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

March 13, 1997

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| FREDERICK J. HARRIS, | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | 8 U.S.C. §1324b Proceeding |
| | ) | Case No. 96B00028 |
| STATE OF HAWAII, | ) | |
| DEPARTMENT OF EDUCATION, | ) | |
| Respondent. | ) | |
| | ) | |

**ORDER OF DISMISSAL**

I. *Background*

On March 12, 1996, Frederick John Harris, (complainant or Harris), a Canadian national who received United States citizenship on January 10, 1996, filed a Complaint against the State of Hawaii, Department of Education (DOE) (respondent). In his Complaint, Harris alleged that on or about April 17, 1995, in the course of his having applied for a Public Relations Specialist II (PRS II) vacancy at the respondent agency, the latter discriminated against him based on his national origin and his citizenship status, retaliated against him for having asserted rights protected under 8 U.S.C. §1324b and engaged in proscribed document abuse in the course of verifying his employment eligibility.

The Complaint further alleges that in having done so, respondents violated the pertinent provisions of section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §§1324b-(a)(1), (a)(5), and (a)(6). The relief which complainant seeks consists of an order directing the respondent to hire him as a PRS II, an award of money damages in the form of back pay from May, 1995,

and attorneys' fees, despite the fact that he has not retained counsel in this matter.

On May 31, 1996, complainant filed a motion for summary decision, based upon respondent's failure to have filed a timely answer. An order denying that motion was issued on August 1, 1996.[1]

On September 9, 1996, complainant requested that these proceedings be stayed for a period of 90 days, or until December 9, 1996, because of his required absence from the United States. That request was granted.

On December 16, 1996, complainant telefaxed a letter to this Office requesting that the federal government provide him with counsel, at the government's expense, since he could not afford counsel. He also advised that in the event his request for counsel was denied, he would move to dismiss the Complaint without prejudice to refiling.

For the following reasons, those requests are being denied and the Complaint is being dismissed with prejudice to refiling.

II. *Discussion*

On December 16, 1996, as noted earlier, complainant advised this Office that he was financially unable to prosecute his claims further and requested that counsel be appointed for him at the government's expense. He also included allegations against the respondent to the effect that he had been compelled to leave the United States because of respondent's discriminatory practices, and advised that he would seek voluntary dismissal without prejudice to refiling in the event that his request for counsel was denied. Some of the more relevant portions of that letter are:

> . . . the plain fact of the matter is that I am a United States citizen who has been driven from the United States to my country of origin by the discriminatory employment practices of the [respondent] . . .

[1] *See* Order Denying Complainant's Motion for Summary Decision dated July 30, 1996 for a complete discussion of the procedural history prior to complainant's motion for summary decision.

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> . . . no longer have the personal resources either to prosecute further these matters or to obtain legal counsel to assist me so that the matters can be heard . . .
>
> . . . I respectfully request that the honorable court consider [my] complaint on the basis of the information I have provided to date and on that basis decide whether the U.S. Department of Justice will authorize the complainant to engage competent legal counsel whose professional fees are to be paid for by the United States government . . . absent legal counsel I will be compelled to file a Motion to the Court where I will request dismissal without prejudice . . . with the related costs to be borne by the respective parties . . .

In the course of making these requests and allegations, Harris did not provide notice to the respondent, as required under the procedural rules. *See* 28 U.S.C. §68.36. Complainant's *pro se* status would normally allow application of less stringent standards in judging violations of specific procedural rules, and an admonition to avoid future infractions. However, throughout this proceeding complainant has shown that he fully understands the procedural rules and his obligation to comply with them. For that reason, complainant's requests are being regarded as prohibited ex parte communications warranting the imposition of appropriate sanctions.

That because ex parte communications between one of the parties to an adjudication and the decision maker deprives the other side of an opportunity to rebut ex parte arguments and evidence. The United States Court of Appeals for the Ninth Circuit has stated that absent some compelling justification, ex parte communications will not be tolerated and are anathema in our system of justice. *Guenther v. Commissioner of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989).

The applicable procedural rule provides in pertinent part:

> A party or participant who makes a prohibited ex parte communication . . . may be subject to any appropriate sanction or sanctions, *including but not limited to*, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication. (emphasis added)

*See* 28 C.F.R. §68.36(b). Accordingly, the requests made in complain ant's ex parte communication are hereby denied. It should be noted that even in the event that complainant's request for counsel had been properly made, neither OCAHO regulations nor constitutional due process require that counsel be appointed at government expense. *See* 28 C.F.R. §68.33(b); *United States v. Carpio-Lingan*, 6 OCAHO 871, at 3 (1996).

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III. *Complainant's Discrimination Claims*

Consideration of complainant's discrimination claims will be undertaken now in order to determine whether dismissal of this action is appropriate or whether an evidentiary hearing should be scheduled.

For purposes of making these rulings, complainant's claims shall be subject to scrutiny under the standard for summary decision, which is appropriate if the pleadings, affidavits, documentary evidence or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. *See* 28 C.F.R. §68.38(c). In connection with complainant's May 31, 1996 summary decision motion, both parties submitted briefs and affidavits setting forth their respective arguments.

A. *National Origin Discrimination*

OCAHO has jurisdiction over claims of national origin discrimination only where the employer has more than three (3) but less than 15 employees. *See* §1324b(a)(2)(B). In the event the employer has 15 or more employees, a claim of national origin discrimination must be filed with the Equal Employment Opportunity Commission (EEOC). The burden of demonstrating that OCAHO has jurisdiction is placed on the complainant at all times, and cannot be waived by either party. An administrative law judge may, *sua sponte*, raise and decide whether jurisdiction is appropriate.

In his original charge filed with the Office of Special Counsel (OSC), dated August 30, 1995, complainant alleged that he was unable to estimate the number of employees respondent employed at all times relevant. Since that date, Harris has neither alleged nor has he produced evidence demonstrating that OCAHO has jurisdiction. It is quite clear that complainant cannot meet this burden since it is found, as a matter of official notice, that the State of Hawaii, as the real party in interest, employs well over 14 employees. *See* 28 C.F.R. §68.41.

Accordingly, complainant's national origin claim is dismissed with prejudice because OCAHO lacks subject matter jurisdiction over that claim.

B. *Citizenship Status Discrimination*

To establish a *prima facie* case of citizenship status discrimination, complainant must show that: (1) he is a member of a protected class; (2) the employer had an open position for which he applied; (3) he was qualified for the position; and (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship status. *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11 (1996).

At the time complainant applied for the PRS II vacancy, he was a permanent resident of the United States, having obtained that status on December 28, 1989. Complainant applied for naturalization on December 28, 1994. Therefore, complainant has established that he is a protected individual under IRCA, thus satisfying the first element of his *prima facie* case. *See* 8 U.S.C. §1324b(a)(3).

However, further inspection of the record discloses that complainant has quite clearly failed to demonstrate the second and fourth elements of his *prima facie* case of citizenship status discrimination.

Respondent has submitted an affidavit and documentary evidence which discloses that the PRS II vacancy was ultimately not filled due to budget cuts and restructuring which occurred on an undetermined date. *See* affidavit of Dr. Donald R. Nugent, Assistant Superintendent, Office of Personnel Services, sworn to June 10, 1996.

By letter dated May 15, 1995, complainant was informed of these developments and advised that his application would remain open until further notification. Complainant acknowledged receipt of that letter and has admitted that the position neither remained open nor was it filled.

Thus, since there is no dispute that the respondent elected not to fill the PRS II vacancy, complainant cannot meet the second element of his *prima facie* case namely, that there was an open position nor has he shown that his application was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship status.

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Accordingly, complainant's citizenship status claim is also hereby dismissed with prejudice.

C. *Retaliation*

To establish a *prima facie* case of retaliation under section 1324b, complainant must show that: (1) he engaged in a protected activity; (2) respondent was aware of the protected activity; (3) he suffered adverse treatment following the protected activity; and (4) a causal connection exists between the protected activity and the adverse action. *See United States v. Hotel Martha Washington Corp.*, 5 OCAHO 786, at 5 (1995).

Complainant alleges that in 1992, in connection with his having applied for another position at respondent agency, he had also been discriminated against based upon his national origin and therefore he had filed an earlier national origin discrimination charge with OSC. He further alleges that respondent was aware of that charge and, as a result, intentionally refused to consider his application for the PRS II vacancy.

As previously noted, it is undisputed that the PRS II position neither remained open nor was filled owing to the DOE's budget restraints and restructuring. Because of that finding complainant cannot demonstrate that he suffered adverse treatment in connection with his application for the PRS II vacancy or further that a causal connection exists between the protected activity and any alleged adverse action the third and fourth elements of his *prima facie* case of retaliation.

Accordingly, complainant's retaliation claim must also be dismissed with prejudice.

D. *Document Abuse*

The document abuse provisions of IRCA, 8 U.S.C. §1324b(a)(6), provide that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system.

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Compliance with the employment verification system consists of requesting and inspecting documents tendered by the employee to ensure proper completion of an employment eligibility verification form (Form I-9), which the employer must maintain on file and make available for inspection to the INS upon proper notice. At the risk of engaging in an unfair immigration-related employment practice, that of document abuse, the hiring person or entity may not refuse to accept documents which are facially valid nor may the hiring person or entity insist that a job applicant provide a specific document in order to establish employment eligibility.

Complainant's document abuse claim consists of the following allegations:

> I also allege Documentation Abuse by Hawaii DOE in connection specifically with the treatment accorded my particular job application in connection with the [PRS II vacancy], where I was unlawfully compelled to replicate my job application even though the documents tendered by me with my 7 February 1995 job application reasonably appeared to be genuine and clearly showed that I am domiciled in Hawaii and eligible to work in the United States.

*See* complainant's affidavit sworn to May 22, 1996.

According to respondent, complainant's initial application had been rejected due to complainant's failure to provide a properly notarized signature. *See* Dr. Nugent's affidavit at 2. After informing complainant of this oversight and even though the application deadline had passed, complainant was permitted to resubmit a properly notarized application. *Id.* Complainant admits that his application was ultimately accepted.

The dispute regarding these facts is not material since it is well settled that the document abuse provisions of IRCA come into play only where an employer has hired an individual for employment, triggering the duty to comply with the employment verification system. *See, e.g., Huescas v. Rojas Bakery*, 4 OCAHO 654, at 13 (1994).

Since it has already been found that the PRS II vacancy was not filled, respondent was never obligated to comply with the employment verification system, and thus could not have committed document abuse. *Id.*

Accordingly, complainant's document abuse claim is also being dismissed with prejudice.

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*Order*

In view of the foregoing, complainant's March 12, 1996 Complaint alleging national origin and citizenship status discrimination, retaliation, and document abuse in violation of IRCA, 8 U.S.C. §§1324b(a)(1), (a)(5), and (a)(6) is ordered to be and is dismissed with prejudice to refiling.

All motions and requests not previously disposed of are hereby denied.

JOSEPH E. MCGUIRE
Administrative Law Judge

*Appeal Information*

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.