

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

MARIA LOURDES CASTILLO,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 92B00224
HOTEL CASA MARINA)
(MARRIOTT),)
Respondent.)
_____)

FINAL ORDER AND DECISION DISMISSING COMPLAINT

I. Procedural History

The procedural history in this case, as set out in my Order to Show Cause Why This Case Should Not Be Dismissed, issued on February 2, 1993, stated:

On June 1, 1992, Complainant, Ms. Maria Lourdes Castillo, an alleged Nicaraguan authorized for employment in the United States, filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practice (OSC) in which she alleged violations of 8 U.S.C. 1324b by Respondent in that it engaged in acts which were employment discrimination based on her national origin. In its letter dated August 27, 1992, OSC notified the parties that, based on its investigation, Ms. Castillo was not a protected individual under the statute and, thus, OSC could not file a complaint. OSC informed Ms. Castillo that she had a right to file a complaint directly with the Office of the Chief Administrative Hearing Officer within ninety (90) days of receipt of OSC's letter pursuant to 8 U.S.C. 1324b(d)(2). As such, Ms. Castillo filed her Complaint on September 28, 1992 and alleged that she was discriminatorily fired based on her national origin and citizenship status. Specifically she alleged that, although she was qualified for her position, she was fired on April 29, 1992 while other workers in her situation of different nationalities or citizenship were not fired. Ms. Castillo did not request backpay but requested the relief available pursuant to 28 C.F.R. 68.52.

The Notice of Hearing On Complaint Regarding Unfair Immigration-Related Employment Practices, dated October 14, 1992, and the Complaint were served on Respondent by certified mail. Respondent's timely Answer, with its affirmative defenses, was filed November 18, 1992 in which it denied any discrimination and raised three affirmative defenses: that the Complaint failed to state a claim upon which relief

could be granted, that Complainant had no standing to bring this cause of action under 8 U.S.C. 1324b (miscited in Answer as 8 U.S.C. 132b), and that I lacked jurisdiction over the matter as Ms. Castillo is not a "protected individual" as required by 8 U.S.C. 1324b(a)(1)(B).

On January 6, 1993, I held a prehearing telephonic conference with Ms. Castillo and Respondent's counsel to discuss the fundamental issues of Ms. Castillo's status as a "protected individual" and my authority to hear Ms. Castillo's national origin claim of discrimination. At that conference, I dismissed the national origin discrimination claim as it was undisputed that Respondent employed more than fifteen (15) individuals and, thus, I had no jurisdiction. 8 U.S.C. 1324b(a)(2).

With regard to my inquiries regarding Ms. Castillo's status as a "protected individual", I found that Ms. Castillo was not clear as to what her immigration status was at the time of her termination from Respondent's employment nor was she clear about her present status except to say that she was not a legal permanent resident. In the interests of justice, fairness and judicial economy, I received Ms. Castillo's permission to contact her immigration attorney for clarification of her prior and present immigration status.

On January 8, 1993, I wrote to Leandro Marin-Abaunza, Esquire, explaining the status of this case and the need for clarification of Ms. Castillo's status as a "protected individual" for the purpose of proceeding with this case. To date, despite two phone conversations by my attorney-advisor with Mr. Marin's secretary to find out if Mr. Marin would be responding to my inquiry, he has not communicated with this Court.

As such, I am issuing this Order (To Show Cause) in which I am directing Ms. Castillo to file with this Court, on or before February 26, 1993, and serve on Respondent with an accompanying Certificate of Service, an affidavit sworn before a notary public along with supporting documentation showing that she is a "protected individual" as defined in 8 U.S.C. 1324b(a)(3). I caution Ms. Castillo that, should this statement not be timely filed or should she not be able to meet the definition of "protected individual", I will be required to dismiss her case, leaving it to the Equal Employment Opportunity Commission to be her forum.

On February 15, 1993, Mr. Marin-Abrunza filed his affidavit in which he stated, in relevant part, that Ms. Castillo entered the United States on or about August 11, 1989 without inspection and that in the course of deportation proceedings, on June 14, 1992, requested, and was granted, voluntary departure. Section 244(e) of the Immigration and Nationality Act. He further stated that since that time, Ms. Castillo has attempted to reopen her deportation case in order to change her status to that of an asylee and has requested an Order of Supervision, which Mr. Marin-Abrunza states is ordinarily granted to Nicaraguans as a matter of general policy, from the Immigration and Naturalization Service. Currently Ms. Castillo's Motion to Reopen is on appeal to the Board of Immigration Appeals and the Order of Supervision has not been granted.

On February 24, 1993, Ms. Castillo contacted my attorney-advisor, through a friend who acted as interpreter, to obtain further explanation of my Order To Show Cause. During that conversation, Ms. Castillo represented:

1. that she would file documents regarding her immigration status;
2. that she entered the United States without inspection, and;
3. that she has never had status as a legal permanent resident, as a temporary agricultural worker, as a refugee or as an asylee. Section 274B(a)(3)(B).

To date, Ms. Castillo has not filed any documents regarding her immigration status as she had indicated she would do.

II. Discussion

Under 28 C.F.R. 68.37(b)(1), I may find that a party has abandoned its complaint or request for hearing if such party has failed to respond to the Court's orders. United States of America v. McDonnell Douglas Corporation, OCAHO Case No. (8/28/92); see also Egal v. Sears Roebuck and Company, 3 OCAHO 442 (7/25/92) at 12 note 9. In this case, the Court is satisfied that proper service of the Order To Show Cause has been effected, that Complainant has had sufficient access to this Court, and that she was aware of the consequences of a nonresponse.

As Complainant has not complied with my Order To show Cause, and, as evidenced, had sufficient access to this Court should there have been some problem with filing its response, I find that Complainant has abandoned her Complaint. 28 C.F.R. 68.37(b)(1). On this basis alone, I may, and do, dismiss this case.

It should be noted that I may also grant dismissal based on the fact that I have no jurisdiction. In order for this Court to have jurisdiction, Complainant must establish that she is a protected individual. Section 274B(a)(3)(B) of the Act; see also Speakman v. The Rehabilitaton Hosptal Of South Texas, OCAHO Case No. 92B00186 (11/6/92). Based on Complainant's attorney's affidavit, Complainant's statements to my attorney-advisor and her statements at the prehearing telephonic conference, I find that Complainant is not a protected individual as

defined in Section 274B(a)(3)(B) of the Act. Therefore, under this alternate analysis, as a matter of law, this case must be dismissed.

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. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 12th day of April, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge