

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

June 30, 1994

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 94B00075
REDI-CUT FOODS, INC.,)
Respondent.)
_____)

ORDER GRANTING MOTION TO DISMISS

On September 10, 1994, Bertha Aguilera (complainant), an individual admitted for permanent residence in the United States, filed a charge with the Office of Special Counsel For Unfair Immigration-Related Employment Practices (OSC), asserting therein that on or about May 5, 1993, Redi-Cut Foods, Incorporated (respondent) violated the provisions of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

Specifically, complainant asserted that on that date she applied for employment with respondent firm and presented to Patricia Glaub (Glaub), respondent's chief of personnel, documents establishing complainant's eligibility for employment in the United States. Complainant also alleged that after having examined her documents, Glaub stated that those documents were false and refused to hire her.

Complainant also asserted that on May 10, 1993 she went to the offices of the Immigration and Naturalization Service (INS) to renew her "green card". On that visit she advised the INS representative of the May 5, 1993 incident at respondent's place of business, whereupon the INS personnel reviewed those documents and verified their validity.

Complainant has also alleged that she returned to respondent's place of business on the following day, presented her renewed "green card", and told Glaub that INS had verified the validity of her documents. She asserted that Glaub agreed to hire her, but she was warned that respondent would continue to investigate complainant's work authorization, and would fire her summarily if it was determined that her documents were not valid.

On April 8, 1994, after having investigated complainant's charge, OSC filed a Complaint on her behalf with this office, asserting the following facts:

Beginning in or before March 1992 through in or about September 1993, respondent requested that all non-U.S. citizens produce a document issued by the INS for reverification of work authorization on the Employment Eligibility Verification Form (Form I-9). During that same period, respondent issued a "reminder letter" to employees who submitted employment eligibility verification documentation that required reverification. Those employees who presented documents with an expiration date were sent the "reminder letter" prior to the pertinent expiration date, and employees who presented a receipt for work authorization documents were sent such letters prior to the expiration of the 90-day period for which such receipts are valid.

In the reminder letter, the recipient was informed of the date upon which the previously produced work authorization document would expire, and was also advised that he or she would be required to present respondent with an updated INS card prior to the expiration date. In addition, the letter warned that if the recipient could not comply with this request, he or she would not be allowed to continue to work until the request was satisfied.

From at least September 7, 1992 through in or about September 1993, respondent refused to accept Alien Registration Cards (Forms I-151) for employment verification purposes. During that time, respondent issued the aforementioned "reminder letter" to those employees who had previously produced an I-151 for employment verification purposes.

On or about May 5, 1993, complainant applied for work at respondent's, in the course of which she was required to fill out an employment application bearing the admonition "proof of U.S. citizenship or immigration status will be required if hired." Although complainant presented a Form I-151 that was genuine and sufficient for employ-

ment authorization purposes under IRCA, 8 U.S.C. § 1324a(b), Glaub told complainant that that form was not sufficient to establish employment eligibility and that she could work for respondent only if she obtained and presented a new INS-issued work authorization document. Despite the fact that her I-151 was valid and genuine for work authorization purposes, complainant applied with INS for a replacement alien registration receipt card.

On or about May 11, 1993, complainant returned to respondent's place of business, presented her application for a replacement alien registration receipt card, and was hired.

Complainant worked for respondent without incident until June 1993, when she was erroneously informed via a "reminder letter" that her INS-issued work authorization would expire on July 15, 1993, and was also advised that she could not continue to work for respondent unless she presented respondent with a new, INS-issued work authorization document. That notice specifically stated: "you will be required to present to us an updated INS card prior to the expiration date. If you can not (sic) provide us with this request, you will not be allowed to continue to work until this is completed."

Complainant's employment at respondent's firm ended on or about August 27, 1993.

The Complaint contained five (5) counts, alleging violations of IRCA, 8 U.S.C. § 1324b.

In Count I, OSC alleged that on or about May 5, 1993, respondent refused to honor, for purposes of satisfying the requirements of IRCA, 8 U.S.C. § 1324a(b), a valid and original Form I-151 tendered by complainant, in violation of the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6).

OSC alleged in Count II that on or about May 5, 1993, respondent required complainant to provide evidence that she had applied for a replacement alien registration receipt card to be eligible for employment, again, in violation of the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6).

Count III contained the allegation that in June 1993, respondent had incorrectly demanded, for purposes of satisfying the requirements of IRCA, 8 U.S.C. § 1324a(b), that complainant provide additional

INS-issued documentation to reverify her work authorization, in violation of the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6).

In Count IV, OSC alleged that it was respondent's regular and standard operating procedure from at least March 1992 through in or about September 1993 to demand that non-citizen employees present an INS-issued document to reverify their work authorization, thereby foreclosing the option that those employees had in order to have established their work authorization by presenting any number of documents, in violation of the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6).

In Count V, OSC alleged that it was respondent's regular and standard operating procedure from at least September 7, 1992 through in or about September 1993 to refuse to accept a Form I-151 for employment verification purposes, and to have required additional INS-issued work authorization documentation for that purpose, in violation of the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6).

On May 13, 1994, the parties filed a Joint Motion to Extend the Time for Filing an Answer, requesting therein that the time period for filing an answer to the Complaint be extended by thirty (30) days. In support of this motion, the parties advised that OSC and respondent had agreed upon the terms of a settlement agreement, and were awaiting complainant's signature on the closing documents.

On May 13, 1994, the undersigned granted the parties' motion, giving respondent an additional 30 days, or until June 17, 1994, to have filed an answer to the complaint.

On June 16, 1994, OSC filed a Motion to Dismiss, advising therein that it has entered into a settlement agreement with respondent resolving all disputes and matters in controversy raised by the complaint in what it termed "a fair and equitable manner." A copy of that settlement agreement was attached to OSC's motion.

OSC further advised that although complainant, a party to this action pursuant to IRCA, 8 U.S.C. § 1324b(e)(3), had been offered what OSC asserted was "full relief" for wages lost as a result of respondent's actions, complainant refused and continues to refuse to participate in the settlement agreement for the reason that complainant demands additional monetary compensation beyond lost wages as compensation

for her "mental suffering." See Motion to Dismiss, at 1; Chavez Decl., at 3.

It should be noted that IRCA, 8 U.S.C. § 1324b, does not provide for recovery of damages based upon "mental suffering", nor do the provisions of that statute authorize the Administrative Law Judge to award a private party any damages aside from back pay and, in the case of a represented private party, a reasonable attorney's fee. See 8 U.S.C. §§ 1324b(g)(2)(B); 1324b(h).

Under the terms of the settlement agreement, respondent agreed to pay a \$3,200 civil penalty to the United States, and offered complainant the sum of \$111.12, less amounts withheld for applicable taxes, which represents a three (3) day salary loss occasioned by respondent's refusal to accept complainant's proffered I-9 documentation.

As part of the settlement agreement which OSC negotiated, respondent has also agreed to conduct its employment verification procedures in a manner consistent with the requirements of the applicable law, to post a notice advising employees of their rights under IRCA, 8 U.S.C. § 1324b, to circulate the revised Handbook for Employers to all of its employees involved in completing the Form I-9, and to attend an educational seminar involving its duties under 8 U.S.C. § 1324b or to view an educational videotape provided by OSC.

OSC asserts, and properly so, that the agreement is valid even without complainant's signature. In particular, it notes that paragraph 18 of the agreement provides:

The Office of Special Counsel and Redi-Cut agree, in the event Ms. Aguilera does not sign this Settlement Agreement and General Release, to be bound by the terms of this Agreement and that the failure to obtain Ms. Aguilera's signature does not affect the validity of this Agreement.

OSC asserts that the settlement agreement offered complainant the full relief to which she is entitled under IRCA, and that complainant would not be entitled to additional relief even if this case were to proceed to hearing. Because the public interest will be vindicated by having the settlement agreement approved, and because complainant will not be prejudiced thereby, OSC requests that its motion be granted.

Complainant had 15 days to have responded to OSC's motion. 28 C.F.R. §§ 68.8(c)(2); 68.11(b), and has failed to do so. Accordingly, only OSC's motion is being considered.

OSC's motion presents a situation analogous to that considered by a colleague in United States v. McDonnell Douglas, 3 OCAHO 507 (4/5/93), wherein OSC and McDonnell Douglas sought to have OSC dismissed as a party from an action based on a negotiated settlement agreement. In their joint motion to dismiss, OSC and McDonnell Douglas asserted that 16 of the 22 charging parties had agreed to settle their claims, resulting in the six (6) nonsettling parties being unrepresented in the event that that motion were to have been granted and OSC dismissed.

In the decision granting OSC's motion, resulting in OSC having been dismissed as a party, the administrative law judge held that in matters of this type OSC and the charging parties with respect to whose charges OSC files complaints are acting in quite separate capacities. Id., at 16. Where OSC files a complaint resulting from a charge, as here, OSC does not represent the charging parties as legal counsel, per se, but rather represents the public interest. Id., at 15.

Therefore, the administrative law judge held that in the absence of a showing of resulting prejudice to any remaining charging parties from such dismissal therefrom, OSC can be dismissed from any Complaint which it files in this forum. Id., at 17-18.

Because it is found that complainant will not be prejudiced by the dismissal of OSC as a party in this proceeding, OSC's Motion to Dismiss is hereby granted.

Accordingly, OSC is dismissed as a party to this proceeding, and by separate order, Bertha Aguilera will be granted 15 days to show cause why she should not accept respondent's net offer of \$111.12 as the proper measure of compensation to which she is entitled under the provisions of IRCA, and in the event that she does not accept that sum from respondent firm, to also show cause why her charge should not be dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge