 C.F.R. § 44.300(b). The determination letter addressed to Complainants' attorney is dated December 6, 1994. Supposing that

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[2] See generally Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

Complainants received OSC's determination letter as early as December 6, notification appears to have been effected more than 120 days after the charge was filed. Under Workrite, OSC would be prohibited from filing a complaint.

Assuming that OSC can show some equitable or other reason for tolling the statute of limitations, there is the additional problem that OSC apparently failed to file a complaint, or in this case its Motion to Intervene, within 90 days of the charging parties' receipt of the determination letter.[3] Nevertheless, I do not find that OSC's failure to adhere to the time limits of § 1324b(d)(2) affects its right to intervene in this case.[4] It does, however, affect OSC's right to allege new or different causes of action beyond the allegations of the Complaint at hand.[5] I reach this conclusion because OSC's Complaint in intervention substantially mirrors the allegations set forth in this Complaint. Differences between Complainants' Complaint and OSC's Complaint appear to reflect only differing levels of detail and do not enlarge upon the original causes of action. Accordingly, I grant OSC's Motion to Intervene.

SO ORDERED.

Dated and entered this 1st day of June, 1995.

MARVIN H. MORSE
Administrative Law Judge

[3] The Motion to Intervene was filed on April 4, 1995, more than 90 days after the date of the determination letter, i.e., dated December 6, 1994.

[4] Title 28, C.F.R. 68.15 provides, without denoting any time limitation, that OSC may petition to intervene in any unfair immigration-related employment case.

[5] Upon a showing by OSC that its determination letter to Complainants was sent within 120 days of receipt of the charge, i.e., that the rule of Workrite is not implicated, OSC can file new or different allegations in this case if it so chooses, in accordance with 28 C.F.R. § 68.9(e).