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

November 18, 1992

JOSE ORTEGA, Complainant	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	Case No. 91200134
VERMONT BREAD, Respondent	)	

DECISION AND ORDER

Appearances: Jose Ortega, pro se; Jonathan Bump, Esquire, Brattleboro, Vermont, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding addresses the Complaint of Jose Ortega (complainant) against his employer, Vermont Bread (respondent), that respondent terminated his employment on February 18, 1990, based solely upon complainant's citizenship status and in having done so violated the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

On March 22, 1991, complainant filed a written complaint with the United States Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), alleging therein that respondent had engaged in a proscribed unfair immigration-related employment practice by reason of having terminated his employment on February 18, 1990, based solely upon complainant's citizenship status.

On May 22, 1991, OSC notified complainant by letter that it had completed its investigation of his charge, that it would not file a complaint with this office on complainant's behalf, and that complainant was entitled to file a complaint directly with an administrative law judge assigned to this office, if filed within 90 days of complainant's receipt of that correspondence.

On August 1, 1991, complainant commenced his private action by filing the Complaint at issue with this office, in which he reasserted the same allegations of citizenship status discrimination.

On September 23, 1991, respondent filed its Answer, stating therein that complainant had never been fired or denied employment by respondent and that at all times relevant to these proceedings com-plainant had been employed by respondent or, from time to time, had not been working but had drawn workmen's compensation benefits from respondent's workmen's compensation insurance carrier, and that complainant has continued to be employed by respondent.

Following due notice to the parties, the matter was heard before the undersigned in Brattleboro, Vermont on Wednesday, July 22, 1992. A fully fluent Spanish interpreter was present throughout the proceeding.

Summary of Evidence

Complainant's evidence consisted of his interpreter-assisted testi-mony, as well as the testimony of two of complainant's co-workers, Michael Joseph Therrien and Jesus Mancinas, and one documentary exhibit which was marked and entered into evidence as Complainant's Exhibit 1.

Respondent's evidence consisted of the testimony of Lisa Cuerdon Lorimer, its vice president and general manager, and one documentary exhibit which was marked and entered into evidence as Respondent's Exhibit A.

Complainant, a 23-year-old native of Mexico, testified that he entered the United States illegally at El Paso, Texas in August of 1984 (T.55). Thereafter, he left El Paso to accept work in Fresno, California and later in Kansas City, Missouri, where he worked as a cook at a salary of $1,400 monthly, and where he also became a permanent resident legal alien on October 24, 1988 (T.71).

Complainant testified that the promise of higher wages as a cook brought him to Brattleboro, Vermont in November, 1989 (T.56), but upon arriving, he found that the job promised him was, in reality, that of a busboy at a salary of $1,000 monthly (T.57). He accepted the busboy position but immediately began searching for other employment.

He secured a position at respondent bakery firm and began work there as a packer in December of 1989, at an hourly rate of $6.00, plus a $1.00 hourly bonus for each hour he worked in those weeks in which he began work punctually (T.36,37).

On February 18, 1990, respondent fell and injured his foot on his way to work (T.68), but it was not immediately known whether the accident had occurred on respondent's premises (T.69). Because complainant had not then been employed by respondent for three months, he was still on new employee status, and was therefore not covered by respondent's health insurance plan (T.68).

As a result of the accident, complainant was unable to work from the end of February, 1990 until returning to work in May, 1990. He stated that he worked continuously for respondent in his previous position until October, 1990 (T.64), in spite of the fact that he was not able to perform the physical requirements of that position (T.69).

Complainant also testified that from the end of October, 1990 until July 1991 he was continuously disabled and that respondent fired him in October, 1990, because light duties were not available. He stated that he received workmen's compensation benefits throughout this period, except for a time in October, 1990, when compensation was withheld until he saw another doctor, as respondent had requested (T.65). After complying with this request, his compensation benefits were resumed (T.66).

In July, 1991, at the request of respondent's insurer's vocational training counselor, respondent created a less physically demanding, part-time position for him. He was employed in that position from July, 1991 until January, 1992 (T.66), although, as complainant asserts, he was fired twice between December 1991 and February 1992 (T.65). In February, 1992, complainant began receiving full-time benefits from respondent's workmen's compensation carrier and those benefits were being paid through the hearing date.

Michael Joseph Therrien (Therrien), who is a friend, roommate, and co-worker of complainant, testified that when complainant initially returned to work, two of respondent's managers, Marlene Shepard (Shepard) and Darrin Agee (Agee), required complainant to perform work requiring great physical exertion, and that Shepard refused to allow Therrien to help complainant perform those activities (T.86).

Therrien also stated that while working in respondent's bakery, he saw managers approach and talk to complainant at various times, and shortly thereafter he noted that complainant would leave the building (T.87). He also testified that following those incidents complainant indicated that he had been terminated (T.90), although he did not actually hear those individuals tell complainant that he was fired (T.85,90). Therrien admitted, however, that he and complainant did not often work on the same shift (T.89-90).

Therrien also acknowledged that he was not sure whether on those same occasions complainant was being asked to leave or had been fired (T.91). At times, Therrien explained, respondent's managers would advise the employees to leave before the end of their shifts, and return to work the next day, as opposed to being fired. He also acknowledged that it was possible that the managers he saw conversing with com-plainant were suggesting to complainant that he go home and return when he felt better (T.91).

Complainant next presented the testimony of Jesus Mancinas (Mancinas), another of his roommates and coworkers. Mancinas testified that he was with complainant in respondent's office the day after complainant's accident. Complainant was attempting to get medical assistance from respondent, and Ann Wyman (Wyman), respondent's insurance manager, refused to help complainant (T.98). Mancinas stated that he and complainant then went to the state social welfare office at Wyman's suggestion (T.118), where an individual contacted respondent (T.101), prompting respondent to acquiesce and aid complainant the next day (T.119).

Mancinas also testified that he was approached by Lisa Lorimer, respondent's vice president and general manager, during complainant's initial absence and following the removal of complainant's foot cast. Mancinas stated that although Lorimer knew that complainant could not work with his injured foot, Lorimer threatened to replace complainant unless he returned to work (T.109,120). Mancinas stated that he conveyed Lorimer's message to complainant, causing complainant to return to work injured in order to keep his job.

Upon returning to work, Mancinas asserted, complainant was assigned to his regular duties by Shepard, even though complainant presented Shepard with a note from his doctor prescribing limited duties, and in spite of the fact that there were less physically taxing duties to which complainant could have been assigned (T.109). Mancinas also stated that he saw complainant arguing with Shepard on another occasion, after which complainant was immediately sent home. Although Mancinas could not hear that argument (T.121), he testified that when he returned to the apartment which he shared with complainant, he was told by him that Shepard had required him to produce a note from his doctor before he would be allowed to return to work (T. 114). When complainant produced that note, Shepard assigned him to regular duties, which complainant stated he could not perform.

Mancinas indicated that respondent was aware of complainant's citizenship status, and had been since the time of complainant's hire (T.123).

The testimony of respondent's sole witness, Lisa Lorimer (Lorimer), its vice president and general manager, concerning the events which followed complainant's accident in February, 1990, differed strikingly from those given by complainant and his witnesses.

She testified that shortly after his accident she saw complainant in the breakroom at the bakery (T.126), and that he stated that he had hurt his foot on the way to work, but that he had failed to specify exactly where the accident occurred. Shortly thereafter, complainant went to the hospital, but encountered difficulty there because his health insurance benefits had not yet begun (T.127). She stated that on the following day complainant, Mancinas, and Jose Ortez spoke with Wyman and her. They determined at that meeting that complainant was not qualified for insurance (T.127), and, not realizing that complainant had been injured on company property, did not believe that complainant was qualified for workmen's compensation benefits (T.127-28). Consequently, they suggested that complainant contact the state social welfare office, which complainant subsequently did (T.128). The state welfare agency then contacted Wyman, informing her that apparently complainant had been hurt on respondent's property, and thus was possibly covered by respondent's workmen's compensation insurance. Shortly thereafter, Wyman called respondent's carrier and learned that complainant's injuries were indeed covered (T.128).

Lorimer testified that throughout complainant's recovery, respondent received regular reports concerning complainant's progress, and was notified when complainant was able to return to work (T.129). When respondent received notification that complainant's cast was removed Lorimer spoke to Mancinas in the breakroom, informing him that respondent was trying to keep complainant's position open (T.131). Lorimer alleged that it was not her intention that this conversation be related to complainant (T.131).

She also stated that shortly thereafter complainant returned to work without restrictions and worked virtually full-time for almost twenty (20) weeks (T.132). She stated that in September or October, 1990, complainant complained of pain related to his injury, and respondent requested that complainant go back to his physician and return to work only when released (T.133). Complainant was released to perform light work duties, but did not return to work. Instead he continued to be paid full workmen's compensation benefits of $197 weekly.

Lorimer testified that in July, 1991, with the help of complainant's rehabilitation counselor, respondent created a light-duty position that complainant was able to perform (T.134), in which complainant worked for four days each week, at a wage of six dollars and twenty-five cents an hour (T.137). The difference between that rate and complainant's normal wage was made up by workmen's compensation benefits (T.138). Complainant subsequently left that position on January 29, 1992, and was receiving full workmen's compensation benefits at the time of the hearing (T.136).

She also stated that in February, 1992, respondent learned from its workmen's compensation insurer that complainant would be out on temporary total disability. Subsequently, respondent was informed in June, 1992, that complainant would be on permanent work restrictions (T.139).

Since complainant's initial accident in February, 1990, respondent has considered complainant an employee on disability status, and has been willing to take complainant back for the next available job for which he was qualified (T.140). In support of this assertion, respondent offered into evidence a two-page compensation record marked Respondent's Exhibit A (T.141), which Lorimer examined and identified as an accurate summary of compensation benefits paid to complainant for the period February 20, 1990 to July 21, 1992.

On cross-examination, Lorimer denied that she had at any time told complainant that she would not help him because he was not a United States citizen, or that she threatened complainant with firing unless he returned to work (T.144), or that she insisted on a note from complainant's physician before allowing him to take leave. Lorimer contended that respondent had simply insisted that complainant seek medical attention, and had promised complainant that he can return to work when released by his physician.

Issue

These disputed facts present a single issue for adjudication, that of determining whether, as complainant has alleged, respondent violated the unfair immigration-related employment practices provisions of IRCA, those set forth at 8 U.S.C. §1324b(1)(B), by having terminated his employment on February 18, 1990, solely on the basis of complainant's citizenship status.

Discussion, Findings, and Conclusions

The cause of action being asserted by complainant herein is that which is set forth in Section 102 of IRCA, (Pub. L. 99-603, 100 Stat. 3374 (Nov. 6, 1986)), 8 U.S.C. §1324b, which amended Chapter 8 of Title II of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163; 8 U.S.C. §1101, et seq., by adding after section 274A of INA the following new section, in pertinent part:

> "Unfair Immigration-Related Employment Practices"
>
> Sec. 274B. {8 U.S.C. 1324b} (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.-
>
> (1) General Rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in Section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.
>
> (emphasis added) * * * * *

In pursuing his charge of an unfair immigration-related employment practice based upon citizenship status, complainant's evidentiary burden of proof is that of establishing by a preponderance of the evidence, 8 U.S.C. §1324b(g)(2)(A), that respondent knowingly and

intentionally engaged in the discriminatory activity he has alleged, 8 U.S.C. §1324b(d)(2).

The burden of proof imposed upon IRCA complainants in actions of this nature can be determined by reviewing and adopting those decisions involving parallel claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (Title VII), Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92); Huang v. Queens Motel, 2 OCAHO 364 (8/9/91); Williams v. Lucas & Associates, 2 OCAHO 357 (7/24/91); Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/91); U.S. v. LASA Marketing Firms, 1 OCAHO 141 (3/14/90).

Complainant bases his charge upon disparate treatment, that he was treated less favorably than others at Vermont Bread, solely because of his citizenship status. In McDonnell Douglas v. Green, 411 U.S. 192 (1973), the Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. The Court held that first, the complainant has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. In order to prove a prima facie case of discrimination, the Court held, complainant must show:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job 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."

Id. at 802.

If the complainant is successful in proving a prima facie case of discrimination, the burden of production then shifts to the respondent to articulate a legitimate reason for the employee's rejection. Should respondent carry this burden, complainant then has the opportunity to prove that the reasons articulated by the respondent were a mere pretext for discrimination. Id. See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Under IRCA, if complainant fails to successfully bear that evidentiary burden, an appropriate order dismissing his complaint must be entered. 8 U.S.C. §1324b(g)(3); 28 C.F.R. §68.52(c)(2)(iv).

Complainant alleges that he was subject to discrimination when he was discharged by respondent on the basis of his citizenship status. To establish a prima facie case of citizenship status discrimination,

complainant must show: (i) that he is a member of a protected class; (ii) that his job performance was satisfactory; (iii) that he was discharged and (iv) that, after he was discharged, the position remained open and the respondent sought applicants from persons with complainant's qualifications. Meiri v. Dacon, 259 F.2d 989, 995 (2d Cir. 1985).

IRCA provides that a protected individual is one who is either a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee, or one who has been granted asylum. 8 U.S.C. §1324b(a)(3). See Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92). Complainant has established that he is a permanent resident alien, number A090327615 (T.59), and thus, a protected individual for purposes of IRCA. 8 U.S.C. §1324b(a)(3)(B).

Regarding the second element, complainant was employed in various positions by Vermont Bread prior to and following his accident in February of 1990. In July, 1991, complainant returned from workmen's compensation status to a lighter duty cleaning job in the bakery. Apparently complainant's performance in both of those positions was satisfactory, as respondent's general manager contended that respon-dent would be willing to take him back for the next job for which he was qualified when he returns from workmen's compensation status (T.140).

However, complainant has failed to prove that he was fired by respondent on February 18, 1990, as alleged in the Complaint, or subsequently.

On the contrary, complainant admitted that he has continuously been an employee of respondent even though he has not been actively working in respondent's bakery (T.67). This fact is also borne out by the compensation record introduced by respondent and identified by complainant. That record discloses that complainant was injured on February 18, 1990, that he received a paycheck from respondent on February 22, 1990, and thereafter received compensation benefits from respondent's workmen's compensation carrier beginning on March 1, 1990, and continuing uninterruptedly until he returned to work in May, 1990.

Nor does the record reveal that complainant was fired at any time thereafter. In his answers to respondent's interrogatories, complainant asserted that he was fired on August 24, 1990. However, com-

plainant testified that he worked continuously for respondent from May, 1990 until October, 1990 (T.64). The compensation record reveals that complainant was paid by respondent on August 23, 1990, but was not paid by respondent again until two weeks later, September 6, 1990. However, on September 10, 1990, complainant received a check for just less than two weeks benefits from respondent's workmen's compensation carrier, ostensibly covering the period when complainant was not being paid by respondent, indicating that respondent did not fire complainant at that time.

Complainant also contended at the hearing that he was fired by respondent in October, 1990, because respondent had no light duties for him to perform, and was not paid until he saw another physician (T.65). The compensation record reveals that complainant was paid by respondent on October 4, 1990 and October 11, 1990, but did not receive any sort of compensation again until October 30, 1990, when he was paid by respondent's workmen's compensation carrier for two weeks' compensation. However, on the following day, October 31, 1990, complainant received an additional two weeks' compensation, again ostensibly covering the period for which no benefits had been paid.

Nor were complainant's witnesses able to verify that complainant had ever been fired. (T.91-92,113,121).

Contrary to complainant's assertions, it appears that respondent considered complainant to be its employee at all times, and treated respondent with the greatest consideration throughout what was and continues to be a long and difficult rehabilitation period. In fact, it appears that it was complainant who ended the employment relationship. On July 6, 1992, while still receiving workmen's compensation benefits from respondent's carrier, complainant started working as a house painter for John Hellender, a contractor in Brattleboro, Vermont and was so employed on the hearing date (T.40).

Complainant's other allegations of discrimination do not entitle him to relief under IRCA, the scope of which is narrower than Title VII. That because the provisions of IRCA proscribe discrimination based only upon national origin or citizenship status, and then only in three employment situations, hiring, recruitment or referral for a fee, and firing. (8 U.S.C. §1324b(a)(1) et seq.). On the other hand, Title VII provides that it is an unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's race color, religion, sex or national origin....(emphasis added)

42 U.S.C. §2000e-2(a)(1). Consequently, in order to obtain relief under IRCA, a complainant must demonstrate national origin or citizenship status discrimination on the part of the employer in the much narrower categories of hiring, recruitment or referral for a fee, or firing.

In his Response to Interrogatories and Requests of Respondent, complainant has listed six instances of discrimination he has alleged were committed by respondent, to which he added a seventh at the hearing (T.51). Only one of those allegations relates to discriminatory discharge, and none of the remaining six relate to discrimination in either hiring or referral or recruitment for a fee.

In summary, complainant has alleged that respondent unlawfully fired him, terminated his employment, or discharged him from his position on February 18, 1990, based solely upon his citizen status, that of permanent legal resident alien.

Given that premise, complainant was required to successfully assume a two-fold evidentiary burden, that of demonstrating by a preponderance of the evidence that: (1) he was fired by respondent, and (2) that respondent intentionally terminated the employment relationship solely because of complainant's citizenship status.

Upon reviewing all of the relevant and credible evidence concerning those allegations, it is readily discernable that complainant has done neither. Resultingly, I find that complainant has failed to establish a prima facie case of citizenship status discrimination in respondent's alleged termination of complainant. That because complainant has failed to prove that respondent has terminated the employment relationship.

In addition, beyond complainant's mere assertion that the alleged firing was based entirely upon his citizenship status, no other evidence was offered in order to support that allegation.

Accordingly, complainant's request for administrative relief must be denied.

Order

Complainant's August 1, 1991, Complaint alleging immigration- related employment practices based upon citizenship status discrimination, allegedly in violation of the provisions of 8 U.S.C. §1324b(a)(1)(B), is hereby ordered to be and is dismissed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Deci-sion and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the em-ployer resides or transacts business, and does so no later than 60 days after the entry of this Order.