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

Richard Becker, Complainant vs. Alarm Device Manufacturing Company, A Division of Pittway Corporation, and District 65-Union, Respondent; 8 USC § 1324b Proceeding; Case No. 89200013.

FINAL ORDER GRANTING RESPONDENT UNION'S MOTION TO DISMISS COMPLAINT AS TO IT, GRANTING IN PART AND DENYING IN PART RESPONDENT UNION'S REQUEST FOR ATTORNEY'S FEES, AND DENYING RESPONDENT UNION'S REQUEST FOR COSTS

Findings of Fact

The original complaint herein alleged that respondents violated in various respects the provisions of 8 U.S.C. § 1324b regarding citizenship status. On August 7, 1989, I dismissed this complaint with respect to allegations of violations more than 180 days prior to August 18, 1988, the date on which complainant's charge was received by the Special Counsel. Under 8 U.S.C. § 1324b(i) and 28 CFR § 68.52(b), any appeal of that order would have had to be filed on or before October 26, 1989. So far as I am aware, no review of that order has been sought. By motion dated September 22, 1989, respondent union sought dismissal as to it of the extant portions of the complaint, and an award of attorney's fees and costs.

The portions of the complaint relating to complainant's April 1986 separation from employment were dismissed in my Order of August 7, 1989. The remaining portions of the complaint relate to alleged subsequent unsuccessful requests by complainant for re-employment by respondent employer. Complainant is a rather inarticulate layman who is not represented by counsel. As I read the various documents which he has sent to me, he argues basically as follows: Respondent union's failure to help him obtain re-employment violated 8 U.S.C. § 1324b because respondent employer's refusal to rehire him was allegedly motivated by his status as a United States citizen and, therefore, violated that statutory provision, and because a duty to provide such help was imposed on re-

spondent union by his membership therein and/or by the union's status as the exclusive collective-bargaining representative of the bargaining unit of which he was a member before his April 1986 separation and would have again been a member if his requests for re-employment had been successful.

Respondent union does not dispute that complainant asked it for assistance in obtaining re-employment with respondent employer and that respondent union failed to honor complainant's request for assistance. Further, respondent union does not appear to dispute complainant's contention that if respondent employer's refusal to rehire complainant violated 8 U.S.C. § 1324b, a prima facie violation of that same provision by respondent union would be made out if it failed to honor a request for assistance, in attempting to induce respondent employer to abide by the law, advanced by an employee with respect to whom respondent union had representative status. Rather, respondent union's resistance to the 8 U.S.C. § 1324b allegations against it is grounded on the claim that ``there is no right under the collective bargaining agreement, and no right under applicable federal labor laws, for [respondent union] to participate in the decision of [respondent employer] to hire, or not hire, any applicant for employment . . . [Respondent union] did not represent the complainant, nor could it legally have represented the complainant, with respect to his alleged requests for rehire subsequent to his termination.''

Attached to respondent union's motion to dismiss is a copy of a collective-bargaining agreement which respondent union implies was in effect at all times relevant here. This agreement includes the following provisions:

> (B) The Employer agrees to use the services of the District 65 Employment Office in hiring new workers. The services of the District 65 Employment Office are available to union and non-union members alike. Considerations such as union membership, union policies, bylaws or union constitutional provisions do not play any part in the section of applicants. The acceptance or rejection of any applicant referred by the District 65 Employment Office will be at the sole discretion of the Employer and will be made on the basis of standards such as efficiency, experience, skills and training . . .
>
> (C) If the District 65 Employment Office fails to supply workers to the Employer within twenty-four hours after such request was made, the Employer may engage such new workers from any other employment office or source . . .

Claimant does not dispute respondent union's assertion that he never sought employment through the District 65 employment office. Laying to one side the apparently undisputed fact that this bargaining agreement was in effect when claimant was hired by respondent employer in December 1985 and until his separation in April 1986, nothing in the documents filed with me indicates

whether claimant knew that this employment office existed, or whether respondent union suggested that he use that office. Claimant does not allege that respondent union's allegedly unlawful conduct after his separation was due to a desire by respondent union to discriminate against applicants for employment because they are United States citizens; nor does complainant appear to contend that respondent union engaged in any affirmative conduct in an effort to induce respondent employer not to rehire him.

Conclusions of Law and Reasons Therefor

A. The Union's Motion to Dismiss

8 U.S.C. § 1324b provides, in part:

> (a)(i) 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) 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 citizen or intending citizen . . ., because of such individual's citizenship status.
>
> (2) EXCEPTIONS.--Paragraph (1) shall not apply to--(A) a person or other entity that employs three or fewer employees . . .

The complaint herein alleges, inter alia, that respondent union violated the foregoing provisions; seeks a remedy under 8 U.S.C. § 1324b(g)(2); and invokes my jurisdiction under 8 U.S.C. § 1324b(e)-(h). The threshold issue presented is whether any conduct by respondent union is subject to such proceedings where (as here) the union is not claimed to have acted either in the capacity of an employer (of, for example, business agents and union organizers) or as a recruiter/referrer. Accordingly, the ensuing discussion does not address the question of whether union conduct in connection with employer violations of 8 U.S.C. § 1324b(a)(1) may give rise to causes of action in forums whose jurisdiction is not controlled by 8 U.S.C. § 1324b.[1]

[1]See Brotherhood of Railroad Trainsmen v. Howard, 343 U.S. 768 (1952); Vaca v. Sipes, 386 U.S. 1717 (1967); N.L.R.B. v. International Longshoremen's Association, Local No. 1581, 489 F.2d 635 (5th Cir. 1974), cert. denied 419 U.S. 1040 (1974); Barton Brands, Ltd. v. N.L.R.B. 529 F.2d 793, 798-799 (7th Cir. 1976); N.L.R.B., v. Local 282, International Brotherhood of Teamsters, 740 F.2d 141, 144-146 (2nd Cir. 1984); Laborers and Hod Carriers Local No. 341 v. N.L.R.B., 564 F.2d 834, 839-840 (9th Cir. 1977); Nedd v. United Mine Workers, 556 F.2d 190, 195, 199-200 (3d Cir. 1977), cert. denied 434 U.S. 1013 (1978); International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 15, AFL-CIO (Gateway Industries, Inc.), 291 NLRB No. 61 (October 17, 1988); Pacific Maritime Association, 209 NLRB 519 (1974).

A natural reading of the foregoing provisions does not suggest that they encompass union participation in an employer's employment practices. I note that when desirous of creating a cause of action against a union for conduct in this area, Congress has at least ordinarily done so in explicit terms. See Goodman v. Lukens Steel Co., 107 S.Ct. 2617, 2619-2620, 2623-2625 (majority opinion), 2633-2635 (dissenting opinion) (1987); Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 52-55 (1954).

Moreover, this natural reading of such provisions is supported by textual analysis as a whole of the Immigration Reform and Control Act of 1986 (P.L. 99-603, 100 Stat. 3359), of which 8 U.S.C. § 1324b is a constituent part, in light of the legislative history and the rules and regulations promulgated in effectuation of that Act. The foregoing provisions forbidding unfair immigration--related employment practices were enacted in response to concerns that the provisions in 8 U.S.C. § 1324a(a) (also a part of the IRCA), which impose sanctions on hiring or retention in employment of unauthorized aliens, would cause or aggravate discrimination against those who appear to be foreign, without regard to whether they are in fact unauthorized aliens. 132 Cong. Rec. H 10, 583 (October 16, 1986); H.R. Rep. No. 3080 (1985) as reprinted in H.R. Rept. No. 99-682 Part 1, at 68 (1986); Klasko & Frye, Employers' Immigration Compliance Guide (1989), § 4.01, p. 4-1 (1989); Godon, 3 Immigration Law and Procedure, § 9.22, p. 9-50.58 (1989). Accordingly, in determining whose actions are controlled by 8 U.S.C. § 1324b, useful guidance is provided by 8 U.S.C. § 1324a, which provides, in part:

> (a)(1) . . . It is unlawful for a person or other entity to hire or to recruit or refer for a fee, for employment in the United States--
>
> (A) an alien knowing the alien is an unauthorized alien . . . with respect to such employment, or
>
> (B) an individual without complying with the requirements of subsection (b) . . .

That subsection (b) requires, inter alia, that ``a person or other entity hiring, recruiting, or referring an individual for employment in the United States'' must attest on a form, and retain that form for a specified period, that he has examined one or more specified types of documents which appear to show that the individual is not an unauthorized alien. Plainly, these inspection and paperwork requirements are designed to discourage the hiring of unauthorized aliens in violation of 8 U.S.C. § 1324a(a)(1)(A), and to assist government officials in determining whether such violations have occurred. Accordingly, I conclude that as to whose conduct is controlled, 8 U.S.C. § 1324a(a)(1), 8 U.S.C. § 1324a(b), and 8 U.S.C. § 1324b(a) are coextensive and coterminous. This equivalence means that if the conduct of a union (when not acting as an em-

ployer or recruiter/referrer) is controlled at all by 8 U.S.C. § 1324b(a), at least under such circumstances the union is subject to the paperwork requirements of 8 U.S.C. § 1324a(b). However, any such requirement would appear to be inconsistent with 8 U.S.C. § 274a.1(d) (e). More specifically, although a union's action in referring or refusing to refer an applicant through an exclusive hiring hall is about as close a connection as a union can have with ``hiring'' or ``hire'' as such words are ordinarily used, and although 8 CFR § 274a.2 effectuates 8 U.S.C. § 1324a by setting forth paperwork requirements for a person or entity ``when recruiting or referring for a fee,'' 8 CFR § 274a.1(d) (e) provides that the terms ``recruitment or referral for a fee'' do not include union hiring halls that refer union members or nonunion individuals who pay union membership dues. Moreover, the contention that 8 U.S.C. § 1324b(a)(1) (directed to ``a person or other entity'') extends to a union's conduct with respect to an employer's employees is difficult to reconcile with 8 U.S.C. § 1324(a)(2)(A), which excepts ``a person or entity that employs three or fewer employees.'' It is highly improbable that Congress intended applicability of § 1324b to turn on how many employees are in the employ a respondent union (not acting as an employer or recruiter-referrer) rather than on how many employees are in the employ of the employer whose employment practices are affected by the union's conduct. Indeed, such an interpretation might render a union with more than three employees (but not acting as an employer or recruiter-referrer) answerable for the employment practices of an employer who is himself excepted from the statute because of the size of his work force.

For the foregoing reasons, I find that the extant portions of the complaint fail to state a cause of action against the union under 8 U.S.C. § 1324b. Accordingly, as to the union the complaint will be dismissed in its entirety.

B. The Motion for Attorney's Fees and Costs

28 CFR § 68.51(c)(1)(D)(v) permits me to ``allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.'' As to alleged violations of 8 C.F.R. § 1324b by respondent union more than 180 days before the Special Counsel's receipt of Becker's charge, I conclude that Becker's argument was ``without reasonable foundation in law and fact.'' More specifically, I note that before Becker filed his complaint, he had been advised by the Special Counsel of the partial dismissal of his charge because of this very timeliness factor. Accordingly, the union is entitled to a reasonable attorney's fee for time spent in connection with this

part of complainant's complaint. See Johnson v. New York City Transit Authority, 116 FRD 394 (E.D.N.Y.). I note that the answer filed by respondent employer dated March 15, 1989, specifically mentioned the 180-day limitations period and requested attorney's fees. In addition, complainant's courtesy copy of a letter from respondent employer to me dated May 15, 1989, set forth the provision in the appropriate rules of practice regarding the award of such fees.

However, my dismissal of the remaining portions of the complaint was based on my interpretation of a relatively new statute, under which there is (so far as I am aware) no decisional precedent squarely in point. Moreover, although I have rejected complainant's tacit assumption that conduct by a union (other than as an employer or recruiter/referrer) could give rise to a cause of action under 8 U.S.C. § 1324b, this assumption was not questioned by respondent union. Accordingly, I conclude that as to this issue (the only issue which I have reached as to allegations not time-barred) the complaint cannot be fairly described as ``without reasonable foundation in law or in fact.'' Accordingly, the union is not entitled to attorney's fees as to the time spent in connection with this part of the complaint.

The request for costs (other than attorney's fees) is denied in its entirety, on the ground that 28 CFR § 68.51(e)(1)(D)(v) does not state that I am empowered to award such costs.

C. Order

1. It is hereby ordered that the complaint against respondent District 65 be dismissed in its entirety.

2. It is hereby ordered that complainant Richard Becker pay attorney's fees to respondent District 65 for time spent in connection with the time-barred portions of the complaint. However, District 65 will not be entitled to attorney's fees unless, within 30 days after the date of this Order, District 65 submits to me and to complainant, as to each of its attorneys (1) the hourly rate claimed, and (2) documented by contemporaneous time records, (a) the date, (b) the billed hours expended, and (c) the nature of the work done. See Hensley v. Ekerhart, 461 U.S. 424, 435, 438 (1983); New York State Association for Retarded Children v. Carey, 711 F.2d 1136, 1147-1148 (2nd Cir. 1983)

3. It is hereby ordered that Local 65's request for attorney's fees be otherwise denied.

This order ``shall be final unless appealed'' within 60 days to a United States Court of appeals in accordance with 8 U.S.C. § 1324b(i), 28 CFR § 68.52(b).

Dated: November 28, 1989.

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