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

CRECENCIO CABRERA MENDEZ, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 91200049
JIM DANIELS, Respondent.	)	

Appearances:
Crecencio Cabrera Mendez
Pro Se Complainant

Jim Daniels
Pro Se Respondent

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

FINAL DECISION AND ORDER

I. *Background*

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324b. Section 1324b provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status . . . ." The statute covers a "protected individual" defined at section 1324b(a)(3) as one who is a citizen or national of the United States, an alien lawfully admitted as for either permanent or temporary residence, or an individual admitted as a refugee or granted asylum.

Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. § 1325b, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in this country. "Joint Explanatory Statement of the Committee of Conference," H.R. CONF. REP. NO. 99-1000, 99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration Unfair Employment Practices (OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. § 1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. This case involves a private action brought by Crecencio Cabrera Mendez (Mendez), Complainant herein.

Mr. Mendez was born on January 1, 1946, in San Luis de la Paz Guanajinato, Mexico. He illegally entered the United States sometime in 1970, but later became a permanent U.S. resident authorized to work in the United States. Respondent, Jim Daniels, operated a horse breeding business in Brenham, Texas, until May of 1988. He hired Mr. Mendez in 1983 to work on his ranch as a caretaker and groomer of horses. He discharged Mr. Mendez in June 1988.

Mr. Mendez charges in his Complaint that on or about June 12, 1988, Jim Daniels, Respondent herein, unlawfully discharged him from his job as a caretaker and groomer of horses because, inter alia, of his national origin (Hispanic) and not for any legitimate business reason in violation of 18 United States Code section 1324b.[1]

II. *Procedural History*

The procedural history in this case shows that on September 26, 1990, Crecencio Cabrera Mendez, Complainant herein, acting pro se,

[1] There is a dispute in this case as to the date when Mr. Mendez first went to work for the Respondent and the date when his employment was terminated. There is also a dispute as to whether or not Mr. Mendez was discharged from his employment or whether he quit working because of a job opportunity. For the purpose of resolving this case expeditiously and without prejudice to the parties, I have assumed Complainant's version of the facts, but not his legal conclusions.

filed a charge of national origin discrimination against Jim Daniels with the Office of Special Counsel (OSC). In his Complaint, Mr. Mendez alleged that he was an alien authorized to work in the United States who had applied for naturalization. He further alleged that the discrimination was as follows:

> Jim always told me that he was gonna pay me and he never did. He said as soon as he sold some land he was gonna pay me and he never did. He owes $27,250.00 (sic). All that time I was there he only gave me $5,200.00 just enough to by (sic) my grocery (sic).

In a letter written in Spanish dated January 3, 1990 (sic), from Special Counsel (SC) addressed to Mr. Mendez, SC advised him that the Office of Special Counsel could not assist him because his Complaint did not relate to any law that it was authorized to enforce or implement.[2] The letter also advised Mr. Mendez that he should contact the U.S. Department of Labor Wage and Hour Division, in either Bryan or Houston, Texas, for assistance.

In another letter written in Spanish and dated January 4, 1990 (sic), from Special Counsel to Mr. Mendez, the OSC advised Mr. Mendez that it received and accepted his Complaint against Jim Daniels on September 26, 1990, in which he alleges an unfair immigration-related employment practice under Section 102 of the Immigration and Reform Control Act of 1986 (IRCA) and that Mr. Daniels owes him $27,500.00. The letter further stated that SC had determined that there was not reasonable cause to believe the charge was true (referring to any alleged act of discrimination); and, therefore, it had decided not to file a complaint on his behalf with OCAHO. Mr. Mendez was advised, however, that pursuant to time constraints in the IRCA, he had until on or before April 24, 1991, to file his own complaint with OCAHO.

On or about March 8, 1991, Mr. Mendez, acting pro se, did file a Complaint letter handwritten in Spanish with the CAHO. In this letter, Mr. Mendez detailed, inter alia, his problems with Mr. Daniels. He stated that he worked for Mr. Daniels at his horse breeding farm during two separate periods. The first period was from January 1974

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[2] I had this letter and others in the file, which are written in Spanish, translated into English by a qualified Department of Justice Spanish to English "interpreter." This letter and a letter dated January 4, 1990, also referred to herein, are dated January 1990 not 1991. It is clear, however, that the date 1990 in each letter was a typo and should read 1991.

until mid-Dec 1982, followed by a brief vacation to Mexico to visit his family. Apparently he was paid for the work he did during this period. See Complainant's Response dated November 4, 1991, to my order of September 19, 1991. The second period was from approximately late December 1982 to June 12, 1988. During this five-year period, Mr. Mendez had a verbal agreement with Mr. Daniels to receive a monthly salary of $500.00 and free room and board. According to Mr. Mendez, Mr. Daniels did not pay him his salary, but told him he would deposit the money into an account and keep it for "safekeeping" until he was ready to move to Mexico. Later, when Mr. Mendez asked for his money, Mr. Daniels told him that he was in the process of liquidating his assets and when he received enough funds he would pay Mr. Mendez.

Mr. Mendez also stated in his letter that he had contacted the Department of Labor's Wage and Hour Division in Texas for help in trying to obtain his money from Mr. Daniels, but they told him that "the period to claim your wages had passed," and did not provide him any help in trying to collect his wages.

There are no facts set forth in these letters by Mr. Mendez to CAHO to suggest that his termination from Mr. Daniels' employment was based upon discrimination because of his national origin.

On April 1, 1991, Complainant, again acting pro se, filed a more formal Complaint with OCAHO against Jim Daniels alleging discrimination based upon national origin status in violation of Section 102 of IRCA.[3]

More specifically, the Complaint alleges that Complainant, a U.S. citizen (sic), was hired by Respondent on or about December 26, 1983, "to take care of horses for Jim Daniels in Brenham, Texas."[4] It is further alleged in the Complaint that Mr. Mendez was qualified for this position, but on or about June 12, 1988, was "knowingly and intentionally" fired from this job because of his Mexican national origin. The factual details supporting the allegation of discrimination were not set out in the Complaint.

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[3] This Complaint is a pre-typed form provided by the CAHO to a pro se complainant which he or she fills out before filing it with the CAHO.

[4] Actually the pleadings and other papers filed in this case indicate that Complainant was an alien authorized to be employed in the United States at the time of his discharge.

On April 5, 1991, I was assigned to hear the case; and on June 14, 1991, I issued an "Order to Show Cause Why Default Judgment Should Not Issue," in which I ordered Respondent to file, on or before July 1, 1991, an explanation as to why he had not filed a timely answer.

On June 31, 1991, Respondent filed his response to my order. Instead of detailing his reasons for filing a late Answer, Respondent filed a detailed Answer. In light of the fact that Respondent was also acting pro se, apparently in poor health, and having significant financial problems, I found just cause for his filing a late Answer and construed his letter/Answer as in compliance with 28 C.F.R. § 68.8.

On September 19, 1991, I issued an order directing Complainant to file a detailed statement of the facts relating to why his filing the Complaint with Special Counsel was not made within 180 days of his termination from employment and also asked him specific interrogatories about the basis for his allegations in the Complaint.

On November 5, 1991, Complainant filed his response to my September 19th order. In his response, Complainant explained, inter alia, what steps he took prior to filing a complaint with OSC to obtain the money that Mr. Daniels owed to him, what his job duties were, why he believed he was fired, and how many other employees worked for Daniels at the time he was terminated.

III. *Discussions, Findings and Conclusions*

In view of the fact that both parties to this case are pro se, I have made a special effort to obtain from the parties sufficient facts to determine whether or not I have jurisdiction to hear this case, and if so, whether or not there are sufficient material facts in dispute to warrant an evidentiary hearing.

In order for me to have jurisdiction to hear and decide this case, I must first determine whether or not the Complainant is a "protected individual," as defined in IRCA, and whether or not Respondent meets the "employee requirement" under IRCA.

"Protected individuals" under IRCA include lawful permanent residents. I find from the record in this case that Complainant was a lawful permanent United States resident on the date of the alleged discrimination; and is, therefore, a "protected individual."

The provisions of IRCA which protect a person from discrimination on the basis of national origin apply only to employers of more than three but less than fifteen employees. See Ndusorouwa v. Prepared Foods, Inc., 1 OCAHO 192 (7/3/90). The EEOC, under Title VII of the Civil Rights Act of 1964, retains exclusive, sole subject matter jurisdiction for national origin charges against employers of more than fourteen employees. See Udofot v. General Electric, 1 OCAHO 205 (7/25/90). I find from the record in this case that Respondent did employ between four and fourteen employees on the date of the alleged discrimination; and, therefore, Complainant has met the employee requirement under IRCA.

After carefully reviewing all the pleadings and statements filed by the parties in this case, it is clear, however, that Complainant's allegations against Respondent, whether true or not, are simply not covered by IRCA; and, therefore, the Complaint will be dismissed for lack of jurisdiction.[5]

Discriminatory conduct under IRCA is known as "unfair immigration-related employment practices." It is an unfair immigration-related employment practice, inter alia, for a person to discriminate against any individual, other than an unauthorized alien, because of that individual's national origin. Specifically, discrimination under IRCA is prohibited in: (1) hiring; (2) recruiting; (3) referring for a fee; or (4) discharging. Discrimination in compensation, terms, or conditions, are not covered by IRCA. See Huang v. Queens Motel, 2 OCAHO 364 (8/9/91); and Fayyaz v. The Sheraton Corp., 1 OCAHO 152 (4/9/90).

Complainant has failed to understand that under the IRCA there is a significant difference between why a person is discharged and whether or not a wage agreement has been breached. Although the Complaint filed in this case alleges that Complainant was discharged from his employment because of his national origin, it is stated in conclusory language. More importantly, it is clear from all the pleadings and statements filed by Complainant that he is seeking a money judgment against Mr. Daniels for breach of contract in failing to pay him approximately $27,300.00 in wages earned during the

[5] Although there is arguably a significant procedural problem in Mr. Mendez' filing his initial Complaint against Mr. Daniels with OSC more than 180 days after the alleged act of discrimination, I believe it is more important to decide this case on a more substantive jurisdictional basis.

period January 26, 1983 to June 13, 1988. As stated above, failure to pay wages or compensation is not covered by the IRCA.

According to Complainant, the reason he was not paid by Respondent was because of his "illiteracy and ignorance." See Complainant's response dated November 4, 1991. Whether this is true or not is not relevant for purposes of determining a violation of section 102 of the IRCA. What is important, in determining whether or not Respondent violated section 102 of IRCA, is Respondent's reasons for discharging Complainant. There has been no statement of facts submitted by Complainant in this case, through affidavits or statements of third parties, to suggest that that the Complaint in this case is for unlawful discharge from employment because of Complainant's national origin.

Respondent states in his Answer to the Complaint that Mr. Mendez began working for him in his horse breeding business in 1977. In 1983, his horse breeding business was bankrupt, but he continued to provide Mr. Mendez with a place to live, food, utilities, medical care, transportation and even helped him in obtaining U.S. citizenship. Respondent further states in his Answer that business conditions did not improve the following year (1984); and, consequently, Mr. Mendez left his ranch to work somewhere else. Respondent does not dispute that he owes Mr. Mendez any money, but states he is too destitute and poor to pay him and any of his other creditors.

Based upon all the pleading and statements filed in this case, I find that Complainant has failed to state a claim upon which relief can be granted. More specifically, I find that Complainant's allegations against Respondent are for an alleged breach of an oral contract or agreement for failure to pay him wages and compensation which is not covered by IRCA.

Although there is no pending motion to dismiss this Complaint for failure to state a claim, the regulations do provide for dismissal sua sponte by an administrative law judge, if he or she determines that Complainant has failed to state a claim upon which relief can be granted. 28 C .F.R. § 68.10 (1991). Since I do have jurisdiction to hear and decide this case because it seeks relief for breach contract over wages and compensation, this Complaint is dismissed.

IV. *Ultimate Findings of Fact and Conclusions of Law*

In addition to the findings and conclusions already stated, based upon the foregoing, considering the pleadings, including their attachments, I find and conclude as follows:

1. That I am without jurisdiction to hear a claim of national origin discrimination under IRCA where, as here, the discrimination involves a dispute over wages or compensation owing to the employee.

2. That Complainant is not entitled to relief under IRCA because his claims for wages is not covered by the IRCA.

3. That the Complaint in this case is dismissed because Complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. § 68.10 (1991).

4. That the entire record on which this Final decision and Order is based consists of the pleadings, including their attachments, filed herein.

5. That pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED this 10th day of December, 1991, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge