

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

YOLANDA HERNANDEZ, ESTELA)
GUZMAN, AMPARO LAGUNAS)
AND MARIA HAYNIE,)
Complainants,)
)
UNITED STATES OF AMERICA,)
Intervenor,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 95B00044
FARLEY CANDY CO.,)
Respondent.)
_____)

ORDER DENYING RESPONDENT'S MOTION TO SEVER
(July 18, 1995)

I. Procedural History

On March 7, 1995, Yolanda Hernandez, Estela Guzman, Amparo Lagunas and Maria Haynie (Complainants) filed a Complaint alleging that Farley Candy Co. (Farley or Respondent) engaged in unfair immigration-related employment practices in violation of § 102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. § 1324b. The Complaint, filed in the Office of the Chief Administrative Hearing Officer (OCAHO), includes an underlying charge previously filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) pursuant to 8 U.S.C. § 1324b(b)(1). Complainants filed their Complaint after being notified by OSC that it had not yet made a final determination as to the allegations contained in the charge. See 8 U.S.C. § 1324b(d)(2).

On April 4, 1994, OSC filed a Motion to Intervene as a party in this action and enclosed its proposed Complaint in Intervention; the Motion was granted by Order dated June 1, 1995. 5 OCAHO 765 (1995).

On June 1, 1995, Respondent filed a Motion to Sever Complaints (Respondent's Motion), arguing that the Complaint should be severed because "each of these matters involve an entirely different set of facts, and seek relief pursuant to different provisions of law." Resp. Motion at 1. The individual Complainants and OSC filed oppositions to Respondent's Motion; Complainants' was filed on June 14, 1995 and OSC's was filed on June 15, 1995 [hereinafter cited as Complainant's Brief and OSC's Brief, respectively]. With its Brief in Opposition, OSC concurrently filed a Motion for Leave to Supplement the Record and a Brief in support.

II. *Discussion*

Although OCAHO rules of practice and procedure do not provide specifically for severance of complaints, the Federal Rules of Civil Procedure are available as a general guideline. 28 C.F.R. § 68.1.¹ Specifically, Federal Rule 42(b) states, in pertinent part:

[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim. . . .

(Emphasis added).

"Only one of these conditions need be met for the court to order a Rule 42(b) separate trial." MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1166 (7th Cir. 1982) (citing United States v. IBM Corp., 60 F.R.D. 654 (S.D.N.Y. 1973)). In determining whether to separate claims, courts "weigh the potential for confusion, delay, prejudice or additional expense resulting from the grant or denial of the motion." Procter & Gamble Co. v. Nabisco Brands, Inc., 604 F. Supp. 1485, 1491 (D. Del. 1985) (setting forth factors listed in Akzona v. E.I. DuPont de Nemours & Co., 607 F. Supp. 227, 232 (D.Del. 1984)). The decision to bifurcate proceedings is in the court's discretion. See, e.g., Brom v. Bozell, 867 F. Supp. 686, 689 (N.D. Ill. 1994) (citing Davis v. Freels, 583 F.2d 337, 343 (7th Cir. 1978)).

Respondent argues that "[t]o require Respondent to file a collective Answer, and to have this Tribunal try these allegations in a consolidated matter would clearly prejudice Respondent and not be within the

¹ See generally Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

spirit or the letter of the law." Resp. Motion at 2. According to Respondent, prejudice would result because each of the Complainant's allegations "involve an entirely different set of facts, and seek relief pursuant to different provisions of law." Id. at 1. Furthermore, "Complainants acted separately in their employment relationships with Respondent, and their terminations with Respondent were wholly independent and unrelated to any other conduct of a concerted nature." Id. at 1-2.

In contrast, Complainants argue that all the women who filed this joint Complaint allege discharges involving "certain common threads that weave together the law and facts." Cplt. Brief at 3. These common threads are as follows:

The common factor that precipitated the discharge and retaliation of all four complainants was an INS notification to Respondent advising it that certain of its employees were using Social Security numbers that appeared to be fraudulent. Although apparently the social security numbers of the Complainants appeared on these lists, all four Complainants offered to tender their documents as proof of their legal status. Despite their offer, the Respondent refused.

. . .

Despite INS' notification that these four Complainants were legal residents and authorized to work in the United States, the Respondent only rehired two of the four Complainants . . . [who were] similarly harassed and eventually were retaliated against in the same manner, i.e., discharge. . . . Likewise, despite similar attempts by Hernandez and Guzman to try to regain their jobs back, they were nevertheless refused reinstatement by Respondent.

Id. at 4.

I agree with Complainants and OSC that their allegations involve very similar, if not essentially parallel, factual scenarios.² That two of the Complainants were rehired initially and two were not, and that

² It is instructive to list the Complainants and their specific allegations:

<u>name</u>	<u>§ 1324b allegations</u>
1.) Yolanda Hernandez	citizenship status discrimination document abuse
2.) Maria Haynie	citizenship status discrimination retaliation
3.) Estela Guzman	citizenship status discrimination
4.) Amparo Lagunas	citizenship status discrimination retaliation

different § 1324b violations are alleged does not alter the claims by Complainants that Respondent fired them for substantially the same reason and in the same manner. In the event this case requires an evidentiary hearing, the events surrounding Complainants' termination will likely be the same or similar. As the Procter & Gamble Co. court has written, "bifurcation will often be inadvisable if there would be a substantial overlap between the issues to be proved at both trials." 604 F. Supp. at 1491-2. Significantly, Respondent's Motion does not particularize specific prejudice from failure to grant severance. Considerations of efficiency and economy argue in favor of a single bench-trial of the claims of all four Complainants. I can see no reason to conduct four, or even two, separate hearings involving substantially similar factual situations and the same respondent. Accordingly, Respondent's Motion is denied.

To date, Respondent has not filed an answer to the Complaint. Farley requests that I grant it 20 days from the date of action on Respondent's Motion in which to answer. I grant that request. Respondent's Answer will therefore be timely if filed **no later than August 10, 1995.**

In addition, I grant OSC's Motion for Leave to Supplement the Record and to File a Brief to Supplement the Record, which responds to inquiries in the June 1, 1995 Order. 5 OCAHO 765.

SO ORDERED.

Dated and entered this 18th day of July, 1995.

MARVIN H. MORSE
Administrative Law Judge