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

April 11, 1997

MICHAEL K. LEE,	)
Complainant,	)
	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 97B00031
AT&T,	)
Respondent.	)
	)

ORDER EXCLUDING COMPLAINANT'S REPRESENTATIVE

I. *Background*

On November 25, 1996, Complainant Michael K. Lee (hereinafter referred to as Complainant or Lee) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against AT&T. The complaint is not signed by Lee, but rather by John Kotmair, pursuant to a power of attorney signed by Lee on October 22, 1996, authorizing, *inter alia*, Kotmair to represent him before an Administrative Law Judge.

On January 16, 1997, Lucent Technologies, Inc. (hereinafter Lucent) filed an answer to the complaint, asserting in the answer that it has been divested by AT&T, but that it was the employing entity of Complainant. Although it did not seek formal substitution, Lucent asserts that it is the proper respondent in this matter. The answer admits certain allegations of the complaint and denies certain allegations. For example, the answer admits that Lee worked for Respondent from July 15, 1991 to August 2, 1994, but asserts that he was terminated due to unsatisfactory conduct (insubordination), not because of his citizenship status. The answer further states that the complaint should be dismissed because it fails to

state a claim upon which relief may be granted, the complaint is untimely, and there is a lack of subject matter jurisdiction.

Since the answer raises an issue as to timeliness, in the First Prehearing Order issued on January 17, 1997, I ordered Complainant to file with the Court any information showing the date he received the determination letter from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in which OSC informed Complainant that it would not file a complaint on Lee's behalf, but that he could file an action directly with an Administrative Law Judge. On February 6, 1997, Complainant filed a reply to the First Prehearing Order, asserting that, although OSC's determination letter is dated February 12, 1996, Complainant did not receive such notification from OSC until August 28, 1996.

On January 20, 1997, Complainant served a motion to strike the answer to the complaint filed by Lucent and to oppose any further responses from Lucent until Lucent proves that it was divested from AT&T prior to Lee's termination and that the decision to fire Lee was made by Lucent, rather than AT&T. On January 30, 1997, Lucent filed an opposition to the motion to strike. On February 11, 1997, Complainant served another motion to strike Lucent Technologies, and on that same date served a motion for default judgment because AT&T had not filed an answer to the complaint.

In the Second Prehearing Order, issued on February 24, 1997, I ordered Complainant to provide a supplemental response concerning its complaint allegations. I noted in that Order that although the complaint asserted that he was fired on February 6, 1994, in his October 19, 1995 letter to the OSC, he states that he was fired on August 2, 1994. I ordered Complainant either to amend his complaint or to explain the apparent inconsistency. Further, I ordered Complainant to submit a copy of the written notification from Respondent terminating his employment and to state whether the oral or written notification should be considered the date that he was fired. He has not done so. Complainant also was ordered to state the date(s) that AT&T refused to accept the documents specified in the complaint. Since Complainant had named AT&T as the respondent in the lawsuit and was seeking a default judgment against AT&T, I ordered Complainant to address the question of whether service on AT&T had been properly effectuated and to submit any evidence in its possession showing that AT&T was doing business at

1111 Woods Mill Road, Baldwin, Missouri 63011 on December 22, 1996, and that Norman Howard is an employee of AT&T authorized to accept service for AT&T. To date, Complainant has not provided that information.

On March 5, 1997, Complainant served a pleading entitled Response to Second Prehearing Order and Second Request for Default Judgement. Contrary to its title, it was not responsive to, and did not provide the information required by, the Second Prehearing Order. Since the pleading was not responsive to the Second Prehearing Order, and since a motion for default judgment already had been filed, in an order issued on March 6, 1997, I struck Complainant's pleading. I also reminded Complainant that the information required by the Second Prehearing Order must be filed by March 11, 1997, and if he failed to do so, appropriate sanctions might be imposed pursuant to 28 C.F.R. §§68.23 and 68.37. Further, I ordered Complainant not to file any further pleadings until a proper response was made to the Second Prehearing Order.[1]

Despite the clear directions provided by the March 6, 1997 Order, on March 11, 1997, Complainant filed a Motion for Findings of Fact and Conclusions of Law, which, contrary to its title, merely sought reconsideration of the Order Striking Complainant's Pleading. That pleading also was not accepted for filing.

In the Third Prehearing Order issued on March 12, 1997, I noted that I had allowed the parties to conduct limited discovery on the issues raised by the pending motions filed by Complainant, as well as the defenses raised by Lucent concerning lack of jurisdiction, lack of timeliness in filing the complaint, and improper service. I specifically gave leave to Lucent to file a motion addressing the issues raised in its answer to the complaint, as well as whether Lucent is properly substituted as the proper Respondent. I noted that Complainant's failure to comply with the Second Prehearing Order invited the imposition of sanctions or a possible finding of abandonment. Complainant specifically was ordered not to serve any new motions **or pleadings** until I adjudicated the pending motions, and

[1]When dealing with a party who persists in filing frivolous pleadings, it is sometimes necessary to enjoin that party from filing further pleadings without prior permission. *See, e.g., Brock v. Angelone*, 105 F.3d 952, 953 (4th Cir. 1997) (federal circuit court prohibits inmate from filing further appeals unless district court certifies appeal as having some arguable merit).

I stated that any pleadings served in violation of the Order would not be accepted for filing.

Despite this very clear ruling, on April 2, 1997, Complainant served a pleading entitled Answer to Judge Barton's Third Prehearing Order, which was submitted in direct defiance of my prior orders. Consequently, that pleading was stricken by my Order dated April 7, 1997.

Because Complainant's representative continued to violate my orders, I decided to schedule a telephone prehearing conference. On April 8, 1997, both Mr. Goemaat, counsel for Lucent Technologies, and Mr. Kotmair's office were informed by telephone that a telephone conference would be held at 9 a.m. on April 10, 1997, and on that same date a written order was issued directing both Mr. Kotmair and Mr. Goematt to appear for the conference on April 10. The April 8 Order informed the parties that the conference would address Complainant's compliance with past orders, Complainant's submission of unauthorized pleadings, as well as Mr. Kotmair's competence to practice before this tribunal, his compliance with the standards of conduct, and his continued participation in this case. Further, the parties were warned that if a party's representative failed to attend the conference, sanctions might be imposed on the party and/or representative, including possible exclusion of the party's representative.

On April 9, 1997, at 2:34 p.m., my office received by FAX a pleading from Complainant entitled Response to Order Directing Parties to Appear for Telephone Prehearing Conference, in which Kotmair stated that he was unavailable for the prehearing conference on April 10, 1997, and, citing 28 C.F.R. §68.13, requested a reasonable notice of at least seven days. This pleading is more significant for what it did not say than what it did say. First, it is not a motion or even a request for a postponement. Moreover, Mr. Kotmair did not state that he had a previous engagement for 9 a.m. on April 10, or that he would not be in the office at that time. Rather, he asserted that because of prior commitments and an already pressing schedule, he needed more notice.

Contrary to Kotmair's suggestion, the Rules of Practice do not require seven days notice of a prehearing conference and, in fact, do not prescribe any specific number of days notice. Rule 68.33 provides, in pertinent part, that a "judge may direct the parties or their

counsel to participate in a prehearing conference *at any reasonable time* prior to the hearing." (emphasis added). Sometimes prehearing conferences need to be scheduled on short notice, and, in this case, considering the propensity of Complainant's representative to violate orders, I concluded that this issue needed to be addressed very quickly. Moreover, Kotmair failed to show why he could not attend the conference at the scheduled time or why the notice was unreasonable.

Therefore, after receiving the "Response," at my direction, my secretary contacted Mr. Kotmair's office on the afternoon of April 9, 1997, and spoke to his secretary Bonnie and informed her that the conference would proceed as scheduled on April 10 at 9 a.m. Mr. Kotmair then came to the telephone. At that time he did not state that he had another engagement that prevented his attendance, but simply angrily informed my secretary that he would not attend the conference and hung up the telephone.

On April 10, 1997, at 9 a.m., my secretary placed a telephone call to Mr. Kotmair's office that was answered by his secretary Bonnie who stated that Mr. Kotmair was "unavailable" for the conference. When asked whether he was present in the office, she repeated that he was unavailable. My secretary informed her that the conference would proceed without Mr. Kotmair. This telephone conversation was recorded by the court reporter.

The conference then proceeded with Mr. Goemaat present as counsel for Lucent. The conference lasted approximately thirty minutes. At the end of the conference, I ruled that Mr. Kotmair had shown by his past actions, including his failure to attend the conference, that he was incompetent to represent Complainant in this action. I also ruled that he had violated the standards of conduct prescribed by 28 C.F.R. §68.35 by failing to comply with directions, by engaging in dilatory tactics, by refusing to adhere to reasonable standards of orderly and ethical conduct, and by failing to act in good faith. I further ruled that no further pleadings signed or prepared by Mr. Kotmair would be accepted for filing. Lucent was ordered to serve Complainant Michael Lee with any pleadings or communications, rather than Mr. Kotmair, and I stated that any further pleadings served on Lucent by Mr. Kotmair could be ignored since he was being excluded immediately from any further participation in the case.

Mr. Goemaat stated that on March 14, 1997 requests for admissions and interrogatories had been served on Mr. Kotmair as Complainant's representative. I ordered Lucent to serve those discovery requests directly on Mr. Lee, and Mr. Goemaat indicated he would do so by April 14, 1997. Finally, I gave Lucent an extension of time until June 2, 1997, to serve the motion referenced in the Third and Fourth Prehearing Orders.

The entire conference has been recorded by the court reporter. While these oral rulings are on the record, since Mr. Kotmair did not attend the conference, I stated during the conference that a written ruling also would be issued. After the service of this Order, Mr. Kotmair will be deleted from the service list.

II. *Lay Representatives*

As noted previously, Complainant has executed a power of attorney that authorizes a lay representative, John Kotmair, to represent him in this proceeding. Kotmair does not claim to be a lawyer, or to have attended law school. However, he is currently representing several individuals in other cases pending before this judge and other OCAHO Administrative Law Judges.

The Rules of Practice neither specifically authorize nor prohibit lay representation. *See* 28 C.F.R. §68.33 (1996). However, it has been the practice in past OCAHO cases to allow an individual party, whether a complainant or respondent, to appear *pro se*. It also has been the practice to allow a corporate party to be represented by a non-attorney owner or officer.[2] Nevertheless, the Rules of Practice do not specify what types of lay representation are permissible.

In this case an individual seeks to be represented by a non-attorney. Prior to the recent cases involving Mr. Kotmair, I have found only one OCAHO case that involved lay representation of an individual, and that representative was a relative of the individual respon-

[2] Since a corporation is not a natural person, but rather a legal entity, it can only appear in a lawsuit through an individual. Thus, allowing an owner, officer, or director to appear on behalf of a corporation is equivalent to *pro se* representation. While such *pro se* representation of a corporate party is not normally permissible in court proceedings, *see Annotation, Propriety and Effect of Corporation's Appearance Pro Se through Agent who is not Attorney*, 8 A.L.R. 5th (1993), it has been allowed in OCAHO administrative proceedings.

dent. *See United States v. Chaudry*, 3 OCAHO 588, at 1 (1993) (upon receiving no objection from the complainant and upon finding no prejudice to the Court, the respondent's brother, a non-attorney, was allowed to represent the respondent). Prior to Kotmair's appearance, there have not been any OCAHO cases involving lay representation of an individual complainant.[3]

When a party seeks to be represented by a lay individual, two questions are presented:

1. Whether the OCAHO Rules of Practice authorize the Judge to allow such representation; and

2. Whether the OCAHO Rules of Practice require the Judge to permit such representation.

With respect to the first question, Rule 68.33 does not specifically address the question of whether lay representatives are allowed. Rule 68.33 permits a party to appear on his own behalf, which suggests that *pro se* representation is allowed, and it specifically authorizes a party to be represented by a qualified attorney. 28 C.F.R. §68.33(a), (b) (1996). However, the Rules do not specifically authorize lay representation.

Rule 68.35, which governs Standards of Conduct, does suggest that lay representation is permitted. Rule 68.35(b) provides that the Administrative Law Judge may exclude a representative from a proceeding and "may suspend the proceeding for a reasonable time for the purpose of enabling a party to obtain another attorney or *representative*." (emphasis added). Since the rule refers to both an attorney and a representative, the latter can only mean a lay representative. Nevertheless, the rule is silent as to when and what type of lay representation is permitted. The rule certainly could be interpreted as allowing only certain types of lay representation (e.g., someone associated with the party, such as an officer or owner of a corporate party).

[3] In *Alvarez v. Interstate Highway Constr.*, 2 OCAHO 385, at 2 (1991), the Judge permitted an association of employers to represent the respondent company upon finding reliable proof that the party had authorized representation by a lay representative and that the non-attorney association possessed some degree of competence, "including a familiarity with the statute and regulations that govern these proceedings."

The issue of Mr. Kotmair's lay representation has been discussed in some recent orders. In *Lee v. Airtouch Communications*, 6 OCAHO 901, at 8 (1996), the respondent sought to exclude Mr. Kotmair as a lay representative, in part because he is an alleged convicted felon.[4] However, since the case was dismissed on other grounds, the Judge made no findings or ruling on the lay representation issue. *Id*. at 13. In *Costigan v. NYNEX*, 6 OCAHO 918 (1997), a case decided by the undersigned, the respondent in that case moved to disqualify Complainant's representative, John Kotmair, solely on the ground that he is not an attorney. I concluded that the Rules of Practice neither specifically authorized nor prohibited lay representation, but suggested that lay representation might be permissible under the OCAHO Rules of Practice. As in *Airtouch*, because I granted NYNEX's motion to dismiss, I declined to decide the issue of lay representation. *Id*. at 12.

In *Costigan*, I further stated that, even assuming that lay representation is permissible, a particular lay representative may not be permitted to appear if there are reasonable concerns about his competence or ethical standards. If a lay representative seeks to represent a party in a particular case, the lay representative must act in accordance with the same ethical standards required of attorneys. Moreover, a representative may be barred from the proceeding if he fails to comply with directions or fails to adhere to reasonable standards of orderly and ethical conduct. 28 C.F.R. §68.35(b) (1996).

While I conclude that the OCAHO Rules of Practice do not bar all types of lay representation, I also find that lay representation is not a matter of right, but is subject to the direction and control of the judge. At the initial stage of the case, even assuming that the lay representative has secured the necessary authorization from the party, the lay representative's appearance in the case is subject to the control of the presiding judge, whether any objection is made by the opposing party or not. Thus, the Court serves as a gatekeeper to assure that a lay representative is competent and qualified to represent a party in the lawsuit, and that the representative will abide by the standards of conduct. Even assuming that the judge initially permits the lay representative to appear on behalf of a party, the lay representative must act in accordance with the same ethical standards required of attorneys. A representative may be barred by the judge

[4] The official record in that case shows that Mr. Kotmair was convicted in the federal district court of Maryland in 1982 for wilful failure to file income tax returns and aiding and abetting, and was sentenced by Judge Miller of that Court to serve one year in prison and to pay a fine of $5,000.

from the proceeding if the representative fails to act competently or fails to act in accordance with the standards of conduct required by 28 C.F.R. §68.35(b).

III. *Exclusion of Complainant's Representative*

In this case I conclude that Complainant's representative should be excluded for two reasons:

1. He is not competent to act as Complainant's representative in this proceeding; and

2. He has not acted in accordance with the standards of conduct.

With respect to the issue of competency, there are several important legal issues that have been raised in this lawsuit, including whether this tribunal has subject matter jurisdiction, whether the complaint is timely filed, whether the charge with OSC was filed in a timely manner, whether the complaint states a claim upon which relief may be granted, and whether Lucent may be properly substituted for AT&T as the party respondent in this case.[5] Although Complainant served a motion for default judgment (in fact, two default judgment motions), such motions are not automatically granted, even if the named respondent has not filed an answer to the complaint, especially if there are serious questions about jurisdiction.[6] I ordered both parties to submit further information with respect to these issues. Complainant's representative has failed to provide the information that my Second Prehearing Order directed him to provide. Moreover, his simplistic approach to these issues reflected in his pleadings shows that he either does not understand the legal issues or is acting in bad faith. In either case, he has amply demonstrated that he is not competent to act as Complainant's representative in this proceeding.

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[5]Although the OCAHO Rules do not directly address the issue of substitution of parties, the Federal Rules of Civil Procedure may be utilized as a general guideline in any situation not covered by the OCAHO Rules. 28 C.F.R. §68.1 (1996). Therefore, Rule 25 of the FRCP may be relevant to the issue of substitution of parties in this case.

[6]Complainant's representative does not seem to understand that default judgments are disfavored in the law and should be used only where the inaction of a party causes the case to come to a halt. *See H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970); *United States v. R & M Fashion, Inc.*, 6 OCAHO 826, at 2 (1995). The preferred disposition of a case is upon the merits and not by default judgment. *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970). An answer to the complaint has been filed in this case, and the question pending before this tribunal is whether the answer should be accepted, which depends on whether Lucent should be substituted for AT&T as the party respondent. Kotmair's insistence on entry of a default judgment in such an instance only shows his lack of understanding of the issues in this case.

Even assuming that a lay representative is competent to represent a party in a proceeding, the representative may be barred if he does not comport with the standards of conduct. The Rules of Practice specifically provide that a Judge may exclude a representative for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, or failure to act in good faith. 28 C.F.R. §68.35(b) (1996). Although the Rule is phrased in the disjunctive, not the conjunctive, I find that all four factors are present here.

Mr. Kotmair clearly has failed to comply with directions. He has not provided the information required by the Second Prehearing Order issued on February 24, 1997. That Order required that the information be filed within 15 days, or not later than March 11, 1997. Moreover, in the Third Prehearing Order issued on March 12, 1997, I reminded Complainant that he had not provided the information required by the Second Prehearing Order, and that his failure to act invited the imposition of sanctions.

Despite very specific rulings, Complainant's representative has continued to defy my orders prohibiting filing of any new motions or pleadings until he complied with the Second Prehearing Order, and until the pending motions, including Complainant's motion for default judgment, were adjudicated. On March 6, 1997, in rejecting Complainant's Response to Second Prehearing Order, I specifically ordered Complainant "not to file any further pleadings until a proper response is made to the Second Prehearing Order." In the Third Prehearing Order, I directed Complainant not to serve any new motions or pleadings until I had adjudicated the pending motions, and I warned that any pleadings served in violation of that Order would not be accepted for filing. Yet despite those very clear directions, on April 2, 1997, Kotmair served an unauthorized answer to the Third Prehearing Order. That pleading was stricken in an Order issued on April 7, 1997.

To date, Kotmair has submitted three unauthorized pleadings which have been stricken.[7] Addressing these unauthorized pleadings

[7]The unauthorized pleadings that were stricken are entitled "Response to Second Prehearing Order and Second Request for Default Judgment," served on March 5, 1997; "Motion for Findings of Fact and Conclusions of Law," served on March 11, 1997; and "Answer to Judge Barton's Third Prehearing Order," served on April 2, 1997. All of these unauthorized pleadings were signed by John Kotmair, and, therefore, he is responsible for their contents. *See* Fed. R. Civ. P. 11(b).

wastes valuable judicial time and resources, and there is no assurance that he will refrain from filing unauthorized pleadings in the future.

As a final example of refusal to comply with orders, Kotmair failed, without good cause, to attend the prehearing conference scheduled for April 10, 1997.[8] The conference was scheduled to give Kotmair the opportunity to show that he was competent to practice before this tribunal, that he would adhere to the standards of conduct, and that in the future he would refrain from filing unauthorized pleadings and that he would obey this tribunal's orders. By refusing to attend the conference (except on his own terms), he has waived the opportunity for a hearing on his fitness to practice. I hereby find that Kotmair has failed to comply with directions, and there is a substantial likelihood that such conduct will continue in the future.

Kotmair also has engaged in dilatory tactics by filing frivolous and unauthorized motions. A prime example was the filing of a second request for default judgment, when the first motion had not yet been adjudicated! The filing of these various motions simply has wasted judicial time and resources, which could have been utilized in considering the merits of this case.[9]

I find that Kotmair has refused to adhere to reasonable standards of orderly and ethical conduct and has failed to act in good faith. In addition to his propensity for ignoring and violating orders, the language used in the pleadings signed and filed by Kotmair are disrespectful and vituperative and would warrant sanctions and referral to the bar against any attorney utilizing such language. Although he is a lay representative, he is expected to comport himself with the

[8]Courts have dismissed actions or entered default judgments when a party has failed to attend a pretrial conference. *Ikerd v. Lacy*, 852 F.2d 1256, 1256, 1258 (10th Cir. 1988); *Price v. McGlathery* 792 F.2d 472, 475-76 (5th Cir. 1986). However, here dismissing the complaint would be punishing the client for Kotmair's misconduct. While that might be justified, the more appropriate sanction is to exclude the representative and allow the case to proceed.

[9]It is difficult to understand why the Complainant's representative would engage in such self-defeating maneuvers, since normally it is in the interest of the party bringing an action to proceed with the litigation. It is elemental that the Complainant only can obtain the relief sought in the complaint after the judge has issued a ruling on the merits and awarded back pay. Kotmair's actions may simply be a reflection of his lack of understanding of the legal process.

same high standards expected of legal counsel. As provided in 28 C.F.R. §68.35(a), all persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity and in an ethical manner.

The pleadings filed by Kotmair raise questions as to his fitness and competency to represent the Complainant in this case. The Judge may exclude from proceedings parties, or their representatives, who refuse to comply with directions, continue to use dilatory tactics, refuse to adhere to reasonable standards of orderly and ethical conduct, or fail to act in good faith. Kotmair's filings in this case raise serious questions both as to his competency and his ethics. By refusing to provide the information directed by the Second Prehearing Order, by serving repetitive, frivolous, and unauthorized pleadings in violation of my prior orders, and by his use of contemptuous and disrespectful language, I find that Kotmair has failed to comply with directions, has engaged in dilatory tactics, has failed to adhere to reasonable standards of orderly and ethical conduct, and has failed to act in good faith.

Consequently, I find that Mr. Kotmair is not qualified to act in a representative capacity, within the meaning of 28 C.F.R. §68.33, and has not comported himself with the standards of conduct required by 28 C.F.R. §68.35. He is hereby excluded from any further participation in this proceeding. No further filings signed or prepared by Mr. Kotmair will be accepted in this case. Further, Lucent Technologies is directed not to serve Mr. Kotmair with any further pleadings, but rather to serve the same on Complainant Lee directly, until he secures another representative.

Complainant may represent himself in this proceeding or may seek to obtain other representation. Any new representative must file a notice of appearance as required by the Rules of Practice. 28 C.F.R. §68.33. If Complainant again selects a non-attorney representative, that person will be required to show his qualifications, as well as his authority to act. If Complainant does not select another representative, he will be required to represent himself in this matter.

As provided during the prehearing conference on April 10, 1997, Lucent shall serve Michael Lee directly with the outstanding discovery requests. Lucent shall have until June 2, 1997, to file the motion referenced in the Third and Fourth Prehearing Orders.

IT IS SO ORDERED.

ROBERT L. BARTON, JR.
Administrative Law Judge