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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	CASE NO. 90200363
MCDONNELL DOUGLAS CORPORATION Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO DISMISS IT AS A PARTY
AND
ORDER DENYING RESPONDENT'S MOTION FOR CLARIFICATION

As the procedural history in this case is long and protracted, this Order will only refer to the procedural history immediately relevant. On June 16, 1992, the Office of Special Counsel (OSC) and Respondent filed a joint Motion To Dismiss the United States as a party in this suit based on a negotiated settlement agreement between OSC and Respondent. The parties informed the Court that upon its granting of the motion, OSC would no longer be involved in this case. Additionally, the parties represented that sixteen (16) of the twenty-two (22) charging parties had agreed to settle their claims. As such, the remaining nonsettling parties were Kim Bumbico, Gerald Crow, Gregory Davis, Thomas Geyer, David Martin and Leland Ryan.

On June 18, 1992, I issued an Order Regarding The Office Of Special Counsel's Request To Withdraw From Representation in which I inferred that the parties' motion was a request to withdraw from representation. I deferred ruling on the parties' pending motion until I was assured that the nonsettling charging parties were fully advised of their rights regarding both, the continued prosecution of their claims against Respondent, and the parameters surrounding OSC's

right to withdraw from representation. Further, I wanted to explore any possibility of prejudice to the charging parties should I grant OSC's motion. In order to hear argument, I scheduled prehearing conferences with each nonsettling charging party, OSC and Respondent to discuss the parties' options should OSC no longer be involved in the case.

On July 14, 1992, Respondent filed a Motion For Clarification Of The Order Regarding The Office Of Special Counsel's Request To Withdraw From Representation. In that motion, Respondent argued that the nonsettling parties would not be prejudiced by OSC's withdrawal as they could proceed either pro se or with separate counsel. It advised the Court that one of the foundations of the settlement agreement was the withdrawal of the United States from the suit, and should that not occur, the settlement would fall apart. In addition, it advised the Court that, based on its belief that settlement was assured, it had already transferred its money settlement amount to OSC. Respondent further advised the Court that, since the filing of the joint Motion To Dismiss, two more of the charging parties, Mr. Burg and Mr. Davis, had agreed to settle their claims and that Mr. David Steven Martin, a nonsettling party, could not be found. Upon the Court's investigation, Mr. Burg was included in the original sixteen (16) settling parties and this notification was redundant.

Between, and including, July 22, 1992 and July 24, 1992, I held prehearing telephonic conferences with Mr. Ryan, Mr. Bumbico, Mr. Geyer and Mr. Crow. At these conferences, only Mr. Ryan stated that he had no objection to OSC's withdrawal; however, on August 12, 1992, Mr. Ryan filed a written objection to OSC's withdrawal stating that he had changed his mind and that he believed that it was in his best interest to have OSC continue as "(his) legal counsel" since it was well informed about the case. Mr. Bumbico gave no reason for his objection to the withdrawal, whereas Mr. Geyer and Mr. Crow stated that they believed that OSC would represent them "all the way". OSC, on the other hand, argued that it did not represent the parties, that it represented the United States "first and foremost", and that the charging parties were separate and distinct parties from its client, the United States.

In my July 22, 1992 prehearing telephonic conference, and memorialized in an Order issued August 6, 1992, I directed OSC to file, on or before August 19, 1992, a brief or memorandum with points and authorities with regard to its position. On August 10, 1992, I issued

an Order Regarding Respondent's Motion For Clarification in which I held that I would not consider Respondent's motion until after the filing of the previously ordered memoranda, which was filed by each party on August 19, 1992.

On August 27, 1992, Mr. Burg, a charging party who had previously indicated to OSC and Respondent that he intended to settle his claim, filed a document entitled "Keep The OSC" in which he withdrew his verbal claim of settlement and stated that he wished to keep OSC as his counsel. On August 28, 1992, I ordered David Martin, a nonsettling charging party, dismissed from the case based on abandonment after his nonresponse to my Order To Show Cause Why Claim Should Not Be Dismissed issued on July 22, 1992.

On October 6, 1992, I issued an Order Requiring Nonsettling Parties To File Individual Statements Regarding Prehearing On Issue Of Office Of Special Counsel's Withdrawal. This Order was based on my concerns regarding whether OSC represented the public interest and/or the charging parties' interests and the possibility of prejudice to the nonsettling parties should I grant OSC's Motion To Dismiss. Thus, I held that prior to ruling on OSC's pending motion, I would allow the nonsettling parties, who had voiced their objections to OSC's withdrawal, to present any relevant legal arguments that supported their position or showed prejudice. These nonsettling parties, by affidavit, would indicate whether they had any such argument and whether they wished to present it in person or in writing. I held that a nonfiling of this affidavit would allow me to infer that that individual had withdrawn his objections to OSC's withdrawal.

On October 19, 1992, Mr. Crow filed his sworn affidavit in which he stated that it had been his understanding that OSC would continue to represent him until the end of these proceedings and that he wanted a prehearing in my presence so that he could present his legal arguments regarding this issue. On October 20, 1992, Mr. Ryan filed his affidavit in which he stated that: (1) he wanted OSC to continue in the case as his representative; (2) that he did not know of any legal argument which he could use to support his position; (3) that he could not afford an attorney to represent him in this matter; and, (4) that he would leave the decision to me as to whether OSC would be permitted to withdraw. On that same date, Mr. Geyer telephonically notified this Court, through my attorney-advisor, that he had met with the other nonsettling parties, Mr. Bumbico and Mr. Burg, and that they had determined that they had no legal arguments to sustain their

position and that appearing at a prehearing was futile. Thus, in an Order Regarding Prehearing On Issue Of OSC Withdrawal dated October 30, 1992, I held that Mr. Geyer, Mr. Bumbico and Mr. Burg did not wish to be heard on the matter of OSC's withdrawal and that they had withdrawn their objections.

The prehearing was set for November 17, 1992 by Order of November 3, 1992, at which time Mr. Crow and Mr. Ryan would present their arguments. On November 6, 1992 and November 9, 1992, OSC and Respondent, respectively, motioned for permission to appear telephonically at that prehearing. I granted their requests in separate Orders issued on November 12, 1992.

On the day of the prehearing, the Court was notified that due to a major telephone cable cut, telephone lines between this Court and any location east of it were out of service. Even though OSC's and Respondent's telephonic appearances were impossible, in the interests of justice, judicial economy and fairness, and after considering that both Mr. Crow and Mr. Ryan had traveled for some time and distance in order to appear, that OSC and Respondent had represented that they would be only participating in rebuttal as they had previously filed briefs, and that a court reporter was present, I proceeded with the prehearing. To remedy any possibility of prejudice to OSC or Respondent, I held that I would allow both OSC and Respondent, if they wished, time to order and review the prehearing transcript and to file any written rebuttal arguments.

During the prehearing testimony, at least one of the nonsettling parties represented that Respondent had attempted to intimidate him into accepting its settlement offer. The alleged intimidation came by way of a letter sent to all the charging parties containing, according to the nonsettling charging party:

1. An offer of settlement to that charging party;

2. Selected portions of the settlement agreement between Respondent and OSC; and,

3. A threat of suit by Respondent against the charging party should the charging party not accept the settlement offer.

As neither charging party had a copy of this letter with them at the prehearing, I directed that a copy be filed so that the Court could review the language of the document to determine whether it was, in

fact, a "threat" or, rather, an explanation of the legal consequences of nonsettlement. Said letter was filed on November 19, 1992.

Pursuant to my Order of November 19, 1992, on December 1, 1992, and December 9, 1992, respectively, OSC and Respondent notified me that they were ordering copies of the prehearing transcript for review. On December 26, 1992, OSC notified this Court that, after its review of the transcript, it had determined that a rebuttal brief was not necessary. On January 13, 1993, Respondent filed a Reply To Pro Se Oral Arguments By Leland G. Ryan And Gerald Crow. Respondent argued that neither Mr. Ryan nor Mr. Crow had raised any factual or legal issues which would sustain the denial of OSC's Motion to Dismiss. Respondent further argued that its letter to the nonsettling charging parties was not threatening in tone or content, but was an advisory letter to the pro se individuals as to the legal consequences, both real and possible, of nonsettlement.

II. *Discussion*

A. Argument

The issue at this time is whether the Office of Special Counsel may be dismissed from a case where: (1) it has filed a Complaint based on charges filed by charging parties; (2) it has actively prosecuted the Respondent; (3) it believes that the public interest has been satisfied; and, (4) some of the charging parties object to the dismissal. It is OSC's position that it represents the public interest and that the charging parties, whose interests may coincide with the public interest, are separate and distinct parties who will not be prejudiced by OSC's dismissal as they may proceed pro se or with counsel. In addition, OSC strongly asserts that, not only has it not represented to the charging parties, at any time, that it was their legal representative, but that the charging parties were aware of that fact. As evidence, OSC has filed excerpts from the depositions of two of the nonsettling parties, Mr. Geyer and Mr. Crow, in which they state that although OSC was present at that deposition, OSC was not appearing there as their counsel. OSC maintains that these statements by these two nonsettling parties are indicative of the beliefs of all the nonsettling charging parties regarding OSC's status as the charging parties' legal counsel.

The nonsettling charging parties, on the other hand, argue, through their testimony at the prehearing telephonic conferences and at the

prehearing, that OSC should not be permitted to withdraw as OSC had led them to believe that it would represent them until the end of their cases, including proceeding to hearing if necessary. To date, neither Mr. Ryan nor Mr. Crow have presented any evidence, written or otherwise, as to the specifics of the time, place, or manner where these representations were made or as to the specifics about the individual(s) who had made these alleged representations. However, they did raise the issue of Respondent's alleged efforts to intimidate the nonsettling parties into accepting Respondent's settlement offer. In support, Mr. Ryan has filed a copy of the letter containing the alleged threats.

Respondent has also filed a brief which reiterates that the settlement agreement will be null and void should the United States not be dismissed and OSC no longer be involved in the case. Its position with regard to possible prejudice to the charging parties is the same as OSC's.

B. Analysis

OSC's position in this case could be interpreted as the United States' legal counsel and/or the charging parties' legal counsel. If I find that the United States is a separate and distinct party from the charging parties, I may dismiss it from the case should I find that the public interests have been satisfied. However, if I find that OSC is the charging parties' legal counsel, then I must apply a different standard and consider, among other things: (1) whether the charging parties have consented to the withdrawal; (2) whether there are any irreconcilable differences between OSC and the charging parties; and, (3) whether there would be such prejudice to the charging parties, Respondent or the Court, that would demand OSC's retention. See, e.g., Kirsch v. Duryea, 21 Cal. 3d 303 (Cal. 1978).

In its memorandum, OSC argues that its function, that of enforcing 8 U.S.C. 1324b of the Immigration & Nationality Act, is analogous to that of the Equal Employment Opportunity Commission (EEOC), which was created to enforce Title VII. As support for its position that it represents the public interest first and foremost, OSC cites to the Supreme Court decision in General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318 (1980) in which the Court considered an action brought by EEOC on behalf of numerous individuals. In that case, the issue was raised as to whether EEOC was bound by Federal Rule of Civil Procedure 23 (FRCP 23) which pertains to class actions. In

reaching its holding that EEOC may maintain certain civil actions and seek specific relief for a group of aggrieved individuals without first obtaining class certification, the Court discussed the "adequate representation" requirement of FRCP 23 and stated:

> But unlike the Rule 23 representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. The individual victim is given his right to intervene for this very reason. The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist.
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> •
> •
> EEOC is guided by the 'overriding public interest in equal employment opportunity...asserted through direct Federal enforcement.' ID. at 1704 (citing 118 Cong. Rec. 4981 (1972)). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

General Telephone v. EEOC, 446 U.S. 318, 331 (1980).

OSC maintains that, in General Telephone, the Court recognized that EEOC must deal with actions that may have competing interests, just as OSC must do. Applying the reasoning from General Telephone to the instant case, which also has competing interests, OSC argues that it has met its statutory responsibility in seeking and achieving the "most satisfactory overall relief". As support, OSC points out that the settlement agreement would be null and void if this motion is denied. Thus, the public interest, as well as the interests of the sixteen (16) settling charging parties, would be harmed.

OSC continues to support its position that its function is complete upon the satisfaction of the public interest by directing the Court to several cases which have held that a governmental enforcing agency does not have an attorney-client relationship with an aggrieved individual, and to other cases which only held that a de facto attorney-client relationship between an agency which seeks relief for an injured individual and that individual exists in privilege issues in discovery matters. See, e.g., Bauman v. Jacobs Suchard, Inc., 136 F.R.D. 460, 1990 U.S. Dist. LEXIS 15376 (N.D. Ill. 1990); Donovan v. Teamsters Union Local 25, 103 F.R.D. 550, 552 (D. Mass. 1984); Williams v. United States, 665 F.Supp. 1466 (D. Or. 1987).

OSC finalizes its arguments by stating that the objecting nonsettling parties in this case would not be prejudiced by the United States

dismissal and OSC's lack of further involvement in the case as the charging parties may proceed, either, pro se or with counsel, at their choice.

1. Alleged Threat by Respondent

Although I find that the allegation of intimidation is not relevant to my determination of OSC's position in this case, I have reviewed Respondent's letter to the charging parties which contains the alleged "threats". I have done so to confirm that no impropriety had occurred during the parties' negotiations. See 8 U.S.C. 1324b(a)(5).

The specific language in Respondent's letter to the charging parties which Mr. Ryan alleges was threatening is as follows:

> If we do so (prevail on a Motion for Summary Judgment), we would seek attorney's fees from you for the cost to MDC (McDonnell Douglas) of litigating your claim.
> •
> •
> •
> If, however, we do not receive the signed agreement in our office by that time, MDC's offer is withdrawn and we will proceed with the litigation against you expeditiously.

Respondent's letter to Mr. Ryan, dated April 9, 1992.

Taken out of context, as Mr. Ryan did, this language may be seen by a non-attorney as a "threat". However, when read in context, it is obvious that there are no threats to the charging parties. Instead, this is clearly a letter to a non-attorney individual disclosing the possible consequences surrounding the charging party's acceptance or rejection of the settlement offer. A reading of the preceding language, in context, makes this clear.

> We have made modest settlement offers to charging parties and most have accepted. We believe that you do not have a claim against MDC which is either recognizable as a matter of law or which includes any damages. Consequently, we are confident that we would prevail against you in a Motion For Summary Judgment on your claim. If we do so, we would seek attorney's fees from you for the cost to MDC of litigating your claim.
>
> In an effort to avoid either MDC or you having to continue with this litigation, we are prepared to offer you the sum of $100 as and for full release and settlement of your claims against MDC. We enclose a Settlement Agreement and General Release for your review. This offer will remain valid through the close of business on April 20, 1992. If by that time we have received the enclosed Agreement and Release signed by you in our office we will secure MDC'S signatures to the agreement, and return a complete signed copy to you along with our check for $100. If however, we do not

> receive the signed agreement in our office by that time, MDC's offer is withdrawn and we will proceed with the litigation against you expeditiously.

Respondent's letter to Mr. Ryan, dated April 9, 1992.

Based on my review of Respondent's letter, I find that Respondent has not used it as a means to threaten and intimidate the charging parties into accepting settlement and that there has been no impropriety by Respondent. I find further that, without more, the charging parties would have no claim under the retaliation provision of 8 U.S.C. 1324b(a)(5).

2. OSC Represents the Public Interest

In reaching my finding that OSC does indeed represent the public interest first and foremost, I have studied the OSC's argument, 8 U.S.C. 1324b of the Immigration and Nationality Act, our Rules of Practice and Procedure, the regulations affecting OSC, and the Supreme Court's decision in General Telephone.

The Office of Special Counsel's duties are set forth in the statute wherein it is charged with being responsible for the investigation of charges, and issuance of complaints, alleging unfair immigration- related employment discrimination and, where it finds reasonable cause to believe that such discrimination has occurred, to prosecute the complaint before the Administrative Law Judge. 8 U.S.C. 1324b (c)(2), (d)(1), (d)(2). I find that OSC's statutorily awarded discretion to investigate unfair immigration-related employment practices on its own initiative, without a charging party, and the ability to file a complaint before an ALJ based on that investigation, are probative of the fact that OSC represents the public interest. 8 U.S.C. 1324b(d)(1). In addition, as I agree that OSC's functions are analogous to those of EEOC and, as our agency decisions have held Title VII cases to be highly persuasive, I find that the Supreme Court's reasoning in the General Telephone case which discusses EEOC's function as guardian of the public interest in discrimination cases, to be quite relevant and persuasive. See, e.g., U.S. v. Marcel Watch, 1 OCAHO 143 (3/22/90); U.S. v. Sargetis, 3 OCAHO 407 (3/5/92).

I can understand the charging parties' incorrect belief that OSC represented them since it was their filed charges which led to OSC's aggressive prosecution of this case. I can also understand their reluctance to have OSC dismissed since they state that they will not

be able to afford other counsel. However, based on my interpretation of the statute, the regulations and the case law, as well as the fact that the charging parties have not presented any evidence to the contrary, I find that OSC did not lead the charging parties to believe that it would represent them as legal counsel. Further, I find that OSC represents the public interest.

3. OSC and the Charging Parties are Separate Parties

Congress has designed this statute so that a charging party's status as a party to the complaint is protected. This protection is found, not just in one provision, but in two. 8 U.S.C. 1324b(d)(2), (e)(3). Together, these provisions designate that any person who files a charge with the Office of Special Counsel respecting an unfair immigration-related employment practice is a party to any complaint that is brought on that charge, whether the complaint is brought by OSC or by the charging party. 8 U.S.C. 1324b(e)(3). Therefore, I find that Congress intended that a charging party maintain its status as a separate and distinct party from the United States at all times during these proceedings.

4. There is no Prejudice to the Charging Parties if OSC is Dismissed

Under the statute, should OSC either determine that it will not file a complaint or should OSC not have made that determination within 120 days of the filing of the charge, the charging party may file its own complaint. 8 U.S.C. 1 324b(d)(2),(e)(3). Thus, the statutory language clearly anticipates that a charging party may be in the position of litigating its claim of unfair immigration-related discrimination without the aid and support of OSC. I note, as well, that there is no provision in the Rules of Practice and Procedure for the agency to provide legal counsel to a charging party. Therefore, I find that neither Congress nor the Attorney General intended to provide OSC as legal counsel to a charging party. Hence, I cannot find that the charging parties' argument that their lack of funds for other counsel would require me to keep OSC in this case. In this case, the charging parties are not prejudiced as they proceed with their cases either in pro se status or with other counsel.

5. Findings and Order

Based on my findings that:

1. Respondent has not tried to intimidate the charging parties into accepting settlement;

2. that the charging parties are separate and independent parties from the United States;

3. that OSC represents the public interest;

4. that OSC did not lead the charging parties to believe that OSC would represent them as their legal counsel;

5. that there is no prejudice to the charging parties as a result of the United States dismissal from the case and removal of OSC's involvement;

6. that Respondent does not object to OSC's dismissal;

7. that there will be no prejudice to Respondent or the Court if the United States is dismissed and OSC is no longer involved in this case; and,

8. that OSC has fulfilled its purpose and has satisfied the public interest;

I grant OSC's motion to be dismissed from this case. Further, I find Respondent's pending Motion For Clarification to be moot and, thus, is denied.

IT IS SO ORDERED this 5th day of April, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge