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

Michael Williamson, Complainant v. Autorama, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89200540.

MARVIN H. MORSE, Administrative Law Judge

Appearances: **MICHAEL WILLIAMSON**, Complainant.
ROBERT M. FRIEDMAN, Esq., on behalf of Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION
(May 16, 1990)

MARVIN H. MORSE, Administrative Law Judge:

Appearances: **MICHAEL WILLIAMSON**, pro se, Complainant.
ROBERT M. FRIEDMAN, Esq., for 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 ``[I]t 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), reprinted in 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).

IRCA also explicitly authorizes private actions. Whenever the Special Counsel does not file a charge of national origin or citizenship status discrimination before an administrative law judge within 120 days after receiving a complaint, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

Procedural Summary:

Mr. Michael Williamson (Williamson or Complainant) charges Autorama, Inc. (Autorama or Respondent) with knowing and intentional national origin discrimination for his dismissal as a new car porter on or about January 11, 1988, in violation of 8 U.S.C. § 1324b. Williamson, a United States citizen, was employed in a probationary status at the time he was fired.

Williamson also filed a charge of national origin discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (EEOC) at its Memphis, Tennessee, office on April 1, 1988. EEOC dismissed his action for lack of reasonable cause on March 31, 1989, determining that he had presented no evidence to confirm allegations of national origin discrimination. An EEOC Determination On Review affirmed the March 31 decision on September 22, 1989.

Complainant next filed a charge with OSC on October 11, 1989. OSC's determination letter to Complainant dated October 18, 1989, did not address the question of timeliness of that filing, although

October 11, 1989 was more than 180 days after the alleged discharge of January 11, 1988. When Williamson filed his initial action with the EEOC on April 1, 1988, there was no agreement between OSC and EEOC preserving the right to make an OSC filing under IRCA by timely filing with EEOC. Under the subsequent Interim Memorandum of Understanding between EEOC and OSC dated May 4, 1988 (53 Fed. Reg. 15,904), a timely filing with one agency satisfies the deadline of the other.

OSC's letter to Williamson of October 18, 1989, recited that it ``lacks jurisdiction over your charge. . . . Under 8 U.S.C. § 1324b(b)(2), no charge of national origin discrimination may be filed with the Office of Special Counsel if a charge based on the same set of facts has been filed with the Equal Employment Opportunity Commission, unless the charge is dismissed as being outside the scope of Title VII of the Civil Rights Act of 1964. . . . Furthermore, this Office has no jurisdiction over race discrimination.''

Although as appears below, I reach the same conclusion as did OSC, the determination letter erroneously advised Complainant that he had until May 10, 1989 to file with the Office of The Chief Administrative Hearing Officer (OCAHO or Office). Clearly, the correct deadline designation should have been May 10, 1990. In any event, he made a timely filing in this Office, i.e., on October 14, 1989, provided that his initial filing with OSC had not been time barred.

For purposes of this decision and order, OSC not having rejected the initial filing as time barred, and Respondent also having raised no objection on that score, I deem his filing before me to be timely, having previously held that requirements as to timeliness are not jurisdictional. See, e.g. United States v. Mesa Airlines, OCAHO Case No. 88200001 and 88200002, (July 24, 1989) appeal pending, No. 89-9552 (10th Cir. filed Sept. 25, 1989) Empl. Prac. Guide (CCH) para. 5243; In re St. Christopher-Ottilie, OCAHO [Subpoena] Case No. 88-2-01-0016A0 (Order Denying Petition to Quash) (May 5, 1988).

Complainant filed an initial Complaint, in letter form, in this Office on October 24, 1989, and an amended Complaint on February 3, 1990. OCAHO's Notice of Hearing was issued February 9, 1990.

Respondent, by counsel, timely filed its Answer to the Complaint, dated February 27, 1990. The Answer was accompanied by a Motion to Dismiss the Complaint Without Further Proceedings and/or Hearing Pursuant to 28 C.F.R. 68.7 [sic] of the interim rules of practice and procedure of this Office, now, 28 C.F.R. § 68.9, as issued at 54 Fed. Reg. 48593 (November 24, 1989). Complainant

filed a letter response to Respondent's Motion dated March 27, 1990, and an additional letter response dated April 2, 1990.

Discussion:

At issue is whether I have jurisdiction to hear this action under Section § 1324b. In U.S. v. Marcel Watch Co., OCAHO Case No. 8920085, (March 22, 1990) Final Decision and Order at 11, I held that ``[J]urisdiction 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 fifteen (15) employees, 8 U.S.C. § 1324b(a)(2)(B) excludes Respondent from IRCA coverage with regard to national origin discrimination claims.'' See also Bethishou v. Ohmite Mfg. Co., OCAHO Case No. 89200175. (August 12, 1989) (Final Decision on Motion for Summary Decision, at 4), Empl. Prac. Guide para. 5244.

Autorama is an employer with more than 14 employees, as conceded in Williamson's charge to OSC, and implicit in EEOC's disposition on the merits of Williamson's charge before that agency. It follows that Respondent is not covered by IRCA with regard to a claim of national origin discrimination.

In Complainant's amended Complaint, he states that he is of ``Black American national origin.'' He asserts at paragraph 6 that ``Autorama knowingly and intentionally fired Michael Williamson because of his national origin in violation of 8 U.S.C. 1324b.'' Since there is no citizenship status discrimination charge before me but only one of national origin discrimination I reach the same conclusion as did OSC. 8 U.S.C. § 1324b(a)(2)(B).

Respondent also contends that because Complainant's charge of discrimination before me is based on precisely the ``same and identical set of facts'' that were brought at the EEOC pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§.2000e et seq, he is excluded from IRCA on the National origin discrimination claim. Where, as here, EEOC has taken up the case on the merits, such dual proceedings are barred by the prohibition against overlap between causes of action before EEOC under Title VII and before administrative law judges under IRCA. 8 U.S.C. § 1324b(b)(2). 28 C.F.R. § 44.300(d).

I agree that the bar to overlap between Title VII and Section 102 of IRCA, 8 U.S.C. § 1324b, effectively prevents me from deciding Complainant's only cause of action, national origin discrimination. As stated in Marcel Watch Co., supra at 11, ``Section 102 of IRCA provides a window through which aggrieved individuals asserting

national origin claims not covered under Title VII may obtain an opening for their charges. This window provides a limited opening for employees of employing entities with 4 through 14 employees. Nothing contained in IRCA, however, confers jurisdiction upon such judges to hear and determine causes of action arising under as distinct from analogy to Title VII.'' As the result, OCAHO has no national origin jurisdiction over Respondent since the EEOC has already determined the identical claim on the merits.

Furthermore, while I am satisfied that Section 1324b applies to citizenship discrimination against United States citizens as well as against covered aliens, nothing in the documents before me raises even a scintilla of evidence that points to citizenship status discrimination. Cf. Marcel Watch Co., supra. Neither Complainant or OSC has specified citizenship status discrimination.

This case is unlike the situation in Marcel Watch Co., supra, where the injured party based her IRCA claim on her status as a U.S. citizen. Without any basis on which to support a claim based on citizenship discrimination, I conclude that Complainant has failed to allege a cause of action cognizable under § 1324b. Accordingly, there is no jurisdiction to hear this case under IRCA, and I am unable to reach the merits of Complainant's claim.

Title 28 C.F.R. § 68.1 provides that ``[T]he Rules of Civil Procedure for the District Courts of the United States shall be used as a general guideline in any situation not provided for or controlled by these rules. . . .'' Because our rules of practice and procedure do not contain any provision for dismissal of a complaint for failure to state a claim upon which relief can be granted, it is appropriate to apply the pertinent Federal Rule. Federal Rule of Civil Procedure (FRCP) Rule 12(b)(6) authorizes dismissal of an action for failure to state a claim. In a case such as the present one where patently Complainant has failed to recite a claim within the jurisdiction of an administrative law judge, it is necessary and just to apply FRCP 12(b)(6). Respondent's Motion to Dismiss is granted.

Attorneys' Fees:

Respondent has requested attorneys' fees based on its status as a prevailing party. Section 102 of IRCA provides for awards, within the judge's discretion, of attorneys' fees ``[I]n any Complaint respecting an unfair immigration-related employment practice. . . .'' In ``the judge's discretion,'' an administrative law judge ``may 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.'' (emphasis added). 8 U.S.C. § 1324b(h).

I am satisfied that Respondent is the prevailing party for purposes of that Section 102 fee shifting provision.

In early decisions under Section 102, specifically 8 U.S.C. § 1324b(h), I stated that it was too soon in the administration of Section 102 to award attorney's fees because of the chilling effect such liability might have on potential complainants. See e.g., Wisniewski v. Douglas School District, OCAHO Case No. 88200037 (October 17, 1988), Empl. Prac. Guide (CCH) para. 5191; Bethishou v. Ohmite Mfg. Co., supra. at 7. Although even now there have been relatively few adjudications under Section 102, it is timely to address the question of fee shifting on its merits.

President Reagan's statement upon signing IRCA into law on November 6, 1986 discussed awards of attorneys' fees under Section 102. Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment. Characterizing the formula ``without reasonable foundation in law and fact'' as a standard applicable to charging parties as well as to employers, the statement provided this analysis:

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> The same standard for imposing attorneys fees applies to all non-prevailing parties. It is therefore expected the prevailing defendants would recover attorneys fees in all cases for which this standard is satisfied, not merely in cases where the claim of the victim, or person filing on their behalf, is found to be vexatious or frivolous.

22 WEEKLY Com. Pres. Doc. 1534, 1535 (Nov. 6, 1986).

Like Section 706(k) of Title VII, as amended, 42 U.S.C. § 2000e-5(k), Section 102 of IRCA was enacted to redress covered discrimination. Title VII, unlike IRCA, however, does not articulate a formula for award of attorneys' fees. Rather, Title VII authorizes a court, in its discretion, to award ``a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.'' 42 U.S.C. § 2000e-5(k).

Title VII jurisprudence, including case law involving attorneys' fees, has become an essential part of our national civil rights legacy. Title VII served as a point of departure in drafting what became Section 102 of IRCA. See e.g Joint Explanatory Statement of the Committee of Conference, Conference Report, Immigration Reform and Control Act of 1986, H.R. Conf. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87-88 (1986) reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842. It is reasonable to conclude, therefore, that Title VII case law with respect to award of attorneys' fees is an important springboard for discussion of attorneys' fees under Section 102.

Section 102, including its fee shifting provision, can be understood as embracing a well-developed body of Title VII jurisprudence from which judges can draw in making determinations about fee awards to a prevailing party. Analysis of Title VII case law on attorneys' fees suggests that in applying the fee shifting authority of Title VII the federal courts have grafted language substantially consistent with the Section 102 formulation as understood by President Reagan. It has been long accepted that the standards laid down by the Supreme Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) are still applied by federal courts in their decisions whether or not to award attorneys' fees to prevailing defendants.

The Court in Christiansburg distinguished an award to a prevailing plaintiff, as had been articulated in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), from that of a prevailing defendant. Under Title VII ``a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances.'' Christiansburg,, supra at 417. In clarifying the rationale for defendants awards in Title VII actions the Court adopted definitions for ``meritless'' actions and also for those which were ``groundless and without foundation'' and ``vexatious.'' Bad faith is not the sole prerequisite for a fee award. Id. at 421. Holding that ``a district court may in its discretion award attorneys' fees to a prevailing defendant in a Title VII case upon finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith,''Christiansburg created a defendant's fee shifting standard. Id.

However, the Christiansburg Court cautioned judges against post-hoc reasoning in determining whether a plaintiff's actions were ``unreasonable.'' ``This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.'' Id. at 422.

In Fort v. Roadway Express, Inc., 746 F.2d 744 (11th Cir. 1982) the Christiansburg standard was applied in a context in which the court explained that the reasonableness of the losing party's continuing to maintain the litigation is a factor to be considered in deciding whether to award attorneys' fees to a prevailing defendant. Where a case may not have been frivolous when it was brought, the time lawyers devoted to factual or legal issues involved may be highly informative, along with ``the novelty and difficulty of the issues litigated,'' in determining an award of attorneys' fees. Id. at 748-49.

The case at hand is disposed of on Respondent's Motion To Dismiss before discovery took place; no depositions or affidavits have been filed. Even so, it is appropriate to determine whether the Complaint was frivolous, unreasonable, or without foundation, when filed. For the reasons discussed below, I conclude it was not.

The initial action before the EEOC was considered on its merits, and thus not deemed frivolous, unreasonable or without foundation by that forum. The EEOC did not dismiss this action; instead it made a determination that the evidence did not establish a violation of Title VII. Just because a defendant prevails does not make the plaintiff's action unreasonable.

That Complainant's sole charge before me, i.e., of national origin discrimination, must be dismissed for failure to state a charge cognizable by an administrative law judge is not, per se, a warrant for fee shifting. Complainant is a pro se litigant asserting a claim of discrimination. See Scarselli v. Reserve Management Co. (S.D. N.Y.), 33 Empl. Prac. Dec. ♀ 33981 (1983) (where claimant, acting pro se in a discrimination suit found to be frivolous, was not required to pay attorneys' fees.) Moreover, Special Counsel, upon declining, on jurisdictional grounds, to file a complaint before an administrative law judge advised Williamson that he may file his own complaint ``directly before'' such a judge. Letter, OSC to Michael Williamson dated October 18, 1989. Given the apparently untutored status of the Complainant, I cannot assume that he would anticipate the subtleties of jurisdiction that might have been clarified had he been represented by counsel or otherwise informed.

Accordingly, in light of Complainant's pro se status, apparent unsophistication in legal matters, and the relatively untested new venue created by IRCA, I cannot find his filing this action unreasonable or, as a prudential matter as distinct from legal niceties, lacking foundation. Accordingly, I deny Respondent's request for attorneys' fees. There is need for caution in awarding attorneys' fees lest those who most need IRCA's protection become vulnerable for what was intended to be an expansion of civil rights remedies. See Soto v. Romero Barcelo, 559 F. Supp. 739, 742 (D. Puerto Rico 1983), where the court cautioned that prevailing defendants in civil rights cases should not be routinely awarded attorneys' fees ``given the purposes of the civil rights laws . . . .''

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 their attachments, I find and conclude that I am without jurisdiction to hear a claim of national origin discrimination where, as here, the employer has more than 14 employees. Moreover, Complainant's charge

arising out of the same claimed discrimination having been disposed of on the merits by EEOC, I am barred from proceeding on his behalf. I conclude also that the pleadings make it clear that Complainant will be unable to establish a prima facie case of citizenship discrimination, ``let alone carry his ultimate burden of proof . . . .'' Scarselli v. Reserve Management Corp., supra, 33 E.P.D. ♀ 33981.

All motions and all requests not previously disposed of are denied. Upon consideration of the complaint and all the pleadings filed, I determine that Complainant is unable as a matter of law to prove by a preponderance of evidence that Respondent has engaged with respect to him in an unfair immigration related employment practice, i.e., discharge from employment as the result of citizenship based discrimination. Accordingly, 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 16th day of May 1990.

MARVIN H. MORSE
Administrative Law Judge