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

Sargon Bethishou, Complainant v. Ohmite Mfg. Co., Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200175.

FINAL DECISION AND ORDER ON MOTION FOR SUMMARY DECISION

(August 2, 1989)

MARVIN H. MORSE, Administrative Law Judge

Appearances: SARGON BETHISHOU, Complainant.

MARK E. FURLANE, Esq., for the Respondent.

Statutory and Regulatory 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. 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. . . .'' Section 274B protection from citizenship status discrimination extends to an individual who is a United States citizen or qualifies as in intending citizen as defined by 8 U.S.C. § 1324b(a)(3).

Congress authorized the establishment of a new venue out of concern that the employer sanctions program might lead to employment discrimination against those who are ``foreign looking'' or ‘’foreign sounding'' and those who, even though not citizens, are legally in the United States. See ‘’Joint Explanatory Statement of the Committee of Conference.'' Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986). Title 8 U.S.C. § 1324b contemplates that individuals who believe that they have

been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Special Counsel or OSC). OSC, in turn is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. § 1324b(e)(2).

The statute also explicitly anticipates the potential for private actions. If the Special Counsel, after receiving a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not within 120 days following receipt of the charge, filed a complaint before an administrative law judge with respect to such charge, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

Procedural Summary:

Mr. Sargon Bethishou (Bethishou or complainant) charges Ohmite Mfg. Co. (Ohmite or respondent) with knowing and intentional discrimination in discharging him on the basis of his national origin and/or citizenship status in violation of 8 U.S.C. § 1324b. Bethishou filed his charge with OSC on October 25, 1988. Upon investigation of Mr. Bethishou's charge, OSC in a letter dated January 26, 1989, notified complainant that the Office of Special Counsel would not file a complaint on his behalf, but advised him of the right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of the end of OSC's 120-day investigation period, i.e., by May 23, 1989. Consistent with 8 U.S.C. § 1324b(d)(2), Bethishou filed a complaint on April 4, 1989. I was assigned the case on April 20, 1989.

By Notice of Hearing to all parties, issued April 20, 1989, this Office transmitted the complaint to respondent. Respondent, by pleadings dated May 5, 1989, filed an answer to the complaint and a Motion for Summary Decision, pursuant to 28 C.F.R. § 68.36, accompanied by a supporting Affidavit.[1] Respondent contends that complainant is without a cause of action before me both because his filing of a charge with the Special Counsel, as a necessary condition precedent to a case before me, was out of time (i.e., four days late) and because his claim is premised on national origin, and not

[1]On May 18, 1989 respondent submitted exhibit 1, copies of Bethishou's charges filed with the Equal Employment Opportunity Commission (EEOC) and with the Illinois Department of Human Rights (IDHR) which were omitted as an attachment to the Affidavit filed with the May 5, 1989 Motion for Summary Decision.

on citizenship, discrimination grounds. Respondent also asserts as an affirmative defense, that complainant was not discharged from his employment, but rather that he voluntarily quit.

A handwritten letter, dated May 13, 1989 was subsequently received by this Office from the complainant presumably in response to Ohmite's answer to the complaint and motion for summary decision. Recognizing that complainant is appearing pro se, I issued an Order on Procedures, dated May 18, 1989, in an attempt to clarify whether complainant intended that his May 13, 1989 letter be understood by the judge to be his response to respondent's motion for summary decision, and to advise him as to the proper rules of practice and procedure in this forum.

Paragraph 3 of that Order stated:

> [The] single page communication from complainant dated May 13, 1989, which may have been intended as a response to the motion for summary decision . . . is clearly an inadequate response to the complainant's (sic) May 5 motion. Because I recognize that complainant is not represented by counsel, this Order provides a further opportunity to him to respond to the motion. To assist him, a copy of the rules of practice and procedure of this Office, as published at 52 Federal Register 44972-85 (November 24, 1987), codified at 28 C.F.R. Part 68, will be enclosed with his copy of this Order.

Complainant was given until May 31, 1989, to file a response to respondent's motion of May 5, 1989, in accordance with the rules of practice and procedure. Bethishou was expressly advised that in such response he should not address the merits of his case but rather focus on the issues raised in the respondent's motion, i.e., whether his filing with OSC was timely, and whether and how he asserts citizenship discrimination, as distinct from or in addition to national origin discrimination.

No written or oral response by complainant was received after his May 13, 1989 letter. The Order on Procedures erroneously characterized the May 5 motion for summary decision as complainant's rather than respondent's. I scheduled a telephonic prehearing conference pursuant to 28 C.F.R. § 68.9, for June 23, 1989, at 6:00 p.m. EST, partly to determine whether Mr. Bethishou was misled by the mischaracterization. The conference also served as an opportunity for the complainant to respond more fully, and to identify any material facts relating to national origin or citizenship status discrimination that would warrant an evidentiary hearing on the merits.

Bethishou and counsel for respondent participated in the telephonic prehearing conference. During the conference, Bethishouconfirmed that he had received the May 18, 1989 Order on Procedures and that he understood that the Order and the conference provided him additional opportunities to respond more fully to Ohmite's motion for summary decision. Bethishou declared that he

had already submitted his response in the form of his May 13 letter and said he had nothing further to add.

Discussion:

The initial inquiry is whether OCAHO, established to administer the provisions for hearings under IRCA before administrative law judges, has jurisdiction over the instant proceeding. Title 8 U.S.C. § 1324b(a)(2)(A) explicitly exempts employers of three or fewer employees from liability under IRCA. Jurisdiction of OCAHO over complaints alleging citizenship status discrimination, therefore, extends only to persons or other entities who employ more than three employees.

By contrast, 8 U.S.C. § 1324b(a)(2)(B) excludes from IRCA coverage complaints of discrimination based on an individual's national origin if the discrimination with respect to that employer and that individual is covered under Title VII of the Civil Rights Act of 1964, i.e., 42 U.S.C. §§ 2000e et seq., which confers national origin discrimination jurisdiction on the Equal Employment Opportunity Commission (EEOC). Under Title VII, an employer is defined to include ``. . . a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .'' 42 U.S.C. § 2000e(b). Since IRCA does not contain the 20 calendar week durational minimum rule, the Department of Justice does not use that yardstick in counting employees for purposes of determining coverage of section 102, although it does use the 20 calendar week requirement to determine whether the prohibition against duality of national origin claims applies. Preamble, Final Rule promulgating 28 C.F.R. § 44.200(b)(1)(ii), 52 Fed. Reg. 37402, (October 6, 1987).

Jurisdiction of OCAHO over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. Since respondent employs more than fifteen (15) employees, OCAHO has no jurisdiction under IRCA based on a claim charging respondent with national origin discrimination. See Affidavit in support of motion for summary decision dated May 5, 1989, at para. 2.

Complainant invokes jurisdiction of this Office by seeking relief on the ground that he, a United States citizen, (complaint, at paras. 2 and 2A), was wrongfully discharged ``because of his/her Assyrian/Iranian national origin'' and that although he was fired, ``similarly situated individuals of a different citizenship status
(or national origin) were not fired.'' Complaint, as paras. 6 and 7.

Although paragraph 6 of the complaint asserts that Ohmite knowingly and intentionally fired complainant because of his national origin, citizenship status is also implicated. The subsequent paragraph explicitly states that other individuals of a ``different citizenship status (or national origin) were not fired.'' Complaint, at para. 7 (emphasis added). Accordingly, OCAHO has jurisdiction over complainant's claim as one of citizenship discrimination. Having found that OCAHO lacks jurisdiction over any claim by complainant of national origin discrimination by respondent, the question remains whether complainant has raised any credible discrimination issue arising out of his citizenship status.

Consideration of the Motion for Summary Decision implicates analogous Title VII case law. In the seminal case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the order and allocation of proof in a disparate treatment case to evaluate whether the plaintiff was subjected to differential treatment on the basis of his protected status. The Court set forth the allocation of proof in establishing whether or not a discriminatory motive exists: (1) the plaintiff must establish a prima facie case, (2) the defendant must offer a legitimate, nondiscriminatory reason for its action, and (3) the plaintiff must establish that this supposedly legitimate, nondiscriminatory reason was a pretext to mask an illegal motive. Although the burden of proof remains at all times with the plaintiff, if a prima facie case is established, the burden of persuasion shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Then, if the defendant is successful in meeting its burden of persuasion, the plaintiff must demonstrate that the reason given by the defendant was in fact pretextual.

In McDonnell Douglas the complainant had the initial burden of establishing a prima facie case of racial discrimination by showing ``(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.'' 411 U.S. at 802.

Although McDonnell Douglas was a refusal to hire case, the order and allocation of proof are equally applicable in an action such as this one alleging discriminatory discharge. Adapting McDonnell Douglas to the instant action, the complainant, in order to establish a prima facie case of discriminatory discharge in violation of IRCA, must show (i) that he was a member of the group of individuals protected by IRCA, (ii) that he was discharged, and (iii)

disparate treatment from which the court may infer a causal connection between his protected status and the discharge.

In the instant action, the complainant has identified himself as among the individuals protected by IRCA, i.e., as a U.S. citizen. Complaint, at paras. 2 and 2A. He claims to have been fired by the respondent on or about April 29, 1988. Complainant, however, is unable to demonstrate disparate treatment from which I can infer a causal connection between his United States citizenship and his supposed discharge. Although a scenario may be imagined in which an employer intentionally prefers to hire or to retain non-United States citizens over United States citizens, there has been no suggestion of that fact here. Compare United States v. Mesa Airlines, Nos. 88200001 and 88200002, (OCAHO July 24, 1989), (Morse, J.) (where an employer was found to have intentionally discriminated against non-U.S. citizens in its hiring policy.

Moreover, complainant has not provided an adequate response, in accordance with the rules of practice and procedure, to Ohmite's motion for summary decision. Title 28 C.F.R. section 68.36(b) makes clear that ``[w]hen a motion for summary decision is made and supported . . . , 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.'' Treating, as I do, complainant's May 13, 1989 letter as his response to respondent's motion, he has failed to allege specific facts of citizenship discrimination. Moreover, when asked during the telephone conference whether he had any additional facts or legal arguments to present, he responded that he did not.

Findings of Fact and Conclusions of Law:

Based on the foregoing, considering the pleadings filed, complainant has failed to make a prima facie showing of discrimination based on his citizenship status. As previously discussed, I am without jurisdiction to entertain a claim, if any, of national origin discrimination arising out of the instant facts. Here there is no semblance of a claim sounding in citizenship discrimination. Even if Bethishou were in fact fired, there is no glimmer of citizenship discrimination. Rather, the only discrimination suggested on this record is complainant's contention that he was discharged based on his national origin.

Whatever redress may be available to Mr. Bethishou, his grievances against Ohmite are not within the ambit of this forum's jurisdiction over citizenship discrimination because they do not turn upon his status as a citizen of the United States. Having failed to set forth specific facts which evidence a citizenship discrimination

claim, complainant is unable to sustain the burden of proof that any discrimination arose out of his citizenship status. Accordingly, I find and conclude that there is no genuine issue of material fact with regard to that claim.

I have not overlooked that complainant is unrepresented, participating pro se. In that light, I have gone to great lengths throughout this proceeding to explain in detail our practices and procedures. See Order on Procedures, May 18, 1989. The prehearing conference of June 23, 1989, was the third opportunity given to complainant to respond to the respondent's motion of May 5, 1989. There was no impediment to direct dialogue between the judge and each of the parties. Complainant acknowledged that he was satisfied with his response of May 13, 1989, despite the additional efforts to put him on notice of its inadequacy.

Dismissal of a complaint on motion for summary decision, authorized by 28 C.F.R. § 68.36, is not a result casually reached. Mindful of the relative strengths of the parties and of complainant's unrepresented status, I cannot, however, deny the motion unless satisfied that there is a genuine issue of material fact for hearing. I am not so satisfied. There is simply no genuine issue of fact as to any conduct by the respondent which implicated the citizenship status of complainant. It follows that respondent is entitled to judgment as a matter of law. See 28 C.F.R. § 68.36.

Upon the basis of the whole record, consisting of all the pleadings filed by both parties, I am unable to conclude that a state of facts could be demonstrated by this complainant sufficient to satisfy the preponderance of the evidence standard required by 8 U.S.C. § 1324b(g)(2)(A).

Respondent is a ``prevailing party'' within the meaning of 8 U.S.C. § 1324b(h). Subsection (h) confers discretion to the administrative law judge to ``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.''[2] Id.

The discussion above, explaining the result reached on the merits of this proceeding, i.e., disposing of it entirely on respondent's motion for summary decision and complainant's response, makes plain my conclusion that complainant's ``argument is without reasonable foundation in law and fact.'' This is not the first case where a summary decision has been granted for failure to state a

[2]The statute makes no distinction in exposure to liability by the losing party for the prevailing party's attorney's fees on the basis of whether or not the losing party is the complainant. Nor does the statute turn on the relative bargaining power of the parties. Nonetheless, the statutory grant of discretion to the judge invites consideration of those and other distinctions.

claim having a reasonable foundation in law and fact. See Wisniewski v. Douglas County School District; No. 88200037, (OCAHO October 17, 1988) (Morse, J.).

I am reluctant to deny respondent's request for attorney's fees. However, the statutory standard for recovery of fees is innovative and untested. In addition, this is but the second disposition on the merits of an IRCA discrimination case before me, involving a pro se complainant. Taking these factors into consideration, I deny respondent's request for attorney's fees.

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 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. 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 respondent's Motion for Summary Decision is granted; accordingly, no hearing will be held. All motions and all requests not previously disposed of are denied.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and ``shall be final unless appealed'' within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated this 2nd day of August, 1989.

MARVIN H. MORSE
Administrative Law Judge