

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

IN RE CHARGE OF)	
MIGUEL LEYTON)	
)	
UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	Case No. 93B00164
RED LOBSTER,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER OF DISMISSAL, SETTLED

(May 2, 1994)

MARVIN H. MORSE, Administrative Law Judge

This is a case under section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, enacting 8 U.S.C. § 1324b. Following filing of the Complaint, Answer, subpoena practice and two telephonic prehearing conferences, counsel advised my office by telephone that the dispute was settled between the parties. Subsequently, on April 29, 1994, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), filed a Motion to Dismiss accompanied by a Settlement Agreement and General Release (Agreement). As the filing was erroneously addressed by OSC to another judge of this Office, it did not reach me until today.

The motion is filed unilaterally by OSC and lacks any indicia of service on either the charging party or Respondent. For those reasons, it has the characteristics of an ex parte communication. See 28 C.F.R. §68.36. The motion, dated April 28, 1994, transmits the agreement dated and signed by the charging party on April 14, 1994, by counsel for Respondent on April 6, 1994, and by OSC on April 19, 1994. Accordingly, notwithstanding the ex parte character of the filing, it is

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appropriate to give effect to the intent of the parties manifest from the execution by them of the settlement agreement.

Notably, while the agreement provides, inter alia, for payment by Respondent of \$1,500.00 in civil money penalties (described at paragraph 2 of the agreement as "fines"), it provides also that,

This Settlement Agreement and General Release will not be considered as a first time judicial determination, for purposes of civil money penalties, of a violation of 8 U.S.C. § 1324b.

Agreement, para. 11.

The complaint alleges violation of the prohibition against citizenship status discrimination, 8 U.S.C. § 1324b(a)(1), and of the prohibition against discrimination by virtue of over documentation requirements, § 1324b(a)(6). By amendment in 1990, the civil money penalty originally enacted by IRCA for § 1324b violations was revised to parallel the tiered civil money penalty enacted by IRCA for violation of the prohibition against employment of unauthorized aliens. See 8 U.S.C. § 1324b(g)(2)(B)(iv), enacted by Sec. 536 of the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, amending 8 U.S.C. § 1324b(g)(2)(B)(iv). Significantly, however, while a judicial determination or one by the Immigration and Naturalization Service, whether through acquiescence or otherwise, of liability under § 1324a compels a civil money penalty pursuant to the tiered structure of 8 U.S.C. § 1324a(e)(4)(A), the scheme of § 1324b(g)(2)(iv) is permissive.

Agreement between OSC and the employer for imposition of civil money penalties without introducing liability for a subsequent violation as second tier offense raises a question of first impression in OCAHO jurisprudence. In any event, however, § 1324b civil money penalties differ in another significant way from § 1324a civil money penalties. Significantly, a finding of a substantive § 1324a violation compels the tiered penalty structure whether or not the violation becomes the subject of a judicial order. Under § 1324a, subsequent penalties are tiered if INS finds a violation as to which the employer fails to request a hearing or, having requested a hearing, acquiesces in a finding by INS of liability short of a judicial determination of liability. Under § 1324b, only the ALJ and/or the appellate court may impose civil money penalties. Because it is within the discretion of the judge to assess or withhold §1324b civil money penalties, in contrast to the scheme of § 1324a prohibitions against unauthorized employment, this decision and order does not disturb the understanding of the parties as set forth at paragraph 11 of their agreement.

The motion is granted and the complaint is dismissed, settled.

SO ORDERED. Dated and entered this 2nd day of May, 1994.

MARTIN H. MORSE
Administrative Law Judge