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

April 5, 1996

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 95B00143
HOTEL MARTHA WASHINGTON)
CORPORATION,)
Respondent.)
)

ERRATA

The Order Denying Respondent's Motion to Dismiss and Entering Judgment by Default issued March 15, 1996 is hereby corrected as follows:

1) At the top of page 5, lines 1 and 2 repeat the language of the last 2 lines at the bottom of page 4, and are therefore stricken.

2) Between the bottom of page 7 and the top of page 8 the following four lines were omitted, and are therefore inserted:

   Court was faced with a similar question under the N.L.R.A. In that case, the NLRB had issued a cease and desist order to halt the prosecution of a retaliatory suit by an employer against employees who had exercised protected labor rights. 461 U.S. at

3) At the top of page 9, lines 1 through 3 repeat the language of the last three lines on page 8, and are therefore stricken.

SO ORDERED.

Dated and entered this 5th day of April, 1996.

ELLEN K. THOMAS
Administrative Law Judge

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ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND ENTERING JUDGMENT BY DEFAULT

Introduction

On October 16, 1995, a complaint was filed by the Office of the Special Counsel (OSC) with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Hotel Martha Washington Corporation (Respondent or Hotel) engaged in retaliatory acts prohibited by the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b (a)(5). Service of the complaint was perfected on November 13, 1995, together with a Notice of Hearing and a copy of the applicable rules of practice and procedure.[1] No Answer was ever made to this Complaint, and on February 2, 1996, OSC filed a Motion for Default Judgment. No timely[2] response was made to this motion, but on February 14, 1996, Respondent requested additional time to respond and was allowed another 10 days. On

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1995).

[2] Section 68.11(b) provides that a party has ten (10) days after service of a written motion to file a response. Section 68.8(c)(2) provides that where service is had by ordinary mail, five (5) days shall be added to the prescribed period.

February 26, 1996, Respondent filed a Cross-Motion and Memorandum in support, together with supplementary documents. The relief sought was "an Order dismissing the instant proceeding as lacking a predicate offense" and an order for attorney's fees.

Respondent did not file an Answer to the Complaint or otherwise respond directly to the Complainant's Motion for Default Judgment. Complainant filed a Memorandum in Opposition to Respondent's Cross-Motion on March 7, 1996. Both Motions are ripe for ruling.

Procedural Background

As is set out in the Complaint in this case, there have been previous proceedings between the same parties in this matter before Administrative Law Judge (ALJ) McGuire in which he issued a summary decision in an earlier case based on facts and circumstances closely related to those here alleged, *United States v. Martha Washington Corp.*, 5 OCAHO 786 (1995) *(Martha Washington I).* The Complaint in that case was filed because Respondent had initiated a multiple count lawsuit against multiple Defendants, in the Supreme Court of the State of New York, Index No. 113866/94, on or about May 16, 1994, in which the sixth cause of action was a claim of abuse of process against three named individuals because they allegedly caused OSC to initiate an investigation "not for any legitimate purpose but to intimidate" the Hotel, 5 OCAHO 786, at 5.[3] The ALJ held the following material facts to be established by Respondent's admissions in its Answer and the contents of its attached Exhibits, including copies of the pleadings in the New York case:

> 1. Respondent employed more than three employees on the date of the alleged retaliatory acts and is subject to the provisions of IRCA.
>
> 2. Respondent posted memoranda at its place of business on May 4 and 6, 1994, which instructed hotel employees to bring specific employment authorization documents to the respondent's personnel office. OSC thereafter informed respondent by fax that it had initiated an investigation to determine whether the document request constituted a violation of IRCA.

[3] Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

3. As a direct result of the OSC investigation, respondent filed a lawsuit in the Supreme Court of New York on or about May 13, 1994, which included a count of abuse of process against Edith Patricia Klarmann, Rosa DeJesus, and Edgar DeJesus claiming they had "caused" OSC to commence its investigation. The Hotel sought nominal, compensatory, and exemplary damages in the amounts of $1, $10,000, and $5,000,000 respectively.

4. The suit was filed in May 1994, even before OSC had completed its investigation and prior to the filing of OSC's complaint with OCAHO.

As a matter of law, the ALJ concluded that the conduct complained of violated the non-retaliation provisions of IRCA, that the Hotel's alleged defenses were without merit, and that there was no reasonable basis for the abuse of process claim against the three individuals based on their having given information to OSC. In concluding that §1324b had been violated, the ALJ set out the burden of proof for a prima facie case of retaliation, finding that the first two elements were met by Respondent's own admissions and the remainder by sufficient record evidence to warrant a summary decision:

1. the individuals engaged in statutorily protected conduct;
2. the employer was aware of the activity;
3. the individuals suffered adverse consequences; and
4. a causal connection existed between the protected activity and the adverse action.

Accordingly, the ALJ issued an order to the Hotel ordering it to cease and desist the maintenance of the abuse of process count against the three named individuals, to pay a civil penalty of $6,000, or $2,000 for each violation, and to educate its personnel in compliance with IRCA. *Id.* at 13. It does not appear that review of this decision was sought pursuant to §1324b(i) within 60 days, and accordingly that Order became final pursuant to 8 U.S.C. §1324b(g)(1).

It was evidently not specifically brought to the ALJ's attention at the time of that decision that the New York court in *Hotel Martha Washington Corp. v. Noel Cruz, et al.,* Index No. 113866/94 (N.Y. Sup. Ct.), had already dismissed the entire complaint as unduly prolix,[4] stating in particular with respect to the abuse of process claim that

[4] Many of the pleadings in the original lawsuit were filed as Exhibits to Respondent's Cross-Motion in *Martha Washington I.* The complaint itself was not. It was described as having 157 numbered paragraphs, with many subparagraphs and 47 exhibits, including the complete texts of several depositions of hotel employees. The new complaint has been reduced to 105 numbered paragraphs, with an undisclosed number of exhibits.

an "unspecified investigation launched by the Department of Justice does not suffice (sic) a legal proceeding for purposes of pleading abuse of process." The instant action *(Martha Washington II)* arose because the New York court gave Respondent leave to file an amended complaint, which the Hotel did on or about April 17, 1995, not only re-alleging abuse of process, but adding a new claim for malicious prosecution as well. The new allegations in the abuse of process count included accusations that Klarmann, Edgar DeJesus, and Rosa DeJesus filed charges or persuaded others to file charges with OSC, as well as the original allegation that they requested the OSC to initiate an investigation.

Pertinent provisions of the Respondent's amended complaint include, *inter alia:*

> 155. That Klarmann, intentionally, willfully, and maliciously suggested to ROSA and EDGAR'S nephew, Ralph Garcia, Jr., to file complaints with the D. O. J. against the Hotel, knowing that the charges against the Hotel were fabricated.
>
> 156. That Klarmann even had Garcia Jr (sic) sign a blank complaint, which she later filled in with her fabricated details.
>
> 157. That Klarmann communicated with DOJ, personally and by counsel, without any legitimate purpose, but only to injure and damage the plaintiff.
>
> 158. That defendants, maliciously, without any lawful purpose, succeeded in having multiple investigations started by the DOJ, to wit:
>
> a. Independent Investigation #51–219;
>
> b. Charge #51–228 as to Garcia Jr., and
>
> c. Charge #51–228 as to Rosa; all three charges are annexed herewith as Exhibit "48".
>
> . . .
>
> 160. That such frivolous complaints and charges leveled by the defendants and their accomplices with the DOJ caused the plaintiff to suffer damages in the form of legal fees, costs, disbursements, and *inter alia* lost productivity from salaried employees; an on-going (sic) loss, given the *inter alia* unconstitutional, oxymoronic, and impermissible retaliation charge.
>
> 161. That the DOJ's retaliation charge was leveled at the request of the defendants and to assist the defendants in being "let-off-the-hook" by the plaintiff, and not for any legitimate purpose.
>
> . . .
>
> 172. That defendant's frivolous and fabricated allegations leveled against the plaintiff with DOJ, OIC, and DCHR were intention, (sic) malicious and purposeful acts of the defendants, intended to damage the plaintiff, and to "bring it to it's (sic) knees".

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173. That plaintiff has been vindicated, after the expenditure of much time and expense.

174. That as a proximate result of these defendants' malicious prosecutions, the Plaintiff has been injured.

Martha Washington II

The specific conduct complained of in the instant case is thus not the complaint in the original 1994 cause of action addressed in *Martha Washington I,* but the subsequent amended complaint in the same cause of action. That amended complaint stated a new sixth count for abuse of process and added a seventh count for malicious prosecution against the same three individuals, including the additional allegations that those three filed or assisted others in filing charges with the OSC concerning document abuse. The amended lawsuit sought, as did the original, $1, $10,000, and $5,000,000, as nominal, compensatory, and exemplary damages, respectively, for abuse of process and malicious prosecution. While these alleged retaliatory acts are not precisely the same acts involved in the former suit, they are obviously closely related. *Martha Washington II* alleges, in addition to the facts found in *Martha Washington I,* the following new facts:

20. On or about April 17, 1995, Respondent amended its state court lawsuit to include in its abuse of process count the additional allegations that Ms. Klarmann had persuaded Mr. Garcia and Ms. DeJesus to file charges with the Office of Special Counsel; that Ms. DeJesus had filed a charge with the Office of Special Counsel; and that Ms. Klarmann, Ms. DeJesus, Mr. DeJesus and others had requested the Office of Special Counsel to file its retaliation action for no "legitimate purpose."

21. In its amended state court lawsuit, Respondent also included a "malicious prosecution" cause of action against the same individuals.

22. In its amended state court lawsuit, Respondent seeks nominal, compensatory, and exemplary damages in the amount of $1, $10,000, and $5,000,000, respectively, for "Abuse of Process" and also for "Malicious Prosecution."

. . .

25. Respondent included Abuse of Process and Malicious Prosecution counts in its amended (April 17, 1995) state court lawsuit because it believed Ms. Klarmann provided the Office of Special Counsel with information in relation to the Special Counsel's independent investigation and because it believed she assisted others in filing charges with the Office of Special Counsel.

. . .

> 28. Respondent included Abuse of Process and Malicious Prosecution counts in its amended (April 17, 1995) state court lawsuit because it believed Ms. DeJesus provided the Office of Special Counsel with information in relation to the Special Counsel's independent investigation and because she filed a charge with the Office of Special Counsel.
>
> . . .
>
> 31. Respondent included Abuse of Process and Malicious Prosecution counts in its amended (April 17, 1995) state court lawsuit because it believed Mr. DeJesus provided the Office of Special Counsel with information in relation to the Special Counsel's independent investigation.

No answer having been filed to the Complaint, these allegations are deemed to be admitted pursuant to 28 C.F.R. §68.9(b). They clearly establish that the Hotel brought these counts against Ms. Klarmann, Mr. DeJesus, and Ms. DeJesus because they engaged in filing charges or assisted others in filing charges with OSC, or provided information to OSC.

Applicable Law

IRCA provides that it is an unfair immigration-related employment practice for a person or entity to intimidate, threaten, coerce or retaliate against any individual because that individual has testified, assisted or participated in any manner in an investigation or proceeding under 8 U.S.C. §1324b, and any individual so intimidated, threatened, coerced or retaliated against is considered to have been discriminated against for purposes of §1324b(d) and (g). 8 U.S.C. §1324b (a)(5); 28 C.F.R. §44.200(a)(2).

The intent of this provision is plain on its face: it is designed to protect any individual—that is, not just an employee, and not just a "protected individual" under §1324b, and not just a person whose conduct is otherwise exemplary—from intimidation, coercion, or retaliation because the person participated in any manner in an investigation or proceeding under §1324b.

OSC is the agency charged by law with the enforcement of §1324b of IRCA. Such enforcement depends upon the willingness of employees and other potential witnesses to come forward, to file charges, and to cooperate in the investigatory process. In no way is this statutory purpose served if OSC is compelled to conduct investigations under circumstances where witnesses are intimidated through a

personal lawsuit. Indeed, the integrity and effectiveness of the OSC investigatory process would be severely compromised if employees and other potential witnesses see that persons giving information to the OSC can be retaliated against with impunity.

To the extent that the original 1994 complaint against Edith Patricia Klarmann, Rosa DeJesus, and Edgar DeJesus was based upon the provision of information to OSC, this issue has already been adjudicated in *Martha Washington I,* and I do not propose to revisit that decision. To the extent, however, that the new amended abuse of process count was based upon new acts of providing information, filing charges, or assisting others in filing charges, it differs from the former case, albeit minimally, but nevertheless sufficiently to constitute a new and separate allegation of a different act of retaliation, as does the addition of another new count for malicious prosecution.

As was clearly stated in *Martha Washington I*, courts have not only disfavored lawsuits of the character of the state suit here, they have also gone to great lengths to protect employees under federal statutes analogous to IRCA. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Supreme 734. In its discussion, the Court noted:

> A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. . . . by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. . . .

461 U.S. at 740–41. Against that consideration, the Court weighed and rejected the countervailing principle of the right of access to the courts. 461 U.S. at 741. The Court found that the NLRB could enjoin a retaliatory state court action "based on insubstantial claims—suits that lack . . . a 'reasonable basis.'" 461 U.S. at 743–44.

Lower courts have likewise been diligent in insulating employees from coercive lawsuits when they utilize the tools provided by Congress to protect their rights. *See, e.g., Proulx v. Citibank*, 659 F. Supp. 972 (S.D.N.Y. 1987), *aff'd,* 862 F.2d 304 (2d Cir. 1988), *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980), *appeal dismissed, Cassidy v. Virginia Carolina Veneer Corp.,* 652 F.2d 380 (4th Cir. 1981), *Martinez v. Deaf Smith Co. Grain Processors,*

Inc., 583 F. Supp. 1200 (N.D. Tex. 1984), *EEOC v. Levi Strauss & Co.,* 515 F. Supp. 640 (N.D. Ill. 1981).

The Supreme Court in *Bill Johnson's* set forth two findings which must be made in order to find that a state suit is a prohibited act of retaliation:

1) that the suit was filed with a retaliatory motive, and

2) that the suit lacks a reasonable basis in fact or law.

The retaliatory motive has been demonstrated; we turn, therefore, to the second element, the sufficiency of the state law claims themselves.

Respondent's State Court Claims Lack Any Reasonable Basis in Fact or Law

As the most cursory review of the relevant authorities

Respondent's State Court Claims Lack Any Reasonable Basis in Fact or Law

As the most cursory review of the relevant authorities would have revealed, the Hotel's state claims against the three individuals were from their inception wholly unsupported and lacking not only in merit but also in any reasonable basis in fact or law.

A. *Abuse of Process*

First, in order to state a claim for abuse of process under New York law, the "process" alleged to be abused must involve an arrest, an attachment, or some other provisional remedy; even the filing of a summons and complaint in a civil action cannot form the basis for an abuse of process claim. *See, e.g., Jeff Isaac Rare Coins, Inc. v. Jaffe*, 792 F. Supp. 13 (E.D.N.Y. 1992), *Cuillo v. Shupnick,* 815 F. Supp. 133 (S.D.N.Y. 1993). *A fortiori*, providing information to a federal agency or filing charges or assisting others in filing charges cannot by any stretch of the imagination provide the basis for the claims sought to be asserted. This was made clear in the prior ALJ Order; it is still the case today.

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B. *Malicious Prosecution*

In order to state a claim for malicious prosecution under New York law, a plaintiff must establish 1) the initiation or continuation of a criminal proceeding against the plaintiff; 2) termination of the proceeding in plaintiff's favor; 3) the lack of probable cause for commencing the proceeding; and 4) actual malice as a motivation for defendant's actions. *Rounseville v. Zahl*, 13 F.2d 625, 628 (2d Cir. 1994) (citations omitted). These elements were never present here, as the three individuals never initiated *any* process, civil or criminal, against the Hotel. They simply gave information to OSC, or filed charges, or assisted others to file charges with OSC. It is clear that the purpose of the Hotel's state court allegations was solely to harass and retaliate: the motivation is amply demonstrated by the fact that the Hotel sought, *inter alia,* $5,000,000 in exemplary damages against the individuals it blamed for initiating OSC's investigation.

Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure were recently imposed upon a plaintiff's attorney in another New York case where allegations of malicious prosecution, *inter alia*, had been made in the absence of any criminal prosecution. Defense counsel had written a letter pointing out the fatal flaws in plaintiff's theory of the case, but even after being put on notice, plaintiff persisted in pursuing its case. In imposing sanctions, the court noted that the elements of a claim of malicious prosecution are well settled in New York law, and it should have been evident that even the minimum showing could not be made. *Gray v. Miller*, 892 F. Supp. 432 (N.D.N.Y. 1995).

Respondent's Motion to Dismiss

Respondent has moved to dismiss the complaint "as lacking a predicate offense," and for an order awarding attorneys fees to the Hotel. The motion is accompanied by a Memorandum and copies of various correspondence and pleadings in *Hotel Martha Washington v. Cruz et. al.,* Index No. 113866/94 (N.Y. Sup. Ct.).

The pertinent OCAHO procedural rule provides for motions to dismiss for failure to state a claim upon which relief can be granted, and is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure. 28 C.F.R. §68.10. Ordinarily these motions are designed to test the sufficiency of the Complaint. Here, how-

ever, Respondent has made no challenge to the Complaint's facial sufficiency. Rather, the Hotel appears (although this is by no means clear) to be attempting the assertion of an affirmative defense.

The Memorandum in support of this Motion is wholly devoid of any citation to caselaw supporting the Hotel's position and consists instead of numerous unsupported factual allegations[5] as to matters occurring subsequent to the filing of the Complaint, the thrust of which appears to be Respondent's belief that it belatedly complied with the Order in *Martha Washington I*,[6] and that this action is therefore moot.

The novel question of whether a Respondent who has failed to file a timely answer, or any answer, to a Complaint may, six months thereafter, raise an affirmative defense by way of a Motion to Dismiss will not be answered here. Whether or not Hotel Martha Washington has finally complied with the prior order is not the issue in this proceeding.[7]

Respondent's Motion to Dismiss is denied. A motion to dismiss does not contemplate dismissal based on a Respondent's disagreement with the factual allegations of the Complaint. Moreover, as a general rule, last minute voluntary cessation of the allegedly illegal conduct will not deprive a tribunal of authority to hear and decide the case. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1971). It appears, in any event, that the unlawful conduct has *not* ceased.

[5] Factual allegations in a brief or memorandum are not evidence, and I do not treat them as such.

[6] Exhibit 10 shows a "Notice of Withdrawal" of counts 6 and 7 in *Hotel Martha Washington v. Cruz et. al.*, which is file-stamped by the Clerk on February 14, 1996. New York Rule 3217, a copy of which is attached to Complainant's memorandum, notes that a party may discontinue a claim by service of such notice only before a responsive pleading is served, or within twenty days after service of the pleading asserting the claim, whichever is earlier. Otherwise a case may be discontinued only by stipulation of all parties or order of the Court. Neither of these events has occurred.

[7] While it appears that Hotel Martha Washington has paid the $6000.00 civil penalty assessed in that Order, there is no showing that it has educated its personnel as was required.

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Complainant's Motion for Default Judgment

On the basis of the factual allegations of the Complaint deemed admitted pursuant to §68.9(b), Complainant's Motion for Default Judgment should be, and is, granted.

Remedies

The Special Counsel has requested a cease and desist order, a civil monetary penalty of $15,000, and an order to educate Respondent's personnel.

Because of the egregious nature of the violation, OSC has asked for the maximum civil penalty pursuant to §1324b(g)(2) (B)(iv) II, which permits an order to:

> . . . a person or entity previously subject to a single order under this paragraph, to pay a civil penalty of not less than $2,000.00 and not more than $5,000.00 for each individual discriminated against.

Complainant's point is well taken that the prior penalty seems to have been an ineffective deterrent.

Findings of Fact and Conclusions of Law

Respondent Hotel Martha Washington is the subject of a prior related Order, *Martha Washington I,* 5 OCAHO 786 (1995), which issued a cease and desist order, assessed a maximum civil penalty of $2000 per individual, and directed Respondent to educate its personnel about the requirements of §§1324b and 1324a.

At all times relevant to this action, Respondent employed more than three employees.

On April 17, 1995, Respondent Hotel Martha Washington amended its Complaint in *Hotel Martha Washington v. Noel Cruz et. al.,* Index No. 113866/94 (N.Y. Sup. Ct.), to charge Edith Patricia Klarmann, Rosa DeJesus, and Edgar DeJesus with an amended count of abuse of process and a new count of malicious prosecution.

The Respondent did so because it believed Ms. Klarmann assisted others in filing charges with OSC and provided OSC with information, because Ms. DeJesus filed a charge with OSC and pro-

vided information, and because Mr. DeJesus provided information to OSC.

Respondent's abuse of process and malicious prosecution counts against Ms. Klarmann, Ms. DeJesus, and Mr. DeJesus constitute prohibited retaliation under 8 U.S.C. §1324b(a)(5). Filing charges, assisting others in filing charges, and providing information to OSC are protected conduct, in retaliation for which Respondent brought state law claims for abuse of process and malicious prosecution which have no basis in fact or law.

Respondent has not withdrawn these counts in a manner complying with New York Rule 3217.

Order

Pursuant to the findings of fact and conclusions of law, the abuse of process and malicious prosecution counts in the Hotel's April 17, 1995 amended complaint in *Hotel Martha Washington v. Noel Cruz, et. al.,* Index No. 113866/94 (N.Y. Sup. Ct.), constitute prohibited retaliation, an unfair immigration-related employment practice in violation of 8 U.S.C. §1324b(a)(5). In accordance with the provisions of 8 U.S.C. §1324b(g), the Respondent is ordered:

1. to cease and desist from the discriminatory practices set forth in the Complaint;

2. to pay the sum of $15,000 as the appropriate civil money assessment, or $5000 for each of 3 violations at issue, in connection with these violations; and

3. to educate all personnel involved in hiring and complying with 8 U.S.C. §1324b or §1324a about the requirements of such sections.

SO ORDERED.

Dated and entered this 15th day of March, 1996.

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.