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

August 30, 1996

MICHAEL K. LEE, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 96B00063
AIRTOUCH COMMUNICATIONS, Respondent.	)	

ORDER OF INQUIRY

Procedural History

Michael K. Lee, a United States citizen, filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on November 11, 1995, in which he alleged that Airtouch Communications[1] (respondent or AirTouch) engaged in unfair immigration-related employment practices on October 2, 1995 in violation of the Immigration and Nationality Act, 8 U.S.C. §1324b (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). He checked boxes on the charge form indicating that he was subjected to national origin discrimination, citizenship status discrimination, retaliation for asserting rights protected under 8 U.S.C. §1324b, and document abuse. A letter included with his charge set out a chronology of events detailing his negotiations with AirTouch about employment as a Senior RF engineer.

On March 18, 1996, OSC notified Mr. Lee that it had determined there was no reasonable cause to believe that a cause of action was stated for citizenship status discrimination or national origin dis-

[1] Respondent has indicated that its name is actually AirTouch Cellular.

crimination under 8 U.S.C. §1324b or for document abuse under §1324b(a)(6). The letter advised Mr. Lee that he had 90 days from its receipt to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

On June 21, 1996, a complaint was filed with OCAHO in Lee's name which was captioned as a *pro se* complaint, but was not signed by the nominal complainant. Rather, it bore the signature of John Kotmair, Jr.[2] The complaint asserts that Lee was fired by AirTouch on October 6, 1995 because of his citizenship status and national origin, that AirTouch refused to accept the documents Lee presented to show that he was authorized to work in the United States, and that AirTouch requested other, different documents.[3] The documents which the complaint alleges were not accepted were a "Statement of Citizenship (stating He is a U.S. citizen and is not subject to withholding of income taxes under Federal Law)" and an "Affidavit of Constructive Notice (He does not have an SSN and is not subject to the Social Security Act)." The document the complaint alleges that AirTouch requested was a "social security number/card."

An answer to the complaint was filed on August 2, 1996 which denied the material allegations of the complaint and asserted twelve separately denominated affirmative defenses. The thrust of this answer is that respondent admits asking complainant for his social security number for the purpose of complying with income tax withholding laws and regulations, but denies requesting the social security card itself, or asking for any documents whatsoever for the purpose of showing Lee's eligibility to work in the United States. Respondent denied firing complainant but stated it failed to hire him for several reasons, one being his unwillingness to disclose his social security number.

Respondent asserted further that:

[2] Although a document attached to the complaint appeared to give Kotmair a power of attorney solely for the purpose of obtaining information, a subsequent notice of appearance was filed on August 26, 1996 with an attached power of attorney signed by Lee specifically authorizing Kotmair to represent complainant in OCAHO proceedings.

[3] Although complainant's original charge had included an allegation of retaliation for asserting rights protected under 8 U.S.C. §1324b, the complaint did not allege retaliation; in fact, in response to the question of whether he was retaliated against, complainant checked the box indicating "No."

> Complainant has acted in bad faith, with the intent to harass, annoy and intimidate AirTouch, thus entitling AirTouch to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The documents and correspondence submitted to AirTouch by Complainant and the Complainant's Representative, John Kotmair, attached hereto as Exhibit A, show that Complainant is associated with a tax protest group led by Mr. Kotmair which propounds untenable, garbled interpretations of the law in support of its members' claims to be exempt from United States tax laws, and uses baseless litigation in order to achieve its ends.

AirTouch requests for this reason that attorneys' fees be assessed against complainant, as the complaint is without a reasonable basis in law or fact.

Applicable Rules

OCAHO rules of practice and procedure,[4] a copy of which was transmitted to each party with the Notice of Hearing, provide that a party may be represented by an attorney at no expense to the government. 28 C.F.R. §68.32(b)(1). The rules are silent, however, as to the question of whether a party may be represented by someone other than an attorney. The implication of the language of §68.32(b)(6) (referring to *any* individual acting in a representative capacity) and of §68.35 (discussing suspension of a proceeding for a reasonable time to enable a party to obtain another attorney *or representative*) (emphasis supplied) is certainly suggestive that representation is not limited to attorneys.

The Administrative Procedure Act, 5 U.S.C. §555(b), provides no assistance because it neither grants nor denies non-lawyers the authority to appear in a representative capacity, but leaves it to agency discretion to establish who is a qualified representative. OCAHO case law precedent, while not extensive, has previously authorized both organizations and individuals to engage in representation of a party, at least where the request was unopposed. *Alvarez v. Interstate Highway Constr.,* 2 OCAHO 385 at 2 (1991)[5] (Mountain States Employers' Counsel Inc. permitted to represent respondent

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

[5] 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.

on finding that organization was both authorized and competent), *United States v. Chaudry*, 3 OCAHO 588 at 1–2 (1993) (respondent's brother authorized to act as his representative, but the representation precluded the brother from being an interpreter or witness in the same proceeding).

As noted, a power of attorney has been filed in which Lee specifically authorizes Kotmair to represent him in OCAHO proceedings. While I am satisfied for purposes of 28 C.F.R. §68.32(b)(6) that Kotmair is authorized to represent complainant in this matter, before allowing him to represent another person, I must also find that he is capable of doing so. *Alvarez, supra*. Accordingly, he will be required to furnish a statement indicating his qualifications to undertake the representation of another. Basic familiarity with the statute and regulations governing these proceedings is expected of any representative, lay or otherwise. Both litigants and representatives in this forum are expected to make reasonable efforts to comply with the applicable procedural rules, and to invoke the judicial process only where there is a good faith reasonable basis to believe that the party has a meritorious claim. This includes an obligation to make a prefiling inquiry as to facts and the law.

Respondent has requested sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. This rule does not apply in OCAHO proceedings; nevertheless cases decided under it provide general guidance as to the appropriate expectations where one individual seeks to represent the interests of another. OCAHO rule §68.1 expressly provides that the federal rules may be used as a guideline. Rule 11 provides basically that the signature of a party or representative on a pleading certifies that to the best of the signer's knowledge and belief formed after reasonable inquiry, the claim is well grounded in fact and warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law. The signer of a pleading in this forum is expected to meet this standard. While Rule 11 does not apply, an administrative law judge (ALJ) may award attorneys' fees to a prevailing party against whom charges have been unreasonably brought, 8 U.S.C. §1324b (h) and 28 C.F.R. §68.52 (c)(2)(v).

Respondent will have ten days after receipt of the proposed representative's statement of qualifications to make its objections, if any, to Kotmair's representation of Lee.

Applicable Law

Ordinarily at this stage the next step would be the commencement of discovery. Before the case is further developed, however, it may be useful for me to outline the legal backdrop against which these allegations are raised. Because lay representation is contemplated here, the initial attention of the parties is directed to relevant OCAHO precedents and other pertinent authority dealing with some of the substantive questions relating to the issues raised by the complaint. Consideration of these authorities, together with responses to the inquiries made here, may assist the parties in making a preliminary assessment of whether a *prima facie* case can be made out on the facts here alleged.

Because the complaint is premised in part upon alleged violations of the employment eligibility verification system, the implementing regulations are set forth here in some detail. Regulations which govern the employment eligibility verification system, 8 C.F.R. §§274a.2(b)(v)(A), (B), and (C), provide lists of documents which are acceptable as evidence of (A) both identity and employment eligibility, (B) identity only, and (C) employment authorization only. An individual may present one of ten specific documents from the A list *or* one of nine documents from the B list (for an individual over 16) *and* one of eight documents from the C list. While the employer may not specify which of the listed documents an individual must present in order to show eligibility for employment in the United States, nothing in the verification program authorizes, much less compels, an employer's acceptance of documents other than those listed in the regulations, or for purposes other than establishing identity and employment eligibility. The employment eligibility verification system, in other words, simply does not address questions of the validity of claimed tax exemptions, appropriateness of withholding taxes, or any other terms and conditions of employment.

In *United States v. A.J. Bart, Inc.,* 3 OCAHO 538 at 6–7 (1993), the regulatory scheme for completion of the I–9 form for the employment eligibility verification process was described as follows:

> Employers are clearly advised in the section 2 wording that specified documents from Lists A, B, and C are to be examined and utilized to determine the identity and employment eligibility of all job applicants. List A documents establish both identity and employment eligibility and include United States passports, certificates of United States citizenship, certificates of naturalization, unexpired foreign passports with attached employment authorization and alien registration cards with photographs (green cards). Accordingly, any job

> applicant presenting a single document from List A effectively establishes both his/her identity and his/her employment eligibility and no other documents need be furnished.
>
> Meanwhile, List B documents establish the applicant's identity only and include, among others, a State-issued driver's license or a State-issued I.D. card with a photograph, or information, including name, sex, date of birth, height, weight, and color of eyes, and a U.S. military card. Resultingly, all persons providing a List B document must also furnish a List C document.
>
> List C documents establish an applicant's employment eligibility only and include, among others, an original Social Security number card (other than a card stating it is not valid for employment), a birth certificate issued by State, county, or municipal authority bearing a seal or other certification, and unexpired INS employment authorization. And all individuals having presented a List C document must also provide a List B document.
>
> Accordingly, any applicant has the option of presenting a List A document which establishes his/her identity and employment eligibility and no other documentation is necessary for Form I–9 purposes.

Specifically, the documents alleged to have been rejected in this case, the "Statement of Citizenship (stating He is a U.S. Citizen and is not subject to withholding of income taxes under Federal Law)" and the "Affidavit of Constructive Notice (He does not have an SSN and is not subject to the Social Security Act)" are not documents referenced in 8 C.F.R. §274a.2(b)(v). While a certificate of United States citizenship proffered for the purpose of showing identity and work eligibility must be accepted *for that purpose,* nothing in the employment eligibility verification system requires an employer uncritically to accept a prospective employee's unilateral representations of exemption from federal taxes, whether income taxes or social security taxes, or to accept documents to establish identity or eligibility other than those specifically enumerated.

Precedent decisions in other cases under OCAHO law have previously addressed factual allegations similar to those raised here. In *Westendorf v. Brown & Root Inc.*, 3 OCAHO 477 (1992), for example, a respondent had refused to hire the complainant as an instrument fitter because the complainant would not provide Brown & Root with a social security number so that the company could comply with federal tax withholding laws. It was held that where the social security number was not requested for the purpose of preparing Section 2 of an I–9, there was no violation. Similarly, in *Lewis v. McDonald's Corp.,* 2 OCAHO 383 (1991), it was held that an employer's simple request for a social security number, where the card itself was not requested in lieu of another document, did not pose any issue justiciable under the Immigration Reform and Control

Act. As was observed in *Lewis,* "[n]othing in the logic, text or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment." *Id.* at 5.

Employers are understandably reluctant to accept representations of social security tax exemption in light of the fact that the Supreme Court has squarely stated that an employee may not simply choose unilaterally to opt out of participation in the social security program. In *United States v. Lee,* 455 U.S. 252, 257 (1982), the Court observed,

> The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S. Rep.No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S.Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.

The Court further observed that the tax imposed upon employers to support the social security system is uniformly applicable except insofar as Congress has explicitly provided otherwise, for example, the exemption granted from social security taxes for self-employed members of certain recognized religious faiths under 26 U.S.C. §1402(g). *Id.*, at 259.[6] Even this exemption does not apply to income taxation. These authorities provide a body of law which must guide decisions in this forum.

Jurisdictional Issues

The OSC charge form indicates that complainant checked the box indicating that respondent has 15 or more employees. According to

[6] 26 U.S.C. §1402 sets out the method by which application for exemption (Form 4029) may be made to the Commissioner of Social Security. If approved, the form is filed with IRS.

Nothing in the statutory scheme suggests that exemption may be obtained by unilateral declaration.

the answer filed in this case, AirTouch Cellular has approximately 3000 employees. How many are employed at the San Diego market office, the facility at issue in this matter, is not evident from the record. Accordingly the parties will be requested to address this issue with greater particularity.

If the charge form is correct and that number exceeds 15, this would appear to preclude the national origin claim on its face. 8 U.S.C. §1324b(a)(2)(B). Jurisdiction of OCAHO administrative law judges over cases alleging national origin discrimination claims is generally limited to those cases involving employers of more than three employees up to a ceiling of fourteen employees. 8 U.S.C. §1324b(a)(2). Where an employer has fifteen or more employees (for each working day in each of twenty or more calendar weeks in the current or preceding calendar year), national origin claims will generally be covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., as amended, and accordingly will fall within the jurisdiction of the Equal Employment Opportunity Commission (EEOC).

IRCA's provisions do not apply to "a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e–2 of Title 42 . . . " 8 U.S.C. §1324b(a)(2)B. It is for this reason that the so called "no overlap" provision was enacted:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e et. seq.], unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

8 U.S.C. §1324b(b)(2).

The power of attorney filed on August 26, 1996 contains authority for Kotmair to represent Lee before the EEOC as well as before OCAHO. The record does not reflect, however, whether an EEOC charge has been filed based on these facts. Inquiry will accordingly be made as to this question as well.

Inquiries

I. *Both Parties*

1. Both parties are requested to provide any information in their possession and/or documentary evidence as to the number of employees at the San Diego market office of AirTouch Cellular in 1995 and in 1994.

2. Both parties are requested to address the question of what steps, if any, were taken for the purpose of completing Form I–9 in connection with the potential employment of complainant by respondent.

3. Both parties are requested to address:

a. Was any charge filed with EEOC against AirTouch based on the same facts and circumstances here alleged:

b. If so, is the EEOC charge currently pending based on these facts?

c. If such a charge was filed, indicate:

1. when it was filed,

2. where it was filed,

3. what disposition if any was made, and

4. what is the current status of the charge?

II. *Complainant*

1. Complainant's representative is requested to file a statement detailing his qualifications to undertake the representation.

2. Complainant is requested to answer the following:

a. Does complainant contend that non-citizens are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?

b. Does complainant contend that persons having a national origin other than in the United States are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?

c. Does complainant contend that AirTouch requested a social security number (or a social security card) for any purposes other than complying with relevant tax laws?

d. If so, does complainant contend that respondent requested his social security number or a social security card to establish his

1) identity?

2) eligibility to work in the United States?

3) both identity *and* eligibility to work in the United States?

Responses will be considered timely if filed before September 23, 1996.

SO ORDERED:

Dated and entered this 30th day of August, 1996.

ELLEN K. THOMAS
Administrative Law Judge