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

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| ALEJANDRA AVILA,<br>Charging Party, and | ) | |
| UNITED STATES OF AMERICA,<br>Complainants, | ) | 8 U.S.C. § 1324b Proceeding |
| v. | ) | OCAHO Case No. 01B00050 |
| SELECT TEMPORARIES, INC., D/B/A<br>SELECT PERSONNEL SERVICES,<br>Respondent | ) | Judge Robert L. Barton, Jr. |

## ORDER GRANTING IN PART RESPONDENT'S MOTION FOR A PROTECTIVE ORDER

*(June 5, 2002)*

## I. INTRODUCTION

On April 11, 2002, Select Temporaries, Inc., d/b/a Select Personnel Services (Respondent) filed a "Motion For Protective Order And To Compel Production Of Investigation Letters Issued By The Office of Special Counsel And The Identities Of The Recipients Of The Special Counsel's Letters." On April 22, 2002, the United States of America (Complainant) filed its opposition to the motion to compel. On April 29, 2002, Respondent motioned the court for leave to file a short reply to Complainant's opposition. I granted the motion on May 7, 2002, and Respondent filed its reply to Complainant's opposition on May 14, 2002.

As previously arranged with the parties, a telephone prehearing conference in this case was conducted on May 22, 2002, at 9:30 a.m. Eastern Standard Time. The parties were notified of the conference by telephone and by the written Notice of Telephone Prehearing Conference issued on May 9, 2002. The primary purpose of the conference was to consider Complainant's motion to compel discovery and Respondent's separate motions for a protective order and to compel discovery. A court

reporter was present to record the conference, and an official transcript of the same will be prepared. Linda White Andrews, Esq., trial counsel for the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), appeared for Complainant. Also present for Complainant were Jane Schaffner and Gladys Chavez. Robert Wallace, Esq., and Teresa Kenney, Esq., appeared for Respondent. As suggested by the title of Respondent's motion, Respondent seeks two different orders: (1) a protective order; and (2) an order compelling discovery. A separate order has been issued with respect to Respondent's motion to compel discovery.

This discovery dispute arises in the context of an immigration-related disparate treatment discrimination case. Specifically, Count I of the Complaint alleges that on August 18, 2000, Respondent discriminated on the basis of national origin and/or citizenship and committed an unfair documentary practice against Alejandra Avila (Charging Party) by requesting "more or different documents than are required" under 8 U.S.C. § 1324a(b), when it required her to produce her resident alien card for employment eligibility verification. Count II further alleges that Respondent retaliated against the Charging Party by "blacklisting" her when she voiced her opposition to the alleged discrimination.

## II. BACKGROUND

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### A. Respondent's Motion

Respondent seeks a protective order preventing OSC from issuing "investigation letters" to its employees and requesting that OSC's interviews of its employees responding to outstanding investigation letters be conducted with notice to Respondent's counsel and with an opportunity for Respondent's counsel to attend the interview. R's Motion at 6. Respondent attached one of the letters to its motion for a protective order. Exh. A. The letter, dated December 13, 2001, and signed by Investigator Gladys Chavez, states that the United States Department of Justice, Office of the Special Counsel for Immigration Related Unfair Employment Practices is "currently in litigation" with Respondent and "it is through this investigation that your name came to the attention of [OSC]." It also states that OSC is "very interested in learning of your experience" with Respondent, and encloses a copy of the Form I-9 completed upon the employee's hire. During the prehearing conference, Complainant stated that 144 such "form letters" were mailed on December 13, 2001. Respondent contends that these letters are improper and justify a protective order. Id. at 2.

Respondent submits that OSC has improperly continued to conduct an investigation after filing the Complaint by contacting Respondent's former and current employees and supports its position by citation to Judge Morse's decision in United States of America v. Patrol & Guard Enterprises, Inc., 8 OCAHO 1052, 808 (2000). Id. at 2-3. Patrol & Guard held that once a Complaint is filed, "[OSC] is subject to the adjudicator's exercise of responsibility with respect to the hearing process, including oversight of trial preparation in the form of discovery, and not investigation." Patrol & Guard, 8 OCAHO at 808.

Respondent asserts that Patrol & Guard supports its contention that OSC may only contact its current employees if it gives notice to Respondent's counsel and provides an opportunity for counsel to be present. R's Motion at 3 (citing Patrol & Guard, 8 OCAHO at 803, 804). Respondent requests that the protective order direct that any interviews of Respondent's employees be conducted on notice to Respondent's counsel, with an opportunity for Respondent's counsel or representative to be present.

B. OSC's Opposition

OSC's opposition brief argues that it should be allowed to contact and interview Respondent's current employees because such contact is not a continuation of its initial investigation, but rather an informal means of discovery to identify witnesses and potential victims of discrimination. C's Opposition at 2. OSC argues that an order denying OSC the right to contact such people would suppress OSC's "ability to contact potential witnesses and injured parties through informal discovery." Id. at 2. It contends that sending letters and conducting interviews is merely a convenient method of informal discovery regarding the relevant information of Respondent's hiring practices and policies. Id. at 2, 5. OSC states that protective orders generally are sought by the movant to seek relief from a discovery request directed to it, and since the informal discovery here does not require Respondent to respond, a protective order is not appropriate. Id. at 8 n.6.

OSC also contends that the Rules of Professional Conduct do not preclude it from communicating with unrepresented Respondent's employees without Respondent's prior knowledge and consent. Id. at 6. While it recognizes the general rule that counsel shall not communicate with persons known to be represented by another lawyer in the matter, OSC submits that "most courts have rejected the notion that every employee of a party is automatically a represented party simply by virtue of his/her employment." Id. at 6 (citing Carter-Herman v. City of Philadelphia, 897 F. Supp. 899, 903 (E.D. Penn. 1995)). Rather, OSC acknowledges that it may not communicate *ex parte* with Respondent's employees if: (1) the employee has managerial responsibility relating to the matter in question; (2) the employee's acts or omissions relating to the issue in litigation may be imputed to the employer; (3) the employees statements may constitute an admission by the employer. Id. at 7 (citations omitted). OSC states that the employees at issue here are not managerial employees, did not take the alleged discriminatory employment actions, they are not capable of making a binding admission on behalf of Respondent. Thus, they may be interviewed *ex parte*. Id.

Finally, OSC's opposition brief points out that under the Office of the Chief Administrative Hearing Officer (OCAHO) Rules of Practice and Procedure Rule 68.18(c) (OCAHO Rules), Respondent's motion for a protective order fails to establish the required showing of "good cause," such as annoyance or undue burden, that must be satisfied prior to the granting of a protective order. Id. at 8 (citing 28 C.F.R. § 68.18(c) (2001)).

C. Respondent's Reply

Respondent's reply brief first addresses the showing of "good cause" required for the issuance of a protective order. Respondent explains that it has produced over 5,600 pages of documents comprising of I-9 forms and employment applications, and that permitting OSC to contact all the individuals identified in these documents would embarrass Respondent and hurt its business. R's Reply at 1. According to Respondent, pursuant to Rule 68.18(c), the potential for such annoyance, harassment, and embarrassment establishes good cause warranting a protective order. Id.

Second, Respondent argues against a broad scope of discovery in an individual disparate treatment case. It submits that OSC's argument for a broad scope of discovery "to vindicate the legal rights of other potential victims" is improperly supported by citation to three class action cases. R's Reply at 2. Because this is an individual disparate treatment case, Respondent contends that class action cases regarding the legal rights of other injured victims are inapposite to the issues at hand. Id.

Third, Respondent concludes that OSC must proceed by the formal rules of discovery as opposed to informal means of discovery. Id. at 5. Respondent contends that by sending "investigation letters" after the filing of the Complaint, OSC acts outside the confines of traditional discovery methods, and "is operating in clear contravention of established case law from the Court." R's Reply at 1. This means all contact with its employees should be done with notice to Respondent. Id. at 5. Finally, Respondent concludes that its motion is not about whether OSC has violated any ethical rules regarding *ex parte* contact, but whether it is using discovery in this case to conduct a broader investigation. Id.

## III. DISCUSSION

A. Respondent's reliance on Patrol & Guard and the Judge's power to control discovery

The thrust of Respondent's motion is based upon the Patrol & Guard, supra, decision. The Respondent in that case alleged that OSC was contacting its current employees, including at least one manager, by a letter explaining "that its inquiry was pursuant to a 'current' investigation." Patrol & Guard, 8 OCAHO at 801. Judge Morse found that the letters plainly appeared to be part of an ongoing investigation. Id. at 806. Accordingly, he held that after filing a Complaint, OSC should proceed by discovery as opposed to investigation. Id. at 804-08. Finding that OSC was subject to his adjudicatory power, Judge Morse ordered that interviews of those employees contacted by the OSC letter be conducted on notice to Respondent's counsel. Id. at 806.

Under the OCAHO Rules, 28 C.F.R. Part 68 (2001), the Judge has considerable powers to control discovery. For example, Rule 68.18(a) provides that the frequency or extent of the methods of discovery may be limited by the Administrative Law Judge upon motion or his own initiative. 28 C.F.R.

§ 68.18(a) (2001).

OSC suggests that a motion for a protective order is appropriate only where the movant seeks relief from a formal discovery request that requires a response, and not from informal discovery that does not require an act or response by the movant. C's Opposition at 8 n.6. To the extent that OSC is arguing that Rule 68.18 only applies to formal discovery requests, or that protective orders can only be granted with respect to formal discovery, I reject that contention.

Rule 68.18(b) provides that a party may obtain discovery regarding any relevant, not privileged, matter, unless otherwise limited by order of the Administrative Law Judge in accordance with the rules. 28 C.F.R. § 68.18(b) (2001). The OCAHO Rules further provide that the Judge may issue a protective order that disallows certain discovery or only allows it under certain specified terms and conditions, or by a method other than that selected by the party seeking discovery. 28 C.F.R. § 68.18(c) (2001) (emphasis added).

Given these broad powers, Judge Morse certainly could place conditions on the methods of discovery used by OSC in Patrol & Guard. To the extent, however, that Respondent contends that only formal discovery may be used in an ongoing litigated case, I also reject that contention. In fact, that idea was actually rejected in the very case Respondent cites. Judge Morse explained in Patrol & Guard that:

> [D]espite repeated informal requests by Respondent for OSC to identify the twenty-three or twenty-four individuals on whose behalf Count II is supposedly premised, OSC has insisted it would only divulge such information in response to formal discovery, an intransigence for which I made my distaste known. That being OSC's position, however, it appears that the rules of formal discovery must serve to guide these proceedings until the discovery period closes.

(emphasis added). Patrol & Guard, 8 OCAHO at 805. Thus, Judge Morse's decision to restrict OSC to formal discovery at least partially resulted from OSC's refusal to comply with Respondent's informal discovery requests. Given the Judge's broad power to control discovery, Respondent's argument that Patrol & Guard limits OSC to formal discovery is thus unpersuasive.

Litigating parties may use formal methods of discovery, but they also may use informal methods of discovery. For example, parties may enter into written fact stipulations that constitute admissions without the need for formal requests for admissions; they may produce documents without the need for formal requests for production; they may exchange information without the need for formal interrogatories; and they may interview potential witnesses without using formal, expensive depositions.

B. OSC's *ex parte* contact with Respondent's employees

Normally, without leave of court, a party may contact or interview *ex parte* a nonparty witness. The issue here is whether all *ex parte* contact with Respondent's current employees should be barred absent leave of court. OSC argues that such a rule would suppress its ability to "contact potential witnesses and injured parties through informal discovery." C's Opposition at 2. The cases it cites, however, are not applicable here because they concern pattern and practice or class action lawsuits regarding *contact with potential class members* as opposed to fact witnesses. The current case is an individual disparate treatment case. OSC counsel stated at the prehearing conference that it has no current plan to seek relief on behalf of anyone other than the Charging Party. Thus, its citation to class action pattern and practice proceedings is not persuasive because contact with potential class members in a pattern and practice proceeding is not at issue here. For example, OSC cites the Supreme Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981). C's Opposition at 3. That case, however, concerned a district court order prohibiting parties and their counsel from communicating with potential class members without court approval. Gulf Oil, 452 U.S. at 93. The Court found that the order was not consistent with the general policies embodied in FED. R. CIV. P. 23 governing class actions, id. at 99, 103-104, and found that the order was not "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the [potential class members]." Id. at 101. OSC also cites two circuit court decisions that are similarly unpersuasive because they involve communications by plaintiff's counsel with the class. C's Opposition at 3-4 (citing Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984) and Williams v. United States Dist. Court, 658 F.2d 430, cert. denied 454 U.S. 1128 (6th Cir. 1981)).

Domingo was a class action where the Ninth Circuit Court of Appeals (Ninth Circuit), applying Gulf Oil, held that it was improper to impose restrictions, *after liability had been determined*, on plaintiffs' counsel in a *class action employment discrimination action* that prevented them from interviewing back pay claimants outside the presence of defendant's counsel to assist class members in filing back pay claims. Domingo, 727 F.2d at 1439-41. Domingo is not applicable because this is not a class action, and liability has not been determined. Similarly, in Williams, a local court rule forbade communications by parties and counsel with potential or actual class members not a formal party to the action without the consent and approval of the court. Williams, 658 F.2d at 432. A district court order enforcing the rule was overturned, however, because under Gulf Oil, it prohibited communications between plaintiffs' counsel and actual or potential class members in a race discrimination case. Id. at 436-37. That case is not controlling because it is a Sixth Circuit decision and involved a class action. The "gag" order there applied to both present and former employees, and, under Gulf Oil, clearly was too broad.

With respect to ethical concerns raised by ex parte contact with current employees, Respondent states that its motion "is not about whether OSC has complied with the California ethical rules regarding contacting employees but rather whether the OSC is attempting to use discovery in this individual case to

conduct a new investigation." R's Reply at 5. OSC stated at the prehearing conference that such an investigation does not exist. Similarly, its brief explains that "OSC is not continuing its investigation, but rather seeking information from potential witnesses and other injured parties through permissible informal discovery." C's Opposition at 5. As explained previously, Judge Morse limited OSC to formal discovery in Patrol & Guard partly because of its refusal to accommodate the Respondent's informal discovery requests.

Neither OSC nor Respondent have proposed that a specific ethical rule should govern the question of whether a party may make *ex parte* contact with another party's current employees. Respondent's assertion that its motion is not about California ethical rules, however, suggests that if the issue were ethics, that California ethical rules would govern. OSC cites the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2, the corresponding CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100, and several federal cases regarding *ex parte* contact, but does not explicitly state which law governs. C's Reply at 6-7.

In a case cited by OSC, McCallum v. CSX Transp. Inc., 149 F.R.D. 104 (M.D.N.C. 1993), the magistrate judge stated that a federal tribunal may apply its ethical code of conduct to out of state attorneys who practice before the court and can sanction conduct which takes place in other states. McCallum, 149 F.R.D. at 112. Even if those states where the conduct occurred permitted the conduct in issue, that does not give the attorney permission to operate in contravention of the *ethical duties as determined by the federal court*. Id. However, McCallum is neither controlling nor, on this point, persuasive. In Palmer v. Pioneer Associates LTD, 257 F.3d 999 (9th Cir. 2001), the Ninth Circuit, whose decisions are controlling in this case, was presented with the question of whether plaintiff's counsel had made an inappropriate *ex parte* contact with one of defendant's employees in a federal case arising in Nevada. Palmer, 257 F.3d at 1001. The Ninth Circuit noted that the specific ethical rule before it was subject to different interpretations, id. at 1002, and referred the ethical question to the Nevada Supreme Court. Id. at 1003. Therefore, the Ninth Circuit, which is the governing circuit in this California-based action, defers to a state's determination of its ethical rules.

In this case, both counsel have offices in District of Columbia, and so it might be argued that the ethical rules of the District of Columbia should apply. Or since this tribunal is located in Virginia, one might argue that Virginia's rules apply. However, since the Charging Party and Respondent are in California; the acts referenced in the Complaint occurred in California; and it is likely that most of the individuals to whom letters were sent are in California, California's ethical rules are the most pertinent.

Further, federal law dictates that Justice Department attorneys are bound by the ethical rules of the locality where their practice takes them. Title 28 U.S.C. § 530B, entitled "Ethical standards for attorneys for the Government," provides that:

> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. § 530B. The Justice Department has implemented accompanying regulations at 28 C.F.R. Part 77 (2002), 64 FR 19273 (April 20, 1999). In relevant part, section 77.2 of these regulations states:

> (j)(1) The phrase where such attorney engages in that attorney's duties identifies which rules of ethical conduct a Department attorney should comply with, and means, with respect to particular conduct:
>
> > (i) If there is a case pending, the rules of ethical conduct adopted by the local federal court or state court before which the case is pending; or
> > (ii) If there is no case pending, the rules of ethical conduct that would be applied by the attorney's state of licensure.
> >
> > (2) A Department attorney does not "engage[] in that attorney's duties" in any states in which the attorney's conduct is not substantial and continuous, such as a jurisdiction in which an attorney takes a deposition (related to a case pending in another court) . . . .

Additionally, "[a] government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending." 28 C.F.R. § 77.4(a) (2002). OCAHO has not implemented or adopted any rules of ethical conduct. Because OCAHO is a trial level tribunal with national jurisdiction, this allows it to apply the ethics of the states where its cases arise.

As discussed above, this case is set in California, and I have therefore consulted California's ethical rules. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100 governs *ex parte* communication with a represented party. The rule states:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
>
> (B) For purposes of this rule, a "party" includes:

> (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
>
> (2) An association member or an employee of an association, corporation, or partnership, [1] if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or [2] whose statement may constitute an admission on the part of the organization.
>
> (C) This rule shall not prohibit:
>
> (1) Communications with a public officer, board, committee, or body;
> (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
> (3) Communications otherwise authorized by law.

CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100. In a decision decided approximately two months after the law went into effect, an intermediate California appellate court explained that the rule *does not* generally bar *ex parte* contact with an employer's non-managerial employees:

> [R]ule 2-100 permits opposing counsel to initiate ex parte contacts with unrepresented former employees, and present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission *of the corporation for purposes of establishing liability.*

Triple A Machine Shop, Inc. v. State of California, 261 Cal. Rptr. 493, 499 (Cal. Ct. App. 1989) (emphasis added); see also Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp., 8 Cal. Rptr.2d 467 (Cal. Ct. App. 1992) and Continental Ins. Co. v. Superior Court, 37 Cal. Rptr.2d 843, 858 (Cal. Ct. App. 1995) (Rule 2-100 applies to current employees, but not former employees).

OSC 's brief cites, but does not analyze, the relevant California ethical rule. Additionally, OSC has not shown that it was aware of the California cases interpreting Rule 2-100 when it sent the December 13, 2001, letter to Respondent's current employees. Some courts have interpreted the various state incarnations of Model Rule 4.2, especially a prong regarding statements that may constitute an admission on the part of the organization, much more restrictively than the California courts. See 18 Empl. Disc. Rep. (BNA) 8 (Feb. 20, 2002), *ABA Approves Model Rule 4.2 Without Language Opposed By Plaintiffs' Attorneys*

(noting that under the old version of the recently amended Model Rule 4.2, some courts prohibited lawyers representing victims of discrimination from interviewing any current or former employees of the entity being sued); cf Lewis v. CSX Transp., 202 F.R.D. 464, 466 (W.D.V.A. 2001) (finding low level employees to be "represented persons" under VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 4.2 because they were relevant witnesses only in regard to information gained within the scope of their employment, thus making their statements possibly admissible under FED. R. EVID. 801(d)(2)(D) as admissions by a party-opponent).

Further, at least one decision cited by OSC in its brief suggests that prior court approval should be obtained before making ex parte contacts with an opposing party's current employees. As the Court stated in McCallum, the "attorney who seeks court approval before contact does not risk an ethical violation, but one who does not acts at his or her own peril." McCallum, 149 F.R.D. at 109. In an uncertain situation an attorney has an ethical duty to seek the court's guidance as opposed to acting on his own. Cagguila v. Wyeth Labs, Inc., 127 F.R.D. 653, 654 (E.D. Pa. 1989). OSC did not do so in this case.

Nevertheless, I conclude that, absent any evidence of abuse or potential abuse, prior court approval for communications between counsel and present and former employees is not required. Cf. Williams v. United States Dist. Ct. 628 F.2d 430 (6th Cir. 1981). Therefore, I am not going to require leave of court prior to such contact in this case. Respondent's interests will be adequately safeguarded by the protective order described below. Moreover, if any improper *ex parte* contact occurs, the court will disallow the use of any FED. R. EVID. Rule 801(d)(2)(D) admissions thereby obtained. McCallum, 149 F.R.D. at 112-13.

Applying California ethical rules to this California-based action, I grant in part and deny in part Respondent's motion for a protective order. Pursuant to the California rule, OSC is barred from initiating *ex parte* communications with Respondent's employees: (1) who exercise managerial or supervisory responsibility on behalf of Respondent; or (2) whose acts or omissions in connection with the matter may be binding upon or imputed to Respondent (e.g. current employees whose conduct is at issue); or (3) whose statements may constitute admissions by Respondent. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100; Triple A Machine Shop, 261 Cal. Rptr. at 499. To the extent that Respondent's motion concerns current employees not covered by these three categories, its motion for a protective order is denied. For example, direct contact is not barred with respect to current employees that merely witness conduct. Cf. Carter-Herman v. City of Philadelphia, 897 F. Supp. 899, 903 (applying analogous Pennsylvania rule and explaining that not every employee is automatically a represented party by virtue of his or her employment).

Nevertheless, I recognize that Respondent's concerns are not without merit. The manner in which OSC conducted its *ex parte* contacts with Respondent's employees is troublesome. Although OSC asserted during the conference that the December 13 letters were not sent pursuant to a separate, independent investigation, the letter twice uses the word "investigation." The use of these words in an

"informal discovery" letter that also indicates OSC is "currently in litigation" with Respondent is, at a minimum, confusing, and possibly misleading. See Patrol & Guard, 8 OCAHO at 803 ("to approach employees utilizing "investigatory" terminology introduce[s] confusion as to whether the parties are in an adjudicatory or an investigatory posture."). I recognize Respondent's concern that the use of such a possibly confusing letter bearing the official seal of the United States Department of Justice, and the letterhead of the Civil Rights Division, has the potential to disrupt the business operations of Respondent and the working relationships of its employees. Id. at 804 (quoting Hoffman v. United Telecomm., Inc., 111 F.R.D. 332, 336 (D. Kan. 1986)). In this sense, I find the requisite showing of good cause justifying a protective order. See 28 C.F.R. § 68.18(c) (2001).

Therefore, pursuant to my broad power to provide a fair and impartial hearing, see 28 C.F.R. § 68.28 (2001), and to control discovery, both formal and informal, see 28 C.F.R. § 68.18 (2001), in all future ex parte contacts with Respondents current *and* former employees, whether initiated orally or in writing, OSC must advise those contacted of the following:

1. that OSC has sued their current/former employer; and

2. the reasons why OSC has made contact with them or is seeking an interview; and

3. the right of the current or former employee to refuse to be interviewed; and

4. the right of the current or former employee to have counsel, including Respondent's counsel, present during any personal or telephone interview.

Also, in any *ex parte* contact with either current or former employees, OSC may neither ask nor permit a current or former employee to disclose privileged communication. See Carter-Herman 897 F. Supp. at 904; Brown v. State of Oregon, 173 F.R.D. 265, 269 (D. Ore. 1997). Additionally, if OSC obtains any statements from an employee or former employee in an *ex parte* manner, upon objection by Respondent, I may refuse to allow such statements in evidence at trial. If Respondent wishes to prevent even initial contact (by letter or telephone) with current supervisors or managers, it may provide OSC with a list of such managers/supervisors (identified by name, title and job description) and OSC will not be permitted, absent court order, from contacting such individuals *ex parte*. Moreover, since Complainant did not include all four disclosures in its December 13, 2001, letters (specifically ¶¶ 3 and 4, advising the recipient that they could refuse to be interviewed and, if interviewed, could have counsel present), during the conference I authorized Respondent to request from OSC the instructions or guidelines provided to Investigator Chavez in drafting the letter or communicating orally with the recipients of the letters.

## IV. CONCLUSION

Respondent's motion for a protective order is denied to the extent it seeks to preclude OSC from all ex parte contact with any of Respondent's current or former employees. Respondent's motion also is denied to the extent that it requests that any interviews by OSC with Respondent's employees be conducted with notice to Respondent's counsel and with an opportunity for Respondent's counsel or representative to attend the interview.

However, I conclude that Respondent has shown good cause for a limited protective order. OCS is ordered to refrain from any ex parte contact with those *current* employees it knows are in any of the following categories:

(1) those having managerial responsibility on behalf of the Respondent; or

(2) those whose acts or omissions in connection with the matter may be binding upon or imputed to the Respondent (e.g. current employees whose conduct is at issue); or

(3) those whose statements may constitute an admission of the organization.

Additionally, while OSC may contact all other current *and* former employees *ex parte*, it is required to make the following four disclosures:

1. that OSC has sued their current/former employer; and

2. the reasons why OSC has made contact with them or is seeking an interview; and

3. the right of the current or former employee to refuse to be interviewed; and

4. the right of the current or former employee to have counsel, including Respondent's counsel, present during any personal or telephone interview.

I reiterate that OSC must make the required disclosures to the interviewee and if an interviewee wishes to have counsel present, the interviewee must not be prevented or discouraged from having counsel present. Moreover, an OSC employee making any *ex parte* contact with either current or former employees may neither ask nor permit a current or former employee to disclose privileged communication. If any improper *ex parte* contact occurs, upon objection by Respondent, the court may disallow the use of any FED. R. EVID. Rule 801(d)(2)(D) admissions thereby obtained. Further, if OSC obtains any *ex parte* statements from an employee or former employee without providing the disclosures required by this Order, upon objection by Respondent, I may refuse to allow such statements at the hearing. Finally, Respondent may

request from OSC a copy of any instructions or guidelines given to Investigator Chavez with respect to the December 13, 2001, letter and any oral communications with such recipient.

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**ROBERT L. BARTON, JR.**
**ADMINISTRATIVE LAW JUDGE**