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

Syed Fayyaz, Complainant v. The Sheraton Corporation, Respondent; 8 USC § 1324b Proceeding; Case No. 89200430.

FINAL DECISION AND ORDER ON MOTION FOR SUMMARY DECISION
(April 10, 1990)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **SYED FAYYAZ**, Complainant.
CARL J. MADDA, 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 . . . .'' Discrimination arising either out of an individual's national origin or citizenship status is thus prohibited. 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 established new causes of action out of concern that the employer sanctions program enacted at INA § 274A, 8 U.S.C. § 1324a, might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens of the United States, are lawfully 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). 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).

IRCA also explicitly authorizes private actions. Whenever the Special Counsel does not within 120 days after receiving a charge of national origin or citizenship status discrimination 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. Syed Fayyaz (Fayyaz or Complainant) charges The Sheraton Corporation (Sheraton or respondent) with knowing and intentional citizenship status discrimination for its refusal in or about October 1988 to hire him as a credit manager, in violation of 8 U.S.C. § 1324b. Fayyaz filed a charge of national origin discrimination with OSC on February 22, 1989.

Upon investigation of the Fayyaz charge, by letter dated June 10, 1989, OSC confirmed that it had dismissed and referred to the Equal Employment Opportunity Commission (EEOC) the national origin portion of his charge. OSC wrote in the same letter that on the basis of its investigation ``there is no reasonable cause to believe that you were discriminated against based on your citizenship status. That letter also notified Complainant that OSC would not file a complaint, but advised that he might file one directly with an administrative law judge within 90 days after OSC's 120-day investigation period, i.e., by September 20, 1989. Fayyaz timely filed his Complaint on August 30, 1989.

By Notice of Hearing to all parties, issued September 11, 1989, this Office transmitted the Complaint to Respondent. Respondent timely filed its Answer to the Complaint on September 22, 1989. I held a telephonic prehearing conference on November 1, 1989.

As confirmed by my Prehearing Conference Report and Order of November 6, 1989, Complainant advised during the conference that within the week he would be leaving the country for a year, suggesting that I decide the case ``now.'' As recited in that Report, he appeared to withdraw that request when ``I suggested that if I were

to decide the case at that point I would necessarily rule against him. I told him this was so because the conference was not intended to be an evidentiary hearing and, in any event, he has the burden of persuading me that his citizenship was the basis for his having been rejected by respondent.'' In deference to Complainant's plans, I said I ``would abate scheduling an evidentiary hearing until October 1990, but that I would not preclude either party from filing pleadings (which may or may not dispose of the entire case) in the meanwhile.''

On February 7, 1990, Respondent filed a Motion for Summary Decision with a memorandum and accompanying exhibits, including affidavits, in support. By pleading with an affidavit attached dated February 20, 1990, filed March 14, 1990, Complainant requested that I consider his ``counter Affidavit'' and deny summary decision to Respondent.

Discussion:

Upon consideration of the pleadings and based on the affidavits filed by both parties, although there are distinctions among the factual recollections of the affiants, and the parties disagree as to inferences to be drawn from certain facts, it is my judgment that there is no genuine issue as to any material fact at issue. Accordingly, Respondent's Motion for Summary Decision is granted, as more fully explained below.

The Motion for Summary Decision implicates analogous Title VII case law. 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 allocation of proof for disparate treatment cases in McDonnel 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, OCAHO Nos. 88200001-2, July 24, 1989, 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 Case No. 89200085, March 22, 1990.

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 ille-

gal 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.

It is undisputed that Complainant, a citizen of Pakistan, is an intending citizen of the United States within the meaning of 8 U.S.C. § 1324b(a)(3)(B). There is also no question that Respondent employs more than fourteen employees. As the result, I have jurisdiction over a citizenship based discrimination claim but none over a claim which turns on national origin claims. 8 U.S.C. § 1324b(a)(2).

Complainant was employed by Sheraton at the Karachi Sheraton Hotel as Credit Manager from August 17, 1985 until April 30, 1988, when he resigned his position voluntarily to go to the United States where he had obtained status as a permanent resident alien. At least as early as September 1986, Fayyaz had sought assistance of Sheraton officials in Karachi to locate comparable employment opportunities in the Sheraton North American Division.

Complainant was well recommended for his work as Credit Manager. Dieter Janssen, Sheraton General Manager in Karachi, in a December 2, 1987 memo to Michael D. Cryan, Sheraton's Assistant Comptroller-Operations, wrote that Fayyaz had done ``an outstanding job,'' and wanted to leave Pakistan as soon as possible, but that ``it is very difficult to place any of our senior staff outside Pakistan, since we cannot get work permits/visas in most parts of the world

for them. It is therefore of importance to the Sheraton family to try to assist those who on their own have achieved the necessary Immigration approval.''

It is clear from the Complaint that Fayyaz initially applied for a position in the United States while he was still employed at the Karachi Sheraton. Indeed, I understand his inquiry of September 2, 1986, before enactment of IRCA, to be an application. In any event, Mr. Cryan, in a letter to Complainant at the Karachi Sheraton on June 10, 1987 having considered ``requests to assist in finding you a position within one of our hotels in the United States'' wrote that he had made inquiry on behalf of Fayyaz to Sheraton's North American regional controllers: ``They have responded that, unfortunately, at present there are no openings . . . [but they] will let you know immediately if there are any suitable openings for which you might be considered.''

Jurisdiction under § 1324b is limited to charges which implicate hiring, recruitment or referral for a fee, or discharge. The broad range of compensation, terms, conditions, or privileges of employment are not covered by IRCA as they are, for example, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. Accordingly, viewed as a continuing process, it is reasonable to conclude that Fayyaz applied for a transfer to a position in the United States, an application which remained in effect after his resignation and continued search from within the United States, but the same search nonetheless. In that respect, I have no jurisdiction and the Complaint must be dismissed.

Complainant, however, in effect considers the alleged discrimination as an independent act, apparently arising out of failure to be hired for a position at the Boston Sheraton. During the time period in question, i.e., late Spring and early Summer, 1988, Complainant was living in Chicago. He contends he was turned down in a phone conversation with Elizabeth James, controller at the Boston property. Ms. James says she told Fayyaz a lobby credit manager position was open and that to save him travel cost he could interview for that Boston opening with Karen Conway controller at the Chicago Sheraton Plaza.

According to Ms. Conway she did interview Fayyaz on behalf of Ms. James, at which time he said he preferred to stay in Chicago and accepted the position of night auditor. Complainant flatly contradicts this, saying that only because he had been turned down for the Boston job did he accept the Chicago night auditor position which paid less. In any event, Fayyaz accepted the Chicago position, working as night auditor from July 17, 1988 to September 3, 1988; he submitted an August 3, 1988 letter which said he was re-

signing so he might study ``for the C.P.A. examination'' which he could not do if he continued to work at night.

In my judgment the discrepancies between Complainant's and Respondent's versions of the Boston/Chicago interview/hiring are immaterial. Nothing contained in Complainant's pleadings, attached exhibits or affidavit, gives rise to an inference that he was rejected on citizenship grounds for a position in Boston or elsewhere at the credit manager or lobby credit manager or other level of employment. Indeed it is unclear that he ever specified any particular level or status of position sought. For all that appears, while doubtless he wanted the highest level position available consistent with his training and experience, nothing in the letters or other documents filed with the pleadings confirms that he made plain to Respondent that he expected, or that Sheraton assured him, a position of any particular level or status.

Assuming the facts in the best light for Complainant, however, assuming pay and other differences between a night auditor and credit manager position, I cannot agree with Respondent's contention that as a matter of law, as distinct from one of fact, he obtained in Chicago what he had applied for. Presumably there are substantial differences in status between a night auditor and an assistant credit manager. Nevertheless, I find Complainant misunderstood generalized expressions of interest on the part of Sheraton personnel that he might become suitably employed at Sheraton in the United States as assurances that a position would be forthcoming. Significantly, if, as he says, he was ``flatly turned down'' for the Boston position there is no scintilla of an implication that his rejection was based on citizenship considerations.

Certain it is that Sheraton officials knew of his citizenship status. As already quoted, Dieter Janssen's memorandum of December 1, 1987 unmistakably points to an effort to assist him in full awareness of his alien status. Mr. Cryan's June 10, 1987 letter, referring to Janssen's recommendation, is consistent, apologizing for delay: ``I have taken the liberty of sending your bio-data as well as the recommendation from Mr. Dieter Janssen to the Regional Controllers for North America.'' It strains credulity in light of the filings before me, to suppose that Complainant was rejected by Respondent on citizenship grounds.

Absent a predicate for finding statistical evidence that such word of mouth recruiting was on its face discriminatory, I do not find in Complainant's allegations a factual basis on which to conclude that intentional discrimination occurred. See e.g., Markey v. Tenneco Oil Co., 707 F.2d 172 (5th Cir. 1983). Compare, In re Charge of Maria Valdivia-Sanchez, U.S. v. LASA Marketing Firms, OCAHO Case

No. 88200061, November 27, 1989, Empl. Prac. Guide (CCH) para. 5246, as amended, March 14, 1990. (Where employment agency, through a telephone inquiry, unlawfully refused to interview job applicant on the basis of allegedly inadequate work authorization documents.)

On neither Complainant's or Respondent's factual hypothesis was he rejected on the basis of citizenship considerations for a position in Boston or elsewhere. Complainant's affidavit recites that Ms. James told him she could not offer him an assistant credit manager position ``as according to her Boston is an expensive place.'' Since he was then interviewed in Chicago and was offered a night auditor position the discrimination, if any there were, would be with respect to the level of the position and not generic to Respondent.

There is no evidence that citizenship was at issue at any time during the job search or interview process. It was because Fayyaz had obtained eligibility to work in the United States that Sheraton in Karachi had originally been willing to assist in his job search in the United States. The memo of 12-2-1987, quoted above is significant in this respect. Also, the telex from the controller, Sheraton Karachi, filed among other documents by Complainant with his October 26, 1989 response to the Answer, recites that he is the ``holder of U.S. green card. Finally, in this respect, on his July 14, 1988 application for employment at the Chicago Sheraton Plaza he checked the entry ``I am an immigrant alien.''

Complainant, in short, has failed to demonstrate disparate treatment from which to infer a causal connection between his status as a permanent resident alien and refusal by Sheraton to offer him the employment he expected. Complainant has proven only that he is a member of a class protected by IRCA, but not at all, by indirect evidence or otherwise, that there was any causal connection between his protected status as a permanent resident alien and Sheraton's refusal to hire him in Boston or elsewhere at the level he expected.

Even viewing the Complaint in the broadest sense so as to interpret the alleged discrimination to have occurred after Complainant resigned from Sheraton it is my judgment that no grounds exist on which I might reasonably find that Respondent violated Section 102 of IRCA in respect of this Complaint.

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 further rebut its failure to hire Mr. Fayyaz. Complainant's expectations of a transfer of his job skills to the United States market provided the basis for his

confusion about the way hiring processes work in this country. The precatory language in the various Sheraton communications were no guarantees of a position such that frustration in not obtaining a desired job constitutes a basis, without more, for a judgment that failure to hire implicates unlawful discrimination. I am unaware of precedent in law or reason for the proposition that an individual can claim a right merely having been told that a position is available. See e.g., Akinwande v. Rick Weyel, Erol's Inc., OCAHO Case No. 89200263, March 23, 1990.

As in any employment decision, many factors are evaluated in the hiring decision, including a person's skills, job history, and eligibility for employment. Respondent did hire Mr. Fayyaz for a night auditor position. While the status of this position is presumptively inferior to that of the previous position Complainant held in Pakistan, there is no question that Respondent did hire him for an accounting job from which he resigned only seven weeks after accepting employment. I find no reason to suspect that the difference in status or level between the positions aspired to and the night auditor job is so great as to support an inference that offer of one but not the other connotes unlawful discrimination. Nor, in light of that conclusion, is there a basis to find that failure to have him come to Boston for an interview on the basis it would be too costly for him was a pretext for failure to hire him in Boston. While he joined issue with Respondent on whether he interviewed in Chicago for the Boston job, neither did he insist to Ms. James that he was prepared to come to Boston for the interview.

Moreover, there is no showing on this record of an employer preference for U.S. citizen candidates. Compare, U.S. v. Mesa Airlines, supra (employer found to have systematically discriminated against non-U.S. citizens in its hiring policy). Accordingly, assuming the facts in a light most favorable to Complainant, I am unable to conclude that Respondent discriminated against him on the basis of citizenship status.

Ultimate Findings of Fact and Conclusions of Law

In addition to the findings and conclusions already stated, based on the foregoing, considering the pleadings, including affidavits and other exhibits and attachments, I find and conclude that Complainant has failed to make a prima facie showing of discrimination based on his citizenship status. As previously discussed, I am without jurisdiction to entertain his claim, if any, of national origin discrimination arising out of the instant facts. Here there is no semblance of a claim sounding in citizenship discrimination. Even if Fayyaz had not been hired for any position by Sheraton

where possible job openings had been identified, i.e., not hired for the Chicago opening, there is no glimmer of citizenship discrimination. Having been hired in Chicago, and no basis appearing on which I can conclude that failure to hire him at the higher level was discriminatory, I hold also that I have no jurisdiction with respect to failure by Respondent to promote him once hired.

Whatever redress may be available to Mr. Fayyaz, his grievances against Sheraton are not within the ambit of my jurisdiction over citizenship discrimination because they do not implicate citizenship and do not turn upon his status as an intending citizen. Complainant having failed to set forth specific facts which evidence a prima facie citizenship discrimination claim, I find and conclude that there is no genuine issue of material fact with regard to that claim. Accordingly, Complainant is unable to sustain the burden of proof that any discrimination resulted from his citizenship status.

Dismissal of a complaint on Motion for Summary Decision, authorized by 28 C.F.R. § 68.36, is not a result casually reached. Mindful of the relative strengths of the parties and of Complainant's unrepresented status, I cannot, however, deny the motion unless satisfied that there is a genuine issue of material fact for hearing. I am so satisfied. There is simply no genuine issue of fact as to any conduct by Respondent which implicates the citizenship status of Complainant. It follows that Respondent is entitled to judgment as a matter of law. See 28 C.F.R. § 68.36; Bethishuo v. Ohmite Mfg. Co., OCAHO Case No. 89200175, August 2, 1989, Empl. Prac. Guide (CCH) para. 5244.

Upon the basis of the whole record, consisting of all the pleadings filed by both parties, I am unable to conclude that a state of facts could be demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard required by 8 U.S.C. § 1324b(g)(2)(A).

The Respondent's Motion for Summary Decision is granted; accordingly, no hearing will be held. All motions and all requests not previously disposed of are denied. The Complaint is dismissed. 8 U.S.C. § 1324b(g)(3).

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 10th day of April 1990.

MARVIN H. MORSE
Administrative Law Judge