

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

MIGUEL A. GALLEGOS, )  
Complainant, )  
 )  
v. ) 8 U.S.C. §1324b Proceeding  
 ) Case No. 93B00207  
MAGNA-VIEW, INC. )  
Respondent. )  
\_\_\_\_\_ )

ORDER

(March 15, 1994)

1. On November 18, 1993, Miguel A. Gallegos (Gallegos or Complainant) filed a handwritten complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The handwritten complaint alleges that the general manager of his former employer, Magna-View, Inc. (Magna-View or Respondent), told him he was being laid off because he could obtain post-employment benefits, but other employees not fired could not obtain such benefits because they were illegals. Gallegos alleges also that the illegals work at the proprietor's ranch for whatever he wants to pay them, presumably at less than competitive wages.

2. Upon receipt by OCAHO of his handwritten complaint, Gallegos was provided with a preprinted "Questionnaire/Complaint" format which he filled out in part, signed and dated December 26, 1993, and filed with OCAHO on January 6, 1994. Where appropriate, the two documents are referred to collectively in this order as the complaint; references to numbered paragraphs of the Gallegos preprinted complaint format are identified simply as complaint paragraphs.

3. On January 27, 1994, OCAHO issued a notice of hearing, which transmitted to Respondent a copy only of the Gallegos preprinted complaint, and which assigned the case to me. Gallegos alleges he is a native and citizen of Mexico who obtained permanent residence

status in the United States on February 12, 1988. Complainant recites that he was employed by Respondent, located in Dallas, Texas, from July 1980 until January 1, 1993 to seal machines. Respondent filed its answer to the complaint by facsimile transmission on February 23, 1994, followed by a signed, mailed copy filed February 28, 1994.

4. There are significant omissions in and contradictions among Complainant's entries on the preprinted complaint. Superficially, the entries on the preprinted format could be understood, as claimed by the answer, to not allege discrimination at all. In contrast, I understand the complaint to allege discriminatory discharge. It is by no means clear, however, whether Gallegos intended to allege national origin and/or citizenship status discrimination. This order addresses only those omissions and contradictions relevant to determining whether Complainant can make out a jurisdictional prima facie case of discrimination in violation of §1324b.

5. Accompanying the complaint is a partial copy of Gallegos' charge filed April 26, 1993, in the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Inexplicably, the copy of the OSC charge filed in OCAHO fails to include the second page of the OSC charge format, resulting in omission of entries ##3 through 7. Also omitted is an English language version of the OSC charges. As filed with me, the narrative portion of the OSC charge by Gallegos describes essentially the same allegations as claimed in the complaint.

6. On August 17, 1993, OSC issued two determination letters, one in Spanish addressed to Gallegos, one in English addressed to Magna-View. The English language letter states that based on its investigation, OSC determined "that there is insufficient evidence for reasonable cause to believe the charging party was discriminated against because of his citizenship status as prohibited by 8 U.S.C. §1324b." The Spanish language letter recites instead that on the basis of its investigation, OSC determined that there was not sufficient reasonable probable cause to believe that there had been a violation of law. The Spanish version of the letter advised Complainant that he could file his complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO). Consistent with the literal text of 8 U.S.C. §1324b(d)(2), the English version advised that the charging party [i.e., Gallegos] might file a complaint directly with an administrative law judge.

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7. Although I am in the dark as to whether Gallegos alleged national origin or citizenship status discrimination in his OSC charge, as noted above, OSC's determination letter refers only to citizenship status:

Based on its investigation, this Office has determined that there is insufficient evidence of reasonable cause to believe the charging party was discriminated against because of his citizenship status as prohibited by 8 U.S.C. §1324b.

OSC Determination Ltr dtd 8/17/93 (English version addressed to Magna-View).

8. In light of the omissions and contradictions in the complaint, this order issues to obtain information on which I may be able to determine whether Complainant has a viable cause of action or whether the request in Respondent's answer that the complaint be dismissed is well taken.

(a) Paragraph 7 of the complaint recites that Gallegos obtained permanent resident status on February 12, 1988. Generally, a permanent resident alien becomes eligible for naturalization five years after obtaining status, but if married to an American citizen that period is shortened to three years. Protection against citizenship status discrimination applies in the case of a permanent resident alien who has become eligible for naturalization only if the alien has applied for naturalization "within six months of the date the alien first becomes eligible." 8 U.S.C. §1324b(a)(3)(B)(i). Accordingly, it is important to know whether and when Gallegos applied for naturalization, entries he should have filled out but left blank at paragraphs 5 and 6 of the complaint.

**Gallegos is directed to advise whether he applied for naturalization; if so, he is to provide a copy of the application and provide the date, place and file number. Advise also if he is or was married to a citizen of the United States, and provide dates and country of residence during marriage.**

(b) At paragraphs 8 and 9, Gallegos entered "no" as to both citizenship and national origin discrimination, in effect stating he was not discriminated against. In contrast, at #10, he claims that Magna-View discriminated against him, entering at #14 that he was fired, as more specifically alleged at #14(b):

Because they said that I had more years there and could get job benefits such as food stamps and the other workers couldn't.

Gallegos made no entry at subparagraph 14(a), which provides for complainant to identify whether the claim is for national origin and/or citizenship status discrimination.

**Gallegos is directed to advise whether he claims national origin and/or citizenship status discrimination, or neither, and to explain how he was discriminated against on the basis of national origin and/or citizenship status.**

(c) Respondent's answer, inter alia, contends that it discharged Respondent for legitimate business necessity reasons.

**Respondent is directed to provide the exact date of, and its explanation of, the business reasons for discharge, and as well to explain who, when and where Respondent informed Gallegos he was being fired. State also what severance compensation, if any, was paid, and what advice was provided as to post-employment benefits for which he was thought to be eligible.** (Note: The complaint states that Gallegos was fired on January 11, 1993, but the answer states that date as November 1, 1993, an inconsistency that may reflect a misreading of the sequence of day/month/year blanks on the OCAHO preprinted complaint format).

(d) Administrative law judge jurisdiction over allegations of national origin discrimination does not attach where the employer is subject to Title VII of the Civil Rights Act of 1964, as amended. 8 U.S.C. §1324b(a)(2)(B). The effect is that only employers of between four and fourteen, i.e., more than three but fewer than fifteen, employees are within OCAHO jurisdiction for national origin discrimination purposes, while citizenship status discrimination jurisdiction attaches in the case of an employer of more than three individuals, with no ceiling on the number of employees. Accordingly,

**Respondent is directed to advise of the number of employees as of (i), the date of hire of Gallegos and (ii), the date of his discharge, (iii) the highest number during the period of his employment and (iv), the average of employees number during his employment.**

9. To both parties: **Complainant and Respondent will file responses to the directions underlined above (i.e., Complainant will respond to paragraphs 8(a) and (b) and Respondent will respond to paragraphs 8(c) and (d) of this Order). Responses shall be filed in affidavit form or otherwise under oath i.e.,**

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**sworn to, not later than Wednesday, March 30, 1994.** The parties are cautioned that every filing must include a certificate of service on the other party, i.e., a recitation that is true to the effect that a copy of the document(s) being filed with the judge have been mailed postage prepaid or otherwise delivered to the other side. The certificate must be signed and show the date and means of service. Facsimile filings are acceptable only if a signed original copy is dispatched on the date of the facsimile transmission.

10. Failure by a party to make a timely filing in response to this order may result in dismissal of the case of the defaulting party.

**SO ORDERED.** Dated and entered this 15th day of March, 1994.

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MARVIN H. MORSE  
Administrative Law Judge