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

IN RE CHARGE OF	)	
MARIA ORELLANA	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 94B00078
WESTIN HOTEL COMPANY,	)	
Respondent.	)	
	)	

ORDER

I. *Introduction*

I am issuing this Order to: (1) deny Respondent's Motion to Enforce Settlement; (2) grant Complainant's Motion to Compel and lift the order staying discovery; and (3) deny Respondent's Motion to Dismiss or, in the Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions.

II. *Procedural History and Background*

On April 21, 1994, the Office of Special Counsel of the United States of America ("Complainant") filed a complaint against Westin Galleria and Westin Oaks Hotel ("Respondent") alleging: (1) Respondent violated 8 U.S.C. § 1324b(a) by requesting a specific document from Ms. Orellana to prove her employment eligibility and by refusing to accept her driver's license and social security card to complete the INS Form I-9 (Employment Verification Form); (2) Respondent has a pattern and practice of requesting specific documents from aliens to complete the INS Form; and (3) Respondent engages in a pattern and practice of discriminatory and disparate treatment of aliens in the hiring process.

From about August 4, 1994 through August 11, 1994, Counsel for both Complainant and Respondent participated in settlement negotiations. Counsel for the Complainant and Counsel for the Respondent discussed terms of a possible settlement in various telephone conversations during August 4th and 5th. Settlement terms discussed were: Respondent paying $9,477 in civil penalties to the United States Treasurer and $5,871 (minus required tax withholdings) to Ms. Orellana as equitable relief.

On August 22, 1994, Respondent filed a motion to Enforce Settlement. On that same date, Respondent filed a Motion for Expedited Consideration of Respondent's Motion to Enforce Settlement or, in the Alternative, Motion to Stay Discovery and Continue Hearing Date. On August 23, 1994, this court granted Respondent's Motion to Stay Discovery and Continue Hearing Date.

On September 2, 1994, Complainant filed a Motion to Compel Respondent to produce documents responsive to Request No. 4 of Complainant's First Request for Production of Documents.

On October 11, 1994, Respondent filed a Motion to Dismiss or, in the Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions.

III. *Respondent's Motion to Enforce Settlement*

It is common practice for courts to encourage parties to settle a dispute. Case law clearly establishes that questions regarding the enforceability or validity of settlement agreements are determined by federal law where the substantive rights and liabilities derive from federal law. See Thompson v. Continental Emsco Company, 629 F.Supp. 1160, 1163 (S.D. Tex. 1986) citing Borne v. A. & P. Boat Rentals No. 4, Inc., 780 F.2d 1254, 1256 (5th Cir. 1986); Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386, 389 (5th Cir. 1984); Fulgence v. J. Ray McDermott Co., 662 F.2d 1207 (5th Cir. 1981); Strange v. Gulf & South American Steamship Co., Inc., 495 F.2d 1235 (5th Cir. 1974); Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33 (5th Cir. 1967). Section 102 of I.R.C.A., 8 U.S.C. § 1324b, creates only federal causes of action, therefore, based on the above cited case law, federal law applies in this case.

Settlement agreements, under federal law, need not be in writing to be enforceable. Oral settlement agreements are enforceable. See Fulgence, 662 F.2d at 1209; Strange, 495 F.2d at 1236. Courts favor

settlement when parties to a dispute can come to an agreement where all sides enter both knowingly and voluntarily. See e.g., Alexander v. Gardner-Denver, Co., 415 U.S. 36, 52 n. 15 (1974); Prieto v. News World Communications, Inc., 1 OCAHO 177, at 2 (1990). Such an agreement may be enforced when it is complete. That is, when the parties to the agreement knowingly and voluntarily intend to be bound by its terms. Callie v. Near, 829 F.2d 888, 890-891 (9th Cir. 1987).

Respondent filed its Motion to Enforce Settlement on August 22, 1994. In deciding whether to enforce the proposed settlement in this case, two issues are raised: (1) whether the parties have come to a knowing and voluntary agreement as to the terms of the settlement; and (2) whether the parties intended to only be bound by the execution of a written, signed agreement. See Prieto, 1 OCAHO 177 at 2, citing Callie, 829 F.2d at 890. These are factual issues and, based on the factual allegations in Respondent's Motion and Complainant's Opposition to the Motion, I find that there is not sufficient evidence of an actual agreement to grant Respondent's Motion to Enforce Settlement.

On August 5, 1994, Complainant's counsel left a voice-mail message for Respondent's counsel confirming that the Special Counsel approved settling the case for the terms discussed above and that she would draft the agreement for approval in the form of a Consent Order. Complainant then drafted the proposed Consent Order which included the terms of the previously discussed agreement. On August 8, 1994, Complainant's counsel telecopied the draft of the Joint Motion for Adoption of Consent Order and a proposed Consent Order which, if mutually agreeable, would have been filed with this court. It is evident that Counsel for the Complainant intended this writing to commemorate an agreement, if one was to be reached. Additionally, Complainant explained that she had not communicated the terms of the agreement to Ms. Orellana so that "any reference to her agreement to the attached proposed Consent Order should be deemed tentative." See Complainant's Opposition to Respondent's Motion to Enforce Settlement, at 2, referring to Complainant's letter to Respondent on August 8, 1994.

On August 9, 1994, following Respondent's receipt of the proposed Consent Order, Counsel for Respondent left two voice-mail messages for Complainant's counsel in which she explained that she wanted to "check with [Complainant's counsel] on a couple of things" including changing some of the language in the Consent Order, that she could not review the agreement with Respondent until a later day, and that she

"would like to reserve the right to make any other comments about the rest of the settlement agreement when [she had] more time to look through it."

Respondent's request for more time to examine the settlement agreement and to make changes to its wording demonstrates that she was not prepared to file the Consent Order with this court to make the settlement official. Complainant continually referred to the agreement as a proposal and explained that as to Ms. Orellana, any agreement was merely tentative.

Whether the parties intended to be bound upon the execution of a written, signed agreement is a factual issue. See Callie, 829 F.2d at 890-891. Such an intent can be determined by examining the circumstances of the settlement negotiations. Fulgence, 662 F.2d at 1209.

From early on in settlement discussions, both Complainant and Respondent have referred to the Consent Order as memorializing the settlement. As both parties explained that they had yet to get approval from Ms. Orellana and Westin respectively, it is apparent that Counsel did not have the power to enter into this agreement on their own. Furthermore, changes to the Consent Order were still being discussed when Complainant decided to postpone the settlement, as communicated in an August 10, 1994 telephone conference and an August 11, 1994 writing.

Therefore, I find that the settlement discussions were still ongoing, based on the lack of approval and the changes sought in the Consent Order. Furthermore, I also find that the parties intended the Consent Order to be the binding settlement agreement. As this document was not completed, approved or filed with this court before Complainant elected to postpone the settlement, Respondent's Motion to Enforce Settlement is hereby denied.

IV. *Complainant's Motion to Compel*

Complainant filed a Motion to Compel on September 2, 1994, requesting that I make such an order. Under Rule 28 C.F.R. § 68.23(a), if "a party upon whom a discovery request is made pursuant to §§ 68.18 through 68.22, fails to respond adequately or objects to the request or to any part thereof, or fails to permit inspection as requested, the discovering party may move the Administrative Law Judge for an order compelling a response or inspection in accordance with the request."

To determine the merits of Complainant's motion I first need to consider the specific allegations of the Complaint and the relevancy of the items sought for discovery to those allegations. U.S. v. Sam Y. Ro d/b/a Daruma Japanese Restaurant, 2 OCAHO 265, at 5 (1990).

In its Complaint, Complainant specifically alleges that Respondent violated 8 U.S.C. § 1324b(a)(6) by requesting specific documents from Ms. Orellana to prove her employment eligibility, while refusing to accept her driver's license and Social Security card. Additionally the Complaint alleges additional violations of 8 U.S.C. § 1324b(a)(6) through a pattern and practice of document abuse by requesting specific documents to complete the Form I-9. Finally, the Complaint alleges that Respondent violated 8 U.S.C.§ 1324b(a)(1) through a pattern and practice of discriminatory and disparate treatment of aliens in the hiring process.

On June 22, 1994 Complainant mailed to Respondent its First Request for Production of Documents. Among the documents Complainant sought was Request No. 4. This request asks for:

> "[a]ll I-9s and corresponding copies of employment authorization verification documents for all employees hired by Respondent since June, 1992." See Complainant's Motion to Compel.

On August 1, 1994, Respondent responded to this specific request by objecting to it as "overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence . . . [and that] without waiver of this objection, Respondent states that such requested document (sic) will be made available to Complainant for review and copying at Complainant's expense upon reasonable notice." See Complainant's Motion to Compel, at 2.

Respondent objected to the request because it had hired approximately 480 employees from June, 1992 and producing the documents would require that Respondent go through each of their personnel files to pull and copy the requested items. Complainant, after receiving Respondents objection to the document request, notified Respondent that it intended to send its investigator to Respondent's place of business on August 8, 1994 to conduct the requested inspection and copying. Respondent then agreed to provide the requested documents by August 5, 1994.

On August 17, 1994, Respondent sent some of the requested documents, but did not include I-9 Forms and attachments collected from June, 1992 through May, 1993. Rather, Respondent provided

Complainant with the I-9 Forms and attachments for the period starting June 1, 1993 through the present. Respondent claims that those documents requested for the period from June, 1992 through May, 1993 are not discoverable because: (1) Complainant has failed to set forth any facts which could support its allegations of pattern or practice document abuse by Respondent in violation of 8 U.S.C. § 1324b(a)(6); (2) Complainant is inappropriately attempting to abuse its broad investigatory powers in the more limited confines of discovery; and (3) the documents sought fall outside the time period permitted by statute. See Respondent's Response to Complainant's Motion to Compel at 3-4.

Respondent's objection that Complainant has not set out facts in support of its allegations essentially is an objection to the relevancy of the information sought. As I stated previously, it is necessary to consider the specific allegations in the Complaint to determine whether or not to grant this Motion to Compel. Complainant did allege that Respondent violated 8 U.S.C, § 1324b(a)(6) through a pattern and practice of document abuse. The scope of discovery allowable under 28 C.F.R. § 68.18(b) includes, "any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . "

Complainant's pleading is sufficient for an allegation of pattern and practice document abuse, thereby making the items sought relevant to establishing such abuse. The Office of Special Counsel has the power to prosecute pattern and practice cases in situations where there is an original charging party, and where the Office of Special Counsel is proceeding under its own investigatory powers. See U.S. v. Robison Fruit Ranch, Inc., 4 OCAHO 594 at 5 (1994) citing U.S. v. Mesa Airlines, 1 OCAHO 74 (1989); U.S. v. McDonnell Douglas Corporation, 3 OCAHO 507 (1993).

It is not necessary for a Complainant to set out in detail the facts upon which he bases his claim. "All the Rules [Federal Rules of Civil Procedure] require is a short and plain statement of the claim that will give the defendant [Respondent] fair notice of what plaintiff's [Complainant's] claim is and the grounds upon which it rests." U.S v. Robison Fruit Ranch, 4 OCAHO 594 at 6 citing Leatherman v. Tarrant County Narcotics, 113 S.Ct. 1160 (1993). The Complaint alleges specific allegations of document abuse regarding Ms. Orellana which serves as the factual basis for the pattern or practice claim. As Complainant's pleading is sufficient to put Respondent on notice as to the claim against him, and included sufficient detail to demonstrate what Complainant is claiming and that there is some legal basis for the

claim, it is sufficient for an allegation of a pattern or practice of document abuse. Id. at 6-7.

Respondent's argument, that the documents sought fall outside the time period permitted by statute, also goes to the relevancy of the items sought. 8 U.S.C. § 1324b(d)(3) states:

> No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel.

Respondent's argument is not compelling because Complainant has alleged a pattern or practice violation. Evidence of conduct occurring prior to the date alleged in the complaint is relevant to proving a pattern and practice of document abuse and is therefore discoverable. It is common practice to look to Title VII discrimination case law in deciding an 8 U.S.C.§ 1324b discrimination issue. See Prieto, 1 OCAHO 177 at 3, citing Mesa Airlines, 1 OCAHO 74, (stating, "[a]s a general matter, the analysis of an unfair immigration-related employment practice charge is substantially the same in many respects as that of a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2200e et seq."). Restrictions based on discovery in Title VII actions are dictated only by relevance and burdensomeness. Ardrey v. United Parcel Service, Inc., 798 F.2d 679, 684 (4th Cir. 1986), citing Rich v. Martin Marietta Corporation, 522 F.2d 333, 343 (10th Cir. 1975). I find that the documents sought are relevant to the claimed pattern or practice violation, and, as discussed below, the request is not unduly burdensome.

Respondent's argument that Complainant is attempting to abuse its broad investigatory powers in the more limited confines of discovery is unfounded. It is not necessary for Complainant to use its investigatory powers as explained in 8 U.S.C. § 1324a to obtain the documents sought as it is relevant information to the pattern or practice claim and is therefore discoverable without resorting to these investigatory powers.

The final argument that this document request is overly broad or burdensome is also not compelling. The scope of discovery in employment discrimination cases is broad. A Complainant in such a case has the burden of proving that the alleged acts were discriminatory. Therefore it is recognized that a complainant "should not normally be denied the information necessary to establish that claim." Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 592 (5th Cir. 1978).

Complainant offered to have its investigator go to Respondent's place of business to inspect and copy the requested documents, at its own expense. Respondent refused this offer, stating that they would provide the documents. Respondent failed to provide the documents from June, 1992 through May, 1993, but did send the items from June, 1993 on. Because of Complainant's offer to incur the expense of this discovery, and Respondent's refusal of the offer, it is apparent that the request for production was not deemed to be too burdensome at that time.

Therefore, as I have found that these documents are relevantand discoverable, and that the request is not burdensome, I hereby grant Complainant's Motion to Compel and order Respondent to deliver the documents requested in Complainant's Request No. 4.

V. *Respondent's Motion to Dismiss Or, in The Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions*

On October 11, 1994, Respondent filed a Motion to Dismiss or, in the Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions. Respondent alleges Complainant violated this court's August 23, 1994 Order staying discovery and continuing the hearing date pending the ruling on Respondent's Motion to Enforce Settlement. That order stated that "all discovery is stayed until further order."

In response to that Order, oral depositions scheduled for September 7 and 8, 1994 were canceled, and other deposition requests were postponed. However, during the week of September 19, 1994, Complainant sent out approximately 150 letters to current and former employees of the Respondent asking for their cooperation in the investigation into Westin's practice of document abuse. The letters specifically stated:

> "The Office of Special Counsel investigates cases of employment discrimination and has filed a complaint against Westin Oaks Hotel. We have attached the Form I-9 that you filled out when you began to work at Westin . . .
>
> . . . We would like to ask for your cooperation with this investigation. For your information, it is illegal for Westin to retaliate against you for responding to this letter."

Discovery tools include: depositions upon oral examination or written questions; written interrogatories; production of documents or things,

or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. See 28 C.F.R. § 68.18.

Complainant argues that its letter to potential witnesses is not a discovery request, as it is not addressed to Respondent, does not ask Respondent to disclose any facts, deeds, documents or other things which are in its exclusive knowledge or possession, and those individuals sent the letter do not occupy managerial positions in the Respondent's place of business and are not parties to the case. See Complainant's Opposition to Respondent's Motion to Dismiss or, in the Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions.

It is arguable whether Complainant's actions, through its counsel, in sending out the letters constituted discovery. However, as Complainant has not obtained any information as a result of these letters this does not constitute a technical violation of my Order. I am presuming that Complainant's counsel has acted in good faith and that if Complainant's counsel is unsure in the future whether its conduct is in violation of a Court Order, he/she should resolve that question by Motion to this Court.

As I have found that Complainant has not violated this Court's Order, I deny Respondent's Motion to Dismiss or, in the Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions.

VI. *Conclusion*

Based on the above, I order that: (1) Respondent's Motion to Enforce Settlement is hereby DENIED; (2) Complainant's Motion to Compel is hereby GRANTED; and (3) Respondent's Motion to Dismiss or, in the Alternative, Motion to Compel Compliance with this Court's Order Staying Discovery and Motion for Sanctions IS hereby DENIED.

Additionally, Respondent advised this office, in its pleading filed October 11, 1994, that its correct name is Westin Hotel Company. In view of Respondent's correction, this Order and all future orders and pleadings shall reflect this name change.

Furthermore, I lift my Order staying discovery and direct parties to proceed forthwith with all discovery in this case. Parties are also directed to make a good faith effort to complete all discovery, on or

before Friday, December 30, 1994. Parties are to submit, on or before December 30, 1994, a status report as to whether or not all discovery is completed and what, if any, additional time is needed in order to file a Motion for Summary Decision, or to be prepared to hear this case in an evidentiary hearing.

In view of the fact that discovery in this case may not be completed until the end of this year (1994), I shall not set this case for evidentiary hearing until these issues are resolved.

SO ORDERED on this 17th day of October, 1994

ROBERT B. SCHNEIDER
Administrative Law Judge