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

January 26, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 93B00182
ROSARIO STRANO & VITO STRANO, D/B/A STRANO FARMS, Respondents.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY DECISION

On March 10, 1993, Mario Mendez (Mendez), Mariano Francisco (Francisco), Bernardo Velazquez (Velazquez), Lucas Pascual (Pascual), Pascual Tasej Cacatzum (P. Cacatzum), and Pedro Tasej Cacatzum (P.T. Cacatzum) (the charging parties), commenced this action by filing charges with the Office of the Special Counsel for Unfair Immigration Related Employment Practices (OSC or complainant).

In those charges, the charging parties alleged that respondent engaged in unfair immigration-related employment practices in violation of the Immigration Reform and Control Act of 1986, 8 U.S.C. §1324b, in particular, by refusing to accept valid documents for work-eligibility purposes. Francisco is a permanent resident alien, Velasquez is a temporary resident alien, and Pascual, Mendez, and the Cacatzums are applicants for political asylum.

On October 6, 1993, complainant filed a three-count Complaint with this Office.

In Count I, complainant alleges that respondent requested more or different documents from the charging parties than were required for employment verification purposes, and refused to honor documents that appeared to be genuine, in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b(a)(6).

In Count II, complainant alleges that respondent engaged in a pattern or practice of document abuse by refusing to honor documents that appeared on their face to be genuine for employment eligibility verification purposes, and by having demanded that the charging parties, as well as others similarly situated, produce more or different documents than those required for employment verification purposes, in violation of IRCA, 8 U.S.C. §1324b(a)(6).

In Count III, complainant asserts that respondent treated individuals disparately based upon their citizenship status, by having required that aliens produce INS-issued documents acceptable to respondent before hiring, while contemporaneously having hired U.S. citizens upon the production of any valid combination of I-9 documents. Complainant contends that this practice constitutes an unfair employment practice under IRCA, 8 U.S.C. §1324b(a)(1)(B).

On December 13, 1993, respondent filed its original Answer, a Motion to Dismiss or for Summary Decision, a Motion to Grant by Default the Motion to Dismiss or for Summary Decision, and a Motion to Compel Production from Complainant.

The procedural regulations governing administrative hearings in cases involving allegations of unfair immigration-related employment practices provide for the dismissal of a complaint where the administrative law judge determines, upon motion by respondent, that complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. §68.10. This rule is similar to and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, which serves as a guide in these proceedings. See Lambert v. AT&T (Order Granting in Part Motion to Dismiss and Order of Inquiry), at 2 (8/18/93).

A motion to dismiss should not be granted unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984); Gonzalez v. McNary, 980 F.2d 1418, 1419 (11th Cir. 1993); Powell v. United States, 945 F.2d 374, 375 (11th Cir. 1991). See also Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 101-102 (1957). In determining whether to dismiss a complaint, the

trial court must accept the allegations set forth in the complaint as true. Rios v. Navarro, 766 F. Supp. 1158, 1161 (S.D. Fla. 1991). See also Scheuer v. Rhodes, 461 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974).

It has been held that the OCHAO administrative law judges may not act outside the limits of their jurisdiction. Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 469, at 6 (11/6/92). Accordingly, in the event that OCAHO does not have subject matter jurisdiction over complainant's claims, those claims must be dismissed. Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 476, at 4 (12/1/92); Brown v. Baltimore City Pub. Sch., 3 OCAHO 480, at 7 (6/4/92).

Respondent's Motion to Dismiss or for Summary Decision is based upon three arguments. Initially, respondent argues that Counts II and III, which allege a pattern and practice of document abuse and disparate treatment, respectively, are not viable as they pertain to Pascual, Mendez, and the Cacatzums because those individuals, as political asylum applicants, are not "protected individuals" for the purpose of citizenship status discrimination, 8 U.S.C. §1324b(a)(3), and because respondent, as an employer of more than 14 individuals, is not subject to the national origin discrimination provisions of IRCA, 8 U.S.C. §1324b(a)(2)(B).

For these reasons, respondent concludes, this Office does not have jurisdiction over Counts II and III as they pertain to Pascual, Mendez, and the Cacatzums and accordingly, those claims must be dismissed.

As previously noted, both Counts II and III allege a pattern or practice of discrimination. A pattern or practice of discrimination may be established without proof that more than one individual, impacted by the practice in question, is eligible to maintain an action for individual relief under IRCA, 8 U.S.C. §1324b. United States v. Mesa Airlines, 1 OCAHO 74, at 52 (7/24/89). Therefore, even if it were determined that Pascual, Mendez, and the Cacatzums were ineligible to maintain causes of action under IRCA, 8 U.S.C. §1324b, complainant may establish, in Counts II and III, that respondent engaged in a pattern or practice of discrimination based upon the claims of Francisco and Velasquez.

Furthermore, respondent's contentions as they pertain to Count II, which alleges a pattern or practice of document abuse, are in error, because as work authorized individuals, Pascual, Mendez, and the Cacatzums are protected under the document abuse provisions of

IRCA, 8 U.S.C. §1324b(a)(6). United States v. Guardsmark, Inc., 3 OCAHO 572, at 15 (11/2/93).

Accordingly, that portion of respondent's motion requesting dismissal of Counts II and III as they pertain to Pascual, Mendez, and the Cacatzums is denied.

Respondent next asserts that Count I, as it pertains to Pascual, Mendez, and the Cacatzums, is also not viable, again because those four individuals are not within the class of "protected individuals" for the purpose of citizenship status discrimination, under 8 U.S.C. §1324b. 8 U.S.C. §1324b(a)(1)(B); 8 U.S.C. 1324b(a)(3). Respondent contends, therefore, that this Office does not have jurisdiction over the document abuse claims of those four charging parties under 8 U.S.C. §1324b(a)(6), and therefore the claims must also be dismissed.

Respondent's contention is misplaced. Again as previously noted, it is a violation of IRCA, 8 U.S.C. §1324b(a)(6), to engage in document abuse against any work authorized individual, not just against those individuals protected against citizenship status discrimination under IRCA. Guardsmark, 3 OCAHO 572, at 15. As work-authorized individuals, therefore, Pascual, Mendez, and the Cacatzums have standing to file a claim for document abuse. Id. For this reason, respondent's motion is denied as it pertains to Count I.

Finally, respondent asserts that Counts II and III are time-barred, contending that OSC cannot file a complaint on its own initiative with regard to an action which occurred more than 180 days prior to the filing of the complaint.

In support of this proposition, respondent relies upon these provisions in OSC's procedural regulations which pertain to enforcement procedures:

> Special Counsel acting on own initiative.
>
> (a) The Special Counsel may, on his or her own initiative, conduct investigations respecting unfair immigration related employment practices when there is reason to believe that a person or entity has engaged in or is engaging in such practices.
>
> (b) The Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration related employment practice has occurred within 180 days from the date of the filing of the complaint.

28 C.F.R. §44.304.

Respondent is correct in its assertion that OSC may not file a complaint on its own initiative with regard to an action occurring more than 180 days prior to the filing of the complaint. However, in this instance OSC is not acting on its own initiative. Rather, under these facts OSC has filed a complaint with respect to a charge, as provided for in complainant's procedural regulations, 28 C.F.R. section 44.303, and in IRCA, 8 U.S.C. §1324b(d)(2).

The pertinent provisions of IRCA, as well as the pertinent OSC regulations, provide that a charging party must file a charge with OSC within 180 days of the alleged occurrence of a discriminatory act. 8 U.S.C. §1324b(d)(3); 28 C.F.R. §44.300(b). OSC is required to investigate the charge and determine, within 120 days of the filing date, whether to file a complaint with respect to the charge. 8 U.S.C. §1324b(d)(1); 28 C.F.R. §44.303(a).

If OSC fails to file a complaint with respect to the charge within the 120-day investigatory period, it must notify the charging party of the charging party's right to file a complaint directly with this Office. 8 U.S.C. §1324b(d)(2); 28 C.F.R. §44.303(b), §44.303(c). The charging party and OSC then have 90 days from receipt of that notice to file a complaint. 8 U.S.C. §1324b(d)(2); 28 C.F.R. §44.303(c); §44.303(d).

OSC's failure to file a complaint within the 120-day investigatory period does not affect its right to file a complaint with this Office within the 90-day period following the charging party's receipt of the 120-day determination letter. 8 U.S.C. §1324b(d)(2); 28 C.F.R. §44.303(d)(1).

The alleged IRCA violations at issue allegedly occurred on February 25, 1993, or 13 days prior to the date upon which the charging parties filed their March 10, 1993, charges with OSC, and thus well within the 180-day filing period. Accordingly, since the charges were timely filed on March 10, 1993, OSC's 120-day investigatory period ended on July 8, 1993, and thereby fixed the 90-day period in which the Complaint must have been filed as October 6, 1993, or the date upon which, as noted earlier, OSC did in fact file the three-count Complaint at issue.

Accordingly, the Complaint in this action was timely filed on October 6, 1993. For this reason that portion of respondent's motion asserting that the Complaint with respect to Counts II and III was untimely filed and should therefore be dismissed is denied.

In view of the foregoing, respondent's Motion to Dismiss or for Summary Decision is denied.

The discovery activities of the parties will proceed, and a telephonic conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which an adjudicatory hearing can be scheduled.

JOSEPH E. MCGUIRE
Administrative Law Judge