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

JOAN A. LARDY,	)	
MARY A. MOORE,	)	
KAROLINA S. GANTCHAR,	)	
FOR AND ON BEHALF OF	)	
THEMSELVES AND ALL	)	
THOSE SIMILARLY SITUATED,	)	
Complainants,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 92B00085
UNITED AIRLINES, INC.,	)	
Respondent.	)	
	)	

ORDER GRANTING PARTIAL LIFTING OF DISCOVERY STAY AND DENYING COMPLAINANT'S MOTION FOR PROTECTIVE ORDER AND RESPONDENT'S MOTION TO STRIKE DECLARATIONS

This case involves an allegation of employment discrimination based on citizenship status brought against United Airlines, Inc. ("United"), by three former London-based Pan American World Airways, Inc. ("Pan Am"), flight attendants who were refused hire by United as flight attendants, on behalf of themselves and all others similarly situated,[1] in violation of Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended by the Immigration and Nationality Act of 1990, 8 U.S.C. § 1324b. The Respondent has filed a Motion to Dismiss the Complaint on several grounds. Complainants contend that they have not responded to the motion because they need significant discovery in order to adequately do so.

[1] Although I have requested briefing on whether I have jurisdiction to hear a class action, I will not decide that issue at this time. I have, however, considered the class issue in ruling on Complainants Motion to Lift. I will rule on whether I have jurisdiction to hear a class action and, if so, after an appropriate motion is filed by Complainants, I will rule on whether I can certify the class.

Other motions relating to discovery have been filed, including a Motion for Protective Order and a Motion to Strike the Declarations of Complainants and their counsel, Raymond C. Fay, in support of Complainants' brief regarding the propriety of a class action and the discovery of the stay. A review of the procedural history of this case will be helpful in understanding the circumstances which gave rise to the pending motions.

I. *Procedural History*

1. On April 22, 1992, Complainants, Joan A. Lardy, Mary A. Moore and Karolina S. Gantchar, for and on behalf of themselves and all those similarly situated former London-based Pan Am flight attendants whom United refused to retain, transfer or hire, filed a Complaint Regarding Unfair Immigration-Related Employment Practices with the Office of the Chief Administrative Hearing Officer (OCAHO) against United, Respondent herein, alleging employment discrimination based on citizenship status, in violation of the Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324b.

2. On May 11, 1992, Complainants filed a Motion to Change Hearing Site from Chicago, Illinois, to Washington, D.C.

3. On May 19, 1992, Complainants filed a Motion for a Protective Order, pursuant to 28 C.F.R. § 68.18(c), as amended by the Interim Rule of October 3, 1991, 56 Fed. Reg. 50049 (hereinafter "28 C.F.R. § 68"). On the same date, Complainants filed a letter, which will be construed as a motion requesting that, pursuant to 28 C.F.R. § 68.25(a), the administrative law judge ("ALJ") issue three subpoenas to third parties; (1) the Association of Flight Attendants ("AFA"); (2) the Independent Union of Flight Attendants ("IUFA"), the collective bargaining representative for flight attendants employed by Pan Am; and (3) Brian Moreau, president of the IUFA.

4. On May 22, 1992, AFA was served with a subpoena for the production of documents. On June 1, 1992, AFA filed a Petition to Revoke Subpoena, arguing that the request was extremely broad, unreasonable and burdensome of AFA's time, efforts and funds. On June 2, 1992, AFA filed an Amended Petition to Revoke the Subpoena, which contained two attached documents, a copy of the subpoena it was served with and a copy of a letter, dated January 24, 1992, from the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") to United's counsel, stating that based on

OSC's determination that it did not have jurisdiction over the allegation of citizenship discrimination, it would not file a complaint.

5. On May 22, 1992, IUFA and Brian Moreau were served with subpoenas. On June 1, 1992, IUFA and Brian Moreau filed a Petition to Revoke Subpoenas and Stay Discovery Or, if Revocation is Denied, For an Extension of Time Within Which to Respond.

6. On June 1, 1992, United filed Respondent's Notice of Motion and Motion: (1) to Dismiss Complaint for Lack of Jurisdiction and For Failure to State a Claim Upon Which Relief Can Be Granted; (2) to Stay All Discovery,[2] and Respondent's Date For Filing an Answer and Other Pleadings, Pending Resolution of Motion to Dismiss; and (3) For Attorneys Fees. In support of its motion, United attached a memorandum of law and the affidavits of Paul G. George, Senior Vice President of Human Resources at United, and Stephen P. Sawyer, Assistant General Counsel of United.

7. On the same date, Respondent filed a Request for Oral Argument on the above motion, pursuant to 28 C.F.R. § 68.11(c).

8. On June 3, 1992, I issued an Order Staying Compliance with Outstanding Subpoenas and Continued Discovery until after resolution of the Motion to Dismiss. The order directed Respondent to file its answer on or before thirty (30) days after the Motion to Dismiss is decided.

9. On June 8, 1992, Complainant filed a Motion for an Extension of Time [to July 15, 1992] to Respond to Respondent's Motion to Dismiss.

10. On June 10, 1992, Complainant filed a Motion to Lift Discovery Stay and Compel Filing of Answer.

11. On June 22, 23, and 24, 1992, AFA, United and IUFA, respectively, filed oppositions to Complainants' Motion to Lift.

12. On July 1, 1992, before ruling on Complainants' Motion to Lift, I issued an Order Directing the Respondent to File an Answer and Both Parties to File Supplemental Briefs.

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[2] United was served with 14 interrogatories and 17 Document Requests.

13. Respondent filed its Answer to the Complaint on July 10, 1992.

14. On July 15, 1992, Complainants filed a Supplemental Brief in Support of Their Motion to Lift. On July 24, 1992, Complainants filed a corrected copy of this brief.

15. On July 15, 1992, AFA filed a Supplemental Memorandum in Opposition to Complainant's Motion to Lift.

16. On July 29, 1992, Complainants filed a Motion to Strike Certain Affirmative Defenses.

17. On August 3, 1992, United filed its Opposition to Complainants' Supplemental Brief and attached thereto were the affidavits of Raymond Boyle, Frank Colosi, Paul George, Craig Horowitz. United also filed on the same date Respondent's Objections to and Motion to Strike Statements in the Declarations of Joan A. Lardy, Mary A. Moore, Karolina S. Gantchar, and Raymond C. Fay in Support of Complainants' Brief: (1) Regarding Propriety of Class and (2) Regarding Discovery Stay.

18. On August 11, 1992, Complainants filed a Reply Memorandum in Support of their Motion to Lift because they were concerned that "United has raised issues not addressed in Complainants' filings and has made numerous misstatements of the law . . ." Complainants also filed a Memorandum in Opposition to Respondent's Motion to Strike.

Although there have been numerous pleadings filed in this case, the only motions that will be decided herein are the Complainants' Motion to Lift the Stay of Discovery, Complainants' Motion for a Protective Order and Respondent's Motion to Strike. For the reasons stated herein, Complainants' Motion to Lift will be partially granted, and Complainants' Motion for a Protective Order and Respondent's Motion to Strike will be denied.

II. *Motion to Dismiss*

Complainants' Motion to Lift the Stay of Discovery is based on their contention that they need additional discovery in order to adequately respond to the Motion to Dismiss. The Motion to Dismiss will, therefore, be addressed first in order to more fully understand Complainants' arguments in the Motion to Lift.

A. Federal Rules as Guideline

Respondent filed its Motion to Dismiss the Complaint For Lack of Jurisdiction and For Failure to State a Claim Upon Which Relief Can Be Granted pursuant to 28 C.F.R. §§ 68.10 and 68.11. Both of these regulations are modeled after Rule 12 of the Federal Rules of Civil Procedure. OCAHO's regulations, however, are not as comprehensive as Fed. R. Civ. P. 12 and do not contain language comparable to Rule 12(b)(6) or Rule 12(c).

OCAHO's regulations provide that an ALJ may use the Federal Rules of Civil Procedure as a general guideline in any situation not provided for by its regulations. 28 C.F.R. § 68.1. I, therefore, will look to Rule 12 and federal case law interpreting its applicable sections for guidance in determining the merits of Complainants' Motion to Lift.

The purpose of Rule 12 is "to expedite and simplify the pretrial phase of litigation while at the same time promoting the just disposition of cases." 5A C. Wright & A. Miller, Federal Practice and Procedure § 1342 at 161 (1990). OCAHO's regulations, 28 C.F.R. §§ 68.10 and 68.11, have the same objective with regard to the prehearing phase of litigation.

Fed. R. Civ. P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction whereas Rules 12(b)(6) and 12(c) govern motions to dismiss for failure to state a claim upon which relief can be granted. Rule 12 requires that Rule 56 standards be applied to motions to dismiss for failure to state a claim under Rule 12(b)(6) when the court considers matters outside the pleadings. Fed. R. Civ. P. 12(b) and (c); Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977) (Motion under Rule 2(b)(6) raising matters outside pleadings is converted to a Rule 56 motion). Rule 12 does not prescribe summary judgment treatment, however, for 12(b)(1) challenges to subject matter jurisdiction where a factual record is developed. Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). Nevertheless, some courts have held that Rule 56 governs a 12(b)(1) motion when the court looks beyond the complaint. In Re Swine Flu Immunization Prod. Liab. Litig., 880 F.2d 1439, 1442-43 (D.C. Cir. 1989); In re Swine Flu Prod. Liab. Litig., 746 F.2d 637, 642 (9th Cir. 1985).

I agree, however, with the majority of circuits that have held to the contrary. See, e.g., Mortensen, 549 F.2d at 891 (disputed issues of

material fact will not prevent trial judge from deciding for itself merits of jurisdictional claims); Mims v. Kemp, 516 F.2d 21, 23 (4th Cir. 1975) (only motion under Rule 12(b) that can properly be converted to one for summary judgment is a motion filed under 12(b)(6)); Williamson v. Tucker, 645 F.2d 404, 413 (5th. Cir.) (district court has power to decide disputed factual issues in a motion under Rule 12(b)(1)); cert. denied, 454 U.S. 897 (1981); Crawford v. United States, 796 F.2d 924, 928 (7th Cir. 1986) (jurisdictional issue must be resolved before trial); Wheeler v. Main Hurdman, 825 F.2d 257, 259 (10th Cir.) (as a general rule, 12(b)(1) motion may not be converted to one for summary judgment), cert. denied, 484 U.S. 986 (1987).

In contrast to a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or other evidence properly before the court. See Thornhill Publishing Co. v. General Tel. and Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). The party opposing the motion then must present affidavits or any other evidence needed to satisfy its burden of establishing that the court, in fact, has subject matter jurisdiction. St. Clair v. City of Chico, 880 F.2d 199, 200-201 (9th Cir. 1989), cert. denied, 493 U.S. 993 (1989). The district court does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes. Id. at 201.

B. Discovery

There are only a few procedural limitations placed on a district court when it faces a factual challenge to a plaintiff's jurisdictional allegations. See 5 C. Wright and A. Miller, supra, § 1350 at 558-59; see also Crawford v. United States, 796 F.2d 924, 929 (7th Cir. 1986) ("No format is specified by statute or rule for evidentiary hearings on jurisdiction; any rational mode of inquiry will do."). Discovery is necessary, however, only if it is possible that a plaintiff can demonstrate the requisite jurisdictional facts if afforded that opportunity. See Wells Fargo and Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977). Where the extra-pleading material demonstrates that the controlling questions of fact are undisputed, additional discovery would be useless. Cf. Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir.) ("Insofar as the defendant's motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence."), cert. denied, 454 U.S. 897 (1981).

Although the plaintiff bears the burden of proving the court's jurisdiction, federal courts hold that the plaintiff should be given the opportunity to discover facts that would support his allegations of jurisdiction. See, e.g., Majd-Pour v. Georgiana Community Hosp., 724 F.2d 901, 902 (11th Cir. 1984); Canavan v. Beneficial Finance Corp., 553 F.2d 860, 865 (3rd Cir. 1977); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1034 (10th Cir. 1975); Miller v. United States, 530 F. Supp. 611, 616 n.3 (E.D. Pa. 1982).

III. *Complainants' Motion to Lift Discovery Stay*

In determining the merits of Complainants' Motion to Lift the Discovery Stay, I will consider certain basic rules of pleading. I will assume that the facts alleged in the Complaint are true because I cannot grant the Motion to Dismiss unless it appears beyond doubt that Complainants can recover on no set of facts consistent with their allegations. See Hishon v. King and Spalding, 46 U.S. 69, 73 (1984). I, therefore, will accept as true the facts alleged in the Complaint and all reasonable inferences that can be drawn therefrom. I will also consider all other pleadings filed, and the admissions therein.

If a material fact needed by Complainants to respond to the motion is not in dispute, I will deny the Motion to Lift the Stay of Discovery with regard to that request. If there needs to be discovery of relevant information outside the pleadings in order for Complainants to adequately respond to any or all of Respondent's reasons for seeking a dismissal of the Complaint, I will permit reasonable discovery.

The rulings to be made herein with regard to Complainants' Motion to Lift the Stay of Discovery are only for purposes of resolving the issue of subject matter jurisdiction. If I later find in favor of Complainants on the issue of jurisdiction, I will then reconsider on motion those discovery requests which I have stayed or denied.

A. Respondent's Arguments in Support of Motion to Dismiss

Respondent argues in its Motion to Dismiss that the Complaint should be dismissed for lack of jurisdiction because (1) Complainants did not timely file their charges with OSC, pursuant to 8 U.S.C. § 1324b(d)(3), as the charges were filed more than 180 days after the alleged acts of discrimination occurred; (2) IRCA's antidiscrimination provisions do not apply extraterritorially to regulate the employment practices of a U.S. employer who interviews and hires applicants

abroad for jobs based overseas; (3) the ALJ lacks jurisdiction over the Complaint because "Complainants have filed charges based upon the same set of facts with other state and federal agencies," Motion to Dismiss at 10, including the Equal Employment Opportunity Commission; and (4) that "Complainants cannot rely on extraneous allegations in their complaint beyond their citizenship discrimination claim to defeat United's jurisdictional arguments," Motion to Dismiss at 12, because "none of these additional allegations were contained in Complainants' charges [filed with OSC], nor (sic) were they the subject of [OSC's] investigation." Motion to Dismiss at 13.

In addition, Respondent argues that even if the ALJ has jurisdiction over the extraneous allegations, each of them must be dismissed for failure to state a claim upon which relief can be granted.

B. Discovery Issue With Regard to Each Argument

1. The Charges Were Not Timely Filed

Respondent argues that Complainants' attempt to escape IRCA's timeliness provisions only "through obscure references in their complaint to alleged 'continuing violations' (Complaint para. 4)." Respondent's Opposition to Motion to Lift at 8.

With regard to this theory of dismissal, Complainants state that they will demonstrate in their opposition to Respondent's Motion to Dismiss that their charges "were timely filed within 180 days of the date they each received United's letter informing them that United had other candidates who more closely met its selection criteria." Motion to lift at 2, fn.2.

More importantly, Complainants specifically state in their supplemental brief that they are not seeking any discovery on this issue "because their charges were timely filed within 180 days after they received United's March 13, 1991 letter." Supplemental Brief at 11, fn.10. Since Complainants are not seeking discovery on this issue, the need for discovery to respond to timeliness is not a basis for lifting any or a part of the stay.

Although not discussed by Complainants, time limits on agency filings are subject to equitable modification, such as tolling. See, e.g., Zipes v. Transworld Airlines, 455 U.S. 385, 393 (1982); Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Salcido v. New-Way Pork

Company, 2 OCAHO 425 (4/28/92) (ALJ Schneider); Grodzki v. OOCL, 1 OCAHO 295 (2/13/91). However, even if the charges in this case were not timely filed, the determination of whether the doctrine of equitable tolling applies does not require discovery of any information that is in the possession of Respondent or the third parties, AFA, IUFA, and Brian Moreau, because the evidence relevant to this issue is a matter of public record or is within the personal knowledge of Complainants.

2. The Extraterritorial Issue

There is a dispute between the parties as to the analysis applicable to determining jurisdiction in this case. Respondent argues that the Complaint should be dismissed because IRCA's antidiscrimination provisions do not apply e xtraterritorially. Respondent, relying on EEOC v. Arabian America Oil Co., 111 S. Ct. 1227 (1991), argues that the United States does not have jurisdiction in this case because the alleged violation occurred in London, where the Complainants were interviewed and where all jobs were based, and not in any "circuit" of the United States." See Respondent's Opposition to Complainant's Motion to Lift at 8.

Complainants contend, however, that this is not an extraterritorial case, as all allegations against Respondent concern activities which occurred in United States territory. Complainants further contend that regardless of whether IRCA applies extraterritorially, this case should not be controlled by the Supreme Court's decision in Arabian American Oil.

Complainants argue in their supplemental brief to their Motion to Lift that the determination of jurisdiction should be based on choice of law principles. In support of this argument, Complainants cite to a number of maritime cases including Lauritzen v. Larsen, 345 U.S. 571 (1953), and Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970), to support the argument that this court should "[weigh] and balance . . . all relevant factors" to determine subject matter jurisdiction instead of considering only where the jobs were based and where the interviews were conducted.[3]

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[3] Both Lauritzen and Rhoditis concerned the application of the Jones Act, 46 U.S.C. App. 688, to foreign seamen serving on foreign flagged vessels. Together, the two cases provide an eight factor balancing test used to determine whether the United States has

(continued...)

In determining whether to lift the stay of discovery as to the issue of jurisdiction, I will assume that a choice of law analysis is appropriate in determining subject matter jurisdiction. It is important to point out, however, that this may not be my ultimate finding in whether I have subject matter jurisdiction in this case. See, e.g., Indep. Union of Flight Attendants v. Pan American World Airways, Inc., 923 F.2d 678, 685 fn 1 (9th Cir. 1991) (Nelson, J., dissenting) ("Extraterritoriality is admittedly one of the looser concepts. As the jurisprudence in this field suggests, the decision whether to label a case "extraterritorial' is far from clear-cut.") Lopez v. Pan Am World Services, Inc., 813 F.2d 1118 (11th Cir. 1987) (finding, based on the plain language of § 13(f) of the Fair Labor Standards Act, that the location of the work station is the controlling factor for discerning the Age Discrimination in Employment Act's (ADEA's) extraterritorial effect), reh'g denied, 819 F.2d 1150 (11th Cit. 1987); but see Wolf v. J.I. Case Co., 617 F. Supp. 858 (E.D. Wisc. 1985) (stating in dicta that an "ambulatory" job, where workweek employment may occur both within and outside the United States, may present a true case of dual foreign and United States employment subject to ADEA protection; see also Lopez, 813 F.2d at 1120 (Hartchett, J., dissenting) (Judge felt "nothing extraterritorial" was involved in ADEA case of U.S. corporation's failure to hire U.S. citizen where application, interview and application processing all occurred in U.S.).

I will therefore consider, but only for the purpose of ruling on the Motion to Lift, the factors which Complainants contend in their supplemental brief and their reply memorandum are relevant to providing jurisdiction, and whether or not the discovery requested is reasonable, necessary and relevant to support Complainants' theory of jurisdiction.

While Complainants are entitled to sufficient discovery to establish the relevant facts to support their theory as to jurisdiction, a careful analysis reveals that some of Complainants' discovery requests are an attempt to obtain detailed information to prove alleged jurisdictional facts that have already been admitted or proven by pleading, affidavits, or documents filed in the case. Some of the other discovery requests seek information which I find to be irrelevant to Complaints' theory of jurisdiction.

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[3](...continued)
sufficient interest in an admiralty controversy for American courts to apply United States Law. See EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109 (M.D. Fla. 1990).

Complainants state in their Motion to Lift that they will demonstrate in their opposition to the Motion to Dismiss that they have not sought to apply IRCA extraterritorially. They do not dispute that they applied for London-based flight attendant positions; nor do they dispute that they interviewed for the positions in London.[4]

Complainants argue, however, that in determining jurisdiction, the court should consider, inter alia, (1) that the London-based flight attendants perform a substantial part of their duties within the United States; (2) Pan Am flight attendants based at Dulles International Airport worked the same routes as the London-based flight attendants, only in reverse; (3) that United flight attendants based in the continental United States work a number of the same routes as London-based flight attendants; (4) the decision not to transfer Complainants to United was made in the United States; (5) virtually all aspects of United's business and flight operations associated with the employment sought by Complainants are in the United States; (6) all the terms and conditions of employment as a flight attendant with United are United States originated and controlled; (7) that United's flight operations are centralized in the United States; and (8) that the flights actually worked by United's London-based flight attendants consist of more than just flights which originate and terminate in London.

Complainants argue that at a minimum, (1) United should be required to respond to Interrogatories 1, 1(a), 1(h), 2, 2(a), 12, and 15-17; (2) AFA should be required to respond to AFA subpoena requests 6-10, 13 and 14; and (3) IUFA and Brian Moreau should each be required to produce document requests 6-10 and 13 in each of their subpoenas.

Taking into consideration Complainants' pleadings and arguments, the factors which I find relevant to support Complainants' theory that this court has jurisdiction are, inter alia, (1) that Complainants were "protected individuals" as defined at 8 U.S.C. § 1324b(a)(3); (2) that

[4] It is unclear from the Complaint whether Complainants were seeking flight attendant positions only in London. Moreover, the Complaint states that during the interview process, Complainants were told that United could not guarantee that any position offered would be for the London base. Arguably, an inference could be made that United considered hiring Complainants for jobs in the United States as well as in London. This is a factual matter which will have to be clarified by the parties prior to ruling on Respondent's Motion to Dismiss.

United is a United States corporation and has its corporate headquarters and principal place of business in the United States; (3) that Complainants applied for flight attendant positions based in the United States; (4) that Complainants were interviewed and/or considered by United for flight attendant positions based in the United States; (5) that if hired for flight attendant positions based in London, Complainants would have flown a substantial number of routes to and from the United States or would have performed a substantial part of their duties in the United States; (6) that the decision not to hire Complainants for flight attendant positions was made at United's headquarters in the United States; and (7) that English law does not provide a remedy for Complainants' claim.

I will now examine Complainants' discovery requests and their arguments presented in their Motion to Lift the Stay of Discovery and supplemental brief in order to determine whether the requested information is necessary in order for Complainants to respond to the Motion to Dismiss.

a. Complainants argue that the Motion to Lift should be granted with respect to discovery which will show that United's London-based flight attendants fly a substantial number of routes to and from the United States or perform a substantial part of their duties within the United States.

Complainants argue interrogatories 1(a), 1(b), 1(h), 2(a), 2(h), 3(a), 3(e), 11 and 12 and Document Requests 16 and 17 submitted to United all seek to confirm the routes and continuation points flown by United through London-Heathrow since April 3, 1991 (and by Pan Am for the several previous months). Complainants argue that these requests bear directly on the significant and controlling nexus between London flight attendant employment and flights into the United States. Complainants also argue that this discovery is expected to show that all London-based flight attendant employment is centered around U.S. flying and none involved extraterritorial flying.

More specifically, Complainants point out that Interrogatory 1(h) of its first set of interrogatories to United, requests that United identify each route or route segment flown by each former Pan Am Flight attendant who was transferred to United; that Interrogatory 11 requests that United "identify (by origination, termination, transfer, and through points and by flight numbers) all routes and route segments served by United since April 3, 1991 originating, terminating

or connecting through London-Heathrow; and that Interrogatory 12 asks for the same information for Pan Am for the period January 1, 1990 to April 3, 1991. Complainants argue that these requests will further demonstrate that the London-based flight attendants continuously work flights into and within the United States.

Although Respondent concedes in its "Opposition to Complainant's Brief" that its London-based flight attendants fly routes to and from the United States, Respondent disputes that these flight attendants fly a "substantial" number of their flights to and from the United States. The difference between some and a substantial number of flights may be significant to Complainants' theory of jurisdiction. I find, therefore, that Interrogatories 1(a), 1(b), 1(h), 2(a), 2(h), and Document Request 16 directed to United are reasonable and relevant to determining whether or not United's London-based flight attendants fly a substantial number of routes to and from the United States or perform a substantial amount of their duties within the United States. Therefore, the Motion to Lift the Stay of Discovery with respect to these specific discovery requests is granted.

I find that Interrogatory 11, discussed supra, will not provide any information that is reasonable or relevant to the issue of jurisdiction because the interrogatory is overbroad and its relevant portions are covered by Interrogatories 1(h) and 2(h). I, therefore, deny Complainants' requests to lift the stay of discovery as to this interrogatory.

Document Request 17 to United seeks the system timetables of Pan Am for November 1, 1990, March 1, 1991 and May 1, 1991, or the timetables nearest each of those dates. Complainants argue that that this request, along with Interrogatory 12, discussed supra, are relevant to prove that London-based flight attendants continuously work flights into and within the United States. I find, however, that these discovery requests are neither reasonable nor relevant to proving Complainants' theory of jurisdiction; and, therefore, Complainant's Motion to Lift the Discovery Stay as to Interrogatory 12 and Document Request 17 is denied.

Interrogatory 3(a) requests the names of each person employed by United as a flight attendant prior to November 1, 1990, and who thereafter transferred to United's London base. Interrogatory 3(e) requests their routes or route segments flown since April 3, 1991. I find that these requests will require overly time-consuming discovery and may only corroborate information acquired from other discovery

requests which I will permit, showing that subsequent to April 3, 1991, United's London-based flight attendants flew a substantial number of flights to the United States. The Motion to Lift the Discovery Stay as to Interrogatories 3(a) and 3(e) is therefore denied.

b. Complainants argue that the Motion to Lift should be granted with respect to discovery which will show that Pan Am flight attendants based out of Dulles Airport worked the same routes as the London-based flight attendants, only in reverse.

I find that this discovery request is not reasonable or relevant, given Complainants' theory of jurisdiction; and, therefore, the Motion to Lift the Discovery Stay is denied with respect to all discovery requests related to proving it.

c. Complainants argue that the Motion to Lift should be granted with respect to discovery which will show that United flight attendants based in the continental United States work a number of the same routes as United's London-based flight attendants.

I find that this discovery request is not reasonable or relevant to Complainants' theory of jurisdiction; and, therefore, the Motion to Lift the Discovery Stay is denied with regard to all discovery requests related to proving it.

d. Complainants argue that the Motion to Lift should be granted with respect to discovery which will show that United's decision not to transfer or hire Complainants was made in the United States.

I find this discovery request is unnecessary because the matter has been pled in the Complaint and has also been admitted by Respondent. See Complaint at para. 3; Answer at para. 3; Respondents' Opposition to Complainants' Brief at 30. Therefore, the Motion to Lift is denied as to this discovery request.

e. Complainants argue that the Motion to Lift should be granted with respect to discovery which will show that all aspects of United's business and flight operations associated with the employment sought by Complainants are in the United States.

Complainants argue that discovery will confirm that all of United's flight operations are centralized in the United States, the airplanes and pilot crews used in London-Heathrow operations are based and

certificated in the United States and all scheduling and regular maintenance is done in the United States.

The pleadings in this case show that United is a Delaware corporation with its corporate headquarters and principal place of business in Illinois. In addition, the pleadings show that United has over 70,000 employees, the vast majority of whom are employed in the United States and that central management and administrative decisions, including those relating to hiring and employment, are made at United's headquarters. See Complaint at para. 3 and Answer at para. 3. It is clear from the record in this case that the decision not to hire Complainants was made in the United States and that a significant part of United's business operations is conducted in the United States. I, therefore, find that Complainants' request is not reasonable and the Motion to Lift the Stay of Discovery is denied with regard to information sought to prove that all aspects of United's business and flight operations associated with the position of London-based flight attendant are in the United States.

f. Complainants argue that the Motion to Lift should be granted with respect to the production of all documents provided to the High Court or the Industrial Tribunal in the United Kingdom regarding charges or complaints brought against United by IUFA or former London-based Pan Am flight attendants.

Complainants have requested all documents provided to the High Court or the Industrial Tribunal in the United Kingdom ("U.K.") regarding charges or complaints brought against United by the IUFA or by the former London-based Pan Am flight attendants. Complainants argue that discovery should be allowed because in the U.K. proceedings, United strenuously argued that the U.K. courts did not have jurisdiction to entertain the former Pan Am flight attendants' claims because their claims were subject to U.S. law, including the Railway Labor Act, and that all United flight attendants were employed pursuant to the terms and conditions of United's Railway Labor Act contract with the AFA. See Motion to Lift at 6.

It is difficult to determine Complainants' need for these burdensome discovery requests because the nature and extent of the proceedings in the United Kingdom have not been carefully described. I find that the discovery requests relating to the U.K. proceeding are not necessary because Respondent has admitted that United flight attendants who fly domestically within the United States or to or from

the United States are employed pursuant to the Railway Labor Act and that the terms and conditions of their employment are governed by the collective bargaining agreement between United and AFA.[5] See Answer, para. 25 at 8. Based on these admissions, Complainants can argue that because the employment contract is governed by the United States law, jurisdiction belongs in the United States. I, therefore, deny the Motion to Lift with regard to this discovery request.

g. Complainants argue that the Motion to Lift should be granted with respect to documents sought from AFA, IUFA and Brian Moreau relating to the Proceedings before the High Court of the Industrial Tribunal in the United Kingdom and to the Department of Transportation in connection with the route sale because they may reflect the applicability of U.S. law.

Complainants' argument relates to Subpoena Requests 6-10, 13 and 14 from AFA and Document Requests 6-10 and Subpoena Requests 10 and 13 from IUFA and Brian Moreau. I find that these document requests are not reasonable, as discussed above, and are not relevant to Complainants' theory of jurisdiction because the basis for them is speculative and does not suggest proof of a relevant factor in determining subject matter jurisdiction in this case. The Motion to Lift is, therefore, denied with regard to these requests.

h. Complainants argue that the Motion to Lift should be granted with respect to Complainants' request that AFA produce documents relating to any grievance brought or arbitration involving any London-based flight attendant who has unsuccessfully attempted to transfer to any United States base of United and relating to any London-based flight attendant who flew or attempted to fly a United domestic flight holder of a "D" visa.

I find that these document requests relating to grievance or arbitration are not reasonable to prove Complainants' theory of jurisdiction. Therefore, the Motion to Lift the Discovery Stay is denied with respect to those documents relating to a grievance or arbitration.

3. Charges on Same Set of Facts Filed With Other Agencies

[5] I would lift the discovery stay as to this request if Complainants had intended to show, e.g., that English law does not provide a remedy for their claim. See EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109, 1112 (M.D. Fla. 1990).

Complainants have filed charges based on the same set of facts with other state and federal agencies, including the Equal Employment Opportunity Commission. No discovery is necessary, however, to determine whether such filings deprive OCAHO of jurisdiction. The facts concerning the filings do not seem to be in dispute and the matter, therefore, can be resolved by legal argument.

4. The Extraneous Allegations

Respondent argues in its Motion to Dismiss that there are several allegations in the Complaint, in addition to the citizenship discrimination claim, that should be dismissed. These "extraneous allegations" include (a) that United unlawfully employed alien flight attendants on U.S. domestic segments of an international trip, rather than on international segments; (b) that "Pan Am and United, jointly and severally, refused to implement the successorship provision in the collective bargaining agreement between Pan Am and the [IUFA] which required United to employ Complainants and others similarly situated on terms and conditions no less favorable than those under which they were employed at Pan Am" (Motion to Dismiss at 5); and (c) that United retaliated against Complainants, and others similarly situated, in violation of 8 U.S.C. § 1324b(a)(5), by not permitting them, as a group, to engage in settlement negotiations regarding the English law claims asserted by former Heathrow-based Pan Am flight attendants.

Respondent argues that because none of these allegations were contained in Complainants' charges filed with OSC and, therefore, were not investigated by OSC, they cannot be included in the Complaint. This is a legal issue, to which Complainants can respond without any additional discovery.

Respondent also argues that each of the extraneous allegations must be dismissed for failure to state a claim upon which relief can be granted. More specifically, Respondent makes the following arguments.

a. Unlawful Employment of Alien Flight Attendants

United argues that Complainants cannot pursue a claim for unlawful employment of aliens which arises under 8 U.S.C. § 1324a in this proceeding in which the underlying charges are for citizenship discrimination pursuant to 8 U.S.C. § 1324b. As Complainants do not

request additional discovery with regard to this argument, it need not be addressed in ruling on the motion to lift the discovery stay.

b. Successorship Issue

Respondent also argues that the successorship issue is not the proper subject of this proceeding:

> The issue whether an air carrier such as United is bound be the substantive terms of a collective bargaining agreement of another air carrier whose overseas route (sic) are acquired is governed by the [Railway Labor Act], and subject to the jurisdiction of an appropriate board of adjustment or the federal courts.

Motion to Dismiss at 14. As Complainants do not request additional discovery with regard to this argument, it need not be addressed in ruling on the Motion to Lift the Discovery Stay. However, if there is a finding of subject matter jurisdiction, Complainants may address the legal argument in their response to the Motion to Dismiss.

c. Retaliation

Respondent denies that it retaliated against Complainant in settlement negotiations with former Pan Am flight attendants to resolve their English law claims. Respondent conceded, however, that like a Fed. R. Civ. P. 12(b)(6) motion which converts into a Rule 56 motion when the moving party relies on evidence outside the pleadings, Mortensen v. First Fed. Sav. & Loan Assoc., 549 F.2d at 891, Respondent's reliance on affidavit evidence with regard to the retaliation allegation converts its Motion to Dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R. § 68.10 into a motion for summary decision under 28 C.F.R. § 68.38 with regard to the issue of retaliation. Therefore, the retaliation issue need not be addressed with regard to the Motion to Dismiss, nor with regard to the Motion to Lift the Discovery Stay.

Retaliation is an unfair immigration-related employment practice under IRCA. 8 U.S.C. § 1324b(a)(5). Although retaliation was not pled in the Complaint as a separate count,[6] whether there was unlawful discriminatory retaliation will be determined by summary decision or after an evidentiary hearing.

[6] Complainants should consider filing a motion to amend the complaint to allege retaliation as a separate count.

5. All Other Discovery Requests

After careful consideration of all Complainants' discovery requests which were not addressed above, I deny the Motion to Lift Discovery Stay with regard to these requests. If the Motion to Dismiss is denied, I will then reconsider, on motion, all discovery requests which remain under the discovery stay.

IV. *Complainants' Motion for Protective Order*

Complainants filed a Motion for Protective Order on May 19, 1992. They state that their basis for the motion is that some of the documents they requested from United, including "qualifications for flight attendant positions at United's London base, employment applications, [minutes] of internal meetings at United, and documents which reflect or refer to United's hiring decision as to individuals and the reasons therefor[,] . . . may contain confidential information regarding individual applicants and commercial information which is confidential and proprietary to United." Motion for Protective Order at 6. Complainants request that a protective order be issued "granting confidential status to those documents provided to Complainants by United which United deems to contain confidential information regarding employees, or applicants for employment, or which contain confidential commercial information which is not otherwise available to the public and the disclosure of which could materially disadvantage United." Id.

Complainants filed their Motion for Protective Order pursuant to 28 C.F.R. § 68.18(c) which states that:

> Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge may make any order which justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense . . .

Complainants' motion is unusual in that Complainants are the party that requested the production of documents. Complainants would not be permitted to bring this motion in a federal case as Fed. R. Civ. P. 26(c)(7), which covers motions for protective order regarding confidential or commercial information, is different than our regulation. According to the federal courts, "[i]t is for the party resisting discovery to establish, in the first instance, that the information sought is within this provision of the rule, see, e.g., Reliance Ins. Co. v. Barron's, 428 F. Supp. 200 (D.C.N.Y. 1977), and that he might be harmed by its

disclosure. See, e.g., Centurion Industries, Inc. v. Warren Steurer & Associates, 665 F.2d 323, 325 (10th Cir. 1981), citing C. Wright & A. Miller, 8 Federal Practice & Procedure § 2043.

I find that in order to grant a Motion for Protective Order regarding the documents which I have allowed Complainants to request from United, it must first be established that the information sought by Complainants is confidential and that United might be harmed by its disclosure. As there has been no showing that United would be annoyed, harassed, embarrassed, oppressed, or put to undue burden or expense if it complied with the request for production of documents which I have allowed, Complainants' Motion for a Protective Order is denied.

V. *Respondent's Motion to Strike Declarations*

On August 3, 1992, Respondent filed a Motion to Strike forty-three (43) statements in the declarations of Complainants and their counsel, Raymond C. Fay, in support of Complainants' brief regarding the propriety of a class action under IRCA and the discovery stay. Respondent argues that these statements should be stricken because they are either hearsay, not the best evidence, vague and ambiguous, lacking in foundation, legal conclusions, conclusory, argumentative, speculative, or irrelevant.

The rules of evidence in an administrative hearing are less stringent than Federal Rules of Evidence. I will now address each class of objections made by Respondent.

A. Hearsay

United objects to numerous statements on the basis that they are hearsay. It is well established, however, that hearsay is admissible in administrative hearings if factors assuring the underlying reliability and probative value of the evidence are present. Gimbel v. Commodities Futures Trading Commission, 872 F.2d 196, 199 (7th Cir. 1989), citing Richardson v. Perales, 402 U.S. 389 (1971); U.S. v. Cafe Camino Real, 1 OCAHO 224 (8/28/90). Such factors include the possible bias of the declarant, whether the statements are signed or sworn to as opposed to oral, or unsworn, whether the statements are contradicted by direct testimony, whether the declarant is unavailable and no other evidence is available, and finally, whether the hearsay is corroborated. Id. at 402. Furthermore, hearsay can constitute substantial evidence

upon which an administrative decision may be based. U.S. v. Mr. Z Enterprises, 1 OCAHO 288 (1/11/91); U.S. v. YES Industries, 1 OCAHO 198 (7/16/90).

Therefore, United's Motion to Strike those statements which it contends are hearsay is denied. That any of these statements may constitute hearsay will only go to the weight I accord them.

B. Best Evidence Rule

United objects to numerous statements in the declarations on the basis of the best evidence rule. The best evidence rule does not apply, however, in proceedings under 8 U.S.C. § 1324b. The Rules of Practice and Procedure state that "[m]aterial and relevant evidence shall not be excluded because it is not the best evidence, unless its authenticity is challenged, in which case reasonable time shall be given to establish its authenticity." 28 C.F.R. § 68.40(b). Therefore, Respondents Motion to Strike those statements which do not comply with the best evidence rule is denied.

C. All Other Objections

Respondent objects to statements in the declarations on the basis that they are vague and ambiguous, lacking in foundation, legal conclusions, conclusory, argumentative, speculative, or irrelevant. Because the rules of evidence in an administrative proceeding are relaxed, and because I disagree with Respondent's characterization of some of these statements, Respondent's Motion to Strike these statements is denied.[7]

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

(1) Respondent shall file a response on or before October 9, 1992, to Complainants' Motion to Change the Hearing Site from Chicago to Washington, D.C.

(2) Respondent shall file a response to the discovery requests permitted herein (Interrogatories 1(a), 1(b), 1(h), 2(a), 2(h) and Document Request 16) on or before October 9, 1992.

[7] I will take into account Respondent's objections in determining the appropriate weight to give these statements.

(3) Complainants are directed to obtain through discovery information to prove (a) whether an agent of United who conducted their job interview, asked them during the interview or application process if they would work as flight attendants in the United States, (b) whether they agreed to do so, and (c) whether at any time after they applied for United flight attendant positions, United considered them for flight attendant positions in the United States. I will permit Complainants to discover this information through appropriate affidavits, interrogatories or depositions of United's agents, their own affidavits and by obtaining relevant documents from United.

(4) Complainants' response to the Motion to Dismiss shall be filed on or before November 9, 1992. Complainants may incorporate any arguments that have been made in prior pleadings.

(5) Respondent shall have ten (10) days after receipt of Complainants' response to file any response. Respondent may incorporate any arguments that have been made in prior pleadings.

(6) Respondent's Request for Oral Argument on the Motion to Dismiss will be taken under advisement until after all briefs on the motion to dismiss have been filed.

SO ORDERED.

Dated: September 3, 1992

ROBERT B. SCHNEIDER
Administrative Law Judge