

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

June 24, 1997

FREDERICK J. HARRIS,)
Complainant,)
) 8 U.S.C. 1324b Proceeding
v.)
) OCAHO Case No. 96B00081
ARGYLE TELEVISION)
OPERATIONS, INC.,)
Respondent.)
_____)

ORDER GRANTING RESPONDENT’S MOTION TO DISMISS

By way of background, the disputed facts in this proceeding originated on or about November 15, 1995 in Honolulu, Hawaii.

On that date, Frederick J. Harris (complainant or Harris), who describes himself as a Canadian national whose status was then that of resident legal alien, and to whom United States citizenship was granted on November 1, 1996, filed applications of employment with a Honolulu, Hawaii television station which he incorrectly identified as Argyle Television Operations, Inc. (respondent or Argyle). The positions in which Harris was interested were those of News Line Producer and Associate Producer at Hawaii Argyle Television, Inc. d/b/a KITV 4 Island Television.

According to Harris, Argyle neither acknowledged his job applications nor granted him an interview.

On February 14, 1996, resultingly, Harris filed a charge with the Office of Special Counsel (OSC), U.S. Department of Justice, alleging that on or about December 15, 1995, Argyle had violated the provisions of 8 U.S.C. §1324b by having committed an unfair immigration-related employment practice namely, by having refused to acknowledge his job applications and did so solely on the basis of his

citizenship status. The relief sought by Harris in his OSC charge was that of having Argyle be ordered to hire him for the recruited position of Writer and/or Television Producer, with back pay from “the day I should have been recruited and interviewed, whether or not employer may have hired me.”.

On June 18, 1996, OSC sent a determination letter to Harris in which he was advised that OSC was not filing a complaint on his behalf against Argyle because OSC had determined that there was not reasonable cause to believe the truthfulness of his citizenship status discrimination charge against Argyle. In view of that conclusion, OSC advised Harris of his right to file a private action with this Office if he did so within 90 days of his receipt of that correspondence.

On July 19, 1996, Harris timely filed the Complaint at issue, but in this proceeding he has alleged national origin discrimination against Argyle, as opposed to his allegation of citizenship status discrimination set forth in his February 14, 1996, OSC charge. His OCAHO Complaint provides the explanation that Harris did not reallege that charge because he simply did not know whether he had been subjected to citizenship status discrimination as well as national origin discrimination.

More specifically, his pending Complaint alleges that Argyle knowingly and intentionally failed to hire him, recruit him, consider him for recruitment, or even to acknowledge his job applications and subsequent letter, despite his having sent separate job application packets to two (2) of Argyle’s employees in Honolulu, Hawaii, and that Argyle did so based solely upon his Canadian national origin.

By having failed to reallege this claim of citizenship status discrimination against Argyle in the Complaint at issue, as he had in his charge filed earlier with OSC, Harris has effectively waived that cause of action against Argyle. That because the wording of 28 C.F.R. §68.7(b)(3), the controlling procedural rule, specifically provides that OCAHO complaints shall contain the alleged violations of law, with a clear and concise statement of facts of each violations alleged to have occurred. *George v. Bridgeport Jai-Alai*, 3 OCAHO 537, at 6, 7 (1993).

On September 6, 1996, the respondent filed an answer in which it denied Harris’ substantive allegations of national origin discrimination. On that date, also, Argyle filed a Motion to Dismiss, in which

respondent maintains, and quite correctly, that the single issue Complaint must be dismissed for failure to state a claim upon which relief can be granted because Argyle has employed more than 14 employees at all relevant times to this dispute, thus denying this Office the requisite subject matter jurisdiction to hear Harris' claim of national origin discrimination.

On September 9, 1996, complainant telefaxed a letter to this Office requesting a continuance of this matter for 90 days because of his required absence from the United States. In the order granting that request, complainant was advised that a response to respondent's dispositive motion was to be filed on or prior to December 16, 1996.

On December 16, 1996, complainant telefaxed a letter to this Office to advise of his inability to respond to the pending dispositive motion and Harris also requested that counsel be appointed to represent his interests at the government's expense. He also advised that if his request for an attorney was denied, he would move to voluntarily dismiss the Complaint, without prejudice to refile.

That request by Harris cannot be accommodated since the pertinent OCAHO procedural regulation, as well as constitutional due process, do not contain the required authorization. *See* 28 C.F.R. §68.33(b); *United States v. Carpio-Lingan*, 6 OCAHO 871, at 3 (1996).

As noted earlier, Argyle has properly urged in its pending dispositive motion that, owing to the fact that at all times relevant Argyle employed 15 or more persons, this Office is without subject matter jurisdiction to entertain Harris' claim of immigration-related national origin discrimination. *Fuentes v. Grace Culinary Systems*, 6 OCAHO 873, at 6-7 (1996); *Bent v. Brotman Medical Center*, 5 OCAHO 764, at 3 (1995); *Tal v. M.L. Energia*, 4 OCAHO 705, at 15 (1994).

Argyle has maintained that its work force numbered well in excess of the 14-person jurisdictional threshold at all times relevant, and that indeed Harris has effectively conceded that fact. *See* Complainant's OSC Charge attached to its July 19, 1996 Complaint, at ¶3. In view of the foregoing, it is found that this Office lacks the required subject matter jurisdiction to entertain Harris' claim of immigration-related discrimination based upon his national origin.

Having determined that complainant has waived his claim of immigration-related citizenship status discrimination, and having determined that this Office lacks subject matter jurisdiction over complainant's immigration-related national origin claim because the respondent employed more than 14 individuals at all relevant times to this dispute, respondent's Motion to Dismiss dated September 6, 1996 is hereby granted.

Accordingly, Harris' July 19, 1996 complaint alleging unfair immigration-related employment practices based upon national origin discrimination, in violation of 8 U.S.C. §1324(a)(1), is hereby ordered to be and is dismissed, with prejudice to refiling.

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.