Published 10/28/15 11 OCAHO no. 1264

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

October 23, 2015

VICTOR GUERRERO, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 14B00068
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Respondent.	)	

FINAL DECISION AND ORDER

For the Complainant:

Christopher Ho

For the Respondent:

Fiel D. Tigno
Miguel A. Neri
Christopher M. Young

I. BACKGROUND AND PROCEDURAL HISTORY

Victor Guerrero filed a complaint with this office on June 11, 2014, alleging that the California Department of Corrections and Rehabilitation (CDCR) discriminated against him by failing to hire him as a correctional officer because he is a naturalized citizen. CDCR filed an answer denying the material allegations and raising fourteen affirmative defenses. The action arises under the nondiscrimination provisions of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012).

Guerrero's OCAHO complaint is one of three separate actions he filed in different fora predicated upon the same set of facts. Guerrero's first complaint was filed in December 2013 in the United States District Court for the Northern District of California. As amended, the complaint in that case involved claims under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq., and the Equal Protection Clause of the Fourteenth

Amendment. *Guerrero v. Cal. Dep't of Corr. & Rehab.*, No. C 13-05671 WHA. Guerrero's third complaint was filed in the California Superior Court for San Francisco County, alleging various state claims as to which CDCR is immune in federal fora.[1] *Guerrero v. Cal. Dep't of Corr. & Rehab.*, Case no. CGC-14-539692 (CEAK).

In the interests of judicial efficiency, the claims in this matter and in the state court action were stayed pending trial of the bifurcated federal action. On July 21, 2015, U.S. District Court Judge William Alsup issued an order finding the defendant liable for violating Title VII and dismissing the equal protection claim. After a hearing to determine the extent of relief, Judge Alsup entered a final judgment on September 28, 2015, together with an order setting out the remedies. The parties thereafter filed a Joint Status Report and Request for Stay in this matter. At a telephone conference on October 8, 2015, I advised the parties that I intended instead to lift the stay, to adopt Judge Alsup's factual findings, and to apply the governing law of this forum to those facts. Counsel for CDCR objected and orally raised an affirmative defense of state sovereign immunity.

Judge Alsup's factual findings are the result of a six-day bench trial, and are hereby adopted and afforded substantial weight in the interest of avoiding duplicative proceedings.[2] Although all of Guerrero's claims arise from a common nucleus of operative fact, the legal issue in the proceeding under § 1324b was not and could not have been addressed in Judge Alsup's final decision. The issues are not the same where the second action involves the application of a different legal standard. *See* 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4417, at 449 (2d ed. 2002).

II. THRESHOLD QUESTION OF STATE SOVEREIGN IMMUNITY

OCAHO case law has long recognized that Congress did not abrogate state sovereign immunity when it enacted § 1324b. *See, e.g.*, *Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO no. 1119, 2 (2005).[3] Complaints against state agencies are routinely dismissed in this forum when the

[1] These claims were initially made in the district court, but were dismissed in May 2014 without prejudice to their refiling in state court.

[2] I do not rely upon the doctrine of collateral estoppel only because the time for appeal of the district court's final decision has not yet run.

[3] 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

immunity defense is timely asserted. *See Reffel v. Prairie View A&M University*, 9 OCAHO no. 1057, 2 (2000) (collecting cases). This immunity may be forfeited, however, where the sovereign fails to assert the defense promptly. *See In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002). The general principle that a state's own conduct in the course of litigation may operate to waive its immunity has been expressly recognized on the highest authority. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 623-24 (2002).

The record in this case reflects that CDCR filed a timely answer to the instant complaint on July 14, 2014, denying the material allegations and asserting fourteen affirmative defenses, none of which can be construed as a defense of sovereign immunity. The parties thereafter filed their respective prehearing statements and participated in a telephonic prehearing conference on November 12, 2014, at which time they agreed that discovery would conclude on January 30, 2015, but that proceedings would otherwise be stayed pending the outcome of the district court trial, which was then scheduled to begin on May 11, 2015.

The trial was rescheduled, the parties made periodic status reports, and the stay in this matter was periodically extended. Judge Alsup issued his preliminary findings of fact and conclusions of law as to liability on July 21, 2015. On August 10, 2015, without having either sought or obtained leave to amend, CDCR filed what purported to be an amended answer adding sovereign immunity as a fifteenth affirmative defense. OCAHO rules[4] provide that the administrative law judge *may* permit amendments to pleadings under certain conditions, but there is no general right to amend pleadings without first seeking leave. 28 C.F.R. § 68.9(e). Leave to file an amended answer in this case will be denied because the defense of sovereign immunity has been waived by inaction. The so-called amended answer is accordingly not accepted for filing.

The Ninth Circuit, in which this case arises, squarely held in *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754, 756-57 (9th Cir.), *opinion amended on denial of reh'g*, 201 F.3d 1186 (9th Cir. 1999), that a state agency had waived the issue of immunity by participating in extensive pretrial procedures and waiting until the opening day of the trial to raise the defense for the first time. The court observed that,

> We see no valid reason why a party should belatedly be permitted to assert Eleventh Amendment immunity. A party knows whether it purports to be an "arm of the state," and is capable of disclosing early in the proceedings whether it objects to having the matter

---

the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[4] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014).

> heard in federal court. Timely disclosure provides fair warning to the plaintiff, who can amend the complaint, dismiss the action and refile it in state court, or request a prompt ruling on the Eleventh Amendment defense before the parties and the court have invested substantial resources in the case. . . . Requiring the prompt assertion of an Eleventh Amendment defense also minimizes the opportunity for improper manipulation of the judicial process.

179 F.3d at 757-58; *accord Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001). So it is in this case. As pointed out in *Hill*, "like every other defendant, a state must timely object to the forum or be deemed to have waived its objections." 179 F.3d at 763. By failing to assert it promptly, the state has waived its immunity defense.

III. JUDGE ALSUP'S FINDINGS AND CONCLUSIONS

A. Findings of Fact

Judge Alsup made forty-six findings of fact which are hereby adopted. They are:

VICTOR GUERRERO

1. Plaintiff Victor Guerrero was brought to the United States by his parents, who were lawful permanent residents, at age eleven. He attended William C. Overfelt High School in San Jose, but did not graduate.

2. Since 1968, federal law has required employers to hire only documented workers and a social security number is commonly used as such proof. Guerrero began working at age fifteen in 1995. In order to work, Guerrero, with the help of an acquaintance and at the urging of his parents, invented an invalid social security number, *i.e.*, one not actually issued by the Social Security Administration. The invented number eventually got issued to someone else in 2004.

3. In 1997, at age seventeen, Guerrero applied to adjust his immigration status, in part so he could receive a validly issued SSN. This application languished until, via his later marriage, Guerrero secured legal status in 2007. While his application remained unaddressed, Guerrero continued to use his invalid SSN to keep employment.

4. Also in 1997, Guerrero applied to the Internal Revenue Service to receive an Individual Taxpayer Identification Number. An ITIN is a number issued by the IRS, upon request, to individuals who, like Guerrero, are employed, but do not have valid SSNs, so that they can pay

their federal taxes. The IRS issued Guerrero an ITIN in 1997. Guerrero began paying federal taxes with his legitimate ITIN in 1998 and continued doing so until 2007, when he received his own valid SSN.

5. Also in 1997, while working in Colorado, Guerrero suffered an injury on a job and applied for workers' compensation benefits. In completing the application form, Guerrero consistently used the same SSN he had used with the employer in question, namely the invalid SSN.

6. In 2004, at age 25, Guerrero married. At that time, Guerrero's wife, Nayeli Ramirez, had already obtained legal permanent residency in the United States. In 2006, Guerrero's wife became a United States citizen. She then filed an "immediate relative" visa petition on Guerrero's behalf.

7. In 2005, at age 28, Guerrero earned his General Education Development certificate. He then pursued a degree in criminal justice at San Joaquin Delta College, but so far has not earned that degree.

8. In 2007, Guerrero became a lawful permanent resident and received his own valid SSN. Shortly thereafter, Guerrero amended his 2004 and 2005 tax returns, such that income earned during those years became associated with his new, valid SSN. The amendments also allowed Guerrero to claim and to obtain earned-income and child tax credits.

9. In short, from 1997 (when Guerrero first applied for legal status), until 2007 (when he obtained legal status), Guerrero did everything he reasonably could have done to navigate the immigration system and obtain legal residence. The ten-year hiatus from his first application to when he finally obtained legal status (and a valid SSN) resulted from an administrative backlog, not from any failing by Guerrero.

10. In February 2011, Guerrero became a United States citizen.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

11. The California Department of Corrections and Rehabilitation operates the state prison system, including supervision of approximately 168,000 adult and 1,400 juvenile offenders. CDCR hires and employs corrections officers, all of whom must be United States citizens. In CDCR's overall hiring, there is virtually no difference between the selection rates for Latinos and non-Latinos — Latinos, in fact, are over represented in CDCR's ranks compared to their representation in the California workforce.

12. In hiring corrections officers, California law requires CDCR to conduct a thorough background investigation to determine that candidates have good moral character. Corrections

officers are authorized to carry firearms. And, they are subject to pressure and manipulation from inmates. In determining moral character, CDCR evaluates applicants' integrity, honesty, and good judgment, among other qualifications. Integrity, honesty, and good judgment remain important and valid qualifications for corrections officers.

13. CDCR closes approximately 1,000 background investigations per month. Currently, CDCR employs 65 sergeants, twelve lieutenants, and thirteen retired annuitants who work in the background investigation unit.

14. At all material times, CDCR's process for determining the eligibility of a candidate required two phases. Phase One consisted of a written test and a minimum-qualifications assessment. Phase Two consisted of a background investigation, physical-fitness test, vision screening, psychological evaluation, and medical examination. Following Phase Two, if they passed, eligible candidates enrolled in a training program at the academy.

15. At the times in question (and still, it appears), Phase Two applicants completed a lengthy background questionnaire. Upon receiving the questionnaire, CDCR automatically "withheld"—meaning disqualified—applicants who engaged in certain acts (*e.g.*, those with an adult felony conviction). Prior use of an invalid SSN, however, did not always result in a decision to withhold. In some cases, CDCR excused prior use of an invalid SSN.

16. CDCR sergeants conducted tape-recorded interviews of applicants. If CDCR withheld an applicant at this stage, the applicant would be sent a withhold letter, which laid out the main reasons for rejection.

QUESTION 75

17. In 2009, CDCR began using Question 75 as part of its background investigation for the hiring of corrections officers. Question 75 asked: "Have you ever had or used a social security number other than the one you used on this questionnaire?" The applicant could check "Yes" or "No." If the applicant checked "Yes," the applicant had to attach a supplement explaining the "Yes" answer.

18. CDCR borrowed Question 75 from the background investigation materials of a different law enforcement agency. Before its adoption, CDCR never articulated any particularized need for the use of Question 75, but at least one legitimate reason has emerged in this case, namely providing CDCR with identifying information usable to conduct background checks. That is, in addition to a valid SSN, CDCR may use invalid numbers to vet candidates.

19. From 2009 to 2014, 23,292 corrections officer candidates answered Question 75 through CDCR's background investigation. Of those applicants, 10,357 were Latino, 12,929 were non-

Latino, and six were unidentified. Of those applicants, 42 answered "Yes" to Question 75. Of the 42, 33 were Latino and nine were non-Latino. Of the 33 Latinos, CDCR cleared fourteen Latinos and withheld nineteen Latinos. Of the nineteen, CDCR withheld nine at least in part because of their prior use of an invalid SSN. For two of those nine, use of an invalid SSN was the only reason mentioned in the withhold letter. Of the nine non-Latinos who responded "Yes" to Question No. 75, CDCR cleared three non-Latinos and withheld six non-Latinos. CDCR withheld all six non-Latinos without reference to their prior use of an invalid SSN. Nine applicants were withheld at least in part on account of prior use of an invalid SSN, all of whom were Latino.

20. [the chart set out in the findings cannot be displayed]

GUERRERO'S APPLICATIONS TO CDCR AND APPEALS TO SPB

21. Guerrero first applied to be a corrections officer with CDCR in the summer of 2011, shortly after obtaining United States citizenship. During Phase One, CDCR concluded that he possessed the minimum qualifications to be a corrections officer. He successfully completed the written and physical examinations. CDCR granted him a place on the corrections officer eligibility list. CDCR then proceeded to Phase Two, the background investigation phase.

22. Guerrero had held steady employment throughout his adult life, owned his own home, maintained a steady family life with his wife and three children, had taken some college classes in the field of criminal justice, and had submitted several personal and employer references to CDCR. His record contained no blemishes other than his previous use of an invalid SSN.

23. As part of Phase Two, Guerrero completed the background investigation questionnaire. Question 75 asked: "Have you ever had or used a social security number other than the one you used on this questionnaire?" Guerrero answered "Yes" to this question, explaining that he had come [to] the United States as a child and had used the invalid SSN for employment purposes.

24. On October 31, 2011, Guerrero appeared for his pre-investigatory interview with the background investigator assigned to his file, Sergeant David Sharp, who informed Guerrero that his invalid SSN use would be an issue and requested additional documentary information. Guerrero submitted additional tax returns and other information.

25. Following the pre-investigatory interview, Sergeant David Sharp requested that Guerrero obtain a credit report under both his valid and invalid SSNs (TX 371E). Guerrero complied. He requested credit reports for a third party and submitted the reports to Sergeant Sharp. Guerrero, however, made a point not to look at the credit report under the invalid SSN (out of respect for the privacy of its true recipient). Sergeant Sharp received the reports prior to issuing the withhold letter.

26. The credit report for the invalid SSN included Guerrero's name and date of birth under sections entitled applicant information and identification information, respectively. The report showed six accounts opened from 2003–2011.

27. On January 27, 2012, Sergeant Sharp sent a letter to Guerrero informing him that he had been withheld from the corrections officer eligibility list. The withhold letter stated (TX 1):

> The fact that you committed identity theft for eight years but [sic] utilizing a social security number of a United States citizen causing unknown ramifications for that person by having income reported under their number that they were unaware of reflects that you are not suitable to assume the duties and responsibilities of a peace officer. The result of the background investigation revealed that you fail to possess these qualifications. You chose to use an unauthorized social security number even though you had [sic] taxpayers [sic] ID number, shows a willful disregard for the law. This 8 year act of unlawfulness shows a lack of honesty, integrity, and good judgment.

28. One month later, Guerrero appealed CDCR's withhold decision to SPB, laying out the myriad of reasons that he remained qualified to be a corrections officer, despite his prior use of an invalid SSN. In his appeal letter, Guerrero also alleged that he had been discriminated against, stating: "I believe my disqualification as a candidate for Corrections Officer was based upon a subtle prejudice and discrimination because I am a Naturalized U.S. citizen and not a U.S. born citizen."

29. SPB advised Guerrero that his appeal had been received, but SPB did not schedule an evidentiary hearing before an administrative law judge to determine the merits of Guerrero's discrimination claim, nor did SPB take any action at all regarding Guerrero's claim that CDCR had discriminated against him. On August 21, 2012, SPB affirmed CDCR's decision to withhold Guerrero. SPB's decision letter stated (TX 7):

> Appellant admits to learning of his illegal alien status at age seventeen and "inventing" a social security number (SSN) to gain employment. Appellant further admits to using the same social security number for the purposes of filing income taxes and a workers' compensation claim. While Appellant maintains that he did not steal another's social security number, his conduct demonstrates a knowingly [sic] and willful disregard for the law, as he admits to continued use of the SSN even after obtaining [sic]

> Individual Taxpayer Identification Number (ITIN) in 1997, thus demonstrating a lack of honesty, integrity and good judgment.

30. After waiting the mandatory year, Guerrero again applied to be a corrections officer with CDCR in the spring of 2013. He passed the written and physical exams in Phase One and proceeded to Phase Two, the background investigation stage, where he again answered "Yes" to Question 75, explaining that he had come the United States as a child and had used the invalid SSN for employment purposes.

31. On October 21, 2013, CDCR again withheld Guerrero from the eligibility list, stating (TX 3):

> The fact that you committed identity theft for eight years but [sic] utilizing a social security number of a United States citizen causing unknown ramifications for that person by having income reported under their number that they were unaware of reflects that you are not suitable to assume the duties and responsibilities of a peace officer. The result of the background investigation revealed that you fail to possess these qualifications. You chose to use an unauthorized social security number even though you had [sic] taxpayers [sic] ID number, shows a willful disregard for the law. This 8 year act of unlawfulness shows a lack of honesty, integrity, and good judgment.

32. This section of CDCR's withhold letter was exactly identical, word for word, to the same paragraph earlier sent to Guerrero. (The two letters even contained the exact same typos and grammatical errors.)

33. In November 2013, Guerrero appealed the second CDCR withhold decision to SPB, which has yet to rule on that appeal.

34. CDCR did not undertake an individualized assessment of Guerrero's case and history in determining his honesty, integrity, and good judgment. While CDCR representatives testified that they vetted the recency, relevancy, and severity of Guerrero's prior invalid SSN use, no actual documentary evidence exists to support this assertion, and the withhold letters simply treated the use of an invalid SSN as a showstopper in Guerrero's case. There are no memos in any files suggesting how CDCR might have considered the recency, relevancy, and severity of Guerrero's invalid SSN use, and this order finds that CDCR did not do so in his case.

35. CDCR's assertion in the withhold letters that Guerrero continued to use an invalid SSN despite procuring an ITIN shows that CDCR fundamentally misunderstood the facts. CDCR should have known (but did not) that an ITIN and an SSN are completely separate and do not

substitute one for the other. Guerrero applied for the ITIN so he could pay his taxes, precisely because he did not have a valid SSN. The ITIN, however, could never have been a substitute for an SSN, valid or invalid. He used his ITIN to pay his tax bill but needed his invalid SSN to continue working. Instead of a negative character flaw, Guerrero's application for and use of an ITIN should have served as a positive character trait (desire to pay his taxes) and mitigated, to an extent, his use of an invalid SSN. CDCR failed to see that Guerrero's ITIN use stood out as a positive rather than a negative.

36. CDCR's emphatic accusation that Guerrero had committed "identity theft" was incorrect as well. Identity theft involves a thief misappropriating the name, address, and/or credit history of someone else to conduct credit transactions, such as using someone's name, address, and credit card number to steal a television. Guerrero, however, always used his own name (and true address). He never used anyone else's name, address, or credit card. He did use an invalid SSN and, after the SSA issued that number to someone else in 2004, Guerrero could be said to have misappropriated that person's number, although no evidence came up at trial to show any harm to the true holder of that number.

37. The credit report associated with the invalid SSN (TX 371B) came into evidence only to show the information available to CDCR—not for the truth of whether Guerrero used the invalid SSN to obtain credit (it being hearsay for that purpose). At no time during the application process did CDCR cite this credit report and it had no impact on CDCR's decision to withhold Guerrero. The withhold letter—which did not mention the issue of credit—set forth all substantial reasons for the withhold. No argument has been made that Guerrero ever failed to make good on the credit accounts or that he somehow cheated creditors. The worst that can be said is that, to open credit accounts, he used the same SSN he had already used for employment so that the stores could trace his true work history.

38. This order finds that CDCR withheld Guerrero solely based on the fact of his invalid SSN use, without delving into any relevant analysis surrounding the recency, relevancy, or severity of Guerrero's invalid SSN use.

39. Today, Guerrero lives with his wife and three children in Stockton, California. He works as a solid waste recovery worker for the Stockton Public Works Department. Despite the multiple rejections, Guerrero still wishes to become a corrections officer with CDCR. He attended all but one day of the evidence at trial (and testified himself).

CALIFORNIA STATE PERSONNEL BOARD

40. At all material times, the California State Personnel Board enforced the civil service statutes, among other responsibilities. SPB also resolved appeals of CDCR's withhold decisions, but SPB

was not involved in CDCR's initial withhold decisions. SPB had the power to reverse CDCR's withhold decisions through the appeals process.

41. SPB was (and remains) a control agency for CDCR and oversaw equal opportunity programs throughout California.

42. If an appellant filed a timely appeal of a CDCR withhold decision, SPB would acknowledge receipt of the appeal via a letter. Both sides could then submit documents to SPB, but most appeals did not involve a hearing. Instead, SPB resolved most appeals through investigation and/or written determination.

43. An SPB investigative officer would then draft a recommended decision. That decision would be reviewed by the manager of the Merit Appeals Unit. The five-person State Personnel Board would then issue a final decision, unless it remanded the case to the investigative officer. Upon entry of a final decision, the candidate could seek judicial review.

44. As detailed above, Guerrero appealed CDCR's rejection of his first application, which SPB affirmed. Guerrero's second appeal to SPB, of CDCR's second rejection, remains pending.

OTHER APPLICANTS WITHHELD IN WHOLE OR IN PART FOR HAVING USED AN INVALID SSN

45. Before trial, the parties were requested to submit joint summaries of the nine Latino applicants who CDCR withheld in whole or in part due to their prior use of an invalid SSN, but counsel were unable to agree on summaries for the nine applicants. Therefore, the Court has thoroughly reviewed each of these voluminous administrative files and created its own summaries, for the benefit of the record and the court of appeals. These lengthy findings will be included in an appendix to this order.

46. In all nine cases, CDCR failed to appropriately apply the three EEOC factors to assess an individual's use of an invalid SSN. The first factor calls for careful consideration of "the nature and gravity of the offense or conduct." The second factor considers "the time that has passed since" the conduct. The third factor looks to "the nature of the job held or sought." U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012). CDCR has stated: "[A]ll candidates for State civil service shall possess the general qualifications of integrity, honesty, dependability, thoroughness, accuracy, good judgment, and the ability to assume the responsibilities and to conform to the work conditions of employment" (TX 183). CDCR, however, has failed to sufficiently link the use of an invalid SSN for employment purposes to the qualifications required to be a corrections officer.

B. Summary of Conclusions

Based on these facts and the testimony of Guerrero's expert witness, Judge Alsup found that, as applied, CDCR's use of Question 75 ("Have you ever had or used a social security number other than the one you used on this questionnaire?") had a disparate impact on Latino applicants. Under the disparate impact theory, the plaintiff's burden is to show that "a facially neutral employment practice produces a significant adverse impact on a protected class." *Guerrero v. Cal. Dep't of Corr. & Rehab.*, 2015 WL 4463537, at *8 (N.D. Cal. 2015) (quoting *Clady v. Los Angeles County*, 770 F.2d 1421, 1427 (9th Cir. 1985)). If the plaintiff does so, the burden shifts to the employer to prove there is a business necessity for the practice. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971)). Judge Alsup found further that the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance on the Consideration of Arrest and Criminal Conviction Records, Section II (April 25, 2012), was entitled to *Skidmore* deference,[5] and that CDCR's failure to comply with those guidelines violated Title VII where CDCR did not undertake the required individualized assessment of the recency, relevancy, or severity of Guerrero's conduct, even in the absence of an arrest or conviction.

The court found that although Question 75 could not be used as an absolute barrier, the question itself did serve a legitimate business interest. Judge Alsup specifically concluded that CDCR could continue to use Question 75 so long as the question's disparate impact was ameliorated by individualized use of the EEOC factors to evaluate an applicant, and that CDCR had a legitimate reason for inquiring into an applicant's previous history, including any prior use of an invalid social security number.

Judge Alsup dismissed the equal protection claim, however, because Guerrero did not make a prima facie showing of a discriminatory purpose, and such a showing is necessary to establish a violation of the Equal Protection Clause. *Id.* at 13 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

IV. DISCUSSION AND ANALYSIS

Guerrero's theory in the instant case is that he was discriminated against because he is a naturalized citizen, and not a native born citizen. He suggests that differential treatment of a naturalized citizen results from the fact that "no native-born United States citizen would ever face the need to use an invented social security number to obtain employment." Complainant's Prehearing Statement at 1.

[5] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (while not controlling, agency rulings or interpretations are entitled to deference to the extent they are persuasive).

This conclusion lacks evidentiary support and is dubious at best, because it rests on what appear to be unarticulated assumptions about the relative percentages of naturalized and native born citizens that have had or used other social security numbers. Question 75 makes no reference to employment, it just asks if the applicant has ever had or used another social security number. There are doubtless many naturalized citizens who have never used false social security numbers, and there also reasons, not necessarily related to employment, why a U.S. citizen might choose to do so, for example, to evade law enforcement authorities, creditors, or ex-spouses. Absent any evidence about whether the forty-two applicants who answered "yes" to Question 75 were naturalized or native born citizens, it is impossible to determine the impact of the question on either group.

More importantly, even were I to assume arguendo that Question 75 had a disparate impact on naturalized citizens like Guerrero, no liability under § 1324b could result from that impact absent evidence of a discriminatory purpose. This is because our case law, unlike Title VII, has never recognized the disparate impact theory. *See, e.g., Yefremov v. N.Y.C. Dep't of Transp*., 3 OCAHO no. 562, 1556, 1579-80 (1993). The plain language of the governing statute authorizes a private action where an individual has filed a timely charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) that "alleges *knowing and intentional discriminatory activity* or a pattern or practice of discriminatory activity." 8 U.S.C. § 1324b(d)(2) (emphasis added). OSC's regulations track the statutory language and provide that it is an unfair immigration-related employment practice for an individual or entity "*to knowingly and intentionally discriminate* or to engage in a pattern or practice of knowing and intentional discrimination." 28 C.F.R. § 44.200(a)(1) (emphasis added). Our case law accordingly recognizes only the disparate treatment theory, and a complainant in a § 1324b case must bring sufficient evidence to show that the discrimination was intentional. *See, e.g., Contreras v. Cascade Fruit Co*., 9 OCAHO no. 1090, 7-8 (2003).

Under the disparate treatment theory, an individual alleging discriminatory failure to hire has the initial burden of establishing a prima facie case by proof of the elements originally set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The traditional manner of doing that is to show that: 1) the individual is a member of a protected class, 2) the individual applied for a job for which the employer is seeking applicants, 3) the individual was rejected despite his or her qualifications, and 4) the position remained open and the employer continued to seek applicants with similar qualifications. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 768 (2000). The fourth element may alternatively be established by any circumstances from which an inference of discriminatory intent may be shown. *Iron Workers Local 455 v. Lake Construction and Development Corp*., 7 OCAHO no. 964, 632, 679 (1997).

Once the employee satisfies the initial burden, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the employment decision. *McDonnell Douglas*, 411 U.S. at 802. The employee then has the opportunity to show that the employer's explanation is a pretext, and that discrimination is the real reason. *Id*. at 804. Pretext may be

established by evidence that similarly situated individuals not in the protected class were more favorably treated, or by any other evidence demonstrating that the employer's explanation is unworthy of credence. *United States v. Estopy and Bortoni d/b/a Estopy Farms*, 11 OCAHO no. 1256, 7 (2015).

Guererro readily meets the initial burden under *McDonnell Douglas*. It is undisputed that, as a citizen of the United States, Guerrero is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A). He applied to CDCR for a job and was eliminated from consideration while CDCR continued to accept applications from other candidates. Despite the disparate impact that Question 75 had as applied, Judge Alsup found that CDCR proffered a legitimate nondiscriminatory reason asking the question, and Guerrero has not suggested that CDCR's explanation is a pretext for discriminatory intent.

This case is wholly unlike *Eze v. West County Transportation Agency*, 10 OCAHO no. 1140, 1 (2011), where a lawful permanent resident sought to apply for a position as an automotive parts clerk and was deterred from completing the application because Question 8 on the employer's questionnaire asked "[u]pon employment, can you furnish proof of citizenship?" In *Eze*, the question was found to be discriminatory on its face, and the employer was enjoined from using it. *Id*. at 5. Here, in contrast, CDCR's question 75 was facially neutral, and there was no evidence of discriminatory intent presented.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

Judge Alsup's factual findings are hereby adopted. I make the following additional findings of fact based on the record in this matter:

47. Victor Guerrero filed a charge of discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on or about December 4, 2013.

48. The Office of Special Counsel for Immigration-Related Unfair Employment Practices sent Victor Guerrero a letter on April 3, 2014, advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter.

49. Victor Guerrero filed a complaint with the Office of the Chief Administrative Hearing Officer on June 11, 2014.

B. Conclusions of Law

1. Victor Guerrero is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. The California Department of Corrections and Rehabilitation is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. Victor Guerrero filed a timely charge of discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

4. All conditions precedent to the institution of this proceeding have been satisfied.

5. A state agency may waive the affirmative defense of sovereign immunity by failing to timely assert it. *Hill v. Blind Indus. and Serv. of Md.*, 179 F.3d 754, 756-57 (9th Cir.), *opinion amended on denial of reh'g*, 201 F.3d 1186 (9th Cir. 1999)

6. The jurisprudence of the Office of the Chief Administrative Hearing Officer does not recognize the disparate impact theory of liability. *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 7-8 (2003).

7. Under the disparate treatment theory, an individual alleging discriminatory failure to hire has the initial burden of establishing a prima facie case by proof of the elements originally set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

8. Victor Guerrero presented a prima facie case by showing that 1) he is a member of a protected class, 2) he applied for a job for which the California Department of Corrections and Rehabilitation was seeking applicants, 3) he was rejected despite his qualifications, and 4) the position remained open and the California Department of Corrections and Rehabilitation continued to seek applicants with similar qualifications. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 768 (2000).

9. The California Department of Corrections and Rehabilitation proffered a legitimate nondiscriminatory reason for inquiring about an applicant's previous use of a different social security number.

10. Victor Guerrero did not suggest that the reason California Department of Corrections and Rehabilitation proffered for its Question 75 was a pretext for discrimination, and he presented no evidence that it was.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 23rd day of October, 2015.

_____
Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.