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

October 4, 2006

DANIEL OJEDA-OJEDA, ET AL, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 06D00021
BOOTH FARMS, L.P., Respondent.	)	

ERRATUM

For administrative reasons, the OCAHO case number previously assigned to proceedings regarding attorney's fees in this matter is hereby corrected as follows:

The number 06E00021 is corrected to read 06D00021.

SO ORDERED, nunc pro tunc.

Dated and entered this 4th day of October, 2006.

Ellen K. Thomas
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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September 26, 2006

DANIEL OJEDA-OJEDA, ET AL, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 06E00021
BOOTH FARMS, L.P., Respondent.	)	

ORDER DENYING REQUEST FOR ATTORNEY'S FEES

I. PROCEDURAL HISTORY

The Farmworker Division of Georgia Legal Services Program (GLSP or Georgia Legal Services) filed a complaint in this matter in which it alleged that Booth Farms, L.P. (Booth Farms) discriminated against seventeen named individuals in violation of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2006). After completion of discovery and motion practice, Administrative Law Judge Ann Z. Cook issued a final order on June 28, 2006 dismissing the complaint. That order gave Booth Farms, as the prevailing party, a period of time until July 31, 2006 to file its request for attorney's fees and costs. Complainants were given until August 18, 2006 to respond. Booth Farms filed a Statement in Support of Request for Allowable Costs and Fees and Complainants filed a timely Opposition to that Request. Booth Farms filed a Response to Complainant's Opposition. The issue is ripe for decision.

II. THE REQUEST AND RESPONSE

Booth's Farms statement in support of its fee request begins with the assertion that "all appearances indicate that this was a lawyer driven case." It goes on to state that people told Larry Booth that complainants' counsel trespassed in his labor camp, that he believes counsel solicited the named complainants in this action for the purpose of coercing a settlement, and that the same was done in other cases as well. The gravamen of the pleading is that counsel engaged in "egregious misconduct" and that Booth Farms was driven out of business as a result of this case.

For this reason Booth Farms seeks to have Georgia Legal Services and complainants' attorneys named as joint debtors with the complainants, and requests that an award totaling $46,790.50 be entered against counsel and the complainants jointly and severally. A number of attachments accompanied the statement, including Booth Farms' schedule of expenses. That schedule reflects that compensation is sought for the labor of Larry Booth's wife and for Larry Booth's own loss of salary, reimbursement of expenses for a consultant attorney and a clerk typist, the cost of various services, supplies, and equipment including a xerox machine, and mileage for fourteen trips to Florida.

Complainants' opposition argues that none of the expenses Booth Farms claims are permissible costs, and in addition that Booth Farms is not entitled to claim attorney's fees because Larry Booth is a pro se litigant. They argue further that the requested costs and fees claimed are unreasonable and that the case was not frivolous because Judge Cook's order dismissing the complaint expressly found that the complainants had presented a prima facie case. Booth Farms' response to complainants' opposition argues that Larry Booth is not a pro se litigant because he is acting in a representative capacity on behalf of Booth Farms, just as complainants' counsel acts as their representative, and that he should accordingly be entitled to claim attorney's fees.

III. THE STATUTORY STANDARD FOR AWARDING ATTORNEY'S FEES IN THIS FORUM

The statute governing this case provides that an award of reasonable attorney's fees may be made "if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h) (2006). While the text of the statute does not draw a distinction between awards to a successful complainant and awards to a successful respondent, OCAHO practice follows the dual standard set out in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), for attorney's fees in cases arising under Title VII. *See, e.g., Trivedi v. Northrup Corp.*, 4 OCAHO no. 600, 105, 125 (1994).[1] A prevailing plaintiff under that standard is ordinarily presumed to be entitled to an award of attorney's fees in order to "'make it easier for a plaintiff of limited means to bring a meritorious suit.'" *Christiansburg Garment Co.*, 434 U.S. at 420 (quoting remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964).

[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).

An award to a prevailing defendant, however, is rarely made. Because such an award is designed to deter potential complainants from bringing lawsuits that are totally without foundation, an award of fees to a respondent is not appropriate simply because the complainant did not prevail or because the complaint was dismissed. *Id*. at 421-22. As pointed out in *Christiansburg*, it is important not to engage in post-hoc reasoning and conclude simply because a party did not prevail that the case was necessarily unreasonable. *Id.* In making a determination of whether a claim is frivolous, I am obliged to view the record in the light most favorable to the non-prevailing party. *See Johnson v. Florida*, 348 F.3d 1334, 1354 (11th Cir. 2003).

IV. DISCUSSION

Complainants correctly point out that it is well-settled law that a pro se litigant in the federal system is not entitled to claim attorney's fees for representing himself, and that this is true even when the pro se litigant is himself a lawyer. *See Kay v. Ehrler*, 499 U.S. 432 (1991); *Ray v. U.S. Dep't of Justice*, 87 F.3d 1250 (11th Cir. 1996). The term pro se, however, denotes an individual who appears on his own behalf. *Horne v. Hampstead*, 6 OCAHO no. 884, 673, 678 (1996). Larry Booth appears in this case in a representative capacity on behalf of Booth Farms, the named respondent in this action. Unlike the Federal Rules of Civil Procedure (FRCP), OCAHO rules[2] expressly permit an individual who is not a lawyer to represent a corporation, partnership, or unincorporated association of which the individual is a partner or general officer. 28 C.F.R. § 68.33(c)(3)(iv) (2005). While it is clear that Larry Booth is not a lawyer, it is not quite so clear that, for purposes of this proceeding, he may not be an attorney.

Black's Law Dictionary (8th ed. 2004), *available at* http://www.westlaw.com, commonsensically tells us that a lawyer is "one who is licensed to practice law." An attorney, on the other hand, is "[s]trictly, one who is designated to transact business for another; a legal agent." *Id. Garner's Modern American Usage*, 485 (2d ed. 2003), similarly provides that the term lawyer refers to "one who practices law," but the term attorney,

> literally means 'one who is designated to transact business for another.' An *attorney* – archaically apart from the phrases *power of attorney* and, less commonly, *attorney-in-fact* – may or may not be a lawyer. Thus Samuel Johnson's statement that *attorney* 'was anciently used for those who did any business for another; now only in law.'

(citation omitted). Larry Booth appears in this proceeding as the legal agent and representative of Booth Farms. Because I decline to adopt a categorical rule that a representative appearing on behalf of a corporation, partnership, or unincorporated association pursuant to 28 C.F.R. § 68.33(a)(3)(iv) (2005), could never qualify for an award of attorney's fees, I must resolve the question presented by the fee request in accordance with the traditional principles ordinarily applied to such petitions in other OCAHO cases.

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[2] Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2005).

In so doing I note at the outset that attorney's fees under § 1324b are customarily awarded against the opposing party, not against opposing counsel. *See Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1189 (11th Cir. 2006) (agreeing with appellants that Title VII contemplates assessment of attorney's fees against losing parties, not counsel); Barbara Lindemann & Paul Grossman, *Employment Discrimination Law*, 1910 (3d ed. 1996). Although Booth Farms alleges that complainants' counsel engaged in "flagrant disregard of rules of conduct," no specific rules of conduct are identified so it is unclear under what standard these accusations are to be evaluated. Booth Farms additionally cites no legal authority pursuant to which I am authorized to impose monetary sanctions on counsel. OCAHO's own standards of conduct, 28 C.F.R. § 68.35 (2005), authorize an administrative law judge to exclude counsel from participation in a proceeding as a sanction under certain limited circumstances; they do not, however, purport to authorize an award of attorney's fees against counsel as a sanction. As observed in *Touissant v. Tekwood Assocs*., 6 OCAHO no. 892, 784, 808 (1996) (citation omitted), denying a motion for fees pursuant to FRCP Rule 11, "[t]he Chief Administrative Hearing Officer (CAHO) previously has ruled that neither the CAHO nor an Administrative Law Judge is empowered by the Rules of Practice to impose a monetary sanction on a party or attorney for misconduct." *See also, Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1104, 2-4 (2004) (discussing regulations and cases giving an administrative law judge the authority to exclude or recuse counsel but not to impose monetary penalties on him or her).

While the question is not entirely free from doubt, the weight of authority in OCAHO jurisprudence thus indicates that the governing rules do not provide administrative law judges with the authority to impose monetary sanctions as a penalty for misconduct, whether by parties or their attorneys. *But see Kalil v. Utica City Sch. Dist*., 9 OCAHO no. 1103 (2003), *aff'd sub nom. Kalil v. U.S. Dep't. of Justice*, 144 F.App'x. 158 (2d Cir. 2005);[3] *petition for cert. filed*, 75 U.S.L.W. 3034 (U.S. July 5, 2006) (No. 06-37) (awarding attorney's fees against a pro se complainant for discovery abuses pursuant to FRCP 37 and the inherent authority of the administrative law judge).

Larry Booth's accusations about what unnamed "numerous people" told him provide neither a sufficient evidentiary basis nor a factual predicate for the sanctions he seeks. Vague and generalized claims of misconduct will not be permitted to create additional post-decisional satellite litigation in this case. If Booth believes that counsel engaged in professional misconduct, the appropriate forum for investigation of such charges is the licensing authority for attorneys in the state of Georgia. He is cautioned, however, that the standard governing solicitation by private attorneys for their own pecuniary benefit substantially differs from that

[3] I cite to this unpublished summary order not for legal precedent but as part of the procedural history of Kalil's case. *See* 2d Cir. R. § 0.23 (citation of dispositions in open court by summary order).

governing such activity by a nonprofit or public interest organization. *United States v. Agripac, Inc.*, 8 OCAHO no. 1012, 218, 230-31 (1998) (citing *In re Primus*, 436 U.S. 412, 426-31 (1978) and *NAACP v. Button*, 371 U.S. 415 (1963)). The appropriate test for an award of attorney's fees in this forum is not, in any event, whether a party believes opposing counsel misbehaved but whether the case itself was frivolous, unreasonable, and without foundation. *See* 8 U.S.C. § 1324b(h) (2006); *Christiansburg*, 434 U.S. at 421. The inquiry is an objective one and is generally not aided by speculation as to the mental state of the losing party's attorneys.

Complainants argue that because they established a prima facie case, their case was ipso facto not frivolous. This is not the only criterion however, although at least one OCAHO case appears to follow that approach. *See Gallegos v. Magna-View, Inc.*, 4 OCAHO no. 628, 359, 362-63 (1994). Because the burden of establishing a prima facie case is so minimal, I choose as a matter of discretion to consider other factors bearing on the issue as well. *See Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Cases in the Eleventh Circuit have directed a case-by-case approach to the question and have looked at three specific factors: 1) whether the plaintiff established a prima facie case, 2) whether the defendant made an offer of settlement, and 3) whether the complaint was dismissed prior to trial or if a full-blown trial on the merits was required. *Sayers v. Stewart Sleep Ctr., Inc.*, 140 F.3d 1351, 1353 (11th Cir. 1998) (citing *Sullivan v. Sch. Bd.*, 773 F.2d 1182, 1189 (11th Cir. 1985)). While the *Sullivan* standards are not binding on this forum, they do provide useful guidance.

Here, the first criterion favors the complainants' position in that Judge Cook found the complainants did present a prima facie case, although I note that she reached this result only by stretching the traditional meaning of the term "similarly situated," and she concluded that any inference arising from the prima facie case did not survive scrutiny. The second *Sullivan* element is based on the theory that a substantial settlement offer militates against a determination of frivolousness. *Quintana v. Jenne*, 414 F.3d 1306, 1310 (2005). Here, Booth Farms made no offer of settlement and insisted throughout the case that it would not do so. The third *Sullivan* element also lends support to the respondent in that no full-blown hearing was required and the case was dismissed prior to trial, albeit not until after full discovery had taken place.

Another factor favoring Booth Farms is the fact that at least one of complainants' arguments was frivolously made in this forum. The complainants are United States citizens from Puerto Rico who have continued throughout this case to insist that Booth Farms had a legal duty to displace its noncitizen Mexican workers in order to provide the complainants with preferred jobs, even after they were advised that the law in this forum is otherwise (Order Granting in Part and Denying in Part Complainant's Mot. for Reconsid.). The statute applicable in this forum, 8 U.S.C. § 1324b(a)(4), permits, but does not require, an employer to prefer a United States citizen over an equally qualified alien in hiring employees. It does not purport to permit, much less require, the displacement of existing employees in favor of United States citizens, and displacing work authorized aliens because of their non-citizenship status could itself constitute a

potential violation of § 1324b. Discrimination on the basis of citizenship status is expressly prohibited; the complainants nevertheless continued to argue throughout this proceeding that Booth Farms had a legal duty to displace its foreign workers in favor of United States citizens, evidently without regard to their comparative qualifications. They cited Department of Labor (DOL) regulations as authority for this proposition, but did not explain why they did not seek relief in the proper forum for that particular claim.

The alleged duty to prefer United States citizens was not, however, the only argument complainants made, and OCAHO case law makes clear that something more than a lack of arguable merit is required before an entire case can be deemed to be frivolous. As *Christiansburg* instructs us, hindsight logic can discourage all but the most airtight claims, and the course of litigation is rarely predictable. 434 U.S. at 421-22. I have reviewed the relevant OCAHO jurisprudence and conclude that a fee award in favor of a prevailing respondent is clearly appropriate only in a very few situations. In *Wije v. Barton Springs*, 5 OCAHO no. 785, 499, 529-30 (1995), for example, the complainant was himself a lawyer and thus should have known from the outset that he could not possibly prevail on a claim of citizenship status discrimination when he knew that the respondent was unaware of his citizenship status and could not have considered it in making employment decisions.

Fees were similarly awarded to several respondents in a series of patently frivolous OCAHO cases in which the tax-protester complainants alleged that as U.S. citizens they were immune from social security and income tax withholding requirements. *Shepherd v. Sturm, Ruger & Co.* 7 OCAHO no. 990, 1054 (1997); *Hamilton v. The Recorder*, 7 OCAHO no. 968, 750 (1997); *Austin v. Jitney Jungle Stores of Am., Inc.*, 7 OCAHO no. 969, 763 (1997); *Kosatchkow v. Allen-Stevens Corp.*, 7 OCAHO no. 966, 721 (1997); *Lareau v. US Airways, Inc.*, 7 OCAHO no. 963, 619 (1997); *Horne v. Hampstead*, 7 OCAHO no. 959, 546 (1997), *Werline v. Pub. Serv. Elec. & Gas Co.*, 7 OCAHO no. 955, 517 (1997); *Jarvis v. AK Steel*, 7 OCAHO no. 952, 488 (1997); *Lee v. AirTouch Commc'ns*, 7 OCAHO no. 926, 49 (1997). These cases all attacked well settled principles of tax law and posed no issues cognizable under § 1324b.

The instant case is not of such a character. While there are factors which favor the respondent, I view the record, as I must, in the light most favorable to the complainants and find that it cannot be concluded with certainty that the case was frivolous, unreasonable and without foundation. OCAHO jurisprudence reflects that fees are almost never awarded to a prevailing respondent unless the case is wholly lacking factual and legal foundation at the outset. *Chu v. Fujitsu Network Transmission Sys. Inc.*, 5 OCAHO no. 778, 433, 449 (1995); *cf. Fuentes v. Grace Culinary Sys.*, 6 OCAHO no. 873, 531, 544 (1996) (finding that the case must be devoid of substantive merit to allow for fee shifting). Fees were even denied to a prevailing respondent as a matter of discretion in *Bozoghlanian v. Lockheed-Advanced Dev. Co.*, 4 OCAHO no. 711, 1067, 1079 (1994), notwithstanding the administrative law judge's conclusion that "[r]arely in the emerging jurisprudence under § 1324 has there been a complaint so lacking in evidentiary credibility as this one."

Accordingly I decline to make a fee award in this case and consequently need not make specific findings as to the appropriateness of the individual elements set out in Booth Farms' fee request.

ORDER

Booth Farms' request for costs and fees is denied. Each party is to bear its own costs and fees.

SO ORDERED.

Dated and entered this 26th day of September, 2006.

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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.