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

September 6, 1991

ROBERTO DECASEZ-MARTINEZ, Complainant	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	Case No. 91200009
TYSON FOODS, INC., Respondent	)	

DECISION AND ORDER

Appearances: Roberto Decasez-Martinez, pro se;
Michael R. Jones, Esquire, Gilker & Jones,
Martinburg, Arkansas, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding involves the complaint of Roberto Decasez-Martinez (complainant) against Tyson Foods, Inc. (respondent), in which complainant alleges that respondent refused to hire him based upon his citizenship status, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

On December 24, 1990, complainant filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices of the Department of Justice (OSC), alleging therein that respondent had engaged in an unfair immigration-related employment practice. Specifically, complainant charged that on December 2, 1990 respon-

dent had refused to hire him for employment solely because of his citizenship status.

On January 11, 1991, following its assessment of complainant's allegations, OSC forwarded a letter to complainant notifying him that it would not file a complaint on his behalf before an administrative law judge. The OSC also informed complainant of his right under IRCA to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO), if he did so within 90 days of his receipt of that letter.

In that correspondence, also, OSC advised complainant that his charged was being referred to the Little Rock, Arkansas Office of the Equal Employment Opportunity Commission (EEOC) since OSC had noted that complainant's allegations may have also constituted a charge of national origin discrimination.

On February 11, 1991, complainant timely filed a complaint with OCAHO, reasserting therein his charge of citizenship status discrimination under the pertinent provisions of IRCA, and also requested that the matter be assigned to an administrative law judge for hearing.

On February 14, 1991, complainant also filed a charge of national origin discrimination with EEOC, as opposed to the then pending citizenship status discrimination charge under IRCA which he had filed with OCAHO on February 11, 1991. In his EEOC charge, complainant alleged that on December 3, 1990 respondent had unlawfully discriminated against him because of his Mexican national origin, in violation of the applicable provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (1982) (Title VII).

Specifically, complainant's EEOC national origin discrimination charge contained the allegations that on December 3, 1990, complainant had interviewed for employment at respondent's Grannis, Arkansas poultry processing facility and had not been hired because he failed a pre-employment drug test. Complainant's charge further recited that he had failed that drug test because respondent had failed to provide an English speaking interpreter, as complainant had requested, owing to his inability to speak or to understand English. Finally, complainant also alleged therein that he had successfully undertaken a second drug test on January 21, 1991, during the course of which an English speaking interpreter was present, but had not been hired on that occasion, either (Respondent's Exh. 6).

That Title VII national origin discrimination charge has not been heard and it is still pending before EEOC.

On March 12, 1991, respondent timely filed its answer herein, in which it generally denied and/or pleaded insufficient information to admit or to deny all allegations in the Complaint.

On May 22, 1991, following written notice to the parties, the matter was heard before the undersigned in Fort Smith, Arkansas. A fluent Spanish interpreter was present throughout the proceeding.

Summary of Evidence

Complainant's hearing evidence consisted of his testimony and that of his father, Jacinto Decasez-Eslovon. Respondent's evidence was comprised of the testimony of Howard W. Hunter, respondent's personnel manager, and Donna Fay Blackmon, the nurse who conducted the drug test in question at respondent's Grannis, Arkansas poultry processing plant. In addition, seven documents were marked and admitted into evidence as Respondent's Exhibits 1 through 7.

Complainant is 26 years of age, having been born on April 6, 1965 in Monterrey, Nuevo Leon, Mexico of parents who, according to his testimony, are United States citizens. He stated that his mother is a naturalized citizen, while his father is a native United States citizen. Although complainant was born in Mexico and carries a Mexican birth certificate, his birth was reportedly registered in Texas since his parents are United States citizens. He is married and his wife and two children, ages 4 and 5, reside in Mexico. He testified that upon securing a certificate of citizenship shortly from the Immigration and Naturalization Service (INS) office in Memphis, Tennessee, his wife and children will join him in Wickes, Arkansas.

Complainant also stated that he legally entered the United States at Del Rio, Texas on August 4, 1990, in the company of his father, who had gone to Mexico for that purpose. They went immediately to the home of his parents located in Wickes, Arkansas, where complainant has lived since that time.

According to respondent firm's two-page employment application form, (Respondent's Exh. 1), which complainant testified had been prepared by his father, and which complainant had signed on October 1, 1990, he began working three days after his arrival, or on August 7, 1990, at a nearby chicken farm located in Cove, Arkansas.

Complainant's employment application also contains the information that his sister and uncle then worked at respondent's Grannis, Arkansas poultry processing plant, which is also located close on to complainant's residence in Wickes.

Complainant learned that respondent firm, which employs some 20,000 workers nationally, was hiring at that plant, which then employed some 500 persons, and shortly prior to December 2, 1990, he delivered the previously-mentioned job application to respondent's personnel manager, Howard W. Hunter.

Complainant was contacted by respondent firm's personnel and was requested to report to the plant nurse at 10:30 p.m. on the evening of the following Sunday, December 2, 1990, for routine pre-employment testing in connection with an opening on the night shift on the deboning line, that part of the operation in which his sister was then employed. That testing was conducted by Ms. Donna Fay Blackmon, a licensed practical nurse, then assigned to the 10:00 p.m. to 6:00 a.m. shift as an occupational health nurse. She had begun her employment at respondent's plant in late November, 1990, or shortly prior to the December 2, 1990 testing episode at issue.

All job applicants are required to take a physical dexterity test, among others, and are also required to undergo a drug test, which involves giving a urine specimen in a monitored setting. That testing is routinely conducted during either of two shifts at that plant, one beginning at 10 p.m. Sunday through Thursday and the second, which starts at 8:00 a.m. Monday through Friday.

Complainant testified that he specifically requested that an English speaking interpreter be present throughout the testing activity because complainant can neither speak nor understand English.

But the testimony of Ms. Blackmon and Howard W. Hunter disputes complainant's version of the events in question. The former testified that complainant displayed no impediments in understanding her instructions and questions, all of which were spoken in English. She also testified that complainant was given no assistance by Ricardo Garcia, a second job applicant who was also being tested on the same evening, nor did he request any help from Garcia. Had there been any linguistic difficulties, according to Ms. Blackmon, she would simply have gone to the nearby deboning line in the plant and, following standard practice, utilized the services of one of the many bilingual workers there as an interpreter for the purpose of assisting in any of the many tests, including the drug test.

It is to be noted that respondent's pre-employment testing records, all seven of which were presumably voluntarily signed by complainant on December 2, 1990, and five of which were also witnessed by Ms. Blackmon, on that date, also, were completed without the assistance of an interpreter (Respondent's Exh. 2).

Only the facts surrounding the taking of a urine sample from complainant in the course of that drug test, upon which complainant has entirely based his charge of citizenship status discrimination, form the basis of the narrow controversy at issue.

Complainant stated that he believes that respondent's nurse gave him a container into which he was to have placed a urine specimen. That was to have been done in a bathroom located immediately next to the nurse's office. He did not understand her instructions and asked the other job applicant being tested, Ricardo Garcia, what the nurse had just instructed complainant to do. Garcia told him to fill the container with urine and to retain the container. Complainant also testified that the nurse placed a red dye in the bathroom's commode and flush box, presumably to ensure the integrity of the testing procedure. Complainant then went into the bathroom, and instead of placing his urine into the container, as he stated he had been told to do by Garcia, as well as the nurse, complainant urinated into the commode, the water in which had just been dyed red by the nurse and, contrary to instructions received only seconds before, he filled the container by dipping it into the red colored, unflushed water in the commode. Having filled the specimen container in that manner he immediately handed it to the nurse and went home.

In her testimony, Ms. Blackmon described the same incident in markedly differing respects. She said complainant had responded, albeit in broken English, to her instructions, which were spoken in English, and that complainant had done so without Garcia's assistance. Complainant was advised that dye had been placed into the commode water and he had washed his hands, as Ms. Blackmon had instructed him to do, prior to the specimen collection phase of the drug test. She also stated that while a drug test normally takes only a few minutes, complainant took between 10 and 20 minutes to return the container, which she noted was abnormally cold and was also off-color in appearance. That fact was noted by her in the upper left portion of the first page of the three-page form routinely completed at respondent firm in the course of all drug testing (Respondent's Exh. 3, at 1). Because the urine specimen had been tainted, she advised the day nurse, as well as Howard W. Hunter, of that fact on the following morning.

Complainant's tainted specimen was routinely sent on to the independent testing laboratory, Roche Biomedical Laboratories. On December 5, 1990, that testing firm advised respondent that clinical testing of complainant's urine specimen, which had been received on December 3, 1990, had resulted in clinical values not consistent with normal urine and requested that a new urine specimen be resubmitted (Respondent's Exh. 3, at 2).

Respondent's records also disclose that on January 21, 1991, complainant was re-tested and that on that occasion it was noted that the temperature of his urine specimen was within the allowable temperature range of 90.5 to 99.8 degrees Fahrenheit (Respondent's Exh. 4, at 1). On January 23, 1991, following testing on the previous day, Roche advised respondent that testing of complainant's second urine specimen had resulted in negative findings (Respondent's Exh. 4, at 2), confirming complainant's contention that he passed the second drug test.

Respondent's corporate drug policy, including the urine collection and testing procedure, is set forth in a 25-page document, which was revised as recently as July 1, 1990 (Respondent's Exh. 7). All job applicants undergo pre-employment drug testing as a condition of employment and all employees, including those in management and clerical positions, as well as production personnel, can be re-tested thereafter, even randomly, under specified conditions.

In the event that any job applicant tests positive in the course of p re-employment drug testing, no job is offered, but that person can re-apply for employment in 90 days.

Respondent's written drug policy also provides that should a urine specimen become adulterated or diluted in the course of collection, as occurred under these facts, that tainted specimen should always be forwarded to the independent testing laboratory, as respondent did in this instance. Upon being advised of that fact by the independent testing laboratory, a second urine specimen should be collected and again forwarded for testing.

Upon receiving the laboratory report on the tainted urine specimen furnished by complainant on December 2, 1990, to the effect that the clinical testing results were not consistent with normal urine and that a new urine specimen should be submitted (Respondent's Exh. 3, at 2), respondent's personnel, namely Ms. Blackmon, its nurse, and Howard W. Hunter, its personnel manager, should have arranged to have a second urine specimen collected from complainant. But neither did so.

On December 2, 1990, Ms. Blackmon had then been working at respondent's plant for less than three weeks, had then had no prior experience involving a tainted urine specimen, and had also not then been sufficiently familiar with her employer's drug testing policy to know that a second urine sample should have been requested of complainant (T. 136). Similarly, Hunter testified that he also was unaware that a second urine specimen should be collected shortly following the receipt of a tainted urine specimen collected from any job applicant (T. 93, 94).

In any event, complainant was subsequently requested to come in again for re-testing, which was done on January 21, 1991, or some 50 days after the initial pre-employment drug test on December 2, 1990. As noted previously, complainant passed that drug test since the testing laboratory advised respondent that testing of complainant's second urine specimen had resulted in negative findings (Respondent's Exh. 4, at 2). On January 23, 1991, respondent learned that complainant had passed the second drug test. But because of a hiring freeze which had been imposed on January 10, 1991, complainant was not offered the deboning position for which he had applied and been tested initially on December 2, 1990.

In late April, 1991, some four weeks prior to the May 22, 1991, hearing in this matter, respondent lifted its hiring freeze, began hiring again and contacted complainant, inviting him to revisit their plant in order to resume the hiring process.

Complainant did so and in the course of respondent's preparation of a Form I-9, the INS Employment Eligibility Verification Form, which is to be completed only for the purpose of establishing an individual's employment authorization, complainant produced a Social Security card, upon the face of which appeared these words: "valid for employment" (Respondent's Exh. 5). Knowing that certain documents of that character routinely contain the wording "not valid for employment", and also because that portion of the Social Security card preceding the word "valid" appeared to have been altered or tampered with, Hunter conferred with his superior, Gary Walker, about that wording on the face of the card. They inquired of complainant, who replied by telling Walker that on or about May 10, 1991, complainant planned to go to the Memphis, Tennessee office of the INS in order to secure a work permit and that he would return to respondent's office with that permit on May 13, 1991. Hunter then told complainant that his employment processing would continue after he returned with the INS documentation. But complainant has never returned and for that reason only, respondent has not resumed processing complainant's job

application (T. 15, 16). On the date of the hearing, complainant was undecided as to whether he is still interested in working for respondent, given the happenings in this matter (T. 74, 75).

Complainant's father, Jacinto Decasez-Eslovon, testified that he had altered complainant's Social Security card, which had been obtained in August or September, 1990, by having erased the word "not" from the notation "not valid for employment" which originally appeared in full on the front of that card. He explained that he did so in order to assist complainant in securing a job. He also testified that an INS officer in Memphis told him that he should not have altered his son's Social Security card in that manner, but that officer had also reportedly added that such document alteration had not mattered since complainant has acquired United States citizenship by virtue of the fact that his father is a native United States citizen (T. 63, 64).

Complainant's father also testified that complainant's citizenship status did not play any part in complainant's not having been hired by respondent, since the latter was of the opinion that complainant was a United States citizen. Instead, he believes that but for the tainted drug test urine specimen complainant would have been hired by respondent in December 1990 and bases his son's citizenship discrimination case against respondent solely upon his belief that respondent had failed to provide a Spanish speaking interpreter at the December 2, 1990 drug test (T. 66, 67).

Issue

The central issue presented for adjudication concerns complainant's claim that on December 2, 1990, respondent engaged in an unfair immigration-related employment practice, in violation of the relevant provisions of IRCA, during the course of having complainant undergo a pre-employment drug test, the salient facts of which have been summarized previously.

More specifically, complainant contends that, based solely upon his citizenship status, he was not hired for employment by respondent on or about that date. That because complainant failed a pre-employment drug test on that date, by reason of his having furnished respondent a tainted urine specimen, a happening which would not have occurred had respondent arranged to have a Spanish speaking interpreter in attendance, as complainant alleges he had requested.

The statutory cause of action which complainant asserts herein is that set forth in Section 102 of IRCA, (Pub. L. 99-603, 100 Stat. 3374

(Nov. 6, 1986), 8 U.S.C. § 1324b, which amended Chapter 8 of Title II of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163; 8 U.S.C. § 1101, et seq., by adding after section 274A of INA the following new section, in pertinent part:

"Unfair Immigration-Related Employment Practices"

Sec. 274B. (8 U.S.C. 1324b) (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.- (1) General Rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 274A(h) (3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment- (A) because of such individual's national origin, or (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.(Emphasis Added) * * * * *

The term "citizen or intending citizen", as set forth at 8 U.S.C. § 1 3 24b(a)(1)(B), is defined at 8 U.S.C. § 1324b(a)(3), in pertinent part, as follows:

(3) Definition of Citizen or Intending Citizen. -As used in paragraph (1), the term "citizen or intending citizen" means an individual who- (A) is a citizen or national of the United States, or (B) is an alien who- (i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208, and (ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen; * * * * *

However, the provisions of Section 533 of the Immigration Act of 1990 (IA90), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) eliminated the requirement that aliens be required to file a declaration of intention to become a citizen in order to file an anti-discrimination complaint such as the one at issue.

Before proceeding, it should be noted that complainant's EEOC charge against respondent, that which is based upon national origin discrimination, as opposed to his IRCA charge herein, which involves citizenship status discrimination, is properly before EEOC since claims based upon national origin discrimination may be entertained by this office on a limited jurisdictional basis namely, only in those cases in which the employer being charged employs between four and 14 employees. Those precise numerical parameters have been established because IRCA exempts persons or entities, such as respondent, that employ three of fewer employees from claims of national origin discrimination, 8 U.S.C. § 1324b(a)(2), 28 C.F.R. § 44.200(b)(1)(i).

IRCA also provides an exemption from claims of national origin discrimination in the event that claims of that character are also covered under Title VII, 8 U.S.C. § 1324b(a)(2)(B), 28 C.F.R. § 44.200(b)(1)(ii), and also because charges of that type must be brought under Title VII, rather than IRCA, in the event that the person or entity involved, as here, employs 15 or more employees, 42 U.S.C. § 2000e(b). Suchta v. U.S. Postal Service, OCAHO Case No. 90200290 (May 16, 1991); Ryba v. Tempel Steel Co., 1 OCAHO 289 (January 23, 1991); Fordjour v. General Dynamics, 1 OCAHO 286 (January 11, 1991). Because it has been shown that respondent has a 20,000-person work force, that cause of action is therefore unavailable to complainant in this forum.

In pursuing this charge of an unfair immigration-related employment practice based upon citizenship status, complainant's evidentiary burden of proof herein is that of establishing by a preponderance of the evidence, 8 U.S.C. § 1 324b(g)(2)(A), that respondent knowingly and intentionally engaged in the discriminatory activity which he has alleged, 8 U.S.C. § 1324b(d)(2).

Previous rulings by OCAHO and the administrative law judges disclose that guidance in ascertaining the burdens of proof imposed upon IRCA complainants was gained by reviewing and adopting those decisions involving claims of discrimination under Title VII. Huang v. Queens Hotel, OCAHO Case No. 91200021 (August 9, 1991); Williams v. Lucas & Associates, OCAHO Case No. 89200552 (July 24, 1991); Ryba v. Tempel Steel Company, supra; U.S. v. LASA Marketing Firms, 1 OCAHO 141 (March 14, 1990).

Since complainant's charge herein is based upon disparate treatment, any further discussion must begin with the Supreme Court ruling in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the leading case dealing with Title VII employment discrimination charges based upon disparate treatment in the hiring process. In that decision, plaintiff was required to establish a prima facie case of discrimination and was further required to prove by a preponderance of the evidence:

> "(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.

The order and allocation of proof in Title VII cases involving disparate treatment was further refined in a subsequent Supreme Court decision, Texas Department of Community Affairs v. Burdine,

450 U.S. 248 (1981). In that ruling, it was held that upon a showing of a prima facie case of discrimination by a preponderance of the evidence, an inference of discrimination arises and imposes upon the defendant a burden of rebuttal which respondent successfully assumes by articulating with specificity a legitimate, non-discriminatory reason for not having not having hired plaintiff. Given that showing, the plaintiff then has the opportunity to prove, once more by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons for not having hired plaintiff, but instead were a pretext for intentionally discriminating against plaintiff. 450 U.S. at 249.

Accordingly, in order to present a prima facie case of discriminatory failure to hire under IRCA, complainant must show: (1) that he belongs to a class of persons protected by IRCA; (2) that he applied and was qualified for a job for which respondent was seeking applicants; (3) that despite being qualified, he was rejected; and (4) that, following his rejection, the position remained open and respondent continued to seek applicants from individuals having complainant's qualifications. U.S. v. Marcel Watch Corp., 1 OCAHO 143 (March 22, 1990); U.S. v. Mesa Airlines, 1 OCAHO 74 (July 24, 1989).

In the event that complainant fails to successfully meet that evidentiary burden, an appropriate order dismissing his complaint must be entered, 8 U.S.C. § 1324b(g)(3); 28 C.F.R. 68.50 (c)(1)(iv); Williams v. Lucas & Associates, supra; Ryba v. Tempel Steel Co., supra; Adatsi v. Citizens, Etc., 1 OCAHO 203 (July 23, 1990); Akinwande v. Erol's, 1 OCAHO 144 (March 23, 1990).

Utilizing the McDonnell Douglas and Burdine evidentiary parameters, these disputed facts will be assessed and a determination made concerning complainant's allegation that respondent's failure to arrange for the presence and utilization of a Spanish speaking interpreter at complainant's December 2, 1990 drug test amounts to an unfair immigration-related employment practice based upon citizenship status.

Under these facts, complainant has demonstrated the initial element of the required prima facie case, that of showing that he is a member of a protected class. As previously noted, the provisions of 8 U.S.C. § 1324b(a)(3)(A) define the term "citizen" as including a citizen or national of the United States. The wording of 8 U.S.C. § 1401(c) provides, in pertinent part, that a person born outside of the United States and its outlying possessions, of parents both of whom are citizens of the United States and one of whom has had a residence in

the United States or one of its outlying possessions, prior to the birth of such person, shall be nationals and citizens of the United States at birth. Complainant's unrebutted testimony to that effect, as well as that of his father, clearly shows that he is a member of a class intended to be protected by the enactment of IRCA.

Similarly, complainant has established that he has satisfied the second element, also, since his testimony to the effect that he applied and was qualified for the deboning position for which respondent was seeking applicants was also unopposed.

In order to make the required prima facie case, complainant must next show that despite having been qualified for the position of deboner, he was rejected. He has satisfactorily assumed his evidentiary burden on that requirement, also.

Finally, complainant succeeded in showing that following his rejection, the deboner position remained open and also that respondent continued to seek applications from persons possessing qualifications comparable to those of complainant.

In that posture, complainant's evidence creates an inference of discriminatory conduct which imposes upon respondent the burden of rebutting that inference by specifically articulating a legitimate, non-discriminatory reason for not having selected complainant for the deboner position of the second shift at its Grannis, Arkansas facility.

For the following reasons, I find that this evidentiary record clearly discloses that respondent has established an eminently legitimate and non-discriminatory reason for not having hired complainant for that position in early December, 1990, namely, complainant's failure to have passed the pre-employment drug test administered on December 2, 1990.

Given that finding, complainant must prove by a preponderance of the evidence that respondent's refusal to hire him, based upon complainant's failure to have passed the December 2, 1990, drug test, was not the actual reason for such refusal and that that decision by respondent was merely a pretext for intentionally discriminating against him. This complainant has failed to do.

An examination of the evidence adduced by complainant reveals that he has offered no facts which are of assistance in determining the actual reason he was not hired, much less any evidence which serves

to demonstrate that said reason was pretextual as concerns respondent's alleged intentional discrimination against him.

It is difficult to predicate complainant's alleged discrimination charge upon citizenship status in view of complainant's testimony that no one at the respondent firm made any inquiry of him concerning his citizenship status (T. 61). In addition, complainant's father testified that he does not believe that his son's citizenship status played any part in respondent's decision not to hire complainant (T. 67).

Complainant has based his charge herein on respondent's refusal to hire him which resulted from his failure to pass the December 2, 1990 drug test. And respondent has shown conclusively that no one is hired at respondent's firm without passing such a test, as verified by an independent testing laboratory following clinical testing of untainted, unadulterated urine samples collected in a monitored setting. In that connection, respondent has more than amply demonstrated that complainant was not treated any differently than any other job applicant.

While this evidentiary record shows that complainant was again tested on January 21, 1991, and further that he passed that test, respondent did not then offer employment to complainant because respondent was not hiring at that time, owing to a hiring freeze which was put into effect earlier, on January 10, 1991, as opposed to any other circumstance which could even remotely be considered to have been related to complainant's citizenship status.

This hearing record further discloses that respondent is still interested in employing complainant, as evidenced by the fact that as recently at April, 1991, upon lifting its hiring freeze, respondent contacted complainant and invited him to come in again in order to resume the necessary pre-employment activities. Upon doing so, complainant presented altered documents and advised respondent's personnel that he would return shortly thereafter with certain documents with which he was reportedly about to be furnished by INS, thus facilitating the hiring process. But complainant failed to return with such documentation and testified that he is undecided as to whether he is still interested in obtaining employment at respondent firm (T. 74, 75).

Any objective assessment of this evidentiary scenario reveals that complainant was not discriminated against in any manner at any stage of the hiring process. Complainant's claim is reduced to his total reliance upon respondent's failure to have had a Spanish speaking

interpreter present at the December 2, 1990 drug test in order to support his claim of discrimination. In essence, it is a matter of weighing his assertions and testimony, and the reasonable inferences one may draw therefrom, against the testimony of respondent's nurse in attendance, Ms. Blackmon. Without particularizing the extensive testimony adduced by those two principal witnesses concerning that critical factual event in question and based upon their respective credibility and demeanor, I credit the testimony of Ms. Blackmon over that of complainant in reaching the conclusion that respondent's failure to provide a Spanish speaking interpreter during the drug test on December 2, 1990 did not result in, or contribute to, complainant's submitting a tainted urine specimen in the course of that drug test.

In the absence of having shown any causality between respondent's alleged failure to have provided such an interpreter and respondent's failure to have hired him, claimant has clearly failed to demonstrate that respondent has practiced the proscribed hiring conduct of which he complains. Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (August 2, 1989); U.S. v. Mesa Airlines, supra.

For the foregoing reasons, complainant's request for administrative relief is being denied and an appropriate order of dismissal entered.

Order

Complainant's February 11, 1991 complaint, charging that respondent had engaged in an unfair immigration-related employment practice based upon citizenship status discrimination, in violation of the provisions of 8 U.S.C. § 1324b, is hereby ordered to be dismissed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This decision and order, upon issuance and service upon the parties shall, in accordance with the provisions of 8 U.S.C. § 1324b(g)(1), become final unless, as set forth in the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such order seeks a timely review of that order 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, and does so no later than 60 days after the entry of such order.