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

IN RE CHARGE OF MARGARITA
MORALES-DELGADO

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	CASE NO. 90200097
WELD COUNTY	)	
SCHOOL DISTRICT,	)	
RE-8, FT. LUPTON, COLORADO,	)	
Respondent.	)	
	)	

DECISION AND ORDER
(May 14, 1991)

E. MILTON FROSBURG, Administrative Law Judge

Appearances:

Bruce Friedman, Esquire, Office of Special Counsel,
for Complainant
Linda R. White, Esquire, Office of Special Counsel,
for Complainant

Kenneth A. DeLay, Esquire, for Respondent,
Margaret Sickel, Esquire, for Respondent.

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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 alternatively 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 intend 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), through OCAHO. 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(2).

II. *Procedural History*

On behalf of Margarita Morales-Delgado, OSC filed a Complaint Regarding Immigration Related Unfair Employment Practices on March 9, 1990. The Complaint contained Ms. Morales' charge form alleging citizenship status discrimination by the Weld County School District Re-8, of Ft. Lupton, Colorado, Respondent. The Complaint alleged that Ms. Morales was refused a custodial job in the school district on or about October 1987, February 1988, and September 1989,

that she was authorized to work in the United States, that the refusal was based upon her failure to possess a "green card" indicating permanent residency in the United States, that she was qualified to be a custodian, and that the job remained open after she was rejected.

The Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing on Complaint on March 14, 1990, assigning me to hear this matter, informing Respondent of its right to file an Answer within 30 days of its receipt, and indicating the location of the hearing as Denver, Colorado, on a date to be determined.

On April 20, 1990, Respondent submitted its Answer to Complaint, denying the substantive allegations in the Complaint, and setting forth four affirmative defenses. Respondent averred that the charging party failed to apply for the eight hour position which was available, that she demonstrated a genuine lack of interest in the job, that the position was not filled with an applicant holding a different citizenship status to her and remained open, and that she received one of the lowest interview scores of all applicants interviewed for the position.

On April 25, 1991, I issued my Order Directing Procedures for Pre-Hearing, advising the parties of the procedural guidelines applicable to this proceeding. I conducted a pre-hearing telephonic conference with the parties on May 15, 1990, during which the date of June 15, 1990 was established as the date for a pre-hearing conference to be held in Denver, Colorado. On June 8, 1990, I received Respondent's Motion for Leave to Amend Answer to Complaint with a copy of its proposed Amended Answer to Complaint, which added three additional affirmative defenses: That the alleged discriminatory acts described in paragraphs nine and ten of the Complaint were barred as being untimely filed, that Respondent hired other applicants who were as equally qualified as the charging party, and that the employment decision not to hire Ms. Morales was based upon other legitimate factors than her citizenship status.

The pre-hearing conference was conducted in Denver, Colorado on June 15, 1991. Counsel for both Complainant and Respondent presented argument as to their respective theories of the case. It was determined at that time that summary decision would not be a possibility in this matter due to the numerous genuine questions of fact. I encouraged the parties to discuss settlement of this matter and to attempt to resolve it if they could do so.

On June 22, 1990, Complainant indicated that it would not oppose Respondent's Motion to Amend, but requested leave to serve additional interrogatories and requests for documents upon Respondent, due to these additional affirmative defenses. On July 12, 1990, I granted Respondent's Motion for Leave to Amend its Answer and granted Complainant's request to propound an additional 10 interrogatories upon Respondent.

On July 26, 1990, Counsel for Complainant submitted a status report, to which Respondent concurred, indicating that the parties were discussing settlement terms and monetary amounts. In its status report of September 14, 1990, Complainant indicated that settlement talks were not fruitful and that discovery was continuing. Respondent also submitted a report on September 7, 1990, indicating that it had not received a response from Complainant regarding its latest settlement offer.

I conducted a second telephonic conference on October 9, 1990, in which the dates of January 15-17, 1991 were reserved for the hearing on the merits in Denver, Colorado. In my Order of December 17, 1990, confirming the hearing date, I indicated that hearing space in Denver was unavailable on the dates previously selected, therefore, the hearing would be rescheduled to January 28-30, 1991.

A third telephonic conference was held on January 7, 1991. The parties stated that they still hoped to work out a settlement in the matter, and that they would be in a better position to discuss the results of their latest settlement negotiations on January 14, 1991. I met with the parties again telephonically on January 14 and learned that their efforts to settle the case were unsuccessful. I received Complainant's Prehearing Statement on January 14, 1991 and Respondent's on January 22, 1991.

The hearing on the merits began in Denver, Colorado on January 28, 1991 and concluded on January 30, 1991. I received testimony from eight witnesses for Complainant and five for Respondent. I received 21 exhibits into evidence. A hearing transcript of 387 pages was compiled, exclusive of exhibits.

I issued an order on March 1, 1991, instructing the parties to review the hearing transcript and to submit any corrections to my office by March 18, 1991. I also ordered that the post-hearing briefs would be due no later than April 18, 1991. Both parties timely filed

corrections to the hearing transcript, which I will include in my copy of the record.

Complainant filed its Proposed Findings of Fact and Conclusions of Law on April 17, 1991. Respondent filed its Post-Hearing Memorandum on April 18, 1991. On April 26, 1991 Complainant submitted Reply Findings of Fact and Conclusions of Law for my consideration.

III. *Applicable Standards of Law*

An allegation of discrimination is proven by a showing of deliberate discriminatory intent on the part of an employer, regardless of the employer's motive. Discrimination or disparate treatment (as opposed to disparate impact) is defined in the case of Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), wherein the Court explained, it is when "the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." 438 U.S. at 577. See also U. S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). The IRCA added to this list of protected classifications an individual's citizenship status. 8 U.S.C. § 1324b(a)(1).

The majority of IRCA discrimination cases previously decided have relied upon the body of law pertaining to Title VII discrimination cases. I agree with the reasoning of the Administrative Law Judge in the case of United States v. Marcel Watch Co., OCAHO Case No. 89200085, (Mar. 22, 1990), who stated, "Title VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases." I will examine in summary fashion the leading Title VII decisions and the IRCA cases which followed their analyses.

The Supreme Court established the order and allocation of proof to be used in discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The claimant must first establish a prima facie case of discrimination or disparate treatment by showing that: (i) he belongs to a minority or suspect class; (ii) he applied and was qualified for employment by the employer; (iii) he was rejected for employment despite his qualifications; and (iv) after being rejected, the position remained open and the employer continued to seek applications from similarly qualified applicants. Then the burden shifts to the employer who must show a legitimate, nondiscriminatory reason for its refusal to hire the claimant. The claimant will then be given the opportunity

to prove that the reason offered by the employer was a pretext to cover an illegal motive.

This analysis was followed again by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Court expanded upon its ruling in McDonnell Douglas by explaining that the employer bears only the burden of explaining the nondiscriminatory reasons for its actions. The employer need not prove by a preponderance of the evidence that its reasons for rejecting the claimant were legitimate. The employer must only meet the claimant's prima facie case with evidence of a nondiscriminatory explanation for its actions. The employer, however, must contradict the prima facie case. Marcel at 14. The burden of persuasion remains at all times with the claimant, who then has the opportunity to show that the employer's reason was pretextual.

In the age discrimination case of Trans World Airlines, Inc., v. Thurston, 469 U.S. 111 (1985), the Court stated that in cases where direct evidence of discrimination is shown, the McDonnell Douglas test does not apply. The Court reasoned that the shifting burden test was necessary to provide a plaintiff a day in court despite the unavailability of direct evidence. In Thurston, the Court found that TWA's policy was discriminatory on its face, therefore, direct evidence was shown. See Tovar v. United States Postal Service, OCAHO Case No. 90200006, (Nov. 19 1990) (policy of U.S. Postal Service which excluded all aliens but permanent residents from employment found to be discriminatory on its face, but found to be an exception within the parameters of 8 U.S.C. § 1324b(a)(2), therefore, the claimant did not prevail).

It appears that to bypass the McDonnell Douglas/Burdine test, the direct evidence must show that the contested employment practice is discriminatory on its face. Thurston, 469 U.S. at 121. When the direct evidence excludes the McDonnell Douglas/Burdine scheme, Thurston permits the employer to attempt to prove an affirmative defense to its discriminatory practice. Id. at 122.

Recent discrimination law has produced another analytical test or method to be used when the employer at least partially based the employment decision on the individual's protected status, but when other factors were also considered. This is known as the mixed-motive theory and was explained by the Supreme Court in the case of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989).

Price Waterhouse states that "a plaintiff [need not] identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. ... Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision. ... [A]n employer shall not-be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." 109 S.Ct. at 1786.

In IRCA cases, if it is demonstrated that the individual's citizenship or national origin was a factor in the decision to refuse to hire or to terminate the employment of the individual, then the inquiry would focus on whether the ultimate employment decision would have been made even in the absence of that prohibited factor.

The trier of fact must assess what criteria contributed to the employer's decision at the time the decision was made. Id. at 1785. The employer bears the burden of proving, as an affirmative defense, that non-discriminatory factors would have led to the action despite the consideration of citizenship or national origin. The Court did not deem this a shift in the actual burden of persuasion to the employer. "Our holding casts no shadow on Burdine, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason." 109 S.Ct. at 1788 (citing Burdine, 450 U.S. at 256-258)

The Court in Price Waterhouse stressed that an employer may not prevail merely by offering a legitimate, non-discriminatory justification for the employment decision. The employer's affirmative defense must demonstrate that the justification offered was actually relied upon at the time of the decision. The employer must further "show that its legitimate reason, standing alone, would have induced it to make the same decision." 109 S.Ct. at 1792 This showing must be made by a preponderance of the evidence. Id.

IV. *Finding of Fact*

I have carefully reviewed the pleadings, the hearing transcript, the parties' post-hearing briefs, and the applicable law. From

them I have gleaned my findings of fact which are numbered and listed below. I find:[1]

1. That Margarita Morales-Delgado (Morales or charging party) was born in Mexico as a Mexican citizen and has resided in the United States for 12 years. (Tr. 21)

2. That Morales received an employment authorization card for United States employment on April 21, 1987 and a temporary resident alien card on August 31, 1987. (Ex. C-10, C-11)

3. That Morales became a permanent resident of the United States in March 1990. (Tr. 21)

4. That Morales completed employment applications for custodial positions at Respondent school district on June 5, 1985, July 23, 1986, April 3, 1987, and October 5, 1987. (Tr. 22-30; Ex. C-l, C-2, C-3, C-4)

5. That Respondent is responsible for employing custodians for the maintenance and upkeep of its schools. (Ex. J-l)

6. That Respondent employed more than three employees from February 1988 through September 1989 and continues to do so today. (EX. J-l)

7. That Floyd E. Acre (Acre) was the Assistant Superintendent of Schools for Respondent during the period of October 6, 1986 through September 1989 and is currently in that position. (Ex. J-l)

8. That one of Acre's responsibilities during the period of time reflected in FF 7 was to screen, interview, and hire employees for custodial positions in the school district, subject to approval by the Board of Education. (Tr. 195; Ex. J-l)

9. That Acre learned about the requirements of IRCA at a Chamber of Commerce luncheon in 1987 and instituted a compliance program at the school district for completion of Forms I-9 for all new employees. (Tr. 200-202)

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[1] The abbreviations utilized throughout the remainder of this Order represent the following: Finding of Fact # is (FF #); Transcript of Proceeding page # is (Tr. #); Complainant's, Respondent's, and Joint Exhibits are (Ex. C-#), (Ex. R-#), and (Ex. J-#), respectively.

10. That Acre requires all new employees to fill out a Form I-9 only after the employment decision has been made by the school district and the position is offered and accepted by the employee. (Tr. 203)

11. That Gary Rabas (Rabas) holds the position of Building and Grounds Maintenance Supervisor for Respondent and is responsible for supervising the custodial staff through the head custodians of each school within the district. (Tr. 303; Ex. J-l)

12. That Rabas generally recommends substitute custodians for potential full-time custodial positions to Acre prior to the selection of applicants to be interviewed for any full-time openings in the school district. (Tr. 310)

13. That Acre selects from the names provided by Rabas, and from the applications on file, those custodial applicants who will be granted interviews for full-time positions. (Tr. 205, 305: Ex. J-l)

14. That Rabas attends all formal interviews for prospective custodians with Acre and discusses each applicant with Acre at the conclusion of the interview. (Tr. 206, 305)

15. That Acre places tremendous weight on Rabas' input regarding the custodial applicants when making hiring decisions. (Tr. 207-08)

16. That during the time period 1987-1989, Acre referred to all employment authorization cards issued to aliens in the United States as "green cards" and did not place greater weight on permanent residency cards than on other forms of work authorization when making hiring decisions. (Tr. 212-13, 298-99)

17. That Acre maintains a Handbook for Employers published by the Immigration and Naturalization Service in his office and refers to the Handbook for validity of work authorization cards presented to him by alien employees. (Tr. 199-200; Ex. J-l)

18. That Acre does not exclude from employment those prospective alien employees who hold temporary work authorization as opposed to permanent authorization. (Tr. 203-04)

19. That Acre does not require more permanent work authorization for full-time custodial employees than for substitute employees. (Tr. 253)

20. That Raymundo Morales, Morales' son, made arrangements to speak with Acre at the school administration office in October 1987 regarding possible full-time employment for his mother. (Tr. 102-03)

21. That Acre met with Morales and Raymundo Morales upon their request to discuss Morales' October 1987 employment application. (Tr. 33, 102-03; J-l)

22. That Acre told Morales that no full-time custodial positions existed within the district at that time, but he offered her a position as a substitute custodian, which she accepted. (Tr. 33, 107)

23. That Acre asked Morales for her "green card" and social security card and made photocopies of her social security card and her temporary work authorization card. (Tr. 34, 105; Ex. C-10)

24. That after leaving Acre's office, Morales was instructed to see Rabas, who placed her name on the substitute custodian list. (Tr. 36)

25. That Morales and Respondent completed their respective sections of the Form I-9 for Morales on October 31, 1987, after she was hired as a substitute custodian. (Tr. 74-75, 215-16; Ex. J-l, R-5)

26. That after signing Morales' Form I-9, Acre wrote on the upper right corner of her employment application, "OK sub custodian immigration papers filled out". (Tr. 214-216; Ex. C-4)

27. That in February 1988 a full-time custodian position at the middle school was available and Acre and Rabas selected Morales, Gloria Botello, and David Flores to be interviewed for the job. (Tr. 218; Ex. J-l)

28. That Rabas recommended Morales to be interviewed because of her good performance as a substitute custodian. (Tr. 310)

29. That all three candidates for the full-time position identified in FF 27 were interviewed by Acre and Rabas on February 24, 1988. (Tr. 218)

30. That Acre routinely fills out an interview guide for each applicant immediately following each interview for prospective

employment, and did so for each candidate on February 24, 1988. (Tr. 220)

31. That Acre rates each applicant on a numeric scale from 1 to 5, with 5 indicating an outstanding candidate, and places the score on his interview guide. (Tr. 221)

32. That Acre completed an interview guide for Morales immediately following her interview on February 24, 1988, and rated Morales as 2 ½ to 3 on his scale of 1 to 5. (Tr. 220; Ex. J-l, C-5)

33. That Acre wrote the following on his interview guide for Morales: "?limited English skills? ?8 hrs? Applicant is concerned about working 8 hrs - (too long every day.) ?wants to work six hours a day ?Green Card - (Ck out.)". (Tr. 221; Ex. C-5)

34. That Morales explained to Acre and Rabas during the February 24, 1988 interview that she was interested in working only six hours a day instead of eight hours, which caused Acre and Rabas to exclude her from further consideration for the available position. (Tr. 222, 312-13)

35. That Acre wrote "Green card - (Ck out)" on Morales' interview guide because he knew that some types of cards contained expiration dates and he wanted to find out how long her work authorization extended and to determine if she would have to seek an extension to continue working for Respondent as a substitute custodian. (Tr. 226-227)

36. After Acre and Rabas discussed each of the three applicants, they recommended David Flores for the position, and he was subsequently offered the position and began employment as a full-time custodian on March 1, 1988. (Tr. 231; J-l)

37. That Gloria Botello, who had been working as a full-time substitute custodian with Respondent since approximately January 1988, was not chosen for the permanent full-time job in February 1988 because Acre was concerned that she was working another full-time job for a different employer and he explained to her that she would be working too many hours a day. (Tr. 246, 296)

38. That Gloria Botello was given a rating of 3 to 3 ½ by Acre after her interview on February 24, 1988, which was reflected on Acre's interview guide for Botello, along with the following: "working days

Longmont Foods - sub. custodian at night Ft. Lupton Schools ... ? limited English skills ? Green Card expires in April (Ck out - need extension)". (Tr. 228-29, 246; Ex. R-12)

39. That Acre wrote "Green Card expires in April" on Botello's interview guide because he knew that the Form I-9 on file in his office for Botello indicated an expiration date of April 13, 1988 for her temporary work authorization and he also knew that she would need to obtain an extension on her work authorization to continue her employment in the United States. (Tr. 230)

40. That Gloria Botello was offered a full-time custodian position by Respondent which she accepted and started on April 1, 1988, after she quit her full-time day job. (Tr. 230-231, 349; Ex. J-l)

41. That when Gloria Botello was given the permanent full-time custodian position in April 1988, she possessed temporary work authorization in the United States, which was extended from April 13, 1988 to August 13, 1988. (Tr. 345-46; Ex. R-11)

42. That Gloria Botello attained permanent residency status in the United States in August 1988. (Tr. 345-46; Ex. R-ll)

43. That Morales and another female employee of Respondent spoke with Dr. Anita Salazar, an administrator at Respondent school district, subsequent to Morales being rejected for full-time employment in February of 1988, and asked her why Morales had not been hired. Dr. Salazar told them that she had nothing to do with hiring of custodians and that they should speak to Mr. Acre. Morales remarked to Dr. Salazar that she would not be interested in a position at the middle school because the head custodian there was too mean and terrible to work for. (Tr. 353-55)

44. That Morales and Sandy Isaguirre went to Acre's office subsequent to the February 1988 interview and the hiring of David Flores to ascertain why Morales had not been hired. Sandy Isaguirre did not attend the formal interview of Morales on February 24, 1988. (Tr. 175-79, 311)

45. That Acre did not make any comments to either Morales or Sandy Isaguirre that Morales was rejected because of her lack of permanent residency. (Tr. 204)

46. That Saul Ramirez and his brother-in-law, Jose Perez, scheduled an appointment with Acre on February 29, 1988 to determine whether Ramirez could be hired as a full-time custodian with Respondent school district. (Tr. 146-48, 161)

47. That Acre met with Ramirez and Perez on February 29, 1988, and explained that the full-time custodial opening had recently been filled and that no jobs were available at that time. (Tr. 167, 250)

48. That Acre offered Ramirez a position as substitute custodian which Ramirez accepted on February 29, 1988. Acre asked for Ramirez' work authorization documentation to complete Ramirez' Form I-9. (Tr. 162-64, 248-49; Ex. J-2)

49. That Acre wrote in the upper right corner of Ramirez' Employment Application: "Sub-Custodian can sub until 6-16-88". (Tr. 249: Ex. C-28)

50. That Acre knew that Ramirez possessed temporary work authorization which was to expire in June 1988 because he checked the expiration date on Ramirez' card when he completed Ramirez' Form I-9. (Ex. C-30)

51. That three full-time custodial positions at the middle school and one part-time position at the high school became available in August 1989 and Acre and Rabas discussed the applicant pool, from which six individuals were selected to be interviewed. (Tr. 233-34; Ex. J-l)

52. That Rabas recommended Morales because of her good substitute custodian work, and she was selected as one of the six candidates to be interviewed on August 29, 1989. (Tr. 315-16)

53. That Morales, accompanied by her son Francisco Morales, was interviewed by Acre and Rabas on August 29, 1989, immediately after which Acre completed an interview guide. (Tr. 40, 94, 232; Ex. J-l, R-7)

54. That Acre wrote on Morales' interview guide: "Not at Middle School? wants to work at high school ... ?Does not want to work at Middle School - too much pressure." (Tr. 236; Ex. R-7)

55. That Morales explained to Acre and Rabas that she did not want to work for Jesse Marfil, head custodian at the middle school, because working for him was too much pressure. (Tr. 42, 96, 236, 317)

56. That Acre and Rabas did not consider Morales for the middle school positions or the high school position after she commented about the pressure in the middle school. Acre believed she lacked the requisite enthusiasm for the job at that time. (Tr. 237, 318)

57. That Acre and Rabas believed Morales was otherwise qualified for full-time custodial work and that she possessed many characteristics necessary for the position. (Tr. 269-78, 291, 315)

58. That one of the three positions at the middle school was not filled as a result of the interviews in August 1989, and was still available at the time of hearing in January 1991. (Tr. 239; Ex. J-l)

59. That Respondent continues to interview candidates for full-time custodial positions as the positions become available. (Ex. J-l)

60. That two full-time custodial positions were available at the middle school as of the date of the hearing in this matter. (Ex. J-l)

61. That full-time and substitute custodians work eight hours a day from 3:30 p.m. to 12:30 a.m. (Tr. 90; Ex. J-l)

62. That Morales completed a charge form on October 6, 1989, alleging citizenship discrimination against Respondent as a result of its failure to hire her in September 1989. (Ex. J-l; Complaint)

63. That Jesse Marfil called Morales in the fall of 1989 to ask her to substitute for a custodian at the school district and Morales responded that she no longer worked for Respondent. (Tr. 331)

64. That Jesse Marfil called Rabas to inform him that Morales was no longer a substitute custodian, and Rabas subsequently called Morales who told him that she did not work for the school district any longer. (Tr. 320-21)

65. That Acre did not exclude Morales from full-time custodial positions because she did not possess a permanent residency card. (Tr. 203, 222, 237)

66. That Acre never directly told Morales, her sons, or Sandy Isaguirre that she could not be hired by the school district because she did not have a green card. (Tr. 79, 86, 99, 110)

V. *Analysis and Conclusions of Law*

Prior to analyzing the merits of the case, I believe it is necessary to address a few issues which were raised in the pleadings and during the course of the proceeding. First, Respondent moved for a dismissal at the conclusion of the government's case, arguing that Complainant had failed to present evidence on all elements required to prove a charge of discrimination. Specifically, Respondent claimed that Complainant had not shown that "after [Morales was] rejected, the position remained open and the employer continued to seek applications from similarly qualified applicants." Although there was little testimonial evidence on this element, I denied the motion from the bench because Respondent had agreed to this fact in Stipulations 25, 28, and 29, which are contained in Exhibit J-l. I cannot construe this fact against Complainant when Respondent agreed to the contents of the stipulations and I accepted them into evidence. (Respondent also stated that a full-time position remained open at the school district in its Answer at paragraph 17.)

Respondent presented a more difficult question in its Amended Answer at paragraph 22, wherein it stated: "Complainant's claims are barred due to the fact that the alleged discriminatory acts set forth in paragraphs 9 and 10 of the Complaint allegedly occurred more than 180 days before the filing of the Complaint." The acts described in paragraphs 9 and 10 of the Complaint refer to Respondent's failure to hire Morales in October 1987 and in February 1988. (FF 22, 34)

Although Respondent did not accurately state the grounds for its defense, it is clear that Respondent is referring to the statutory time limit placed upon claimants who seek to file charges under section 274B of the Act. IRCA dictates that "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C. § 1324b(d)(3). The charge is deemed filed on the date it is postmarked by the charging party. 28 C.F.R. Part 44.300(b). Respondent did not raise this issue again throughout the course of the proceeding, but did argue it in its post-hearing brief. Complainant also briefed this issue following the proceeding. I am compelled to explore all relevant

and potential defenses raised, and can raise them myself, especially if they center on "jurisdictional" type grounds.

The issue of timeliness of discrimination charges filed with the OSC was raised and thoroughly discussed in the case of United States v. Mesa Airlines, OCAHO Case Nos. 88200001 and 88200002, (July 24, 1989). Mesa involved the filing of a charge of citizenship discrimination against an airline which had a policy of hiring only United States citizens. The charging party technically filed his charge with the OSC more than 180 days beyond the date his employment application was initially rejected by the employer. However, the ALJ found that the employer's communication to the charging party that he was not eligible for employment did not effectively inform him of his rejection, because the employer held out hopes that an opportunity for employment could still be available, despite his Turkish citizenship. Therefore, the date upon which the employer relied in raising its timeliness argument was not the date from which the ALJ computed the 180 days. The ALJ calculated the statutory time limit from the date upon which the charging party finally became aware that his citizenship status was a complete bar to his employment with Mesa. His charge, therefore, was timely filed.

In Mesa the ALJ followed the relevant Title VII and ADEA (Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 29 U.S.C. §§ 623 et seq.) case holdings pertaining to timeliness of filed charges. Of crucial importance to a determination of timeliness is the date upon which the discriminatory act is alleged to have occurred. That is the date from which the statutory time period runs. This date is generally the date upon which the adverse employment decision is communicated to the applicant or employee. Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988). In some cases the employer never informs the applicant that his application has been rejected. In other cases the parties dispute when the adverse decision allegedly occurred. Therefore, certain indicators have been devised by the courts to assist in this determination, although each case must rest upon its unique fact situation.

In Delaware State College v. Ricks, 449 U.S. 250 (1980), the Court held that the filing period began when the notice of employment termination was communicated to the employee, not at a later time when the effects of the termination were felt. Ricks had been employed as an instructor and was given notice that he would not be tenured as a professor, however, he was told that he would be re-employed for a one-year terminal contract. The statutory period

began when Ricks first learned of the adverse decision, not at the conclusion of his extended contract. His charge was not deemed timely filed.

The charging party in EEOC v. Safeway Stores, Inc., 634 F.2d 1273 (10th Cir. 1980), cert. denied, 451 U.S. 986 (1981), was informed by the employer that he would be considered for a carpenter position when the present head carpenter retired. Another individual was hired as an assistant carpenter after this communication was made, and was subsequently hired to replace the retiring carpenter. The court held that the crucial date was not when the assistant was hired to be groomed to take over the carpenter's job, but when he assumed the position as head carpenter. The discriminatory act did not become apparent to the charging party until that time, therefore, his charge was timely filed.

The Mesa decision appears to cite Farmer v. Washington Federal Savings & Loan Ass'n, 71 F.R.D. 385 (N.D. Miss. 1976), for the proposition that the statutory period would not begin to run at the time an applicant applies and is rejected for a job, if no job vacancies exist at that time. However, the Farmer case centered around an applicant who applied for a position, was told that no vacancies existed, followed-up her application with several phone calls over the subsequent months, and was repeatedly told that no jobs were available. However, the applicant learned through other sources that the employer had been hiring new employees throughout this period. The court found that the date of her first rejection was not crucial, but that the limitations period would run from the date upon which she should have become aware of "grounds upon which she might reasonably have concluded that she was being discriminated against." 71 F.R.D. at 387.

In Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975), the court stated that the plaintiff did not technically meet the then 90-day filing period established for the EEOC. However, the court tolled the statute of limitations because the facts that would support a charge of discrimination under Title VII were not apparent to a person with a reasonably prudent regard for her rights. 516 F.2d at 930.

As in Reeb, the principle of equitable tolling was explored in the case of Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). The Court dispelled the suggestion that untimely charges of discrimination were jurisdictionally barred. The Court followed several

circuit court decisions which had held that a timely charge filed with the EEOC pursuant to Title VII is not jurisdictional, "but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 392. See also Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99 (1977), reh'g denied, 434 U.S. 1042 (1978) ("Although courts often refer to time limits for filing as jurisdictional, they are more akin to statutes of limitation which are subject to equitable modifications.")

In order to apply this principle, the courts have generally held that the filing period will be equitably extended for periods during which: (1) the employer held out hopes of employment or the applicant was not made aware that he was not being considered for employment; (2) the charging party timely filed his charge in the wrong forum; or (3) the employer lulled the applicant into inaction during the filing period, through misconduct or otherwise. See Gray, 858 F.2d at 616; Martinez, 738 F.2d at 1112; Morgan v. Washington Mfg. Co., 660 F.2d 710 (6th Cir. 1981).

The court in Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559, 1561 (11th Cir. 1987) stated "[e]quitable tolling is a type of equitable modification, which 'often focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.' ... Equitable tolling focuses on the employee with a reasonably prudent regard for his rights, and does not require misconduct by the employer." (quoting Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981).

In Mesa, the ALJ reasoned that the same principles favoring equitable modification of the statutory filing period in other types of discrimination cases were present in IRCA cases. "As in Title VII and ADEA cases, a liberal rather than a strict construction of the filing requirements of IRCA will best facilitate the purpose of 8 U.S.C. § 1324b in eliminating immigration-related unfair employment practices and will prevent shielding on technical grounds, instances of discrimination otherwise violative of IRCA." Mesa, at 27.

Complainant raised for the first time in its post-hearing brief another principle relating to the timeliness issue, that of the theory of a continuing discriminatory violation perpetrated by Respondent against Morales. Citing applicable case precedent, Complainant correctly asserts that a continuing violation may be found when the

employer maintains a company wide policy of discrimination, or takes a series of related discriminatory acts against an individual. Bruno v. W. Elec. Co., 829 F.2d 957 (10th Cir. 1987). If a showing of a discriminatory policy is made, the statute may be tolled to include all violations committed during the time period in which the discriminatory policy was in effect. The statutory filing period may also be tolled to include separate acts against the individual, as long as one of the acts was committed during the applicable filing period. See Roberts v. North Am. Rockwell Corp., 650 F.2d 823 (6th Cir. 1981).

Complainant contends that the several actions of Respondent taken with respect to Morales' application for permanent employment demonstrate a continuing pattern of discrimination, such that the statutory 180 day period should be equitably tolled to include both the refusal to hire Morales in February 1988 and in August 1989. Although the Complaint also includes a factual recitation regarding Respondent's failure to hire Morales for permanent employment in October 1987, Complainant's brief clearly reveals its agreement that no violation occurred at that time because no job vacancies existed at Respondent school district. However, Complainant relies upon Respondent's actions in October 1987 to support its claim of a continuing violation.

It is without question that Morales' charge filed in October 1989 was timely with respect to the alleged discriminatory act in August 1989. Based upon Complainant's rendition of the facts in its brief, I will not consider the October 1987 application and the subsequent failure to hire Morales as an alleged violation. I agree that no positions were available in the school district for full-time custodians at that time. The remaining question is whether the February 1988 allegation should be encompassed within the statutory filing period under the continuing violation theory. Without the application of this theory, or any other justification for tolling of the statutory period, the 1988 refusal to hire would clearly be barred as untimely.

Complainant has advanced no other argument in support of equitable tolling than the continuing violation theory. My independent review of the evidence does not reveal any other justification. Morales was interviewed on February 24, 1988. Although she did not receive a rejection letter or phone call from Respondent, the position was filled on March 1, 1988. It is apparent from the evidence that Morales was aware at or about that time that she was not hired for that position. The 180 day clock would run from March 1, 1988 in the

absence of any equitable tolling. I find that Morales was or reasonably could have become aware of her right to file a charge of citizenship discrimination within 180 days after March 1, 1988, (based upon the facts as she believed them to be) and that Respondent did not engage in any misconduct or any legitimate activity which lulled Morales into inactivity or otherwise prevented her from timely filing her IRCA based charge.

In analyzing the continuing violation theory, I do not find that Respondent had a discriminatory policy in place which excluded aliens possessing temporary work authorization from employment. In fact, the evidence presented persuades me to find that Respondent hired temporarily authorized aliens for both substitute and permanent positions within the schools. (FF 22-26, 41, 48-50)

I also do not find that Respondent's actions taken with respect to Morales in 1987, 1988, and 1989 support the application of the continuing violation theory. In order to find a continuing violation, I must also find a present violation of IRCA. See United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). I would only be able to equitably modify the filing period to include the February 1988 action if a related violation was found to exist in August of 1989. My findings of fact simply do not support a conclusion that Respondent discriminated against Morales in 1989, as will be discussed more fully below.

Even considering all of Respondent's employment decisions relative to Morales during this three-year time period, I cannot find sufficient evidence to support a claim of citizenship discrimination under IRCA, despite Complainant's thorough presentation to the contrary. Without the application of the continuing violation theory, Complainant's Complaint with respect to the February 1988 refusal to hire must be dismissed as untimely. I hereby dismiss the February 1988 interview situation because the charging party did not file a charge of citizenship status discrimination within 180 days after March 1, 1988.

My further analysis will primarily encompass the August 1989 refusal to hire scenario. I will analyze this claim using the McDonnell Douglas and Burdine shifting burden scheme and not the Price Waterhouse mixed-motive theory. Complainant did present evidence supporting a prima facie case and evidence of discrimination in its case in chief. Complainant argued that this presentation was sufficient to establish direct evidence of an unfair immigration-related employment practice.

I agree with Complainant's general proposition that the McDonnell Douglas theory of proof is unnecessary when discrimination is shown by direct evidence, as I have explained above in section III of this Order. When such proof is established the Respondent's burden becomes one of persuasion rather than production. The Respondent must show that other legitimate considerations would have caused it to make the same employment decision regardless of its consideration of the prohibited factor or its application of a discriminatory policy.

However, if the evidence is insufficient to prove that the employer's decision was at least partially based on citizenship or other prohibited grounds, then McDonnell Douglas and its progeny apply. When the evidence presented by the Complainant is not enough to make out a case of discrimination on its face or to prove the existence or a discriminatory policy, the evidence may be considered later as part of Complainant's pretextual showing. Although the burden shifts to Respondent intermediately, the Complainant's initial presentation of evidence may be considered for both its prima facie case and its subsequent pretext argument. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Five-Year Cumulative Supplement, 22-23 (1989)

I find no evidence to suggest that Respondent considered Morales' citizenship in making its hiring decision, therefore Price Waterhouse is inapplicable. I also do not find that direct evidence of discrimination was shown which would exclude the McDonnell Douglas analysis, as discussed in section III above. Although Complainant did present its entire case at one time, I will analyze only the evidence applicable to the making of a prima facie case at this point.

In assessing Complainant's prima facie case, the four requisite elements are easily disposed of in favor of Complainant.[2] Morales belongs to a minority class and is a protected person within the meaning of IRCA because she was authorized for employment in the United States at the time she interviewed for the custodial position on August 29, 1989. (FF 2) Morales' application was on file with Respon-

[2] This analysis pertains to the full-time eight hour position. Although a four hour part-time position was available, scant evidence was presented regarding that job. Complainant presented no evidence that the four hour job remained open and that Respondent continued to seek applications for it. I do not find a prima facie case was presented regarding this position.

dent and she was selected as a candidate for employment by Respondent. At the time of her interview Morales was qualified for employment as a custodian. (FF 52,57) Morales was not selected for one of the custodial positions despite her qualifications. (FF 56) After being rejected for a full-time position at the middle school, the position remained open and Respondent continued to seek applications from similarly qualified applicants. (FF 59)

With the prima facie case comes a presumption that the reasons for the rejection were discriminatory. See Furnco Construction Corp v. Waters, 438 U.S. 567, 575 (1978) ("But McDonnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 344, 358 (1977)).

The inquiry then turns to Respondent who must meet Complainant's prima facie case with evidence of legitimate, non-discriminatory reasons for the refusal to hire Morales. Respondent demonstrated through the credible testimony of Acre, Rabas, and Francisco Morales that Morales was asked about the head custodian at the middle school, Jesse Marfil, to which she responded that he was pushy and demanding. She indicated that there was a lot of pressure at the middle school. Her statements caused Acre and Rabas to doubt whether she would be a productive, long-lasting employee at the middle school, thus eliminating her from contention for the available positions. (FF 55-56)

Morales' feelings about Jesse Marfil and the conditions at the middle school were also related to Dr. Anita Salazar several months prior to this interview. Morales told Dr. Salazar that she felt Marfil to be "terrible" and that she did not like working for him as a substitute custodian. Although Dr. Salazar's knowledge was not communicated to Acre at the time of the adverse employment decision, and therefore cannot be used to support Respondent's offer of a legitimate reason for its decision, it does support the credibility finding made regarding Acre and Rabas.

I find that this evidentiary production by Respondent substantially meets Complainant's prima facie case. As explained in Burdine, Respondent's burden is only one of production. Complainant bears the ultimate burden of proving that Respondent intentionally discriminated against Morales on the basis of her citizenship status.

Burdine, 450 U.S. at 254-56. The Complainant still has the opportunity to prove that the Respondent's proffered reason was pretextual.

> At this stage, the plaintiff's burden of showing pretext 'merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination.' The plaintiff's burden of showing that the defendant's articulated reason was not the true reason for the action taken may be met by demonstrating that a discriminatory reason predominated over the legitimate reason offered or by undermining the credibility of the employer's proffered explanation. ... Because of the plaintiff's easy burden of establishing a prima facie case of disparate treatment and because defendants can normally satisfy the burden of articulating some 'legitimate, nondiscriminatory reason' for the action in question, even where the reason is arguably subjective, the great majority of disparate treatment cases turn on the plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination.

B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *1313-14 (2d Ed. 1983) (citations omitted).*

This is just such a case. Complainant offered numerous pieces of evidence for the proposition that Respondent's actions were discriminatory, despite the reasons cited for its refusal to hire Morales. Morales and her son Francisco testified that during the August 1989 interview, Acre asked Morales for her "green card", which Morales could not produce because she did not possess one. Both Acre and Rabas testified to the contrary.

It has been Complainant's contention from the inception of this action that a causal relationship existed between the asking for a "green card" and the refusal to hire. Although Morales testified that such a relationship existed, when asked directly by Respondent's counsel on cross examination whether anyone from the school district ever told Morales that her lack of a "green card" prevented her from obtaining a full-time position, Morales could not answer affirmatively. It appears to me that Morales, who knew the precise meaning of a "green card" and was striving to obtain one, created this causal relationship, or at least inferred it from the conversations she had with Acre. Under the allegations as set forth in the Complaint, unless I agree that such a causal relationship existed, i.e., that Morales was deprived of employment because she was not a permanent resident alien, then the Complaint is not proven.

The allegation in this case is not one of the employer asking the protected applicant for more or different documents than are required by section 274A(b) of the Act. Under the 1990 Act, enacted

November 29, 1990, an employer could be liable for an unfair immigration-related practice for simply requesting such documents. This section of the Act, located at section 535 of the 1990 Act, is not retroactive. I am not considering how the actions of Acre would be analyzed under this new provision assuming he asked for a "green card", because the provision was not effective at the relevant time of Acre's actions.

Prior to the enactment of this provision, a showing of a request for a particular employment eligibility or work authorization card was found to be evidence of, but not necessarily proof of, an unfair immigration-related employment practice. Complainant relies on previously decided cases in this agency for its contention that the asking for a "green card" is a prohibited practice. It is necessary that I analyze the holdings of these cases and compare them to the case at bar.

In United States v. LASA Marketing Firms, OCAHO Case No. 88200061, (Mar. 14, 1990), LASA was an employment referral agency who rejected the application of an alien who was temporarily authorized for employment in the United States because she was unable to produce more documentation than her driver's license, social security card, and temporary work authorization. The respondent admitted that it treated applicants differently based upon their citizenship status. The ALJ found that the respondent failed to produce evidence of a legitimate non-discriminatory reason for rejecting the charging party's application. The ALJ further found that the employer both knowingly and intentionally discriminated against the charging party. The knowledge standard was met not by a showing of actual knowledge on the part of the employer, but by a constructive knowledge standard. The employer "failed to exercise reasonable care to acquire some minimally functional knowledge of the legal significance of immigration-related employment documents, and to conduct his employment referral operations in a fair and consistent manner." LASA, at 25. Although the ALJ did not find Complainant's case to have been shown by direct evidence, the lack of substantial evidence on the respondent's part caused the finding of discrimination to be made.

In United States v. Marcel Watch Corp., OCAHO Case No. 89200085, (Mar. 22, 1990), the complainant established by direct evidence that the charging party, a Puerto Rican born United States citizen, was discriminated against because the employer refused to employ her when she could not produce a green card. The ALJ

found the insistence for a green card, which could not possibly have been produced, was discriminatory on its face. The employer's argument that it required this documentation to fulfill its obligations under section 101 of IRCA was not persuasive. "Cavalier rejection of proferred documents and insistence on unnecessary ones (i.e., green cards), whether or not in a good faith effort to comply with Section 101, is no justification for disparate treatment of Puerto Rican-born U.S. citizens." Marcel, at 18.

The employer's agent claimed an innocent mistake based upon his ignorance of U.S. geography and history. However, the ALJ determined that the innocent mistake took on "the color of intent". Id. The ALJ explained that an employer's duties and responsibilities under IRCA's employer sanctions provisions do not place the employer in an "untenable position" with respect to IRCA's antidiscrimination provisions. The employer must exercise reasonable care to ensure that its employment requirements are not discriminatory. "[R]eckless prescreening of prospective employees as a rationale for complying with employer sanctions imperatives violates 8 U.S.C. § 1324b." Marcel, at 21-22.

In Jones v. DeWitt Nursing Home, OCAHO Case No. 88200202, (June 29, 1990), the ALJ found direct evidence of citizenship discrimination by the employer's unnecessary requirement for a birth certificate as a predicate for employment. When the charging party, a U.S. citizen, was initially hired, he presented a social security card and state identification card within three business days of hire in accordance with the employer sanctions provisions of IRCA. The employer additionally required a birth certificate which the charging party did not have in his possession. When he was unable to obtain the birth certificate from his mother by the employer's deadline, his employment was terminated. This was within eight days of his initial hire. He did obtain the birth certificate within the 21 day time period established in IRCA for submission of unavailable documentation. A per se violation of discrimination was found. The employer was unable to show that it would have retained Jones despite his inability to produce a birth certificate.

In both Marcel and DeWitt the ALJ found discrimination by direct evidence because the employers insisted on certain documents as predicates to employment. In LASA the ALJ found that the requirement for additional paperwork was indirect or circumstantial evidence of discrimination. All three of these cases are easily distinguishable from the case at bar.

In this case I do not find that Acre required permanent residency cards as a precondition to employment as did the employers in the above-described cases. Acre did not exclude from employment those who could not produce green cards like the employer in Marcel. Although it was not entirely aware of the specifics of IRCA, the school district did not differentiate between citizens or permanent residents and temporary aliens. The prescreening procedures utilized by Acre were not so deficient that they could be termed "reckless". Fortunately for the school district and its applicants for employment, the results of Acre's hiring practices were not discriminatory as were the actions of the employers in the above-cited cases.

Complainant's reliance upon these cases for its proposition that direct evidence of discrimination was shown by Acre's asking for a green card in misplaced. I do not find that Acre's actions show direct evidence of discrimination. There exists a subtle, yet important difference between the mere asking for a piece of identification and the requirement for the identification as a precondition to employment, which was present in the Marcel, LASA, and DeWitt cases. Here, nothing discriminatory stemmed from the asking for a "green card". The potential certainly existed in the school district for a violation of IRCA due to its misunderstanding or lack of complete knowledge of IRCA's requirements, yet no violation occurred with respect to Ms. Morales.

Again, assuming Acre did request a "green card" from Morales on August 29, 1989, Complainant has failed to meet its burden of proving that Respondent's actions amounted to an unfair immigration-related practice. To prevail Complainant must prove by a preponderance of the evidence that Respondent knowingly and intentionally discriminated against Morales on the basis of her citizenship. Complainant has not shown that any relationship existed between the asking for a "green card" and the refusal to hire her. The suggestion that such was the case is mere speculation which Complainant tries to pass off as fact. The circumstantial tie between the asking for a "green card" and the failure to employ is not nearly as persuasive as Complainant would seem to suggest.

I feel I must state my opinion that Respondent was somewhat remiss in not becoming more educated about the dual portions of IRCA after its passage in 1986. The school district should have ensured that the administrators who were responsible for employment decisions were better acquainted with the applicable provisions of the antidiscrimination provisions of IRCA and that they

acquired a working knowledge of pertinent terms, such as "green card". It was unfortunate that the application form used by the school district was not altered prior to the present litigation to eliminate the question, "Do you presently hold a green card to be working in the United States?". This Complaint possibly would not have been filed had Respondent taken these steps.

Having said that, however, I do not believe that Complainant's evidence, although well presented, was sufficient to prove a case of intentional discrimination in light of the overwhelming evidence to the contrary. Complainant failed to show that the application form, although problematic, prevented Morales, or any other non-permanent residents or citizens from applying with the school district. In fact, Morales applied more than once and Saul Ramirez and Gloria Botello each applied while they were temporary aliens. Additionally, each of these three individuals was hired by Respondent without a "green card" or permanent resident alien card. This fact weighs heavily against Complainant's case. All three were hired as substitute custodians and Ms. Botello was later hired as a permanent custodian prior to receiving her permanent resident alien card. (FF 41)

Acre testified that he did not know the correct meaning of a "green card", but used the term broadly to encompass all INS issued work authorization or employment eligibility documents. His credible statements were supported by contemporaneous written statements which indicated that he did not distinguish between different classes of work authorization for different types of jobs. Acre knew enough about the law to know that there were different types of acceptable work authorization cards, some of which contained expiration dates. Acre demonstrated that he did not refuse employment to an individual just because a temporary card indicated that it was due to expire. When Acre hired Saul Ramirez for substitute work in February 1988, he noted on Ramirez' application form "can sub until 6-16-88" (Ex. C-28), the same date reflected on Ramirez' Form I-9 in sections 1 and 2 (Ex. J-2).

Acre also recommended Gloria Botello for permanent employment which she was to begin on April 1, 1988, when her temporary work authorization was due to expire in 12 days. (FF 41) Ms. Botello's temporary status was not extended until April 13, 1988, and her permanent residency application was not approved until approximately August of that year. Complainant presented no persuasive evidence to support its contention that Acre believed Botello to be

in a different category than Morales or Ramirez because she was in the process of applying for her permanent residency at the time she was given permanent employment. Sandy Isaguirre's testimony on that point is not persuasive in light of the contrary evidence.

When Morales was originally hired as a substitute custodian, Acre noted at the top of her Form I-9 "Okay sub custodian immigration papers filled out". (Ex. C-4) I do not agree with Complainant's suggestion that Acre stressed the substitute part of her job in relation to her immigration papers presented at that time, namely her temporary authorization card. Acre's ignorance regarding the technical nature of the various cards really assisted Respondent's case on this point. I do not believe Acre knew enough about the cards to cause him to distinguish between different cards for different jobs. I cannot accept Complainant's contention that Acre would hire Morales only for substitute work since she possessed only a temporary authorization card, and that permanent full-time positions were reserved for those applicants possessing citizenship or permanent resident alien cards. Again, the fact that Respondent hired Morales, although not for the type of position she desired, favors Respondent.

It would seem preposterous that Acre would agree to consider Morales and Ms. Botello as two of the three applicants for a full-time position in February 1988, knowing that each of them only possessed temporary authorization. I would wonder why Acre would spend time interviewing Morales again in August 1989 as one of six candidates for four openings if he had a policy of only hiring permanent resident aliens for full-time positions. Common sense would suggest that Acre would not waste valuable time interviewing unqualified candidates. Therefore, Morales' citizenship status did not, in my view, prevent her from obtaining full-time employment with Respondent school district.

Although many of the above actions were taken prior to the August 1989 incident, they demonstrate Acre's practices with respect to acceptance of work authorization cards and support his testimony regarding his lack of discrimination of protected applicants. I considered all of the above very strongly when making my determination that no continuing violation occurred from February 1988 to August 1989. I was puzzled, as was Respondent, by the testimony of Sandy Isaguirre regarding Acre's alleged statements to her in February 1988 that Morales did not possess the proper documentation necessary for a full-time job. Although I did not entirely

discredit her testimony, I did not find it to be sufficiently persuasive to demonstrate a pretext of a discriminatory motive.

As stated above, Complainant's attempts to demonstrate a common discriminatory thread running through all of the episodes presented in its case have failed. Complainant has not succeeded in proving by a preponderance of the evidence that the legitimate reason offered by Respondent for refusing to hire Morales was pretextual. Morales certainly feels frustrated as a result of her continued rejection for permanent employment with the school district. I do not doubt her sincerity based upon her belief as to why she was not hired. I simply do not agree with her that the asking for a "green card" and the failure to employ are causally tied in this instance.

I wonder if the Morales family and friends who assisted them at the time were so strongly convinced of the causal connection between the asking for a "green card" and the rejection that they sincerely believed Acre told them Morales was not qualified due to her citizenship status. I do not know the answer to that and I will not hazard a guess. Something obviously prompted them to believe that the lack of a green card prevented Morales from being employed on a full-time basis. I do not believe, however, that that something was a discriminatory practice being employed by Respondent.

Complainant could have made a stronger case if it could have shown stronger evidence of a preference for citizens and permanent resident aliens in the school district. Complainant tried to convince me that Morales and Saul Ramirez were discriminated against because they were temporary aliens by demonstrating that they were hired only in a substitute capacity. The argument never got off the ground, however, because at the time both of them were offered substitute jobs, no full-time positions were available for them. Complainant presented no further evidence regarding Saul Ramirez' employment with the district.

Morales performed well as a substitute. The fact that she was kept in a substitute position did not appear to be a reflection on her citizenship status, but rather as an indication that there were no jobs available. She was twice selected to compete for full-time positions. I can only infer from the evidence that these were the only occasions during her tenure as a substitute when openings became available for full-time jobs. I fail to see anything discriminatory in that chain of events.

Complainant's case might have been more persuasive if it could have shown that other temporary aliens were not hired for full-time jobs because of their citizenship. Due to the speculative nature of the evidence presented, a stronger case could have been made with greater statistical proof. The burden certainly was not on Respondent to show that it did not have a preference for citizens and permanent residents, however, Respondent did show that at least one temporary resident alien was hired for a full-time position prior to receiving her green card. (FF 41)

The totality of evidence presented was not sufficient to prove Complainant's claim that Margarita Morales-Delgado was discriminated against on the basis of her citizenship by the Weld County School District of Fort Lupton, Colorado on or about August 29, 1989. I must therefore dismiss this action pursuant to 28 C.F.R. Part 68.50(c)(1)(iv).

VI. *Ultimate Findings of Fact and Conclusion of Law and Order*

In addition to the findings and conclusions already mentioned, I make the following ultimate findings of fact and conclusions of law:

1. That Margarita Morales-Delgado is a protected person within the meaning of 8 U.S.C. § 1324b(a)(1).

2. That Ms. Morales timely filed with the OSC a charge of citizenship based discrimination pursuant to 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(3) based upon Respondent's decision not to hire her as a full-time custodian in August 1989.

3. That Ms. Morales' claim of citizenship status discrimination, based on Respondent's decision not to hire her in February 1988, was not timely filed within 180 days after the alleged discriminatory act, and was therefore, dismissed pursuant to 28 C.F.R. Part 68.50(c).

4. That Respondent school district employed more than three individuals at all times relevant to this action.

5. That Complainant made out a prima facie case of citizenship status discrimination regarding Respondent's decision not to hire Ms. Morales in August 1989.

6. That Respondent met its burden of production by demonstrating a legitimate, non-discriminatory reason for refusing to hire Ms. Morales for full-time employment.

7. That Complainant did not prove its case of alleged discrimination against Respondent by a preponderance of the evidence because Complainant did not show that Respondent required its permanent, full-time custodians to present green cards or permanent resident alien cards as a prerequisite to employment.

8. That Complainant did not prove by a preponderance of the evidence that Ms. Morales was denied full-time employment because she was a temporary resident alien who did not possess a green card.

9. That Respondent's hiring practices from 1987 through 1989 did not demonstrate a preference for United States citizens and permanent resident aliens despite Respondent's lack of knowledge about the antidiscriminatory provisions of IRCA.

10. That pursuant to 28 C.F.R. Part 68.50(c)(1)(iv), the Complaint is dismissed in its entirety.

11. That this Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. § 1324b(i) and 28 C.F.R. Part 68.51(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek review of the Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the Respondents transact business.

12. That all motions and/or requests not previously disposed of are denied.

IT IS SO ORDERED this 14th day of May, 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge