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

May 11, 1993

DORON A. TAL,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 92B00143
M. L. ENERGIA, INC.,)
AND MS. NIRA S. LAVID AND)
DR. MOSHE M. LAVID,)
Respondents.)
)

ORDER GRANTING PARTIAL SUMMARY DECISION

On April 7, 1993, the undersigned issued an Order to Show Cause Why Summary Decision Should Not Issue, in which complainant was ordered to show cause why summary decision should not be granted in respondent's favor with respect to the charges made in paragraphs 6.1 to 6.14 and 6.16 to 6.35 of the Complaint, Appendix for Paragraph 6, and with respect to complainant's claim that he was discharged on the basis of his citizenship status, as alleged in paragraph 6.15 of the Complaint, Appendix for Paragraph 6.

In that Order, the undersigned noted that paragraphs 6.1 to 6.14 and 6.16 to 6.35 alleged claims that did not appear to be actionable, or, alternatively, did not appear to be actionable under IRCA, 8 U.S.C. §1324b. Accordingly, complainant was ordered to clearly and succinctly demonstrate that the charges made in those paragraphs allege causes of action under 8 U.S.C. §1324b.

On April 21, 1993, complainant filed his Response to the Order as of April 7, 1993 Show Cause Why Partial Summary Decision Should Not Be Issued in Favor of Respondent (Response), in which he asserted generally that respondent has discriminated against him "by referral to his fee, ...with respect to his hiring, ...and with respect to his discharge, in violation of 8 U.S.C. §1324b(a)(1)(A) and §1324b(a)(1)(B)", that respondent has violated 8 U.S.C. §1342b(a)(5) by retaliating against respondent, and that respondent "failed to follow requirement concerning document practices, as required by OSC, and recently by the Honorable Judge (during this proceeding), in violation of 8 U.S.C. §1324b(a)(6)." Response, ¶13.

Summary judgment is properly regarded not as a disfavored procedural shortcut, but as an integral part of the Federal rules, designed to secure the just, speedy, and inexpensive determination of every action. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986). The purpose of the summary judgment procedure is to avoid an unnecessary hearing when there is no genuine issue as to any material fact as shown by the pleadings, affidavits, discovery, and judicially noticed matters. Id. To successfully oppose summary decision, complainant must set forth specific facts showing genuine factual issues for hearing. Fed. R. Civ. P. 56(e). See Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986); Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (6/1/92); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/92). Complainant cannot rely upon speculation, conclusory allegations and mere denials to raise issues of fact. Alvarez, 3 OCAHO 430, at 7; United States v. PPJV Inc., d/b/a Publishers Press, 2 OCAHO 337 (6/1/91).

Complainant's Response clearly fails to meet this standard. Rather than presenting evidence or pointing to specific facts to support the allegations he has already made, complainant asserts additional claims against respondent, including claims not actionable in this proceeding. For example, in paragraphs 1, 2, 5(a), 5(b), 5(c), and 6 of his response, complainant attempts to assert claims under the employer sanctions and document fraud provisions of IRCA, 8 U.S.C. §§1324a and 1324(c) respectively, that he is unable to assert under the Act. See 8 U.S.C. §1324a(e)(1)(D); 8 U.S.C. §1324c(d). Complainant also attempts in paragraphs 2 and 3 of his response to allege violations under provisions of the Immigration and Nationality Act, particularly 8 U.S.C. §§1182 and 1184, over which the undersigned has no jurisdiction.

While complainant asserts that he can "easily prove" that respondent has discriminated against him with respect to referral for a fee and hiring and has retaliated against him, he fails to offer any evidence or point to any specific facts to support this assertion in his Response. Accordingly, summary decision is granted in respondent's favor with respect to those allegations made in paragraphs 6.1 to 6.14 and 6.16 to 6.35 of the Complaint, Appendix for Paragraph 6.

In the Order to Show Cause, the undersigned also ordered complainant to show cause why summary decision should not be granted in respondent's favor with respect to complainant's claim that he was discharged on the basis of his citizenship status, as alleged in the Appendix for Paragraph 6, paragraph 6.15 of the Complaint. In particular, complainant was ordered to demonstrate that he is a "protected person" for purposes of citizenship status discrimination.

In response, complainant asserts that IRCA never intended to discriminate against H-1 aliens, but rather simply ignores them, and asserts that H-1 aliens are protected from "abuse" under 8 U.S.C. §§1182 and 1184. Complainant further asserts that the undersigned has the authority, under 28 C.F.R. section 68 and 8 U.S.C. §1324b, to apply those sections of the Immigration and Nationality Act "for the purpose of justice, defending the public interests and the right of the parties."

As noted in the Order to Show Cause, complainant bears the burden of establishing that he is a protected individual under 8 U.S.C. §1324b(a)(3). See Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 469, at 6 (11/6/92); Prado-Rosales v. Montgomery Donuts, 3 OCAHO 438 (6/26/92). Complainant's assertion that Congress "ignored" H-1 aliens in defining the term "protected individual" for purposes of citizenship discrimination under IRCA is irrelevant to determining whether complainant is a protected individual. To have proved he is a protected individual, complainant would have had to have offered evidence that he is a member of one of the classes of individuals listed in 8 U.S.C. §1324b(a)(3), not that a class of individuals to which he does belong is not included in the aforementioned provision.

Furthermore, complainant is incorrect in his assertion that the authority conferred by IRCA or by the implementing regulations give the undersigned the authority to act outside of his jurisdiction. See Speakman, 3 OCAHO 469, at 6.

Accordingly, because complainant has failed to establish that he is a protected individual as defined in 8 U.S.C. §1324b(a)(3), summary decision is also granted in respondent's favor with respect to complainant's claim that he was discharged on the basis of his citizenship status, as alleged in paragraph 6.15 of the Complaint, Appendix for Paragraph 6. See Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 476, at 4 (12/1/92).

Accordingly, the only issue remaining for hearing is complainant's claim that he was discharged on the basis of his national origin.

JOSEPH E. MCGUIRE
Administrative Law Judge