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

Fordjour, Complainant, v. General Dynamics, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 90200146.

DECISION AND ORDER DISMISSING COMPLAINT
(January 11, 1991)

Appearances: **SAMUEL FORDJOUR**, Complainant
LINDA LARSON CLARK, Esq., on behalf of Respondent

MARVIN H. MORSE, Administrative Law Judge

I. Background

On April 23, 1990 Mr. Samuel Adwaji Fordjour (Complainant) filed a complaint with this Office charging General Dynamics (Respondent) with knowing and intentional discrimination for its refusal in both December 1988 and June 1989 to hire him as a painter with its Electric Boat Division. Complainant alleges that Respondent's failure to hire him resulted from national origin and citizenship status discrimination in violation of the prohibition against unfair immigration-related employment practices, i.e., Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1324b).

On November 19, 1990 I issued an Order Dismissing Complaint in Part, and Inquiry to the Parties in which I dismissed as untimely Complainant's allegation of an unfair immigration-related employment practice occurring on or about December 12, 1988. I found, however, that Complainant had timely filed his Complaint before me based on an alleged refusal to hire in June 1989. In that Order, I further directed the parties to provide additional information and advised that, depending on their responses, I might decide the case based on the pleadings alone.

In its response to the Order, Respondent states that it currently has 23,811 employees and had 23,996 employees in June 1989. Respondent states that it requires all applicants for employment as painters in its Electric Boat Division to show proof of citizenship after the individual accepts an offer of employment, in accordance with IRCA and Department of Defense regulations.

In addition, Respondent filed an Amended Motion to Dismiss which contends that Complainant was treated no differently than any applicant for the position of painter. Respondent further states that Complainant neither provided Respondent with proof of citizenship status nor complied with other employee processing requirements which are imposed on every person applying for that position.

In his response to my Order of November 19 filed November 29 and in his Objection to Respondent's Motion to Dismiss filed December 18, Complainant states that a representative of Respondent, Mr. Michael Botempo, assured him that his original employment application dated October 5, 1988 would be kept on file so that he need not file another application. Complainant further states that Mr. Botempo and he orally agreed that when he became a citizen he should contact Mr. Botempo and then would be able to start work immediately, receiving all relocation benefits.

Complainant telephoned Respondent in June 1989 after he was naturalized a U.S. citizen and spoke with a Mr. Winston. Complainant states that he telephoned Respondent several times, but Respondent refused to hire him. It does not appear, however, that Complainant provided Respondent with documentation regarding his newly acquired citizenship status.

II. Discussion

Complainant excuses not having timely filed his complaint based on the first charge he filed with the Office of the Special Counsel (OSC) in December 1988 on the ground that he had not received a determination letter from OSC based on that charge.* Complainant appears to believe that issuance of a determination letter is a condition precedent to the filing of a charge with this Office. At the time Complainant filed his charge with OSC, however, neither IRCA nor OSC regulations required that OSC issue a letter of determination. See 28 C.F.R. § 44.303(c) (containing the only regulatory reference to the issuance of a determination letter). The recent amendment to IRCA which now mandates such a determination

*Complainant's delay in filing a complaint arising out of the December 1988 failure to hire was discussed in the November 19, 1990 Order Dismissing Complaint in Part, and Inquiry to the Parties.

letter has no retroactive application. 8 U.S.C. § 1324b(d)(2), amended by Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

Complainant alleges both national origin and citizenship status discrimination. Jurisdiction of administrative law judges over national origin claims is limited to claims against employers employing between four and fourteen individuals. 8 U.S.C. § 1324b(a)(2)(B); Williamson v. Autorama, OCAHO Case No. 89200540 (May 16, 1990); Akinwande v. Erol's, OCAHO Case No. 89200263 (March 23, 1990); Bethishou v. Ohmite Mfg. Co., OCAHO Case No. 89200175 (Aug. 2, 1989); Wisniewski v. Douglas County School District, OCAHO Case No. 88200037 (Oct. 17, 1988).

At the time of the alleged June 1989 discriminatory act, Respondent employed over 23,000 employees. I have no jurisdiction to entertain a claim charging Respondent with national origin discrimination as Respondent clearly employs more than fourteen (14) individuals. Accordingly, so much of the Complaint as alleges discrimination based on national origin is dismissed.

I do have jurisdiction, however, to consider Complainant's claim of citizenship status discrimination. Complainant has evidenced that he was naturalized a U.S. citizen on May 30, 1989. As a U.S. citizen, Complainant is entitled to protection against citizenship status discrimination prohibited by IRCA. 8 U.S.C. § 1324b(a)(1)(B); Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 (June 29, 1990).

As established in my Order of November 19, the pending allegation involves solely the alleged refusal to hire which occurred in June 1989. Order at 3. Therefore, I need only decide whether Complainant in fact and in law applied for the position of painter with Respondent in June 1989 and, if so, whether he was denied employment by Respondent in June 1989 because of his citizenship status. Based on the pleadings and other documents before me, I find that Complainant has failed to state a claim upon which relief can be granted and, dismiss the remainder of the Complaint for the reasons stated below.

The record, culminating with the parties' responses to my November 19 Order and Complainant's Motion to Object to Respondent Amended Motion to Dismiss, shows that Complainant did not apply anew for a painter's position in June 1989. Instead, Complainant acknowledges that his application of December 1988 was to be treated as a continuing application, dependent upon his subsequent tender of proof of United States citizenship.

Complainant at no time, however, presented Respondent proof of his newly acquired citizenship. Respondent's procedures require such proof after an offer of employment has been made. I find that

in context of a continuing employment application an employer's procedure by which it abates the hiring pending receipt of proof of citizenship can be fairly understood to constitute an offer of employment. Since the offer of employment had already been extended, the request for documentation was not a prohibited prescreening in violation of 8 U.S.C. § 1324b.

Complainant has neither met the documentation requirement nor shown that such requirement depends on one's citizenship status.** To the contrary, Complainant could not have been discriminated against in June 1989 on the basis of citizenship status in view of his having become a U.S. citizen on May 30, 1989. In fact, in both his response to my Order and his Motion Objecting to Dismissal, Complainant states that Respondent refused to employ him because of his national origin, over which I have no jurisdiction.

Based upon the pleadings, therefore, I dismiss the Complaint in its entirety for its failure to state a claim upon which relief can be granted. I find that under the Rules of this Office, 28 C.F.R. § 68.1, and Federal Rule of Civil Procedure 12(b)(6), dismissal of the Complaint is authorized and appropriate in this case.

Respondent has requested attorney's fees in this action. Title 8 U.S.C. § 1324b(h) allows ``a prevailing party, other than the United States, a reasonable attorneys' fee, if the losing party's argument is without reasonable foundation in law and fact.'' That Complainant has been successful in his quest for relief in this forum, however, does not compel a finding that his argument lacked reasonable foundation in law and fact. From the limited filings which form the record of this proceeding, it appears that Complainant's citizenship discrimination claim was not prime facie unreasonable or lacking any legal foundation.

Moreover, considering the relative economic posture of the parties, notwithstanding that Respondent is the prevailing party for section 1324b(h) purposes, in the exercise of my discretionary authority I disallow Respondent's request for fee shifting. Accordingly, Respondent's request for fee shifting is denied.

III. Ultimate Findings of Fact and Conclusions of Law

I have considered the pleadings, evidence, memoranda and arguments submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly, and in addition to the

**Even had he presented evidence of citizenship, the employment would not have taken place because his expectation that Respondent would pay relocation costs was in conflict with Respondent's policy in effect in June 1989. See Memorandum In Support Of Motion To Dismiss.

findings and conclusions already specified, I make the following determinations, findings of fact and conclusions of law:

1. That Complainant filed a Complaint with this Office on April 23, 1990, alleging an unfair immigration-related employment practice based on both national origin and citizenship status.

2. That, as previously found and held in my Order of Novem␣ber 19, 1990 and as adopted anew, I dismiss as untimely Complainant's allegation of an unfair immigration-related employment practice occurring on or about December 12, 1988.

3. That Complainant timely filed a complaint alleging an unfair immigration-related employment practice occurring in June 1989.

4. That Respondent employed 23,996 employees in June 1989.

5. That I have no jurisdiction to entertain an allegation of an unfair immigration-related employment practice based upon Complainant's national origin because Respondent employs more than fourteen (14) employees and, therefore, dismiss such claim.

6. That Complainant was naturalized a United States citizen on May 30, 1989.

7. That, as a United States citizen, Complainant has standing to bring a claim of an unfair immigration-related employment practice based on his citizenship status.

8. That Complainant completed an employment application for a painter's position with Respondent on October 5, 1988.

9. That Complainant's employment application of October 1988 constituted a continuing application for purposes of the alleged refusal to hire incident of June 1989.

10. That a continuing application for employment pending proof of United States citizenship can be characterized as a potential offer for employment.

11. That Complainant was obliged, under Department of Defense regulations, to provide Respondent with proof of United States citizenship as a prerequisite to obtaining employment with Respondent as a painter in its Electric Boat Division, a requirement to which he does not except.

12. That applicants for painters' positions in Respondent's Electric Boat Division are required to show proof of United States citizenship after an offer of employment has been made.

13. That, in June 1989, Complainant failed to present Respondent with proof that he had been naturalized a United States citizen.

14. That Complainant's failure to provide such proof, rather than any discriminatory act of Respondent, was the reason Complainant was not considered for employment with Respondent in June 1989.

15. That it is not prohibited prescreening to require proof of citizenship, pursuant to Respondent's usual practice with respect to

painter applicants for its Electric Boat Division, where an employee has not reapplied for a position but instead has a continuing application of employment pending awaiting his grant of citizenship status.

16. That even had Complainant evidenced his naturalization as a U.S. citizen, refusal of employment on the basis that he had formerly been a foreign national would turn on national origin and not citizenship status, and would not be culpable under IRCA where he has not alleged discrimination arising out of his status as a U.S. citizen.

17. That the Complaint is hereby dismissed for failure to state a claim upon which relief can be granted.

18. That I do not find that Complainant's ``argument'' is so lacking in ``reasonable foundation in law and fact'' as to warrant an award of an attorney's fee to Respondent and, accordingly, deny Respondent's request for an award.

This proceeding is now concluded. This Decision and Order addressing both the national origin and citizenship claims is the final administrative order in this case pursuant to 8 U.S.C. § 1324b(g)(1). Complainant may appeal this Decision and Order not later than 60 days after entry ``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.'' 8 U.S.C. § 1324b(i).

SO ORDERED.
Dated this 11th day of January, 1991.

MARVIN H. MORSE
Administrative Law Judge