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

Thereza A. Freeman, Complainant v. Mexico Studio, et al, Respondents; 8 U.S.C. § 1324b Proceeding; Case No. 90200292.

DECISION AND ORDER GRANTING DEFAULT JUDGMENT TO COMPLAINANT

(January 30, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearance: THEREZA A. FREEMAN, Complainant

I. STATUTORY BACKGROUND

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 § 274B), codified at 8 U.S.C. §§ 1101 et seq. INA Section 274B, codified at 8 U.S.C. § 1324b, provides that 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. . . .'' Discrimination arising either out of an individual's national origin or citizenship status is thus prohibited. Section 274B protection from citizenship status discrimination extends to an individual who is a United States citizen or a protected individual as defined by 8 U.S.C. § 1324b(a)(3), as amended by Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, 104 Stat. 4978 (November 29, 1990).

II. PROCEDURAL SUMMARY

On September 21, 1990 Thereza A. Freeman, Complainant, filed a complaint dated September 17, 1990 with this Office against Mexico Studio a/k/a Mexico Photo Studio and its alleged owners

Myrthala Gonzalez and Beningo Briones, Respondents. The Complaint alleges that Respondents in June 1989 and again on or about December 17, 1989 ``knowingly and intentionally refused, forced and kept'' her from work. The Complaint, enclosed with a Notice of Hearing issued by this Office, was mailed on September 26, 1990 to ``Mexico Studio c/o'' the individually named Respondents. The file contains returned certified mail receipts signed on October 2, 1990 by Myrthala Briones. The Notice of Hearing at paragraph 3 cautioned that failure to file an answer within 30 days might lead to entry by the judge of a judgment by default.

On December 4, 1990 I issued an Order of Inquiry to the parties. The Order specifically noted that more than 30 days had elapsed from the receipt of the Complaint on October 2, 1990 by Mexico Studio a/k/a Mexico Photo Studio in care of the three individually named Respondents. the Order provided to Respondents an opportunity to respond to specific questions from the judge, and an extension of time to file an answer in accordance with 28 C.F.R. § 68.8 (1990). The parties were specifically cautioned that ``failure to timely respond to this Order may result in entry by the judge of a judgment of default against the party.'' (Emphasis in original). On January 2, 1991, Complainant responded to the judge's inquiry. No mailing to Respondents has been returned by the postal service to this Office or to the judge. No filing or other communication has been in this Office or to the judge on the part of any Respondents.

III. DISCUSSION

Failure of Respondents to file a timely answer to the complaint and respond to my Order of Inquiry constitutes a basis for entry of a judgment by default within the discretion of the administrative law judge. 28 C.F.R. §§ 68.8(b) and 68.35(c); see Williams v. Deloitte & Touche, OCAHO Case No. 89200537 (November 1, 1990); U.S. v. Educational Employment Enterprise, OCAHO Case No. 90200242 (Decision and Order Granting Complainant's Motion for a Default Judgment) (October 30, 1990).

Accordingly, no answer having been filed by Respondents within 30 days of their receipt of the Complaint, or even as of this date, and no response having been filed to my Order of Inquiry, I find that Respondents Mexico Studio a/k/a Mexico Photo Studio, Myrthala Briones, Marthad Gonzalez, and Beningo Briones are in default, having failed to plead or otherwise defend against the allegations of the Complaint. Based upon Respondents' failure to answer the allegations set forth in the Complaint, I find all the allegations are admitted by Respondents. 28 C.F.R. § 68.8(c)(1). Education Employment Enterprise, OCAHO Case No. 90200242 at 3. I

conclude, therefore, that Respondents have violated 8 U.S.C. § 1324b as alleged by Complainant.

Upon concluding that Respondents have violated 8 U.S.C. § 1324b, I have discretion to award reinstatement and back pay to Complainant. 8 U.S.C. § 1324b(g)(2). See also 8 C.F.R. § 68.50(c)(1)(i)(C). The injured party is to be reinstated to the position she would have had absent the discriminatory conduct. See Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 at 20 (June 29, 1990) citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); Franks v. Bowman, 424 U.S. 747, 764 (1976) (further citations omitted). In fashioning such relief, the judge may order reinstatement of a wrongfully discharged employee. Sias v. City Demonstration Agency. 588 F.2d 692, 696 (9th Cir. 1978). Here, although Complainant has not specifically requested such relief, she made a general demand for ``any other appropriate relief.'' It is the exceptional case where reinstatement is not ordered. Nord v. United States Steel Corp. 758 F.2d 1462, 1470 (11th Cir. 1985); Garza v. Brownsville Independent School Dist., 700 F.2d 253, 255 (5th Cir. 1983). No exceptional circumstances are evident on this meager record. To arrest such discrimination and to make Complainant whole, Respondents will be expected to reinstate Complainant to the position from which she was unlawfully discharged, at the prevailing wage and with commensurate benefits. Jones, OCAHO Case No. 88200202 at 20. Cf. U.S. v. Mesa Airlines, OCAHO Case Nos. 88200001-2 at 56 (July 24, 1989) (entitlement to back pay without instatement is consistent with IRCA).

An order for payment of back wages is typical to compensate a discriminatee for earnings lost as a result of unlawful discrimination. Jones, OCAHO Case No. 8200202 at 21; see Mesa Airlines, OCAHO Case Nos. 88200001-2 at 56-59. The back pay remedy has the dual purpose of reimbursing a claimant for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges. Jones, OCAHO Case No. 88200202 at 21, citing N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

A prevailing discriminatee, such as Complainant, however, has a duty to mitigate damages by reasonable diligence in seeking employment substantially equivalent to the position she lost. Ford v. EEOC, 458 U.S. 219, 231 (1982). An award of back pay is reduced by the amount of interim earnings or amounts earnable ``with reasonable diligence by the individual . . . discriminated against. . . .'' 8 U.S.C. § 1324b(g)(2)(C).

I find that Complainant searched for similar employment with reasonable diligence, and that she is eligible for an award of back

wages. Complainant's unrebutted affidavit in response to the Order of Inquiry attests that at the time of the discriminatory firing on December 17, 1989, she earned six hundred dollars ($600.00) per week, Complainant's Response at para. 5. In the interim, she unsuccessfully sought similar employment. Complainant's Response at para. 6. Complainant's wages since the date she left Respondent's employ were two hundred dollars ($200.00) per week. Thus, the unrebutted four hundred dollars ($400.00) per week differential is assessed for 58 weeks and two days as the measure of Respondents' back pay liability. See Jones, OCAHO Case No. 88200202 at 21-24; Mesa Airlines, OCAHO Case Nos. 88200001-2 at 59-66.

Accordingly, the total civil money award is $23,333.32. This amount is calculated as the net resulting from the off-set for the amount of money actually earned by Complainant from the date of the discriminatory act on December 17, 1989 until January 29, 1991. This is the sum I find Complainant would have earned absent the discrimination. Although I have discretionary authority to award prejudgment interest, Complainant provided no basis on which to calculate such additional award. Cf. Jones, OCAHO Case No. 88200202 at 25; and Educational Employment Enterprises, OCAHO Case No. 90200242 (Final Decision and Order . . .) at 5 (January 2, 1991) (Complainants provided a calculation of interest). I decline to include prejudgment interest in the back pay award.

IV. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

Accordingly, in addition to the findings and conclusions already stated, it is found and concluded:

1. The Respondents[1] are in violation of 8 U.S.C. § 1324(b) with respect to their discriminatory firing of Thereza Freeman, on or about December 17, 1989 based upon her naturalized U.S. citizenship status;

2. That Respondents employ more than three individuals but fewer than 15 individuals;

3. That Respondents are in violation of 8 U.S.C. § 1324(b) with respect to their discriminatory firing of Thereza Freeman on or about December 17, 1989 based upon her Brazilian national origin;

4. That Respondents cease and desist from the discriminatory practice described in the Complaint;

5. That the Respondents comply with the requirements of 8 U.S.C. § 1324a(b) with respect to individuals hired for a period of three years from the date of this Order;

[1]As referred to in paragraphs 1 thought 9 and term ``Respondents'' includes both the business entity and the named individuals, jointly and severally;

6. That Respondents retain for a period of three years the names and addresses of each individual who applies, either in person or in writing, for employment in the United States, to any business entity associated with Respondents;

7. That Respondents post notices to employees about their rights under 8 U.S.C. § 1324b, and employer's obligations under 8 U.S.C. § 1324a;

8. That Respondents reinstate Thereza Freeman;

9. That Respondents pay an amount of twenty-three thousand, three hundred and thirty-three dollars and thirty-two cents ($23,333.32) as back pay due and owing to Complainant.

This Decision and Order is the final administrative order in this case pursuant to 8 U.S.C. § 1324b(g)(i). Respondents 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)(1).

SO ORDERED.
Dated this 30th day of January, 1991.

MARVIN H. MORSE
Administrative Law Judge