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

DRAHOMIRA ADAME,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 94B00066
DUNKIN DONUTS,)
Respondent.)
______________________________)

ORDER, INCLUDING TENTATIVE CONCLUSIONS
CONCERNING COMPLAINANT'S CAUSES OF ACTION
(September 27, 1994)

1. The procedural history and background of this case up to August 18, 1994 is set forth in the order of that date. The order addressed a series of questions to each of the parties. The parties were advised that,

> on the basis of the responses to this order and the pleadings already filed, I may issue a final decision and order which disposes of this case. Alternatively, on the basis of those filings, I may schedule a telephonic prehearing conference in which to discuss the case further with the parties.

Id. at 4.

2. Previously, on August 15, 1994, Respondent filed a document which I accepted as its answer to the complaint. There was no indication that Respondent served its filing on Complainant. Accordingly, the copy of the August 18, 1994 order addressed to Complainant transmitted to her a copy of the answer. The Order cautioned:

> Filing of a document which lacks a certificate that it has been served on the other party (e.g., by personal delivery or mailing postage prepaid), is a serious breach of the Rules. The parties are cautioned that all filings must be accompanied by a certificate of service indicating that a copy has been served on the other party. 28 C.F.R. §68.6(a). In the future, failure of a party to certify service of a copy of each filing on the opposing

> party, and to effect that service, may result in my disallowing the offending filing and resolving this case in favor of the other party.

Order at 2.

In response to the order, on September 7, 1994, Complainant, by counsel, Harold R. Mayberry, Jr., Esq., of Washington, D.C., who filed a concurrent entry of appearance, filed a four-page statement with exhibits attached. Complainant's counsel included a certificate of service dated September 2, 1994. On September 9, 1994, Respondent filed a one-page response, with exhibits attached. The filing included an attached copy of the August 18, 1994 order. Despite the explicit warning in that order, quoted above, Respondent omitted a certificate of service. That Respondent could not have been in the dark about my warning is clear from its statement that its filing is in response to the August 18 order. Because Respondent failed to heed the warning, I cannot determine whether in fact it effected service of its response on Complainant.

3. On September 6 and 14, 1994, Complainant, individually, inquired as to the status of her case. Upon her suggestion that the filing by counsel may not have been complete, and that she had additional material to provide, my office advised that such materials could be filed, provided copies were sent to Respondent. On September 23, 1994, Complainant, individually, filed a letter-pleading dated September 21, 1994 which expressed thanks "for permitting me to submit additional evidence," and contained an appropriate certificate of service, and enclosed a "additional evidence" in respect to Questions 1-3, including at #3, a series of exhibits lettered A through G.

This Order forwards Complainant's filing to her attorney, retaining only her transmittal letter dated September 21, 1994, and a copy of the document provided as the initial attachment in respect of Question 2, discussed at paragraph 5.A., below.

Either Complainant is represented by counsel, or she is not. On the record to date, Complainant is so represented. The opportunity for Complainant to file any additional response to the August 18, 1994 Order was not intended to open the door to filings by the individual as well as by counsel. In any event, there has been no call for submission of evidence. The judicial inquiry requested responses to specific questions, not submission of documents as evidence.

4. Complainant's response, by counsel, to the August 18 order noted that as of completion of discovery, "Complainant requests a hearing in

Washington, D.C.," for the evidentiary phase of the hearing process. The request states as the reason for that location, presumably in contrast to Chicago where the parties are located, that counsel is in Washington, D.C., and that "Dunkin Donuts is a multinational corporation" which he believes is headquartered in Boston, Massachusetts.

This Order reminds Complainant that the Respondent she has named in this case is the operator of the Dunkin Donuts located at 1755 W. Addison Street, Chicago, Illinois 60613. Indeed, the whole thrust of her case addresses whether she was discriminated against by an owner of that Dunkin Donuts location alone, and not by another enterprise.

5. This Order addresses, as a threshold question, the viability of the two claims asserted by Complainant, i.e., national origin discrimination, and retaliation.

A. National Origin Discrimination

As to national origin discrimination, the materials filed by Complainant individually, on September 23, 1994, include a Determination dated March 25, 1994, by the Chicago District Director, U.S. Equal Employment Opportunity Commission (EEOC). That document is an EEOC determination "as to the merits," inter alia, of a national origin charge "filed under Title VII of the Civil Rights Act of 1964, as amended." The Determination recites that upon analysis, "I have determined that the evidence obtained during the investigation does not establish a violation of the statutes." The Determination specifies that the processing of the charge is concluded, and closes with a "right to sue" authorization.

Jurisdiction of an administrative law judge (ALJ) over Complainant's cause of action is created by, and circumscribed by, 8 U.S.C §1324b, as enacted at Section 102 of the Immigration Reform and Control Act of 1964, as amended (IRCA).[1] To avoid overlap with national origin discrimination jurisdiction previously conferred by Title VII of the Civil Rights Act of 1964, as amended (Title VII), on EEOC, Section 102 provides as follows:

> No Overlap with EEOC Complaints. -- No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) if a charge

[1] See Memorandum of Understanding between EEOC and OSC, at III, 54 Fed. Reg. 32,499, 32,501 (1989).

> with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

Title 8 U.S.C. §1324b(b)(2).

It appears from the recitation in the EEOC Determination that the unfair immigration-related employment practice, i.e., discharge from employment, alleged in the OCAHO complaint is based on the same set of facts as the EEOC charge. Presumptively, therefore, I appear to be ousted from national origin discrimination jurisdiction. In contrast, I note that the Determination refers to "14 individuals employed by the previous owner," of whom 10 were discharged. Interestingly, the Title VII definition of an employer covered by Title VII is one "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. §2000e(b). OCAHO cases dismissing national origin claims because more than fourteen individuals were on the employer's payroll are legion. See e.g., Berlanga v. Butterball Company, 4 OCAHO 669 (7/25/94) at 4-5; Jia Xian Pan v. Jude Engineering, Inc., 4 OCAHO 648 (6/15/94) at 9-10; Pioterek v. Anderson Cleaning Systems, Inc., 3 OCAHO 590 (12/29/93) at 2-3, and cases cited.

This appears to be the first ruling which addresses the interplay between §§1324a(a)(2)(B) and (a)(2)(B) in context of an assumption of jurisdiction by EEOC. Stated another way, the question whether an EEOC determination on the merits bars an ALJ role without regard to whether EEOC should have dismissed the case for want of jurisdiction appears to be a matter of first impression in OCAHO jurisprudence. Jurisdiction under §1324b does not reach a national origin discrimination claim "covered under section 703 of the Civil Rights Act of 1964." 8 U.S.C. §1324a(a)(2)(B). However, it is pertinent to compare subsection (a)(2)(B) with the no-overlap text of subsection (b)(2): Subsection (a)(2)(B) precludes ALJ jurisdiction if EEOC jurisdiction attaches where the number of individuals on the employer's payroll exceeds ALJ jurisdiction, i.e., exceeds 14 employees. Subsection (b)(2) precludes ALJ jurisdiction when EEOC exercises jurisdiction, without regard to whether EEOC is correct that it is authorized to reach a merits determination.

The phrase in (b)(2), "unless the charge is dismissed as being outside the scope of" Title VII appears to impose an absolute bar to ALJ

consideration of a §1324b claim "based on the same set of facts," except where EEOC in fact dismisses the Title VII charge before it. (Emphasis added). The emphasized text speaks of dismissal of a charge; it does not say "may be dismissed," "should be dismissed," "is dismissible," or words to similar effect. The distinction between "is dismissed" and "is dismissible" can be analogized to the difference between a matter that is void and one that is voidable. It seems to follow that the ALJ lacks power in a §1324b case to entertain a jurisdictionally grounded collateral attack on an EEOC decision on the merits.

B. Retaliation

The rule is not the same for the retaliation claim. Only a national origin claim is susceptible to the Title VII coverage exception to §1324b jurisdiction and to the no-overlap provision. Very early in the development of IRCA caselaw it became clear that those provisions, i.e., §§1324b(a)(2)(B) and (b)(2), did not bar dual EEOC/OCAHO claims arising out of the same facts but based on differentiated rationale. United States v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90); Romo v. Todd, 1 OCAHO 25, aff'd, U.S. v. Todd Corporation, 900 F.2d 164 (9th Cir. 1990) (rejecting a claim that EEOC national origin jurisdiction bars §1324b citizenship status discrimination consideration, recognizing that an EEOC policy statement "adopted February 26, 1987 explicitly recognized that the same conduct can be in violation of both the prohibition against national origin discrimination and against citizenship discrimination.") 1 OCAHO 25 at 9.

Consistent with that development, OCAHO jurisprudence instructs also that a claim of retaliation survives rejection of underlying national origin and citizenship status claims. Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638 (5/18/94) at 20 (Amended Decision and Order . . . Dismissing in Part the Complaint). As summarized in the August 18, 1994 order, Complainant alleges that Respondent fired her

> As a retaliation for contacting immigration service, IRS, and SSA in Chicago and helping my co-workers with the same problem on the job.

Cplt. at para. 14(b).

An individual who is subjected to intimidation, threat, coercion or retaliation covered by 8 U.S.C. §1324b(a)(5) "shall be considered . . . to have been discriminated against." Id. It is incumbent on Complainant to set forth a prima facie case that she was fired because Respondent "interfered with any right or privilege secured" under §1324b, or because Complainant "intends to file or has filed a charge or a

complaint, [or has] testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under §1324b. It is not a retaliation in violation of §1324b for an employer to discharge an employee "because the employee told INS [Immigration and Naturalization Service] that his or her employer was not complying with IRCA's paperwork requirements or may have hired illegal aliens." Palacio v. Seaside Custom Harvesting, 4 OCAHO 675 (8/11/94) at 14. Retaliation, if any, against an employee for advising INS or other third parties of putative violations of law by an employer is not covered by §1324b because that conduct of the employee is not among those rights, privileges or activities specified in §1324b(a)(5). Palacio recognizes this limit on the reach of §1324b(a)(5), even though:

> INS regulations provide that an employee who is concerned that his employer is violating IRCA's employer sanction provisions may submit a signed written complaint in person or by mail to the INS office having jurisdiction over the business or residence of the violator. See 8 C.F.R. §274a.9 (1994).

Palacio, 4 OCAHO 675 at 14 n.3.

Literally read, the retaliation alleged in the complaint falls within the Palacio rule, and outside §1324b(a)(5). Even as augmented by her September 7, 1994 filing by counsel, with a single exception discussed below, Complainant fails to specify that she was fired by Respondent because she exercised her rights under §1324b or in respect of an investigation, proceeding, or hearing pursuant to §1324b. To the contrary, as explained in her response to the August 18, 1994 order, her complaint specifies that she was fired because she "complained to the INS and IRS about the conduct of the former owner." Response at para. 7. Totally lacking is any suggestion by Complainant that (1), she had a reasonable, good faith belief that a violation of §1324b had occurred and (2), she intended to act or acted on it and (3), Respondent knew of her intent or act and (4), in consequence took retaliatory action against her. Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638 (Amended Decision and Order) at 23. Each of the four elements must be established in order for Complainant to prevail. Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 661 (7/14/94) at 18-19.

The exception to Complainant's otherwise apparent failure to recite a claim cognizable under §1324b(a)(5) is the conclusory statement in her response to the direction in the August 18, 1994 order to specify the basis for her national origin discrimination claim:

> I was discriminated against because I was filing or intending to file Section 1324b complaints.

Response at para. 4.

6. As appears from the discussion above, Complainant claims that she was fired because of her national origin, i.e, Czechoslovakian and not Indian. She claims also that she was fired in retaliation for having "complained to the INS and IRS about the conduct of the former owner," and similar activity. For the first time, in contrast, she claims in her September 7, 1994 filing that "I was discriminated against because I was filing or intending to file Section 1324b complaints."

7. This Order directs Complainant to specify and explain in detail:

When and by what means she formed a reasonable, good faith belief that a violation of §1324b had occurred; describe that violation;

Describe the basis for the claim that she was fired because she "was filing or intending to file Section 1324b complaints;" specify the proof that will prove this claim;

What action she took prior to being fired on the basis of that belief;

When, prior to her discharge, and by what means, did Respondent become aware of her intent or act pursuant to §1324b; and;

Explain whether she claims that the former owner fired her or that Respondent fired her or that Respondent and the former employer conspired together to fire her; describe the basis for that claim.

9. Respondent shall report whether it served Complainant with its response to the August 18, 1994 order. Respondent is once again cautioned against filing any document which does not contain a truthful certificate of service. Another such failure to so certify may prompt rejection of the filing or entry of judgment against the offending party.

10. In addition to directing responses to paragraphs 7 and 8, this Order provides an opportunity to both parties to file comments with respect to the discussion at paragraph 5 of retaliation and national origin discrimination, and the tentative conclusions discussed above, including specifically the impact of the EEOC determination.

The response by Complainant shall be filed by counsel. So long as she is represented by counsel, Complainant is instructed to communicate with the office of the judge through counsel. A copy of this Order is

being mailed to Complainant, individually. In the future, however, this Office will address communications only to her counsel.

Responses will be timely if filed no later than Tuesday, October 18, 1994.

SO ORDERED.

Dated and entered this 27 th day of September 1994.

____
MARVIN H. MORSE
Administrative Law Judge