

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

Hector Cascante, Complainant v. Kayak Club, Respondent; 48 U.S.C. § 1324b Proceeding; Case No. 89200530.

**ORDER DIRECTING PRO SE PARTIES TO FILE APPROPRIATE MOTIONS AND
PLEADINGS**

Procedural History

1. On October 16, 1989, Complainant, acting pro se, filed a Complaint in Spanish with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer. An amended Complaint, in English, was filed on November 7, 1989, the Complainant alleges that he was fired from his employment at the Kayak Club because of his national origin and citizenship, which is in violation of section 102 of the Immigration Reform and Control Act of 1986, 48 U.S.C. § 1324b.

2. A Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practice was mailed to Respondent, on November 30, 1989, The amended Complaint was served on Respondent on December 29, 1989.

3. On May 24, 1990, I issued an Order to Show Cause Why Default Judgment Should not Issue.

4. A response on my Order to Show Cause was filed by Respondent on June 20, 1990, wherein Respondent stated his reasons for not answering the Complaint in a timely manner as set forth in the regulations at 28 C.F.R. § 68.8.

5. On June 21, 1990, I issued an Order permitting and directing Respondent to File a late Answer to the Amended Complaint.

6. Respondent filed its Answer to the Complaint in this case on July 9, 1990, which responded to the allegations of the Complaint as follows:

Allegation 1-no response

Allegation 2-I do not know the complainant's national origin however our kitchen manager verified his naturalization through normal practices. A copy of the verification showing the certificate number inspected is enclosed as exhibit A.

Allegation 2A-see above

Allegation 3-Kayak Club employed 47 individuals as of October 18, 1988 and is an Alaskan corporation.

Allegation 4-Hector Cascante was employed by Kayak Club. In on (sic) August 30, 1985 and voluntarily terminated his employment on October 18, 1988.

Allegation 5-Hector Cascante was a dishwasher for the Kayak Club restaurant during his entire employment. He did a satisfactory job.

Allegation 6-Hector Cascante quit his job at the Kayak Club on October 18, 1988. He was requested to stay and later asked to return. He voluntarily walked off the job after a dispute with an assistant kitchen manager. Letters from his day manager and a determination notice from the State Department of Labor are enclosed as exhibits B and C. Exhibit D is a personnel action form completed by the night kitchen manager.

Allegation 7-Kayak Club continually employs from four to six fulltime dishwashers. Our current employment is representative of normal times. I am not familiar with the employees' national origin or citizenship status that were employed with or following Mr. Cascante. Currently however the names are

Billy Awalin-native Alaskan

Bob Little-Caucasian

Byron Sakamoto-Japanese

Duane Monsen-Caucasian

John Paucek-Caucasian

Martin Creech-Caucasian

Fernando Menchelli-Puerto Rican

Bradley McCoy-Black

Willie Davro-Black

Richard Jacobsen-Black

Andrew Poole-Caucasian

Allegation 8-Copies of our correspondence with the Special Counsel's Office is enclosed as exhibits E through H.

The Kayak Club is currently running an ad for dishwashers in the local paper. We have also listed the job with the Department of Labor's job service. We were told they had over 'an inch and one-half ' of job requests for dishwashers. We would reemploy Mr. Cascante if he is able to work and is still in this area.

II. Legal Analysis

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted a prohibition against unfair immigration-related employment practices at section 102 by amending the Immigration and Nationality Act of 1952 (INA section 274B), codified at 8 U.S.C. section 1101 et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides it is an 'unfair immigration-related employment practice' to discriminate against any individual other than an unauthorized alien with respect to

hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status''

In the case at bar, Complainant, Hector Cascante, alleges that Respondent knowingly and intentionally fired him from his position as a dishwasher because of his citizenship status or Costa Rican national origin.

The regulations at 28 C.F.R. § 68.36, which govern the proceedings before me is alleged discrimination in hiring under the Immigration Reform and Control Act, provide for a resolution of a complaint without the necessity of having an evidentiary hearing, if there are not material facts in dispute. This is determined by a party filing a Motion for Summary Decision.

The regulations at 28 C.F.R. § 68.36 specifically provide for the filing of a Motion for Summary Decision within twenty (20) days before the date fixed for any hearing and state the following:

(a) Any party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve supporting or opposing papers with affidavits if appropriate, or countermove for summary decision. The Administrative Law Judge may set the matter for argument and/or call for submission of briefs.

(b) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 558 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(c) The Administrative Law Judge may 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.

After carefully considering Respondent's Answer to the Complaint and other documents filed in this case, it appears to me that there may not be any material facts in dispute on the issue as to whether or not Respondent allegedly discriminated against Complainant.

I, therefore, direct the Respondent to file with this office (and mail a copy of Complainant at the address of: 946 E. 5th Avenue, Anchorage, Alaska 99501) on or before August 1, 1990, a pleading captioned ``Motion for Summary Decision,' ' incorporating all of the facts set out in its Answer which disprove discrimination and attach as proof (in lieu of testimony at a hearing) the affidavits of all witnesses who prove the facts alleged in the motion for summary decision including the employer, the general manager, and

Nancy F. Nieblas and Michael Pugh. (See, form for Motion for Summary Decision enclosed herein.)

In order to help Respondent prepare and submit the affidavits of these individuals, I am attaching hereto blank affidavit forms for completion.

It is further ORDERED that the Complainant shall have until August 9, 1990, to file with this office its response to Complainant's motion which can be done by letter stating what FACTS it disputes as set out in Complainant's motion and affidavits.

SO ORDERED:

This 19th day of July, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge
U.S. Department of Justice, Office of Administrative Law Judges,
950-6th Ave., suite 401, San Diego, California 92101