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

JUAN CORAIZACA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 90200337
YESTERDAY'S RESTAURANT,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(June 4, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearance: Juan Coraizaca, Complainant.

On March 13, 1991 I issued the Decision And Order Granting Default Judgment To Complainant, But Reserving Decision As To Relief To Be Granted (Decision and Order). The proceedings and procedures which preceded its issuance are discussed at pages 1-3 of the Decision and Order. Respondent not having answered the Complaint or otherwise having appeared in this case, the Decision and Order found in Complainant's favor that Respondent had discriminatorily discharged Complainant in violation of 8 U.S.C. §1324b. Complainant proffered no basis for a judgment as to back pay or mitigation of such sum by reasonable diligence in seeking employment. 8 U.S.C. §1324b(g)(2)(C). Accordingly, recognizing his pro se posture, I gave Complainant more than four weeks, i.e., until April 19, 1991, to submit evidence in affidavit form, the requirements for which were explained in detail in the March 13 Decision and Order.

Complainant failed to respond. On April 26, 1991, after the time period set forth for the filing, an individual not otherwise identified telephoned my staff on Complainant's behalf. As a result, on May 7, 1991 I provided Complainant a further period of time in which to submit the necessary evidence, ordering as follows:

> It appears that Complainant may have misunderstood that unless he made the April 19 filing, I would not be able to award back pay. Accordingly, this Order provides additional time for him to respond. For convenience, a copy of the March 13 Decision and Order is attached to Complainant's copy of this Order. Complainant will be expected to follow the directions in the third and fourth full paragraphs of page 4 of the March 13 Decision and Order. Unless Complainant makes an appropriate filing not later than May 31, 1991, I will be unable to provide any further relief.

That date is now past, and no response or other communication has been received from or on behalf of Complainant.

This case presents as a question of first impression* whether, in exercising discretion to award back pay, 8 U.S.C. §1324b(g)(2)(B)(iii), it is proper to deny such award here a prevailing complainant has failed to introduce any evidence on that claim, either at hearing or otherwise. As more fully explained below, this Final Decision and Order finds against Complainant on that question.

The March 13, 1991 Decision and Order discussed the relief to which a discriminatee is entitled under analogous civil rights legislation, and cited, among others, the leading case of Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). Albemarle stands for the proposition that back pay claims may be raised after trial. Id. at 424. On April 2, 1991 citing Albemarle, the United States Court of Appeals for the Eighth Circuit held that "the district court did not abuse its discretion in refusing to award backpay" to a "successful Title VII claimant" who had failed to present any evidence on the issue at trial. Goff v. USA Truck, Inc., 929 F.2d 429, 430 (8th Cir. 1991). The Goff court relied on its own precedent, Harper v. General Grocers Company, 590 F.2d 713 (8th Cir. 1979). In Harper the court concluded that failure to award back pay was not an abuse of discretion where the trial court "had no way of knowing the extent of Harper's earnings as a casual employee of the Company or as an employee of another employer, if there was one." Id. at 717; see also T & S Service Associates, Inc. v. Crenson, 666 F.2d 722, 728 (1st Cir. 1981) ("Plaintiff has the burden of proving that he lost earnings as a result of defendant's discrimination," citing Harper).

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* In United States v. Educational Employment Enterprise, OCAHO Case No. 90200242 (Jan. 2, 1991), the judge provided an opportunity similar to that afforded Complainant here, to augment the record following entry of judgment by default. In that case, however, the requisite evidence was produced as to interim and lost earnings so as to support an award of back pay.

In both Goff and Harper the court also rejected demands for post-trial evidentiary hearings, finding no indication in the record of either case that issues of liability and compensation were to be bifurcated. Coraizaca, however, presents an a fortiori situation. Here, I twice provided an opportunity for him to submit evidence to support a back pay award, in effect bifurcating the case to Complainant's advantage, but to no avail.

Title 8 U.S.C. §1324b at subsection (g)(2)(A) in terms prescribes a preponderance of the evidence standard of proof as to liability, commanding administrative law judges upon finding liability to issue cease and desist orders. At subsection (g)(2)(B), such judges are authorized, but not commanded, to provide further relief to the discriminatee and further burden to the wrongdoer. The statute does not in terms require a preponderance of the evidence standard as the predicate for award of back pay. Considerations of essential fairness as between the parties, however, require that an award be denied where the complainant, as here, has failed to respond to judicial demand that he come forward with evidence in support.

Complainant has failed twice to respond to orders of the judge to submit evidence in support of his case for compensation. By that failure, Complainant has forfeited his claim to back pay under 8 U.S.C. §1324b. By failing to enable me to make findings in his favor he has no further rights in that respect within the meaning of Albemarle. I conclude that to provide back pay on the record before me would result in prejudice to Respondent, notwithstanding it has been found in default. The comment in Goff, 929 F.2d at 930, that "denial of backpay in such a case does not offend the broad purposes of Title VII," is equally opposite to our jurisprudence.

This Final Decision and Order incorporates the findings and conclusions previously stated in the Decision and Order dated March 13, 1991 which is adopted and incorporated herein as if fully reproduced here. In addition, it is also found and concluded as follows:

(1) That Respondent is in violation of 8 U.S.C. §1324b with respect to the discriminatory discharge of Juan Coraizaca on or about April 26, 1990, based upon his citizenship status and national origin.

(2) That Respondent cease and desist from the discriminatory practice described in the Complaint.

(3) That Respondent comply with the requirements of 8 U.S.C. §1324b with respect to individuals hired for a period of three years from the date of this Order.

(4) That Respondent retain for a period of three years the names and addresses of each individual who applies, either in person or in writing, for employment in the United States, to any business entity associated with Respondent.

(5) That Respondent post notices to employees about their rights under 8 U.S.C. §1324b, and employer's obligations under 8 U.S.C. §1324a.

(6) That Respondent reinstate Juan Coraizaca without back pay.

This Decision and Order is the final administrative order in this case pursuant to 8 U.S.C. §1324b(g)(i). Not later than 60 days after entry, any party aggrieved by this Decision and Order may appeal it "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated this 4th day of June, 1991.

MARVIN H. MORSE
Administrative Law Judge