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

Eden Harrison Adatsi, Complainant v. Citizens & Southern National Bank of Georgia (C&S) and Bill Vanlandingham, Respondents; 8 U.S.C. emphasis added 1324b Proceeding, Case No. 89200482.

FINAL DECISION AND ORDER
(July 23, 1990)
SYLLABUS

1. Where complainant fails to establish a prima facie case that respondent has engaged in an unfair immigration-related employment practice, the administrative law judge will dismiss the complaint without requiring respondent to show a legitimate, nondiscriminatory reason for complainant's discharge.

2. An INS receipt date is not conclusive in determining the filing date of a Declaration of Intending Citizen (Form I-772), and therefore does not preclude standing to maintain a charge of citizenship, status discrimination even though such date is subsequent to the filing of the charge with the OSC.

3. Section 102 of the Immigration Reform and Control Act of 1986 (IRCA) limits coverage solely to failure to hire, recruit or refer for a fee, or unlawful discharge; unlike title VII of the Civil Rights Act of 1964, IRCA provides no remedy for discrimination based on retaliation against a citizen or an intending citizen.

MARVIN H. MORSE, Administrative Law Judge

Appearances: **EDEN HARRISON ADATSI,** Complainant.
BRENT L. WILSON Esq. and
A. MELISSA ANDREWS, for Respondents.

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 emphasis added 274B), codified at 8 U.S.C. emphasis addedemphasis added 1101 et seq. Section 274B, codified at U.S.C. emphasis added 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, re-

cruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. . . .'' (Emphasis added). 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. emphasis added 1324b(a)(3).

Congress established new causes of action out of concern that the employer sanctions program enacted at INA emphasis added 274A, 8 U.S.C. emphasis added 1324a, might lead to employment discrimination against those who are ``foreign looking'' for ``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. 1000, 99th Cong., 2d Sess., at 87 (1986). Title 8 U.S.C. emphasis added 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. emphasis added 1324b(e)(2).

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

Procedural Summary:

On May 5, 1989 Mr. Eden Harrison Adatsi (Adatsi or Complainant), a permanent resident alien of the United States and citizen of Ghana, filed a charge with the Office of the Special Counsel (OSC) against Citizens and Southern National Bank (C&S or Respondent) and Bill Vanlandingham alleging an unfair immigration-related employment practice in violation of 8 U.S.C. emphasis added 1324b(a)(1)(B). By letter dated September 1, 1989 OSC advised Adatsi that it had found no reasonable cause to believe he had been terminated because of this citizenship status. OSC informed Adatsi that it would not file a complaint before an administrative law judge but that he could file his own action not later than December 4, 1989.

On September 25, 1989 Adatsi filed a Complaint with the Office of the Chief Administrative Hearing officer (OCAHO) alleging that C&S has discriminated against him on the basis of his citizenship

status in violation of 9 U.S.C. emphasis added 1324b.[1]On October 4, 1989 OCAHO issued its Notice of Hearing advising the parties of my assignment to the case. On November 6, 1989 Respondent timely filed its Answer to the Complaint, in part denying and in part conceding the allegations of the Complaint.

On December 14, 1989 I granted Respondent's Motion to Strike Allegations of Title VII of the Civil Rights Act of 1964. I held that I have no jurisdiction in this case to hear a claim of national origin discrimination because respondent employs more than 14 individuals. 8 U.S.C. emphasis added 1324b(a)(2)(B).

Preparation for an evidentiary hearing included three telephonic prehearing conferences, extensive discovery and other prehearing activity. Thereafter, on June 11, 1990, Respondent filed a Motion to Dismiss the Complaint, or in the alternative for a continuance, for Complainant's failure to comply with discovery orders of April 11, and June 1, 1990. I held an emergency telephonic prehearing conference on June 12 in light of that Motion and overruled it, confirming the previously scheduled hearing date.

The evidentiary hearing was held in Atlanta, Georgia on June 19-20, 1990. At the outset, I denied Respondent's Motion in Limine to preclude certain testimony. Complainant presented seven witnesses, in addition to his own testimony. At the end of Complainant's case, Respondent moved for a directed verdict. I granted the motion on the record, characterizing it as a motion for an involuntary dismissal,[2]and announced that a written Decision and Order would follow receipt of the transcript. Tr. 272-76.

Discussion:

The issue in this case is whether, on April 18, 1989, C&S unlawfully discharged Adatsi from his position as Senior Adjustor in Atlanta because of his citizenship status, in violation of the prohibition against unfair immigration related employment practices. 8 U.S.C. emphasis added 1324b(a)(1)(B). Although I disagree with Respondent that

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[1]Although named in the complaint, Vanlandingham was neither served nor substantially referred to during the proceeding; accordingly, references in this Decision and Order are to C&S as the sole respondent.

[2]The Rules and Practice and Procedure of this Office provide that ``[T]he [Federal] Rules of Civil Procedure [(FRCP)] . . . shall be used as a general guideline in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.'' 28 C.F.R. emphasis added 68.1, 54 Fed. Reg. 48, 593 et seq., Nov. 24, 1989, to be codified at 28 CFR part 68. FRCP 41(b) provides in part: ``Involuntary Dismissal . . . After plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . ''

Complainant lacks standing to bring this action, I hold that Complainant has not proved by a preponderance of the evidence that he was discriminated against because of his citizenship status. Accordingly, for the reasons discussed below, and confirming the decision announced on the record, this Decision and Order grants Respondent's motion for dismissal of the complaint.

Respondent argues that Complainant lacks standing to bring this action because he was late in filing his Declaration of Intending Citizen (INS Form I-772) with the Immigration and Naturalization Service (INS). The I-772 has an INS receipt date of May 11, 1989, six days after Adatsi filed his charge with OSC. Also, the date April 15, 1989 is entered on the I-772 below Complainant's signature. Complainant testified that he delivered it to INS on April 28, 1989.

OSC regulations state that the I-772 must be completed before filing a charge of discrimination. 28 C.F.R. emphasis added 44.101(c)(2)(ii). An agreement between OSC and INS clarifies that the I-772 may be filed with either OSC or INS, and allows OSC to maintain the filed I-772s. 53 Fed. Reg. 40,498 (October 17, 1988). Neither the statute nor the regulation, however, mention that a receipt date stamp is controlling to determine the filing date of the I-772.

Although the preamble to the rulemaking which promulgated the current text of 28 C.F.R. emphasis added 44.101(c)(2)(ii) mentions both completion and filing of I-772, the regulation refers only to completion prior to filing a charge. As the result, it is unclear that there is any requirement that the form be filed at a particular point in time relative to the filing of a charge. In any event, I have no reason to doubt Complainant's testimony that he completed the I-772 on April 15, 1989, and filed it with INS on April 28, 1990, a date prior to filing his charge with OSC. Moreover, that OSC neither challenged Complainant's charge with respect to his standing nor disposed of the case on that ground suggests it did not find that the I-772 had been untimely completed or that its filing had been unduly delayed. Accordingly, I find that Complainant timely completed the requisite Declaration of Intending Citizen and, therefore, has standing to bring this action as an intending citizen of the United States.

In proving a case of citizenship status discrimination under IRCA, the burden is on the party seeking relief to establish by a preponderance of the evidence that the respondent has engaged in an unfair immigration-related employment practice. See 8 U.S.C. emphasis added 1324b(g)(2)(A); Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202 (June 29, 1990); Akinwande v. Erol's, OCAHO Case No. 89200263 (March 23, 1990); U.S. v. Marcel Watch, OCAHO Case No.

89200085 (March 22, 1990); Empl. Prac. Guide (CCH) ♀5263; U.S. v. Mesa Airlines, OCAHO Case No. 88200001 (July 24, 1989); Empl. Prac. Guide (CCH) ♀5243.[3]The administrative law judge must dismiss the complaint if the complainant does not meet that burden. 8 U.S.C. emphasis added 1324b(g)(3); 28 C.F.R. emphasis added 68.50(c)(1)(iv). Here, I find that Complainant has failed to meet his burden. The evidence does not provide a basis for a judgment that Complainant's discharge turned on his citizenship status.

Complainant's case heavily turns on his belief that he should not have been discharged for misconduct. To the extent that his claim depends on a finding that Respondent's stated reason for discharge is a pretext for an unlawful discrimination, Complainant must first establish a prima facie case. See McDonnell-Douglas Corp., supra note 3, at 804 (articulating the issue of pretext as the third prong of the three-part analysis in Title VII cases).

In addition to his own testimony, Complainant presented eight witnesses at the hearing, seven of whom were employees of Respondent. Neither the testimony of Adatsi's witnesses nor his documentary evidence make a prima facie showing that he was discharged from C&S because of his citizenship status. To the contrary, the evidence makes clear that he was discharged for misconduct, a legitimate, nondiscriminatory reason. Several C&S customers complained about Adatsi's treatment of them on the telephone and Adatsi disobeyed his supervisor's orders not to call those customers who had lodged complaints against him. Not one of the C&S personnel knew or was concerned that Adatsi was not a U.S. citizen.

Moreover, an April 4, 1989 warning letter from management to Adatsi placed him on notice that his productivity level was insufficient. Exh. 1. As acknowledged by Helen Kallao, Employee Relations Representative for the Georgis Banking Group, C&S, the fact that Adatsi was the subject of numerous customer complaints during his probationary period was a factor in his discharge. The normalcy of such personnel action legitimizes the discharge absent any credible basis for an inference that the discharge was motivated by citizenship considerations. Even Adatsi could only speculate that citizenship was implicated.

I find that citizenship is in no way implicated in Complainant's discharge. As such, Complainant has failed to make a prima facie

[3] These cases have either adopted or addressed the three-part burden of proof analysis developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), for Title VII cases. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981) (adopting the McDonnell Douglas analysis).

showing of discrimination based on citizenship status. It follows that there is no need to shift the burden to Respondent to show a legitimate, non-discriminatory reason for discharging Complainant, although the evidence indeed shows such a reason.

In addition to his charge of citizenship status discrimination, Complainant claims that he was discharged in retaliation for informing Respondent that he was going to file a complaint with the federal authorities. Tr. 163; Exh. 2. IRCA, however, limits charges under Section 102 solely to those involving hiring, recruitment or referral for a fee, or discharge. 8 U.S.C. emphasis added 1324b(a)(1). Unlike Title VII of the Civil Rights Act of 1964, IRCA provides no remedy for claims of retaliatory activity. Compare 8 U.S.C. emphasis added 1324b(a)(1) with 42 U.S.C. emphasis added 2000e-3(a), as amended March 24, 1972, P.L. 92-261, 86 Stat. 109. I lack jurisdiction to review any such claims made by Complainant.

Complainant has failed to make a prima facie showing that he was discriminated against or that he was treated less favorably than any similarly situated American citizen employee because of his citizenship status. The record clearly reveals that the decision to discharge Complainant was made for legitimate, nondiscriminatory reasons and not as a pretext for citizenship status discrimination. I find that C&S did not discriminate against Adatsi based on his citizenship status and therefore did not violate the prohibition against unlawful citizenship discrimination in 8 U.S.C. emphasis added 1324b. Accordingly, I dismiss the Complaint.

This Final Decision and Order confirms the decision made on the record of hearing on June 20, 1990, granting Respondent's motion for directed verdict. In view of this disposition of the case it is unnecessary to reach the other defenses raised by Respondent.

Ultimate Findings of Fact and Conclusions of Law:

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

1. That Complainant, Eden Harrison Adatsi, qualifies as an intending citizen of the United States.

2. The Complainant was discharged from his employment by C&S in Atlanta on April 18, 1989.

3. That an intending citizen of the United States is entitled, by virtue of the prohibition of 8 U.S.C. emphasis added 1324b against unfair immigration-related employment practices, to protection from citizenship status-based discrimination in discharge from employment.

4. That an INS receipt date stamp on the Declaration of Intending Citizen (INS Form I-772) is not conclusive in determining the filing date of the Declaration of Intending Citizen; neither IRCA nor regulations specify what that date must be in relation to the filing of the I-772.

5. That Complainant has failed to establish a prima facie case that he was unlawfully discriminated against in violation in Section 102 of IRCA.

6. That Complainant has failed to prove by a preponderance of the evidence that Respondent discriminated against him based on citizenship status.

7. That, based on Complainant's failure to meet his burden of proof, I grant Respondent's Motion for Directed Verdict, characterized on the record as a motion for involuntary dismissal.

8. That I have no jurisdiction under IRCA to review claims that an employer has retaliated against an employee for acting in opposition to actions prohibited by IRCA.

9. That the Complaint as to Bill Vanlandingham, not having been served, is dismissed. In view of Complainant's lack of proof, failure to serve Vanlandingham is not prejudicial to Complainant.

10. That, pursuant to 8 U.S.C. emphasis added 1324b(g)(1), this Decision and Order is the final administrative order in this case and ``shall be final unless appealed'' to a United States court of appeals in accordance with 8 U.S.C. emphasis added 1324b(i).

SO ORDERED.
Dated this 23rd day of July, 1990.

MARVIN H. MORSE
Administrative Law Judge