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

ROSA MARIA TOVAR,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00042
A.P. ESTEVE SALES, INC.,	)	
Respondent.	)	
	)	

Appearances:

Rosa Maria Tovar
Complainant Pro Se

Bruce J. Sarchet, Esquire
For the Respondent

Before: ROBERT B. SCHNEIDER,
Administrative Law Judge

FINAL DECISION AND ORDER GRANTING SUMMARY DECISION FOR RESPONDENT

I. *Procedural History*

On September 16, 1991, Complainant, Rosa Maria Tovar ("Tovar"), acting pro se, filed a charge of employment discrimination, under Section 102 of the Immigration and Reform Control Act of 1986 ("IRCA"), with the Office of Special Counsel ("OSC"), against Rick Misquez, the manager for A. P. Esteve Sales, Inc. ("Misquez"), Respondent herein.

On January 14, 1992, OSC sent Tovar a letter by certified mail advising her that she could file her own complaint or lawsuit with the Office of the Chief Administrative Hearing Officer ("OCAHO") within 90 days of receipt of this letter. Although Tovar did receive this

"notification" letter from OSC, the record is not clear as to the exact date it was received.

On February 19, 1992, Tovar filed a complaint with OCAHO, set forth in a letter, against Misquez. In her letter, Complainant described the alleged acts of discrimination as follows:

> At this job I had various job duties including forklift driver, working the almond sorting machine and the gravel sorter. The boss had provided a trailer for me to live in and after this incident, about 2 weeks, I felt so sad that I told Rick that I was going to leave.
>
> One day I was washing paint brushes and rollers and Rick came up to me and took one of the rollers out of my hands and tried to wash the roller in water alone. The paint wasn't water soluble (sic) and so I had been using paint thinner to clean the rollers. He proceeded to throw the roller across the room and cuss profusely at me. Such words as stupid, ----, --- you and ---(expletive language omitted). I (sic) made me feel so sad that I started to cry. After his day, things were different and I started to act more serious with Rick. Within 3 days of my notification to him regarding my moving, he let me know that I was fired. I want something done for how I was treated by my boss. I worked hard for him and I dedicated alot of time to him. I worked there for 3 years and always very happy, up until Rick said all those bad things to me.

On or about February 28, 1992, Tovar was provided a form "Amended Complaint Regarding Unfair Immigration-Related Employment Practice" by the Chief Administrative Hearing Officer. This form-type of complaint requires the complainant to fill in various sections of the complaint to conform to the requirements of 28 C.F.R. § 68.7 (Interim Rule 1991).

The amended complaint alleges that Tovar was an alien of mexican national origin authorized to be employed in the United States. It further contends that on August 28, 1991, she was fired from her job as a laborer by her employer Misquez in violation of 8 U.S.C. § 1324b. Confusingly, however, the amended complaint states that on August 28, 1991, the Respondent knowingly and intentionally fired Tovar but <u>not</u> because of her citizenship status or national origin. If this asser-tion is correct, the complaint will have to be dismissed for failure to state a cause of action. Moreover, the amended complaint states that on the date Tovar was fired she was working in the position of a laborer at "C. A. Almond Packers and Exporters, Inc., located at P.O. Box 927, Corning, CA."

The amended complaint also alleges that after Tovar was fired her position remained open and Respondent continued to seek applications from individuals with her qualifications.

On April 5, 1992, Respondent filed its answer to the amended complaint admitting, inter alia, that Tovar was employed by A. P. Esteve Sales, Inc., and Capex in Corning, California; that Misquez serves as the general manager of both A. P. Esteve Sales and Capex; and that after Tovar was fired, Respondent, on behalf of A. P. Esteve Sales and Capex, hired another individual to take her place.

Respondent's answer also alleges, inter alia, as affirmative defenses, that Tovar was fired for lawful business reasons and that the work force of A. P. Esteve Sales and Capex is predominantly hispanic and non-U.S. citizens.

On April 24, 1992, I set this case for an evidentiary hearing to be held at Sacramento, California, on August 10, 1992.

On June 16, 1992, this office contacted Respondent's counsel to deter-mine whether or not Respondent was going to file any type of motion, i.e., to dismiss or for summary decision. Respondent's counsel indicated that no motion to dismiss the case would be filed and that, in effect, the case would have to be decided after an evidentiary hearing.

On June 26, 1992, I directed the parties to submit to the court answers to a number of interrogatories to help identify the appropriate respondent and to see whether or not this case may be resolved by summary decision.

In response to my order, Respondent submitted to the court the affidavits of Rick Misquez, the general manager for A. P. Sales, Inc. ("Esteve Sales"), and California Almond Packers and Exporters ("CAPEX"); Tony Jones, the ranch supervisor for Esteve Sales; and Estella Perez, who was employed by Capex as the supervisor of the almond packing plant in Corning, California.

Complainant, in response to the court's order, filed a one-page letter dated July 15, 1992, which is poorly written but comprehensible. Complainant's letter, however, does not answer with specificity each of the interrogatories asked.

The affidavits submitted by Respondent are detailed and comprehensive and show that Complainant was discharged from her employment with A. P. Esteve Sales, Inc., because of her poor work performance, "apathetic attitude towards work, hostility and insubordination toward her supervisors."

Misquez's affidavit states that Complainant was discharged from her employment with Esteve Sales, Inc., on or about August 29, 1991. This is the date that the Complainant alleges in her complaint the Respondent "knowingly and intentionally fired" her in violation of 8 U.S.C. § 1324b.[1]

II. *Findings of Fact and Conclusions of Law*

Complainant is pro se and I will construe her complaint liberally. The Supreme Court has long held that courts must construe pro se complaints liberally, applying less stringent standards than when a plaintiff is represented by counsel. Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 175, 66 L.Ed.2d 163 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L.Ed.2d 652 (1972) (per curiam); see also Robles v. Coughlin, 725 F.2d 12, 15 (2nd Cir. 1983) (per curiam). In view of the Supreme Court's view of liberally construing pro se complaints, I find that the complaint alleges both national origin and citizenship discrimination.

It is unlawful for an employer to discharge an employee due to national origin or citizenship under section 102B of the Immigration and Reform and Control Act of 1986 (IRCA). My jurisdiction, however, over claims of national origin discrimination prescribed by 8 U.S.C. § 1324b(a)(a)(A) is statutorily limited to claims against employers employing between four and fourteen employees. For citizenship discrimination, the same four employee factors exist, but there is no ceiling on employee numbers. See Alvarez v. Interstate Highway Construction, 2 OCAHO 430 (6/1/92).

The record in this case shows that Respondent owns and operates several almond and prune orchards in Tehman County, California, near the town of Corning. The record in this case also shows that Respondent's business is seasonal and at its peak in December of 1991 employed no more than fourteen (14) employees, eleven (11) of whom were hispanic/mexican. I find, from the nature of Respondent's business and the maximum number of employees that were employed by the company for the year 1991, that I have jurisdiction to decide

[1] Complainant does not dispute that she was discharged from her employment with Esteve Sales rather than Capex. The court, therefore, finds that proper party Respondent in this case is A. P. Esteve Sales, Inc., not Rick Misquez, manager for A. P. Sales, Inc. All pleadings hereinafter filed shall be captioned with the appropriate Respondent.

whether or not Complainant was discharged on August 28, 1991, because of either her national origin or citizenship.

The regulations that govern these proceedings authorize an administrative law judge (ALJ) to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material facts and that a party is entitled to summary decision." 28 C.F.R. § 68.38.

The complaint may be analyzed under the "disparate treatment model" which applies when an individual has been singled out and treated less favorably than others similarly situated on account of national origin or citizenship. Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982). See Alvarez, at 430. Direct of circumstantial proof of discriminatory motive is required. Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir.), cert denied, 469 U.S. 1036 (1984).

Decisions from federal courts in Title VII cases provide a proper guide to determine the respective burdens of producing evidence in disparate treatment cases under IRCA:

> In order to prevail in a Title VII disparate treatment case, a plaintiff must first establish a prima facie case of discrimination. The burden of production then shifts to the respondent to articulate a legitimate nondiscriminatory reason for the adverse employment decision. If the respondent carries its burden, the plaintiff is then afforded an opportunity to demonstrate that the assigned reason was a pretext or discriminatory in its application.

Diaz v. American Tel. and Tel., 752 F.2d 1356, 1358-59 (9th Cir. 1985) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973). However, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Castillas v. United States Navy, 735 F.2d 338, 342 (9th Cir. 1984). "The district court must decide which party's explanation of the employer's motivation it believes." Castillas, 735 F.2d at 342 (quoting United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711,717 (1983).

Specifically, the issue in this case is whether Tovar established a "prima facie case of discrimination" to create a genuine issue of material fact sufficient to foreclose summary judgment. See Fong v. American Airlines, Inc., 62 F.2d 759, 761 (9th Cir. 1980). The prima

facie case is established by a preponderance of the evidence. Burdine, 450 U.S. at 252-53; Castillas, 735 F.2d at 343; and Michael Iandolo v. New York Zoological Society, OCAHO Case # 91200169 (Decision and Order decided 6/30/92).

Based upon prior Title VII federal decisions, I find that in order for Complainant in this case to prove a prima facie case of discriminatory discharge under IRCA, she must show:

1. She is a member of a class protected by IRCA;

2. She was performing her job well enough to rule out the possibility that she was fired for inadequate job performance; and

3. Her employer sought a replacement with qualifications similar to her own, thus demonstrating a continued need for the same service and skills.

Every person seeking employment in the United States, other than an unauthorized alien, is protected by IRCA against discrimination because of national origin, unless the claim is cognizable under Title VII. Only "protected individuals" benefit from the safeguards against discrimination because of their citizenship status. A protected individual includes an alien who is lawfully admitted for permanent residence. 8 U.S.C. §1324b(a)(3)(B).

The undisputed record in this case shows that on the date of her discharge Complainant, whose national origin is mexican, was an alien lawfully admitted for permanent residence. Since the Respondent employed between four and fourteen employees on the date of discharge and Complainant was a permanent resident alien, she is a member of a protected class under IRCA, both as to national origin and citizenship; and, therefore, she meets the first requirement for a prima facie case.

Complainant's statement of July 15, 1992, states that she has witnesses to show how she worked, how she ran the crews and took care of everything, and [she] never did anything wrong. Complainant's statement supports a finding that she was performing her job satisfactorily; and, therefore, she has met the second element of a prima facie case.

According to Misquez's affidavit, Complainant was replaced by Jesus Hernandez, who is also hispanic. I think it is fair to infer that Com-plainant's qualifications were not beyond that of an unskilled laborer. I find that Respondent sought a replacement with qualifications similar to Tovar, thus demonstrating a continuing need for the same services and skills required from Tovar. Complainant has met the third element of the prima facie test.

The affidavits submitted by Respondent clearly present a number of legitimate nondiscriminatory reasons for Tovar's discharge. More specifically, Misquez's affidavit states that in the spring of 1991 Tovar was responsible for the irrigation systems on 230 acres of almond groves called C-230, shared responsibility with others for irrigation on a 70 acre plot of almond groves called C-70, and was partially responsible with others for irrigation systems on a 80 acre plot of prune groves called C-80. Tovar's supervisor was Anthony Jones.

Misquez's affidavit shows that during the spring of 1991 he instituted a reorganization of the farming operations and as a result Anthony Jones became Tovar's supervisor. Misquez states that Tovar "refused to work cooperatively with Jones," "she became insubordinate, deliberately disregarded work instructions, and displayed a cavalier and apathetic attitude toward the trees and equipment for which she had responsibility."

Misquez identifies several examples of Tovar's poor work that resulted in her discharge. According to Misquez, Tovar, contrary to her supervisor's instructions, repeatedly over-inflated the tires on a John Deere AMT (All Material Transport) five-wheel vehicle used to travel about the orchards, causing all five tires to be replaced. She also repeatedly, contrary to specific instructions, stuck nails into the seat of the AMT and failed to properly maintain the AMT, causing damage to the air filter. She also failed to properly maintain the diesel motor and well pump which supplied the drip irrigation system, by failing to add oil and check the level on a daily basis. She failed to properly repair clogged drip emitters. She failed to properly maintain the irrigation system, which caused flooding to some areas of the orchard and significant drying to others.

Tovar was given a written warning about her poor work performance and shortly thereafter told Estella Perez, another employee, that she

had "let the water run over on C-709 intentionally and that she had left open the valve on the sand operator on the drip system intentionally."

I find that the reasons given for Tovar's discharge were legitimate and nondiscriminatory. I provided Complainant with at least two opportunities to respond to Respondent's affidavits in support of summary decision. See my orders of July 21, 1992, and August 19, 1992. Complainant has failed on both occasions to make any response. I, therefore, conclude that Respondent has provided a legitimate nondiscriminatory reason for discharging Complainant from her job as a laborer on August 28, 1991. I further find that Complainant has failed to present any evidence to show that the reasons given by Respondent for her discharge were pretextual.

Accordingly, Respondent's Motion for Summary Decision is hereby granted.

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(i). Not later than 60 days after entry, Complainant may appeal this Decision and 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. 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated: September 21, 1992

ROBERT B. SCHNEIDER
Administrative Law Judge