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

May 13, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 93B00182
ROSARIO STRANO & VITO STRANO, D/B/A STRANO FARMS, Respondents.	)	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS FOR DISCOVERY VIOLATIONS, ORDER GRANTING RESPONDENTS' MOTION TO COMPEL DISCOVERY FROM UNITED STATES, AND ORDER DENYING MOTION TO STRIKE BACK PAY CLAIMS

This order addresses the three (3) motions which respondents filed on April 25, 1994, those having been captioned Respondents' Motion to Dismiss for Discovery Violations, Respondents' Motion to Compel Discovery from United States, and Motion to Strike Back Pay Claims.

In their Motion to Dismiss, respondents request that the claims of the charging parties and any derivative claims of the government, be dismissed because the charging parties have failed to comply with respondents' discovery requests.

In particular, respondents assert that on October 21, 1993, they sent each charging party a request for production, in which respondents sought originals of the documents that the charging parties allegedly

had presented to the respondents in order to verify that those documents were valid.

In the course of a January 18, 1994 prehearing conference, as confirmed in a subsequent prehearing conference order, the undersigned held that copies of those documents would suffice for respondents' purposes. Accordingly, complainant was ordered to retrieve those documents from the charging parties for copying and provide copies to respondents. Complainant indicated that it would contact the charging parties directly for that purpose. Respondents assert that to date complainant has failed to comply with that order.

Respondents further assert that on February 28, 1994, they noticed the depositions of each charging party, to be held on March 11, 1994, but that none of the charging parties appeared at the appointed time. In addition, respondents contend that on March 28, 1994, complainant noticed the taking of the charging parties' depositions on videotape in order to preserve their testimony for the scheduled hearing on April 15, 1994. Respondents assert that only one of the charging parties, Mariano Marcos-Francisco, appeared at that time.

Respondents argue that the failure of the charging parties to participate in discovery thus far is unduly prejudicial to respondents' trial preparation, and should result in the charging parties' claims being dismissed.

The pertinent procedural regulations provide that "(d)epositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths." 28 C.F.R. § 68.22(a). The regulations further provide that if:

> a party upon whom a discovery request is made pursuant to (the regulation governing depositions, 28 C.F.R. section 68.22) fails to respond adequately... the discovering party may move the Administrative Law Judge for an order compelling a response... in accordance with the request.

28 C.F.R. § 68.23(a). Should the party fail to comply with an order compelling the taking of a deposition, the Administrative Law Judge may order appropriate sanctions from among those enumerated at 28 C.F.R. section 68.23(c), or may dismiss the complaint as abandoned, under 28 C.F.R. section 68.37(b)(1).

Thus, the Complaint cannot be dismissed, as respondents have requested, in the absence of an order having been issued, but respondents are entitled to secure the deposition testimony of the

charging parties and they are also entitled to be provided copies of the documents which, complainant asserts, the charging parties presented to respondents.

Accordingly, complainant is ordered to produce the charging parties for depositions to be scheduled at the mutual convenience of the parties and counsel, but not more than 45 days from complainant's acknowledged receipt of this order, and to also produce copies of the documents which the complainant asserts the charging parties presented to respondents, and to have done so within 30 days of its acknowledged receipt of this order.

In the event that complainant fails to comply with the terms of this order, appropriate sanctions will be ordered from among those listed at 28 C.F.R. section 68.23(c).

Concerning respondents' Motion to Compel Discovery, respondents request an order to compel responses from complainant to interrogatories and requests for production propounded by respondents on October 21, 1993. For the following reasons, that motion is granted.

In the course of a telephonic prehearing conference between the undersigned and the parties held on May 6, 1994, respondents' counsel indicated that he had received responses to respondents' interrogatory requests, but that those responses were unsworn.

The procedural regulation governing interrogatories, 28 C.F.R. section 68.19, provides, in pertinent part:

> (a) Any party may serve upon any other party written interrogatories to be answered in writing....
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> * * * *
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> (b) Each interrogatory shall be answered separately and fully in writing under oath and affirmation, unless it is objected to, in which event the reasons of objection shall be stated in lieu an answer. The answers and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answer or objections upon all parties to the proceeding within thirty (30) days after service of the interrogatories, or within such shorter or longer period as the Administrative Law Judge may allow (Emphasis added).

The procedural regulation governing requests for production provides that a party may serve any other party with a request to:

> Produce and permit the party making the request... to inspect and copy any designated documents... in the possession, custody, or control of the party upon whom the request is served.

28 C.F.R. § 68.20(a)(1).

That regulation further provides that:

> The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after service of the request.

28 C.F.R. § 68.20(d).

If a party upon whom an interrogatory or request for production fails to respond adequately to the discovery request, the party seeking the discovery may move the Administrative Law Judge for an order compelling a response in accordance with the discovery request. 28 C.F.R. § 68.23(a).

Accordingly, because complainant has failed to properly respond to respondents' interrogatories and requests for production, complainant is ordered to provide written answers under oath and affirmation to those interrogatories and also to respond fully to respondents' requests for production of documents, in accordance with the pertinent procedural regulations and to have done so within 30 days of its acknowledged receipt of this order. Failure to do so will result in appropriate sanctions being ordered from among those enumerated in the procedural regulations at 28 C.F.R. section 68.23(c).

Respondents' April 25, 1994, Motion to Strike Back Pay Claims, asserts that complainant's request for back pay for the charging parties should be ordered stricken, on the ground that back pay is not a proper remedy for claims of document abuse under IRCA, 8 U.S.C. § 1324b(a)(6). That motion must be denied for the following reasons.

Respondents cite to 8 U.S.C. § 1324b(g)(2)(C), which, respondents contend, "establishes a clear distinction between document violations and other 1324b violations for purposes of available relief." That provision provides:

> No order shall require the hiring of an individual as an employee or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status.

Respondents' fundamental contention, that the cited provision draws a clear distinction between the relief available for document abuse violations and other violations of 8 U.S.C. § 1324b, is flawed.

While the cited provision was initially included in the Immigration Reform and Control Act of 1986 (IRCA), the document abuse provision, 8 U.S.C. § 1324b(a)(6), was added to section 102 of IRCA by the Immigration Act of 1990 (IMMACT 90). Accordingly, it could not have been the intent of the drafters of IRCA to include the cited provision to preclude the awarding of back pay in instances of document abuse, since the document abuse provision, 8 U.S.C. § 1324b(a)(6), was not initially included in IRCA's provisions, but was included in the provisions of IMMACT 90.

Furthermore, respondents interpretation of the cited provision is incorrect. While there is no IRCA caselaw interpreting that provision, its wording is similar to and based upon section 706(g)(2)(A) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g)(2)(A), which provides:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

It can be seen that this provision precludes the award of back pay in instances of "mixed-motive" discrimination, wherein complainant demonstrates that the employer was motivated by an impermissible consideration, but the employer proves that the same employment decision would have been made absent the impermissible consideration. See Bibbs v. U.S. Dep't of Agriculture (Bibbs II), 850 F.2d 457, 460 (8th Cir. 1988); Bibbs v. Block (Bibbs I), 778 F.2d 1318, 1322 (8th Cir. 1985); Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1166-1167 (9th Cir. 1984); Saracini v. Missouri Pac. R.R. Co., 431 F. Supp. 389, 397 (E.D. Ark. 1977).

A similar interpretation of 8 U.S.C. § 1324b(g)(2)(C) is appropriate. See Maurice A. Roberts and Stephen Yale-Loehr, Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act, The International Lawyer, Vol. 21, No. 4, at 1050 (Fall 1987) ("the statute specifies that an ALJ cannot require back pay and/or the hiring of an individual if the person was refused employment on legitimate grounds as well as because of national origin or citizenship discrimination").

Finally, even if respondents were correct in their interpretation of the cited provision, back pay recovery would still be appropriate if complainant were to prove its allegations of document abuse since, as noted earlier, the document abuse provision of IRCA, 8 U.S.C. § 1324b(a)(6), was added to section 102 of IRCA by IMMACT 90. And even prior to enactment of IMMACT 90, document abuse was recognized as a form of national origin and/or citizenship status discrimination under IRCA, 8 U.S.C. § 1324b(a)(1)(A) and (B). See United States v. LASA Mktg. Firms, 1 OCAHO 141, at 17 (11/27/89); United States v. Marcel Watch Co., 1 OCAHO 143, at 15 (3/22/90); Jones v. DeWitt Nursing Home, 1 OCAHO 189, at 15 (6/29/90).

Accordingly, even in the event that the cited provision were to be interpreted to preclude back pay relief for all non-discriminatory unfair immigration-related employment practices, such relief would still be an available remedy in instances of document abuse.

In summary, respondents' Motion to Dismiss is denied, but complainant is ordered to make the charging parties available for depositions and must also provide copies of the previously-described documents to respondents and do so within the time frames set forth earlier.

Respondents' Motion to Compel Discovery is granted. Complainant is ordered to fully answer respondents' written interrogatories under oath and affirmation and also to provide copies of those documents requested by respondents and to do so within 30 days of its receipt of this order.

Finally, respondents' Motion to Strike is denied for the previously-discussed reasons.

JOSEPH E. MCGUIRE
Administrative Law Judge