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

ADNAN NIAZ MIR, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 92B00225
FEDERAL BUREAU OF PRISONS, Respondent.	)	

ORDER
(April 20, 1993)

I. *The Sovereign Immunity Claim*

A. Background

On October 9, 1992, Complainant Adnan Niaz Mir (Mir) filed this private action alleging violation of the prohibition against unfair immigration-related employment practices. 8 U.S.C. §1324b(d)(2). Mir contends that although he was qualified for the position of correctional officer, he was denied employment by Respondent Federal Bureau of Prisons (FBP) at the Federal Correctional Institution (FCI), Sheridan, Oregon. According to Mir, the denial of employment constituted national origin and citizenship status discrimination prohibited by law.

On November 19, 1992, FBP timely filed its answer to the complaint together with a motion to dismiss premised on a determination that federal agencies are protected against §1324b liability by virtue of the sovereign immunity doctrine. Upon receipt of the motion, I invited FBP to address its sovereign immunity claim in context of Roginsky v. Dept. of Defense, 3 OCAHO 426 (5/5/92). In response, FBP's brief in support of its motion, dated December 30, 1992, analyzes Roginsky and refers to the September 17, 1992 determination letter by the Office of the Special Counsel for Immigration Related Unfair Labor Practices (OSC). That letter advised that after investigating Mir's §1324b discrimination charge, OSC found "insufficient evidence of

probable cause to believe the charging party was discriminated against as prohibited by 8 U.S.C. §1324." The letter continued,

> Regarding potential liability of the U.S. Bureau of Prisons, the Department of Justice has recently reevaluated whether federal agencies are covered under 8 U.S.C. §1324b. The Department of Justice has determined that the Office of Special Counsel lacks jurisdiction to pursue such claims against federal agencies, including the Bureau of Prisons. Therefore, this Office has decided not to file a complaint with an administrative law judge regarding this matter.

FBP's brief relies on a memorandum of the Office of Legal Counsel, Department of Justice (OLC), dated August 17, 1992. Upon receipt of the brief, I requested FBP to file a copy of the OLC 1992 memorandum. On complying, FBP generously also filed OLC's earlier memorandum of May 2, 1990.

The 1990 OLC memorandum responded to an OSC inquiry concerning jurisdiction in connection with the Roginsky charge prior to filing a complaint before an Administrative Law Judge. OLC concluded that "IRCA [Immigration Reform and Control Act of 1986, as amended, codified at 8 U.S.C. §§1324a, b, c] provides the Special Counsel with jurisdiction over charges of citizenship status discrimination filed against federal agencies." OLC Memo. (5/2/90) at 1. Subsequently, while Roginsky was pending before the judge, OSC and the Department of the Navy (Navy) agreed that, at Navy's instance, OLC would be asked to reconsider its 1990 memorandum. Initially, the case was abated pending an OLC response. However, no reconsideration memorandum being forthcoming, the Roginsky parties and the judge agreed to go forward. Following extensive briefing including submission of the materials previously submitted by the Navy to OLC, the judge announced that:

> I find and conclude that the defense of sovereign immunity is not available to shield a federal entity from liability under 8 U.S.C. §1324b. Although the question may be a close one, I find in IRCA a sufficient congressional waiver of sovereign immunity to bring such departments and agencies within the ambit of 8 U.S.C. §1324b. During the conference I expanded on that ruling, which will be explained in more detail in a forthcoming order.

Roginsky, 3 OCAHO 324 (5/6/91) (Third Prehearing Conference Report and Order). See also Roginsky, 3 OCAHO 415 (3/8/91) (Second Prehearing Conference Report and Order).

In May 1992, an order was issued in the context of an expected agreed disposition of the Roginsky dispute. That order addressed the

sovereign immunity issue, as anticipated by the May 1991 order. Roginsky, 3 OCAHO 426 (5/5/92).

The August 17, 1992 OLC memorandum addressed to the Navy advised,

> This memorandum responds to your request that we reconsider our opinion of May 2, 1990 . . . After evaluating your request for reconsideration and the response of the Special Counsel, we conclude that the federal government is not a 'person or other entity' covered by the Antidiscrimination Provision. We withdraw our earlier opinion. [Footnote omitted].

OLC Memo. (8/17/92) at 1.

The order here issues upon consideration of FBP's motion to dismiss the complaint. FBP asserts that by virtue of the doctrine of sovereign immunity, it is not amenable to liability under the Immigration Reform and Control Act of 1986, as amended, codified at 8 U.S.C. §§1324a,b (IRCA). Sovereign immunity is a judicially formulated, time honored doctrine. The doctrine dictates that suit to obtain redress against the sovereign is prohibited absent its consent.

B. The OLC Memoranda

(1) Generally

The two OLC memoranda generated by the Roginsky controversy, are mutually exclusive, illuminating the uncertainty and elusiveness which attends resolution of the question whether sovereign immunity attaches to particular statutory causes of action. The 1990 memorandum concluded that the United States is included within the ambit of §1324b liability because as an employer the federal government not excluded from the phrase "person or other entity." 8 U.S.C. §1324b(a)(1). To the contrary, the 1992 memorandum concludes that federal agencies are not persons or entities and are, therefore, immune from §1324b liability. OLC relies in part on U.S. v. Nordic Village, Inc., 112 S. Ct. 1011, 1014 (1992), and in part on the notion that failure to interpose sovereign immunity would introduce constitutionally impermissible "intra-Executive branch litigation." OLC Memo. (8/17/92).

(2) The 1992 OLC Memorandum

Although OLC's 1992 memorandum acknowledges the Roginsky litigation, its reliance on Nordic Village ignores the discussion in the Roginsky May 5, 1992 order which distinguished Nordic from §1324b cases.

> In IRCA, unlike the Bankruptcy Code at issue in Nordic Village, the pertinent provisions are consistent, inter se. The ambiguity created by arguably inconsistent provisions is absent. This IRCA feature distinguishes it from the bulk of those which address sovereign immunity. The typical form of the question is whether a waiver reaches a particular cause of action, e.g., amenability to a particular liability claim but uncertainty whether interest accrues on the claim. Here, where liability of general applicability is enacted subject to explicit exceptions, it is unnecessary to make the inquiry as to whether an explicit waiver of sovereign immunity was intended to go so far and no further. No ambiguity arises regarding whether the United States was intended to be treated differently than any other employer. It follows that the rejection of legislative history as an analytic tool in Nordic Village need not control the outcome here.

Roginsky v. U.S., 3 OCAHO 426 at 8.

The OLC memorandum does not mention Ohio v. U.S. Dept of Energy, 112 S.Ct. 1627 (1992), where the Supreme Court found waiver as to federal liability to the State of Ohio under the Clean Water Act (CWA) for certain sanctions but not others. The Ohio majority, finding waiver for coercive but not punitive sanctions, explicitly relied on distinctions it found among CWA's penalty provisions. As discussed in Roginsky,

> Significantly, the [Ohio] majority opinion discussed the tension "between a proviso suggesting an apparently expansive but uncertain waiver and its antecedent text that evinces a narrower waiver with greater clarity." Such a finding does not deny an IRCA waiver. 60 U.S.L.W. at 4331.
>
> The majority opinion addressed the tension which arose from perceived differences in textual treatment of waiver among provisions in the environmental statutes involved. Justice White, concurring in part and dissenting in part, commented, "[I]t is one thing to insist on an unequivocal waiver of sovereign immunity. It is quite another 'to impute to Congress a desire for incoherence' as a basis for rejecting an explicit waiver. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 394 (1939) . . ." Ohio v. Dept of Energy 60 U.S.L.W. at 4333. There is no such tension in IRCA.
>
> It may argued that these two recent Supreme Court decisions imply an emerging judicial disfavor with caselaw which finds waiver in any but the most stringently explicit circumstances. I think instead that these precedents deal only with statutes susceptible to disparate analysis because expressions of waiver inter se are found to be inconsistent and imprecise.

Roginsky, 3 OCAHO 426 at 9.

Reasoning that a finding of waiver as to §1324b would implicate §1324a employer sanctions liability, OLC's memorandum asserts that Congress did not intend §1324a to apply to the government. OLC rejects the notion of a federal agency as a "person or other entity" because such status which "would permit the imposition of criminal penalties." Another impermissible result would be "an enforcement action [by the Attorney General] against another Executive agency and indeed against the Congress or the Judiciary." OLC Memo. (8/17/92) at 13. Federal agency conduct effects no estoppel and cannot itself waive sovereign immunity. I take official notice, however, that §1324a employment eligibility verification compliance procedures (INS Forms I-9) are widely and routinely administered in the federal establishment, including in the Department of Justice.

Having condemned intra-agency enforcement of employer sanctions as impermissible, but acknowledging the government-wide utilization of the INS Form I-9, OLC concludes that

> [O]f course, our opinion does not preclude federal agencies, as a matter of policy, from continuing to adhere to the immigration status verification procedures prescribed by the Office of Personnel Management. See Federal Personnel Manual Supplement 296-33, Subchapter 5-2.6a (1988) (requiring use of Standard Form I-9).

OLC Memo. (8/17/92) at 14-15, n. 16.

The logic of OLC's conclusion that sovereign immunity and the bar to intra-agency litigation precludes liability by federal agencies for fail-ure to comply with IRCA requires the further determination that agencies are not entitled to administer §1324. Certainly, an employing agency expends money administering an I-9 program. I am unaware of authority to expend appropriated funds to implement an impermissible, ergo unlawful, requirement. It is unreasonable to confront recruits, including personnel transferring among employing agencies, with an unlawful compliance obligation as a condition of employment. It can be no more proper to oblige federal agencies and their employees to comply with §1324a and to expend appropriated funds in that respect than it is to compel enforcement of §1324b by federal employers. OLC to the contrary, it is unlawful for federal agencies to expend appropriated funds in compliance with §1324a, if it is unlawful for them to be obliged to comply with §1324b.

The Roginsky opinion, 3 OCAHO 426 (5/5/92), suggested that as the government agency tagged with initial responsibility for program development, investigation and prosecution of discrimination cases,

OSC's interpretations are also entitled to deference. See Martin v. Occupational Safety and Health Commission, 111 S.Ct. 1171, 1175 (1991). OSC's position, as reflected in its position in Roginsky was that the government is subject to 8 U.S.C §1324b. Indeed, as noted in that order, prior to that litigation, OSC had investigated charges implicating government agencies and had negotiated settlements with them. OSC Memorandum to OLC at 7 (4/27/90). Roginsky, 3 OCAHO 426 at 13.

FBP stands OLC's 1992 memorandum on its head, arguing that deference in the Roginsky opinion to OSC interpretation supports FBP's sovereign immunity claim in Mir. FBP Brief 12/30/92 at 4-5. To the contrary, the record in Roginsky and the text of both OLC opinions are clear. They unmistakably point to the conclusion that but for the 1992 OLC memorandum, OSC would continue to prosecute unfair immigration-related employment practice charges and complaints. See e.g., Roginsky, 3 OCAHO 426 at 15.

(3) Whether intra-executive branch suits are prohibited

OLC's pillar to support its immunity pantheon crumbles, notwithstanding its reliance on the absence of a justifiable "case or controversy" in suits involving the government inter se. The first response is to refer to the myriad cases in which the government's policy interest as defined by statute is vindicated by the agency responsible for its implementation at the expense, fiscal and otherwise, of another agency. See, e.g. Fed. Labor Relations Authority v. Dept of Defense, Nos. 90-4722, 90-4775 (10/9/92), and cases there cited. OLC's concession that courts "sometimes decide cases nominally between" federal agencies swallows up its whole argument. OLC Memo. (8/17/92) at 11, n. 12. It is sufficient to note that OSC's posture in court would not materially differ from that of the protagonist agency in the cases relied on by OLC. In any event, whether FBP is amenable to §1324b jurisdiction of administrative law judges is not resolved by blinking the reality that agencies are subjected to the jurisdiction of other agencies when Congress so commands. If such a command were impermissible, the logic of OLC's analysis would impact, among others, Title VII of the Civil Rights Act of 1964, as amended, which OLC concedes reaches federal agencies. 42 U.S.C. §2000e-16(a). In sum, OLC's intra- agency litigation discussion is simply not instructive on the question whether the government is amenable to §1324b.

C. Focus on 8 U.S.C. §1324

(1) The text of §1324

The Roginsky analysis totally ignored by the August, 1992 OLC opinion, is the predicate for much of the discussion here.

The IRCA prohibitions against hiring and employing unauthorized aliens, 8 U.S.C. §1324a(1), and against national origin and citizenship status discrimination, 8 U.S.C. §1324b(1), apply in identical terms to any "person or other entity."

Exceptions to the prohibition of 8 U.S.C. §1324b against unfair immigration-related employment practices include (1) a person or other entity that employs three or fewer employees; (2) national origin discrimination covered under Section 703 of the Civil Rights Act of 1964; and (3) discrimination because of citizenship status otherwise required (a) in order to comply with law, regulation, or executive order, or (b) required by Federal, State, or local government contract, or (c) which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State or local government. 8 U.S.C. §1324b(a)(2). Nowhere is the term "person or other entity" narrowed so as to eliminate the government or any other employer qua employer from the class title.

(2) §1324b Considered as a Whole and in Context

The statute must be considered as a whole. Nordic Village, 112 S.Ct. 1011; Ohio v. Dept of Energy, 112 S. Ct. 1627; SUTHERLAND ON STATUTORY CONSTRUCTION at Sec. 46.05 (4th ed. 1986) ("it is not proper to confine interpretation to the one section to be construed.") IRCA demonstrates the congressional intent to treat the antidiscrim-ination and employer sanctions provisions as unitary. This intent is evident because liability for both broadened national origin protection and for citizenship status protection was designed to expire if sanctions were repealed pursuant to §1324b(k). See also 8 U.S.C. §1324a(l). It follows that the antidiscrimination provisions must be analyzed in concert with the employer sanctions provisions.

The Senate Judiciary Committee report addressing §1324(a) unequivocally embraces the universe of employers without excluding governmental employers from the intended class, i.e., any "person or other entity." The Senate committee had before it for consideration only employer sanctions and not the discrimination provisions. After

noting that recruiters or referrers who charged no fee or other consideration were excluded, the report commented:

> With the exception of the categories noted, all employers, recruiters, and referrers are covered: individuals, partnerships, corporations and other organizations, nonprofit and profit, private and public, who employ, recruit, or refer persons for employment in the United States.

S. REP. No. 132, 99th Cong., 1st Sess. 32 (1985). (Emphasis supplied).

The House of Representatives Report of the Judiciary Committee is in accord. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 56 (1986) ("[sanctions penalties] are uniformly applied to all employers."). Summarizing its discussion of §1324b, the committee of conference commented that the "antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context." H.R. REP. No. 1000, 99th Cong., 2d Sess. 87 (1986).

That §1324b complements §1324a and broadens Title VII's protections against national origin is consistent with waiver. See H.R. REP. No. 1000 at 87. See also 42 U.S.C. §2000e-16 (employment by federal government covered by Title VII). Nothing in the legislative history reflects an intention to avoid or reject coverage of federal agencies, except as explicitly provided.

Moreover, the Roginsky order, 3 OCAHO 426 (5/5/92), did not depend on the reasoning of the earlier OLC memorandum. Rather, Roginsky interpreted amendment to IRCA in 1990 as signaling a congressional waiver. Id. at 12. Significantly, §1324c enacted several years after §1324b by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, (Nov. 29, 1990), introduced, inter alia, civil money penalties for document fraud. Subsection c excepts from its coverage,

> any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States . . . .

8 U.S.C §1324c(b).

The necessary implication of the explicit exemption for federal law enforcement and intelligence agencies is that government activities not exempted are included within the ambit of §1324c; otherwise, there would be no rationale for the exemption. The scope of §1324c is stated in terms identical to those of §§1324a and b, i.e., any person or

other entity. It is reasonable to infer that these terms have the same meaning in all three sections, viz., any employer except as explicitly exempted.

(3) IRCA as a Complement to Title VII

Congress enacted IRCA as a complement to Title VII. IRCA, as enacted, was intended to fill the alienage discrimination gap left by the Supreme Court's interpretation of Title VII in Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). Endorsing the proposal, which became §102 of IRCA, the House Judiciary Committee recognized that "the Farah Court found that nothing in Title VII prohibits discrimination based on alienage." H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 69 (1986). Accord, H.R. REP. No. 682, 99th Cong. 2d Sess., pt. 2, at 12 (1986) (Report of the Committee on Education and Labor). The statement by the House Judiciary Committee is compelling:

> Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.

H. R. REP. No. 682, pt. 1, at 70.

Title VII, at 42 U.S.C. §2000e-16, renders federal employers amenable to the same nondiscrimination standards as employers in the private sector. Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. §2000e-16(a) reaches federal agency employment discrimination based upon "race, color, religion, sex, or national origin." By supplementing Title VII's employment discrimination provisions, IRCA embraces Title VII's explicit reach to the federal government.

(4) Agency Implementation of IRCA

Regulatory implementation of §§1324a and 1324b also points to federal agency compliance. The Immigration and Naturalization Service (INS) is the agency charged with operational responsibility for implementation of the employer sanctions provisions, 8 U.S.C. §1324a. INS defines "entity" to include "a . . . governmental body, agency," etc. 8 C.F.R. §274a.1(b). Traditionally, as discussed in Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980), adjudicators accord deference to "'the interpretation given [a] statute by the officers or agency charged with its administration,' Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (quoting Udall v. Tallman, 380 U.S.

1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965)." For a leading case, see also Chevron, USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Title 8 U.S.C. §1324b(a)(1)(C) explicitly recognizes that compliance in specified respects with federal requirements exempts an employer from coverage. Such recognition is consistent with the inference that absent explicit exclusion, federal employment is covered. However, agreeing with OLC's 1992 recanting of its 1990 memorandum, I concur that reference to the executive order exception of §1324b(a)(1)(C) is not a statement that §1324b otherwise applies to the federal government. As noted by OLC, executive orders may affect private interests. See e.g., Dames & More v. Regan, 453 U.S. 654 (1981). At a minimum, however, the exception is consistent with the conclusion that except as specifically provided, coverage was intended to be universal.

I do not rely on the argument that an agency's compliance with employment eligibility verification requirements of §1324a(b), bars a claim of sovereign immunity. Although compliance may demonstrate an agency's understanding of a statute's reach, compliance does not estop the agency from asserting sovereign immunity. Moreover, "administrative regulations cannot waive the federal government's sovereign immunity." Pittman v. Sullivan, et al, 911 F.2d 42, 46 (8th Cir. 1990), (quoting Mitzelfelt v. Dep't of Air Force, 903 F.2d 1293, 1296 (10th Cir. 1990), citing United States v. Mitchell, 463 U.S. 206, 215-16 (1983)).

D. The Affect of the OLC Opinion

FBP contends that as OLC is the final arbiter of legal disputes within the executive branch, administrative law judges are bound by its opinions.* The response is that this is a private action, not a legal dispute within the executive branch. 8 U.S.C. §1324b(d)(2). But even were it an OSC action, OLC would not be the forum for its resolution. As with employer sanction cases, 8 U.S.C. §1324a(e)(3)(B) and document fraud cases, §1324c(d)(2)(B), IRCA dictates that discrimina-

* Had OLC shared FBP's view that its 1992 opinion controls discretion of the judges, OLC presumably would have shared the opinion with OCAHO. It did not. Although issued in response to a request by Roginsky parties, no copy was ever transmitted by OLC to OCAHO or the judge. It is my understanding that the first official delivery of the second memorandum to OCAHO was FBP's January 22, 1993 transmittal pursuant to my request in Mir. workplace standards as other employers.

tion hearings be held before administrative law judges pursuant to the Administrative Procedure Act (APA). 8 U.S.C. §§1324b(d)(2) and (e). OLC is not implicated.

It is also noteworthy that in a striking departure from traditional legislation invoking the APA, IRCA hearing authority is conferred directly on the administrative law judge, rather than on the head of the agency. Typically, the opportunity for hearing on the record provides recourse to the agency which may elect that either findings of fact and conclusions of law be developed by an administrative law judge or by the head of the agency. Moreover, in §1324b cases, there is no administrative review. Rather, a final order of the judge is appealable directly to "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). FBP's effort to subordinate the role and function of the judge to OLC are in derogation of and do not comport with these statutory indice of independent decision making.

E. Conclusion as to Sovereign Immunity

The OLC memoranda are not Attorney General's Opinions, policy statements adopted pursuant to notice and comment rulemakings, nor rules of practice and procedure. I am not obliged as a matter of law to concur. The memoranda are, however, entitled to due consideration. I find the second OLC memorandum and FBP's brief unpersuasive. For the reasons discussed above, I adhere to the decision and order in Roginsky, 3 OCAHO 426; 2 OCAHO 324 (5/6/91) (Third Prehearing Conference Report and Order). I conclude that §1324b applies to FBP. I respectfully disagree with an interpretation that fails to oblige the government as a "person or other entity" to adhere to the same IRCA "workplace standards as other employers."

II. *The National Origin Claim*

Mir alleges both national origin and citizenship status discrimination. The exhibits attached to its answer to the complaint, particularly FBP's Examining Unit certificate of eligibles (exh. 1, attach. 2) demonstrate that for purposes of IRCA the employer is FBP, not FCI Sheridan alone. Respondent asserts on brief, and Mir does not demurrer, that FBP is an integral part of the Department of Justice; I agree. I find that FIC Sheridan is an organizational component of FBP and, in turn, of the Department of Justice. I take official notice

that the Department of Justice is, and at all relevant times has been, an employer of more than fourteen individuals. It is well understood in OCAHO jurisprudence that, with exceptions not pertinent here, administrative law judges lack jurisdiction over national origin discrimination complaints against employers of more than fourteen individuals.

It has become commonplace that

> jurisdiction of administrative law judges 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 fourteen (14) employees, U.S.C.§1324b(a)(2) (b), it is excluded from IRCA coverage with regard to the national origin discrimination claims.

U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90) at 11.

See also Huang v. U.S. Postal Service, 1 OCAHO 288 (1/11/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Yefremov v. New York City Dept of Transportation, 3 OCAHO 446 (10/23/92)(Order Denying Respondent's Motion for Summary Decision/Miscellaneous Rulings); Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459 (9/24/92), appeal docketed, Curuta v. U.S. Water Conservation Lab., No. 92-70774 (9th Cir. 1992); Brown v. Baltimore City Schools, OCAHO Case No. 91200231 (6/4/92); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92); Williamson v. Autorama, 1 OCAHO 174 (5/16/90); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

Accordingly, the national origin discrimination claim is dismissed.

III. *The Citizenship Status Discrimination* Claim

Dismissal of the national origin portion of a complaint does not impeach the vitality of a citizenship discrimination claim. I have routinely retained jurisdiction, even going to evidentiary hearing, over the citizenship portion of mixed claim cases. Yefremov, OCAHO Case No. 92B00096 (10/1/92) (Order) ("Notwithstanding such partial dismissal and Complainant's action pending in district court, I retain jurisdiction over that portion of the complaint alleging citizenship discrimination and retaliation."); Salazar-Castro, 3 OCAHO 401 (2/26/92). See also Roginsky, 2 OCAHO 415 (3/8/91) (Second Prehearing Conference Report and Order).

Employers have been found liable for §1324b violations against United States citizens. U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90); Jones v. DeWitt Nursing Home, 1 OCAHO 189 (6/29/90). As distinct from Mir's claim, however, those cases involved employer demands for documents to satisfy §1324a which were found to be excessive, implicating §1324b violations. Here, Mir alleges unlawful refusal to hire at a point in time prior to employment eligibility verification procedures.

Accordingly, while Mir may be entitled to assert a claim as a procedural matter, the circumstances demonstrated by the pleadings to date do not clearly disclose a basis for a claim of citizenship status discrimination. This case does not raise the issue alleged in Roginsky. Certainly, Mir does not claim he was denied FBP employment because he is a United States citizen. Accordingly, this order calls upon Mir to submit a statement which describes the basis for a claim of citizenship status discrimination as distinct from the national origin claim.

Complainant will be expected, not later than May 3, 1993, to file a statement which alleges facts and theory to assist the bench in resolving whether this case embraces a viable citizenship status discrimination claim under §1324b. A responsive pleading by FBP will be timely if filed by May 20, 1993. Consideration will be given to requests for extensions of time at the request of either party for good cause shown.

SO ORDERED.

Dated and entered this 20th day of April, 1993.

MARVIN H. MORSE
Administrative Law Judge