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

I. *Introduction*

There are a number of pre-trial motions pending before me, including a motion to change the hearing site, a motion to amend the complaint, a motion to strike the affidavits of Raymond E. Boyle, Richard E. Sebastian, Robert A. Siegel and Michael Curley, a motion for sanctions and attorneys fees and a motion to compel Respondent to answer a number of written questions submitted to three United employees who were directly involved in United's decision-making process regarding whether to hire Complainants. I will discuss and decide each of these motions seriatim.[1]

II. *Complainant's Motion to Compel*

The procedural background to this matter shows that on January 8, 1993, Complainants filed a motion to compel responses to Complainants depositions on written questions of Raymond E. Boyle, John

[1] Although Respondent's motion to dismiss the complaint in this case has been pending since June 1, 1992, and substantial briefing has been submitted by both parties, the motion to dismiss cannot be decided until these other motions (except the motion to change hearing site) have been decided and discovery has been completed on the issue of whether I have jurisdiction to decide this case.

Kurnick and Deanna Popowcer.[2] The questions at issue in the motion to compel were submitted to Respondent pursuant to my Order of September 3, 1992. That order stated that some of the factors which I considered relevant to support Complainants' theory of jurisdiction were "that Complainants applied for flight attendant positions based in the United States" and "that Complainants were interviewed and/or considered by United for flight attendant positions based in the United States." This would include whether there was discussion with Complainants during the interview process of potential employment in the United States.

Accordingly, in the Order of September 3, 1992, I partially lifted my prior order staying discovery by inter alia, directing Complainants 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.

After my September 3, 1992, order was issued, the parties entered into a discovery agreement by which the Complainants would take the depositions of United employees Boyle, Kurnick and Popowcer upon written questions, in lieu of live testimony. Pursuant to this agreement, Complainants served upon United three separate sets of depositions upon written questions, each set containing the identical thirty-six questions.

Complainants argue that on objection and instruction by Respondent each of the three deponents have essentially failed to answer 24 of the 36 questions. Copies of the written questions, including United's responses on behalf of the deponents, were attached to Complainants' motion to compel.

In the motion to compel, Complainants' request that I issue an order compelling Respondent to answer written questions 8-25, 30 and 33-36. Complainants' motion to compel was amended in its reply memorandum, filed February 5, 1993, to exclude questions 14-19. Respondent filed an "Opposition to Complainants' Motion and a

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[2] Initially, Complainants stated their desire to depose each of the individuals who interviewed the former Pan Am flight attendants in London. When United's counsel explained that some of those persons lived in San Francisco, England, or Hawaii, Complainants changed their plans and asked only for depositions of the three United human resource professionals who sat on the interview panels.

Request for Attorney Fees." Complainants then filed a sur-reply. Subsequent thereto, Respondent filed a response and a letter arguing, inter alia, that I should not consider Complainants' sur-reply brief because Complainants failed to obtain my authorization to file the pleading as required by 28 C.F.R. §68.11(b). Respondent's request to disregard Complainants' sur-reply will be denied but I will grant Respondent's request to consider all its other arguments in its reply and letter. Moreover, I direct Complainants to obtain the necessary approval before submitting any further pleadings, if required by the Office of Chief Administrative Hearing Officer's "(OCAHO)" regulations.

After carefully considering all the pleadings filed on the subject of the motion to compel and the arguments made by both parties, for the following reasons I grant in part and deny in part Complainants' motion to compel.

Complainants, citing Federal Rules of Civil Procedure 26, argue that the deposition questions at issue are "reasonably calculated to lead to the discovery of admissible evidence" pertaining to those matters specifically designated in my September 3, 1992, Order. Complainants provide a list of reasons explaining how the questions seek to obtain information directly related to Complainants' job interviews and the application process. Complainants have misconstrued my September 3, 1992, order, which was purposely limited to resolve a jurisdictional issue and not to allow broad discovery requests regarding the underlying facts of this case. Contrary to Complainants arguments, the three questions set forth above as to which I allowed them to take deposition testimony are neither open-ended nor general.

My September discovery order had the limited purpose of allowing Complainants to determine whether at any time after they filed an application for employment with United for a flight attendant position, employment in the United States in lieu of employment in London, England, was an option presented to them orally or in writing, during the interview process or otherwise.

Foundation questions and detailed background information are not necessary to discover the specific job location(s) discussed and/or offered to Complainants. Complainants, have limited their inquiry to some extent by the discovery tool they have chosen because written questions, unlike oral questions at a deposition, cannot be immediately

reframed on objection to resolve issues of semantics, relevancy and scope of the inquiry.[3]

Although Complainants themselves can testify as to what was told to them during the interview process or otherwise, my order suggests that it may be helpful in resolving the jurisdictional issue (although not necessarily determinative for the ultimate finding of jurisdiction) to determine if any of Respondent's hiring officials recall offering Complainants employment in the United States or discussing employment in the United States as an option at that time. This can simply be determined by Complainants asking the deponents the content of any discussions they had with any of the three Complainants about the location(s) of the flight attendant positions.

A careful review of the answers given by the three deponents shows that each testified that United did not ask the Complainants or any of the other Pan Am applicants if they would work as flight attendants in the United States. Each further testified that none of the Complainants or Pan Am applicants agreed to work in the United States and that United never considered the Complainants or any of the Pan Am applicants for positions in the United States. As pointed out by Complainants, however, United's standard application form, which was completed by all of the former Pan Am flight attendants who applied to United asks, "Are you willing to relocate for employment?" It also asks that each applicant state his or her "Home base location preferred." See Complainants' Memorandum in Opposition to Respon-dent's Motion to Dismiss King's Declaration, attached as Exhibit F. In addition, Ms. Moore has declared in a affidavit that she and some of the former Pan Am flight attendants, including Ms. Moore, were told in their interviews with United that United could not guarantee a job in London. See MOR Moore Decl. par. 2. Complainants suggest that there may be more information needed from Respondent than the straight forward answers of the deponents denying that any flight attendant jobs in the United States were discussed with complainants.[4]

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[3] It is important to note that it is undisputed that the three United employees who were deposed by written questions were all involved in the interviewing of Complainants, but were not the only United employees who were present during the interviews. It is not clear from the record whether the Complainants had conversations with other United employees representing management beside deponents, but outside their presence, about the location of the flight attendant job.

[4] If there is a conflict between the testimony of Complainants and the deponents concerning whether employment in the United States was an option, I will be required

(continued...)

After carefully reviewing all the questions which Complainants seek Respondent to answer in the motion to compel, I find that many are too broad and seek responses beyond the intent, scope and purpose of my September discovery order. Other questions, however, can be modified and submitted to Respondent for an answer. I agree with Respondent that many of Complainants' questions (Question "(Q)" 9-19) would have United explain all of its staffing decisions and the entire process used to staff the London base. (See Q. 9-19.) Moreover, I agree with Respondent that information relating to United's acquisition of the London domicile (Q. 8-10), information relating to the structure of the interview process (Q. 22 and 23), goes far beyond the three narrow areas of inquiry which I permitted in my September discovery order.

Complainants' memorandum in support of their motion to compel also shows that many of the questions at issue are beyond the scope of my discovery order. These questions ask among other things each deponent's role in United's acquisition of Pan Am's London routes (Q. 8); each deponent's input to United officials regarding the staffing of the London routes (Q. 9,10); each deponent's own duties and respon-sibilites regarding flight attendant staffing of the London routes and those of their subordinates (Q. 11); and the nature of each deponent's involvement in United's attempt to staff the London routes in 1991 (Q. 12). Since these questions clearly go beyond the scope of my September discovery order, Complainants' motion to compel is denied as to questions 8-12.

Question 20 asks if during 1991 the deponent interviewed any individuals for flight attendant positions for the London routes, and Questions 21, 24 and 25 ask how many persons were interviewed, the location of the interviews and how many persons were interviewed at each location. Complainants argue that question 20 is the foundation question for asking about what was told to them and the other Pan Am flight attendants in their interviews regarding where they would be based. These questions also go beyond the limited scope of my Septem-ber order. Moreover, Respondent has already admitted that all three deponents were involved in the interviews of former Pan Am applicants, including Complainants and has agreed to provide Complainants with the number of interviews that each of the deponents conducted and the place of those interviews. See Respondent's letter to the administrative law judge, dated February 10, 1993.

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[4](...continued)
to hold an evidentiary hearing. I will deal with this potential problem in an order at the end of this Order.

Complainants further argue that questions 21, 24 and 25 provide the basis for testing the deponent's capacity to remember events which occurred almost two years ago, and to test the veracity of the deponent. Foundation questions and capacity to remember relate to the admissibility and/or weight of the testimony not to the discovery of relevant evidence within the context of my September order. If there is a conflict between any of the Complainants' memories of what was said and those of the deponents, this can be addressed at a hearing to determine credibility. For the forgoing reasons, Complainants motion to compel is denied as to questions 20, 21, 24 and 25 except that Respondent should provide to Complainants, if requested, the information it has agreed to provide to Complainants in its' letter of February 10, 1993.

Complainants state that questions "22 and 23 ask the deponent to identify any written instructions which governed the interview process and to describe each document as it pertains to domicile and transfers." Complainants argue that "if there were written instructions for the interview process which pertain to what was to be told to the former Pan Am flight attendants about where they would be domiciled, Complainants are entitled to know about them." Instructions as to domicile is an appropriate subject of inquiry, but questions 22 and 23 cover more than domicile. Question 22 asks the deponent to "identify all written instructions, guidelines, regulations, orders or similar documents governing the interviewing of flight attendants that were applicable to the interviews in which [he or she] participated in 1991 regarding the London routes." Question 23 asks the deponent to "describe the substance of each document identified in the preceding question as it pertained to domiciles and transfers." As stated above, these questions are overbroad.

It is appropriate for Complainants to ask each of the deponents to identify all written instructions and discuss all oral instructions provided by United in connection with their interviews of Complainants which relates to the location of the job, including the possibility of relocating to the United States. Complainants' motion to compel a response to questions 22 and 23, as modified is granted.

Complainants state that "questions 13, 30 and 33-36 all relate to whether or not the former Pan Am flight attendants would be based in London or some other United domicile." Complainants argue that "if the transfer procedures and the willingness to transfer were discussed with the flight attendants, this is clearly relevant as to whether they thought that they might be based at some other United base." Complainants further argue that "question 13 seeks information as to the locations where the flight attendants could be transferred or

could transfer. Complainant's contend that "[i]f, at that time, the only other bases at which they could have been domiciled were in the United States, it is clear that the flight attendants could have understood that they might be based in the United States, either from the beginning or in the near future."

Question 13 asks the deponent to identify each domicile that United maintained outside the United States at which flight attendants of United States citizenship could reside. This question is beyond the scope of my September order and Complainants' motion to compel a response to the question is therefore denied.

Question 30 asks "in early 1991, what factors governed the ability of flight attendants at United to transfer from one domicile to another?" Question 30 also goes beyond the scope of my September order and Complainants' motion to compel a response to that question is also denied.

Question 33 asks whether during the deponent's interviews with Ms. Lardy, Ms. Moore and/or Ms. Gantchar, the deponent discussed with them transfers to other United domiciles. Question 33 is appropriate if the question is re-phrased to ask "Did you discuss with any of the Complainants the possibility of relocating to any of United's bases in the United States?[5] Complainants' motion to compel question 33, as modified, is granted.

Question 34 asks the deponent whether "United's transfer procedures were discussed in any of the interviews in which [he or she] participated." This question is beyond the scope of my September order and therefore Complainants' motion to compel an answer to question 34 is denied.

Question 35 asks whether "during the interviews in which [the depo-nent] participated, including but not limited to those of Ms. Lardy, Ms. Moore and/or Ms. Gantchar, the deponent or any United representatives or employees discussed any applicant's willingness, or unwillingness, to locate to another domicile? If so, describe the substance of the discussion." Although discussions with respect to locating to other domiciles is too broad, I would permit Complainants to ask the depo-nents whether they or any United representatives who were in their presence, asked any of the Complainants if they were willing to

[5] I distinguish between relocating and transferring as follows: Relocation means moving to another location to begin a new job, if hired. Transferring implies moving to another location to continue a job one is already performing.

relocate to the United States. If so, what was the substance of the conversation. Complainants' motion to compel Respondent to answer question 35 is granted, as modified.

Question 36 asks whether "the unwillingness to relocate to another domicile was a disqualifying factor for flight attendant applicants for the London routes in 1991." Question 36 goes beyond the scope of my September 3, 1992 order and therefore Complainants' motion to compel is denied as to this question.

Although not all the questions which Complainants want Respondent to answer are within the scope of my September discovery order, I do not find that Complainants' brought their motion to compel in bad faith and deny Respondent's request for attorney fees. I do, however, suggest that Complainants carefully frame any future discovery requests to fit within the limited parameters of my September discovery order.

III. *The Motion to Strike*

Complainant's move to strike the affidavits of Raymond E. Boyle, Richard E. Sebastian, Robert A. Siegel and Michael Curley (which were attached to R's Reply Memorandum in Support of its Motion to Dismiss) because they were not timely filed. Alternatively, Cs move to strike paragraph 4 of Mr. Curley's affidavit because it allegedly mischaracterizes the events which transpired prior to the filing of the complaint and because documents submitted in support of his statements in paragraph 4 show that his statements are false.

Respondent stated that filing was late because counsel had an emergency arise on another matter and had attempted to meet the Federal Express deadline, but failed to catch certain errors which had to be corrected before the affidavits could be filed. Cs have had an opportunity to respond to any factual assertions made in the affidavits.

I find that Respondent's reason for the late filing does not show willful disregard or lack of respect for the rules and procedures that govern the filing deadlines in this case. I further find that Complainants have not been prejudiced by the late filing. Therefore, I deny Complainants' motion to strike with regard to the Boyle, Sebastian and Siegel affidavits.

With respect to paragraph 4 of Mr. Curley's affidavit, however, Respondent has not disputed Cs argument that the date Cs claims were filed preceded the date in March 1992 when Complainants'

counsel requested that Cs be allowed to participate in the settlement negotiations. I therefore find that Complainants' motion to strike paragraph 4 of Mr. Curley's affidavit inaccurately states the date when Cs and other Pan American flight attendants filed claims with the New York State Division of Human Rights, Worker's Compensation Claims in New York, the EEOC claims in Chicago and New York and the date Lardy filed a claim with the Department of Labor. Thus, Complainant's motion to strike paragraph 4 of Mr. Coley's affidavit is granted.

IV. *Motion to Amend the Complaint*

On June 11, 1993, pursuant to my suggestion in the September discovery order, Cs filed a motion to amend their complaint to make retaliation a separate count. The original complaint alleged that Respondent had retaliated against Cs, but did not allege retaliation as a separate count. Although Respondent opposes the motion to amend the complaint, I find that granting it would facilitate a determination of the merits of this case and would avoid prejudicing the public interest in resolving this dispute, at a minimum of time and cost. I further find that Respondent would not be prejudiced by my permitting the amendment. See 28 C.F.R. § 68.9(e). Therefore, Complainants' motion to amend is granted.

V. *Motion to Change Venue*

On April 24, 1992, the Chief Administrative Hearing Officer (CAHO) issued a Notice of Hearing, stating that a hearing on the Complainants' allegations would be scheduled to take place in or around Chicago, Illinois. On May 11, 1992, Cs filed a motion to change the proposed hearing site to Washington D.C. On October 9, 1992, Respondent filed its opposition to Complainants' motion.

After carefully considering the arguments of both parties, I have concluded that in the interest of convenience and fairness, an eviden-tiary hearing in this case on the merits shall take place in Chicago, Illinois. This decision is based on the following: United's corporate headquarters and its principal place of business are located in Elk Grove Village, Illinois, just outside of Chicago, and most of United's witnesses and most of the relevant documents are located in Chicago. In contrast, none of the Complainants live in Washington D.C. or the United States and Complainants have admitted that the majority of their witnesses live outside the United States. Complainants' motion to change venue with respect to an evidentiary on the merits is therefore denied.

There is also the possibility, however, of holding an evidentiary hearing to obtain facts on the limited issue of jurisdiction. If an evidentiary hearing is required on the issue of jurisdiction, I will reconsider Complainants' motion to change the hearing site to Washington D.C.

VI. *Complaint's Motion for Sanctions*

Complainants have requested in their Memorandum in Response to Respondent's Reply Memorandum, filed January 25, 1993, that sanctions be assessed against United for United's (lawyers) alleged (l) "flagrant attempt to mislead the court;" ...(2) "outrageous and egregious mischaracterization of the law and facts;" and for (3) "blatantly l[ying] to this Court regarding the investigation of the Office of Special Counsel and Complainants' actions before, during and after the settlement negotiations."

After carefully considering Complainants' arguments in support of this motion and Respondent's response to these very serious allegations of misconduct, I do not find any support for Complainants' motion. Complainants' motion for sanctions is therefore denied. I want to admonish Complainants' counsel, however, that I do not consider lightly allegations that opposing Counsel has knowingly misrepresented matters to this agency. I have previously stated that such allegations that counsel knowingly submitted false statements should not be made unless there is strong evidence in support thereof. See Kamal-Griffin v. Cahill Gordon and Reindel, OCAHO Case # 92B00067 at pages 3-4, fn 4 (Sept. 25, 1992) (finding no evidence that Respondent's counsel knowingly submitted false statements to this office and citing to the ABA Model Rules of Professional Conduct 3.3(a)(1) and 4.1(a) and Discliplinary Rule 7-102(A)(5)).

Given the adversarial nature of legal disputes, it may be difficult to distinguish between misrepresentation and inadvertence or mistake. I would suggest, however, that Complainants' counsel carefully chose her words when alleging misconduct of opposing counsel without clear and convincing evidence. This is especially true when the reputation of a lawyer or law firm in the legal community for integrity and professionalism is excellent. See Martindale-Hubbel Law Directory (1992) (rating Respondent's law firm very highly).

Accordingly, it is hereby **Ordered:**

1. Complainants' Motion to Compel is denied as to questions 8-13, 20, 21 and 25, 30, 34 and 36. Complainants' Motion to Compel is granted, as modified, as to questions 22-23, 33 and 35.

2. Respondent shall respond to questions 22-23, 33 and 35 on or before March 19, 1993.

3. Complainants shall not conduct any additional discovery in this case on the issue of jurisdiction without my permission and all requests for additional discovery must be filed with this office on or before March 24, 1993.

4. If Complainants believe that there is a conflict in the material facts relating to jurisdiction, Complainants shall file with this office within five (5) days after receiving all discovery on jurisdiction, (a) a motion requesting an evidentiary hearing on the issue of jurisdiction and (b) a motion requesting the appropriate site for an evidentiary hearing. Respondent will have five (5) days to respond to these motions.

5. Complainants may file a supplemental brief on the issue of jurisdiction within five (5) days after all discovery has been completed on jurisdiction, including an evidentiary hearing. Respondent shall have five (5) days after receiving Complainants' brief to file a response.

6. Complainants' motion filed on January 25, 1993 for leave to file a brief in response to reply memorandum of points and authorities in support of Respondent's motion to dismiss complaint for lack of jurisdiction has been accepted and considered and the motion is therefore granted.

7. Complainants' motion for a change of the hearing site to determine the merits of this complaint is denied.

8. Respondent's request for attorney fees is denied.

9. Complainants' motion to strike the affidavits of Raymond E. Boyle, Richard E. Sebastian, and Robert A. Seigel is denied. Complainants' motion to strike paragraph 4 of Michael Curley's affidavit is granted.

SO ORDERED THIS 5th day of March, 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge