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

April 7, 1998

UNITED STATES OF AMERICA, Complainant, v. TOWNSEND CULINARY, INC., Respondent.	)))) 8 U.S.C. 1324b Proceeding) OCAHO Case No. 98B00001)))

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL

Procedural History

On October 1, 1997, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC/complainant) commenced this action against Townsend Culinary, Inc. (Townsend Culinary/respondent) for alleged violations of Section 274C of the Immigration and Nationality Act, 8 U.S.C. §1324b.

On March 13, 1998, the complainant filed a motion to compel seeking to reopen the deposition of Zenaida Velez-Dorsey. Complainant seeks the reopening of the exam so that it may ask a question objected to at the deposition and follow-up questions, as well as payment for the cost of reopening and other restrictions on respondent for further discovery. Velez-Dorsey, a former employee of the respondent, was deposed by the complainant on February 24, 1998.

On March 23, 1998, Townsend Culinary filed its opposition to the reopening of the deposition, stating that the reopening would be oppressive and unduly burdensome, and accused Complainant's counsel of attempting to engage in ex parte communication with the un-

dersigned and "otherwise engaging in an uncivil and unprofessional manner."

The next day, March 24, complainant filed a motion to file a reply to respondent's opposition, which was granted. In its reply, OSC challenged Respondent's characterizations of the reopening as burdensome and of counsel's conduct as uncivil and unprofessional.

I will first analyze the dispute over the deposition of Velez-Dorsey and then briefly discuss the other requests and allegations.

Deposition of Velez-Dorsey

Complainant is seeking an order reopening the deposition Zenaida Velez-Dorsey, who was originally deposed on February 24, 1998. Indicative of the discovery in this case, the parties even disagree as to the question in dispute for this motion. Complainant contends that the question which the deponent was requested to not answer was, "When you worked for Townsend Culinary, Inc. could you have hired a person who is not a U.S. citizen who showed only a driver's license and social security card?" Respondent, on the other hand, argues that the question at issue is, "Could you hire a non U.S. citizen who showed a driver's license and a social security card for I–9 purposes?" The two questions are obviously similar and the analysis of the issue is not affected by which question is central.

A review of the deposition transcript reveals that Townsend Culinary's counsel, acting also as deponent's counsel for purposes of the deposition, objected to both questions, objections based on form, asked and answered, and harassment of the deponent. At one point David F. Major, respondent's Vice President of Human Resources asked complainant's counsel, "What are you doing?" Respondent's counsel instructed Velez-Dorsey not to answer the question. OSC's counsel then attempted to reach the undersigned for a ruling, but the office had closed for the day.

The applicable regulatory section provides:

> If a deponent fails to answer a question propounded, . . . the discovering party may move the Administrative Law Judge for an order compelling a response. . . . Unless the objecting party sustains his or her burden that the objection is justified, the Administrative Law Judge may order that an answer be served.

28 C.F.R. §68.23(a) (1997).

I will, therefore, first determine if the Respondent has sustained its burden of justifying the objections. Unless otherwise limited by regulation or the judge, a party may obtain discovery of any matter not privileged which is relevant to the subject matter. 28 C.F.R. §68.18(b). The Federal Rules of Civil Procedure upon which the OCAHO procedural rules are based, 28 C.F.R. §68.1, provide that instructions to not answer a deposition question are only appropriate to preserve a privilege, enforce a court order, or protest harassment or a lack of good faith. Fed. R. Civ. P. 30(d)(1). Objections based on the form of a question are insufficient to justify an instruction not to answer and are improper.

Likewise, "'[a]sked and answered' is not an appropriate objection on a deposition." *El-Yafi v. 360 East 73nd Owners Corp.*, 93 Civ. 3704, 1995 WL 276140, at *1 (S.D.N.Y. May 11, 1995). Furthermore, the record does not support the contention hat the questions were in fact asked and answered. The questions at issue here dealt with whether the deponent could hire an alien who presented a driver's license and a social security card. The prior answered questions discussed the legal Form I–9 requirements for non-citizens (Deposition, p.30, lines 2–6) or the company's general Form I–9 practices (Deposition, p.26, line 5–p.28, line 12), not the company's I–9 policy toward non-citizens.

Respondent's other objection, and the one relied upon in its submission, is based on harassment of the witness. Specifically, respondent argues that the complainant's "repetitive and misleading questioning constitutes annoyance and harassment" such as is prohibited under 28 C.F.R. §68.18(c). While there is a repetitive component to many of the questions asked, the questions are more similar than repetitive, and the record does not support the proposition that the questions constituted harassment or annoyance such as would justify the refusal of the deponent to answer a relevant question.

Therefore, respondent has failed to meet its burden of justifying the objections made at deposition.

However, that alone is not automatically sufficient for the reopening of the deposition; the language of 28 C.F.R. §68.23(a) provides that an "Administrative Law Judge *may* order that an answer be served" when the objecting party has failed to justify the objections. Townsend Culinary argues that the reopening of the deposition in order for Velez-Dorsey to answer one question would be oppressive and unduly

burdensome, citing to 28 C.F.R. §68.18(c). Section 68.18(c) lists oppression and undue burden among the reasons for limiting discovery.

Respondent points out that the deponent is a former employee of the Townsend Culinary who had to travel 167 miles for the previous deposition. Complainant argues in contrast that the reopening would not be unduly burdensome since the deponent will be reimbursed for mileage and expenses and a location convenient to Velez-Dorsey will be arranged. The deposition transcript reveals that the deponent is currently employed by Meals on Wheels of Central Maryland. (Deposition, p.6, line 24.)

28 C.F.R. §68.18(c) is based upon Rule 26(c) of the Federal Rules of Civil Procedure, and Administrative Law Judges in this office have found federal case law interpreting Rule 26(c) to be instructive. *United States v. Clark*, 5 OCAHO 771, at 389 (1995).[1] Rule 26(c) has been interpreted as providing a sliding scale which grants greater protections as the needs of the discovering party decreases. *8 Charles Alan Wright, et al.*, *Federal Practice and Procedure* §2036 (1994). I find that the reopening of the oral deposition would be unduly burdensome on the deponent since (1) only one question is at issue; (2) she is not a party to this case; (3) is elsewhere employed; and (4) has already traveled 167 miles for the deposition. Burden is measured by more than just financial concerns, and the 28 C.F.R. §68.18(c) list burden and expense as separate factors in determining the appropriateness of discovery.

Nonetheless, the un-answered deposition questions are relevant and the objections to them were improper. I am, therefore, authorizing the complainant to seek the answers through deposition upon written questions, an alternative discovery method authorized under 28 C.F.R. §68.18(a).[2] Since complainant has already had an opportu-

[1]Citations to OCAHO precedents reprinted in bound Volumes 1 to 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 to 5 are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

[2]"Depositions upon written questions" is the description in 28 C.F.R. §68.18(a), while the section on depositions, §68.22(a), refers to "written interrogatories." Written interrogatories, unlike depositions, are generally limited to parties. 28 C.F.R. §68.19(a). Nonetheless it is clear that the term "written interrogatories" in §68.22(a) is like oral depositions and not limited to parties. A similar confusion in the Federal Rules of Civil Procedure was removed when the term interrogatories was replaced by depositions upon written questions in Rule 31. *See* Fed. R. Civ. P. Advisory Committee Notes, 1970.

nity to depose Velez-Dorsey, it will limited to the questions objected to at the deposition and related questions.

Considering the nearness of the scheduled hearing date, an accelerated time-frame is in order. Complainant must submit the depositions upon written questions o the deponent and the opposing party by Wednesday, April 15, 1998. Any objections that the deponent or the respondent has to the questions must be submitted o this office by Wednesday, April 22. The deponent should submit the sworn answers to the questions by Friday April 24.

Other Requests and Allegations

1. *Payment of costs*

OSC seeks that respondent pay complaint for the costs for reopening the deposition. I do not have the authority to enter such an order. Administrative Law Judges may not impose discovery sanctions not enumerated in 28 C.F.R. §68.23(c). *United States v. Ulysses, Inc.*, 2 OCAHO 390, at 735 (1991); *accord United States v. Nu Look Cleaners*, 1 OCAHO 274, at 1779–80 (Modification by CAHO 1991). The payment of costs is not one of the sanctions enumerated in §68.23(c). I am therefore barred from ordering the requested fees. Additionally, the costs should be minimal, since the form of deposition is now written rather than oral.

2. *Requested prohibition of interference of David F. Major*

Complainant also requests that David F. Major, respondent's Vice President of Human Resources be barred from interfering in future depositions. This request apparently stems from a single comment Major made during the deposition of Velez-Dorsey. Like the requested payment of costs, I am barred from granting this order because it is not one of the enumerated sanctions of §68.23(c). Furthermore, one comment during a heated exchange of a deposition is not sufficient basis for me to prevent Major from making comments at further depositions.

3. *Allegations of misconduct*

In addition to the above discussed requests, the submissions of this discovery dispute are full of allegations of misconduct by each party. None of these allegations are made in the context of request-

ing additional relief, but are simply allegations of misconduct, or in the case of the supposed ex parte contact, allegations of attempted misconduct. Since there is no relief requested and I see no justification for a sua sponte ruling, I will issue no order based upon the alleged conduct of the parties in this case.

JOSEPH E. MCGUIRE
Administrative Law Judge