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

Carlos Alfredo Osorno, Complainant v. Cesar Geraldo, Owner, Reliable Graphics, Inc., Respondent; 8 U.S.C. 1324b Proceeding; Case No. 90200153.

ORDER GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **CARLOS ALFREDO OSORNO**, pro se Complainant
WILLIAM E. HARRIS, Esquire for Respondent.

I. INTRODUCTION

In the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress prohibited the hiring, recruiting, or referral for a fee, of aliens not authorized to work in the United States, and provided for civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

As a complement to the employer sanctions provisions, section 102 of IRCA, section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. § 1324b, these antidiscrimination provisions were passed to provide relief for those employees or potential employees who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent.

The aims of IRCA are thus dual in nature. The plan seeks to prevent employers from hiring unauthorized workers, but is alterna-

tively designed to prevent employers from being overly cautious or zealous in their hiring practices by avoiding certain classes of employees or treating them in a discriminatory fashion.

Title 8 U.S.C. § 1324b dictates which classes of employees are provided protection under the Act. These include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who evidence their intention to become citizens.

The IRCA legislation expanded the national policy on discriminatory hiring practices, found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Claims under Title VII did not raise a distinction between national origin and alienage discrimination. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973). Further, Title VII provided for claims solely against employers of 15 or more employees. Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business, in order to avoid overlap with Title VII claims.

Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three, but less than 15 employees. This section also fills in the gap left in Title VII by allowing for causes of action based upon citizenship discrimination against all employers of more than three employees.

IRCA authorizes individuals to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the individual. If the OSC does not file such a charge within 120 days of receipt of the claim, the individual is authorized to file a claim directly with an Administrative Law Judge (ALJ). 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(2).

II. PROCEDURAL HISTORY

Consonant with the statute and regulations, on or about August 14, 1989, Carlos Alfredo Osorno filed a Complaint with the OSC, alleging that Reliable Graphics, Inc. had discriminatorily terminated Mr. Osorno on the basis of his Colombian national origin and citizenship status. A Declaration of Intending Citizen, signed by Carlos Alfredo Osorno, and received by OSC on August 1, 1989, is also on file, along with letters from Mr. Osorno describing his termination.

On October 31, 1989, the OSC responded by letter to Mr. Osorno, stating that the OSC would not file a complaint regarding this

matter with OCAHO. The OSC informed Mr. Osorno that he could file a Complaint directly with an ALJ, if filed not later than March 12, 1990. Complainant's charge form was also apparently forwarded to the Equal Employment Opportunity Commission by OSC, for investigation of a claim of national origin discrimination. The EEOC responded in a letter dated November 17, 1989, that it had no authority to investigate the claim, as the allegations surrounding Mr. Osorno's termination dealt with his ``non participation in drug use with respondent'' which is non-jurisdictional with the EEOC.

On May 4, 1990, Complainant Osorno filed a Complaint, dated April 27, 1990, with OCAHO against Cesar Geraldo, Owner, Reliable Graphics, Inc., Respondent. Complainant alleges that he was discriminated against because of his citizenship status as a result of Respondent's action in terminating his employment. The allegations are typed onto a complaint form which does not contain any explanatory language supporting Complainant's claim. The letters sent to OSC by Complainant were attached to the Complaint form when received by my office, and were considered to be a part of the Complaint.

On June 6, 1990, OCAHO issued a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices. This Notice provided a 30-day time limit in which Respondent could file an Answer, and set a hearing location for this matter in or around Van Nuys, California, on a date to be determined.

On July 9, 1990, Respondent, by and through counsel, William E. Harris, filed an Answer to the Complaint, specifically admitting or denying, or stating it was without sufficient information to answer, each allegation. Respondent also asserted as affirmative defenses that Mr. Osorno was terminated for cause, and that it had a policy of equal employment which resulted in a staff of predominantly foreign employees.

On October 4, 1990, a pre-hearing telephone conference was held. Complainant indicated that despite his efforts, he had been unsuccessful in obtaining legal representation. Counsel for Respondent expressed his intent to file a motion to dismiss the action.

On October 16, 1990, Respondent filed a Motion for Judgment on the Pleadings Based Upon Claimant's Failure to State a Claim [Rule 12(b)(6)]. On October 18, 1990 Complainant submitted a letter requesting that I not dismiss the Complaint. I issued an Order to Show Cause Why Motion for Judgment on the Pleadings Should not be Granted on October 19, 1990, inviting Complainant to respond in a more satisfactory and explanatory fashion. Complainant provided another letter on October 25, 1990, requesting that I deny Respondent's motion.

On November 5, 1990 Respondent submitted an ex parte motion, requesting to amend its motion of October 16, 1990. Respondent stated that it inadvertently referred to Federal Rule of Civil Procedure 12(b)(6), when the proper Rule relating to this motion is 12(c). Respondent explained that the motion was correctly based upon Rule 12(b)(6) for failure to state a claim, however, once pleadings are closed, this type of motion can only be brought as a motion for judgment on the pleadings under Rule 12(c). Respondent requested to change the title on the original motion as well as three places in the body of the motion to conform the motion to the Federal Rules of Civil Procedure. Complainant has not responded to this motion as of yet.

III. LEGAL ANALYSIS

The basis for Respondent's motion is that Complainant has failed to state a claim for which relief can be granted. Respondent's motion, as amended, correctly sets out the manner in which such a motion may be brought.

According to Rule 12 of the Federal Rules of Civil Procedure, a respondent may frame the defense of failure to state a claim in several ways. However, the usage and applicability of such a defense varies according to the stage in the proceeding in which it is brought. Rule 12(b) provides that a defense of failure to state a claim upon which relief can be granted is to be brought prior to a responsive pleading. The most appropriate time is generally prior to answering the Complaint. It is difficult to frame a responsive pleading when the complaint does not set forth sufficient facts to support an allegation for which relief should be granted. See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987).

In this case, the pleadings were closed prior to Respondent bringing the motion. This is not fatal, however. The Respondent is not precluded from bringing this defense after answering. Rule 12(h)(2) preserves this defense by permitting it to be brought in a motion for judgment on the pleadings. See Thomason v. Nachtrieb, 888 F.2d 1202 (7th Cir. 1989). A Rule 12(c) motion for judgment on the pleadings may be brought at any time after the pleadings are closed, so long as it does not unduly delay the proceedings. See Savina v. Gebhart, 497 F. Supp. 65 (D. Md. 1980).

Respondent's amended motion correctly reflects the proper method for bringing a motion for failure to state a claim and I accept it as a motion for judgment on the pleadings. Therefore, Respondent's motion to amend its original motion of October 16, 1990

is granted and the changes requested are accepted and hereby incorporated into the original motion.

Motions for judgment on the pleading for failure to state a claim are disfavored in the law. Hall v. City of Santa Barbara, 813 F.2d 198, 201 (9th Cir. 1986), amended by, 833 F.2d 1270, 1274 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988). The United States Court of Appeals, Ninth Circuit, has stated that dismissal is unwarranted unless `` `it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' '' Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989) (quoting Gibson v. United States, 781 F.2d 1334, 1337 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987)). See also Conley v. Gibson, 355 U.S. 41 (1957).

The complaint should not be dismissed simply because the court does not believe the complainant will succeed, or because it does not appear that the complainant is entitled to the relief requested. The court is to analyze the allegations presented in the complaint to determine if they would support relief on any theory, not just the theory advanced by the complainant. When the theory is novel, the court should be exceptionally hesitant to grant a dismissal on the basis of the pleadings. See generally C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1357 (1990).

When considering a judgment on the pleadings, only the contents of the complaint are reviewed.[1]The allegations are accepted as true and are construed in the light most favorable to Complainant. See Abramson v. Brownstein, 897 F.2d 389 (9th Cir. 1990); Love, 871 F.2d at 1491. A Rule 12(b)(6) motion does not provide the court with discretion to dismiss or not, since it is an issue of law. Even if, by applying liberal pleading standards, the complaint is formally insufficient, the motion must be granted. See Wright & Miller, supra.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the present case, I have carefully reviewed the Complaint filed by Complainant as well as the letters and documents attached to the Complaint. My examination of the Complaint reveals no theory or claim for which Complainant is entitled to redress through this administrative channel. I have looked closely at the factual allegations advanced by Complainant, I have taken them as true, and unfortunately do not find anything to support his bald allegation of citizenship discrimination.

[1]The motion for judgment on the pleadings based upon a failure to state a claim may also be treated as a motion for summary decision, if matters outside the pleading are presented and considered by the court. See Fed. R. Civ. Proc. 12(b). This is not such a case.

I have considered the fact that Complainant is acting pro se, and has not precisely adhered to the procedural rules regarding the proper filing of a Complaint. Complainant's failures in this regard, however, go beyond mere technical violations. Complainant's Complaint and accompanying documentation are completely devoid of any supportable allegations of citizenship discrimination by Respondent.

If taken as true, the factual allegations put forth by Complainant would support theories that Complainant was terminated by Respondent because he refused to engage in drug use with Respondent's employees, or that he was terminated because he injured his back. Neither of these theories constitutes a claim of an unfair immigration-related employment practice by Respondent. Therefore, they are not triable in this jurisdiction.

I have provided Complainant with an opportunity to establish, if he could, that Respondent's motion should not be granted. Again, Complainant conclusorily stated that he was terminated based upon his Colombian citizenship. The factual allegations in the Complaint just do not support such a conclusion, or even an inference that discrimination has occurred. I have no choice but to grant Respondent's motion since the pleading is clearly insufficient.

It is appropriate, however, that I grant Complainant leave to amend his Complaint. Amendments are advisable following a dismissal for failure to state a redressable claim, unless it is clear that the claim is completely frivolous and without merit. See Udom v. Fonseca, 846 F.2d 1236 (9th Cir. 1988); Albrecht v. Lund, 845 F.2d 193 (9th Cir. 1988), aff'd, 915 F.2d 433 (9th Cir. 1990). Although it appears that Complainant does not have a meritous claim based upon the Complaint submitted, I do not wish to deprive Complainant of the opportunity to present a claim based upon citizenship discrimination, if he can do so in an appropriate fashion.

ACCORDINGLY,

1. Respondent's motion for judgment on the pleadings based upon Complainant's failure to state a claim under Rule 12(b)(6) is hereby GRANTED without prejudice.

2. Complainant is given leave to amend the Complaint within 20 days. Any such amendments must adhere to the Rules of Practice and Procedure, 28 C.F.R. Part 68, and must be received in my office no later than the close of business December 26, 1990.

3. Complainant's Complaint, dated April 27, 1990, is hereby dismissed.

4. The hearing to be scheduled in or around Van Nuys, California is cancelled.

IT IS SO ORDERED: This 5th day of December, 1990, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
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