

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

GRZEGORZ PIOTEREK,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 92B00260
ANDERSON CLEANING)
SYSTEMS, INC.,)
Respondent.)
_____)

FINAL DECISION AND ORDER

(December 29, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Grzegorz Pioterek, pro se.
John E. Thiel, Esq., for Respondent.

I. Procedural Background

On November 25, 1992, Grzegorz Pioterek (Pioterek or Complainant) filed a complaint amended by complaint dated December 30, 1992, filed January 4, 1993. The complaint invokes the jurisdiction of an administrative law judge under the pertinent provision of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b. Complainant seeks redress for unlawful discharge from employment in violation of the prohibitions against immigration-related unfair employment practices, i.e., national origin and citizenship status discrimination.

The procedural history of this case is set out in the Order, Including Request to Office of Special Counsel to File an Advice, 3 OCAHO 484 (1/27/93) and in another Order, 3 OCAHO 539 (7/22/93); the history and disposition of a related action appears in Pioterek v. Scott Worldwide Food Service, 3 OCAHO 530 (6/9/93).¹

¹ Pioterek's claim against Scott was for national origin discrimination alone and did not allege citizenship status discrimination. The dismissal of the complaint in Scott by Final Decision and Order Granting Motion to Dismiss, 3 OCAHO 530, was based on the fact that Scott employs more than 14 individuals and, therefore, is outside the jurisdiction

(continued...)

Pioterek alleges that he was unlawfully discharged from employment on October 11, 1991, by Anderson Cleaning Systems, Inc. (Anderson or Respondent). As described in the orders issued January 27 and July 22, Respondent has a motion pending to dismiss the complaint. Anderson claims that Pioterek filed a national origin discrimination charge arising out of the firing by Anderson both in this forum and before the U.S. Equal Employment Opportunity Commission. The two orders contain inquiries by the judge designed to elicit data on which to determine whether the dispute is susceptible to resolution on the pleadings or whether it should go to hearing. For the reasons set out below, this final decision and order grants Respondent's pending motion to dismiss the complaint. The complaint is dismissed also on other jurisdictional grounds.

II. *Discussion*

A. National Origin Discrimination Claim Dismissed

Anderson's response to the July 22 order includes an affidavit of Mary Sagen (Sagen), its president, with payroll schedules attached. Sagen reports employment data to the effect that on March 29, 1991, when Complainant's employment by Anderson began, Respondent employed 69 individuals; on October 10, 1991, the last day he worked for Anderson, Respondent employed 72 individuals. The minimum number of employees on any date during his employment was 67 individuals.

I have no reason to doubt that the Sagen affidavit accurately reflects the magnitude of Anderson's payroll during the relevant time period. I find, therefore, that Anderson employed more than fourteen individuals at all times relevant to the complaint in this case. Accordingly, I necessarily conclude that Respondent is not amenable to administrative law judge jurisdiction over a national origin discrimination claim. This is so because national origin discrimination jurisdiction is limited under 8 U.S.C. §1324b to cases not cognizable by the Equal Employment Opportunity Commission (EEOC) pursuant

¹(...continued)

of 8 U.S.C. §1324b, and because Anderson, not Scott was the employer at all times relevant to Pioterek's claims here. Pioterek was assigned by Anderson to duties at Scott, a relationship which was found not to create an employment relationship between Pioterek and Scott for purposes of OCAHO jurisdiction.

to section 703 of Title VII of the Civil Rights Act of 1964, as amended. 8 U.S.C. §1324b(a)(2)(B).

Generally stated, a national origin claim cognizable under Title VII cannot also be the subject of an IRCA national origin discrimination claim. As has been held in a number of cases:

jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees.

DeGuzman v. First American Bank Corporation, OCAHO Case No. 93B00099 (12/13/93) at 3; Holguin v. Dona Ana Fashions, OCAHO Case No. 93B00005 (12/1/93) (Order) at 3-4; Zolotarevsky v. U.S. Nuclear Regulatory Commission, OCAHO Case No. 93B00078 (9/24/93) at 4; Cortes v. Seminole County School Board, OCAHO Case No. 93B00038 (6/23/93); Monjaras v. Blue Ribbon Cleaners, 3 OCAHO 526 (6/15/93) quoting Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4, quoting U.S. v. Marcel Watch Co., 1 OCAHO 143 (3/22/90) at 11. See also U.S. v. Huang, 1 OCAHO 288 (4/4/91), *aff'd*, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Pioterek v. Scott Worldwide Food Service, 3 OCAHO 530; Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedents cited).

Moreover, as urged by Anderson's motion to dismiss the complaint, OCAHO jurisdiction is defeated by pendency of a claim arising out of the same facts. 8 U.S.C. §1324b(b)(2). Anderson appears to confuse the ouster of OCAHO jurisdiction where EEOC jurisdiction attaches, §1324b(a)(2)(B), with the prohibition against overlap between OCAHO and EEOC in cases arising out of the same facts, §1324b(b)(2). However, Anderson is on target in pointing out that the case in the Wisconsin Department of Industry, Labor and Human Relations, Equal Rights Division, Pioterek v. Anderson Cleaning Systems, Inc., ERD Case No. 9200115, EEOC Case No. 26G920920, is the same as Pioterek's national origin claim before me.² The conclusion that the state agency proceeding is an EEOC case is premised on the assignment of an EEOC docket number, and the fact that the agency's

² Pioterek's response to the July 22, 1993 order of inquiry includes copies of documents before the Wisconsin Department of Industry, Labor and Human Relations, in another action, Pioterek v. Scott Worldwide Food Service, ERD Case No. 9201633, EEOC Case No. 26G921205.

instruction sheet advises of a work sharing arrangement by which the state agency undertakes to refer national origin claims, among others, to EEOC. For those reasons, I infer that the national origin discrimination claim before the Wisconsin agency is an EEOC proceeding.

B. Citizenship Status Discrimination Claim Dismissed

Pioterek's charge before the Special Counsel for Immigration Related Unfair Employment Practices (OSC) alleged only national origin discrimination and not citizenship status discrimination. His OCAHO complaint alleges both. Respondent's motion to dismiss implies that a decision favorable to its national origin jurisdiction claim disposes of the entire case. Anderson is in error. See 3 OCAHO 484 at 4. IRCA caselaw clearly establishes that jurisdictional limits on OCAHO national origin jurisdiction do not affect jurisdiction over citizenship status discrimination. Romo v. Todd Corp., 1 OCAHO 25 (8/19/88), aff'd, 900 F.2d 164 (9th Cir. 1990); Yefremov v. N.Y.C. Dept. of Transportation, OCAHO Case No. 92B00096 (Order, 10/1/92) at 2; Palancz v. Cedars Medical Center, OCAHO Case No. 91200197 (Order Granting Respondent's Motion For Summary Decision In Part, 3/24/92); Salazar-Castro, 3 OCAHO 406.

It follows, therefore, that the citizenship status discrimination claim survives the motion to dismiss. Because, however, Complainant is not a protected person he cannot maintain a case of citizenship status discrimination.

As previously explained,

To be entitled to IRCA citizenship discrimination protection, an individual must be either a citizen or national of the United States, or an alien (1) admitted for permanent residence, (2) an IRCA amnesty applicant, (3) a refugee, or (4) an asylee. 8 U.S.C. §1324b(a)(3).

Order, 3 OCAHO 484 at 3.

Pioterek's OSC charge claimed that he "has been granted asylum under 8 U.S.C. §1158." OSC had previously issued a determination letter dated August 27, 1992 to the effect that,

the Special Counsel has determined that there is insufficient evidence of reasonable cause to believe you were discriminated against on the basis of your citizenship status, as prohibited by 8 U.S.C. § 1324b. In addition, you are not a protected individual under the statute. The Office of Special Counsel does not have jurisdiction of your allegations

of national origin discrimination because of the number of individuals employed by this employer.

(Emphasis added.)

Pioterek's claim of asylee status was presumptively inconsistent with OSC's conclusion that he was not protected against citizenship status discrimination. The January 27, 1993 order asked OSC to make a filing which explains its conclusion that Pioterek was not a protected individual with respect to his charge. By letter dated February 12, 1993, OSC responded, inter alia, that it understood that Pioterek "applied for asylum on February 15, 1990, and was granted asylum on January 17, 1992, after the alleged date of discrimination (October 11, 1991)."

Complainant's response, dated August 8, filed August 16, 1993, to the July 22, 1993 order of inquiry includes an apology by which he recites that he was mistaken in claiming that he had been granted asylum as of the dates relevant to his discrimination claim. By affidavit dated August 23, 1993, filed August 26, Pioterek advises that on August 19 he obtained a letter from the Immigration and Naturalization Service (INS) confirming that he had been granted asylum on January 17, 1992. A copy of an INS letter dated January 17, 1992 to that effect was filed on September 7, 1993.

There is no reason to question Complainant's eligibility to be employed in the United States during the tenure of his employment by Anderson. Similarly, there is no reason to suppose that prior to the grant of asylee status in January 1992 he was a protected individual. Accordingly, the citizenship status discrimination claim is dismissed.

C. Fee Shifting Denied

Anderson's answer to the complaint asks for an award of attorneys fees and costs. In the exercise of my discretion, I decline to assess Pioterek with Respondent's fees. I am unable to conclude that Pioterek's "argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). Moreover, although Anderson is the prevailing party, dismissal of the complaint follows only in part its argument that the national origin claim is outside OCAHO jurisdiction. In addition, Respondent failed to address the citizenship status jurisdictional issue.

III. Ultimate Findings, Conclusions, and Order

3 OCAHO 590

I have considered the pleadings and supporting documents filed by the parties. All motions and other requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude that:

1. The national origin discrimination claim is dismissed because it is outside the jurisdiction of OCAHO.

2. The citizenship status discrimination claim is dismissed because Complainant was not a protected individual at the time of the incidents alleged in the complaint.

3. I find and conclude that Respondent has not engaged and is not engaging with respect to Complainant in unfair immigration related employment practices alleged and within the jurisdiction of this Office. *i.e.*, national origin and citizenship status discrimination. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(3).

4. I decline to shift attorneys' fees. 8 U.S.C. §1324b(h).

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.

Dated and entered this 29th day of December, 1993.

MARVIN H. MORSE
Administrative Law Judge