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

January 8, 1993

STEPHEN J. SALERNO, Complainant	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	Case No. 92B00041
ICL RETAIL SYSTEMS, INC., Respondent	)	

DECISION AND ORDER

Appearances: Stephen J. Salerno, pro se;
Martin B. Danziger, Esquire and Mary Sue Donavan, Esquire, Danziger & Mak, Washington, D.C., for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding addresses the Complaint of Stephen J. Salerno (complainant) against his former employer, ICL Retail Systems, Inc., now known as Fujitsu-ICL Systems, Inc. (ICL/respondent), that ICL knowingly and intentionally terminated his employment on July 29, 1991, based upon complainant's national origin and 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 September 26, 1991, complainant filed a charge with the Texas Commission on Human Rights, in which he alleged that ICL had practiced national origin discrimination against him in the course of terminating his employment on July 29, 1991, in violation of the pertinent provisions of Title VII of the Civil Rights Act of 1964, as well as the Texas Commission on Human Rights Act.

On October 3, 1991, complainant also 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 under the provisions of IRCA by reason of having terminated his employment on July 29, 1991, based upon complainant's national origin and citizenship status.

On February 5, 1992, OSC notified complainant by letter that it had completed its investigation of his IRCA charge, that it had determined that there was no reasonable cause to believe that complainant's charge was true, that it would not file a complaint on his behalf with this office, and that complainant was entitled to file a complaint directly with an administrative law judge assigned to this office, if he did so within 90 days of his receipt of that correspondence.

On February 14, 1992, the Texas Commission on Human Rights ruled that ICL had not discriminated against complainant under the provisions of Title VII of the Civil Rights Act of 1964 based upon his national origin. Complainant has appealed that adverse ruling to the United States Equal Employment Opportunity Commission (EEOC), where the matter is currently pending.

On February 19, 1992, complainant commenced his private IRCA action by filing the Complaint at issue, reasserting the same allegations based upon national origin and citizenship status discrimination. That initiating pleading was followed by protracted and voluminous discovery activities and motion practice.

On June 23, 1992, the undersigned issued an order dismissing complainant's alleged claim of national origin discrimination for lack of subject matter jurisdiction under IRCA since the size of ICL's workforce namely, 15 or more employees, statutorily confers exclusive national origin discrimination jurisdiction upon EEOC. The parties were further advised in that ruling that complainant's claim of citizenship status discrimination under IRCA was not affected thereby, remained at issue and would be addressed at the scheduled adjudicatory hearing.

After due notice to the parties, that hearing was conducted before the undersigned in Dallas, Texas on July 28 and 29, 1992.

Summary of Evidence

Complainant's evidence consisted of his testimony and the submission of several hundred pages of documentary evidence marked and entered into evidence as Complainant's Exhibits A through E.

That of respondent took the form of the testimony of Carlo P. Frappolli (Frappolli), its Vice President of Human Resources, as well as those documentary exhibits identified and placed into evidence as Respondent's Exhibits 1 through 9.

Those sources, together with the pleadings and the discovery replies, have provided the following pertinent facts.

Complainant, age 40, was born and raised in Westchester County, New York. He earned a Bachelor of Science degree in Finance at Boston College in 1974 and completed a one-year post-graduate course in Finance at the University of Connecticut. Between September, 1974 and November, 1979 he worked as a senior financial analyst/accountant/budget planner for three firms located in the Greater New York City area.

In November, 1979, he joined his two sisters in the latters' direct mail marketing and public relations firm, Salerno Group, Incorporated, located in Manhattan and remained in that association "on and off" for 5-1/2 years, or until June, 1985, when his sisters invited him to seek other employment (T. 45). At that time, his sisters' five-person firm was comprised of two part-time employees, his two sisters, and himself. In the course of that 5-1/2 year association, he also worked for two or three other employers performing undetermined duties.

Complainant learned of ICL through an employment placement firm and in July, 1985 he accepted a temporary position in ICL's five or six-person Finance Department in its Stamford, Connecticut headquarters. In December of that year, he was offered and accepted a permanent position of Corporate Financial Analyst, a fourth level position, at an annual salary of $37,500.

Early on in his ICL employment, in late 1986 or early 1987, according to a confidential memorandum in complainant's personnel file, he began experiencing job-related conflicts which were apparently resolved and complainant received favorable performance appraisals concerning his financial analyst duties through 1988.

In 1989 and 1990, following its acquisition of Datachecker, Inc., a Dallas-based firm, ICL moved its corporate headquarters to Irvine, Texas, a suburb of Dallas, and resultingly relocated and consolidated its Stamford finance operations there, also.

On February 13, 1989, as evidenced by a memorandum from Frap-polli, complainant was offered the position of Manager, Financial Re-porting and Analysis with ICL's newly-acquired ICL Datachecker in Dallas, reporting directly to Russ Surmanek, Controller, at an annual-ized base salary of $52,000. Complainant's relocation entitlements were set forth in a detailed, six-page Datachecker relocation policy, a copy of which was provided to complainant and the receipt of which complainant acknowledged over his signature dated February 27, 1989.

Complainant and Surmanek experienced conflicts over the former's contemplated July 1989 relocation. Complainant's conduct, which reportedly involved his refusal of a job assignment, the use of unacceptable language in the workplace and having been absent without approved leave, was viewed as insubordinate and resulted in Frappolli having issued a written warning to complainant on August 10, 1989. Complainant was given 90 days in which to improve his behavior or face further disciplinary action, up to and including discharge.

On October 11, 1989, according to complainant's personnel file, at page 72, he was given written notice of employment termination, effective October 25, 1989, but was relieved of his work responsibilities on the earlier date. He was granted a termination package consisting of salary through October 25, 1989, five weeks' severance pay and travel and transportation allowances.

Surmanek left ICL in early 1990 and complainant was rehired by ICL on March 12, 1990, at his previous $52,000 annual salary, as a Senior Financial Analyst, a lower ranking position from the one he held previously. In that new position, he reported to Rick Fogarty, Surmanek's successor.

Kerry Jenkins, ICL's Vice President of Finance, described complainant's position as being that of "Headquarters Controller" in conversation as well as in a single internal memorandum issued in October, 1990. ICL had no position so titled (T. 136, 187), but complainant regarded that limited and obvious job title misdescription to have been

tantamount to a promotion, even though he received neither salary increase nor pertinent notification. Complainant also requested the usual prerequisites which accompany promotions, a private office, a shared secretary, business cards reflecting that title, and a reserved automobile parking space.

Complainant's personnel file, at page 132, also discloses that in January, 1991, Barry Collier, Controller, Finance, complainant's supervisor and reviewing appraiser, prepared a handwritten four-page performance appraisal for the period January 1, 1990 to January 1, 1991, concerning complainant, whose position title was then Financial Analyst - Corporate Division. His listed strengths including having been a good administrator and also having then had a good knowledge of basic accounting as well as that of ICL's operations. In complainant's listed areas involving performance improvement and development were those which concerned interpersonal skills and listening to and learning from the opinions of others. That same appraisal, at page 135, set forth the comments of Collier's manager, Kerry Jenkins, Vice President of Finance, to the effect that while complainant was a good technician, it would be necessary that in order that he move from his then present level to a senior financial role, complainant needed additional experience and "a change in his approach."

On July 29, 1991, according to complainant's personnel file at page 141, he received written notification from Frappolli that his employment would be terminated as of that date. In that termination letter, complainant was advised that his position had been eliminated as a result of an organizational restructuring.

The termination letter was delivered to complainant by Kerry Jenkins in the latter's office and Frappolli was also present. At first, complainant reacted contentiously and, according to Frappolli, "threatened to snap Mr. Jenkins' neck and throw him out the window" (T. 367). Frappolli escorted complainant to the latter's work cubicle in order to remove his personal effects and then to the elevator. Complainant's job duties were parceled out to five other employees, who simply added those tasks to their regular duties (T. 368).

It might be well to discuss the nature of ICL's business as well as the economic conditions in which it was operating prior to its having abolished complainant's position, together with many others at ICL's North American operations, in July, 1991.

ICL is a wholly-owned subsidiary of ICL PLC, a corporation duly organized under the laws of the United Kingdom, headquartered in London. It is engaged in the design of information systems for the retail, local government, financial services, public services, commercial and defense markets. In 1990, the ICL PLC corporate group employed 35,000 persons worldwide with a gross annual income of $4 billion.

In November, 1990, Fujitsu Ltd., of Japan, acquired an 80 percent ownership in ICL PLC and the remaining 20 percent interest was acquired by Northern Telecom, resulting in ICL PLC now serving as a majority owned (80 percent) British-registered subsidiary of Fujitsu of Japan (Respondent's Exhibit 6).

ICL's North American operations consisted of two wholly-owned subsidiaries, ICL Canada and ICL, Inc., and involved computer equipment referred to as retail systems solutions, or point-of-sale systems used by retailers to scan bar codes on products at checkout locations, for purposes of pricing and inventory data collection and transmission between retailers' stores.

In July of 1991, the two corporations which comprised ICL's North American operations employed some 1,083 persons, including 121 employed in Toronto, Canada and the remainder in a number of offices in the United States. Some 600 worked in customer service, 250 in engineering and software development, 75 in sales and marketing, and the remainder in general and administrative functions, such as human resources, finance, and management information systems (T. 344, 345).

The years 1989 and 1990 resulted in the North American operations having suffered net losses exceeding $18 million and $54 million, respectively. Since a significant loss was projected in 1991, also, ICL began a series of cost-cutting measures in January and February, 1991, which included every conceivable cost containment measure short of deferring salary increases and laying off employees in the course of a reduction in force (RIF).

It was disclosed in the course of a senior staff meeting in June, 1991 that despite the austere measures adopted earlier an additional $5 million loss was forecast, resulting in a decision to implement a RIF in the North American workforce (T. 347). Some 63 ICL employees, 9 in Canada and 54 in the United States, which involved 13 in the Finance Department including complainant, were terminated on July 26, 1991

and the only criterion upon which their individual terminations were based was job eliminations which were based solely upon business requirements (Respondent's Exhibit 1 at 3).

On June 16, 1992, a second RIF, involving approximately 170 employees, was announced and those terminations will have been completed by January, 1993, resulting in the elimination of some 233 positions in a workforce of 1,083, or a 22 percent staffing reduction overall.

As in the case of complainant's eliminated position, the duties of all 233 abolished jobs will be performed by the remaining workers by their taking on additional work assignments (T. 369). Meanwhile complainant's abolished position, that of Senior Financial Analyst, has not and will not be filled as it was simply eliminated in the course of ICL's organizational restructuring.

Complainant'a evidence referred frequently and extensively to Sheila Boyd, a Canadien citizen who joined ICL Canada in its Toronto office in 1981, and with whom complainant worked as a fellow financial employee in Stamford before transferring to Dallas in 1989. Sheila Boyd progressed in positions of increasing responsibility, assuming the managerial position of Finance Manager in Toronto in June, 1989.

As part of ICL's cost containment discussions in early 1991, it was decided to create a new position, that of Manager, Financial Planning and Analysis, in order to assist the line managers in planning their operating expenses. With that position so defined, Kerry Jenkins and Frappolli reviewed all of ICL's financial personnel in the United States and found that none were qualified to undertake those tasks.

Sheila Boyd was identified as the person having the necessary quali-fications for that assignment, in effect a person with leadership quali-ties, coupled with sensitivity, finesse and tact in order to inspire leadership and commitment from subordinates and to be able to add a sense of calm to an often hectic work environment. In addition, she was capable of communicating with different personality types and senior managers under very trying circumstances and was able to alter her approach, depending upon the circumstances. She also had excellent written and verbal communication skills, was a good listener and possessed an understanding of the technical facets of financial analysis.

Frappolli testified that complainant was interested in that position, had spoken to him about it, had been considered for the job but was found to be woefully lacking in interpersonal skills, clarity of thought, communications skills, and calmness and logic in order to deal effectively with people (T. 380). In addition, the person selected for the new position would be required to spend 75 percent of his/her time working closely with line managers, whereas complainant had only spent some 25 percent of his time in that manner and then only to secure numbers (T. 381).

It was decided to offer that position to Sheila Boyd. Frappolli stated that the position had not been created for Sheila Boyd. Instead, the position had been defined in order to effect economies within ICL's operations and then the search commenced to find the right person within the organization to assume those duties.

Organizational charts for the period between January 1, 1989 and July, 1991 disclose the following information. Sheila Boyd's position, as shown on the January, 1991 chart was that of a manager who re-ported directly to Barry Collier, Controller, Sales and Support, and one to whom others reported. The July, 1991 organizational chart discloses that Sheila Boyd was then serving as Manager, Financial Planning and Analysis in Dallas. Meanwhile, charts for like periods described complainant's positions variously as Financial Analyst in Stamford, as Manager, Financial Planning and Analysis in Dallas, prior to his initial termination from that position, and lastly, as a Senior Financial Analyst in Dallas in July, 1991. None of the charts contained a position described as Headquarters Controller, or that position to which complainant claims to have been named by Kerry Jenkins. Frappolli testified that in his opinion complainant is not qualified to hold a position at either the controller or director levels (T. 389).

It was also established that Sheila Boyd performed the duties of Manager, Financial Planning and Analysis until she died as a result of an automobile accident in the Dallas area in late November, 1991, while in the company of Kerry Jenkins. Her position has not and will not be filled since it may also be involved in the further downsizing of ICL.

There was some measure of testimony concerning ICL's payment to complainant of some $52,800 in relocation expenses in connection with his 1989 move from Stamford to Dallas. Complainant viewed those

payments as a bonus for outstanding service. Meanwhile, ICL contends that all relocation benefits paid to complainant were those which are routinely paid to any transferring employee under the same circumstances. Frappolli pointed out that complainant had not been treated any differently and that he had signed a release, which is in complainant's personnel folder, to the effect that he had received total relocation sums in the amount of $39,100, covering eight specific relocation expense items (Respondent's Exhibit 9). Because that $39,100 reimbursement sum is taxable as ordinary income, ICL simply added and withheld for complainant the further sum of $13,700 as a Federal income tax withholding sum, or tax-gross-up amount, which accounts for ICL's total relocation expenditure to complainant of $52,800 for the Tax Years 1989 and 1990 (T. 393-396).

Issue(s)

The threshold issue to be examined under these disputed facts is that of determining whether ICL, as complainant has alleged, knowingly and intentionally terminated his employment on July 29, 1991, based solely upon complainant's citizenship status.

Should that inquiry be answered affirmatively, an appropriate order will be entered, in conformance with the provisions of 8 U.S.C. §1324b(g).

In the event that findings are entered in favor of ICL on that underlying issue, further consideration must be granted to ICL's Motion for Attorney's Fees, in the itemized amount of $40,325.56.

Discussion, Findings, and Conclusions

Complainant's cause of action 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 ICL 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 deci-sions 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).

The basis of complainant's charge, as noted earlier, is that ICL know-ingly and intentionally treated him differently, or disparately, than other employees similarly situated in the course of terminating his employment on July 29, 1991, and did so based solely upon complainant's citizenship status. Complainant has further alleged that ICL discharged him under the false pretense of a company layoff/restruc-turing.

Because disparate treatment has been alleged, decisional guidance is available in the Supreme Court ruling in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the leading case concerning Title VII employment discrimination charges based upon disparate treatment in the hiring process. In discussing the evidentiary burden of proof which a prevailing party must successfully bear in that type proceeding, the Court ruled that the plaintiff therein was required to establish a prima facie case of discrimination and was further required to prove by a preponderance of the evidence:

> "(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.

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. at 807. See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Moreover, "{t}he ultimate burden of persuading the trier of the fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 253.

Under IRCA, if complainant fails to successfully bear that evidentiary burden, an appropriate order dismissing the 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 ICL on the basis of his United States 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).

In addressing the initial element in his evidentiary burden of proof, complainant has established that he is a citizen of the United States and, therefore, a protected individual for purposes of IRCA. 8 U.S.C. §1324b(a)(3)(B).

Considerable doubt surrounds complainant's contention that his job performance was satisfactory, the second element in his burden of

proof, in view of his prior termination on October 11, 1989, following his having been issued a warning letter earlier on August 10, 1989.

Complainant has attempted to demonstrate his purported satisfactory job performance by urging that ICL has given him monetary bonuses, involving significant sums in 1989 and 1990, and must have only logically have done so because of his outstanding job performance. While that claim has been asserted, its color of accuracy has been more than slightly muted by ICL's explanation that the total sum of $52,800 paid to complainant was not a bonus or reward of any type. Instead, it was a routine relocation reimbursement amount to which any ICL employee similarly situated is ordinarily entitled, in accordance with that firm's employees' benefits package.

Moreover, complainant has failed to fulfill the third element in his evidentiary burden, that of demonstrating that his job position of Senior Financial Analyst and/or Headquarters Controller, depending, remained open and that ICL sought applications from persons with parallel qualifications.

ICL has more than adequately shown that the position which com-plainant describes as having been titled Headquarters Controller did not, in fact, ever exist. ICL has also amply demonstrated that com-plainant's last position, that of Senior Financial Analyst, has been effectively abolished in the course of the July 29, 1991 RIF which implemented the first phase of its structural reorganization which commenced on that date and which is ongoing presently.

A cursory review of this evidentiary record discloses that in the 130-month period encompassing the dates September, 1974, complainant's initial post-graduate employment at GK Technologies in Greenwich, Connecticut to July, 1985, the career point at which he accepted a temporary position as a Finance Department employee in ICL's Stamford headquarters, complainant held seven or eight positions, according to his testimony.

The ensuing six years, from July, 1985 to July, 1991 were spent in ICL's employ, a relationship which, by any measure of objective rea-soning, must be regarded as having proven difficult for both parties.

Complainant's initial charge at OSC contained the allegation that ICL is a British based firm which favors British, Canadien and Australian citizens over United States citizens in promotions, job

assignments and layoffs. He also complained that Sheila Boyd, a Canadien citizen, was illegally brought to Dallas from Toronto to fill a position to which he should have been appointed, given his qualifications. As further evidence of his alleged citizenship status employment related discrimination, complainant has alleged that on three occasions prior to the event Kerry Jenkins told him that Sheila Boyd was being brought to Dallas to replace him.

But a review of Frappolli's testimony, discussed earlier, in which he recounted the selection process under which Sheila Boyd was awarded the position of Manager, Financial Planning and Analysis, in Dallas in the summer of 1991, effectively refutes complainant's assessment of that promotional choice. Moreover, Frappolli was insistent in maintaining that complainant's work history at ICL had clearly demonstrated that complainant simply lacked those skills which were required in order to have been seriously considered for that job opening, or for any other position at the controller or director levels, for that matter.

In view of the foregoing, I find that complainant has failed to present a sufficiency of credible evidence in order to have established by a preponderance of evidence a prima facie case that ICL discriminated against him in the manner alleged.

Even in the event that complainant's evidence had made such a showing, the evidence presented by ICL has more than handily shown that complainant was terminated for a legitimate business reason on July 29, 1991, in the course of an economically driven organizational restructuring which resulted in its having abolished complainant's position, as well as 62 others on that date and an additional 170 employees since.

The action taken by ICL in the course of reducing its former 1,083-person North American workforce by some 22 percent, represented by 233 positions, constituted a prudent managerial decision to remain efficient and productive in a competitive information technology marketplace.

Given that fact, complainant's evidence has not remotely suggested that those reasons articulated by ICL in connection with his termination were, in reality, merely pretextual in character.

For these reasons, complainant's request for administrative relief must be denied.

Given that ruling, we must now consider ICL's request for attorney's fees, predicated upon the pertinent IRCA provisions pertaining to the awarding of attorney's fees, those codified at 8 U.S.C. §1324b(h), which provide:

> In any Complaint respecting an unfair immigration-related employment practice, an Administrative Law Judge, in the judge's discretion may allow 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.

Accordingly, the fee shifting request of ICL may only be granted upon an entry of findings in its favor on both of the following factors: (1) that ICL is the "prevailing party" in this proceeding, and (2) that complainant's "argument is without reasonable basis in law and fact." 8 U.S.C. §1324b(h).

I find that ICL is the prevailing party in this proceeding. Further inquiry is in order to determine whether ICL's request for fee shifting should be granted.

ICL maintains that it is entitled to attorneys fees under the ruling in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694, 16 F.E.P. 502 (1978), wherein it was held that a court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Id. at 420.

Simply because it has been shown that complainant has failed to prove the employment related discriminatory practice alleged to have resulted in his job termination, that finding does not support a further finding that complainant's case was so devoid of substantive merit that fee shifting should be ordered.

Complainant's evidence contains the assertion that on three occasions Kerry Jenkins advised him that Sheila Boyd was being transferred from Toronto to Dallas in order to replace him. It is not unreasonable to conclude that such an utterance by a Vice President of Finance from ICL's corporate headquarters to a subordinate in complainant's position would have been taken seriously by him and has accounted for the enthusiastic manner in which the unrepresented

complainant has sought to advance his argumentation throughout this proceeding.

Because that argumentation is being found to have not been without reasonable basis in law and fact, ICL's request for fee shifting, in the form of its Motion for Attorney's Fees, is being denied.

Order

Complainant's February 19, 1992, 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.

ICL's September 17, 1992, Motion for Attorney's Fees, filed in accordance with the provisions of 8 U.S.C. §1324b(h) and 28 C.F.R. 68.50(c)(D)(v), is hereby denied.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision 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 employer resides or transacts business, and does so no later than 60 days after the entry of this Order.