

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

GALDINO CASILLAS GARCIA,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 94B00024
McCARRON ELECTRIC)
COMPANY)
Respondent.)
_____)

FINAL DECISION AND ORDER
(March 23, 1995)

MARVIN H. MORSE, Administrative Law Judge

I. Procedural History

By a charge dated June 30, 1993, filed July 9, 1993, Galdino Casillas Garcia (Complainant or Garcia) alleged that McCarron Electric Company (Respondent or McCarron) discriminated against him in violation of section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b. Garcia filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Garcia, a Mexican national, is a permanent resident alien. Specifically, his charge alleged that McCarron retaliated against him for asserting rights protected under 8 U.S.C. § 1324b and engaged in document abuse by refusing to accept a valid document or demanding more or different documents than are required for completing the employment eligibility verification form required under 8 U.S.C. § 1324a.

By determination letter dated November 2, 1993, OSC informed Garcia that it elected not to file a complaint on his behalf before an

administrative law judge (ALJ).¹ OSC, however, informed Garcia that he could pursue a private cause of action directly with an ALJ.

On February 7, 1994, Garcia filed a complaint in the Office of the Chief Administrative Hearing Officer. The Complaint was assigned to ALJ Robert B. Schneider and alleges that McCarron discriminated against Garcia on the basis of his citizenship status. Specifically, Complainant alleged that his employment was terminated by Respondent on October 8, 1992² in order that he could be replaced by an unauthorized alien at a lower salary than Garcia.

On March 29, 1994, Respondent timely filed an answer which denied all allegations of unlawful and/or improper termination and discrimination. Respondent stated that "Mr. Garcia was not fired, as he states in his complaint, he was one of six people that were laid off on September 24, 1992, who have not been rehired."

On July 11, 1994, ALJ Schneider issued an order directing Complainant to answer interrogatories as specified by the Order. Complainant's answers to these interrogatories were filed on September 12, 1994.

On November 29, 1994, ALJ Schneider issued another order which stated that³

In order to expedite a determination as to determining this case by summary decision, and in lieu of issuing a subpoena to obtain testimony from [Complainant's] . . . witnesses pursuant to 28 C.F.R. § 68.25, I hereby ORDER Complainant to make a good-faith effort to obtain written statements or affidavits from these witnesses in support of his contentions and to file such statements with this court on or before January 13, 1995.

¹ OSC did not state a reason for electing not to file a complaint. The determination letter states only that "[u]pon concluding the investigation of your discrimination charge against McCarron Electric, the Special Counsel has determined that [omission]." The Spanish language text of the determination letter reads as follows: "Al concluir la investigacion de su queja de discriminacion contra McCarron Electric, el Consejero Especial ha determinado que."

² Complainant alleged in his Complaint that the date on which he was fired was October 8, 1992. In contrast, he stated on his OSC charge form that the "unjust practice" occurred on February 4, 1993. Respondent's Answer, on the other hand, stated that Garcia was "laid off" from his job on September 24, 1992 (but he had paid vacation until October 8, 1992).

³ The Order reserved decision on scheduling an evidentiary hearing "pending my decision on whether this case can be decided by summary decision."

Order dated November 29, 1994, at 2. Complainant filed no response to this Order.

On February 7, 1995, this case was reassigned to me.

II. *Discussion*

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).⁴ Ordinarily, a motion to dismiss filed by a party 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").⁵ Where no motion is filed by a respondent, the 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). See also *Adame v. Dunkin Donuts*, 5 OCAHO 722, at 6 (1995). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

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." Garcia's Complaint stated that he was fired on October 8, 1992. In his charge with OSC, however, Complainant stated that the unfair practice occurred on February 4, 1993. As his charge was filed on July 9, 1993, the date of termination alleged in the Complaint renders his Complaint untimely filed because more than 180 days elapsed from October 8, 1992 to July 9, 1993. Respondent's Answer alleges that Garcia was laid off on September 24, 1992 effective October 8, 1992 in which case the Complaint would also be untimely. If, however, the date alleged on the charge is correct, his Complaint was timely filed.

⁴ See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

⁵ The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of OCAHO cases. 28 C.F.R. § 68.1.

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In order to clear up this discrepancy, ALJ Schneider issued specific questions to Complainant including:

10. Your complaint alleges that the discrimination in this case occurred on October 10 [sic], 1992. Why did it take you until July 9, 1993 to file a charge with OSC?

Order dated July 11, 1994, at 6.

Although Complainant responded to certain of the ALJ's interrogatories, he failed to respond explicitly to the quoted question. However, his response at another point stated again that "I was fired from my employment on February 4 . . ." but failed to note the year. Complainant's Response at 3. Assuming he meant 1993, Complainant included no support for the statement that he was fired on February 4. Furthermore, he offers no explanation for failing to respond to question 10.

In contrast, Respondent included with its Answer to the Complaint both a "Notice of Change in Employee Status" and a "Vacation Notice" in each of which Complainant's termination date is noted as October 8, 1992. Complainant has made no effort to contradict those documents in his response to the ALJ's interrogatories, or otherwise.

Moreover, on November 29, 1994, Complainant was ordered by ALJ Schneider

to make a good-faith effort to obtain written statements or affidavits from . . . witnesses in support of his contentions and to file such statements with this court on or before January 13, 1995.

If Complainant is unable to get such statements or affidavits from the witnesses, then in the alternative, I hereby ORDER Complainant to file a pleading with this court in which he will proffer (explain what he believes these witnesses will testify to) evidence regarding what these witnesses know and will contribute to my determination of whether this case can be decided by summary decision or requires a full evidentiary hearing. . . .

Order dated November 29, 1994, at 2. To date, two months after the due date, no response has been filed by Complainant to the November 29, 1994 Order of the Judge.

Complainant's responses to requests for information as to when he was terminated have been incomplete and unresponsive. He has not refuted Respondent's assertion and documentary evidence that he was terminated effective October 8, 1992. Complainant alleged in his Complaint that he was fired on October 8, 1992. I do not credit his occasional contentions that he was discharged in February, 1993; he

provides no contextual support for a conclusion that he was laid off other than in October, 1992. Accordingly, I conclude that there is no material issue as to the date of Complainant's termination. Having been terminated on October 8, 1992, he delayed until July 9, 1993 to file his OSC charge with OSC. Because he procrastinated more than 180 days after the alleged unfair immigration-related employment practice, Garcia's Complaint is untimely filed.

This Final Decision and Order dismisses the Complaint by means of summary decision, consistent with the warning to that effect issued by Judge Schneider in his Order of November 29, 1994. See also Order Continuing Hearing and Directing the Complainant to Answer the Administrative Law Judge's Interrogatories (July 11, 1994).

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, responses to orders, 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 § 1324b claims because the charge was not filed with OSC within 180 days of the alleged unfair immigration-related employment practice as required under 8 U.S.C. § 1324b(d)(3);
2. 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 23d day of March, 1995.

MARVIN H. MORSE
Administrative Law Judge