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

Errol Williams, Complainant v. Lucas Associates, Inc. (formerly Lucas & Associates), Respondent; 8 U.S.C. §1324b Proceeding; Case No. 89200552.

DECISION AND ORDER GRANTING IN PART RESPONDENT'S MOTION TO DISMISS, AND ORDER TO SHOW CAUSE

(October 22, 1990)

MARVIN H. MORSE, Administrative Law Judge

SYLLABUS

1. Claim that employment agency has unlawfully discriminated against an individual on the basis of national origin is within the jurisdiction created by Title VII of the Civil Rights Act of 1964 (Title VII) without regard to the number of employees of such agency. While Title VII jurisdiction is limited generally to employers of more than fourteen individuals, that threshold is inapplicable where the alleged discriminator is an employment agency.

2. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), administrative law judges have jurisdiction only over claims of unlawful national origin discrimination where the alleged discriminator employs between four (4) and fourteen (14) individuals. Because IRCA prohibits overlap where jurisdiction is created by Title VII, there is no power under IRCA to adjudicate claims of national origin discrimination where the alleged discriminator is an employment agency regardless of the number of employees.

Appearances: **ERROL WILLIAMS**, Complainant.
REGINALD H. WOOD, Esq., for Respondent.

I. 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 prohibi-

tion 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. . . .'' (Emphasis added). 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 Section 101 of IRCA (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. 1000, 99th Cong., 2d Sess. 87, 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 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).

II. PROCEDURAL SUMMARY

Errol Williams (Williams or Complainant) a citizen of Jamaica and a permanent resident alien of the United States alleges that Lucas Associates, Inc. (formerly Lucas & Associates, Lucas, or Respondent) refused to refer him for employment with Touche Ross & Company or Touche Ross (now Deloitte & Touche) on or about January 27, 1989 in violation of 8 U.S.C. § 1324b. Specifically, Com-

plainant alleges that Respondent committed unfair immigration-related discrimination based on Complainant's citizenship status and his Jamaican national origin.

Complainant timely filed a charge of discrimination dated April 4, 1989 with OSC on May 4, 1989. On July 21, 1989 Special Counsel, by letter, determined that there was ``no reasonable cause to believe that the charge of citizenship status discrimination is true.'' OSC also declined consideration of the national origin portion of the charge stating it lacked jurisdiction over employers covered by Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2. Complainant was advised by that letter of his right to bring a private action which would be timely if filed not later than November 30, 1989.

On October 30, 1989 Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). An Amended Complaint was filed on February 20, 1990, at which time I was assigned this case.

By order dated May 25, 1990 Respondent was granted an extension of time for filing its answer. On June 29, 1990 Respondent filed an Answer and Motion to Dismiss for Lack of Subject Matter Jurisdiction or Alternatively for Failure to State a Claim Upon Which Relief Can be Granted (Motion). I issued an Order of Inquiry (Order) on August 20, 1990 in which I specified certain questions to be answered and documents to be provided by the parties. Complainant has replied neither to the Motion nor to my Order. In my Order to Show Cause I am providing Complainant an opportunity to explain his failure to have replied as an alternative to dismissing his Complaint in its entirety at this time. For the reasons discussed below, this decision and order disposes entirely of so much of the Complaint as alleges national origin discrimination.

III. DISCUSSION

A. National Origin Jurisdiction

Complainant alleges that Lucas Associates, Inc. denied him a job referral because of his Jamaican national origin and his citizenship status. IRCA authorizes causes of action arising out of national origin discrimination against persons or other entities who employ between four (4) and fourteen (14) individuals. 8 U.S.C. § 1324b(a)(2). See Williamson v. Autorama, OCAHO Case No. 89200540 at 4 (May 16, 1990); U.S. v. Marcel Watch Corp., OCAHO Case No. 89200085 at 11 (March 22, 1990) amended (May 10, 1990); Wisniewski v. Douglas County School District, OCAHO Case No. 88200037 at 3 (October 17, 1988).

Section 102 of IRCA makes plain that national origin discrimination covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., is outside IRCA jurisdiction. IRCA prohibits overlap with the national origin jurisdiction of the Equal Employment Opportunity Commission (EEOC) established by Title VII. 8 U.S.C. § 1324b(a)(2)(B).

To date, national origin discrimination cases under IRCA have generally turned on the jurisdictional issue of whether an employer employs more than fourteen (14) individuals. If such a finding is made, the IRCA national origin discrimination claim will be dismissed by the administrative law judge because the national origin charge is covered by Title VII, Section 703(b), 42 U.S.C. § 2000e(b). See Williamson, OCAHO Case No. 89200540; Ndusorouwa v. Prepared Foods, Inc., OCAHO Case No. 89200191 (July 3, 1990); Bethishou v. Ohmite Mfg. Inc., OCAHO Case No. 89200175 (August 2, 1989).

This is a case of first impression charging an employment agency with national origin discrimination under IRCA. While Title VII jurisdiction is limited generally to employers of more than fourteen (14) individuals, analysis of Title VII informs that this threshold is inapplicable where the alleged discriminator is an employment agency.

The legislative history reflects congressional intent that IRCA ameliorate the ``inadequacy of current law to protect individuals from the potential act of discrimination that may uniquely arise from the imposition of [employer] sanctions.'' House Committee on Education and Labor Report, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 2, at 12, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5761. IRCA would only fill the gap in Title VII jurisdiction. Recognizing that Title VII generally imposes a numerical threshold of fifteen (15) employees for national origin discrimination actions against employers, Section 102 of IRCA national origin jurisdiction encompasses employers who employ between three (3) and fourteen (14) employees. 8 U.S.C. §§ 1324b(a)(2)(A) and (B).

IRCA explicitly limits national origin jurisdiction to claims of discrimination that are not covered by Section 703 of Title VII. 8 U.S.C. § 1324b(a)(2)(B). While Title VII Section 703(a) applies only to employers of fifteen (15) or more individuals, Section 703(b) of Title VII provides, without any words of limitation, that ``It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against any individual because of his . . . national origin . . . .'' 42 U.S.C. § 2000e-2(b), (emphasis added).

``Employment agency'' is defined at Section 701(c) of Title VII: ``The term `employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.'' 42 U.S.C. § 2000e(c). This definition is separate and apart from the term ``employer'' which includes in its definition the numerical threshold of fifteen (15) employees. Section 701(b), 42 U.S.C. § 2000e(b). Based on the record before me I find that Lucas Associates, Inc., is an employment agency within the parameters of Title VII, Section 701(c).

It appears unmistakable from the foregoing analysis that, for Title VII purposes, national origin jurisdiction attaches in the case of employment agencies without inquiry as to the number of employees. Cf. City Comm'n. on Human Rights v. Boll, 8 F.E.P. 1139 (N.Y. Sup. Ct. 1974) (one individual who counseled and referred male graduates of the Harvard Business School was determined to be an ``employment agency'' within the meaning of analogous New York Human Rights law.) A leading commentator agrees: ``a single person may be an employment agency within the meaning of § 701(c).'' B. Schlei and P. Grossman, EMPLOYMENT DISCRIMINATION LAW at 657 (1983).

I conclude also that the prohibition of IRCA against unfair immigration-related employment practices with respect to ``recruitment or referral for a fee,'' 8 U.S.C. § 1324b(a)(1), is the IRCA violation implicated in the present case, and that ``a person or other entity'' as so described in IRCA is an employment agency for Title VII purposes. It appears, therefore, that the congruence of Title VII and Section 102 of IRCA with respect to employment agencies is such that there is no national origin jurisdiction under IRCA for national origin based discrimination claims against employment agencies.[1]

Accordingly, I hold that employment agencies are exceptions to IRCA's national origin jurisdiction. Employment agencies are not persons or entities covered by IRCA with regard to claims of national origin discrimination. Cf. U.S. v. LASA Marketing Firms, OCAHO Case No. 88200061 (November 27, 1989) (where there was no claim of national origin discrimination under IRCA, but the employment agency was found liable for citizenship based discrimination). Thus, while they are covered employers under IRCA for citi-

[1] Mr. Williams does not lack a venue in which to seek a remedy for the alleged national origin discrimination charge. The Office of Special Counsel's July 21, 1989 determination letter reflects that OSC referred Complainant's national origin discrimination claim to the Equal Employment Opportunity Commission (EEOC). See 8 U.S.C. § 1324b(b)(2).

zenship discrimination claims, 8 U.S.C. § 1324b(a)(1), employment agencies are not subject to IRCA's national origin jurisdiction.

Having concluded that employment agencies are not covered by IRCA with regard to national origin discrimination, I dismiss Complainant's claim of national origin discrimination for lack of jurisdiction.

B. Fee Shifting Denied

Respondent's Answer and Motion to Dismiss asks for an award of attorney's fees pursuant to 8 U.S.C. § 1324b(h), specifically requesting a finding that Complainant's ``argument is without reasonable foundation in law and fact.'' Respondent correctly quotes the fee shifting authorization of Section 102 in favor of prevailing parties. Subsection (h) provides explicitly, however, that ``an administrative law judge, in the judge's discretion, may allow . . .'' a reasonable attorney's fee.

That Complainant's charge of national origin discrimination is dismissed for lack of jurisdiction 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., 33 Empl. Prac. Dec. para. 33981 (S.D. N.Y. 1983) (where claimant, acting pro se in a discrimination suit found to be frivolous, was not required to pay attorney's fees.) Moreover, Special Counsel, upon declining on jurisdictional grounds to file a complaint before an administrative law judge, advised Williams that he may file his own complaint ``directly before'' such a judge. Letter, OSC to Errol L. Williams, dated July 21, 1989. Given the apparently untutored status of 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 do not find his filing this action unreasonable or, as a prudential matter as distinct from legal niceties, lacking foundation. Williamson v. Autorama, OCAHO Case No. 89200540 at 8 (May 16, 1990). Upon consideration, Respondent's request is denied with respect to the claim of national origin jurisdiction.

There is need for caution in awarding attorney's 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 pur-

poses of the civil rights laws. . . .'' Although this decision and order disposes solely of the national origin portion of the Williams' Complaint, I anticipate, absent persuasive argument to the contrary, that I would reach a similar result as to fee shifting with respect to the citizenship discrimination issue in the event that remaining aspect of the Complaint should also be dismissed.

IV. ORDER TO SHOW CAUSE WHY CITIZENSHIP DISCRIMINATION CLAIM SHOULD NOT BE DISMISSED

In an Order of Inquiry issued August 20, 1990 I requested of both parties specific information and documentation to be filed by September 7, 1990, relating to so much of the Complaint as alleges citizenship-based discrimination. Respondent timely replied and filed affidavits in support of its Motion to Dismiss. To date Complainant has failed to reply.

Complainant is advised that I will accept a response to Respondent's Motion to Dismiss for Failure to State a Claim provided that Complainant shows good cause by way of explanation for his failure to have timely responded to my order of August 20, 1990. The rules of practice and procedure of this Office contemplate that a default decision may be entered against any party failing, without good cause, to appear at a hearing. 54 Fed. Reg. 48,593, 48,604 (November 24, 1989) (to be codified at 28 C.F.R. § 68.35(c)). Complainant is cautioned that failure to respond and to reasonably explain delay may result in my treating Complainant as having failed, without good cause, to appear at a hearing, and a decision may be rendered against him.

This Order affords Complainant until November 9, 1990 to respond to Respondent's Motion and my August 20th Order. Title 28 C.F.R. §§ 68.35 (b) and (c) authorize entry of a decision and order dismissing a complaint and finding a complainant in default for failure to respond to a pretrial order. See U.S. v. Nu Line Fashions, Inc., OCAHO Case No. 89100566 (March 30, 1990) and Troncoso v. Ferlin Service Industries, Inc., OCAHO Case No. 88200235 (December 5, 1989) (default judgments entered for failure to respond to pretrial order). See also Fed. R. Civ. P. 41(b) made applicable to proceedings before administrative law judges by 28 C.F.R. § 68.1, (a complaint may be involuntarily dismissed for failure to comply with an order); Cascante v. Kayak Club, OCAHO Case No. 89200530, (Order Dismissing Action for Lack of Prosecution Pursuant to FRCP Rule 41(b)) (August 27, 1990); Cf. Banuelos v. Transportation Leasing Co., et al., OCAHO Case No. 89200314 (September 10, 1990) (Decision And Order Dismissing With Prejudice Complaint Against Respondent Bortisser Travel Service) (failure to

comply with judge's order resulted in sanction of dismissal of a respondent against the Complainant).

V. ULTIMATE FINDINGS, CONCLUSIONS AND ORDER

I have considered the pleadings and affidavits of the parties. Accordingly, and in addition to the findings and conclusions already specified, I make the following determinations, findings of fact and conclusions of law:

1. That the entire record on which this Decision and Order is based consists of the pleadings, including attachments.

2. That Lucas Associates, Inc. recruits or refers for a fee, and, as such, is an employment agency.

3. That there is no IRCA national origin jurisdiction with respect to an employment agency since such a person or entity is subject to the jurisdiction of Title VII, Section 703, 42 U.S.C. § 2000e-2.

4. That I dismiss the claim of national origin discrimination for lack of jurisdiction.

5. That the request for fee shifting pursuant to 8 U.S.C. § 1324b(h) is denied as to the national origin discrimination claim.

6. That pursuant to 8 U.S.C. § 1324b(g)(1), this Decision and Order is the final administrative order with regard to the claim of national origin discrimination 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 22nd day of October, 1990.

MARVIN H. MORSE
Administrative Law Judge