

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

May 29, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 13B00094
)	
AUTOBUSES EJECUTIVOS, LLC D/B/A)	
OMNIBUS EXPRESS,)	
Respondent.)	
_____)	

ORDER GRANTING MOTION TO COMPEL

I. PROCEDURAL HISTORY

This action arises under the nondiscrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324 b (2012). The Office of Special Counsel (OSC) filed a complaint against Autobuses Ejecutivos, LLC d/b/a/ Omnibus Express (Omnibus) on August 5, 2013. Omnibus filed a timely answer to the complaint on October 4, 2013.

Prehearing procedures are ongoing. The parties previously submitted a joint discovery plan that was adopted by order on February 4, 2014, pursuant to which discovery will continue until November 4, 2014. OSC filed a motion to compel discovery on April 17, 2014, and Omnibus filed a response on April 28, 2014. That motion has been fully briefed and is ready for resolution. For the reasons set forth below, the government’s motion will be granted.

II. BACKGROUND INFORMATION

OSC’s complaint alleges that Omnibus engaged in a pattern or practice of discrimination against U.S. citizens and other protected individuals during its recruiting and hiring processes, thereby violating 8 U.S.C. § 1324b. Specifically, OSC alleges that from at least September 2012 to February 2013, Omnibus: 1) favored the employment of temporary foreign nationals under the H-2B visa program over protected individuals; 2) failed to consider applications for bus driver

positions filed by individuals who were not H-2B workers before hiring temporary foreign nationals; 3) actively discouraged non-H-2B workers from pursuing employment as bus drivers by misrepresenting the availability of positions and by not contacting those individuals about the status of their applications, and; 4) made material misrepresentations to the Department of Labor and the Department of Homeland Security, United States Citizenship and Immigration Services in connection with petitions and applications seeking authority to hire temporary foreign nationals.

The government served the company with its first set of interrogatories consisting of twenty interrogatories, and a first set of requests for production of documents consisting of twenty document requests, on December 13, 2013. The interrogatories and document requests contained a temporal qualification stating that, “[u]nless otherwise stated, the timeframe for these requests is January 1, 2010, to the present.” Omnibus filed responses and produced documents, but made a broad objection to the time frame, stating in response to the document requests,

Respondent objects to these requests to the extent that they seek documents that are outside the temporal scope of the claims specifically at issue in this case. In particular, the Complaint in this case alleges that Respondent engaged in documentary hiring practices specifically related to its November 15, 2012 to September 15, 2013 visa program. Accordingly, Respondent objects to providing information concerning Respondent’s earlier visa programs, which are outside the scope of the claims in this lawsuit. Not only are such requests overbroad, but documents concerning earlier visa programs are neither relevant to the matters at issue in this case nor reasonably calculated to lead to the discovery of admissible evidence. Accordingly, unless specified otherwise, **Respondent has limited its answers to providing the documents requested for the period January 1, 2012.**

A similar objection was made to the interrogatories, and responses were limited to the same period.

III. THE MOTION TO COMPEL DISCOVERY AND RESPONSE

OSC’s motion to compel says that Omnibus’s refusal to provide responses for the time period beginning January 2010 prevents OSC from ascertaining the extent of Omnibus’s discriminatory recruiting and hiring practices for bus drivers. The motion states that the complaint contains allegations about Omnibus’s practices from *at least* September 2012, and because the allegations are of a pattern and practice of discrimination, it is critical to go back further in time than the principal allegation. The prior time frame is relevant, OSC asserts, because it could show the respondent’s prior hiring practices or uncover that the unfair employment practices began prior to

2012. The motion is accompanied by exhibits A-L.

Omnibus opposes the motion, stating that requests including information for 2010 and 2011 are overbroad because the allegations specifically state that the unfair practices occurred from September 2012 to February 2013. Furthermore, the company says that responding to the requests would be unduly burdensome, as its business has already been impacted severely by providing responses for years 2012 and 2013. Omnibus says its employees have had to be paid overtime while working to respond to the requests, and several business events have been cancelled or postponed. Providing responses for years 2010 and 2011 is more burdensome than for years 2012 and 2013, Omnibus says, because the older documents are stored in large outdoor shipping containers. The company argues that such circumstances make responding to the requests an undue burden on the company. Omnibus' response was accompanied by exhibits 1-7. Exhibit 7 is the declaration of Liliana Aguilar. The declaration describes the company and provides details as to how responding to the requests would burden the company.

IV. STANDARDS APPLIED

The scope of inquiry in discovery generally extends to any relevant information that is not privileged. 28 C.F.R. § 68.18(b). OCAHO case law instructs that “in the discovery context, relevancy ‘has been construed broadly to encompass any matter that bears on, or that could reasonably lead to other matter that could bear on, an issue that is or may be in the case.’” *United States v. Select Temporaries, Inc.*, 9 OCAHO no. 1078, 2 (2002) (quoting *United States v. Ro*, 1 OCAHO no. 265, 1700, 1702 (1990) (internal citation omitted))¹. While the Federal Rules of Civil Procedure may be used as a guideline in situations not specifically provided for in OCAHO rules, 28 C.F.R. § 68.1,² the Administrative Law Judge is not bound by the federal rules, *Hsieh v. PMC Sierra, Inc.*, 9 OCAHO no. 1084, 4 (2002), and must exercise discretion in resolving discovery disputes. See *Kamal Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 460, 647, 650 (1992).

¹ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

² See Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2013).

A party seeking to compel a response to discovery must include in its motion the nature of the request, the objections of the responding party, arguments in support of its motion, and a certification of good faith attempts to resolve the dispute without action by the Administrative Law Judge. 28 C.F.R. § 68.23(b). The party objecting to the discovery request bears the burden of persuasion, and must articulate its objections in specific terms and demonstrate that its objections are justified. *United States v. Allen Holdings, Inc.*, 9 OCAHO no. 1059, 5 (2000). Generalized or conclusory assertions of irrelevance, overbreadth, or undue burden are not sufficient to constitute objections. *Id.*, citing *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990).

OCAHO rules provide that a party objecting to an interrogatory must state its objections in response, together with the reasons for objection. 28 C.F.R. § 68.19(b). Similarly, a party objecting to a request for production must also state the reasons for objection. 28 C.F.R. § 68.20(e)(2). Cf. Fed. R. Civ. P. 33(b)(4) (any ground not stated in a timely objection is waived unless excused for good cause shown).³ While federal rule 34 does not explicitly state that objections to document requests are waived if not timely asserted, many courts hold the waiver implied. *See, e.g., Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 685 (S.D. Fla. 2012). Parties are thus not permitted to hold their objections in reserve and raise them for the first time in response to a motion to compel.

V. DISCUSSION

Omnibus's response to OCS's motion chiefly argues that OSC's request is unduly burdensome, that the company's operations were already impaired significantly by producing responses for the years 2012 and 2013, and that operations will be even more impaired if the company is required to produce responsive documents for years 2010 and 2011 because the documents are stored in large outdoor shipping containers. Omnibus accordingly seeks to limit the scope of discovery of documents to the years 2012 and 2013.

But the objections Omnibus raised in response to OSC's interrogatories and requests for production did not include undue burden; the company's objections were limited to its assertions that the information and documents sought were outside the scope of the claims in this lawsuit, overbroad, and neither relevant to the matters at issue nor reasonably calculated to lead to the discovery of admissible evidence. Omnibus candidly acknowledges that it "did inadvertently omit the objection of undue burden from its discovery responses," but makes no claim or showing of good cause for doing so. I consider the objections Omnibus actually made, but decline to

³ Courts are divided, however, as to whether objections based on privilege may be waived.

consider objections the company raises for the first time in response to a motion to compel.

Where, as here, a complaint alleges a pattern and practice of discriminatory conduct, a broader scope of discovery is usually appropriate than where only a single discriminatory incident is in issue. The cases Omnibus cites in support of its contention that the scope of requested discovery is overbroad are for the most part cases involving individual acts of discrimination rather than a pattern and practice of conduct. Employment practices outside the limitations period are always potentially relevant because they may demonstrate evidence of an ongoing policy or practice. *See generally Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). As was pointed out in *Miles v. Boeing Co.*, 154 F.R.D. 117, 119 (E.D. Pa. 1994), moreover, even the scope of discovery in an individual discrimination case is commonly extended to a reasonable number of years prior to the defendant's alleged illegal action and also for periods after the alleged discrimination. *See e.g., McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 63 (E.D. Pa. 1979) (five years prior to plaintiff's termination) and *Milner v. Nat'l School of Health Tech.*, 73 F.R.D. 628 (E.D. Pa. 1977) (two years after termination). *Cf. Miller v. Hygrade Food Prods. Corp.*, 89 F. Supp. 2d 643, 657 (E.D. Pa. 2000) (it is "well established that discovery of conduct predating the liability period . . . is relevant, and courts have commonly extended the scope of discovery to a reasonable number of years prior to the liability period").

As explained in *United States v. Agripac, Inc.*, 8 OCAHO no. 1012, 226, 234 (1998), an attempt to limit discovery to the liability period, or a period of 180 days prior to the acts alleged, confuses issues involving evidence gathering with issues involving the scope of permissible recovery. Whatever the period for which recovery may be had, information and documents for a period starting two years prior to the earliest date mentioned in the complaint may lead to evidence that the policy or practice has been ongoing and reaches further back in time than previously known, or, on the other hand, may lead to evidence to the contrary, that there were changes in a pattern of conduct. These questions cannot be characterized as irrelevant.

Finally, I note that OSC's memorandum recites that the government attempted to persuade Omnibus to its position by citing a recent unpublished, interlocutory OCAHO order⁴ as authority for its requests. Unpublished decisions lack precedential value and are not intended to be relied upon or cited in other cases. There is a plethora of published case law, both in this forum and in the federal courts, that addresses the appropriate temporal scope of discovery. Reliance on the unpublished order is misplaced, not only because the order is unpublished, but also because the reference to it apparently ignores parenthetical notes in the order itself explaining that the determination of an appropriate temporal scope for discovery must be made based on the context of each case individually. *See, e.g., Onwuka v. Fed. Express Corp.*, 178 F.R.D. 508, 517 (D. Minn. 1997) (stating that discovery in an individual case must be tailored to a reasonable period

⁴ *United States v. Rose Acre Farms*, OCAHO Case No. 12B00008, Order Granting in Part and Denying Without Prejudice in Part OSC's Motion to Compel Discovery (July 9, 2013).

before and after the discriminatory event). There is no broad general rule setting out a specific time frame for discovery and disputes about the temporal scope are typically resolved based on the factual context of each case. Unpublished interlocutory orders resolving specific discovery disputes in the context of one particular case constitute the law of the case, but have no application in another context.

Because the discovery sought here is relevant and the requests are not overly broad, the Complainant's motion to compel will be granted.

ORDER

OSC's motion to compel discovery is granted. Omnibus is directed to supplement its responses to OSC's first request for production of documents and first set of interrogatories within thirty days of the date of this order to provide responsive documents and answers to interrogatories for the years 2010 and 2011.

SO ORDERED.

Dated and entered this 29th day of May, 2014.

Ellen K. Thomas
Administrative Law Judge