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

March 16, 1999

CHRISTINE DELARESE STUBBS, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding) OCAHO Case No. 97B00064
SAVANNAH HOTEL ASSOCIATES, LLC, t/a SAVANNAH DESOTO HILTON, Respondent.	)

ORDER DENYING RESPONDENT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND/OR FOR SUMMARY DECISION AND GRANTING JOINT MOTION TO REVISE SCHEDULING ORDER

I. *INTRODUCTION*

Christine Delarese Stubbs, a permanent resident alien authorized to work in the United States, was hired as a night auditor at the DeSoto Hilton Hotel in Savannah, Georgia in September of 1995. She was still working there when the Savannah Hotel Associates, LLC, bought the DeSoto Hilton on June 5, 1996. On July 20, 1996, Stubbs filed a charge with the Office of Special Counsel (OSC) claiming that the new owner of the Hotel discriminated against her on the basis of her citizenship and national origin, and retaliated against her for engaging in conduct protected by the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b. That charge formed the basis of Stubbs' complaint to the Office of the Chief Administrative Hearing Officer (OCAHO). An answer to the complaint was filed, discovery and motion practice ensued, and a partial summary judgment was entered making certain findings of fact and conclusions of law (unpub). Deadlines were set for February 16, 1999 for the simultaneous filing of witness and

exhibit lists, and for ten days thereafter for the noting of objections in preparation for a hearing to be held in Savannah, Georgia as to the remaining issues.

Presently pending is the Hotel's intervening Motion to Enforce Settlement Agreement and/or for Summary Decision, which was accompanied by an affidavit and supporting materials. Stubbs responded to the motion, also with supporting materials. The Hotel asserts that the parties orally entered a binding settlement and that the agreement should be enforced; Stubbs denies that an agreement was finalized. The parties also jointly requested that the deadlines previously set for filing their witness and exhibit lists and for noting objections be extended pending ruling on the motion. For the reasons that follow, the Hotel's motion will be denied both as to the enforcement of the alleged agreement and as to the request for summary decision. The deadlines previously set for filing witness and exhibit lists and for noting objections will be extended.

II. *EVIDENCE TO BE CONSIDERED*

In assessing the Hotel's motion, I have examined the Affidavits of Regina Young, counsel for the Hotel, and Orin Alexis, counsel for Stubbs, two letters addressed from Young to Alexis dated October 26, 1998 and November 20, 1998, and the alleged agreement itself.

The affidavit of Regina Young sets out the chronology of negotiations, including discussions and correspondence between counsel. She states that on October 30, 1998, in a telephone conversation, complainant's counsel accepted her counteroffer as set out in her October 26, 1998 letter, that on November 20, 1998, she forwarded him the agreement and release, that in a telephone conversation on December 9, 1998, he said the agreement was fine, he just had to get his client to sign it, but that he subsequently told her that Stubbs had changed her mind and wanted more money. She states further that at no time was she informed that there were any limitations on the authority of Stubbs' attorney to enter a binding settlement.

The affidavit of Orin Alexis states to the contrary, that he informed Young in October that any settlement would have to be approved by Stubbs. His report of the conversation of October 30, 1998 is that he advised Young that Stubbs was considering

the counteroffer, not that she had accepted it. He states that in the December 9, 1998 conversation he told Young that Stubbs was still reviewing the agreement and had not given her approval, and that he subsequently told her Stubbs did not like the phrase "less required withholdings" or other unspecified language in the agreement as proposed.

Paragraph 1 of the agreement contains the following language:

> Stubbs hereby fully and finally releases and discharges Released Parties from all claims, demands, rights, damages, costs, losses, suits, actions, causes of action, attorney's fees, and expenses of any nature whatsoever, in law or equity, known or unknown, arising from or by reason of any matter, act, omission, cause, or thing whatsoever, whether known or unknown, foreseen or unforeseen, including, without limitation: all claims by or on behalf of Stubbs that the Released Parties committed any statutory violation or other wrong with respect to Stubbs; all claims of other liability or damage of any nature whatsoever which have arisen or might have arisen from any alleged acts, omissions, events, circumstances, or conditions, related to Stubbs' employment with or separation from the Released Parties; all claims arising out of any alleged violations of any alleged contract, express or implied; any covenant of good faith and fair dealing, express or implied; any tort (including but not limited to claims of willful or negligent infliction of emotional distress, libel, slander, and invasion of privacy), or any federal, state, or other governmental statute, regulation, or ordinance including all claims for any monetary recovery; and all claims whatsoever asserted by Stubbs in any claim, complaint, suit, or charge against Released Parties for or on account of any matter or thing whatsoever occurring up to and including the date of execution of this Agreement. Stubbs represents and warrants that she has not and will not assign any interest in any of her asserted claims against Released Parties to anyone.

Paragraph 2 of the proposed settlement agreement provides:

> This Agreement is made and entered into in the state of Georgia, and a court of competent jurisdiction in the state of Georgia wherein the Savannah DeSoto Hilton is located shall have jurisdiction to enforce the terms of this Agreement."[1]

Paragraph 3 provides for a payment to Stubbs, less required withholdings, as severance pay in exchange for her promises. Paragraph 4 covenants that Stubbs will never apply for employment with the released parties, and Paragraph 5 covenants that she will not disclose information about the agreement to anyone with the exception of immediate family and professional representatives "who are or promptly will be informed of and bound by this confidentiality clause." Paragraph 6 recites that the agreement re-

[1] Why in light of this provision, the Hotel seeks enforcement in this forum rather than in a court of competent jurisdiction in the state of Georgia is unexplained.

solves all claims, and Paragraph 7 recites that the agreement is made voluntarily and knowingly and is the exclusive agreement.

Paragraph 8 of the agreement reiterates the voluntary and knowing nature of the agreement and also states that:

> Stubbs' attorney further states that he has carefully explained the terms, conditions, and final binding effect of this Agreement and Release to Stubbs, answered her questions fully, and that Stubbs indicated she understood the Release and its final binding effect.

Paragraph 9 of the agreement provides that the parties will cooperate and will execute documents and take actions necessary to cause Stubbs' complaint to be dismissed with prejudice. Paragraph 10 provides that each of the parties bears its own and her own costs.

The agreement is signed by neither party. There are signature blocks on the final page for each party and for each attorney. An entry over each attorney's signature line reads, "Approved as to Form Only."

III. *THE MOTION FOR ENFORCEMENT OF SETTLEMENT AGREEMENT*

The Savannah DeSoto Hilton requests an order "enforcing the Settlement Agreement" but does not set out with specificity precisely what form such an order is to take. If specific performance is sought for the terms proposed, this would apparently require that I issue an injunction not only compelling Stubbs to accept the Hotel's check, but also compelling her to sign a waiver of all claims of any nature from the dawn of time to the present, whether for torts, workers' compensation, or for any other type of known or unknown claim, enjoining her from ever applying for work with respondent again or from ever speaking to anyone other than her immediate family or representatives about the settlement, and requiring her to execute unidentified documents to carry out the intent of the agreement. Presumably, however, it would also require that I compel the Hotel to seek enforcement of the agreement in the Georgia courts as provided for in Paragraph 2 of the agreement.

Settlement agreements in OCAHO proceedings are provided for in the governing Rules of Practice and Procedure[2] which state:

> (a) Where the parties or their authorized representatives or their counsel have entered into a settlement agreement, they shall:
>
> (1) Submit to the presiding Administrative Law Judge:
>
> (I) The agreement containing consent findings; and
>
> (ii) A proposed decision and order; or
>
> (2) Notify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action. Dismissal of the action shall be subject to the approval of the Administrative Law Judge, who may require the filing of the settlement agreement.

28 C.F.R. § 68.14(a).

A settlement consummated pursuant to 28 C.F.R. § 68.14(a)(1) has the same force and effect as a decision and order made after a full hearing, 28 C.F.R. § 68.14(b)(1), while a settlement under § 68.14(a)(2) simply results in a dismissal. This latter provision is evidently the type of settlement contemplated by the parties here. Dismissal pursuant to 28 C.F.R. § 68.14(a)(2) is, of course, subject to the approval of the Administrative Law Judge.

While there is a minimum of case law addressing the question of the enforcement of settlement agreements achieved in accordance with OCAHO rules, at least one case has observed with respect to a proposed settlement pursuant to § 68.14(a)(2) that because enforcement is committed to the district courts, an administrative law judge is without jurisdiction to enforce a settlement agreement. *Tovar v. United States Postal Service,* 4 OCAHO 650, at 526 (1994).[3] *Tovar* involved a question about enforcement which was proposed to take place after the entry and approval of the settlement and, presumably, after dismissal of the case. It does

[2] All references to the rules are to the Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066 (1999) (to be codified at 28 C.F.R. Part 68) (hereinafter cited as 28 C.F.R. § 68).

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* and Volumes 3 through 7, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States,* reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

not suggest that the same result would necessarily obtain in a case where a party refused to abide by an acknowledged agreement prior to dismissal of the pending action. *Cf. Kent v. Baker*, 815 F.2d 1395, 1398 (11th Cir. 1987). *But see Londono v. City of Gainesville*, 768 F.2d 1223, 1227 (11th Cir. 1985) (contra).

As authority for its determination, *Tovar* cited to the former OCAHO rule 28 C.F.R. § 68.53(b) (1998), now to be codified as § 68.57, governing the enforcement of final decisions and orders of an Administrative Law Judge in cases arising under § 1324b. That rule provides that enforcement of a final order in such a case may be had by filing a petition in the United States District Court in the district in which the violation that is the subject of the final order is alleged to have occurred, or in which the respondent resides or transacts business, requesting that the order be enforced. This rule clearly applies to settlements consummated pursuant to § 68.14(a)(1) once these agreements have become final orders of the administrative law judge; it is by no means clear that this provision has any application whatever to settlements arrived at pursuant to § 68.14(a)(2).

I need not reach this difficult question because the disputed issue here is whether Stubbs, through counsel, ever consented to the terms proposed and not where or how enforcement may be had of an undisputed agreement. It is beyond cavil that a party who has orally authorized a settlement is not free to change his mind later and repudiate the agreement when presented with the necessary documents for signature. *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. 1981). A party who knowingly and voluntarily agrees to the terms proposed is bound thereby. *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1352 (11th Cir. 1983) (citing *Fulgence*). It is also clear that under appropriate circumstances an administrative law judge does have the authority to compel a recalcitrant party to execute an agreement to which that party has previously consented. *United States v. Boatright*, 4 OCAHO 634, at 402 (1994).

A close reading of the Hotel's motion suggests that, notwithstanding its request for enforcement of the agreement, the circumstances indicate that the Hotel's true objective is that Stubbs be required to accept and be bound by an agreement allegedly approved by her attorney; that is to say that a summary decision be entered that the alleged settlement actually was consummated. The dispute between the parties is clearly one as to whether an

agreement was made. Stubbs has not declined to comply with an acknowledged agreement; she has denied that an agreement ever was achieved. The question here is whether there was a settlement at all.

IV. *THE MOTION FOR SUMMARY DECISION*

The Hotel's motion asserts that it seeks summary decision "as to the remainder of Stubbs' allegations." However, it also asserts that there is no issue as to any material fact regarding the existence of an enforceable settlement and that the settlement itself therefore constitutes a final resolution of those claims. Accordingly, I treat the motion for summary decision as addressed to the question of the binding effect of the proposed settlement, and not to the merits of Stubbs' remaining claims.

Summary decision may be entered for either party if there is no genuine issue as to any material fact and that party is entitled to summary decision. 28 C.F.R. § 68.38(c). The rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO 611, at 222 (1994).

The party seeking a summary decision has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once that showing is made, the opposing party must set forth specific facts showing that there is a genuine issue as to some material fact. 28 C.F.R. § 68.38(b). In this case, the moving party also bears the burden of proof to show that the opposing party consented to the terms of the agreement.

V. *DISCUSSION*

Both parties urge that the question as to whether an agreement was formed is governed by Georgia law. Decision as to which law to apply, however, becomes necessary only if the facts are undisputed. Construing the facts as I must, most favorably to the nonmoving party, *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 992 (11th Cir. 1995), I find that the Hotel has failed to demonstrate that there is no genuine issue as to any material fact.

It appears here that there is a direct conflict between the two affidavits of counsel. Young says she was not told of any limitations on Alexis' authority to bind his client; Alexis says unequivocally that he informed Young that any settlement had to be approved by Stubbs.[4] Young says that her counteroffer was accepted on October 30, 1998; Alexis says he told her that day that Stubbs was considering it. It is not appropriate in ruling on a motion for summary decision to resolve disputed issues of fact and for that reason summary decision must be denied.

VI. *CONCLUSION AND ORDER*

I have considered the Hotel's motion and all pertinent parts of the record, on the basis of which I conclude that the motion to enforce settlement agreement or for summary decision is denied, but the joint motion to revise the scheduling order is granted.

The scheduling order previously entered is revised as follows: simultaneous witness and exhibit lists will be filed prior to March 31, 1999. Witness lists are to show the name, address, and telephone number of each witness. Any party objecting to an exhibit proposed by the opposing party will file a notice of each objection and a brief statement of the ground therefore within ten days after the filing of the exhibit list. A telephonic prehearing conference will be scheduled shortly in order to complete preparations for the hearing.

SO ORDERED.

Dated and entered this 16th day of March, 1999.

Ellen K. Thomas
Administrative Law Judge

[4] There appears to be another factual issue as to whether Stubbs rejected the agreement because she wanted more money or because she objected to particular language. While genuine, the issue is not material because it has no effect on the outcome of this motion.