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

June Wisniewski, Complainant v. Douglas County School District, Respondent; 8 U.S.C. Section 1324b Proceeding; Case No. 88200037.

FINAL DECISION AND ORDER ON MOTION FOR SUMMARY DECISION

MARVIN H. MORSE, Administrative Law Judge

Appearances: JUNE WISNIEWSKI, Complainant.

STEVEN D. MCMORRIS, Esq., for the Respondent.

This Final Decision and Order issues in response to the September 19, 1988 Motion for Summary Decision, with supporting Affidavit and Points and Authorities tendered by Douglas County School District (respondent). Complainant tendered a pleading dated September 21, 1988, and denominated ``Request For Hearing,'' presumably in response and opposition to the respondent's September 19th motion. Respondent in turn tendered a September 26, 1988 response to the complainant's ``Request For Hearing,'' with supporting affidavit.

Paragraph 2 of the September 8, 1988 Prehearing Conference Report and Order confirming the September 7 telephonic conference among counsel and the judge instructed the parties to advise me jointly or one of behalf of both by a writing to be mailed not later than September 23, 1988, of progress, if any, in effecting an agreed disposition. The exchange of pleadings referred to above overtakes that instruction; clearly there is no agreed disposition, although it appears from those pleadings that respondent is conditionally prepared to reinstate complainant on its substitute teacher list and that she is conditionally prepared to abandon the reinstatement portion of her claims here.

This proceeding was initiated by a letter/complaint dated April 10, 1988, followed by a more formal complaint dated April 30, 1988,

which is treated as the complaint of April 10 amended as of April 30, 1988. Respondent's answer filed August 25, 1988 was deemed to be timely in accordance with the judge's instructions in the August 8, 1988 Initial Prehearing Order.

Complainant's allegation of discrimination against respondent arises out of an employment relationship in which she worked as a substitute teacher for respondent at various schools within the respondent school district. Complainant claims to have been hired by the respondent at the end of December 1985 or the beginning of January 1986.

Complainant claims that respondent purposefully discriminated against her by terminating her from its employ because she could not produce the citizenship documentation which respondent required be presented to it by March 27, 1987. Respondent, among the affirmative defenses accompanying its answer, asserts that the complainant was not terminated from her position as a substitute teacher but rather would have been eligible to be called by respondent for substitute teaching ``at anytime since March 27, 1987, . . . if she showed Respondent employment authorization.''

Discussion:

The Immigration Reform and Control Act of 1986 (IRCA) enacted a prohibition against unfair immigration related employment practices at section 102 by amending the Immigration and Nationality Act of 1952 (INA section 274B). Section 274B, codified at 8 U.S.C. 1324b, provides that it 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. . . .'' Section 274B protection from citizenship status discrimination extends to an individual who qualifies as a citizen or intending citizen as defined by 8 U.S.C. 1324b(a)(3).

Congress authorized the establishment of a new venue out of concern that the employer sanctions program might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens, are legally in the United States. Title 8 U.S.C. section 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 (Office of Special Counsel or OSC). OSC, in turn, is authorized to file complaints before administrative law judges who are specially designat-

ed by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. 1324b(e)(2).

The statute also explicitly anticipates the potential for private actions. If the Special Counsel, after receiving a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not within 120 days following receipt of the charge, filed 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).

Complainant charges respondent with knowing and intentional discrimination against her on the basis of her citizenship status in violation of 8 U.S.C. 1324b. OSC by letter dated February 11, 1988, notified Ms. Wisniewski, the charging party, that it would not file a complaint on her behalf but advised her of the right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days. Consistent with 8 U.S.C. 1324b(d)(2), the complainant filed a complaint dated April 10, 1988. I was assigned the case on June 10, 1988.

The initial inquiry is whether OCAHO, established to administer the provisions for hearings under IRCA before administrative law judges, has jurisdiction over the instant proceeding. Title 8 U.S.C. section 1324b(a)(2)(A) explicitly exempts employers of three or fewer employees from liability under IRCA. Jurisdiction of OCAHO over complaints alleging citizenship status discrimination, therefore, extends only to persons or other entities who employ more than three employees.

By contrast, 8 U.S.C. 1324b(a)(2)(B) excludes from IRCA coverage complaints of discrimination based on an individual's national origin if the discrimination with respect to that employer and that individual is covered under Title VII of the Civil Rights Act of 1964, i.e., 42 U.S.C. 2000e et seq., which confers national origin discrimination jurisdiction on the Equal Employment Opportunity Commission. Under Title VII, an employer is defined to include ``a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .'' 42 U.S.C. 2000e(b). Since IRCA does not contain the 20 calendar week durational minimum rule, the Department does not use that yardstick in counting employees for purposes of determining coverage by section 102, although it does use the 20 calendar week requirement to determine whether the prohibition against duality of national origin claims applies. Preamble, Final Rule promulgating

28 C.F.R. Part 44, 52 Fed. Reg. 37402, Oct. 6, 1987; see particularly 28 C.F.R. 44.200(b)(1)(ii).

Jurisdiction of OCAHO over claims of national origin discrimination in violation of 8 U.S.C. 1324b(a)(2)(B) is necessarily limited to claims against employers employing between four and 14 employees. Since respondent is an employer of approximately 350 employees, OCAHO would have no jurisdiction under IRCA based on a claim of national origin jurisdiction. See Affidavit in support of motion for summary decision dated September 19, 1988, at para. 10; see also Prehearing Conference Report and Order, September 8, 1988, at para. 6.

Complainant's pleadings, however, assert that her claim sounds in discrimination based on citizenship status, although she recites a charge of discrimination based on national origin: ``I am Polish and speak with an accent, although I was born and raised in the United States.'' See Ms. Wisniewski's letter to OSC dated August 12, 1987, filed as an attachment to the April 30, 1988 amendment to the letter/complaint of April 10, 1988.

Complainant's April 10, 1988 letter/complaint fairly explicitly limits her claim to one of citizenship: ``I would like to file a complaint against Douglas County School System for discriminating against me regarding my citizenship status.'' Similarly, paragraph 6 of the April 30 submission alleges that ``[o]n or about March 27, 1987, Douglas County School District knowingly and intentionally fired June Wisniewski because of her citizenship status in violation of 8 U.S.C. 1324b.'' Since complainant's April 30 amendment concedes in terms that she is a United States citizen, her reference to being Polish can only refer to national origin status for the purpose of IRCA jurisdiction. However, neither the April 10 complaint nor its April 30 amendment is understood to claim national origin discrimination; to do so would exceed OCAHO jurisdiction.

In my judgment, OCAHO has jurisdiction over complainant's claim as one of citizenship discrimination. The question to be resolved is whether she has raised any credible discrimination issue arising out of citizenship status.

Consideration of the Motion for Summary Decision requires analysis of analogous Title VII case law. In the leading case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the order and allocation of proof in a disparate treatment case to evaluate whether the plaintiff was subjected to differential treatment on the basis of his protected status. The Court set forth the allocation of proof for establishing whether or not a discriminatory motive exists: (1) the plaintiff must establish a prima facie case, (2) the defendant must offer a legitimate, nondiscriminatory reason for its actions, and (3) the plaintiff must establish that this supposedly legitimate, nondiscriminatory

reason was a pretext to mask an illegal motive. Although the burden of proof remains at all times with the plaintiff, if a prima facie case is established, the burden of persuasion shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Then if the defendant is successful in meeting its burden of persuasion, the plaintiff must demonstrate that the reason given by the defendant was in fact pretextual.

In McDonnell Douglas the complainant had the initial burden of establishing a prima facie case of racial discrimination by showing ``(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.'' 411 U.S. at 802.

Although McDonnell Douglas was a refusal to hire case, the order and allocation of proof are equally applicable in an action such as this one alleging discriminatory discharge. Adapting the four-prong test of McDonnell Douglas to the instant action, the complainant, in order to establish a prima facie case of discriminatory discharge in violation of IRCA, must show (i) that she was a member of the group of individuals protected by IRCA, (ii) that she was discharged, and (iii) disparate treatment from which the court may infer a causal connection between her protected status and the discharge.

In the instant action, the complainant has identified herself as among the individuals protected by IRCA. Paragraph 2 of the complaint as amended April 30th explicitly describes complainant's status as ``a citizen of the United States of America, as defined by 8 U.S.C. 1324b(a)(3).'' She claims to have been fired by the respondent on or about March 27, 1987. Complainant, however, is unable to demonstrate disparate treatment from which I can infer a causal connection between her United States citizenship and her supposed discharge. Although a scenario may be imagined in which an employer intentionally prefers to hire or retain non-United States citizens over United States citizens, there has been no suggestion of such fact here. Indeed complainant, in her April 30th complaint, acknowledges that ``similarly situated individuals of a different and the same citizenship status were not fired'' (emphasis added).

Even assuming arguendo that the complainant can establish a prima facie case of citizenship status discrimination, the respondent school district has articulated a legitimate, nondiscriminatory

reason for the action that it took with regard to the complainant. While denying that the complainant was ever terminated from her position as a substitute teacher, respondent has acknowledged that it was unable to use complainant as a substitute teacher after March 27, 1987, due to complainant's failure to produce the requisite documentation showing employment authorization. Respondent maintains that documentation was required under IRCA as there was a break in complainant's earlier employment so as to designate her status as a new hire after November 6, 1987.

In addition, respondent claims that its self-imposed deadline of March 27, 1987, as the end of its grace period for compliance with the verification requirements of IRCA, was justified to allow it ``to begin the verification effort before the process became `logistically burdensome' . . .'' Although in my view the respondent's deadline of March 27, 1987, was both anticipatory and unnecessary, imposition of that deadline and consequential conduct for failure of an employee to comply does not justify a finding of discrimination. The deadline was imposed as part of a policy evenhandedly applied and enforced with regard to all of respondent's employees who were subjected to the verification requirements of IRCA without regard to their citizenship or national origin status.

The burden accordingly, shifts back to the complainant to demonstrate that the reason articulated by respondent is merely a pretext for intentional discrimination. Complainant's ``Request For Hearing'' dated September 21, 1988, fails to suggest proof that respondent's articulated reasons are in the least pretextual. Rather, complainant focuses on issues which she concedes ``may not fall within the jurisdiction of this court. . . .'' The ``Request'' clearly falls short of the requirement that a response to a motion for summary decision ``must set forth specific facts showing that there is a genuine issue of fact for the hearing.'' 28 C.F.R. 68.36(b). Complainant at several instances also admits that she no longer seeks reinstatement but rather ``will be requesting dropping of the termination charges.'' (``Request For Hearing,'' Paras. 6, 7, 8.)

Findings of Fact and Conclusions of Law:

Based on the foregoing, considering the pleadings filed, complainant has failed to make a prima facie showing of discrimination based on her citizenship status. As previously discussed, I am without jurisdiction to entertain a claim, if any of national origin discrimination arising out of the instant facts. Here there is no semblance of a claim sounding in citizenship discrimination. Rather, the only discrimination hinted at on this record is complainant's contention at the outset. See as attached to April 30 amendment,

complainant's letter to OSC dated August 12, 1987, characterizing respondent's actions as having discriminated against her because ``I am Polish and speak with an accent, although I was born and raised in the United States.''

Whatever redress may be available to June Wisniewski for her grievances against the Douglas County School District, they are not within the ambit of this forum's jurisdiction over citizenship discrimination because they do not in any conceivable way turn upon her status as a citizen of the United States. Having failed utterly to suggest a scintilla of evidence in support of citizenship discrimination claim, complainant is unable to sustain the burden of proof that any discrimination arose out of her citizenship status. Accordingly, I find and conclude that there is no genuine issue of any material fact.

I have not overlooked that complainant is unrepresented, participating pro se. In that light, I have gone to great lengths throughout this proceeding to explain in detail our practices and procedures. For example, during the September 7 prehearing conference, I repeated statements by counsel for the respondent when complainant asserted that she was unable to hear him fully. I do not understand that the suggestion in complainant's September 21 Request of her inability to have heard the entire conversation is inconsistent with my certain recollection that she participated fully in dialogue with me. Moreover, the parties and the judge, recognizing that the three-way phone connection was less than perfect, nevertheless went forward with the understanding that the judge would--and did--repeat one to the other any statements exchanged between the bench and the other of the parties on the line. There was no impediment to direct dialogue between the judge and each of the parties, but only an apparent difficulty in clarity of communication between the parties themselves.

Disposition of a complaint on motion for summary decision, authorized by 28 C.F.R. 68.36, is not a result causally reached. Mindful of the relative strengths of the parties and of complainant's unrepresented status, I cannot, however, deny the motion unless satisfied that there is a genuine issue of fact for hearing. I am not so satisfied. There is simply no issue of fact as to any conduct by the respondent which implicates the citizenship status of complainant. It follows that respondent is entitled to judgment as a matter of law, 28 C.F.R. 68.36.

Upon the basis of the whole record, consisting of all the pleadings filed by both parties, I am unable to conclude that a state of facts could be demonstrated by this complainant sufficient to satis-

fy the preponderance of the evidence standard required by 8 U.S.C. 1324b(g)(2)(A).

Respondent is a ``prevailing party'' within the meaning of 8 U.S.C. 1324b(h). Subsection (h) confers discretionary jurisdiction on the administrative law judge to ``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.''

The discussion above, explaining the result reached on the merits of this proceeding, i.e., disposing of it entirely on respondent's motion for summary decision, reflects my conclusion that complainant's ``argument is without reasonable foundation in law and fact.'' Nevertheless, I deny the respondent's motion for attorney's fees, rejecting the claim at this early juncture in the administration of section 102.

This is but the second disposition on the merits of an IRCA discrimination case before an administrative law judge, and the first involving a pro se complainant. The statute makes no distinction in exposure to liability by the losing party for the prevailing party's attorney's fees on the basis of whether or not the losing party is the complainant. Nor does the statute turn on the relative bargaining power of the parties. Nonetheless, the statutory grant of discretion to the judge invites consideration of those and other distinctions. To my mind, an important consideration is that at this juncture potential complainants may not have been made adequately aware of exposure to such liability. It might be helpful in this context for the Special Counsel, upon informing charging parties of their opportunity to initiate private actions where the Special Counsel declines to file a complaint, to caution that there is such potential liability. Of course, there is a need for sensitivity to the balance between advising potential complainants of that exposure and frightening them off from prosecuting credible claims of discrimination in violation of IRCA.

The notice of hearing dated June 10, 1988, scheduled an evidentiary hearing to begin October 25, 1988, in Reno, Nevada. In view of the disposition of this proceeding by this Final Decision and Order on Motion for Summary Decision, that hearing is cancelled.

The respondent's Motion for Summary Decision is granted. All motions and all requests not previously disposed of are denied.

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 AND ADJUDGED.

Dated this 17th day of October, 1988.

MARVIN H. MORSE
Administrative Law Judge