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

ANNA J. FLORES, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 93B00144
DANIEL DRY CLEANERS Respondent.	)	

AMENDMENT TO FINAL DECISION AND ORDER

(December 6, 1994)

Pursuant to 28 C.F.R. §68.52(4), the ULTIMATE FINDINGS, CONCLUSION AND ORDER set forth at paragraph V (page 11) of the Final Decision and Order issued November 29, 1994 are corrected to include the following:

"3. The complaint is dismissed. 8 U.S.C. § 1324b(g)(3)."

SO ORDERED. Dated and entered this 6th day of December, 1994.

MARVIN H. MORSE
Administrative Law Judge

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FINAL DECISION AND ORDER
(November 29, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Robert B. Dennis, Esq.
for Complainant

Todd M. Nielsen, Esq.
for Respondent

I. *Procedural Background*

On November 5, 1992, Anna J. Flores (Complainant or Flores), a native of El Salvador, filed a charge against Daniel Dry Cleaners (DDC or Respondent) with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) claiming employment discrimination on the basis of her national origin, in violation of § 102 of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324b. Under IRCA, OSC is given 120 days to investigate discrimination charges and, upon determining that there is reasonable cause to believe that the charge is true, is authorized to file a complaint before an administrative law judge (ALJ). 8 U.S.C. § 1324b(d)(1).

In Flores' case, OSC had not decided whether to file a complaint on Flores' behalf within the 120 day period. Because the 120 days had passed without OSC filing a complaint, OSC was obliged to, and did,

inform Complainant of her right to file her own complaint before an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO). 8 U.S.C. 1324b(d)(2).

On July 29, 1993, Flores, by counsel, Robert B. Dennis, Esq., filed an OCAHO complaint alleging that she was knowingly and intentionally fired because of her national origin. Complainant asserts that DDC made a mistake on her tax form, spelling her name incorrectly, and then refused to correct the mistake, instead using it as an excuse to fire her.

On November 24, 1993, Respondent filed an answer to the complaint containing a general denial of liability. In the course of prehearing procedures, an evidentiary hearing was set to be held in Fort Worth, Texas on February 17, 1994. The critical issue between the parties is whether Flores was fired and, if so, for what reason, or whether she voluntarily quit her job.

On March 30, 1994, Todd M. Nielsen, Esq. entered a notice of appearance as attorney for Respondent which had previously been representing itself.

The confrontational evidentiary hearing was held on April 21, 1994 in Fort Worth, Texas. Complainant introduced three witnesses: (1) Ana Flores (Complainant), (2) Guillermo Medrano (a friend who acted as her interpreter in dealings with Respondent) and (3) Paul Glasser-Kerr (a coordinator of social services). Respondent also introduced three witnesses: Navnit Kumar Patel (owner of DDC), Chandrika Patel (Navnit Kumar Patel's wife) and Emma Gamboa (a DDC employee). Upon Respondent's assertion at hearing that Julio Oscar Lemus (Lemus), a DDC employee, was out of the country and unavailable for hearing, and its contention that he was a critical witness, it was agreed Lemus' testimony would be taken subsequent to the hearing. The Lemus deposition was taken on June 9, 1994 as confirmed by an order issued June 30, 1994. On September 12, 1994, Respondent filed an uncontested Motion for Leave to Supplement the Transcript with Lemus' testimony which was granted on September 30, 1994. Each party requests an award of attorneys' fees.

On September 13, 1994, Complainant filed a Motion to Correct Transcript, whereby she argued that the transcript from the April 21, 1994 hearing should be corrected to reflect shortcomings in the translation of certain Spanish words spoken by Complainant from the witness stand. Respondent filed an opposition to Complainant's motion on September 19, 1994. By order dated September 12, 1994, I denied

Complainant's motion and granted Respondent's motion to accept the Lemus deposition into evidence.

Both parties filed Post-Trial Opening Briefs on September 29, 1994. Both parties also filed Post-Hearing Reply Briefs; Complainant's was filed on October 13, 1994 and Respondent's was filed on October 14, 1994.

II. *Facts*

A. Complainant's Version

Complainant alleges that in May, 1992, she received a notice from the Internal Revenue Service stating that the name listed on her tax return differed from the name on record with the Social Security Administration. Upon reviewing her pay stub and W-2 form filed by DDC, Flores found that her employer had listed an incorrect last name for her. The name listed on these forms was spelled F-R-E-A-Z-E-R instead of F-L-O-R-E-S.

Complainant alleges that on May 27, 1992, she and Medrano, who acted as her interpreter talked to Navnit Patel (Patel). Patel told Complainant that the fact that her name was incorrect on her W-2 form was not his problem. She alleges that Patel handed her a piece of paper with an address on it and suggested that she go to that address to take care of the problem. Flores claims she inquired about vacation time and, in the alternative, a raise and was refused both by Mr. Patel. He informed her that her employment papers were not valid and that therefore, after nearly 14 months of employment, Complainant was not authorized to work for him. Believing herself to have been fired, Flores did not return to work.

B. Respondent's Version

Respondent alleges that Complainant quit her employ at DDC prior to any discussion about her IRS records. Respondent states that Flores did not show up for work for two days forcing DDC to hire a temporary employee. The conversation concerning the misspelling of Flores' name did not occur until after Flores had failed to show up for work. At this meeting, Respondent asserts he may have told Complainant that she no longer worked for him, but that this was only after he thought she would not return and had consequently hired another employee.

III. *Discussion*

The factual versions offered by each party are in sharp contrast. In order to prove discrimination in employment, an individual must "establish a prima facie case by showing: (1) that he is a member of a protected class; (2) that he was qualified for a position with Respondent . . .; (3) he was not hired for the position, and (4) another individual with a different citizenship status was hired." U.S. v. McDonnell Douglas Corp., 4 OCAHO 676, at 6 (1994). See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-255 (1981). While Complainant is a member of a protected class and qualified for the position, her allegations that she was "not hired" or more accurately not retained are not strengthened by the evidence presented at hearing. Flores can prevail only if she can persuade the trier of fact by a preponderance of the evidence that she was fired, and if so, that her termination was based on her national origin, and not because she failed to appear for work for two days. The principle hurdle which confronts Flores, and which she has failed to overcome, is that of the language barrier between her and Patel.

Complainant states that she went to see Patel on May 27, 1992 at 5:00 p.m. in order to discuss the misspelling of her name on the IRS forms. She is certain of the date and time because she got off work at 4:30 p.m. that day and had to first go get Medrano who would act as her interpreter. For this reason, she is certain that she was still working for Respondent at the time of the conversation during which Patel allegedly told her she was fired.

Patel admits that he told Complainant that she could not have a vacation at a meeting prior to the time she stopped coming to work, presumably at the May 27, 1992 meeting described by Flores. When asked about the meeting, Patel stated:

> A. The reason for the separation was asking for vacation right away. Was told vacation during July . . .
>
> . . .
>
> A. And next day she did not show up or phone. That was -- [unintelligible]. She did not phone us. She did not -- because she quit, but she did not show at all the next day or nothing that she not coming.

Tr. at 132.

Patel asserts that Flores and Medrano did not speak to him about the misspelling in the W-2 form until several days after she had failed to appear (i.e., in June) and after she had been told she could not have a vacation until later in the year. Patel testified:

Q. Once again, it's your testimony that Ms. Flores came back to you after she stopped coming to work, sometime in June, weeks after --Is that right?

A. Yes, sir.

Q. And that's when you first saw the IRS letter that has been introduced as Exhibit 3; is that correct?

A. Yes, sir. I saw that later.

Q. When was the first time you saw it?

A. Somewhere after I hired the new girl. That must have been somewhere in June. I cannot recall exact dates or the time.

Q. Understood.

A. But it was in the afternoon.

Q. But it's your testimony that it was after that last week in June when Ms. Flores stopped coming to work?

A. Yes, sir.

Tr. at 119-120.

In direct contrast to Patel's testimony, Flores said there was only one meeting with regard to the IRS form, vacation and her termination. To bolster this assertion, she offers two pieces of evidence. First, she claims that she recalls the exact date of termination because she recorded it in an address/calendar/ notebook in which she recorded all important dates and telephone numbers. There was much discussion about this book at hearing because her alleged termination occurred in 1992 while the book contained a 1993 calendar. Challenging its reliability, Respondent asserts that Flores wrote down her termination date after the fact. It is also unreliable, according to Respondent, because it has pages torn out as well as pasted or inserted.[1]

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[1] Complainant moved to amend the transcript because certain words pertaining to whether Complainant had actually pasted, inserted or stapled the additional pages into the book were, according to Complainant, incorrectly translated by the interpreter. According to Complainant, the translated words imply a different meaning than that intended by Flores, detracting from the credibility of the evidence offered. As appears in the order denying the motion, any such claim should have been raised at hearing. Complainant's claim addressed the accuracy of the interpretation and not the correctness of the transcript. I denied the motion on the grounds that these issues should have been brought up at the hearing and not after the fact. Upon acquiescing at the outset of the hearing to the qualifications of the interpreter, Complainant's counsel necessarily (continued...)

Whether or not Complainant wrote May 27, 1992 as the correct date of termination in a 1992 or 1993 calendar is not critical. More important is whether or not Flores understood the conversation with Respondent correctly through her interpreter, Medrano. Complainant admits she does not speak or understand English very well. I am satisfied she can converse only in Spanish. Her knowledge of the conversation taking place on May 27, 1992 comes exclusively from Medrano.

Respondent emphasizes and relies substantially on Medrano's apparent lack of ability to speak and understand English, and therefore his lack of credibility as an interpreter. Specifically, Respondent points to statements made by Medrano during cross-examination:

Q. Have you ever had any formal training or education in English?

A. Repeat, please.

Q. Have you ever taken any English classes?

A. No.

Q. Have you ever served or worked as an interpreter?

A. I have worked -- I understand this English, but the people speak it slow for me.

Judge Morse: Do you help other people out in English, other Salvadorans [sic].

A. No.

Judge Morse: Do you assist them in English?

A. I speak English, the person did the job.

Judge Morse: Go ahead.

Q. Have you ever received pay for your work as an interpreter?

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[1](...continued)
consented to that interpreter's ability to communicate the witness's testimony, subject to challenge at the hearing. Absent a contemporaneous challenge to the accuracy of translation, there is no way to test the bona fides of a subsequent claim that the interpretation failed to communicate exactly what the witness had purportedly said in her native language. Post-hearing procedures cannot fairly be used to cure this sort of claim of discrepancy in language, and the oral rendition of the testimony by the interpreter must stand. In any case, as I noted at hearing, the notebook lacks "dignity" as evidence no matter what meaning is attached to Complainant's words. Tr. at 71.

A. No.

Q. Do you understand the word "interpreter"?

A. Yes.

Q. Do you know what it means?

A. It means --I don't understand what it means.

Q. Can you speak up, please?

A. [Stands.]

Q. No, no, not stand up. Speak up so we can hear you. You're speaking very softly.

A. I don't understand what it means.

Tr. at 79-81.

Continuing with cross-examination, Respondent's counsel elicited the following responses:

Q. --did Mr. Patel speak very slowly so you could understand him?

A. Yes, yes. He speak very slow because this is when he . . .

Q. I'm sorry. I didn't understand.

A. Okay. He speak slow.

Q. Through the whole conversation?

A. Yes.

Q. And you understood every word?

A. Not everything.

Q. I'm sorry. Your answer was no, you didn't understand every word?

A. I don't understand every word, but this is-- He speak with me. I understand what he say.

. . .

Q. Okay. It has been your testimony that there's no possibility -- no posibilidad -- that you misunderstood Mr. Patel the day you talked to him. Do you maintain that testimony?

A. Please repeat.

Q. You have trouble understanding some English, don't you?

A. Yeah.

Tr. at 81-82.

These exchanges illustrate what was quite obvious at hearing, namely Medrano's total lack of comprehension and ability to speak elementary English. Often even a rewording of the question did not enable Medrano to make an accurate response. As stated by Medrano, Patel did speak slowly in order to enable Medrano to better understand him during their meeting or meetings. Whether Medrano asked Patel to clarify those statements which were unclear to him, as they were at the hearing, or whether Patel often stopped in order to make sure that Medrano understood exactly what was being said is not known. At any rate, it was not addressed at the hearing.

It is certain that Medrano did not understand every word or sentence that Patel said to him. In light of the fact that Patel's testimony goes against Medrano's and Flores', and that Medrano did not fully understand Patel on the day he allegedly fired Flores, Complainant has failed to prove that Medrano substantially understood what Patel said. It follows that Complainant has failed to prove by a preponderance of the evidence that Patel fired her.

There is additional testimony by Emma Gamboa (Gamboa) who was hired several days after Flores' last day at work. She states:

Q. When you started work there, were you a temporary or permanent employee?

A. I was temporary.

Q. Did Mr. Patel tell you why you would be a temporary employee?

A. Yeah, because he has to wait for Julie [Flores].

Q. Wait for her what? What was he waiting for?

. . .

A. Because she quit and he want to wait a few days to see if she want to come back.

Q. Did Mr. Patel tell you that when you first started work in June?

A. Yeah.

Tr. at 160.

Unlike Medrano, it was not necessary to have each question to Gamboa repeated or explained. Her comprehension when asked about conversations with Patel lacks the spectra of a language barrier. Gamboa's testimony bolsters Patel's assertion that he did not fire Flores on May 27, 1992 but rather was expecting her to return to work, following which he assumed she quit. Lemus, her coworker at DDC, also testified that Complainant left the job because she wanted to. Deposition of Lemus at 9.

Complainant asserts that Patel wrote her name wrong on the W-2 form and used the misspelling as an excuse to fire her. Complaint at 12. Furthermore, Complainant contends that Respondent refused to give her a copy of the W-2 for several weeks after she asked for it because he wanted her to sign letters stating that she had left of her own volition. Her theory is that, in this way, Respondent would be able to exculpate himself in the face of a discrimination charge and would not have to contribute to her unemployment compensation. Complainant's Post-Trial Opening Brief at 4. See also Complainant's Exhibits 7, 8 and 9.

Patel counters that he did not intend to misspell Flores' name; rather, he inadvertently wrote F-R-E-A-Z-E-R. As already stated, he also claims that her request for the W-2 form did not come until after Flores had already quit.

Obviously, there was confusion as to what each party expected at the May 27th meeting. While Flores and Medrano contend that they asked for the W-2 form and did not receive it, Patel states that he agreed (several days after Flores stopped work) to give them a corrected W-2 form but that it would take a few days because he could not leave his store during the busy part of the week. Patel states that he did go to the IRS office in order to get a 1992 W-2 form but that, when he got there, none were available. Since Flores did not come back for the form for some time, Patel states he "never bothered to look it up [again]. [He] . . . thought everything was in order. . . ." Tr. at 110.

Patel claims DDC sent Flores her W-2 at the traditional time before taxes are due in January and never received any notice that the W-2 had not been delivered. Apparently, there was confusion as to her current address. Patel had sent the form to her last known address at which she no longer lived.

Paul Glasser-Kerr (Glasser), on behalf of Flores, asked Patel for the W-2 form. The latter responded that he could not give out the information without authorization from Flores. Tr. at 92 and 114-115.

When Flores came in for the W-2 form in June, Patel explained he wanted to have an acknowledgment that she had received it and therefore asked her to sign the first two letters. Exhibits 7 & 8. With regard to the third letter he asked her to sign which stated that Flores had quit her job at DDC, Patel answered:

> Because they were disputing the [unintelligible] vacation pay, no vacation pay. And normally [unintelligible] employment, I simply said you quit, I did not fire somebody. In case things like this happen in the future, I have a reference. I say you quit this job; I did not fire you.

Tr. at 119 and Exhibit 9.

Again, as with the May 27, 1992 meeting, there is uncertainty as to what was being asked of and wanted by each party at the June meeting. Complainant has failed to establish that through delay in presenting her with the W-2 form and by asking her to sign three letters stating that she received her W-2 form and left voluntarily, that Patel fired her on national origin grounds. Patel made sense when he said: "Why it took me 15 months or 18 months to fire her? If I have to fire, I won't hire somebody." Tr. at 113-114. I am unable to conclude on this record that she was in fact fired or that Patel deliberately misspelled her name on the W-2 for reasons that implicate § 1324b relief. In any event, there is no evidence that she was discriminated against on national origin grounds.

In addition, there is no evidence that Patel discriminated against immigrants in general. Numerous immigrants have worked at DDC, including Lemus and other El Salvadorians.

Both Lemus and Flores testified that they were working for DDC illegally for some time before they received their work permits from INS. Lemus' Deposition at 24 and Tr. at 57. Patel in fact gave Flores time off in order to obtain her work authorization. Tr. at 57. There is no reason to assume that, upon finding a mistake in Flores' W-2 form, Patel would terminate her on those grounds since he was willing to hire Flores when she lacked work authorization. If he in fact did fire Flores, it was for reasons other than national origin. Complainant has utterly failed to establish national origin discrimination by a preponderance of the evidence.

IV. *Respondent's Request for Attorney's Fees Denied*

Attorney's fees are awarded to a prevailing party when "the losing party's argument is without reasonable foundation in law and fact." 28 C.F.R. § 68.52(c)(2)(K)(ii). Although Respondent is the prevailing party

in this case, "[t]he Supreme Court has cautioned district courts to "resist the temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Huesca v. Rojas Bakery, 4 OCAHO 654 (1994) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)). Further, "[e]ven when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id.

In the case at hand, Complainant is a victim of her lack of English comprehension. Although she failed to establish by a preponderance of the evidence that she was fired because of her national origin on May 27, 1993, she may have believed in good faith that she was fired. Therefore, I am not able to find that she acted unreasonably in filing her OCAHO complaint. For this reason, her "argument" did not lack a reasonable foundation in law and fact and accordingly, I deny Respondent's Motion for Attorney's Fees.

V. *Ultimate Findings, Conclusion and Order*

I have considered the pleadings, testimony, evidence and arguments submitted by the parties. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. That Complainant failed to meet her burden of proving by a preponderance of evidence that Respondent discriminated against her because of her national origin.

2. That in light of the language barrier between Complainant and Respondent, the complaint was not so lacking in legal and factual foundation as to warrant an award of attorney's fees.

All motions and other requests not specifically ruled upon are denied.

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 29th day of November, 1994.

MARVIN H. MORSE
Administrative Law Judge