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

Henry O. Akinwande, Complainant v. Rick Weyel, Erol's Inc., Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200263.

FINAL DECISION AND ORDER

(March 23, 1990)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **HENRY O. AKINWANDE**, Complainant.
JACK L. GOULD, Esq., for the Respondent.

Statutory and Regulatory Background

The Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted a prohibition against unfair immigration-related employment practices at Section 102 by amending the Immigration and Nationality Act of 1952 (INA § 274B), codified at 8 U.S.C. §§ 1101 et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides that it is an ``unfair immigration-related employment practice'' to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. . . .'' Section 274B protection from citizenship status discrimination extends to an individual who is a United States citizen or qualifies as an intending citizen as defined by 8 U.S.C. § 1324b(a)(3).

Congress authorized the establishment of a new venue out of concern that the employer sanctions program might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens, are legally in the United States. See ``Joint Explanatory Statement of the Committee of Conference,'' Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), 1986 U.S. Code Cong.

& Admin. News 5840, 5842; Title 8 U.S.C. § 1324b contemplates that individuals who believe that they have been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Special Counsel or OSC). OSC, in turn is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. § 1324b(e)(2).

The statute also explicitly contemplates private actions. If OSC does not, within 120 days following receipt of a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, file a complaint before an administrative law judge with respect to such charge, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

Procedural Summary

Mr. Henry O. Akinwande (Mr. Akinwande, charging party or complainant) in effect charges Rick Weyel and Erol's Inc., with knowing and intentional discrimination in refusing to hire him on the basis of his national origin and/or citizenship status in violation of 8 U.S.C. § 1324b. [For simplicity, Erol's as the employer and Weyel as its agent are treated in this decision and order collectively as Erol's or Respondent].

Mr. Akinwande, a citizen of Nigeria, filed his charge with OSC on December 19, 1988. Upon investigation of Mr. Akinwande's charge, OSC, in a letter dated April 18, 1989, notified complainant that the Office of Special Counsel would not file a complaint on his behalf, but advised him of his right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of the end of OSC's 120-day investigation period, i.e., by July 17, 1989. OSC referred the national origin portion of Akinwande's claim to the EEOC as the appropriate agency with jurisdiction over such charges.

Consistent with 8 U.S.C. § 1324b(d)(2), Mr. Akinwande filed a Complaint with OCAHO on June 8, 1989. By Notice of Hearing to the parties, issued June 20, 1989, OCAHO transmitted the Complaint to Respondent, and advised that I was assigned to the case. Respondent, by pleadings dated July 5, 1989, filed an Answer denying each allegation of the Complaint.

Pursuant to my order issued August 28, 1989 (which provided Complainant a copy of the rules of practice and procedure of this

Office) a Prehearing Conference was held in Falls Church, Virginia on October 11, 1989. At the prehearing conference I advised that I had jurisdiction in this case only with respect to the claim of citizenship discrimination. I rejected Respondent's contention that the Complaint was silent as to citizenship, pointing out, inter alia, that Special Counsel, in rejecting Complainant's charge, dealt with the charge as one of citizenship.

Pursuant to the schedule agreed to during the Conference, an evidentiary hearing was held on December 6, 1989 in Washington, D.C. At the close of hearing Respondent moved for summary decision which I overruled, pending my consideration of the record following receipt of the transcript. I did, however, point out that I was ``very, very doubtful that I can see within the four corners of the record here today a basis for a finding in favor of Mr. Akinwande. But given that he is unrepresented; given that we are still so early in the administration of this statute, I do overrule the motion.'' Tr. at 129.

Recognizing that Complainant is unrepresented, participating pro se, I have gone to great lengths throughout this proceeding to explain in detail our practice and procedure and the governing law. Mr. Akinwande participated throughout in an informed manner in dialogue among the parties and the bench.

Discussion

Both parties waived post-hearing briefing. This decision and order follows:

The initial issue raised by Respondent, whether I have jurisdiction over this case, is resolved in favor of Complainant. Title 8 U.S.C. § 1324b(a)(2)(A) explicitly exempts employers of three or fewer employees from liability under IRCA. Jurisdiction of OCAHO over complaints alleging citizenship status discrimination, therefore, extends only to persons or other entities who employ more than three employees.

By contrast, 8 U.S.C. § 1324b(a)(2)(B) excludes from IRCA coverage complaints of discrimination based on an individual's national origin if the discrimination with respect to that employer and that individual is covered under Title VII of the Civil Rights Act of 1964, i.e., 42 U.S.C. §§ 2000e et seq., which confers national origin discrimination jurisdiction on the Equal Employment Opportunity Commission (EEOC). Under Title VII, an employer is defined to include ``. . . a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .'' 42 U.S.C. § 2000e(b). Since IRCA does not contain

the 20 calendar week durational minimum rule, the Department of Justice does not use that yardstick in counting employees for purposes of determining coverage of section 102, although it does use the 20 calendar week requirement to determine whether the prohibition against duality of national origin claims applies. Preamble, Final Rule promulgating 28 C.F.R. § 44.200(b)(1)(ii), 52 Fed. Reg. 37402, (October 6, 1987).

Jurisdiction of OCAHO over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is necessarily limited to claims against employers of between four (4) and fourteen (14) employees. Since it is undisputed that Respondent employs more than fifteen (15) employees, OCAHO has no jurisdiction under IRCA based on a claim charging Respondent with national origin discrimination.

Complainant invokes jurisdiction of this Office on the ground that he, a permanent resident alien, was refused a job as an Assistant Manager in Training (AMIT) because he was not the ``color or race or the nationality'' that Erol's wanted for persons seeking positions as AMITs. Complaint at para. 5.

Paragraph 2 of the Complaint asserts that Rick Weyel, as agent for Erol's, bears animus against ``blacks and foreigners.'' Akinwande's citizenship status is also implicated by the totality of the Complaint and by OSC's characterization of it. Accordingly, I conclude that I have jurisdiction over Complainant's claim as one of citizenship discrimination. Having found, however, that I lack jurisdiction over any claim of national origin discrimination by Respondent, the only remaining question is whether Complainant has raised and proven any credible discrimination issue arising out of his citizenship status.

After a full evidentiary hearing, I am unable to conclude that Respondent refused to hire Akinwande because of his citizenship status. As in other cases under Section 102 of IRCA, Title VII disparate treatment analysis provides the point of departure whereby liability under Section 102 is proven by a showing of deliberate discriminatory intent on the part of an employer. Statement of President Ronald Reagan upon signing S.1200, 22 Weekly Comp. Pres. Doc. 1534, 1537 (November 10, 1986). A complainant must establish ``knowing and intentional discrimination'' by a preponderance of the evidence, 8 U.S.C. § 1324b(d)(2).

To succeed in a Title VII employment discrimination action a Complainant must (1) establish a prima facie case that a discriminatory act occurred, and (2) meet the evidentiary burden, i.e., burden of persuasion, that allows a court to find the alleged discriminatory act unlawful. The Supreme Court has described the al

location of proof for disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The same burden exists for complaints filed under Section 102 of IRCA. See e.g., U.S. v. Mesa Airlines, Final Decision and Order, OCAHO Nos. 88200001-2, (July 24, 1989) (Morse, J.) Empl. Prac. Guide (CCH) ♀5243, appeal pending, No. 89-9552 (10th Cir. filed Sept. 25, 1989), slip op. at 41. In re Rosita Martinez, U.S. v. Marcel Watch Corp., OCAHO No. 89200085 (March 22, 1990) (Morse, J.).

In McDonnell Douglas, supra the Court set forth the allocation of proof for determining whether or not a discriminatory motive exists: (1) the plaintiff must establish a prima facie case, (2) the defendant must offer a legitimate, nondiscriminatory reason for its action, and (3) the plaintiff must establish that this supposedly legitimate, nondiscriminatory reason was a pretext to mask an illegal motive. Although the burden of proof remains at all times with the plaintiff, Burdine, supra, 253, if a prima facie case is established, the burden of persuasion shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Then, if the defendant is successful in meeting its burden of persuasion, the plaintiff must demonstrate that the reason given by the defendant was in fact pretextual.

In McDonnell Douglas the complainant had the initial burden of establishing a prima facie case of racial discrimination by showing ``(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.

Like the instant action, McDonnell Douglas was a refusal to hire case. Accordingly, the order and allocation of proof discussed in that seminal authority are applicable to the present case. Adapting McDonnell Douglas here, in order to establish a prima facie case of refusal to hire in violation of IRCA, Complainant must show (i) that he was a member of the group of individuals protected by IRCA, (ii) that he was not hired, and (iii) disparate treatment from which I may infer a causal connection between his protected status and the failure to hire.

Here, Complainant has identified himself as among the individuals protected by IRCA, i.e. a citizen of Nigeria, a permanent resident alien eligible for employment in the United States. He claims that in November 1988 while attending a job fair near his home in Beltsville, Maryland, he applied with Erol's for a position of Assist-

ant Manager in Training (AMIT). His application was processed on site by a Ms. Wendy Wormley, an assistant Employment Administrator of Erol's; after an initial interview with Ms. Wormley and subsequent interview with Erol's District Manager, Mr. Rick Weyel, he was refused employment in the AMIT program because Mr. Weyel ``prefers hiring only whites for his own districts.'' Complaint at para. 2.

Complainant, however, has failed to demonstrate disparate treatment from which to infer a causal connection between his status as a permanent resident alien and his being refused employment. Complainant has proven only that he is member of a class protected by IRCA, but not at all, by indirect evidence or otherwise, that there was any causal connection between Erol's refusal to hire him and his protected status as a permanent resident alien.

At hearing, Mr. Akinwande submitted no evidence other than his own assertions to support his claim of disparate treatment arising out of citizenship status. There is no evidence that his citizenship was at issue at any time during the interview process. Although it is disputed whether Mr. Weyel, as interviewer was then aware of Complainant's Nigerian national origin there is no evidentiary predicate for an inference that Respondent was on notice of Mr. Akinwande's citizenship, as distinct from national origin. For all that appears, Complainant failed to meet Respondent's routine and nondiscriminatory AMIT employment qualification criteria.

Failing proof by Complainant of a prima facie case, I need go no further in applying the McDonnell/Burdine analysis to shift the burden of persuasion to the Respondent to rebut their refusal to hire Mr. Akinwande. Nevertheless it is noteworthy that Respondent's proof of the managerial and employee composition at Erol's, including that of those operations within Mr. Weyel's jurisdiction, refutes the claim that non-citizens are excluded in favor of U.S. citizens. For example, Respondent's Exhibit 3 summarizing AMIT hires for the period November 6 1986 to March 10, 1989 who remained active in the AMIT program at the end of that period identifies as aliens three of 38 employees. Further, at hearing, Respondent noted that as of October 1989 out of 42 management positions in Mr. Weyel's district, 22 positions were held by blacks. Tr. at 57.

In sum, there is no showing on this record of an employer preference for U.S. citizen candidates. Cf., U.S. v. Mesa Airlines, supra (employer found to have systematically discriminated against non-U.S. citizens in its hiring policy). Accordingly, I find no basis on which to conclude that Respondent discriminated against Mr. Akinwande on the basis of his citizenship status.

Findings of Fact and Conclusions of Law

Complainant has failed to make a prima facie showing of discrimination based on citizenship status. As previously discussed, because of the number of employees on Erol's payroll, I lack jurisdiction to adjudicate a claim, if any he has, of national origin discrimination. Certainly, I have no jurisdiction with respect to charges of racial discrimination.

There is no glimmer on the record before me that citizenship discrimination is the reason Erol's failed to hire Mr. Akinwande. Viewed in a light most favorable to Complainant, whatever discrimination may be speculated as having played a part in his failure to be hired by Respondent, it was not citizenship status-based discrimination. His Complaint must be dismissed on the merits. See, e.g., Bethishou v. Ohmite Mfg. Co., OCAHO No. 892000175 (August 3, 1989) (Morse, J.). Empl. Prac. Guide (CCH) ♀5244.

Ultimate Findings, Conclusions, and Order

I have considered the pleadings, testimony, evidence, briefs and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. That Henry O. Akinwande is a citizen of Nigeria, admitted for permanent lawful residence in the United States, who completed a declaration of intending citizenship as of December 16, 1988, executed prior to his December 19, 1988 charge to OSC.

2. That after OSC by letter dated April 18, 1989 advised Mr. Akinwande that it had determined not to file a complaint before an administrative law judge with respect to that charge, he timely filed his Complaint.

3. That because Respondent employs more than three individuals I have jurisdiction over so much of that complaint as alleges citizenship status-based discrimination, but none as to national origin-based discrimination. 8 U.S.C. § 1324b(2)(B).

4. That on the basis of the record in this proceeding, I am unable to find by a preponderance of the evidence that Respondent has engaged in or is engaging in an unfair immigration-related employment practice arising out of the citizenship status of Mr. Akinwande. I do determine upon the preponderance of the evidence that Respondent has not and is not engaging in citizenship status discrimination with respect to Mr. Akinwande. 8 U.S.C. §§ 1324b(g)(2)(A) and 1324b(g)(3).

5. This proceeding, including the Complaint, is dismissed on the merits. 8 U.S.C. § 1324b(g)(3). 28 C.F.R. § 68.50(c)(1)(iv).

6. That, pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and ``shall be final unless appealed'' within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated this 23rd day of March, 1990.

MARVIN H. MORSE

Administrative Law Judge