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

MARTIN A. HOLGUIN, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 93B00005
DONA ANA FASHIONS, Respondent.	)	

FINAL DECISION AND ORDER

(February 1, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Martin Holguin, pro se.
Daniel Parisi, on behalf of Respondent.

I. *Introduction*

The Order issued December 1, 1993, 3 OCAHO 582, dismissed so much of the complaint as alleged retaliation and national origin violations of 8 U.S.C. §1324b, and summarized prior developments in this case. That order, incorporated and made a part of this final decision as if fully set forth herein, set forth certain facts which are not in dispute. The order also addressed factual inquiries to the parties in order to provide a basis on which to determine whether there may be a prima facie case of citizenship status discrimination within the jurisdiction of the administrative law judge. The order directed both parties to identify their prospective witnesses, and reminded them of the requirement to certify service of their filings on each other.

As discussed in previous orders, the gravamen of Complainant's case is that he worked for a few months as a truck driver for Respondent,

driving between Mexico and New Mexico. He contends he was replaced by a Mexican national driver hired by Respondent in violation of Complainant's right as an American citizen pursuant to §1324b not to be discriminated against on the basis of citizenship status. In contrast, Respondent contends that transportation between it and Congen, a Mexican contractor over which Respondent exercises no control, is now provided by Congen which employs its own Mexico-based driver.

As recited in the December 1, 1993 order,

> I can find in Complainant's favor only if he can make out a prima facie case of citizenship discrimination by showing that (1) Dona Ana's transportation arrangement after mid-June 1992, . . . discriminated against him in violation of §1324b, and (2) that Dona Ana and/or Suzette, on behalf of Dona Ana, controls the business decisions of ConGen [Congen], in consequence of which ConGen as the agent for Dona Ana employed a non-citizen for employment some of which takes place in the United States. Even if both (1) and (2) are found in Complainant's behalf, the burden confronting him remains formidable for it is unclear whether §1324b has extra-territorial applicability, viz, whether the administrative law judge is authorized to find a violation of §1324b where the locus of employment is outside the United States.

3 OCAHO 582 at 4.

On December 27, 1993, Respondent filed a December 20, 1993 affidavit of Daniel Parisi. That filing responds in general to the factual request addressed to Respondent by the December 1, 1993 order. Parisi, on behalf of Respondent, undertakes that

* * *

> 2. There is no contractual arrangement between Dona Ana and Congen, S.A. Ded C.V. (hereinafter referred to as "Congen"), either currently or at any time in the past, except for an informal understanding between January 1992 and June 1992, when we offered to operate our own truck to and from Congen, in an effort to better service our mutual customer, Suzette Fashions, Inc. . . .
>
> 3. Neither Dona Ana, nor any other entity on Dona Ana's behalf, controls or directs either the transportation of goods or the employment of personnel at "Congen."
>
> 4. The vehicle Complainant formerly drove is hereby identified as a 1984 Ford truck, New Mexico License Number 144 FHS, Vehicle Identification Number 1FDJE37G7EHA96370.

5. The vehicle operated by Congen is hereby identified as a 1984 International truck, New Mexico License Number 177 CLS, Vehicle Identification Number 2HTD102E3ECB10182.

6. The vehicle Complainant formerly drove is not used or operated by Congen.

On January 10, 1994, Complainant made a filing in obvious response to the December 1 order but inexplicably addressed to the Special Counsel for Immigration Related Unfair Employment Practices, with a copy to me, but none shown to Respondent. That filing is set out in full:

> It is a shock to me that Mr. Daniel Parisi still insists on telling lies, and should not be believed.
>
> I hope this will continue forward and reach a favorable conclusion according to Federal laws, as Mr. Parisi continues to violate all federal laws in this case.
>
> In the affidavit sent to me, items 4, 5, and 6, I will completely deny, as these allegations are all false.

(Emphasis in original).

II. *Discussion*

A Complainant Has Failed to Demonstrate a Citizenship Prima Facie Case Status Discrimination

It has been clear since at least the prehearing conference on May 11, 1993, as confirmed by the First Prehearing Conference Report and Order dated May 14, 1993, that the essential issue in this case is whether Respondent continued to exercise control over the operation of the truck transporting goods after it terminated Complainant's truck driving responsibilities. The December 1, 1993 order explicitly stated that I could find for Complainant, if at all, only on a showing that Respondent controls Congen's employment of the truck driver. I understand Respondent's response to the December 1 inquiry to be that it has no control over transportation or personnel used in the transit of goods between it and Congen. Rather than provide a factual basis for my concluding otherwise, Complainant's response offers only an unsubstantiated rejection of the affidavit, labeling items 4, 5 and 6 to be false. Complainant's allegation that certain portions of the Parisi affidavit are false fails to overcome the specificity set forth by Respondent in that affidavit. Notably, as inadequate as is Complain-

ant's response for failure to provide any factual predicate for disallowing Parisi's affidavit, Complainant's disavowal only of paragraphs 4 through 6 lends support to paragraphs 2 and 3 which are unchallenged.

Even assuming a dispute as to the identification and utilization of the vehicles identified in paragraphs 4-6 of the Parisi affidavit, I have before me the unrebutted submission by Respondent in paragraphs 2-3 that it has no role in the employment of the substitute and successor driver(s) to Complainant. In any event, the only probative evidence submitted in response to my request, i.e., Respondent's filing, is incompatible with Complainant's claim that Respondent rejected him in favor of a non-citizen employee.

B. Summary Decision Granted to Respondent

In the interest of efficient judicial resolution of disputes which do not require an evidentiary confrontation, the Supreme Court has established standards for deciding motions for summary decision. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The rules of practice and procedure for §1324b cases before administrative law judges provide for entry of summary decision if the pleadings, other filing by the parties, or matters officially noticed "show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c) [1992]. Title 28 C.F.R. §68.38 reflects the principles of Celotex as applied in OCAHO caselaw. See e.g., Brooks v. KNK Textile (Partial Summary Decision Dismissing National Origin Discrimination Claim and Order of Inquiry), 3 OCAHO 528 (6/21/93) at 4; Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524 (6/10/93) at 4-5; Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (4/30/93) at 2-3; U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92).

By failing to provide a factual rejoinder to the Parisi affidavit, Complainant has provided no factual predicate to support his complaint. Accordingly, I dismiss the remaining issue of citizenship status discrimination. For that reason, I do not reach the question of extraterritorial applicability of §1324b, an issue not yet adjudicated in OCAHO jurisprudence. For an extensive discussion of extraterritorial principles potentially pertinent to resolution of §1324b disputes, see Lardy v. United Airlines, Inc., OCAHO Case No. 92B00085, 4 OCAHO__ (1/11/94) (interlocutory order) at 14-33.

C. Complainant Deemed to Have Abandoned His Complaint

Even if Complainant had demonstrated a genuine issue of fact for hearing, I would be unable to rule in his favor. He has so failed in his obligation to adhere to the rules of the forum as to abdicate any claim for relief. His letter-pleading dated January 1, 1994, filed January 10, 1994, fails to contain a certificate of service or otherwise to reflect service upon Respondent. That failure violates the command of 28 C.F.R. §68.6(a). Significantly, it violates also my twice repeated written admonition to the parties. My order of March 12, 1993 advised that:

> The parties are reminded that any filings submitted to this Office should be accompanied by a certificate of service indicating that a copy of such filing has been served on the other party. 28 C.F.R. §68.6(a).

A subsequent filing by Complainant took no heed of the plain requirement of 28 C.F.R. §68.6(a). My Order, 3 OCAHO 582 (12/1/93), contained this warning:

> The parties are reminded that every filing case must be accompanied by a certificate of service, reciting truly that such filing was served on the opposing party. 28 C.F.R. §68.6(a).

Compassion for Complainant's pro se status in the circumstances described must give way to the need for orderly and informed participation by the parties to an administrative adjudication. Failure to certify service on the opponent is at odds with that participation. Failure to adhere to explicit orders by the judge invites dismissal of the complaint, as deemed to have been abandoned. 28 C.F.R. §68.37(b)(1(). Brooks v. Watts Window World, 3 OCAHO 570 (11/1/93); Castillo v. Hotel Casa Marina (Marriott), 3 OCAHO 508 (4/12/93); Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/93); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92).*

Moreover, while Respondent answered the December 1, 1993 call for identification of its prospective witnesses in event of a confrontational evidentiary hearing, Complainant failed to respond.

iii. *Ultimate Findings, Conclusions, and Order*

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* Failure to provide any indication that a filing has been served on the other party renders the filing susceptible to treatment as an ex parte communication. Although not the premise on which this final order and decision issues, I note that, as provided at 28 C.F.R. §68.36(b), one among several sanctions for filing an ex parte communication is an "adverse ruling on the issue which is the subject of the prohibited communication."

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, including those set forth in the order issued December 1, 1993, 3 OCAHO 582, I find and conclude that:

1. The national origin discrimination, citizenship status discrimination and retaliation claims are dismissed.

2. 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. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(3).

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative adjudication 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 1st day of February, 1994.

MARVIN H. MORSE
Administrative Law Judge