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

IN RE CHARGE OF M.U.	)	
	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 20B00116
GREAT EARTH COMPANIES, INC.,	)	
Respondent.	)	**MARVIN H. MORSE**
		Administrative Law Judge

ORDER ON MOTION TO STRIKE COUNTERCLAIM AND AFFIRMATIVE DEFENSES, AND TO AMEND THE COMPLAINT
(June 1, 2001)

I. Procedural History

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act (INA), as amended, § 274B, as codified at 8 U.S.C. § 1324b.

On December 15, 2000, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) filed a Complaint against Great Earth Companies, Inc. (Respondent or GEC). The Complaint alleges that when GEC discharged M.U. from his position as an administrative assistant *because he complained about ethnic slurs* made against him by a member of GEC's management, it committed (1) national origin discrimination and (2) retaliation in violation of 8 U.S.C. § 1324b. OSC alleges also that GEC retaliated against M.U. after he was discharged by refusing to confirm his GEC employment to prospective employers.

On January 17, 2001, GEC filed an Answer essentially denying the allegations of the Complaint, and asserting three affirmative defenses and a counterclaim against M.U. On January 31, 2001, OSC filed a Motion to Strike Respondent's Affirmative Defenses and Counterclaim for costs. The challenged affirmative defenses are:

1. The Complaint fails to state a cause of action;

2. The Complaint lacks sufficient particularities to plead a prima facie cause of action, and

3. While OSC has a duty, pursuant to 8 U.S.C. § 1324b(c)(1), to investigate charges,

> OSC acted not as an investigator but instead as an advocate of M.U., failing to acknowledge facts that would establish that GEC had no discriminatory intent in discharging M.U..

On the basis that the Complaint contains allegations fabricated by M.U., GEC counterclaims for shifting of expenses incurred in its defense.

On January 31, 2001, OSC filed a Motion to Amend Complaint. Seeking to add a second count of retaliation premised on Respondent's assertion of its counterclaim for costs against M.U., OSC characterizes the counterclaim as an act of intimidation and retaliation for filing his OSC charge.

On March 9, 2001, GEC filed memoranda in opposition both to the motion to strike and to the motion to amend the complaint.

On March 13, 2001, OSC filed a motion to submit a reply brief to GEC's memoranda; on March 15, 2001, GEC filed an opposition to the motion, or in the alternative, a cross-motion to file a sur-reply. On March 16, 2001, I granted OSC's motion to reply and GEC's motion to sur-reply. On April 2, 2001, OSC filed replies to GEC's oppositions. On April 16, 2001, GEC filed sur-replies.

II. Factual Issues

M.U. is a United States citizen of Mexican descent. OSC alleges that M.U. was hired on October 13, 1997 by GEC as an administrative assistant in the mail order department; soon after hire, he was assigned responsibility for clerical and administrative support in the mail order, franchise sales, and training departments. GEC's Answer asserts that M.U.'s hire as an administrative assistant included, among other duties, answering all incoming telephone calls and performing clerical functions and duties at GEC in Rancho Cucamonga, California. However, GEC's third affirmative defense contends that "in February of 1998, when M.U. *was given additional duties and responsibilities*, he was given a $2,000 increase in salary." (Emphasis supplied).

The Complaint alleges without contradiction that on July 21, 1998, M.U. received a favorable performance review and a $3,000 per year salary increase, presumably the salary increase which GEC contends was to motivate him to improve his performance.

OSC alleges that on January 12, 2000, M.U. was referred to as a "beaner" by a GEC manager, identified by M.U. on deposition as Scott Johnson; that this was not the first time Johnson made an ethnic slur about M.U., and that M.U. reported the incident to his supervisors, but no corrective action was taken. On deposition, M.U. stated that Johnson referred to him as a "beaner" on two occasions. Twice in nine months Johnson allegedly used an identical phrase, "be careful, you know M.U. is a 'beaner.'" in conversation with third persons, inadvertently

overheard by M.U., but Johnson did not call M.U. "beaner" to his face.

GEC's Answer denies that any employee called M.U. a "beaner" or that M.U. reported an ethnic slur to a supervisor. GEC contends that Johnson, the manager of a GEC franchise in Cerritos, California, was not M.U.'s supervisor, that M.U. concluded that Johnson was a manager because he managed a retail store, that Johnson was not a GEC officer or director, and made no hiring, firing or company policy decisions.

On deposition, M.U. said he reported the ethnic slurs to his supervisor Kathleen Woodward. According to M.U., his employment was terminated only because he complained about the ethnic slurs. In contrast, on deposition, Woodward said that M.U. never complained about being called a "beaner." Another supervisor, Christopher Barr said on deposition that the only time he heard "beaner" used was by M.U. at a Christmas party.

GEC contends that Eugene Bruno, another supervisor, took back duties from M.U. with the goal of lightening his work load because M.U. claimed he was overwhelmed with work. On deposition, Bruno stated he offered M.U. a position as training coordinator because he thought M.U. would be better able to focus on the tasks of a single department, but M.U. declined the position.

The Complaint alleges, and the Answer admits, that on February 18, 2000, GEC notified M.U. that he would be terminated as of February 25, 2000. GEC says M.U. was notified that his termination was due to poor performance. However, due to a purported medical condition, M.U. only worked only until February 22, 2000. According to GEC, M.U.'s primary fault was lack of attention to detail.

III. Discussion

A. Motion to Strike Counterclaim and Motion to Amend Complaint

OSC's motions to strike the counterclaim and to amend the Complaint are sufficiently interrelated to invite a single discussion.

1. *The Counterclaim is Struck*

GEC's counterclaim against M.U. asserts that because OSC's Complaint is based on factual fabrications by M.U., GEC incurred and continues to incur legal and travel expenses which it asserts should be recoverable from M.U.. OSC counters, citing 8 U.S.C. § 1324b(h), establishing administrative law judge (ALJ) jurisdiction for shifting attorney's fees, to the effect that,

> In any complaint respecting an unfair immigration-related employment

> practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

Section 1324b(h) has been held by the Ninth Circuit Court of Appeals, in whose appellate jurisdiction this case arises, not to reach to fee shifting against the United States, and, therefore, GEC is ineligible to recover attorney's fees from OSC. This is so because the court in *General Dynamics Corp. v. United States*, 49 F.3d 1384 (9th Cir. 1995), was "unable to detect a waiver of sovereign immunity" in § 1324b(h) to authorize payment of attorney's fees by the United States to a prevailing employer in a § 1324b adjudication. *Accord, United States v. Zabala Vineyards,* 6 OCAHO no. 844, 206 (1996)[1] (Decision and Order on Attorneys' Fees); *United States v. Workrite Uniform Co., Inc*., 5 OCAHO no. 755, 266, 273 (1995) (Order on Reconsideration and Attorney's Fees).

In contrast, GEC's counterclaim against M.U., considered in context of OSC's motion to amend its Complaint, invites consideration whether M.U., as the charging party, would be liable for fee shifting under § 1324b(h). It is well established in OCAHO jurisprudence that in private actions, *i.e.*, pursuant to 8 U.S.C. § 1324b(d)(2), where OSC was not a party, complainants routinely have been subject to fee shifting, the only inquiry focusing on whether the other party prevailed and whether the losing party's argument was without reasonable foundation in law and fact. *See, e.g., Shepherd v. Sturm, Ruger & Co.,* 7 OCAHO no. 990, 1054 (1997) (Order Granting Respondent's Motion for Attorney's Fees); *Werline v. Public Service Elec. & Gas Co.*, 7 OCAHO no. 955, 517 (1997) (Order Granting Respondent's Request for Attorney's Fees); *Grodzki v. OOCL (USA), Inc.*, 1 OCAHO no. 295, 1948, 1956 (1991). In 1988-89, the very early years of § 1324b adjudication, decisions by the ALJ denied requests for shifting of attorney's fees on a prudential bases, having found the losing party's cases lacking in reasonable legal and factual foundation. *Bethishou v. Ohmite Mfg. Co.*, 1 OCAHO no. 77, 534, 540-41 (1989); *Wisniewski v. Douglas County Sch. Dist.*, 1 OCAHO no. 29, 153, 160 (1988). Although vulnerability to fee shifting of a losing complainant in a private action is typically implicit, the potential for such exposure was explicitly recognized as early as *Wisniewski*, and reiterated in *Bethishou*, at 541:

> As I suggested in *Wisniewski, supra*, at this early juncture in the administration of section 1324b, potential complainants may not have been made adequately aware of exposure to liability for attorney's fees of the prevailing party. It might be

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[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 omitted from the citation.

> helpful in this context for the Special Counsel, upon informing charging parties of their opportunity to initiate private actions where the Special Counsel declines to file a complaint, to caution that there is such potential liability.

That suggestion, both in *Wisniewski*, 1 OCAHO at 160 and *Bethishou*, 1 OCAHO at 541, concluded with the caveat that "Of course, there is a need for sensitivity to the balance between advising potential complainants of that exposure and frightening them off from prosecuting credible claims of discrimination in violation of IRCA [the Immigration Reform and Control Act of 1986, enacting § 274B of the Immigration and Nationality Act]."

Simply stated, OSC cannot be liable for fee shifting, at least in the Ninth Circuit, but complainants in private § 1324b complaints can be liable. Whether the charging party on an OSC complaint may be vulnerable to fee shifting appears to be a question of first impression, although there is seven year old precedent which constrains me to a negative response.

Title 8 U.S.C. § 1324b(e)(3) stipulates that:

> Any person filing a charge with the Special Counsel respecting an unfair immigration-related employment practice shall be considered a party to any complaint before an administrative law judge respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony.

Not being persuaded of a reason to conclude otherwise, it is my judgment that subsection (e)(3) fails to provide an answer to the question at hand. Moreover, *United States v. Auburn Univ.*, 4 OCAHO no. 646, 488 (1994) (Fifth Prehearing Conference Report and Order), drew attention to the difference between OSC complaints and private actions in vulnerability to fee shifting when OSC moved to withdraw and the charging party "indicated she might maintain . . . the case as a private action . . . despite OSC's withdrawal." *Id.*

As the presiding ALJ, I noted, *Auburn Univ.*, 4 OCAHO at 489, that OSC was candidly explicit in reciting the premise for its withdrawal, i.e., that:

> [I]n light of an in-depth analysis of all the currently available evidence that it will be unable to meet it (sic) burden, as required by 8 U.S.C. § 1324b(a)(1)(B), of proving that Respondent's decision not to hire Dr. Katalin Balazs-Kilgore was made on the basis of her citizenship status.

As stated in *Auburn Univ.*, *id.*,

> With respect to fee shifting, OSC assured me that it had alerted Balazs, as the charging party contemplating a private action under 8 U.S.C. § 1324b(d)(2), to the significance of OSC's premise for withdrawal. I noted also that eligibility for

> fee shifting under 8 U.S.C. § 1324b(h) as against OSC may turn on analysis of the reasonableness of the factual and legal foundation for its 'argument' as of the time it initiated the action without benefit of what it may have learned during the litigation through discovery or otherwise. In contrast, the reasonableness of the charging party's going forward may turn on analysis of the circumstances at the time that decision is made by her, i.e., in light of notice by OSC of the premise for its motion to withdraw.

Clearly, *Auburn University* supports the conclusion that where OSC is the complainant, the charging party becomes vulnerable to fee shifting only upon withdrawal by OSC. Subsection (e)(3) does no more than delineate the distinction between participation as a matter of right by the charging individual, and participation by third parties as a matter within the ALJ's discretion. Once OSC takes the case, the charging party's contentions become subsumed in OSC's allegations of fact and assertions of law. The distinction between a private action authorized at 8 U.S.C. § 1324b(d)(2) and one conducted by OSC would be eviscerated if the aggrieved individual were able to maintain control over the claim sufficiently to permit analysis as to whether his or her argument, and not OSC's "is without reasonable foundation in law and fact." *Auburn University* tells us as much. The *Wisniewski/Bethishou* caveat against the chilling effect of apprehension over fee shifting is powerfully instructive. Considering the remedial purpose of the prohibition against immigration-related discrimination in the workplace, subsection (e)(3) is no warrant for mulcting the aggrieved individual with fee shifting once OSC takes over and maintains prosecution of the § 1324b claim.[2]

In addition, the counterclaim fails because it is premature and because it is unnecessary. Judicial discretion to consider fee shifting cannot be brought into play until it is timely to identify who, if any, is a prevailing party whose opponent's losing "argument is without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h). The present pleadings posture hardly invites that analysis. I adhere to the ruling in *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 808 (1996), that attorney's fee recovery will only be considered "once the case has been adjudicated." Moreover, the Rules of Practice and Procedure for cases before Administrative Law Judges, 28 C.F.R. pt. 68 (Rules), at 28 C.F.R. § 68.52 (d)(6), provide an explicit vehicle for raising the issue of attorney's fees by specifying that "Any application for attorney's fees shall be accompanied by an itemized statement."

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[2]The result here is consistent with *Workrite Uniform Co., Inc.*, 5 OCAHO at 273, which in addition to rejecting fee shifting against OSC in accord with the circuit's decision in *General Dynamics Corp.*, 49 F.3d at 1384, declined as a matter of judicial discretion to shift the prevailing employer's attorney's fees to the charging party whose complaint had been dismissed, in *Workrite*, 5 OCAHO no. 736, 107, (1995), because it was filed one week too late. Unlike the Complaint at hand, however, because *Workrite* involved two OCAHO complaints, one filed by OSC, the other by the charging party, it was appropriate to address the attorney's fees request with respect to each complainant.

Finally, GEC's counterclaim overreaches in its demand for reimbursement beyond attorney's fees. As I have previously held, "I am unaware of any authority for an award to the prevailing party of costs as distinct from fee shifting." *Zabala Vineyards*, 6 OCAHO at 207. *Tekwood,* decided six months after *Zabala* is to similar effect, rejecting claims for fee awards under Fed. R. Civ. P. 11, noting the earlier ruling in an 8 U.S.C. § 1324a case that neither IRCA nor the Rules authorize monetary sanctions. *Tekwood,* 6 OCAHO at 808 (*citing United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 274, 1771, 1780 (1990)).

For the reasons discussed above, OSC's motion to strike GEC'S counterclaim is granted.

2. *The Amendment is Rejected*

Not content with seeking to strike the counterclaim, OSC argues that by its very advocacy, GEC has committed an act of retaliation by counterclaiming for costs against M.U., warranting an amendment to the Complaint to that effect. OSC argues that its additional retaliation Count III is essential to protect the interests of the individual and of the United States. OSC's proposed amended complaint includes at paragraph 22 the rationale, *inter alia*, that "Mr. M.U. will have to incur time and expense, and possibly attorney's fees, in order to defend himself against Respondent's counterclaim." OSC relies principally on two OCAHO decisions finding prohibited retaliation on the part of an employer who twice filed abuse of process complaints in state court against employees who were alleged to have caused OSC for no good reason to investigate the employer, *United States v. Hotel Martha Washington Corp. (Hotel Martha Washington II),* 6 OCAHO no. 846, 216 (1996); *United States v. Hotel Martha Washington Corp. (Hotel Martha Washington I),* 5 OCAHO no. 786, 533 (1995). GEC counters that these cases are inapposite because its counterclaim was an appropriate effort to preserve its opportunity for fee shifting as against the charging party, recognizing that at least in the Ninth Circuit, *General Dynamics Corp.*, precludes recovery against OSC for lack of a § 1324b sovereign immunity waiver. OSC replies that as the counterclaim seeks recovery from M.U. of costs beyond attorney's fees it evidences retaliation.

Having struck the counterclaim at OSC's request, the government no longer needs to be concerned that the charging party is exposed to fee shifting, let alone other costs. I echo OSC's concern for the need to vindicate the government's interest in a discrimination free workplace, but cannot agree that the enunciation of costs recovery by the employer constitutes meaningful retaliation in response to conduct protected by § 1324b. No reasonable person should have been, nor is there a suggestion that M.U. was, intimidated by the assertion of costs recovery well after his discharge and initiation of this litigation. I am mindful of the general rule favoring amendment of complaints. *See, e.g., United States ex rel Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1050 (9th Cir. 2001) (denial of leave to amend complaint reviewed for abuse of discretion); *Owens v. Kaiser Foundation Health Plan, Inc*., 244 F.3d 708, 711 (9th Cir. 2001) (grant of leave to discrimination defendant to amend its answer reviewed for abuse of discretion). In the case at hand, however, the amendment does not implicate the viability of the underlying cause of action or defense as in the typical case. It is a matter at the margin, at best a distraction.

While there is a strong policy favoring amendment of pleadings leading to a strict review of denials of motions to amend, factors governing propriety of motions to amend include undue delay, bad faith, prejudice to an opponent, and futility. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765-66 (9th Cir. 1986). Considered in context of the issues remaining in this litigation, including two retaliation counts, it would be not only futile but a poor allocation of resources, judicial and otherwise, to grant this amendment which I can at best characterize as an academic exercise. I do not say that a case might not arise where the pleading in defense of a § 1324b claim is itself an actionable wrong, but this is not that case. The motion to amend the Complaint is overruled.

B. Motion to Strike Affirmative Defenses

1. *Standards Applicable to the Motion*

The Rules do not include a provision explicitly addressing motions to strike affirmative defenses, but do provide that the Federal Rules "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. It is well established that Fed. R. Civ. P. 12(f), governing disposition of motions to strike affirmative defenses in the United States district courts is available as a "general guideline" to dispose of the pending motion.

It is frequently stated that motions to strike affirmative defenses are not favored in the law, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 789 F.2d. 181, 188 (3d Cir. 1986); *United States v. A&A Maint. Enter. Inc.*, 6 OCAHO no. 852, 265, 267 (1996)*; United States v. Makilan*, 4 OCAHO no. 610, 202, 205 (1994), but affirmative defenses are susceptible to motions to strike, both in OCAHO jurisprudence and in the federal courts, when the alleged defenses lack a legal or factual basis. *See, e.g.*, *United States v. Task Force Security, Inc.*, 3 OCAHO no. 563, 1608, 1612 (1993) (citing cases). The Ninth Circuit Court of Appeals applies an abuse of discretion standard to trial court decisions regarding motions to strike affirmative defenses. *See Federal Sav. & Loan Ins. Corp. v. Gemini Management*, 921 F.2d 241, 244 (9th Cir. 1990).

Fed. R. Civ. P. 8(c) requires only that an affirmative defense be pleaded in terms sufficient to provide notice. 5 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1281 (2d ed. 1990). Under 8(c), a "bare assertion" will do. *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994). In contrast, the OCAHO Rule requires "a statement of the facts supporting each affirmative defense." 28 C.F.R. § 68.9(c)(2). OCAHO precedents have struck affirmative defenses found to be devoid of factual content, and where there is no prima facie viability for the legal theory upon which they are premised. Where a putative affirmative defense is either insufficient as a matter of law or lacks the required statement of facts, it will be stricken. Alternatively, either on motion or *sua sponte*, the ALJ may require a defending party to supplement its affirmative defense with the required statement of facts. *Cf. United States v. Mark Carter*, 6 OCAHO no. 865, 458, 467 (1996).

2. *The Motion to Strike the First Affirmative Defense, that the Complaint fails to state a cause of action, is denied.*

GEC asserts that the Complaint fails to state a claim upon which relief can be granted. No statement of facts accompanies the affirmative defense. However, on motion practice, GEC refers to the portion of its Answer denominated "Statement of Facts" which recites factual contentions which "not only relate to the allegations of the Complaint and refute them, but form the basis, in part, for alleging the affirmative defenses." GEC also points to factual assertions in its Answer which are outside the Statement of Facts.

OCAHO Rule 68. 9(c)(2) departs from the more liberal pleading requirement of Fed. R. Civ. P. 8(c), obliging the answering respondent to plead a statement of facts in support. Literally read, the first affirmative defense lacks explicit substantive content. The inquiry is not foreclosed in favor of the motion, however, for there can be no doubt what GEC contends in support of its defense. I adopt the analysis of an early OCAHO precedent, i.e., that "Respondent has set forth in its Answer facts in support of its affirmative defenses which provide Complainant with sufficient notice of the nature of its' (sic) defenses. . . [and] . . . the Answer of Respondent should be liberally construed in order to provide the Respondent with every reasonable opportunity to present . . . its defenses. . ." *United States v. Ed Valencia and Sons, Inc.*, 2 OCAHO no. 387, 724, 725 (1991).

In circumstance as here where the affirmative defenses addresses a legal conclusion and the Answer contains detailed factual contentions in response to the specifications of fact in the Complaint, I hold that the affirmative defense satisfies Rule 68. 9(c)(2) sufficiently to defeat the motion to strike. *See United States v. W.S.C. Plumbing,* 9 OCAHO 1061, at 19 (2000) (where the "defense is self-explanatory, Respondent need not provide any additional statement of facts" in support). *See also United States v. Desert Palace, Inc.,* 9 OCAHO no. 1067, at 7 (2001) (Order Granting Respondent's Motion to Amend Answer and Denying Complainant's Motion to Strike Affirmative Defenses) ("since a failure to state a claim defense is based on the legal insufficiency of the complaint, a detailed factual statement may be unnecessary").

Rejecting a motion to strike, a colleague recently held that "on the basis of the record before me, I simply cannot conclude with any confidence that Respondent's affirmative defense[s] lack any conceivable relationship to the controversy. Further, Complainant has not shown that the continued presence of the defense[s] in Respondent's Answer will be unfairly prejudicial to Complainant." *United States v. Tropicana Casino & Resort,* 9 OCAHO no. 1064, at 6 (2001) (Prehearing Conference Report and Order Denying Complainant's Motion to Strike Affirmative Defenses). There is no dispositive motion before me. It is sufficient that, coupled with its detailed response to the allegations of the Complaint, Respondent's affirmative defense challenges the legal sufficiency of the Complaint. Quite clearly, GEC has proffered as a putative legitimate nondiscriminatory explanation for discharging M.U. that his performance was unsatisfactory. The issue is joined as to whether that explanation is "merely pretextual and that the actual motivations more likely than not were discriminatory." *Brisson v. Delta Air Lines, Inc.,* 239 F.3d 456, 468 (2d Cir. 2001).

More than ten years ago, the OCAHO paradigm for disposing of a motion to strike affirmative defenses addressing legal sufficiency of the complaint but lacking Rule 68.9(c)(2) specificity was to invite the respondent to amend its answer. *United States v. Broadway Tire, Inc*., 1 OCAHO no. 226, 1506 (1990). Because there is no doubt what is at issue before me, I do not require an amended answer. The motion is denied.

3. *The Motion to Strike the Second Affirmative Defense, that the Complaint is insufficient and states insufficient particularities, is granted.*

In contrast to the situation before the judge in *Tropicana Casino & Resort*, there has already been extensive deposition practice in the present case, and frequent and voluminous filings. The case is not ripe for decision on the merits but it is not reasonable to read the Complaint as deficient in factual content. Code pleading dictates are satisfied. The first affirmative defense preserves GEC's assertion of legal insufficiency of the Complaint, any more is mere redundancy. As diligently as GEC has defended this Complaint, it cannot reasonably claim to lack understanding of the allegations against it. The motion is granted.

4. *The Motion to Strike the Third Affirmative Defense, that OSC acted not as an investigator but instead as an advocate of M.U., is granted.*

Title 8 U.S.C. § 1324b establishes the investigative and advocacy roles of OSC. GEC's third affirmative defense essentially challenges the factual and legal underpinnings of the Complaint. Section 1324b vests OSC with the authority to initiate the evidentiary hearing process before an ALJ within whose jurisdiction the merits of the OSC cause of action are to be resolved. To the extent that GEC addresses OSC's investigatory and prosecutorial functions, I adopt the statement in *Hotel Martha Washington*, 5 OCAHO at 541-42, that "the management and structure of OSC has no bearing on the outcome of this proceeding. Further, respondent has offered no legal support for its requested separation of functions." The motion is granted.

IV. Conclusion

OSC asserts that under the analysis established in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), its Complaint recites a *prima facie* case of national origin employment discrimination. To prove a *prima facie* case of employment discrimination using indirect evidence under the *McDonnell Douglas/Burdine* analysis, it must be established that the injured party: (1) belongs to a protected class; (2) was qualified for and able to perform the job; (3) was subjected to adverse treatment by the employer; and (4) that similarly situated individuals outside the protected class were not subjected to adverse treatment.

OSC asserts that it sufficiently alleged the elements and facts necessary to state a cause of action for retaliation. In order to prove a *prima facie* case of retaliation under 8 U.S.C. § 1324b(a)(5) the individual alleging the violation must show that: (1) he engaged in a protected activity; (2) the employer was aware of the activity; (3) the charging party suffered adverse

treatment following the activity; and (4) a causal connection exists between the protected activity and the adverse action. *United States v. Hotel Martha Washington*, 5 OCAHO at 537 (1995); *Fakunmoju v. Claim Admin. Corp*., 4 OCAHO no. 624, 308, 323 (1994).

Unless this case is otherwise resolved, e.g., as by an agreed disposition, the parties are encouraged to analyze and evaluate the national origin discrimination issue in terms of amenability of an employer to liability in what appears to be a situation implicating stray remarks by non-supervisory co-worker addressed to a third party. I am unaware of any OCAHO precedent which informs whether stray remarks can constitute national origin discrimination. Rather, in each of two citizenship status discrimination cases, the ALJ understandably disregarded as irrelevant to *citizenship* status, remarks addressed to the charging party. *See Dhillon v. The Regents of the Univ. of Cal. (Univ. of California, Davis, Dept. of Human Anatomy)*, 3 OCAHO no. 497, 977, 998 (1993) (Indian national origin); *Jasso v. Danbury Hilton & Towers*, 3 OCAHO no. 522, 1225, 1248 (1993) ("wetback"). Absent prior authority it appears to me a question of first impression whether a stray derogatory remark, if that is what "beaner" proves to be, may qualify as national origin discrimination. While to decide whether OSC proves its case, it will be necessary to consider whether the remark "beaner," is evidence of national origin employment discrimination, the retaliation issue may survive as an independent cause of action.

From the pleadings to date there appear to be substantial disputes of material fact. At a telephonic prehearing conference to be scheduled within the next several weeks by my office, the parties should be prepared to address whether this case presents a viable cause of action. In preparation for such discussion, counsel should consider several cases which have come to my attention, and others as may be appropriate. For example, the Supreme Court, in a gender discrimination case, has stated that "stereotyped remarks can certainly be evidence that [a protected characteristic] played a part" in an employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989).

Ninth Circuit cases involving age, race, or gender discrimination which discuss derogatory comments with respect to an inference of discriminatory motive include, *e.g., EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 683-84 (9th Cir. 1997) (supervisor's age-related remarks were not mere "stray remarks" but rather were tied to the decision to remove an older employee); *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1149 (9th Cir. 1997) (comment that employee was a "dumb Mexican" and that he was hired because he was a minority can create an inference of discriminatory motive); *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (fire chief's derogatory comments about Hispanics create an inference of discriminatory motive); *Nesbit v. Pepsico, Inc*., 994 F.2d 703,705 (9th Cir. 1993) (supervisor's comment that "[w]e don't necessarily like grey hair" was weak circumstantial evidence of discriminatory animus on the basis of age, was uttered in ambivalent manner, and was not tied directly to employee's termination); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (supervisor's remarks indicating sexual stereotyping create inference of discriminatory motive); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (hiring executive's comment that he selected a "bright, intelligent, knowledgeable young man" was merely a stray remark, insufficient by itself

to establish age discrimination); *DeHorney v. Bank of America,* 879 F.2d 459 (1989) (absence of a nexus between subordinate's racial slur and superior's decision to terminate former bank teller fails to establish that race was a factor in employee's termination).

Counsel also will want to consider case law in other circuits, including, for example, *Brisson,* 239 F.3d at 467 (remarks may be more ominous than "stray" when "other indicia" of employment discrimination are shown); *Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 303 (5th Cir. 2000) (to be probative, age-related comment must be direct and unambiguous, allowing fact-finder "to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee"); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996) (age-related remarks may evidence age discrimination if, *inter alia*, "made by an individual with authority over the employment decision at issue.")

The anticipated conference will also consider the matters outlined at 28 C.F.R. § 68.13.

SO ORDERED.

Dated and entered this 1st day of June, 2001.

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Marvin H. Morse
Administrative Law Judge