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.	)	

FINAL DECISION AND ORDER
(January 4, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Drahomira Adame, Pro se
Shirad Malani, for Respondent

I. *Procedural History And Facts*

By a charge dated October 1, 1993, Drahomira Adame (Adame or Complainant) alleged that Dunkin Donuts (Dunkin Donuts or Respondent)[1] discriminated and retaliated against her based on her national origin, practices prohibited by § 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a). Adame filed her charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

[1] Dunkin Donuts in this case is an enterprise located at 1755 W. Addison Street, Chicago, Illinois. It appears to be a franchise and not a component of the nationwide employer of similar name.

Adame was employed by Dunkin Donuts as a sales clerk. On or around April 1, 1993, Dunkin Donuts changed ownership and on April 4, 1993 the new owner discharged Adame and nine of the 14 other employees. Before her discharge, she filed a charge dated January 25, 1993 with the Chicago District, U.S. Equal Employment Opportunity Commission (EEOC). She alleged employment discrimination based on the fact that (1) she is not of Indian descent as is the owner of Dunkin Donuts but rather Adame is Czechoslovakian and (2) age discrimination because she had been discharged in favor of younger sales clerks.

Prior to a decision by EEOC, by a determination letter dated December 30, 1993, OSC advised Adame that it elected not to file a complaint before an administrative law judge (ALJ) due to "insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. § 1324b." OSC informed Adame that she could pursue a private cause of action directly with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

On March 24, 1994, EEOC dismissed Adame's charge on the basis that the evidence did not prove a violation under Title VII of the Civil Rights Act of 1964 or under the Employment Act of 1967. Although Adame filed her EEOC complaint before discharge of her OSC charge, the EEOC Determination addressed her claim in terms of the discharge before me.

On April 5, 1994, Adame filed an OCAHO complaint in which she reasserted her claim that Respondent had discriminated and retaliated against her on the basis of her national origin. Specifically, Adame contended that her employer was (1) withholding taxes from her paycheck and those of other employees without reporting them to the Internal Revenue Service (IRS), (2) hiring illegal Indian aliens and firing legal non-Indian workers, (3) harassing her for filing an EEOC charge and for helping coworkers faced with similar problems, and (4) paying legal aliens the same rate of pay as illegal aliens (i.e. a low rate).

On July 6, 1994, OCAHO issued its Notice of Hearing (NOH), which transmitted to Respondent a copy of Adame's complaint.

On August 15, 1994, Respondent filed a response to the complaint which I accepted as an answer in an order dated August 18, 1994. In the answer, Dunkin Donuts states that the present owner and the previous owner agreed that all employees could finish out the work

week, but would have to complete new applications for employment and were not guaranteed employment positions. Moreover, Dunkin Donuts has no record of Adame filling out an employment application at that time.

By Order dated August 18, 1994, I directed each party to answer specific questions in order to clarify the facts. Complainant filed a response to the August 18 Order on September 7, 1994 which included a notice of appearance by an attorney on her behalf. Respondent filed its response on September 9, 1994. On September 23, 1994, Complainant gratuitously filed additional "evidence." As reflected in the order issued September 27, 1994,[2] I retained only her transmittal letter and a copy of the EEOC determination letter. All other materials were forwarded to counsel for Complainant.

The September 27, 1994 Order included tentative conclusions concerning Complainant's causes of actions and again directed certain inquiries to the parties. Responses to the Order were due on October 18, 1994. An order dated October 13, 1994 granted Complainant an extension of time to respond until November 8, 1994.

On November 7, 1994, Complainant's attorney filed a motion to withdraw as counsel due, he says, to Adame's lack of cooperation and his inability to contact her. In order to allow Complainant adequate time to respond to the motion as well as to prepare her own responses to the September 27 Order, I granted an additional extension of time to Complainant in an order dated November 18, 1994. Counsel for Complainant, but not Complainant herself, responded to the order on December 21, 1994.

II. *Discussion*

A. National Origin Claim Barred by "EEOC Overlap Provision"

As stated in the September 27, 1994 Order, this case presents the unusual 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 . . . ." Adame v. Dunkin Donuts, 4 OCAHO 691, at 4. Under Title VII of the Civil Rights Act of 1964, as amended (Title VII), EEOC has jurisdiction over national origin discrimination charges against employers having "fifteen or more

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[2] Adame v. Dunkin Donuts (Order, Including Tentative Conclusions Concerning Complainant's Causes of Action) 4 OCAHO 691, at 2 (1994).

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). 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). See also Lardy v. United Airlines, Inc., 4 OCAHO 595 (1994); Williams v. Lucas Associates, Inc., 1 OCAHO 254 (1990).

The EEOC determination letter which made a ruling on the merits, however, refers to "14 individuals employed by the previous owner . . ." of Dunkin Donuts. Thus, despite the fact that this case appears to fall within the exclusive jurisdiction of OCAHO, EEOC has asserted jurisdiction over Adame's cause of action. The issue therefore is whether prior EEOC exercise of jurisdiction affects OCAHO's jurisdiction over Complainant's § 1324b complaint.

Section 1324b addresses overlap of jurisdiction between Title VII and IRCA. Where either EEOC or OCAHO has asserted jurisdiction over a case involving national origin discrimination, the federal agency not having exercised jurisdiction over the case may not subsequently entertain the same case "unless the charge is dismissed as being outside the scope . . ." of that agency's statute (i.e. outside the scope of jurisdiction of the first agency to exercise jurisdiction). 8 U.S.C. § 1324b(b)(2). As pointed out in the September 27 Order, "[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." 4 OCAHO 691, at 4 (emphasis added). In fact, the language in subsection (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 . . ." and brought before EEOC first. Id.

Complainant, by counsel, however, argues that an EEOC decision on national origin discrimination which is void (i.e. lacking in jurisdiction) cannot be given effect. Therefore, the EEOC's determination, as "'[an administrative proceeding infected with fundamental procedural error[,] . . . is a legal nullity and subject to collateral attack.'" Complainant's Response to Sept. 27, 1994 Order at 3 (quoting Winterberger v. Gen. Teamsters Auto Truck, 558 F.2d 923, 925 (9th Cir. 1977)). By definition, a collateral attack is an attempt to evade a previous decision through a judicial proceeding other than an appellate review, i.e., other than direct attack.

Complainant's reliance on Winterberger is misplaced. The Winterberger court reversed the district court for erroneously dismissing a union member's challenge to union disciplinary penalties imposed upon him. The district court had dismissed for failure to exhaust administrative remedies. In a previous union disciplinary proceeding arising out of the same facts as the second one, the union assessed penalties. The state court rebuffed the union's suit to enforce that assessment on the basis that the union had failed to provide statutory notice of its proceeding, rendering it void. Commenting that it would be futile for Winterberger to be required to exhaust administrative remedies in light of the prior events and the state court's judicial determination that the initial proceeding was a nullity, the Ninth Circuit held that the district court should have taken jurisdiction to entertain the collateral attack. Winterberger, 558 F.2d at 925. In the present case, however, there is no judicial declaration that EEOC's action exceeded its jurisdiction, and/or is void. Patently, EEOC was aware of the number of employees implicated in Adame's claim. It is only speculative whether EEOC lacked a plausible basis for having addressed that claim on the merits. I am unaware of any authority for this forum of limited jurisdiction to reject the apparently deliberate exercise by EEOC of its jurisdiction.

Counsel for Complainant maintains that like an Article III Court's power to determine a lower court's subject matter jurisdiction, ALJs have the power to determine the validity of EEOC's determination. Complainant further states that even if a nonjurisdictional error is made by EEOC, OCAHO has the jurisdiction to entertain a collateral attack against EEOC's decision. Complainant's Response to September 27 Order at 2. (citing Campos v. Puerto Rico Sun Oil, 536 F.2d 970 (1st Cir. 1976)). Whether EEOC made a jurisdictional or nonjurisdictional error is, however, immaterial under § 1324b's no overlap provision. As stated in counsel's response, "'[t]he mode of challenging an agency's jurisdictional decision is by direct attack.'" Complainant's Response to September 27 Order at 3 (quoting McCullock Interstate Gas v. FPC, 536 F.2d 910, 913 (10th Cir. 1976)). Likewise, in the case at hand, Complainant may directly attack EEOC's determination by filing an appeal with the U.S. court of appeals for the appropriate circuit. See 42 U.S.C. § 2000e-5(j). OCAHO is not, however, the proper forum in which to litigate the claim that EEOC lacked jurisdiction. In light of § 1324b's no overlap provision, I am barred from considering Complainant's complaint absent an appellate court ruling nullifying EEOC's action. Therefore, this Final Decision and Order adopts the tentative conclusion that Complainant's national origin discrimination complaint based on the same facts relied on to resolve her EEOC

charge must be dismissed due to EEOC's prior exercise of power to decide the national origin issue.[3]

B. Retaliation Claim not Covered under IRCA

Dismissal of Complainant's national origin claim does not, however, impair her retaliation claim under § 1324b. "Only a national origin claim is susceptible to the Title VII coverage exception to § 1324b jurisdiction and to the no-overlap provision." 4 OCAHO 691, at 4. See also 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); Yohan v. Central State Hospital, 4 OCAHO 593 (1994); Fakunmoju v. Claims Administration Corp., 4 OCAHO 624 (1994).

In order to prevail on a retaliation cause of action, Complainant must prove that she "(1) had a reasonable, good-faith belief that an IRCA violation occurred; (2) she intended to act on it; (3) Respondent(s) knew of Complainant's intent or act and (4) Respondent(s) lashed out in consequence of it." Palacio v. Seaside Custom Harvesting and Zinn Packing Co., 4 OCAHO 675, at 13 (1994) (citing Zarazinski v. Anglo Fabrics Co. Inc., 4 OCAHO 661, at 17 (1994); Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991)). I adopt the Palacio criteria for analysis of Adame's retaliation claim.

In her complaint and initial filings, Complainant asserts that she was fired because she "complained to the INS [Immigration and Naturalization Service] and IRS about the conduct of the former owner." Complainant's Response to August 18, 1994 Order at 4. However, "[i]t is not a retaliation in violation of § 1324b for an employer to discharge an employee "because the employee told INS that his or her employer was not complying with IRCA's paperwork requirements or may have hired illegal aliens." Order, 4 OCAHO 691, at 5 (quoting Palacio, 4 OCAHO 675, at 14).

In order for Complainant to have a valid retaliation claim under § 1324b, she must either (1) have been retaliated against because she had filed a § 1324b complaint or (2) intended to file or assisted someone else in filing a § 1324b complaint. 8 U.S.C. § 1324b(a)(5). In

[3] See, Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459, at 9 (1992), aff'd 19 F.3d 26 (9th Cir. 1994) (unpublished) (available at 1992 WL 72898) (noting that a complaint is not barred by IRCA's overlap provision when the EEOC has "rebuffed efforts at such a filing.").

conjunction with such scenarios, Palacio rightly requires that Respondent have been aware of Complainant's § 1324b allegations.

Adame's OCAHO complaint does not contain any reference to her intent to file an IRCA complaint. In contrast, two subsequent filings contain short and conclusory references to her intent to file a § 1324b charge. These assertions do not, however, answer my inquiries as to when she came to the conclusion that a § 1324b violation had occurred, whether the new owner knew about her intent and whether he retaliated because of it. In effect, Complainant's failure to answer my inquiries and lack of evidence fail to meet any of the four Palacio requirements.

OCAHO rules of practice and procedure authorize the ALJ to dispose of cases upon motions to dismiss for failure to state a claim upon which relief can be granted. 28 C.F.R. § 68.10 (1994). Ordinarily, such a motion to dismiss is filed by the opposing party and is treated as tantamount to a motion for summary decision. See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").[4] Where no motion is filed by a Respondent, an ALJ may "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242,248 (1986).

Adame fails to allege sufficient facts to meet Palacio's requirements despite repeated inquiries by me as to the facts surrounding her claim. It is noteworthy that counsel premises his request to be relieved of responsibility on his difficulty in communicating with Complainant. Nevertheless, he appends a rambling, largely incoherent two-page statement of hers which, in passing, refers to retribution by Respondent for her having contacted, inter alia "Special Council" [sic]." That document, being undated, lacks probative value. In context of Complainant's other filings and of the inadequate responses to inquiries addressed to her by the bench, there is no reason to suppose that Complainant made reference to the Office of Special Counsel prior to her discharge from employment. Accordingly, I conclude that

[4] The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of OCAHO cases. 28 C.F.R. § 68.1.

Complainant's pleadings fail to state a claim upon which relief can be granted, and that there is not a genuine issue as to any material fact. Summary decision is granted in Respondent's favor.

III. *Ultimate Findings, Conclusions and Order*

I have considered the complaint filed by Adame, Respondent's answer to the complaint, and other 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. OCAHO lacks jurisdiction over Complainant's national origin discrimination claim under § 1324b's prohibition against overlap of EEOC and IRCA causes of action.

2. Complainant's retaliation allegation under § 1324b fails to state a claim upon which relief can be granted.

3. Counsel for Complainant's Motion to Withdraw is granted.

4. 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 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 4th day of January, 1995.

MARVIN H. MORSE
Administrative Law Judge