

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

SERGIO FLORES ORTIZ,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00106
MOLL-TEX BROADCASTING	)	
COMPANY,	)	
D.B.A. KKXS (FORMERLY	)	
KLXQ	)	
Respondent.	)	
_____	)	

ORDER DIRECTING THE PARTIES TO FILE A  
RESPONSE TO THE COURT'S INTERROGATORIES

This case is presently set for an evidentiary hearing to be held on October 21, 1992, at San Antonio, Texas. Neither party in this case is represented by counsel; therefore, the court shall develop through its own discovery sufficient facts to determine whether or not it has jurisdiction to hear this case and whether or not summary decision can be granted to either party.

The regulations authorize an administrative law judge ("ALJ") to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material facts and that a party is entitled to summary decision."

The Complaint in this case alleges that Sergio Flores Ortiz, Complainant herein, was born in Mexico and is a citizen of Mexico, but is also an alien authorized to be employed in the United States. Complainant alleges that on March 1, 1991, his employer, KLXQ 102 FM, Respondent herein (Respondent's corrected name, as is now shown in all pleadings, is Moll-Tex Broadcasting Company doing business as KKXS), knowingly and intentionally fired him from his job as a radio DJ and program director because of his national origin in violation of Title 8 United States Code Section 1324b. The Complaint

further states that Complainant was qualified for his job and other workers in his situation of different nationalities were not fired.

The Complaint also states that Complainant was intimidated, coerced or retaliated against by Respondent because he filed or planned to file a complaint or was kept from assisting someone else to file a complaint. More specifically, the Complaint alleges that Ortiz was "verbally abused by the station manager, Mecon (sic) on a constantly (sic) basis. I was advised Mexican Americans wanted everything in (sic) a silver plate . . ."<sup>1</sup>

On June 15, 1992, Respondent filed its Answer to the Complaint, stating that the company was having financial problems during the first part of 1991 and hired Larry Mecom to help "assess the situation, bring up sales and reorganize the staff." The Answer further states that at the end of January 1991 Ortiz was given a job selling advertising on a commission basis, but failed to sign his contract. The Answer, however, does not clearly state when or why Ortiz was fired, nor does the Answer respond to each and every allegation of the Complaint.

I view the Complaint as alleging two types of Unfair Immigration- Related Employment Practices that are violations of the Immigration and Reform Control Act of 1986 and its 1990 amendments (IRCA): (1) unlawful discharge and (2) unlawful intimidation, threats, coercion or retaliation.

I. Wrongful Discharge

It is an unfair immigration related employment practice for a person or other entity to discriminate against any individual, other than an unauthorized alien, because of that individual's national origin. Discrimination is prohibited in hiring, recruiting, or discharging. Discrimination in compensation, terms, conditions, and privileges of employment is not mentioned in the statute. I have held that these conditions are not covered by IRCA.

Ortiz' claim will be analyzed under the "disparate treatment model," which applies when an "individual has been singled out and treated

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<sup>1</sup> I do not construe these verbal acts as forms of retaliation or other prohibited conduct under the 1990 amendments to IRCA, but rather evidence of discriminatory motive which led to his discharge.

less favorably than others similarly situated on account of his national origin."

In order for Ortiz to prevail in this case, he must first establish a prima facie case of discrimination. The burden of production then shifts to Respondent to articulate a legitimate nondiscriminatory reason for the adverse employment decision. If Respondent carries its burden, Ortiz is then afforded an opportunity to demonstrate that the assigned reason was a pretext or discriminatory in its application

One of the issues that I need to decide is whether Complainant can establish a prima facie case of discrimination to create a genuine issue of material fact sufficient to foreclose a summary decision. The prima facie case is established by a preponderance of the evidence.

For discriminatory discharge, the complainant must show:

1. He was within a protected class;
2. He was performing his job well enough to rule out the possibility that he was fired for inadequate job performance; and
3. His employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills.

Since it is undisputed that Complainant was an alien authorized to be employed in the United States, he is a protected individual as that term is defined under IRCA. I do not need any additional evidence on this element of a prima facie case.

The Complaint alleges that Complainant was a radio DJ and program director. The Answer seems to suggest that Ortiz was a salesmen and may have been employed to handle a "Spanish show." The court is unclear as to what job Complainant held with Respondent at the time he was discharged. The second element of the prima facie case requires Complainant to establish that he was performing his job well. The facts surrounding this element of the prima facie case will have to be more fully developed by appropriate answers to my interrogatories set forth below.

The record is also unclear as to whether or not the Respondent sought a replacement for Ortiz with qualifications which were similar

to his own (Ortiz). Finally, the record is also unclear as to why Ortiz was discharged from any of his jobs with Respondent. Accordingly, Complainant Ortiz shall answer the following interrogatories by the court, by submitting a written statement or by affidavit from himself or third parties on or before August 1, 1992:

1. When did you first begin working for Respondent?
2. What was your job, job duties and responsibilities?
3. What were your qualifications for your employment?
4. When do you claim you were unlawfully discharged by Respondent?
5. At the time of your discharge, how were you performing your job responsibilities?
6. If you have any papers, documents or letters reflecting why you were discharged, showing that you were performing your job well or not, you should submit those to the court.

The Respondent shall answer the following interrogatories by a written statement or affidavit from persons who have personal knowledge of the information requested on or before August 1, 1992.

1. When did you first hire Complainant?
2. What were his job duties and responsibilities?
3. Was he qualified for the job at time you hired him and, if so, how did he perform his job thereafter?
4. Did you discharge Complainant? If so, when and why?
5. If you discharged him, did you replace him with someone more qualified or similarly qualified?
6. If you discharged Complainant, state the job he was performing for you at the time you discharged him and your reasons for doing so.
7. At the time of Complainant's discharge, how many employees were working for Respondent?

8. During the period of time Complainant was employed by Respondent, what was the maximum number of employees working for Respondent?

II. *Anti-Retaliatory Provisions*

The Immigration Act of 1990 makes it an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce or retaliate against any individual (1) because the individual intends to file or has filed a charge or complaint; (2) because the individual has testified, assisted or participated in an investigation or hearing; or (3) because the person wants to interfere with any right or privilege established by the unfair immigration-related employment practice provisions.

Complainant has, in his Complaint filed herein, made conclusory allegations that Respondent unlawfully intimidated, threatened, coerced or retaliated against him. The record, however, does not describe in sufficient detail the basis for this allegation.

Accordingly, Complainant shall also file, on or before August 1, 1992, answers to the following additional interrogatories:

1. What specific act or acts of retaliation are you claiming occurred while you were employed by Respondent?
2. What evidence do you have to show that the acts described in paragraph #1 were related to your national origin or were related to your taking any type of legal action against Respondent?
3. Explain in detail all the types of legal action you have taken against Respondent in connection with the allegations in this Complaint, including actions before state agencies or boards and the EEOC, and the date or dates said action was taken.

**SO ORDERED** this 15th day of July, 1992.

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ROBERT B. SCHNEIDER  
Administrative Law Judge