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

March 3, 2005

MARILYN MARIE SANCHEZ, ET AL., Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00009
LEOBARDO AND CARMEN OCANAS D/B/A LEO OCANAS FARM, Respondent.	)	

FINAL ORDER AND DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

These are three consolidated cases in which Michigan Farmworker Legal Services and the Michigan Migrant Legal Assistance Project filed complaints alleging that Leobardo and Carmen Ocanas d/b/a Leo Ocanas Farm (collectively, the farm) discriminated against Marilyn Sanchez, Luis Esparza, and Jesse Esparza and thereby violated the nondiscrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(1) (2004). The farm is located in Grand Traverse County, Michigan and is engaged in the business of growing fruits and vegetables for commercial sale. Sanchez and the Esparzas (collectively, the applicants) are citizens of the United States who allege that on June 14, 2002 the farm failed to hire them as seasonal farmworkers to prune, cultivate, pick or otherwise harvest fruit and vegetables and that the farm hired temporary foreign workers with H-2A visas instead.

Among the attachments to the complaint was an affidavit stating that on June 14, 2002, the affiant Sylvia Esparza called the MDCD [Michigan Department of Career Development] and spoke with ESA Migrant Services Worker Jamie Schlagel. Esparza says that Schlagel referred her to Leobardo Ocanas because he had a job order listed with the Department. The affiant says she then called Ocanas and told him she had three United States citizens available who were looking for work. Ocanas told her he had no work available then because of the late frost and would not have work until mid-August, but to call again in August if they still needed work.

The farm did not directly challenge the affidavit, but denied the material allegations of the complaint and contended that the applicants were informed on June 14, 2002 that there would be

no work available until mid-August, and that they left no address or phone number and they never called back. Discovery is substantially completed. The farm filed a motion to dismiss or in the alternative for summary decision, in response to which the applicants filed a brief in opposition. Because the motion raised a novel issue as to coverage under the INA, the parties were asked for and filed additional briefs addressed to that issue. The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) was also invited to file an amicus brief, which it did. The applicants filed a reply to OSC's brief. The motion to dismiss or for summary decision is ripe for resolution.

II. STATUTORY AND REGULATORY BACKGROUND

A. Scope of Coverage of the Statute

Entities and persons who employ three or fewer employees are totally exempt from coverage under the statute. 8 U.S.C. § 1324b(a)(2)(A) (2004). The statute is silent, however, as to the particular time period as of which the determination is to be made of how many employees a particular employer has and the manner in which those employees should be counted.

Congress gave the Attorney General the power to promulgate regulations to effectuate and enforce § 1324b as well as the power to delegate that authority. 8 U.S.C. § 1103(g). As was observed in *Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 67 (1994),[1] it was the Special Counsel's Office to which the Attorney General delegated his authority. The agency subsequently promulgated such regulations; the final rule was made effective November 5, 1987, Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37402-01 (October 6, 1987) (codified as amended at 28 C.F.R. Part 44 (2004)). The regulations themselves, like the statute, are silent as to the precise time and manner for calculating how many employees an employer has. 28 C.F.R. § 44.200(b)(i). However, the Preamble which accompanied publication of the final rule read in pertinent part as follows:

> Unlike title VII, section 102 does not contain the 20 calendar week

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage. htm#Published).

> durational minimum.[2] In light of the language and legislative history of the IRCA antidiscrimination provisions, the Special Counsel will calculate the number of employees referred to in paragraph (b)(1)(i) of § 44.200 by counting all part-time and full-time employees employed on the date that the alleged discrimination occurred. The Department, therefore, will not use the 20 calendar week requirement contained in title VII in counting employees for purposes of determining coverage by section 102. 52 Fed. Reg. at 37402.

The rule thus established no durational employment requirement for an employer to be covered under the statute. It directs instead that the count of employees is to be made as of the date the alleged discrimination occurred and that all who are employed on that date, whether full-time or part-time and whether permanent or seasonal, are to be counted.

B. The Employment of So-Called "H-2A Workers"

The colloquial term "H-2A worker" is applied to an alien who comes temporarily to the United States to perform agricultural labor of a temporary or seasonal nature. The term derives its name from 8 U.S.C. § 1101(a)(15)(H)(ii)(a) of the INA. *See also* 8 U.S.C. § 1188(i)(2). Approval for the employment of a nonimmigrant alien for seasonal agricultural work is governed and regulated by a complex system of interrelated laws administered by the Departments of Labor (DOL), State, and Homeland Security. *See generally* Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 Tex. Hisp. J.L. & Pol'y 79 (2004).

An employer initiates the multi-step process of obtaining approval for hiring an H-2A worker by filing an Application for Alien Employment Certification, Form ETA 750, with the Department of Labor at least 45 days in advance of the anticipated need. Regulations encourage even earlier filing if possible. 20 C.F.R. § 655.101(c)(3). Labor Department regulations generally applicable to the employment of H-2A workers are found at 20 C.F.R. Ch. V, Pt. 655, Subpart B (2004). If the certification application is approved, the employer may then file a Petition for Nonimmigrant Worker, Form I-129, with the appropriate service center[3] seeking a determination as to whether a

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[2] Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e(b) (2004)] defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." (emphasis added)

[3] At the time the events herein and at all relevant times prior to March 1, 2003 that petition would have been filed with the Immigration and Naturalization Service (INS). The Homeland Security Act of 2002 (HSA), 6 U.S.C. § 101 et seq. (2002) transferred the former INS's functions to a new Department of Homeland Security (DHS). Pursuant to the authority granted in 6 U.S.C. § 542, the President's Homeland Security Reorganization Plan of

(continued...)

visa petition should be granted. 8 C.F.R. § 214.2(h)(2)(i)(A), 214.2(h)(5)(i)(A) (2004). *See also* § 214.2(h)(1)(i) and 214.2(h)(1)(ii)(C). Approval of the petition entitles the alien to seek the issuance of an H-2A visa. 8 C.F.R. § 214.2(h)(5)(vii). Visas permitting individuals to enter the United States for employment are issued by the Department of State. Regulations governing the issuance of such visas are found at 22 C.F.R. Pts. 40-41 (2004).

III. THE MOTION

The farm asserts that during the whole month of June, 2002, it had only one employee, and accordingly it did not come within the coverage of 8 U.S.C. § 1324b on June 14, 2002. It notes that OSC had dismissed the complainants' charges pursuant to the rule set out in the Preamble on the ground that OSC's investigation reflected that the farm did not have the statutory minimum number of employees on June 14, 2002, the date of the alleged discrimination, and the agency thus had no jurisdiction. The farm urges that the instant complaint should be dismissed on the same ground.

Sanchez and the Esparzas argue in response that the farm was actively engaged in the recruitment of H-2A workers before, on, and after June 14, and that OSC's dismissal of the applicants' charges is not determinative of the scope of the statute's coverage or of OCAHO's jurisdiction to adjudicate this case. They contend that the issue of statutory coverage involves a disputed issue of material fact and that the farm failed to comply with Labor Department regulations governing the employment of H-2A workers.

In response to OSC's amicus brief urging that the date-of-discrimination counting rule is entitled to deference, the applicants argue that the Preamble to 8 C.F.R. Pt. 44 is only "a general statement of OSC policy" and accordingly is not binding in this forum, that the Preamble was not the subject of notice-and-comment rulemaking pursuant to the APA [Administrative Procedure Act, 5 U.S.C. § 553], and that the Preamble is, moreover, inconsistent with the framework and legislative history of the statute itself. They argue as well that literal application of the rule in this case would lead to a result that would be "arbitrary, unreasonable, and manifestly contrary to the statute."

IV. MATERIALS CONSIDERED

I have considered the record as a whole, including all the pleadings and attachments thereto. The farm's motion was accompanied by the affidavits of Leobardo Ocanas and Carmen Ocanas and

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[3](...continued)
November 25, 2002, as modified on January 30, 2003, called for those functions to be transferred as of March 1, 2003. Pursuant to 6 U.S.C. § 552(a)(1), existing INS regulations were continued in effect until modified or revoked. Form I-129 is now filed with the Directorate of Border and Transportation Security.

by copies of six H-2A visas issued in August, 2002. The names on three of the visas are illegible. A handwritten notation states that there was one other visa which had not been located. The exhibit appears to be the same as that identified as Exhibit M in the materials complainants submitted with their brief in support of OCAHO jurisdiction. Attached to the complainants' response to the motion was a five page letter from the Department of Labor dated May 17, 2002 addressed to Georgina Magana and Leobardo Ocanas with other attachments consisting of 17 pages, the same being an Application for Alien Employment Certification, Labor Department Employment and Training Administration (ETA) Form 750, for Georgina Magana, dated April 1, 2002, and Form ETA 790, Agricultural and Food Processing Clearance Order, signed by Leobardo Ocanas and dated April 22, 2002.

Complainants' brief in support of OCAHO jurisdiction was accompanied by A) pages 39-44, 74, and 78-85 of the deposition of Janie Schlagel; B) I-9 Forms for Constantina Gomez, Fidel Trujillo, Maria Trujillo, Gustavo Magana, Luis Magana, Jose (Salud) Magana, Georgina Magana, Eliezar Magana, and Miguel Magana; C) ETA Form 750 for Miguel Magana dated April 1, 2002 and ETA Form 790; D) Letters from the ETA to Leobardo Ocanas dated April 18, 2002, April 26, 2002 and May 3, 2002; E) a letter from ETA to Miguel Magana and Leobardo Ocanas dated May 17, 2002; F) Michigan Job Bank Job Orders dated May 22, 2002 and May 30, 2002; G) An advertisement in the Traverse City Eagle dated May 24, 2002; H) a letter from ETA to Miguel Magana and Leobardo Ocanas dated June 10, 2002; I) 4 I-129 Forms, Petition for Nonimmigrant Worker, for Miguel Magana, Jose Magana, Luis Magana, and Juan Lemus all dated June 20, 2002; J) an Agricultural Labor Camp License permitting occupancy from May 30, 2002 to November 15, 2002; K) the Affidavit of Sylvia Esparza dated June 20, 2002; L) INS Approval Notices dated July 15, 2002 for H-2A status for Gustavo Magana, Luis Magana, Georgina Magana, Eliezer Magana, Miguel Magana, Juan Lemus and Jose Magana; and M) 6 H-2A visas issued in August, 2002, apparently a duplicate of the exhibit accompanying the farm's motion.

Accompanying the applicants' brief in response to OSC's amicus brief were copies of certain supplemental discovery requests made to the farm and the respondents' answers to the requests for admission.

V. RESPONDENT'S EVIDENCE IN SUPPORT OF THE MOTION

The affidavit of Leobardo Ocanas states that the affiant is a farmer whose major crops are cherries, apples, peaches, pears, plums and apricots. It says that pruning of all these trees is usually needed in the spring, after which cherries are the first crop to be harvested, in good years from late June until the end of July or early August.

Ocanas said that at the end of November, 2001 he filled out an "Agricultural and Food Processing Clearance Order" (Form ETA 790) for the farming year 2002, ordinarily April through November, with the expectation of a normal harvest, but that an extreme freeze hit all of northern Michigan in late April 2002 while the buds on the cherry trees were forming. The region's cherry crop was essentially destroyed for that year. Ocanas says that the total cherry

harvest for him in an average year would be a million pounds, 600,000 of which would be tart and 400,000 sweet, but that in 2002 his family harvested no tart cherries. He said the family harvested only 800 pounds of sweet cherries before giving up, and made the attempt to harvest those cherries only because crop insurance required such an attempt before a claim could be filed.

Ocanas says that because of the freeze he had only one employee in June and July of 2002, and that with some help from his family and that employee they did all the other work of fertilizing and caring for the garden. He said that in August he hired seven employees with H-2A visas, four of whom were previously known to him from working in previous years and three of whom were new. He said he also hired two United States citizens, and that he had 10 employees from mid-August until the end of November. The affidavit of Carmen Ocanas asserts the same facts.

All but one of the H-2A visas accompanying the motion have issuance dates of August 15, 2002. The final one was issued August 20, 2002. Appendices accompanying complainants' brief in support of OCAHO jurisdiction state that the visas are for Georgina, Miguel, Eliezer, Gustavo, and Luis Magana, and Juan Lemus (Exhibit M). Approval notices from the INS authorizing the State Department to issue H-2A visas for those individuals and for Jose Magana are dated July 15, 2002 (Exhibit L).

VI. COMPLAINANT'S EVIDENCE IN OPPOSITION TO THE MOTION

Janie Schlagel testified in a deposition taken on June 30, 2004, that she had visited the Ocanas farm on two occasions, once in May or June in 2003 and once in 2002, possibly in October. She said she was acquainted with the Trujillo family who worked there. She met with Fidel and Maria Trujillo, but not with other members of that family. They were "always" there and she has known them for about five or six years. They worked for both the Ocanas and the Waunch farms. Schlagel did not know of any relationship between the two growers, but the Trujillo family worked for both. Schlagel made logs of her visits. She testified that Ocanas was looking for workers in March, 2002 and that he was concerned about the license for the migrant housing because he could not seek workers until the housing was licensed. She knew the Magana family worked for Ocanas in 2002 "because they have been working for him forever," but she does not know when in 2002 they arrived there. She made a referral of some interested workers in 2002 but does not have any record of it.

The documentary evidence reflects that an I-9 Form was signed on May 17, 2002 by Constantina Gomez and by Carmelita Ocanas on behalf of the farm (Exhibit B). I-9 Forms for members of the Magana family are dated July 1, 2002 and I-9 Forms for Fidel and Maria Trujillo are dated July 13, 2002. Complainants' Exhibit D reflects that the Department of Labor rejected Ocanas' first application for temporary labor certification on April 18, 2002 for a number of reasons and requested several modifications. Two subsequent letters dated April 26 and May 3 requested still more modifications (Id.). The letter of May 17 reflected that the application filed for Miguel Magana had been accepted for consideration (Exhibit E). This application was approved by the Department on June 10, 2002 (Exhibit H).

Complainants' Exhibit I reflects that the Petitions for Nonimmigrant Workers filed on behalf of some of the H-2A workers contain representations that Miguel Magana entered the United States without inspection on May 20, 2002, and that Jose Magana, Luis Magana, and Juan Lemus entered the United States without inspection on June 10, 2002. The petitions were approved by INS on July 15, 2002 and showed a validity period from July 15, 2002 until November 15, 2002 (Exhibit L). The visas issued in August were valid until November 15, 2002 (Exhibit M).

VII. FACTS ESTABLISHED BY THE RECORD

While Ocanas says he had no employees other than Gomez until August, 2002, there are nevertheless executed I-9 forms which at least suggest that some members of the Magana family may have been employees of Ocanas Farms as early as July 1, 2002 (Exhibit B). There is nevertheless no specific evidence that any individual other than Constantina Gomez was employed by Ocanas on June 14, 2002 or at any date prior to July 1, 2002.

While Schlagel testified that the Magana family had been working for Ocanas Farms "forever," she acknowledged that they were seasonal employees and that she had no idea when in 2002 they started work (Exhibit A). Although she said that the Trujillos were "always" at the Ocanas farm, she also said she knew that the Trujillos worked for the Wauch farm as well, and she knew of no relationship between the two farms. Schlagel made only one visit to the Ocanas farm in 2002 and believed that it was in October. Accordingly she appears to have no personal knowledge of who was employed there on June 14, 2002. Neither party submitted payroll records.

Complainants argue that because Exhibit I suggests that Miguel, Jose, and Luis Magana and Juan Lemus may have entered the United States without inspection by June 10, it should therefore be "presumed" that they were working illegally at Ocanas Farms on June 14. But it cannot even be "presumed" that those individuals were in Michigan on June 14, let alone that they were working at Ocanas Farms. A theoretical possibility is insufficient to establish a fact and there is simply no evidence that those individuals were physically present in Michigan or working for any employer on June 14, 2002. The record is silent as to their whereabouts at that time and thus establishes as a fact only that Constantina Gomez was employed by the respondents on June 14, 2002. It is nevertheless undisputed that the farm had a job order posted with MDCD at that time and that it was actively engaged in the process of pursuing authorization to hire H-2A workers (Exhibit F).

VIII. DISCUSSION

The complainants' principal argument is a challenge to the applicability of the Preamble's rule for counting employees on the date of alleged discrimination, which they characterize as a "narrow policy interpretation" having no effect in this forum. They assert several reasons why they believe the rule is not entitled to deference, and argue that the better rule to apply to employers of seasonal agricultural workers would be to consider the number of employees during the entire growing season to determine size of the employer, not just the ones who happen to be working on a particular day. Ocanas said the farm had 10 employees from August to October, so

if the entire growing season were the appropriate measure, the respondents would have enough employees to come within the coverage of the statute.

OCAHO cases, however, have not only recognized and accorded deference to the regulations at 28 C.F.R. Pt. 44, they have also generally followed the rules set out in the Preamble as well. *See, e.g., Romo v. Todd*, 1 OCAHO no. 25, 116 , 134-37 (1988) (where Attorney General has promulgated regulations, "[a] preamble, although more obscure and elusive than positive regulatory text which becomes codified in the code of federal regulations, is not, so far as I am aware, rendered thereby amenable to change except by the same official who promulgated the statement being changed, or his delegatee"[4]); *United States v. Mesa Airlines*, 1 OCAHO no. 74, 462, 467, 469-71 (1989) ("placement in the preamble in no way lessens the judicial deference which is its due"); *Walker v. United Air Lines, Inc.*, 4 OCAHO no. 686, 791, 835 (1994) (same).

Walker presented the question of whether for purposes of a pattern and practice action every aggrieved person had to file a timely charge. As is true in this case as well, neither the statute nor the regulations answered the specific question. The Preamble, however, did discuss the issue of when other aggrieved persons could "piggyback" on one person's timely charge and set out the circumstances under which they could do so. Judge Schneider noted that the Preamble set out a reasonable interpretive rule, to which he chose to give deference. 4 OCAHO no. 686 at 834. This result is in accord with the approach taken in *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004), which involved the application of the statutory phrase "unduly disrupt" in the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(o)(5) (2004), to the city's practices with respect to denial of compensatory leave. The Secretary of Labor had promulgated regulations, 29 C.F.R. § 553.25, the Preamble to which addressed the precise question at issue, Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2017 (January 16, 1987), although the regulation itself did not. The Wage and Hour Administrator had also issued an opinion letter determining, as the Preamble had stated, that the term "undue disruption" required an operational disruption, not just the burden of having to pay overtime. The court held that the Secretary's interpretation was entitled to deference. *Beck*, 390 F.3d at 919-20, *citing United States v. Mead*, 533 U.S. 218 (2001) and *Christensen v. Harris County*, 529 U.S. 576 (2000). OSC as amicus in this case suggests that the same deference should be afforded to this rule.

Complainants contend, however, that the counting rule set out in the Preamble is defective because it is inconsistent with the statute. The power of an agency or department to issue rules and regulations extends, of course, only to the power to promulgate those which are in harmony with the underlying statute. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). It is axiomatic that regulations must be consistent with the statutes under which they are promulgated if they are to be valid. *Moore v. Harris*, 623 F.2d 908, 919 (4th Cir. 1980).

[4] It is not at all clear that an administrative tribunal within the Department of Justice may entertain a challenge to the validity of regulations or policies promulgated by the Attorney General. Neither of the parties elected to address this issue.

But here the statute says nothing at all about how and when to count employees. It is silent on those questions, so there is nothing in the rule which is explicitly inconsistent with the statute. As was pointed out in *Walker*, the Attorney General gave OSC the power and duty to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress. 4 OCAHO no. 686 at 832, *quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Given the interstitial nature of the rule as to the time and method of counting employees, the agency's construction fills a gap in the statute. Where Congress has not spoken to the precise question in issue, the agency's approach, so long as it is based upon a permissible reading, must ordinarily be sustained. *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002).

Complainants point out that nothing in the statute mandates the conclusion that the computation must be done as of the date of the alleged discrimination. This is true. The salient question here, however, is not whether OSC's rule is necessarily the only way or even the best way to fill the gap in the statute. Rather, the question is whether the Preamble's rule is based on a permissible reading of the statute and I conclude that it is. The factors considered in *Walton* are applicable here: the statute does not forbid the agency's rule and the agency's construction is at minimum permissible. *Id*. at 218. The statute, like that at issue in *Walton*, demands that some particular time period be established. The rule itself is longstanding and unchanged. *Id*.

It is not entirely accurate, moreover, to suggest that the Preamble itself was not part of the notice and comment process. It was fully set forth in a Notice of Proposed Rulemaking (NPRM), 52 Fed. Reg. 9274 (March 23, 1987), which observed that the purpose of the Preamble was to highlight key issues raised by the proposed rule and encourage public comment on those issues. Counting employees was the first such key issue noticed. The commentary on the final rule does not reflect that any comments were received on this provision and it appears to have remained unchallenged in the intervening 18 years.[5]

Complainants also emphasize the legislative history of § 1324b which makes clear that Congress specifically intended for the statute to apply to seasonal agricultural employment. That intent was precisely the reason that the framers did not adopt Title VII's durational requirements: growing seasons are often shorter than the 20 calendar weeks required for coverage under that statute.[6] For that reason the complainants argue that the rule is arbitrary, unreasonable and manifestly contrary to the statute when applied to a seasonal employer. No special rule, however, was made in § 1324b for employers of seasonal agricultural workers, and the same general standards, including the exclusion of employers having three or fewer employees, must be

[5] The fact that a rule was reached through less than formal rulemaking is not in any event determinative. *Mead*, 533 U.S. at 231. *Mead* pointed to a number of instances in which deference was afforded to agency interpretations that did not emerge from notice-and-comment rulemaking.

[6] An excerpt from Senator Levin's floor statement, 133 Cong. Rec. S11436 (daily ed. Sept. 13, 1985), is included in the NPRM, 52 Fed. Reg. 9274-75, noting that the 20 week requirement would exclude most agricultural workers.

applied to such employers as are applied to any other employer.

Complainants next suggest that even if the counting rule is valid, the "date of the alleged discrimination" cannot be limited to the date on which the applicants weren't hired, but necessarily must encompass as well the date when nonmembers of the protected class were hired, because the disparate treatment was not fully apparent until the H-2A workers were hired. They argue that it is this final element, the hiring of nonmembers of the protected class, which completes the act of discrimination. Under another theory, complainants argue that the entire period during which recruitment activities continued should be construed as the "date of discrimination." Both theories appear to assume that the failure to hire the complainants can be construed as a "continuing" act and would appear to be foreclosed by *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). *Morgan* identified two questions critical to the inquiry: what constitutes the discriminatory act, and when did the event "occur." *Morgan* noted that a failure to hire, like a termination or a failure to promote someone, is a discrete act, not a continuing one. The discriminatory act ordinarily "occurs" when the employment decision is made and communicated to the individual. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

If Ocanas failed to hire the applicants on June 14 and told them that same day that they would not be hired, the act of failing to hire them was complete on that day. That someone else in a nonprotected status was hired later may provide circumstantial evidence pertinent to the question of intent, but the failure to hire was complete when the decision was made and communicated to them. The *McDonnell Douglas* paradigm,[7] to which the applicants allude, is no more than an evidentiary standard which governs the order of presenting evidence in a disparate treatment case. *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002). As was more fully explained in *Amini v. Oberlin College*, 259 F.3d 493, 499-500 (6th Cir. 2001), the focus of the inquiry for purposes of deciding when a claim accrues, is on the act itself and when the decision was communicated to the applicant, not on when the applicant later learned who had been hired.

Complainants contend that there was an "employment relationship" with 5-7 H-2A workers on the day in question because Ocanas had employed members of the Magana family in previous seasons and was actively engaged in pursuing petitions on their behalf in 2002. An employer ordinarily "has" an employee when it maintains an actual, not a hypothetical, employment relationship with the individual on the day in question. While an employee does not actually need to be physically at work on the particular day, there still needs to be something more to the existence of an employment relationship than the fact that the person was previously employed or may be employed again at some point in the future.

As explained in another context, the existence of an actual employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll, hence the colloquial expression "payroll method" of counting employees. *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 206-207 (1997). Such a relationship may be demonstrated by other means as

[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

well, but it is surely not established simply by declaring it to be so. A seasonal employee is exactly that: one who is employed for a discrete period of time during a particular season. Termination of such an employment relationship, like a failure to hire, is also a discrete event. *Morgan*, 536 U.S. at 114. For a seasonal employee, the employment relationship would ordinarily come to an end at the close of the season; former employees do not continue to be employees based on the possibility that they might be employed again at some time in the future. Whatever the nature of the relationship between Ocanas and the prospective H-2A workers on June 14, 2002, that relationship, insofar as the record discloses, fell short of employment as the term is generally understood.

The applicants point out that applying the rule means that an employer who usually has four or more employees would still be free to discriminate whenever the number of employees dropped below four. This is true. While the applicants urge that this result is arbitrary, unreasonable and manifestly contrary to the statute, I am unable to agree. Any time a line is drawn, someone will necessarily fall on the other side of it. If an alternative test were established incorporating a durational requirement, there would always be an employer who fell just short of satisfying that test too. The statute makes clear on its face that the legislative intent was not necessarily to cover every possible employer: employers of three or fewer are expressly excluded. I conclude that under the applicable counting rule Ocanas Farms was not covered by § 1324b on June 14, 2002 when the alleged discriminatory events occurred. The question of whether or not the respondents violated any of the Labor Department regulations in the process of later acquiring H-2A workers,[8] while perhaps not wholly irrelevant if the merits were to be reached, does not aid in the determination of how many employees Ocanas had on June 14, 2002. That number, according to the record, is one.

IX. CONCLUSION

In order to withstand a motion for summary decision, the complainants must show sufficient evidence to create a genuine issue of material fact. *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 613 (6th Cir. 2002). Here, with respect to the number of employees Ocanas Farms had on June 14, 2002, they have not done so. Because Ocanas Farms had only one employee on the date of the alleged discrimination, the respondents are beyond the reach of the statute and the complaint must be dismissed.

X. FINDINGS OF FACT

1. Marilyn Sanchez, Luis Esparza and Jesse Esparza are citizens of the United States.

[8] The appropriate forum for resolving issues of noncompliance with those regulations is the Department of Labor itself. Procedures and penalties for violations are found at 20 C.F.R. § 655.110 (2004).

2. Leobardo and Carmen Ocanas d/b/a Ocanas Farms are engaged in the business of growing fruits and vegetables in Grand Traverse, Michigan.

3. On June 14, 2002 Sylvia Esparza telephoned Leobardo Ocanas and told him she had three United States citizens available who were looking for work.

4. Leobard Ocanas told Sylvia Esparza on June 14, 2002 that he had no work available until mid-August.

5. Beginning on May 17, 2002 Constantina Gomez was employed by Ocanas Farms for the 2002 growing season.

6. On July 1, 2002 I-9 Forms were executed by Carmelita Ocanas with Gustavo, Luis, Georgina, Eliezer and Miguel Magana.

7. On July 13, 2002 I-9 Forms were executed by Carmelita Ocanas with Fidel Trujillo and Maria Trujillo.

8. On December 5, 2002 the Michigan Farmworker Legal Services and the Michigan Migrant Legal Assistance Project filed charges with the Office of Special Counsel for Unfair Immigration-Related Employment Practices on behalf of Marilyn Sanchez, Luis Esparza, and Jesse Esparza.

9. On September 2, 2003 OSC sent a letters to Marilyn Sanchez informing her that her charge was dismissed and that she had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days of her receipt of the letter.

10. On December 2, 2003 the Michigan Farmworker Legal Services and the Michigan Migrant Legal Assistance Project filed complaints with the Office of the Chief Administrative Hearing Officer on behalf of Marilyn Sanchez, Luis Esparza, and Jesse Esparza.

XI. CONCLUSIONS OF LAW

1. Marilyn Sanchez, Luis Esparza, and Jesse Esparza are protected individuals within the meaning of 8 U.S.C. § 1324b(a)(3)(a) (2004).

2. Leobardo and Carmelita Ocanas d/b/a Ocanas Farms are individuals and an entity within the meaning of § 1324b(a)(1).

3. All conditions precedent to the institution of this action have been satisfied.

4. Because Ocanas Farms had only one employee on the date of the alleged discrimination the complaints do not come within the coverage of the statute. 8 U.S.C. § 1324b(a)(2)(A).

5. There is no genuine issue of material fact and respondent is entitled to judgment as a matter of law.

ORDER

The consolidated complaints in this matter are hereby dismissed.

SO ORDERED.

Dated and entered this 3rd day of March, 2005.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.