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

EDGARDO MANTILLA, Charging Party, and	)
UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding) OCAHO Case No. 99B00057) Judge Robert L. Barton, Jr.
AMERICAN AIRLINES, INC., Respondent, and	)
TRANSPORT WORKERS UNION OF AMERICA, Respondent.	)

ORDER DENYING RESPONDENT AMERICAN AIRLINES, INC.'S FIRST AND SECOND MOTIONS TO DISMISS

(January 27, 2000)

I. *INTRODUCTION*

On November 30, 1999, and December 3, 1999, Respondent American Airlines, Inc. (AA) filed Motions to Dismiss Count I of the Complaint. AA bases its First Motion, at least implicitly, upon the theory of mootness, arguing that because it has entered into a settlement agreement with Edgardo Mantilla (Mr. Mantilla or the charging party) in which Mr. Mantilla has agreed to withdraw his Charge of discrimination filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), OSC should therefore be foreclosed from pursuing its Complaint with respect to any facts alleged in the withdrawn charge. AA bases its Second Motion on the argument that the Office of the Chief Administrative Hearing Officer (OCAHO) lacks subject-matter jurisdiction with respect to Count I because Mr. Mantilla

had already been "hired" by AA at the time the alleged unfair immigration related employment practice occurred, thus making this a "conditions of employment" case.

For the reasons discussed below, both of AA's Motions to Dismiss are denied. However, the settlement between AA and Mr. Mantilla is valid as between its signatories. Thus, Mr. Mantilla is conditionally dismissed as a party to this case, and paragraph B.2. of the Complaint's Prayer for Relief is stricken, thus foreclosing OSC from seeking back pay, interest, or retroactive seniority and benefits on Mr. Mantilla's behalf.

II. *BACKGROUND AND PROCEDURAL HISTORY*

On January 15, 1999, Mr. Mantilla filed a charge with OSC alleging that AA had engaged in unfair immigration-related employment practices. On August 18, 1999, OSC filed a Complaint with OCAHO alleging two counts of citizenship-status discrimination against AA. Count I of OSC's Complaint alleges that AA "knowingly and intentionally discriminated against Mr. Mantilla on the basis of his citizenship status by requiring him to produce a passport, green card or certificate of naturalization for the purpose of obtaining a U.S. Customs badge during orientation for junior fleet service clerks, before he could start working." *Compl.* at 5, ¶26. In Count II, OSC alleges that "American's practice of requesting U.S. citizens born abroad and non-U.S. citizens to produce passports, green cards or certificates of naturalization before they can start working constitutes a pattern or practice of citizenship status discrimination in violation of 8 U.S.C. § 1324b(a)(1)(B)." *Compl.* at 7, ¶33. In paragraph B.2. of its prayer for relief, OSC requests, inter alia, that this court "[o]rder Mr. Mantilla to be reinstated into a junior fleet service training class, with full back pay, interest and retroactive seniority and benefits[.]" *Compl.* at 7. Of the eight remedies requested in OSC's prayer for relief, this was the sole request relating to specific personal compensation for Mr. Mantilla; the other seven requested forms of relief sought civil penalties, a cease and desist order, miscellaneous non-monetary equitable remedies, and specific personal compensation for all victims of AA's discrimination who are "identified during discovery." *Compl.* at 7, 8. Presumably, because the alleged discrimination against Mr. Mantilla was identified pursuant to his filing of an OSC charge, and not "identified during discovery," Mr. Mantilla would not be entitled to personal compensation under this last request for relief.

On November 30, 1999, AA filed its First Motion to Dismiss with Prejudice. In its Motion, AA "requests that Count I of the Complaint be dismissed" on the ground that "American and Edgardo Mantilla have agreed to settle Mr. Mantilla's charge of discrimination . . ." *AA's First Mot. to Dismiss* at 2. In support of its Motion, AA attached a copy of a signed settlement agreement between itself and Mr. Mantilla. *Id.* at RX-A. Numbered paragraph 4 of the settlement requires Mr. Mantilla to "withdraw with prejudice the charge filed against American with the Office of Special Counsel." *Id.* at RX-A–2. Moreover, that same paragraph indicates that Mr. Mantilla's "signature on this Agreement will constitute a request for such withdrawal." *Id.* This Motion reflects AA's belief that the charging party's withdrawal of his OSC charge, effected pursuant to settlement, should foreclose OSC from bringing an OCAHO Complaint based on that Charge. AA never expressly characterizes the procedural basis for its First Motion to Dismiss.

On December 3, 1999, AA filed a second Motion to Dismiss and attached a supporting memorandum of law. In its second Motion, AA challenges OCAHO's subject-matter jurisdiction with respect to Count I of the Complaint, arguing that "[t]he alleged [discriminatory] incident took place after Edgardo Mantilla [the charging party] had been hired by American. Therefore, 8 U.S.C. § 1324b(a)(1)(B), which applies to hiring decisions, could not have been violated . . ." *AA's Second Mot. to Dismiss* at 1. In brief, AA argues that because Mr. Mantilla had already been "hired" at the time the alleged discriminatory practice occurred, OSC's Complaint merely alleges discrimination with respect to the conditions of Mr. Mantilla's employment, and therefore falls outside the scope of § 1324b. *AA's Memo. in Support of Second Mot. to Dismiss* at 4.

On December 14, 1999, OSC filed a Memorandum of Points and Authorities in Opposition to Respondent's Motions to Dismiss. In its Memorandum, OSC argues that AA's First Motion to Dismiss Count I should be denied on the ground that the settlement between AA and Mr. Mantilla is not in the "public interest." *OSC's Opp. Mem.* at 2–6. Specifically, OSC criticizes the AA-Mantilla settlement because it fails to afford Mr. Mantilla several remedies—"full back pay, interest and retroactive seniority and benefits"—sought in OSC's prayer for relief. *Id.* at 3, 4. Consequently, OSC asserts that it "should be allowed to proceed under Count I to ensure that Mr. Mantilla is made whole." *Id.* at 4. Moreover, OSC attacks the AA-Mantilla settlement for its failure to include

any broad equitable remedies, such as requiring AA to (1) discontinue its putatively discriminatory practices, (2) post notices to AA employees regarding their rights under § 1324b, (3) pay civil penalties, or (4) train its employees regarding their responsibilities under the immigration laws. *Id.* at 5.

OSC's Memorandum also makes three arguments in opposition to AA's Second Motion to Dismiss Count I. First, OSC asserts that

> INA's statutory prohibition against discrimination 'with respect to hiring' prohibits all discrimination concerning the hiring process. This prohibition does not just cover complete refusals to hire but rather includes the hiring process *in toto*. This prohibition encompasses discriminatory application procedures, selection processes, and terms of initial contract (e.g., wage, hours, conditions, job classifications, and benefits), regardless of a refusal to hire.

Id. at 6. OSC alleges that AA's discriminatory request for documents during Mr. Mantilla's orientation prevented the charging party from beginning work pursuant to AA's offer of employment, and according to OSC, "[n]ot allowing an individual to start working is tantamount to not hiring them [sic] in the first place." *Id.* at 8.

Second, OSC argues that AA's Second Motion to Dismiss Count I should be denied because the Motion misstates the facts regarding the timing of Mr. Mantilla's "hiring." According to OSC, the alleged discrimination against Mr. Mantilla in fact occurred four days prior to the date upon which AA claims it "hired" Mr. Mantilla. *Id.* at 9–10.

Third and finally, OSC argues that AA's Second Motion to Dismiss Count I should be denied because "even if the alleged discrimination is somehow not part of the hiring process, or 'with respect to' hiring, the alleged citizenship status discrimination is covered by the statute because the charging party was constructively discharged." *Id.* at 10.

On January 13, 2000, a Second Prehearing Conference was convened in this case. In part, the purpose of this Conference was to permit oral argument with respect to AA's two Motions to Dismiss. During the conference, I questioned Mr. Mantilla at some length in an effort to ensure that he understood the implications of the settlement agreement he had entered into with AA. In light of Mr. Mantilla's responses to my questions, I am confident

that he understands the basic terms of the settlement agreement, including the fact that the settlement agreement does not provide for back pay, interest, or retroactive seniority and benefits.

III. *STANDARDS OF REVIEW*

AA has moved to dismiss Count I of the Complaint on the ground that OCAHO lacks subject-matter jurisdiction. Specifically, in its First Motion to Dismiss, AA implies that the settlement between itself and Mr. Mantilla renders Count I moot. As the U.S. Court of Appeals for the Fifth Circuit[1] (Fifth Circuit) held in *Escobedo v. Estelle*, 655 F.2d 613 (5th Cir. 1981), "mootness goes to the heart of the federal courts' subject-matter jurisdiction . . ." *Id.* at 614. In its Second Motion to Dismiss, AA challenges OCAHO's subject-matter jurisdiction directly, arguing that OSC's Complaint merely alleges that AA discriminated with respect to the conditions of Mr. Mantilla's employment, a matter not covered by 8 U.S.C. § 1324b. I further note that AA's second attack on OCAHO's subject-matter jurisdiction implicates not just OCAHO's jurisdiction, but also an element of the cause of action under § 1324b. Specifically, adjudication of AA's Second Motion to Dismiss would require this court to answer a question that goes to the substantive merits of OSC's claim—i.e., whether the alleged offense in this case occurred "with respect to hiring."

The OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68, contain no specific provision authorizing motions to dismiss for lack of subject-matter jurisdiction. The Rules, however, provide that the Federal Rules of Civil Procedure (Fed. R. Civ. P.) "may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (1999). Thus, it is well established that Fed. R. Civ. P. 12(h)(3), which compels dismissal of actions "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter," may be "used as a general guideline" when an OCAHO Administrative Law Judge (ALJ) is confronted with a motion challenging OCAHO's subject-matter jurisdiction. *See, e.g., Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO (Ref. No. 1015), at 3 (1998), 1998

[1] Fifth Circuit opinions issued prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). The decision in *Escobedo v. Estelle* was issued on September 8, 1981.

WL 1085948, at *2 (O.C.A.H.O.); *Artioukhine v. Kurani, Inc. d/b/a Pizza Hut*, 1998 WL 356926, *3–4 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 1113, 1119 (Ref. No. 916) (1997), 1997 WL 176910, *5 (O.C.A.H.O.); *Caspi v. Trigild Corp.*, 6 OCAHO 957, 960 (Ref. No. 907) (1997), 1997 WL 131354, * 2–3 (O.C.A.H.O.).[2] Because the alleged cause of action against AA arose in the State of Florida, and because any judicial review will lie with the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit), I shall hereafter follow Eleventh Circuit precedent where applicable.

The Eleventh Circuit applies different standards of review to "facial" motions to dismiss for lack of subject-matter jurisdiction—i.e., attacks based on the plaintiff's failure to invoke the court's jurisdiction in the complaint, but not challenging the court's legitimate authority to adjudicate the dispute—and "factual" or "speaking" motions to dismiss for lack of subject-matter jurisdiction—i.e., attacks alleging that the court lacks subject-matter jurisdiction in fact, despite the formal sufficiency of the allegations made in the complaint. *See Scarfo v. Ginsberg, DBG 94*,175 F.3d 957, 960–61 (11th Cir. 1999); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990). In essence, a "facial" motion to dismiss alleges a mere defect in pleading that can be cured if the non-moving party makes appropriate amendments to the complaint. A "factual" motion to dismiss, by contrast, alleges an incurable jurisdictional defect that deprives the court of any authority to adjudicate the dispute.

AA's attacks on OCAHO's subject-matter jurisdiction in this case are "factual" in nature; that is, they challenge this court's subject-matter jurisdiction in fact, despite the formal sufficiency of the allegations made in the Complaint. Under Eleventh Circuit law,

[2] Citations to OCAHO precedents in bound Volumes I and II, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practice Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. Citations to OCAHO precedents in bound Volumes III-VII, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. For OCAHO precedents appearing in bound volumes, pinpoint citations refer to specific pages in those volumes; however, pinpoint citations to OCAHO precedents in as yet unbound Volumes are to pages within the original issuances. Decisions that appear in Volumes I-VII will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I-VII decisions. Unbound decisions that have only been published on Westlaw shall be identified by Westlaw reference number.

when a trial court reviews a complaint under a factual attack with respect to the court's subject-matter jurisdiction, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case," *Scarfo*,175 F.3d at 961 (quoting *Lawrence*, 919 F.2d at 1529); moreover, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The trial court in such cases has broad discretion to determine the scope of its jurisdictional inquiry, and may consider "matters outside the pleadings, such as testimony and affidavits," *id.*, without transforming the motion to dismiss into a motion for summary judgment; however, a trial court must be mindful that "a plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction." *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243–44 (11th Cir. 1991) (citing *Majd-Pour v. Georgiana Community Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984)).

IV. *ANALYSIS*

A. *Respondent American Airlines' First Motion to Dismiss*

As mentioned previously, AA's First Motion to Dismiss implies that AA's settlement with Mr. Mantilla deprives OCAHO of subject-matter jurisdiction, with respect to Count I of the Complaint, on grounds of mootness. This is a "factual" challenge to OCAHO's subject-matter jurisdiction, in that it alleges that OCAHO lacks jurisdiction in fact to adjudicate a part of the present dispute, regardless of the sufficiency of the jurisdictional allegations made in the Complaint. Consequently, according to Eleventh Circuit precedents governing "factual" challenges of this sort, I need not presume the truthfulness of Complainant's allegations; rather, I am free to weigh the evidence and satisfy myself as to the existence of my power to hear the case. *Scarfo*,175 F.3d at 961. Applying these standards, I hereby DENY AA's First Motion to Dismiss. I hold that AA's private settlement with Mr. Mantilla, while perfectly valid and acceptable to the court as between its signatories, has no preclusive effect upon OSC's power to bring an independent action in the public interest against AA, even with respect to any unfair immigration-related employment practices AA may have committed against Mr. Mantilla. However, I also hold that OSC is bound to respect the private settlement between AA and Mr. Mantilla, in which Mr. Mantilla voluntarily gave up his rights to personal compensation. Consequently, OSC may not seek any

compensatory relief—such as back pay, interest, retroactive seniority or retroactive benefits—on behalf of Mr. Mantilla, and paragraph B.2. of the Complaint's prayer for relief must be stricken. My rationale for these decisions is set forth below.

As a threshold matter, OSC's Memorandum in Opposition to AA's First Motion to Dismiss fails to identify the real issue raised by the AA-Mantilla settlement. OSC's Memorandum in Opposition reflects an apparent belief that Mr. Mantilla has a responsibility to concern himself with the "public interest" when making decisions regarding settlement. OSC correctly cites OCAHO's decision in *United States v. McDonnell Douglas Corp.*, 3 OCAHO 1053 (Ref. No. 507) (1993), 1993 WL 404485 (O.C.A.H.O.), as support for the proposition that OSC has a peculiar obligation to act in the public interest. *Id.* at 1061–62. Yet, *McDonnell Douglas* imposes no reciprocal "public" responsibility upon charging parties such as Mr. Mantilla. On the contrary, OSC's principal argument in *McDonnell Douglas*, which the ALJ accepted, was that "[OSC] represents the public interest and that the charging parties, whose interests *may* coincide with the public interest, are separate and distinct parties." *Id.* at 1057 (emphasis added). This distinction between the public responsibilities of government anti-discrimination enforcement agencies and the private interests of charging parties is underscored by the Eleventh Circuit's comments in *Riddle v. Cerro Wire and Cable Group, Inc.*, 902 F.2d 918 (11th Cir. 1990), where the court referred to the "not necessarily compatible" interests of the Equal Employment Opportunity Commission (EEOC) and Title VII charging parties. *Id.* at 923. Specifically, the *Riddle* Court noted that "EEOC is primarily interested in securing equal employment opportunity in the workplace [while the charging party] is primarily interested in securing specific personal relief . . ." *Id.* at 922–23; *cf. Herman v. South Carolina National Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999) (holding, in the ERISA context, that "private plaintiffs do not adequately represent, and are not charged with representing, the broader national public interests represented by the Secretary.").

In light of the foregoing, I believe the question at issue, properly framed, is not whether Mr. Mantilla's settlement is in the public interest—the public interest is not Mr. Mantilla's concern. Rather, the real question is whether the provision of the settlement that requires Mr. Mantilla to withdraw his OSC charge will prevent OSC from vindicating the public interest. In short, I must decide

whether the withdrawal of Mr. Mantilla's charge precludes OSC from using that charge as the basis for Count I of its Complaint against AA.

Section 1324b and OSC regulations are silent with respect to the withdrawal of OSC charges. Further, OCAHO case law provides no definitive guidance on this issue. Therefore, this is a case of first impression. In the absence of any statutory, regulatory or case authority, I am presented with the following novel questions: (1) will the withdrawal of Mr. Mantilla's OSC charge preclude OSC from using that charge as the basis for Count I of the complaint against AA?; and (2) if so, under what circumstances may charging parties withdraw OSC charges?

1. *Withdrawal of OSC Charges: OCAHO Case Law*

In only a single reported case, which neither party has cited, has OCAHO been confronted with an attempt by a charging party to withdraw a charge after OSC had initiated proceedings against an employer. In *United States v. Monfort, Inc.*, 4 OCAHO 91 (Ref. No. 597) (1994), 1994 WL 269205 (O.C.A.H.O.), OSC brought an OCAHO complaint against the respondent employer, on behalf of two named charging parties, alleging document abuse and citizenship-status discrimination with respect to hiring at respondent's plants in Kansas and Nebraska. *Monfort Compl.* at 6–9 (8/6/93). In addition, OSC alleged two counts of pattern or practice violations. *Id.* at 9–10. Several months after the complaint was filed, OSC amended the complaint to include a third charging party. *Monfort Amended Compl.* at 10 (10/22/93). Shortly thereafter, this newly-added charging party filed a motion with the ALJ seeking leave to withdraw her OSC charge for undisclosed reasons. *CP's Mot. to Withdraw* (12/17/93). In response to this motion, OSC sent a letter to the ALJ explaining that "the United States does not oppose [the charging party's] Motion to Withdraw as it does not adversely affect the United States action." *OSC Letter* at 1 (12/27/93). Specifically, OSC cited the Tenth Circuit's opinion in *EEOC v. United Parcel Service*, 869 F.2d 372, 374 (10th Cir. 1988), for the following proposition: "'[o]nce the [government] has properly sued pursuant to a specific individual's complaint, it may proceed . . . although the original plaintiff is no longer a party.'" *Id.* According to OSC, *United Parcel Service* suggested that the charging party's withdrawal of her OSC charge did "not affect the United States ability to seek relief on her behalf." *Id.*

In response to the Motion to Withdraw the Charge, the ALJ issued an Order of Clarification in which he expressed agreement with OSC's position that the withdrawal of the charging party "will not affect [OSC's] ability to proceed with this case," but in which he also sought further information from OSC regarding the sort of relief it wished to pursue on behalf of the withdrawn charging party. *Monfort*, 4 OCAHO 91, at 92, 1994 WL 269205, at *1. In a Memorandum filed in response to the ALJ's Order of Clarification, OSC conceded that the facts of the case did not justify a claim for back pay or reinstatement on the charging party's behalf (the withdrawing party had alleged document abuse only and was employed by respondent at the time of suit); however, OSC did not concede that such relief would be precluded under different facts. *OSC Memo.* at 1 (2/7/94). Instead, OSC indicated that it

> seek[s] relief based upon the allegations in [the withdrawing party's] charge in vindication of the public interest. With respect to [the withdrawing party's] allegations, OSC seeks an order requiring that Monfort post notices; educate its personnel; and pay a civil penalty up to $1,000.

Id. at 2. Several days after receiving OSC's Memorandum, the ALJ issued an Order granting the charging party's motion to withdraw her charge on the grounds that "good cause has been shown; that there is no prejudice to the remaining parties; and, there has been no opposition" to the motion. *Order Granting Mot. to Withdraw Charges* (2/7/94). The ALJ did not address OSC's arguments regarding the types of remedies that it could seek on the basis of a withdrawn charge, and the issue was rendered moot some months later when OSC and the respondent entered into a settlement agreement providing for a compromise lump-sum civil penalty.

2. *Withdrawal of OSC Charges: EEOC Analogs*

EEOC regulations expressly provide that no charge may be withdrawn by a charging party or his representative unless EEOC consents. 29 C.F.R. § 1601.10 (1999). As a result, the peculiar factual circumstances of the instant case—in which a charging party withdraws his charge without government consent after the government has initiated a complaint on the basis of that charge—would never occur in a Title VII suit brought by EEOC. If a Title VII charging party enters into a settlement agreement with the respondent in which the charging party agrees to withdraw his EEOC charge, EEOC has the power under 29 C.F.R. § 1601.10

to veto that attempted withdrawal and proceed with a complaint on the basis of the charge despite the charging party's opposition. *Whitehead v. Reliance Ins. Co.*, 632 F.2d 452, 458 (5th Cir. 1980); *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999); *EEOC v. Harvey L. Walner Assocs.*, 91 F.3d 963, 969 (7th Cir. 1996); *Croushorn v. Board of Trustees of the Univ. of Tennessee*, 518 F. Supp. 9, 26 (M.D. Tenn. 1980).

EEOC's authority to veto attempts to withdraw charges gives rise to the negative inference that the withdrawal of a charge, once effectuated, "precludes EEOC from asserting that charge as a basis for a civil action . . ." *Walner Assocs.*, 91 F.3d at 971. The *Walner Assocs.* Court reasoned that, "[w]e can imagine no reason for requiring EEOC consent for an effective withdrawal of charge other than to preclude EEOC from using that charge as a basis for a civil complaint." *Id.* Thus, it appears that in the Title VII context the withdrawal of a charge—which can only occur with EEOC consent—erases the claim against the respondent, and estops EEOC from bringing a complaint on the basis of that charge.

In a number of cases, courts have confronted situations in which charging parties have settled Title VII lawsuits without having withdrawn their EEOC charges, thus presenting EEOC with a fait accompli. If EEOC has not consented to withdrawal of a charge, independent settlement by the charging party may have either one of two effects upon EEOC's subsequent suit. In *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975), the Fifth Circuit concluded as follows:

> Although the termination [by settlement and subsequent dismissal] of the aggrieved persons' suit does not cut off the EEOC's right to bring suit to end practices discovered through the investigation of the charge filed by that person, the EEOC would be barred from filing suit on that particular charge and on behalf of that person who had had his suit adjudicated. Res judicata would prevent such a suit.

Id. at 456. In 1980, the Fifth Circuit elucidated the *Huttig Sash & Door* ruling when it concluded in dicta that "the EEOC may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the EEOC seeks relief different from that sought by the individual." *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 525 (5th Cir. 1980). Thus, in the Fifth and Eleventh Circuits it appears that a charging party's decision to settle prevents EEOC from

pursuing a complaint with respect to the charging party, but has no preclusive effect with respect to any other victims discovered during the course of the EEOC's investigation of the charge. It is important to keep in mind, however, that the *Huttig Sash & Door* rule was articulated in the context of two separate, consecutive lawsuits, the first by the charging party alone and the second by EEOC alone—thus the court's reference to res judicata principles. Moreover, it must be kept in mind that EEOC, unlike the OSC, lacks the authority to seek civil money penalties against discriminatory employers, a power exercised "on behalf of" a charging party (i.e., the civil penalty is sought to punish the specific act of discrimination against the charging party) but not "for the benefit of" a charging party (i.e., the money derived from the penalty is paid to the U.S. Treasury and not to the charging party). Thus, the factual posture of *Huttig Sash & Door* is not precisely analogous to the instant case, where only a single suit has been brought, with both OSC and Mr. Mantilla as discrete complainants, 8 U.S.C. § 1324b(e)(3), and with OSC seeking a civil money penalty in addition to various forms of equitable relief.

The other circuits which have addressed the issue of a Title VII charging party's private settlement have adopted a modified version of the rule in *Huttig Sash & Door*. In *EEOC v. McLean Trucking Co.*, 525 F.2d 1007 (6th Cir. 1975), *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975) and *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987), the Sixth and Ninth Circuits, respectively, held that a charging party's independent settlement had no preclusive effect upon EEOC's ability to use the charge as the basis for an EEOC complaint; rather, such a settlement merely prevented EEOC from seeking specific personal remedies—such as back pay and reinstatement—on behalf of the settling party. *McLean Trucking*, 525 F.2d at 1011; *Kimberly-Clark*, 511 F.2d at 1361; *Goodyear Aerospace*, 813 F.2d at 1544. In *McLean Trucking*, for example, the court held as follows:

> While under our holding [the charging party] is not to recover any 'private benefit', such as back pay, not granted to him under the compromise settlement of the separate action, [the charging party] should not and cannot practically be prevented from enjoying the benefits inuring generally to all McLean employees as the result of the eradication of any unlawful practices which may be proved to exist or the benefit of improvements in working conditions.

525 F.2d at 1011 (internal citation omitted).

I note that in both its Memorandum in Opposition and at the second prehearing conference in this case, OSC has referenced the district court case of *EEOC v. Dayton Tire & Rubber Co.*, 573 F. Supp. 782 (S.D. Ohio 1983), as support for the proposition that OSC should be free to seek back pay for Mr. Mantilla over and above what he agreed to (i.e., nothing, in this case) in his private settlement with AA. In *Dayton Tire & Rubber*, an employer filed a motion to dismiss EEOC's Title VII Complaint on the ground that a settlement between itself and the charging party had mooted EEOC's claims. *Id.* at 784. The district judge, citing the Sixth Circuit's authoritative decisions in *McLean Trucking* and *Kimberly-Clark*, correctly concluded that EEOC's claim was not mooted by the private settlement. *Id.* at 786–87. However, the district judge also indicated that EEOC's "public interest" mandate permitted it to seek back pay for the charging party—who had already received $18,000 in her private settlement—simply because the agency believed "the charging party settled 'with less than acceptable terms.'" *Id.* at 787. To the district judge, the EEOC's request for additional back pay "appear[ed] to be a proper exercise of vindicating the public interest, in that the EEOC may feel that only a larger settlement (or award) will deter violations of the discrimination laws by the present defendants or similarly situated defendants." *Id.*

I believe the district court in *Dayton Tire & Rubber* exceeded its authority when it permitted EEOC to seek back pay on behalf of a charging party who had already entered into a settlement agreement with the employer. *McLean Trucking* and *Kimberly-Clark*, both of which were referred to as binding precedent by the district judge, compel the conclusion that a charging party "is not to recover any 'private benefit', such as back pay, not granted to him under the compromise settlement of the separate action." *McLean Trucking*, 525 F.2d at 1011. Consequently, I decline to rely upon the reasoning set forth by *Dayton Tire & Rubber*.

More recently, several circuits have confronted the issue of whether the EEOC, in prosecuting its own civil suit against an employer, is bound by a pre-existing private arbitration agreement between the charging party and the respondent. The Second and Fourth Circuits, emphasizing the different interests represented by EEOC and private Title VII plaintiffs, have concluded that private arbitration agreements cannot preclude EEOC from prosecuting its own action against the employer, but that such agreements do prevent EEOC from seeking "make-whole" relief on be-

half of any party who has entered into such an agreement. *See EEOC v. Waffle House, Inc.*, 193 F.3d 805, 806–07, 812–13 (4th Cir. 1999); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302–03 (2d Cir. 1998). The Sixth Circuit has concluded, for reasons of public policy, that a private arbitration agreement has no effect whatsoever on EEOC's independent right of action, and that "make-whole" relief for charging parties is recoverable by EEOC despite the existence of such agreements. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462 (6th Cir. 1999). Neither the Fifth nor the Eleventh Circuit has yet had occasion to address this question.

These rules governing settlements, arbitrations and withdrawals of charges in Title VII cases do little to advance our analysis of the effect of settlements and withdrawals in the OSC context because the rules in Title VII cases simply reflect the idiosyncratic EEOC regulatory scheme. It is difficult to fit the square peg of EEOC's specific rules regarding withdrawal of charges into the round hole of OSC's entirely distinct, generalized, regulatory program. Therefore, I hold that Title VII case law does not provide particularly useful guidance for the instant proceeding.

3. *Withdrawal of OSC Charges: Conclusion*

Because OSC lacks EEOC's veto power over withdrawal of charges, application of the Title VII rule—i.e., that withdrawal of a charge precludes EEOC from using that charge as the basis for an independent complaint—would lead to untenable results in the § 1324b context. The public interest in deterrence and punishment of employment discrimination would be subverted if charging parties could withdraw charges against § 1324b violators for negligible financial recovery and thereby immunize those violators from § 1324b liability. *Cf. Huttig Sash & Door*, 511 F.2d at 455; *Goodyear Aerospace*, 813 F.2d at 1544. At the same time, justice and judicial economy dictate that private parties should be encouraged to enter into settlement negotiations with employers, and thus avoid the uncertainties and inefficiencies of litigation. *Walner Assocs.*, 91 F.3d at 970. A charging party should not be denied the right to accept a sorely-needed job offer simply because OSC believes the charging party is not getting a good-enough deal. In its response to AA's Motion, OSC proclaims that "[o]nly reinstatement with retroactive seniority and benefits will make Mr. Mantilla whole." *C.'s Opp. Mem.* at 3. Yet Mr. Mantilla's decision to settle with AA reflects his disagreement with OSC's assessment

of his best interests. During the second prehearing conference in this case, Mr. Mantilla emphatically stated that he was interested in obtaining the job with AA and was willing to forgo both back pay and retroactive seniority. Surely, Mr. Mantilla is in the best position to determine what will "make [him] whole." Thus, the proper ruling is one in which OSC is permitted to vindicate the public interest in eradicating workplace discrimination while charging parties are given the freedom to seek a livelihood during the pendency of OSC litigation.

With these competing interests in mind, I hereby DENY AA's First Motion to Dismiss. I hold that Count I of the Complaint should not be dismissed, as AA asserts. However, I also hold that Mr. Mantilla is conditionally dismissed as a Complainant in this case. Consequently, OSC is hereby foreclosed from seeking specific personal remedies from AA—such as back pay, interest, or retroactive seniority and benefits—with respect to Mr. Mantilla. Thus, paragraph B.2. of OSC's prayer for relief, *Compl.* at 7, is hereby struck from the Complaint. OSC retains its independent right of action against AA (and its commensurate right to seek civil money penalties and other "public interest"-oriented equitable relief), even with respect to AA's alleged treatment of Mr. Mantilla. Moreover, pursuant to the pattern or practice allegations in Count II of the Complaint, OSC retains the right to seek reinstatement, back pay, interest, retroactive seniority and retroactive benefits for as yet unnamed persons, if any, who are identified during the course of discovery as victims of unfair immigration-related employment practices at the hands of AA.

Finally, despite the fact that withdrawal of the charge has no effect on OSC's independent enforcement rights, the AA-Mantilla settlement survives undisturbed, and is hereby approved. As I noted during the second prehearing conference, the obligations of AA and Mr. Mantilla under the settlement agreement are not conditioned upon this court's granting AA's First Motion to Dismiss. Therefore, I expect that AA will honor its agreement with Mr. Mantilla; if AA fails to do so, Mr. Mantilla may reinstate his charge and reenter this action. AA's bargain with Mr. Mantilla—involving a job offer in exchange for Mr. Mantilla's withdrawal of his OSC charge—has been fully satisfied, even though it may have a different effect from that hoped for by AA.

B. *Respondent American Airlines' Second Motion to Dismiss*

As mentioned previously in this Order, my adjudication of AA's Second Motion to Dismiss requires that I decide, at least preliminarily, an issue central to the merits of OSC's cause of action—i.e., whether the alleged offense in this case occurred "with respect to hiring." The Eleventh Circuit treats motions such as this—i.e., motions to dismiss for lack of jurisdiction that also affect the merits—differently from conventional motions to dismiss. In *Williamson v. Tucker*, 645 F.2d 404, 415–16 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981), private plaintiffs brought an action under the Securities Act of 1933 and the Securities Exchange Act of 1934 seeking rescission of certain joint venture agreements. *Id.* at 409. The defendants in that case sought summary judgment and, in the alternative, dismissal of the action on the ground that the joint venture agreements at issue were not "securities" as that term is defined in the '33 and '34 Acts. *Id.* The district court agreed with the defendants and dismissed the action for lack of subject-matter jurisdiction. *Id.* at 409–10. On appeal, the Fifth Circuit reversed the district court, noting that "the applicability of the 1933 Act and the 1934 Act to the transactions at issue is the basis of both federal jurisdiction and the merits of the plaintiff's cause of action." *Id.* at 412. To the Fifth Circuit, this peculiar circumstance warranted special treatment:

> Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the [trial] court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. . . . Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as . . . motions [to dismiss for lack of subject-matter jurisdiction] provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) (for failure to state a claim upon which relief can be granted) or Rule 56 (summary judgment)—both of which place greater restrictions on the [trial] court's discretion. . . . Therefore as a general rule a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action.

Id. at 415–16.

In the instant case, the applicability of 8 U.S.C. § 1324b(a)(1)(B) to AA's conduct is the basis of both OCAHO's subject-matter jurisdiction and the merits of the OSC's cause of action. Consequently, the *Williamson* rule dictates that AA's Second Motion to Dismiss must be denied insofar as it challenges the court's subject-matter

jurisdiction. At the same time, however, the allegations put forth in AA's Second Motion to Dismiss must be adjudicated as if filed as a motion for summary decision or a motion to dismiss for failure to state a claim. Because the motion is supported by an affidavit, I find that I must treat it as a motion for summary decision under 28 C.F.R. § 68.38, rather than as a motion to dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R. § 68.10.

The OCAHO Rules of Practice and Procedure permit me to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1999). Rule 68.38(c) is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. *United States v. Aid Maintenance Company, Inc.*, 6 OCAHO 810, 813 (Ref. No. 893) (1996), 1996 WL 73594, *3 (O.C.A.H.O.); *United States v. Tri Component Product Corp.*, 5 OCAHO 765, 767 (Ref. No. 821) (1995), 1995 WL 813122, *2 (O.C.A.H.O.).

An issue of material fact must have a "real basis in the record" to be considered genuine. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). Moreover, only facts that might affect the outcome of the proceeding are deemed material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." *Matsushita*, 475 U.S. at 587.

The party requesting summary decision carries the initial burden of asserting the absence of any genuine issues of material fact by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). After the moving party has met this burden, the nonmoving party must then come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587. In seeking

to satisfy this burden, the nonmoving party may not rely on mere conclusory allegations or denials contained in its pleadings, 28 C.F.R. § 68.38(b) (1999); at the same time, however, the nonmoving party's evidence need not be produced "in a form that would be admissible at trial . . .." *Celotex Corp.*, 477 U.S. at 324.

Applying these standards to AA's Second Motion to Dismiss, I find that AA has failed to satisfy its initial burden of asserting the absence of any genuine issues of material fact. Specifically, I find that the allegations made in AA's Second Motion to Dismiss cannot, at present, be reconciled with AA's Answer to the Complaint. In the Memorandum of Law filed along with its Second Motion to Dismiss, AA claims that "[t]he evidence clearly shows Mr. Mantilla was an employee at the time he attended orientation" on September 10, 1998. *AA's Memo. in Support of Second Mot. to Dismiss*, at 5. Yet AA's own Answer to the Complaint contradicts this assertion when it states, in its first affirmative defense, that "Respondent hired Mr. Mantilla on September 14, 1998 . . . ," *Ans.* at 8, four days *after* the orientation. In my First Prehearing Conference Report and Order (FPCR), entered on November 18, 1999, I made the following statement relevant to the present issue:

> In light of AA's statement, in the first affirmative defense in its answer, that Mr. Mantilla was hired by AA on September 14, 1998 (i.e., four days *after* the September 10, 1998 orientation), I expressed some reservations about [AA's] assertion that the alleged discrimination occurred after Mr. Mantilla had been hired. I informed [AA] that I would accept September 14, 1998, as the official date of Mr. Mantilla's hiring unless AA provided information to me that seemed to justify a deviation from that date.

First PHC Report & Order, at 3.

OSC's Memorandum in Opposition, making reference to the above-quoted language, states that "this Court has accepted September 14, 1998, as Mr. Mantilla's hiring date." *OSC's Opp. Mem.* at 10. However, since this statement in the FPCR as to Mr. Mantilla's hiring date may be misconstrued, I wish to emphasize that I have not made a determinative finding that Mr. Mantilla was, in fact, "hired" on September 14, 1998. Rather, the statement in the FPCR merely reflects my intention to bind AA to the statement in its answer to the complaint that September 14, 1998, was the date when Mr. Mantilla was hired, *until evidence is presented that would justify a deviation from that date.* While AA's attached affidavit from Ms. Rossina Fernandez, who identifies herself as a Recruitment Coordinator for Human Resources at AA, discusses

the job processing for Mr. Mantilla, Ms. Fernandez never definitively contradicts AA's assertion that Mr. Mantilla was hired on September 14, 1998.

AA's Second Motion to Dismiss never addresses the above-quoted language, nor does the Motion produce evidence suggesting that the September 14, 1998, hiring date is incorrect. Instead, AA simply seems to ignore the fact that its Second Motion to Dismiss directly contradicts its first affirmative defense. Moreover, even if AA had satisfied its initial burden of asserting the absence of a genuine issue of material fact, OSC's Memorandum in Opposition to AA's Motions to Dismiss sets forth "specific facts" (i.e., [t]he allegations in AA's answer regarding September 14, 1998, as Mr. Mantilla's hiring date, and my comments at the First Prehearing Conference regarding those allegations) sufficient to satisfy OSC's burden of showing that there is a genuine issue for trial. Thus, AA's Second Motion to Dismiss, which I have adjudicated as a motion for summary decision pursuant to the *Williamson* rule, is hereby DENIED.

V. *SUMMARY AND CONCLUSIONS*

In conclusion, (1) AA's First Motion to Dismiss is denied; (2) AA's Second Motion to Dismiss is denied, both in its capacity as a motion to dismiss for lack of subject-matter jurisdiction and in its capacity, under the *Williamson* rule, as a motion for summary decision; (3) the settlement agreement reached between AA and Mr. Mantilla is approved by the court as a valid expression of the intentions of both AA and Mr. Mantilla; (4) Mr. Mantilla is conditionally dismissed as a party in this case, and his name should no longer appear in the caption of any future pleadings filed with the court; and (5) paragraph B.2. of the Complaint's Prayer for Relief is stricken, with the result that the remaining Complainant, OSC, may not seek personal compensatory relief—including but not limited to back pay, interest, retroactive seniority and retroactive benefits—on behalf of Mr. Mantilla.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE