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

In Re Charge of Jose Antonio Ordonez

United States of America, Complainant v. Educational Employment Enterprise, et al, Respondents; 8 U.S.C. 1324b Proceeding; CASE NO. 90200242.

FINAL DECISION AND ORDER GRANTING MOTION FOR REMEDIES AND GRANTING IN PART MOTION FOR ATTORNEYS FEES

E. MILTON FROSBURG, Administrative Law Judge

Appearances: **DANIEL W. SUTHERLAND**, Esquire
for the Office of Special Counsel for Immigration
Related Unfair Employment Practices
CHARLES WHEELER, Esquire and VIBIANA ANDRADE, Esquire
for the National Immigration Law Center

I. PROCEDURAL SUMMARY

The Immigration Reform and Control Act of 1986 (IRCA), at Section 102, enacted Section 274B of the Immigration and Nationality Act of 1952, (the Act), 8 U.S.C. Section 1324b, introducing a program designed to prevent discrimination in employment based upon an individual's citizenship or national origin.

On August 3, 1990, the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC) filed a Complainant against Educational Employment Enterprise, Entertainment Production Enterprise, William Clay, Individually and in his Capacity as Owner/Operator of Educational Employment Enterprise and Entertainment Production Enterprise, and Linda Martin, Individually and in her Capacity as an Owner/Operator of Educational Employment Enterprise and Entertainment Production Enterprise,

(Respondents), alleging that Respondents refused to hire Jose Antonio Ordonez because of his citizenship status, in violation of IRCA.

The Complaint alleged that Mr. Ordonez applied for a position as a receptionist/office worker for Respondents on or about July 18, 1989, but that Mr. Ordonez was refused a job because he was not a United States Citizen or a permanent resident alien. The Complaint alleged that Mr. Ordonez was authorized to accept employment in the United States at the time of this alleged discriminatory act and had been granted asylum by the Department of Justice on August 5, 1988. Complainant also alleged that Respondents hired an employee with qualifications similar to Mr. Ordonez subsequent to their refusal to hire him.

By Notice of Hearing dated August 8, 1990, Respondents were advised of the filing of the Complaint, my assignment to the case, the opportunity to answer within thirty (30) days after receipt of the Complaint, the possibility of a judgment by default being entered against them if no answer was filed, and the approximate location for a hearing to be scheduled in or around Los Angeles, California.

On August 14, 1990, I issued a Notice of Acknowledgment indicating receipt of this case in my office, and advising Respondents of the necessity of filing an Answer within thirty (30) days of receipt of the Complaint. No Answer was ever received in this office from Respondents.

By Motion for Default Judgment dated October 3, 1990, Counsel for Complainant asked that Respondents be found in default for failure to answer or otherwise defend within thirty days after service of the Complaint.

On October 9, 1990, I issued an Order to Show Cause Why Default Judgment Should Not Issue, inviting Respondents to file a motion for leave to file a late answer, with an explanation of their failure to timely answer the Complaint. In said Order I granted Respondents until October 24, 1990 in which to submit the appropriate pleadings. I indicated that I would consider the Motion for a Default Judgment if no documents were received in my office by that date.

On October 30, 1990, I granted Complainant's Motion for Default Judgment, no answer or other responsive pleading having been received from Respondents pursuant to my previous orders. I deemed all allegations as set forth in the original Complaint as admitted by Respondents, pursuant to my authority under 28 C.F.R. Part 68.8(c)(1). In said Order I assessed a civil penalty of $1,000.00 (one thousand) against Respondents, yet retained jurisdiction of the matter to permit Complainant an opportunity to support its request for back-pay and other remedies. I Ordered that all support-

ing documents and affidavits be received in my office no later than November 16, 1990.

Subsequent to my Decision and Order Granting Complainant's Motion for a Default Judgment, on November 15, 1990, Complainant filed a Motion for Remedies for Jose Antonio Ordonez with supporting memoranda, and Ordonez' attorneys filed a Motion for Attorney's Fees, also with supporting memoranda. Respondents have failed to respond to either of these Motions.

II. LEGAL ANALYSIS

a. Remedies for Jose Antonio Ordonez

Reinstatement and back-pay awards are authorized in the discretion of the Administrative Law Judge under 8 U.S.C. Section 1324b(g)(2). See also 28 C.F.R. Part 68.50(c)(1)(ii). The purpose of these types of remedies is to place the discriminatee in the position he would have been in had the discriminatory act not occurred. See Jesse C. Jones v. De Witt Nursing Home, OCAHO Case No. 88200202, (June 29, 1990). According to Ordonez' Declaration and the Motion for Remedies, a request for reinstatement and restoration of seniority is not being made. Ordonez voluntarily removed himself from the labor market when he entered the seminary on or about October 26, 1990. He does not, therefore, seek employment at this time. Based upon Ordonez' current status and desires, I will not order Respondents to hire and restore lost seniority to Ordonez, despite my authorization to do so.

Back-pay is typically ordered to compensate a discriminatee for earnings lost as a result of unlawful discrimination. De Witt Nursing Home at 21 (citing N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966)). Section 1324b(g)(2)(C) of Title 8 indicates, however, that ``[i]nterim earnings or amounts earnable with reasonable diligence by the individual . . . discriminated against shall operate to reduce the back pay otherwise allowable under such subparagraph.'' See De Witt Nursing Home at 21 (citing Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)) (Prevailing discriminatee has duty to mitigate damages by reasonable diligence).

Complainant seeks back pay remedies in the amount of $8,777.33 (eight thousand seven hundred seventy-seven dollars and thirty-three cents) for the period beginning July 18, 1989 through June 15, 1990. Complainant calculates this amount based on a 40-hour work week at $5.00 per hour, the amount Respondents told Ordonez they were paying for this position. See Declaration of Jose Antonio Ordonez at 1. At this rate of pay, Complainant alleges that

Ordonez would have earned $9,520.00 (nine thousand five hundred twenty) during the period for which back pay is requested.

Complainant correctly notes in its Memorandum in Support of Motion for Remedies that IRCA regulations impose a reduction to back-pay remedies equal to the amount the individual earned or with due diligence could have earned. This statutory requirement is similar to that of Title VII, 42 U.S.C. Section 2000e-5(g). Case law interpreting back-pay standards under Title VII and under IRCA indicate that the discriminatee need only make an ``honest, good faith effort'' to find employment in order to mitigate any damage award. United States v. Mesa Airlines, OCAHO case Nos. 88200001, 88200002, (July 24, 1989) (citing United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979)).

Complainant indicates that Ordonez made ``an honest and good faith effort'' to obtain other employment, but that his efforts were successful to only a limited extent. See Memorandum in Support of Remedies at 6. Ordonez indicated in his Declaration that he was employed part-time during August, September, and October 1989 by one employer, that he worked a three day assignment for another, and that during the period February 1990 through June 15, 1990, he worked part-time for yet a third employer, earning a total of $1,622.00 (one thousand six hundred twenty-two).

Ordonez also states that on June 16, 1990 he obtained full-time employment at a rate of pay higher than he would have received working for Respondents. That date, therefore, signifies the cut-off date for calculation of back-pay. See Ordonez' Declaration at paragraph 7.

Respondents have the burden of showing that the discriminatee's conduct in seeking employment was deficient. De Witt Nursing Home at 22. Absent such a showing, the discriminatee is given the benefit of every doubt that his conduct was reasonable. id. Respondents have made no such showing, therefore, I find that Ordonez acted with proper diligence in seeking further employment.

During the period claimed, Ordonez alleges $1,622.00 (one thousand six hundred twenty-two) in interim earnings. Accepting, as I do now, Complainant's calculations of Ordonez' potential earnings as noted above, these interim earnings would reduce back-pay awarded under 1324b(g)(2) from $9,520.00 (nine thousand five hundred twenty) to $7,898.00 (seven thousand eight hundred ninety-eight).

Complainant also requests that prejudgment interest be included in any back-pay award. An award of prejudgment interest is discretionary. De Witt Nursing Home at 25. As calculated by Complainant, Ordonez should receive, in addition to back-pay, prejudgment

interest in the amount of $879.33 (eight hundred seventy-nine dollars and thirty-three cents). This calculation is based on interest of 11% per annum, compounded quarterly. Complainant argues that this rate and method of computation is consistent with the ``short term'' IRS rate for underpayment of taxes currently in use. While I am not bound to this calculation, absent an alternative calculation by Respondents and any statutorily imposed formula, I find Complainant's calculation to be reasonable. I therefore award interest in the amount requested. Accordingly, the back-pay amount of $7,898.00 (seven thousand eight hundred ninety-eight) will be increased by $879.33 (eight hundred seventy-nine dollars and thirty-three cents).

Complainant's Motion for remedies for Jose Antonio Ordonez in the amount of $8,777.33 (eight thousand seven hundred seventy-seven dollars and thirty three cents) is hereby GRANTED.

b. ATTORNEYS' FEES

Under 8 U.S.C. Section 1324b(h), an Administrative Law Judge may allow ``a prevailing party other than the Untied States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.'' Authority to award such fees is within the discretion of the Administrative Law Judge. Ordonez' attorneys have requested compensation for 13.1 hours of time at $150.00 (one hundred fifty) per hour, for a total of $1,965.00 (one thousand nine hundred sixty-five). For the reasons stated below, I will grant Complainant's request for attorneys' fees, but at a lower hourly rate than requested.

Before an award of attorneys' fees may be granted under IRCA, two threshold questions must be answered. First, is Complainant a ``prevailing party'' entitled to compensation under the Act, and second, was the losing party's argument without reasonable foundation in law and fact? The answer to the first question is easily determinable, but the answer to the second question requires more delicate analysis.

A ``prevailing party'' is that party, ``in whose favor the decision or verdict is rendered and judgment entered.'' Black's Law Dictionary 1069 (5th ed. 1979). Under IRCA, Administrative Law Judges have significant discretion to determine if a party is ``prevailing,'' and on what grounds. ALJ Morse has found a respondent to be a ``prevailing party'' where the complainant's action was dismissed for lack of jurisdiction. Michael Williamson v. Autorama, OCAHO Case No. 89200540, (May 16, 1990). In another vein, a complainant was found to be a prevailing party where the respondent's defenses were without basis in law and fact. DeWitt Nursing Home at 25.

ALJ Schneider has found a respondent to be ``prevailing'' where summary decision was granted on respondent's behalf. Jaime Banuelos et al v. Transporation Leasing Company, et al, OCAHO Case No. 89200314, (Oct. 24, 1990), but see Ken Tang, v. Telos Corporation and Jet Propulsion Laboratory, OCAHO Case No. 88200065, (Nov. 10, 1988) (respondent found not to be a prevailing party where complainant voluntarily agreed to dismiss complaint).

Ordonez' attorneys, Vibiana Andrade and Charles Wheeler, argue that, as a result of the default judgement in Ordonez' favor, he is a prevailing party, and thus entitled to consideration for reasonable attorneys' fees under 8 U.S.C. Section 1324b(h). They assert that because Respondents did not contest or defend the action, and because all allegations of the Complaint were deemed admitted by Respondents, Ordonez has prevailed on the ultimate issues of this action.

Complainant's contentions have merit. With Respondents' allegations deemed admitted, it is clear that Complainant is a party ``in whose favor the decision or verdict is rendered and judgment entered.'' Blacks Law Dictionary, supra. As such, I find that Ordonez is a prevailing party in that he did prevail on the ultimate issue of whether or not Respondents were in violation of 8 U.S.C. Section 1324b, as alleged in the Complaint.

The more difficult question is whether Respondents' argument was without reasonable foundation in law and fact. Respondents never entered a responsive pleading to any motion by Complainant or to any of my Orders. No answer was ever received by Respondents, and no arguments were ever put forth on Respondents' behalf. As noted above, when default judgment was issued, all allegations of the Complaint were deemed admitted by Respondents pursuant to 28 C.F.R. Part 68.8(c)(1). Does this action translate into an argument ``without reasonable foundation in law and fact?''

``Without reasonable foundation in law and fact'' has been equated in IRCA cases as analogous to ``without merit.'' DeWitt Nursing Home at 28 (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Under Christianburg, ``without merit'' means ``groundless or without foundation, rather than simply that the [party] has lost his case.'' De Witt Nursing Home at 28. In Richard Becker v. Alarm Device Manufacturing Co., OCAHO Case No. 8920013, (Nov. 28, 1989) it was held that one of the complainant's arguments against respondent union was without reasonable foundation in law and fact because the complainant's filing of the charge was untimely.

In a somewhat more analogous case to the one at bar, summary decision was granted on behalf of several respondents where the

complainant was unable to establish any issue of material fact regarding its allegations of unfair immigration related employment discrimination. Banuelos at 24, 27. ALJ Schneider found, using the Christianburg standards discussed above, that the complainant's allegations were without merit, and therefore ``without reasonable foundation in law and fact.'' Banuelos at 24.

I find that through their failure to answer the Complaint, and by deeming the allegations of the Complaint as admitted, Respondents have failed to establish any issue of material fact on which to base its defense. As such, its defense has no reasonable foundation in law and fact, and Complainant is therefore entitled to attorneys' fees under 8 U.S.C. Section 1324b(h). I intend to utilize, consistent with other decisions made under 8 U.S.C. Section 1324b(h), the analogous Title VII standards for the awarding of attorneys; fees. See Williamson at 6, De Witt Nursing Home at 27, and Banuelos at 17.

Ordonez' attorneys request compensation at an hourly rate of $150.00 (one hundred fifty). They calculate this amount based on the twelve factors emunerated in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). See Memorandum in Support of Motion for Attorney's Fees at 2-3. The factors enumerated in Johnson have gained wide acceptance. See Hensley v. Eckerhart, 461 U.S. 424 (1983).[1]Of these

``It remains important . . . for the [court] to provide a concise but clear explanation of its reasons for the fee award.'' Hensley at 437. However, there is no set formula for determination of a reasonable rate. Id. at 436. Neither Title VII or IRCA establish a dollar figure as to what is reasonable, however, the Equal Access to Justice Act, 28 U.S.C. Section 2412(d)(1)(A) sets a $75.00 cap on fees.

Some courts have adopted a ``break-point'' figure for awards to non-profit organizations. New York State Association for Retarded Children, Inc. v. Carey, at 1151, 1152 (break point of $75.00 per hour based on 1980 rates in New York City). Other courts have established elaborate formulas for determination of fees for non-profit advocates. Mary Glover, et al v. Perry Johnson, et al, 531 F.

[1]The 12 factors are: (1) the time and labor required: (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the ``undesirability'' of the case; (11) the nature and length of the professional relationship with the client, and; (12) awards in similar cases. See also American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106 (1980).

Supp. 1036, 1044 (E.D. Mich. 1982) (overhead costs of organization divided by total number of attorneys, divided by total billable hours, plus attorney's salary divided by total billable hours equals hourly fee). The different formulas and standards illustrated here merely reinforce the discretion given to the courts to determine what is reasonable.

It is important in my consideration of the reasonableness of a fee award to analyze the type of work performed and the time involved on the various tasks. Attorney Andrade spent a total of 7.5 hours on Ordonez' behalf, consulting with her client as well as the OSC attorney involved, and preparing two documents to institute this charge. After she left the employ of NILC and turned the file over to Attorney Wheeler, he spent a total of 5.6 hours on the case, 2.3 of them spent in the preparation of the Motion for Attorneys Fees. The remaining hours were divided between telephone conversations, meetings with Ordonez, and the preparation of one document.

Although Ordonez was fortunate to have found attorneys with expertise in the still evolving area of IRCA law, neither Andrade nor Wheeler appeared to perform any tasks which required such specialized skill that a substantial fee award would be justified. Both attorneys obviously consulted with and received assistance from Attorney Sutherland from OSC.

Based on the foregoing, upon the large award ordered to be paid by Respondents to Ordonez, the type of work performed and particularly upon the non-profit nature of counsel's employment, I am reducing the requested hourly rate to $75.00 per hour. I consider this to be a reasonable amount based upon the information provided for my consideration in the Motion for Attorneys Fees and the accompanying memoranda.

Accordingly, the Motion for Attorneys Fees is hereby GRANTED in part in the amount of $982.50 (nine hundred eighty-two dollars and fifty cents).

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered all the pleadings, memoranda, and affidavits submitted by the Complainant in support of its Motion for Remedies for Jose Antonio Ordonez, and by Attorneys Andrade and Wheeler in their Motion for Attorneys Fees, I make the following findings of fact and conclusions of law:

(1) As previously found and discussed, I find Respondents in violation of 8 U.S.C. Section 1324b with respect to their discriminatory

refusal to hire Complainant Jose Antonio Ordonez based on his citizenship status;

(2) That had Jose Antonio Ordonez been hired by Respondents, he would have earned $9,520.00 (nine thousand five hundred twenty) for the period between July 18, 1989 and June 15, 1990;

(3) That Jose Antonio Ordonez acted with reasonable diligence in attempting to find new employment following Respondents' discriminatory act;

(4) That Jose Antonio Ordonez earned $1,622.00 (one thousand six hundred twenty-two) between July 18, 1989 and June 15, 1989;

(5) That Jose Antonio Ordonez began full-time employment on June 16, 1990, earning more than the hourly amount he would have earned working for Respondents;

(6) That Complainant is entitled to pre-judgment interest in the amount of $879.33 (eight hundred seventy-nine dollars and thirty-three cents);

(7) That Respondent pay to Jose Antonio Ordonez back-pay in the amount of $8,777.33 (eight thousand seven hundred seventy-seven dollars and thirty-three cents);

(8) That pursuant to 8 U.S.C. Section 1324b(h), Complainant is a prevailing party for the purposes of awarding attorneys' fees;

(9) That pursuant to 8 U.S.C. 1324b(h), Respondents arguments were without reasonable basis in law and fact;

(10) That determination of the amount of attorneys' fees is within the discretion of the court under 8 U.S.C. Section 1324b(h);

(11) That $75.00 per hour is a reasonable rate for the services performed by attorneys Andrade and Wheeler;

(12) That attorneys Andrade and Wheeler worked 13.1 hours on behalf of Jose Antonio Ordonez;

(13) That Respondents pay to NILC a reasonable attorney's fee in the amount of $982.50 (nine hundred eighty two dollars and fifty cents);

(14) That pursuant to 8 U.S.C. Section 1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and ``shall be final unless appealed; within sixty (60) days to a United States court of appeals in accordance with 8 U.S.C. Section 1324b(i).

IT IS SO ORDERED: This 2nd day of January, 1991, in San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge