

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

SANFORD J. STRAUSS,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 94B00130
RITE AID CORPORATION,)
Respondent.)
_____)

FINAL DECISION AND ORDER
(December 19, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances by: Sanford J. Strauss, pro se
Michael C. Fox, Esq., for Respondent

I. Procedural History and Facts

On February 16, 1994, Sanford J. Strauss (Complainant or Strauss), a United States citizen, filed a charge against Rite Aid Corporation (Respondent or Rite Aid) dated August 3, 1990, in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). He claimed employment discrimination on the basis of his national origin and citizenship status, in violation of § 102 of the Immigration Reform and Control Act, as amended (IRCA), 8 U.S.C. § 1324b. Strauss alleged that he applied for a pharmacist position with Respondent on two separate occasions and was denied employment because of discriminatory practices on the part of Respondent.

By a determination letter dated June 10, 1994, OSC advised Strauss that it elected not to file a complaint before an administrative law judge (ALJ) due to "insufficient evidence of reasonable cause to believe . . . [he was] discriminated against as prohibited by 8 U.S.C. § 1324b." OSC, however, informed Strauss that he could pursue a private cause of action directly with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

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On July 14, 1994, Strauss filed an OCAHO complaint in which he reasserted his claim that Respondent had denied him employment on the basis of his citizenship status and national origin. On July 19, 1994, OCAHO issued its Notice of Hearing (NOH), which transmitted to Respondent a copy of Strauss' complaint.

On August 30, 1994, Rite Aid filed a response to the complaint which denied discrimination, stating that the reason Strauss was not employed by Respondent was due to his lack of qualifications.

An order dated September 7, 1994 addressed specific questions to each party in an attempt to (1) clarify questions on jurisdiction and (2) determine whether Complainant states a prima facie case of discrimination. The Order also advised the parties that, upon review of the responses to the Order, a final decision and order may dispose of the case.

Both parties responded to the Order; Complainant's response was filed on September 19, 1994 and Respondent's response was filed on September 26, 1994. On September 20, 1994, an order was issued which (1) returned certain documents to Complainant which he included in his response to the September 7 Order and which are not of probative value, (2) forwarded a copy of Complainant's response to Respondent as it did not appear that Complainant had served Respondent and (3) warned the parties of the requirement to serve the opposing counsel or party with all filings.

The responses filed by the parties were neither extensive nor complete thereby necessitating a further Order of Inquiry issued December 2, 1994. On December 12, 1994, Complainant filed a response.¹ In light of the disposition of this case, it is not necessary to wait until Respondent has filed its response in order to render a final decision.

II. *Discussion*

A. National Origin Claim Dismissed for Lack of Jurisdiction

Under Title VII of the Civil Rights Act of 1964, as amended (Title VII), the Equal Employment Opportunity Commission (EEOC) has jurisdiction over national origin discrimination charges against employers having "fifteen or more employees for each working day in

¹ As with Complainant's response to the September 7 Order, his response to the December 2 Order failed to include a certificate of service on Respondent.

each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). As a complement to this provision, OCAHO ALJs have jurisdiction over only those national origin discrimination claims involving employers who employ between three and fourteen individuals. 8 U.S.C. § 1324b(a)(2).

The employer information report Rite Aid submitted to the EEOC in 1993 reflects a payroll of 31,832 employees. Respondent's Response at 1 and corresponding exhibit. Due to the fact that Respondent employs more than 14 employees, this final decision and order dismisses Complainant's national origin claim for lack of jurisdiction. *See, e.g., Hernandez v. City of Santa Ana* 4 OCAHO 674, at 6 (1994); *U.S. v. Huang*, 2 OCAHO 313 (1991), *aff'd*, *Huang v. U.S. Postal Service*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Berlanga v. Butterball Co.*, 4 OCAHO 669 (1994).

Dismissal of a national origin claim does not, however, affect Complainant's allegation of discrimination based on citizenship status which is not subject to the 14 employee ceiling. *See, e.g., Adame v. Dunkin Donuts* (Order, Including Tentative Conclusions Concerning Complainant's Causes of Action) 4 OCAHO 691, at 2 (1994); *United States v. Marcel Watch Corp.*, 1 OCAHO 143 (1990); *Romo v. Todd*, 1 OCAHO 25 (1990), *aff'd*, *U.S. v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990).

B. Discrimination based on Citizenship Status Claim Dismissed as Untimely

OCAHO complaints require a copy of the charge filed with OSC to be included as an attachment to the complaint. The complaint at issue included a copy of a charge filed by Strauss with OSC on August 3, 1990. The underlying discriminatory action alleged by Complainant in the charge deals with an employment application he filled out for Rite Aid on February 15, 1988 and which was rejected on that same day. Complainant apparently allowed his 1990 OSC charge to lapse but continued to apply for employment with Rite Aid. Specifically, Strauss filed an employment application on January 6, 1992 which received no response from Rite Aid.² Complainant subsequently called Rite Aid on December 8, 1993, nearly one year later, to inquire as to the

² Although Respondent's Response to the September 20, 1994 Order (Respondent's Response) states that Complainant last applied for employment with Rite Aid on January 1, 1992, the copy of his employment application enclosed with that filing is dated January 6, 1992.

status of his application but never spoke to a representative of Respondent. On February 16, 1994, Strauss filed his second OSC charge but used the charge filed in 1990 alleging discrimination based on his 1988 interview as the basis for both the 1994 OSC charge and this OCAHO complaint.

As previously stated, two orders addressing specific inquiries to each party were sent out in large part to determine when and how Complainant knew he had been discriminated against. The date and facts surrounding an alleged discriminatory practice are necessary in order to determine the timeliness of an OSC filing. Under 8 U.S.C. § 1324b(d)(3), "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." Complainant's pleadings state various dates and scenarios as the time for the alleged discrimination.

The 1990 OSC charge filed with the OCAHO complaint recites only that Strauss was rejected during his first and only interview with Rite Aid on February 15, 1988. When asked to produce a 1994 charge filed with OSC, Complainant stated he could not because "none exists. I based my [1994] complaint on the 1990 charge only." Complainant's Response to the December 2, 1994 Order of Inquiry at 1 (Complainant's December 2 Response). Obviously, therefore, by Complainant's own admission, the discriminatory action he complains about occurred prior to 1990. His 1994 filing with OSC is untimely.

Nevertheless, in response to the inquiry "[s]tate explicitly when you were rejected including a description of how you learned about it," Complainant answers "[on] January 1, 1992 I assumed I was rejected by total ignorance of the Cleveland [Rite Aid] Division Office."³ Order of Inquiry at 1 (Dec. 2, 1994) and Complainant's December 2 Response at 1. Whether Strauss realized he was discriminated against on the date he was interviewed and rejected (i.e. on February 15, 1988) or on the date he "assumed" he was rejected (i.e. January 1, 1992) is immaterial because either date is out of time in relation to his 1994 OSC

³ Quite apart from procedural impediments to Complainant's cause of action, his response to my inquiries demonstrates that he has already largely conceded an inability to prove that Respondent discriminated against him on the basis of citizenship status. His response to the September 7, 1994 Order states "I cannot state that Rite Aid was aware of my citizenship status but I believe they tried to circumvent all Civil Rights Laws in force at the present time." "Belief" that an employer may have engaged in a discriminatory practice is sheer speculation and therefore insufficient to establish a prima facie case of discrimination.

refiling of a 1990 charge. Accordingly, I dismiss his citizenship status discrimination complaint as untimely.

C. Complainant's Failure to Serve Documents on the Opposing Party

Notwithstanding Complainant's failure to meet IRCA's statute of limitations requirement, I would dismiss his claim for continuously failing to certify service of filings upon Respondent in the face of repeated judicial warnings regarding the consequences of said failure. OCAHO rules of procedure require that all pleadings "delivered or mailed for filing to the Administrative Law Judge assigned to the case . . . shall be accompanied by a certification indicating service to all parties of record." 28 C.F.R. § 68.6(a).

Three of my previous orders in this case have cautioned the parties that any filing not containing a truthful certification of service upon the opposing party will be rejected and possibly deemed a basis for a judgment by default for failure to adhere to the order of the judge. Despite repeated warnings, Complainant failed to certify service of any of his pleadings. Therefore, were this complaint not untimely, I would enter a default judgment in favor of Respondent due to Complainant's failure to adhere to my previous admonishments. See Brooks v. Watts Window World, 3 OCAHO 570, at 3 (1993).

III. Ultimate Findings, Conclusion and Order

I have considered the complaint filed by Strauss, the answer filed by Rite Aid, and other filings and supporting documents filed by each party. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. I lack jurisdiction over Complainant's national origin discrimination claim because Respondent employs more than 14 employees.
2. I lack jurisdiction over Complainant's citizenship status claim because the complaint was not filed within IRCA's statute of limitations.
3. The complaint is dismissed.

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

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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 19th day of December, 1994.

MARVIN H. MORSE
Administrative Law Judge