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

Jaime Banuelos, et al., Complainants v. Transportation Leasing Company (Former Greyhound Lines, Inc.), Bortisser Travel Service, G.L.I. Holding Company and Subsidiary Greyhound Lines, Inc., Bus Wash, Missouri Corporation, Respondents; 8 U.S.C. § 1324b Proceeding; Case No. 89200314.

ORDER DENYING COMPLAINANTS' MOTION FOR A PRELIMINARY INJUNCTION

ROBERT B. SCHNEIDER, Administrative Law Judge

Dated: April 2, 1990

SYNOPSIS

Complainants filed a Motion for Preliminary Injunction. Respondents opposed on the grounds that an IRCA ALJ lacks jurisdiction to grant such relief and, in the alternative, that Complainants are qualified. I found and concluded that (1) I have the authority under the regulations to consider the rule on motions for injunctive relief; and, (2) that Complainants were eligible for such relief because they could show neither a likelihood to succeed on the merits, or that they would suffer ``irreparable harm'' in the interim.

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I. Introduction:

This proceeding, involving allegations of unfair immigration-related employment practices pursuant to section 1324b of Title 8 of the United States Code, was initiated by the filing of a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office of Immigration Review, Department of Justice, on July 7, 1989.

Section 1324b prohibits discrimination based on national origin and/or citizenship status, and sets out appropriate administrative and judicial procedures through which charges of violations are alleged, investigated, determined, reviewed and, when necessary, remedied. The regulations governing the Rules of Practice and Procedure for Administrative Hearings before Administrative Law Judges in cases involving allegations of unfair immigration-related employment practices are set out at 28 CFR § 68.1-68.53.

There are twenty-three separately-named Complainants, and all of them are pro se. There are four named Respondents.

Complainants filed an amendment Complaint on August 23, 1989. Complainants have filed all pleadings with OCAHO pursuant to their private right of action as authorized by statute. Section 1324b(d)(2). Complainants are pursuing their private right of action because the Office of Special Counsel, established pursuant to section 1324b(c) for the purpose of investigating charges and issuing complaints to prosecute cases involving unfair immigration-related employment practices which allege knowing and intentional discriminatory activity, determined upon review not to bring a complaint on behalf of Complainants.

There are numerous motions pending in this case, including Complainants' Motion to Certify Class Action, and Respondent's Motion for Summary Decision. The following Order, as captioned,

addresses Complainants' Motion for Preliminary Injunction. It is a case of first impression in section 1324b proceedings.

II. Procedural History:

On February 14, 1990, Complainants' filed a Motion for Preliminary Injunction. Complainants' assert, conclusorily, that an Administrative Law Judge has the power to issue orders granting injunctive relief, and that they are entitled to it because they have ``substantial likelihood of a (sic) irreparable injury that may result in the absence of an injunction.'' It is not specifically clear what the nature of Complainants' contentions are with respect to its position that an injunction would be necessary to prevent ``irreparable injury,'' but it appears that pro se Complainants believe that they are entitled, at least temporarily, to ``reinstatement'' on the grounds that they need their jobs to make money in order to hire attorneys to proceed in this case.

On February 26, 1990, Respondent Transportation Leasing Company (``TLC'') filed an ``Opposition to Complainants' Motion for Preliminary Injunction.'' In its Opposition papers, TLC summarily contends that ``the Administrative Law Judge has no authority to issue a preliminary injunction.'' In addition, TLC asserts, ``Complainants have failed to set forth any support for a preliminary injunction under the standards contained in Federal Rules of Civil Procedure, Rule 65.''

On March 1, 1990, Respondents GLI Holding Company and Greyhound Lines, Inc. (collectively, ``the GLI Respondents''), filed an ``Opposition to Complainants; Motion for Preliminary Injunction.'' In its thorough and helpful ``Opposition'' papers, GLI argued against Complainants' Motion for Preliminary Injunction on several grounds: (1) the administrative law judge has no authority to issue a preliminary injunction; (2) assuming, arguendo, that the administrative law judge has the power to grant a preliminary injunction, no such order is appropriate against the GLI Respondents because they never employed the Complainants or exercised control over other employers' hiring decisions concerning the Complainants; and, (3) Complainants cannot meet the requirements for granting a preliminary injunction since they cannot show a sufficient likelihood of success on the merits, a serious question for litigation, or that they will be irreparably harmed if an injunction is not issued.

Complainants filed no response to Respondents' Opposition memorandum.

III. Legal Standards for Deciding Motion:

A. Jurisdiction:

I have not previously addressed this issue of whether an administrative law judge (ALJ), whose statutory authority derives from the 1986 Immigration Reform and Control Act (``IRCA''), as codified at 8 U.S.C. § 1324b, and the Administrative Procedures Act (``APA''), as codified at 5 U.S.C. § 554 et. al., has the power to issue a preliminary injunction.

Regrettably, Complainants' assertion that an ALJ ``has jurisdiction over the parties under 8 U.S.C. § 1324b proceedings and the Administrative Law Judge is empowered in the issued (sic) of an injunction (sic) 274B(g)(2)(A) section 44.300(d) [sic] of the final rule delineates the exclusive spheres of jurisdiction of the Office of Special Counsel and EEOC over charges of Unfair Immigration Related Employment Practices in accordance with 8 U.S.C. 1324(b)(2) [sic],'' is almost incoherent and certainly, as stated, wrong.

Alternatively, Respondents GLI argue strongly that ALJs, in IRCA proceedings, do not have the authority to issue preliminary injunctions because such an action is not explicitly permitted by statute or regulation. Moreover, GLI argues, IRCA authorizes ALJs to issue only final orders, and ``since final administrative orders can be enforced only through the federal court system, a fortiori, the authority to grant preliminary equitable orders such as injunctions should also remain in those courts, and not within the purview of IRCA's administrative law judges.''

I am not persuaded that I do not have the discretionary power to consider an equitable request for temporary injunctive relief in instances wherein a party that has made a prima facie showing that it is entitled to judgment may, in the interim, suffer irreparable injury. See, e.g., 28 C.F.R. § 68.26(a)(8)&(9).

The powers and responsibilities of an ALJ are defined in the Administrative Procedure Act (``APA'') and in the enabling acts and procedural rules of the Department of Justice. See, APA, 5 U.S.C. §§ 551-559, 701-706, 1305, 1306, 3105, 3344, 5372 and 7521 (1976 and Supp. IV. 1980), originally enacted as ch. 324, 60 Stat. 237 (1946); see also, 28 C.F.R. § 68.26. An ALJ's powers, duties, and status have been considered on several occasions by the federal courts. See, Butz v. Economou, 438 U.S. 478 (1978); Ramspeck v. Federal Trail Examiners Conference, 345 U.S. 128 (1953); Riss and Coi. v. United States, 341 U.S. 907 (1951); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973).

As was stated in Butz v. Economou, supra, at 513:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within his framework is `functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.

The regulations governing these proceedings state at their outset that ``the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules or by any statute, executive order, or regulation.'' 28 C.F.R. § 68.1. (emphasis added.) The statute and the regulations governing these proceedings are silent on the issue of preliminary injunctive relief, and I am not aware of any other statute, executive order, or regulation which ``controls'' my decision-making authority on this question. In this regard, it is my view that I ``shall'' apply the Federal Rules of Civil Procedure to Complainants' Motion for Preliminary Injunction, including Rule 65 which sets out the requirements for injunctive relief.

The regulations governing these proceedings also provide that an ``ALJ shall have all powers necessary to the conduct of fair and impartial hearings including . . . tak(ing) any action authorized by the Administrative Procedure Act.'' See, 28 C.F.R. § 68.26(a)(6). In this regard, the APA provides that an ALJ may ``dispose of procedural requests or similar matters'' and does not limit the scope and authority of an ALJ to hear and decide any matters relating to the constitutional rights of a Respondent . . . .'' See, 5 U.S.C. § 556(c)(7).

Respondents' argument that an IRCA ALJ does not have the power to issue a temporary injunction under section 1324b because power to enforce all administrative decisions rests with the federal court system is not convincing to me because the issuance of an order is commonly distinguishable from the enforcement of the order in all instances, and should not preclude the granting, in appropriate circumstances, of equitable relief in the form of a temporary injunction.

For example, OCAHO does not have the authority to enforce subpoenas or even final orders, but they are issued with the expectation that such enforcement decrees are achieved by appealing to the federal courts. See, e.g., 8 U.S.C. § 1324b(f)(2); and, § 1324b(j)(1)&(2). It is clear from the language of the statute, however, that the federal courts must have an actual order from an ALJ to work from before they can hope to structure an appropriate en-

forcement decree.[1]In other words, the federal court can do nothing until a petitioner has, in effect, ``exhausted administrative remedies.'' See e.g., League of United Latin American Citizens (LULAC) et. al. v. Pasadena Independent School District, 662 F.2d 443 (5th Cir, 1987), 43 EPD 37,098. Id.

In LULAC, a very early federal court decision in the ongoing development of IRCA, the Fifth Circuit granted a preliminary injunction to qualified section 1324b claimants. The Fifth Circuit's reasoning, in LULAC, was partly premised on its observance that the general prerequisite of exhausting administrative remedies was not a viable course of action since the administrative procedures established under IRCA, including the authority vested in the administrative law judge to grant appropriate relief, was not yet in place. Inferentially, it is reasonable to presume that the Fifth Circuit, in LULAC, would not itself have acted to grant a request for preliminary relief in the form of reinstatement if such administrative procedures were, as they are now, ``in place.''

Precisely because the statute and the regulations governing these proceedings are silent on the issue of preliminary relief, it is clear that a party has no specifically identifiable venue in which to seek such relief, even in reasonably foreseeable, if extraordinary, circumstances which may require an authoritative judicial decision in order to equitably avoid ``irreparable injury.'' If a federal court cannot ``enforce'' an issued administrative order until it has one before it, section 1324b(i)&(j), or alternatively, until the petitioner has ``exhausted administrative remedies,'' LULAC, supra, who else, in the context of section 1324b proceedings, sits in a legal and equitable position to consider such a traditional anti-discrimination procedural request as preliminary injunctive relief?

In this regard, it is my view that since the role of an ALJ, in section 1324b IRCA proceedings, is functionally comparable to a district court judge, he or she, consistent with the general powers outlined in the statute, governing regulations, and the APA, has the requisite legal and equitable authority to consider and rule on requests for preliminary relief. Such a consideration and ruling is comparable to the statutory authority to issue cease and desist orders, as well as the general authority provided for in the regulations to ``take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts.'' See, 28 C.F.R. § 68.26(a)(8) (emphasis added).

[1]Moreover, it is clear that the statute, on its face, does not limit court enforcement of administrative orders to ``final'' orders, as is apparently urged by Respondent GLI. Id.

Accordingly, it is my view that I can and should consider motions for preliminary injunction in section 1324b cases. [2]See, 28 C.F.R. § 68.1.

IV. Legal Analysis:

In order to be entitled to injunctive relief, a complainant must demonstrate that he is likely to prevail on the merits, that he will suffer irreparable harm if injunctive relief is denied, that the respondent or other parties connected with the case will not suffer substantial injury if injunctive relief is granted, and that the public interest favors the granting of injunctive relief, or at least that injunctive relief is not contrary to the public interest. See, Rule 65(a) of Fed. R. Civ. P.; see also, e.g., Jarrell v. U.S. Postal Service, 753 F.2d 1038 (D.C. Cir. 1985).

In the Ninth Circuit, a party seeking a preliminary injunction must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips in its favor. See, Hunt v. National Broadcasting Co., Inc., 872 F.2d 289 (9th Cir. 1989), citing, United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987) (``These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'').

Complainants' Motion for Preliminary Injunction is not accompanied by any affidavits or sworn statements. In its Motion, Complainants assert that ``without a Preliminary Injunction the intention of the Complainants to hire a counsel for either the continuance of the case or for a Class Action Decision will be unable to pay a Counsel its legal fees.''

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[2]I find additional support for my view on this issue in caselaw that has analyzed the purpose and scope of preliminary injunctions under Rule 65 of the Federal Rules of Civil Procedure. See, Stacey G. v. Pasadena Independent School District, 695 F.2d 949, 955 (5th Cir. 1983); see also, Wright & Miller & Kane, Federal Practice and Procedure, vol. 11, section 2947 (``Although the fundamental fairness of preventing irremedial harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.'') (emphasis added). Similarly, it is my view that in the cases that are before me pursuant to complaints filed under section 1324b, an ALJ should have, in the appropriate circumstance, the procedural flexibility to prevent the administrative ``judicial process from being rendered futile by a defendant's action or refusal to act.'' I might also add that while I consider this public policy purpose underlying Rule 65 applications to be most importantly preserved in a prospective sense, I nevertheless find that in the case at bar, all Respondents, with the exception of Bortisser Travel, have professionally and promptly responded to all pleadings filed, and have otherwise complied in every way with communications from my office.

Difficulties in meeting legal expenses does not, in my view, constitute ``irreparable injury'' justifying a temporary injunction. Legal expenses, while often daunting, are not injurious in the sense intended by the remedial protections afforded by injunctive relief. See, e.g., Wright & Miller & Kane, Federal Practice and Procedure, vol. 11, sect. 2948.

Moreover, I am not presently persuaded that Complainants are presenting a case that is likely to succeed on the merits. While it is true that pro se Complainants are held to ``less stringent standards'' than one represented by competent counsel, see, Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972), they are still required to present their case by evidence admissible pursuant to the Federal Rules of Evidence. See, e.g., Jerrell v. Tisch, supra. In this regard, while I must heed the ``less stringent'' requirement of the pro se Complainants, I cannot and will not overlook the legitimate rights of the Respondents in this case to insist upon competent evidence. Id.

In this regard, it is my view that Complainants have not presented even a prima facie case that they are likely to succeed on the merits in this proceeding. None of their pleadings state in a clear and straightforward manner the simple facts of this case, let alone the legal theories on which their allegations are premised. I am certainly interested in seeing that Complainants ``have their day in court'' if they can show that there are serious genuine issues of material fact in dispute and that I have the authority, pursuant to section 1324b, to resolve such disputes.

So far, however, Complainants have, regrettably, made no such showing, and for this reason, inter alia, I am denying their Motion for Preliminary Injunction because it does not meet the minimum threshold requirements of Rule 65(a) of the Federal Rules of Civil Procedure and interpretive caselaw.

SO ORDERED:
This 2nd day of April, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge