

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

January 11, 1994

BENJAMIN A. K. YOHAN,	)
Complainant,	)
	)
v.	) 8 U.S.C. 1324b Proceeding
	) OCAHO Case No. 93B00048
CENTRAL STATE	)
HOSPITAL,	)
Respondent.	)
_____	)

ORDER DISMISSING COMPLAINT IN PART

On October 19, 1992, complainant commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), in which he alleged that respondent, a hospital which complainant estimated employed more than 100 individuals, had discriminated against him on the basis of his national origin, and had retaliated against him, in violation of the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b.

In that charge, complainant asserted that he was lawfully admitted for permanent residence, and had applied for naturalization on an indeterminate date. Complainant further alleged that he had filed a charge based on the same set of facts on September 3, 1992, with the Commission on Equal Opportunity in Atlanta, Georgia.

On February 16, 1993, OSC informed complainant by letter that based upon its investigation of his charge it had determined that, because of the number of individuals employed by respondent, it does not have jurisdiction over complainant's charge. That correspondence further informed complainant that OSC had referred the matter to EEOC Atlanta, Georgia on November 5, 1993. OSC also informed complainant of his right to file a private action with this Office.

On March 29, 1993, complainant filed a Complaint with this Office, in which he asserted that his status is that of Permanent Resident Alien, which he obtained on February 23, 1979. Again, however, complainant asserted that he did not remember the date he had applied for naturalization.

In paragraph 7 of the Complaint, complainant asserted that he had been discriminated against because of his national origin, and in paragraph 8 denied that he had been discriminated against because of his citizenship status. However, in paragraph 12 of the Complaint, complainant alleged that he was not hired for permanent status because of his citizenship status and national origin (Complaint, ¶¶12a, b, and c).

In paragraph 13, complainant alleged that he had been fired because of his citizenship status and national origin (¶¶13a, b, and c). In particular, complainant listed eight (8) specific reasons for his termination, the initial four were based on complainant's accent and command on the English language. Reason six was described as "verbal abuse," and reason seven he described as "emotional abuse." Reasons five and eight alleged race-based discrimination, reason five being "color of skin," and reason eight "my white-race supervisors degraded me and dehumanized me, with their attitude and behavior towards me."

In paragraph 14, complainant reasserted that he had been intimidated for asserting rights under the anti-discrimination provisions of IRCA, 8 U.S.C. §1324b.

On May 14, 1993, respondent filed its Answer, denying complainant's allegations of discrimination, and asserting eight specific affirmative defenses.

A review of the record in this proceeding indicates that the undersigned may lack subject matter jurisdiction over complainant's national origin discrimination, citizenship status discrimination, and retaliation claims.

In determining whether an administrative law judge in this Office has jurisdiction over a complainant's national origin discrimination claim, it is necessary to ascertain whether the alleged discrimination acts fall under the coverage of IRCA, 8 U.S.C. §1324b, or under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e. 8 U.S.C. §1324b(a)(1)(A); §1324b(a)(2)(B).

To determine whether an administrative law judge has jurisdiction over a complainant's citizenship status discrimination claims, it is necessary to ascertain whether that person is a "protected individual," as defined in IRCA, 8 U.S.C. §1324b(a)(3). *Brooks v. KNK Textile*, 3 OCAHO 545, at 1 (8/3/93).

On November 15, 1993, in order to obtain the necessary information to make those determinations, the undersigned issued two separate Orders of Inquiry. In the first of these, complainant was instructed to answer the following questions regarding his citizenship status and his employment with respondent:

1. Describe, in your own words, the discriminatory acts that you allege occurred.
2. When, specifically (month/day/year), did you for naturalization? What is the status of that application?
3. Since the date that you obtained permanent resident status, have you resided outside the United States? If so, where did you reside, when did you leave, and how long did that residence last?
4. Since the date that you obtained permanent resident status, have you left the country for any purpose? If so, where, when, for what purpose, and for how long were you gone?
5. Are you currently married and is your spouse a States citizen? Were you married at the time that you obtained permanent resident status? Have you been divorced since the time that you obtained permanent resident status? If so, when were married and when were you divorced? Was your spouse a United States citizen?
6. Have you filed a charge with the Equal Employment Opportunity Commission (EEOC)? If so, when did you file that charge, and what is the status of that charge? If the charge has been dismissed, what reason was given by EEOC for that dismissal? Please submit copies of any documentation that you have received from EEOC relating to that charge.

In the second Order of Inquiry, respondent was instructed to submit an affidavit attesting to the number of individuals employed by respondent at the present time, as well as on September 1, 1992, and on March 16, 1992.

On December 3, 1993, respondent filed its response to the Order of Inquiry, attaching thereto the notarized affidavit of Henry Taylor, respondent's personnel director, which averred that on September 1, 1992, respondent employed 3,961 individuals; that on March 16, 1992, respondent employed 3,773 individuals, and that on November 24, 1993, respondent employed 4,187 individuals. (Taylor Aff. at 1).

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On December 7, 1993, complainant filed his response to the Order of Inquiry. In response to question 2 in the first Order of Inquiry, complainant asserted that he applied for naturalization on unspecified dates in 1992 and 1993, and that those applications are being processed.

In response to question 3, complainant averred that he has not resided outside of the United States since receiving permanent resident status, but that he did return to India on two separate trips, each lasting between four (4) and six (6) weeks.

Complainant made similar averments in response to question 4, asserting therein that since February 23, 1979, the date he obtained permanent resident status, he has left the United States for four (4) to six (6) week periods in order to visit his parents in India.

In response to question 5, complainant asserted that he was married in India on June 16, 1976, and that his wife also became a permanent resident alien after she arrived in the United States. Complainant asserted, however, that he is not currently married, having been divorced in December 1983.

Finally, in response to question 6, complainant averred that he filed a charge with EEOC the day after he was discharged by respondent, and that EEOC found in respondent's favor. In the determination letter, filed by complainant with his response to the Order of Inquiry, the EEOC stated that, although respondent was an employer within the meaning of Title VII, and all other jurisdictional requirements had been met, it had concluded that the evidence did not establish violations of the pertinent statutes.

Complainant must establish that this Office has subject-matter jurisdiction over his claims. See Tal v. M.L. Energia, Inc., 3 OCAHO 519, at 3 (5/11/93); Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 469, at 6 (11/6/92); Prado-Rosales v. Montgomery Donuts, 3 OCAHO 438 (6/26/92).

It is a fundamental fact that the administrative law judges in this office may not act outside of their jurisdiction under IRCA, 8 U.S.C. §1324b. Speakman, 3 OCAHO 469, at 6. Whenever it appears that a trial court lacks jurisdiction over the subject matter, the court shall dismiss the action. Penteco Corp. v. Union Gas Sys., 929 F.2d 1519, 1521 (10th Cir. 1991) (quoting Fed. R. Civ. P. 12(h)(3)); Zolotarevsky v. General Elec. Co. (Order Granting Respondent's Motion for Summary

Decision)(9/24/93), at 4; Brown v. Baltimore City Pub. Sch., 3 OCAHO 480 (6/4/92).

The subject matter jurisdiction of the administrative law judges in this office over claims of discrimination based upon national origin under IRCA, 8 U.S.C. §1324b(a)(1)(A), is necessarily limited to claims against employers employing between four (4) and 14 individuals. Therefore, an employer who employs more than 14 individuals is excluded from IRCA coverage with respect to national origin claims. 8 U.S.C. §1324b(a)(2)(B) Yefremov v. New York City Dep't of Transp., 3 OCAHO 466 (10/23/92); Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459, at 6 (9/24/92); Adepitan v. United States Postal Serv., 3 OCAHO 416, at 6; Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406, at 5 (2/26/92).

In the charge complainant filed with OSC, he asserted that complainant employed more than 100 individuals. Charge ¶3. In its response to the second Order of Inquiry, respondent's personnel director averred that at the time that the alleged discrimination occurred, September 1, 1992, respondent employed 3,961 individuals, and further averred that at the present time, respondent employs 4,187 individuals. (Taylor Aff. at 1).

Accordingly, I find that this office lacks subject matter jurisdiction over complainant's claims of discrimination based upon national origin. 8 U.S.C. §1324b(a)(2)(B). Accordingly, that portion of the Complaint alleging discrimination based upon national origin is ordered to be and is being dismissed.

With respect to complainant's allegations of discrimination based upon his citizenship status, as noted previously, this office does not have jurisdiction over citizenship status discrimination claims brought by those who are not within the class of "protected individuals," as that term is defined in 8 U.S.C. §1324b(a)(3).

Generally, aliens lawfully admitted for permanent residence in the United States are protected individuals for purposes of citizenship status discrimination. 8 U.S.C. §1324b(a)(3)(B). However, IRCA excludes from the class of protected individuals those aliens who fail to apply for naturalization within six months of the date they first become eligible (by virtue of period of lawful permanent residence) to apply for naturalization. 8 U.S.C. §1324b(a)(3)(B)(i).

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The Immigration and Nationality Act (INA), as amended, establishes when a lawful permanent resident alien becomes eligible to apply for naturalization. Brooks v. KNK Textile, 3 OCAHO 545, at 3.

In particular, section 316 of INA, 8 U.S.C. §1426, prescribes the residency requirements for naturalization. Under section 316, an alien lawfully admitted for permanent residence is eligible to apply for naturalization after five (5) years of continuous residence in the United States, during at least half of which the alien was physically present in the United States. 8 U.S.C. §1426(a). Absence from the United States during that period may break the continuity of residence, delaying the date on which the alien is eligible to apply for naturalization. 8 U.S.C. §1426(b).

In the case of an alien residing with a citizen spouse, the residency period is three (3) years. 8 U.S.C. §1430(a). See Brooks, August 3, 1993 Order, at 2; Prado-Rosales v. Montgomery Donuts, 3 OCAHO 438, at 5 (6/26/92).

In his response to the first Order of Inquiry, complainant asserted that he attained permanent resident status on February 23, 1979. (Complainant's Response, ¶4). He averred that he has not resided outside of the United States since that he attained his permanent resident status (Id., ¶3), and has left the United States only sporadically and for brief periods since that time. (Id., ¶4).

Although complainant was married at the time he came to the United States, and remained married until December 1983, this fact does not affect the date upon which complainant first became eligible to apply for naturalization because it does not appear that his wife was or became a United States citizen during their marriage. (Id., ¶5).

Accordingly, complainant first became eligible to apply for naturalization on February 23, 1984. Because this date is earlier than the effective date of IRCA, November 6, 1986, complainant had until six (6) months after that date, or until May 6, 1987, to have applied for naturalization in order to be included with the class of protected individuals for the purpose of citizenship status discrimination. 8 U.S.C. §1324b(a)(3)(B)(i).

In his response, complainant asserted, however, that he did not apply for naturalization until an unspecified date in 1992. (Complainant's Response, ¶2). Assuming that complainant applied for naturalization on January 1 of that year, he would still have applied tardily, by more

than 4-1/2 years, to become qualified as a "protected individual", and thus be entitled to pursue his claim of citizenship status discrimination.

Because complainant failed to apply for naturalization within six (6) months after the effective date of IRCA, November 6, 1986, or by May 6, 1987, it is found that he is not a "protected individual" for the purpose of maintaining an action based upon citizenship status discrimination. 8 U.S.C. §1324b(a)(3)(B)(i).

Similarly, as complainant is excluded from the class of individuals entitled to protection against citizenship status discrimination by operation of law, it is further found that this Office does not have jurisdiction over complainant's claim of citizenship status discrimination. Brooks, 3 OCAHO 545. Accordingly, that portion of complainant's claim alleging citizenship status discrimination is also ordered to be and is dismissed.

The remaining portion of the Complaint involves complainant's contentions that respondent retaliated against him for asserting rights protected under IRCA, 8 U.S.C. §1324b. The pertinent provision of IRCA, 8 U.S.C. §1324b(a)(5), provides:

It is also an unfair immigration-related employment practice for a person or other entity to intimidate, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced or retaliated against shall be considered... to have been discriminated against.

When asked to describe the retaliation he alleged respondent committed, complainant answered as follows:

I was verbally, and on documents told that my English is not correct. Lot of verbal abuse about my culture, and about my being of Indian-origin, my accent, color of skin, "salt & pepper don't mix," mental and emotional abuse, with their attitude and behavior, degrading and dehumanizing me till last day of termination.

Complaint, ¶14a.

Because this statement did not appear to allege an unfair immigration related employment practice under IRCA, 8 U.S.C. §1324b(a)(5), on December 14, 1993 the undersigned issued a third Order of Inquiry.

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In that Order of Inquiry, complainant was instructed to answer the following questions regarding his retaliation claim:

1. Please state whether you allege that respondent intimidated, threatened, coerced, or retaliated against you for the purpose of interfering with a right or privilege secured under IRCA, 8 U.S.C. §1324b. If so, describe those acts clearly and succinctly, and identify the individual or individuals who performed them and the date on which they occurred.

2. Please state whether you allege that respondent intimidated, threatened, coerced, or retaliated against you because you filed or intended to file a charge with OSC or a Complaint with this Office. If so, describe those acts clearly and succinctly, and identify the individual or individuals who performed them and the date on which they occurred.

In that Order, also, respondent was instructed to answer the following questions regarding its employment of complainant:

1. On what date was complainant discharged from respondent's employ?

2. On what date was respondent informed that complainant intended to file or had filed a charge or complaint under IRCA, 8 U.S.C. §1324b, naming respondent?

3. Please describe any contact that respondent had with complainant after complainant's discharge, and particularly, after respondent learned that complainant had filed or intended to file a charge or complaint.

On January 3, 1994, respondent filed its Response to the third Order of Inquiry. In its Response, respondent asserted that complainant was discharged from respondent's employ twice, first on July 23, 1992, and again on September 4, 1992.

Respondent further asserted that it was informed of complainant's intention to pursue a claim under IRCA, 8 U.S.C. §1324b, by letter from EEOC dated October 20, 1992.

Finally, respondent asserted that it has had no personal or written contact with complainant other than through communications with its legal counsel in response to pleadings filed in this action.



On January 7, 1994, complainant filed his response to the third Order of Inquiry.

In response to question 1, complainant asserts that respondent intimidated complainant for the purpose of interfering with a right secured under IRCA, 8 U.S.C. §1324b. In particular, complainant asserts that respondent repeatedly warned him not to argue about the unfair treatment to which complainant was allegedly subjected. Complainant's response, at 2. In addition, complainant contends that respondent told him that he did not have any rights or privileges because he is not a citizen, and that respondent could have complainant deported. Id.

In response to question 2, complainant further asserts that respondent also retaliated against him because he intended to file a charge with OSC and also a complaint with this Office.

Complainant asserts that while employed by respondent, he told respondent that he would report what he alleged to be unfair treatment to EEOC, OSC, the Immigration Department (sic), the American Counsel General, this Office, the ALCU (sic), the NAACP, and Georgia Legal Services, but that respondent told complainant that to do so would be prohibitively expensive, which complainant asserts he believed. Id., at 4.

In addition, complainant asserts that after he was discharged, and while he was still living on respondent's campus, he was repeatedly harassed by respondent's police on respondent's orders. Id.

Finally, complainant asserts that he was fired because he threatened to file a charge, contending:

..."80% of filing a charge with OSC, or with (this Office) was prior to (his) firing, or was during his working period. Complainant verbally, softly let respondent know that he would file a report to get justice done. Right after that, their reaction towards was (sic) evil, ill and attitude (sic) full of revenge.... The outcome of my discussions with (respondent) about filing the charges with OSC, EEOC, NAACP, ALCU or AULC was... my last final termination.

Id., at 5.

Coverage under 8 U.S.C. §1324b(a)(5) requires a finding that the particular cause of action implicates rights and privileges secured under, or involves proceedings under, 8 U.S.C. §1324b. 8 U.S.C. §1324b(a)(5). Accordingly, this Office does not have jurisdiction over a

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claim of retaliation for asserting a right or privilege that is not secured under 8 U.S.C. §1324b, or for filing or planning to file a charge with an entity other than OSC or a complaint with an entity other than this Office. See Millan v. Smithfield Packing Co., OCAHO Case No. 93B00086 (Order Granting Respondent Smithfield Packing Company's Motion to Dismiss), at 3 (9/2/93).

Because this Office does not have jurisdiction over complainant's national origin and citizenship status discrimination claims, I find that I do not have jurisdiction over complainant's claim that he was retaliated against for asserting rights protected under 8 U.S.C. §1324b. Accordingly, that portion of the Complaint is ordered to be and is dismissed. *Id.*; 8 U.S.C. §1324b(a)(5).

However, this Office does have jurisdiction over the remaining claim in the Complaint, alleging retaliation because complainant filed or intended to file a charge with OSC and intended to file a Complaint with this Office. Therefore, an evidentiary hearing will be held to determine respondent's liability for this remaining alleged violation.

A telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted. In accordance with the terms of the procedural regulation governing the place of hearing, 28 C.F.R. section 68.5(b), due regard shall be given to the convenience of the parties and witnesses in selecting the place for that hearing.

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JOSEPH E. MCGUIRE  
Administrative Law Judge