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

June 10, 2015

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00011
	)	
JERRY ESTOPY AND MANUEL BORTONI,	)	
D/B/A ESTOPY FARMS,	)	
Respondent.	)	
	)	

ORDER FINDING LIABILITY AND SCHEDULE FOR SUPPLEMENTAL FILINGS

I. PROCEDURAL HISTORY

Saul Garces and Enrique Romero filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Jerry Estopy and Manuel Bortoni d.b.a. Estopy Farms discriminated against them on the basis of their citizenship status. The respondents filed an answer denying the material allegations of the complaint, and prehearing procedures were undertaken. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) subsequently filed a complaint-in-intervention on behalf of complainant Enrique Romero only, and Estopy Farms filed a timely answer to that complaint as well. The action arises under the nondiscrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2012), as amended by the Immigration Reform and Control Act of 1986 (IRCA).

Saul Garces and Enrique Romero were also parties in *Covarrubias v. Estopy,* no. 2:13-cv-00249, an action in the District Court for the Southern District of Texas pursuant to the Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq., and other federal and state law causes of action. Because the claims in *Covarrubias* were based in part on the same operative facts as are asserted in the instant action, pending motions for summary decision in this forum were stayed until the resolution of *Covarrubias*. The parties subsequently notified this office that *Covarrubias* had settled, and that Garces and Romero received relief as part of that settlement in exchange for which they signed releases of all their claims against the respondents, including the claims in this action. On March 10, 2015, Garces and Romero requested jointly with the respondents that their

claims in this action be dismissed, and an order was issued on March 17, 2015 dismissing Garces' and Romero's private complaint in accordance with 28 C.F.R. § 68.14(a)(2).[1]

Still pending, however, is the complainant-intervenor OSC's motion for summary decision as to its separate complaint-in-intervention. OSC was not a party to the district court litigation in *Covarrubias*, and its claims were not resolved in that action. The dismissal of Garces' and Romero's complaint does not moot OSC's action; OSC is a separate and distinct party, and is entitled to pursue its complaint-in-intervention on its own, even in the absence of a charging party. *See United States v. McDonnell Douglas Corp*., 3 OCAHO no. 507, 1053, 1061-62 (1993).[2] OSC appears in this forum as the guardian of the public interest, as observed in *McDonnell Douglas*, 3 OCAHO no. 507 at 1061, and seeks remedies of its own pursuant to 8 U.S.C. § 1324b.

Discovery in this entire matter was contentious and unduly prolonged, largely because Estopy Farms was nonresponsive and evasive, and engaged in a pattern of delay and obfuscation commencing early in the underlying investigation and continuing throughout the proceeding. Even after a second order in this action compelling discovery responses, Estopy Farms still failed to comply with discovery orders and make adequate production of documents. In addition to its failure to comply with discovery obligations, Estopy Farms ignored judicial orders, engaged in stonewalling and needless delay, and made frivolous and dilatory filings, all of which frustrated and prejudiced the ability of the complainants and the complainant-in-intervention to prepare for the filing of dispositive motions and for a potential hearing. It was, in fact, only the strong preference in this forum for judgments on the merits that prevented the issuance of a default judgment based on Estopy Farms' continued misconduct in this litigation. *Cf. Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 674 (1997).

Other less draconian sanctions were imposed, however, pursuant to which Estopy Farms was precluded from objecting on the grounds of authentication to the introduction of certain evidence. It was also inferred and concluded that the documents the respondents failed to

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[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014).

[2] 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.

produce in response to certain requests for production would have been adverse to Estopy Farms. In addition, the respondents' untimely and frivolous motion for summary judgment[3] was denied, and it was deemed conclusively established for purposes of this action that Estopy Farms had more than three employees at all times relevant to this case.

OSC's motion for summary decision is ready for resolution. Because the respondents failed to make timely responses to a previous prehearing order and their late-proffered filings failed to comply with that order, their filings were rejected, but the respondents were nevertheless afforded a limited opportunity to respond to the motion for summary decision. That opportunity was restricted to a response to the question of whether Estopy Farms had a legitimate, nondiscriminatory reason for failing to hire Romero and another U.S. citizen applicant. Estopy Farms filed what it styled as its first response to the motions for summary decision, and OSC's motion is ripe for adjudication as to the question of liability.

II. BACKGROUND INFORMATION

The colloquial term "H-2A worker" [4] refers to a nonimmigrant alien who comes to the United States to perform agricultural labor of a temporary or seasonal nature. Admission of such workers is governed and regulated by a complex system of interrelated laws administered by the Departments of Labor (DOL), State, and Homeland Security (DHS). *See generally Sanchez v. Ocanas*, 9 OCAHO no. 1115, 3-4 (2005) (outlining the multi-step process for employing temporary or seasonal agricultural workers under 8 U.S.C. § 1101(a)(15)(H)(ii)(a)). Approval of a petition for the employment of a nonimmigrant alien for such work is subject to certain conditions, among which is the requirement of a certification by the Secretary of Labor that there are not enough domestic workers available to perform the work. 8 U.S.C. § 1188(a)(1)(a). Such a certification may not issue unless the employer engages in positive recruitment efforts to find qualified United States workers. 8 U.S.C. § 1188(b)(4).

The certification may issue where the employer complies with the recruitment requirements and no qualified eligible individuals are found. 8 U.S.C. § 1188(C)(3)(A). Detailed implementing regulations are set out at 20 C.F.R. § 655.100 et seq., including, inter alia, 20 C.F.R. §§ 655.103(a)(b), 655.135,[5] which provides that, to bring nonimmigrant workers to the U.S. to perform agricultural work, employers must first demonstrate that there are not sufficient U.S. workers able, willing, and qualified to perform work in the intended area of employment. The

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[3] OCAHO rules use the term summary decision rather than summary judgment. 28 C.F.R. § 68.38 (2014).

[4] The term derives its name from 8 U.S.C. § 1101(a)(15)(H)(ii)(a) of the INA.

[5] The regulations in effect at the time of the events in question were the revisions published at 75 Fed. Reg. 6884 (February 12, 2010).

regulations also provide that the employer may not reject such an individual based on criteria not listed in the original job order, which is the document containing all the material terms and conditions of employment, as reflected on Form ETA-790. 20 C.F.R. § 655.121(e)(2). Only after DOL approves the certification application may the employer file a Petition for Nonimmigrant Worker, USCIS Form I-129, to seek a determination as to whether a visa petition should be granted. 8 C.F.R. § 214.2(h)(2)(i)(A). It is the approval of the second petition that permits the Department of State to issue a visa permitting an individual to enter the United States for employment. The visa ends the process. *See United States v. Sourovova*, 8 OCAHO no. 1020, 283, 290 (1998) (noting that in order to obtain an employment-related visa, an individual must be the beneficiary of both a labor certification and an approved visa petition).

Jerry Estopy and Manuel Bortoni, individually and jointly d.b.a. Estopy Farms, are engaged in the business of harvesting crops, including cotton, in Texas and Mexico. Manuel Bortoni is Jerry Estopy's stepson; individually and jointly while doing business as Estopy Farms, they own at least eight cotton harvesting machines. At all times pertinent, Estopy and Bortoni, individually and jointly d.b.a. Estopy Farms, planted, cultivated, and harvested their own crops in Edinburg, Texas, and also used their cotton harvesting machines to harvest cotton for other farmers near Corpus Christi, Texas.

On or about May 18, 2010, Jerry Estopy and Manuel Bortoni, individually and jointly d.b.a. Estopy Farms, submitted two Agricultural and Food Processing Clearance Order requests (Form ETA-790) to the Texas Workforce Commission Foreign Labor Certification Unit seeking to hire seven H-2A workers from July 25, 2010 to March 25, 2011 to work as cotton machine operators at Whatley Farms in cotton and grain sorghum, and seven H-2A workers to work as cotton machine operators in cotton and grain sorghum at Estopy Farms in Edinburg, Texas. The job specifications stated: "Cotton Machine Operator will drive and operate a John Deere Cotton Picker Machine; will drive farm machine from farm to field to harvest cotton; will prepare cotton machine by adjusting speeds and levels; and will refuel engine and lubricate machine parts." Both ETA-790s contained a statement that "[t]raining will be provided for 2 days and workers will be allowed 2 days to reach the production standards of the activity." Neither clearance request reflected any requirement that the applicants have previous experience operating a cotton harvester machine. [6]

Enrique Romero is a citizen of the United States who was referred to Estopy Farms by the Texas Workforce Commission and was interviewed in June 2010 by both Estopy and Bortoni for a job as a seasonal agricultural equipment operator. At the time of the events in question, Romero had fourteen years' experience in operating agricultural equipment, including combines and tractors,

[6] The record reflects, however, that in July when Estopy Farms filed its application for certification to apply for visas for the seven H-2A workers (Form 9142), it included a statement, that was nowhere in the original job order, saying that one month of experience as a cotton picker operator was required.

but not including cotton harvesters. Jerry Estopy told Enrique Romero that the job would begin in a few weeks, and that he would be notified of the start date. During the next several weeks, Enrique Romero telephoned Manuel Bortoni several times, but Estopy Farms never called Romero back. Romero later learned from the Texas Workforce Commission that all the individuals subsequently hired for the jobs at issue were H-2A workers who came from Mexico with visas authorizing them to enter the United States to work for Estopy Farms.

III. STANDARDS APPLIED

A. Summary Decision

OCAHO rules provide that summary decision as to all or part of a complaint may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56 of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).

B. Discrimination in Hiring

The familiar burden-shifting paradigm originally articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) provides the framework for analysis in a disparate treatment case. A prima facie case of discrimination in hiring is shown when a complainant demonstrates that he belongs to a protected class; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that after his rejection, the position remained open and the employer continued to seek applicants with similar qualifications. *See Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 768 (2000). Alternatively, the individual may show that he is a member of a protected class, that he applied for and was qualified for the job, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination. *See Lee v. AirTouch Communic'ns*, 6 OCAHO no. 901, 891, 902 (1996).

Once the employee presents a prima facie case, the burden shifts to the employer to present a legitimate, nondiscriminatory reason for the employment decision. *See Haire v. Bd. of Sup'rs of LSU A&M Coll.*, 719 F.3d 356, 362-63 (5th Cir. 2013). The employer's burden is one of production only, not of persuasion. *See Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000). An employer's nondiscriminatory explanation dispels any inference of discrimination, after which the employee must show that the proffered explanation is a pretext

and was not the real reason for the decision. The complainant retains the ultimate burden of persuasion throughout. *See Ameristar Airways, Inc. v. DOL*, 650 F.3d 562, 567 (5th Cir. 2011).

The employee can overcome an employer's proffered reason by showing that the explanation provided is not the real reason, and is a pretext for discrimination. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 658-59 (5th Cir. 2012). The employee may establish pretext by showing that a discriminatory motive is more likely to have motivated the adverse employment decision. *Haire*, 719 F.3d at 363. Pretext may be established by evidence that similarly situated individuals not in the protected class were more favorably treated, or by any other evidence demonstrating that the employer's explanation is unworthy of credence. *See generally Haire*, 719 F.3d at 363-64; *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 685 (5th Cir. 2001).

IV. DISCUSSION AND ANALYSIS

The record readily demonstrates all the elements of a prima facie case pursuant to the *McDonnell Douglas* formula. It is undisputed that Romero, as a citizen of the United States, is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3). Regulations specifically provide that employers must list the material terms and conditions of employment in the job order, as reflected on Form ETA-790, 20 C.F.R. §§ 655.103(b), 655.135, and that the employer may not reject such an individual based on criteria not listed in the job order, 20 C.F.R. § 655.121(e)(2). Here, there were no minimum qualifications in the job order, and Romero was willing and able to perform the work. He was therefore qualified as a matter of law for the job he was seeking. Romero was told he would be called back when the work started, but he never was, and Estopy Farms continued to seek temporary nonimmigrant aliens from Mexico to fill the positions. The individuals ultimately hired for the jobs were all H-2A workers who were not members of Romero's protected class.

In response to OSC's prima facie case, Estopy Farms sought to explain the reason for its failure to hire Romero by stating that he had no experience operating cotton picker harvester machines. The company's response to the motions for summary decision was accompanied by Exhibit A, a newspaper advertisement that in pertinent part described the duties of the position as: "Drives and operates a John Deere Cotton Picker Harvester. Prepares cotton harvesting machines by adjusting speeds & levels. Refuels eng[ine] & lubricates machine parts." No particular qualifications, skills, experience, background, or other requirements are mentioned in this advertisement.

Estopy and Bortoni failed to respond to discovery requests in this matter, either for documents pertaining to the hiring criteria it used or for documents pertaining to the qualifications, training, and experience of the temporary foreign workers who were actually hired for the jobs. It was therefore inferred that the responsive documents would have been adverse to them. While there is some indication that four of the individuals Estopy Farms hired may have worked for them

previously, there were at least two who had no such experience and there is not a scintilla of evidence that either of these two individuals, Rogelio Gallegos Palacios and Carlos Eliud Esparza Bazaldua, had qualifications comparable to those offered by Romero.

OSC's motion contends that respondents fail even to satisfy their minimal burden of production because they have not adequately presented a legitimate, nondiscriminatory reason for failure to hire Romero in that their proffered reason has no factual basis in the record where no minimum experience or special skills are mentioned in the advertisement Estopy Farms proffered. OSC points out that the respondents are obliged to introduce some admissible evidence that, if believed, would support a finding of nondiscrimination, *citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993), and that they have not done so. OSC says that where an employer's conclusory reason is not factually supported, the complainant is entitled to judgment as a matter of law, *citing Ratliff v. City of Gainesville*, 256 F.3d 355, 361 (5th Cir. 2001).

Assuming arguendo for purposes of this motion that Jerry Estopy, Manuel Bortoni, and Estopy Farms met their burden of production, the record reflects that their explanation is pretextual for several reasons. First, there was no requirement either in the ETA-790 clearance orders the respondents submitted on or about May 18, 2010, which the job order is based on, or in the job advertisement itself, that the applicants have any specific experience. Regulations require, moreover, that an employer list the material terms and conditions of employment in the job order, and that the employer may not reject such an individual based on criteria not listed in the job order. Second, Estopy Farms could not have based all its hiring decisions on an experience requirement because at least two of the H-2A workers the respondents actually hired were not shown to have any such experience. Jerry Estopy testified in his deposition, moreover, that if a man is familiar with farm equipment such as combines or tractors, he could be trained in three to four hours to operate a cotton picker harvester machine; Estopy said he himself had trained several people to do this work, including his stepson, Bortoni. The job order itself specifically included a statement that "training will be provided for 2 days and workers will be allowed 2 days to reach the production standards of the activity." With fourteen years of experience operating various kinds of farm equipment including combines and tractors, Romero could have readily been trained for the position.

Finally, and most persuasively, Estopy Farms provided a series of shifting, inconsistent, and mutually contradictory explanations over the course of this proceeding for failing to hire Romero. Jerry Estopy said at one point that Romero was not qualified, but then acknowledged in his deposition that Romero was. Later, Estopy said that Romero did not follow up on his application, but after Bortoni acknowledged that Romero had called him more than once, Estopy changed his story again and said he didn't remember the interview, and that he would have hired an applicant with Romero's qualifications had there been one. Estopy Farms in the end returned to the assertion that Romero was not qualified. Like the employer's constantly shifting and evolving explanations for its adverse action in *Ameristar*, Estopy Farms' series of changing positions standing alone amply justifies a finding of pretext. 650 F.3d at 569; *cf. Vieques Air*

Link, Inc. v. DOL, 437 F.3d 102, 110 (1st Cir. 2006) (employer's shifting explanations for challenged action can itself demonstrate pretext).

I have considered the record as a whole, as well as the materials submitted in connection with the instant motion. Based on that record, any reasonable factfinder would have to conclude that Jerry Estopy and Manuel Bortoni d.b.a. Estopy Farms simply passed over a qualified U.S. citizen in favor of hiring temporary H-2A workers from Mexico. For all that the record discloses, the decision to hire H-2A workers was already made in May before Romero even applied. As explained in *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 596 (1982), the whole purpose of the labor certification process is to protect, not to disadvantage, domestic workers:

> The obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers . . . . First, these workers are given a preference over foreign workers for jobs that become available within this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers.

That purpose of the labor certification process was ill-served in this case. To be clear, unlike the labor certification process, nothing in this forum's governing statute or regulations mandates that a U.S. citizen be afforded any preference over an equally qualified alien individual. 8 U.S.C. § 1324b(a)(4). Both the certification process and this forum's statute are on the same page, however, in mandating that U.S. workers are not to be discriminated against in favor of foreign workers. 8 U.S.C. § 1324b(a)(1)(B). That is precisely what happened here.

ORDER

Jerry Estopy and Manuel Bortoni, individually and d.b.a. Estopy Farms, are liable for engaging in an immigration-related unfair employment practice in violation of 8 U.S.C. §1324b(a)(1)(B). OSC will have until July 10, 2015 to present its requests as to civil money penalties, and as to the contours of an appropriate cease and desist order. Jerry Estopy and Manuel Bortoni, individually and d.b.a. Estopy Farms, will have until August 10, 2015 to file a response to the government's requests.

SO ORDERED.

Dated and entered this 10th day of June, 2015.

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Ellen K. Thomas
Administrative Law Judge