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

June 24, 1998

William Sabaganga Monda, Complainant,	)
v.	) 8 U.S.C. 1324b Proceeding) OCAHO Case No. 97B00102
Staryhab, Inc., Respondent.	)

DECISION

Appearances: William Sabaganga Monda, *pro se*

John R. Cernelich, Esquire and
Scott M. Loomis, Esquire
Cleveland, Ohio for respondent.

Before: Administrative Law Judge Joseph E. McGuire

I. *Background*

On November 18, 1996, William Sabaganga Monda (Monda/complainant), a citizen of Kenya and a nonimmigrant temporary worker who had been issued an H–1B visa, filed a charge with this Department's Office of Special Counsel (OSC) against his former employer, Staryhab, Inc. (Staryhab/respondent).

In that charge, Monda alleged that on or about August 2, 1996, Staryhab, in the course of terminating his employment, had committed unspecified unfair immigration-related employment practices in violation of the provisions of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324b. Paragraph 4 of that OSC charge, which requests the injured party to identify the unfair immigration-related employment practices allegedly suffered, was left blank.

However, in paragraph 9 of his formal charge, Monda described the alleged unfair employment practices as follows:

> (i) that Staryhab Inc. failed to get me work between May 16 to June 30 and July 13–30, 1996, (ii) that Staryhab Inc. denied me full payment for the above mentioned period, (iii) that Staryhab Inc. discriminated against me on payment—instead of paying me $7,260.00; only $1,948 has been paid, (iv) that Staryhab Inc. denied me shelter in Lancaster, California, (v) that Staryhab Inc. abandoned me in a hopeless and helpless situation, and (vi) that Staryhab Inc. refused me a return air ticket back home despite several requests.

On March 26, 1997, OSC informed Monda that it had "investigated the charge you filed against Staryhab, Inc.", and that based upon its investigation of his unspecified charge(s) it had determined that he was not a "protected individual" under 8 U.S.C. § 1324b and therefore OSC had decided not to file a complaint on his behalf before an Administrative Law Judge assigned to the Office of the Chief Administrative Hearing Officer (OCAHO or this Office). That correspondence further informed complainant that he was entitled to file a private action directly with this Office within 90 days of his receipt of that notification.

Accordingly, on May 7, 1997, Monda filed the Complaint at issue, in which he specifically alleged national origin discrimination and retaliation.

In having chosen not to include an allegation of citizenship status discrimination in his OCAHO Complaint, complainant is presumably aware that as a nonimmigrant temporary worker and holder of an H–1B work visa, he is not a member of the class of "protected individuals" listed in section 1324b(a)(3) and therefore lacks the standing necessary to assert a claim of that nature. *Tal v. M.L. Energia*, 3 OCAHO 519, at 1212 (1993)[1] (Order Granting Partial Summary Decision).

In accordance with the general policy of this Office in cases involving *pro se* litigants, the wording of the Complaint will be

[1] Citations to OCAHO precedents reprinted in the bound Volumes 1 to 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, and Volumes 3 to 5, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volume 1 through Volume 5 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to OCAHO cases subsequent to Volume 5, however, are to pages within the original issuances.

interpreted broadly in order to extend to this unrepresented charging party the widest ambit of administrative relief.

In paragraph 13 of the Complaint, and in support of his retaliation claim, Monda advises:

> When I reminded Staryhab Inc. that it was a breach of contract for failing to pay me they retaliated by withdrawing apartment payment and refused to pay for the hotel thus leaving me with no place to stay. Abandoned me and refused me air ticket.

And in paragraph 11 of his Complaint, Monda asserted that on August 2, 1996 he "was qualified for the position but was fired anyway." Attached to the Complaint is a one-page document entitled "Statement of Facts", consisting of 14 typewritten paragraphs, in which complainant has further alleged that respondent had treated him differently than United States nationals because of his Kenyan national origin.

The relief which Monda seeks includes an order requiring Staryhab to (1) hire him for a period of two (2) years, (2) award him pay backpay from August 2, 1996, (3) remove any false information from an unspecified file, and (4) desist from engaging further in unfair employment practices.

On June 26, 1997, a Notice of Hearing on Complaint Regarding Unfair Immigration–Related Employment Practices (NOH), together with a copy of the Complaint and a copy of OCAHO Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Part 68 (1996), were mailed to respondent by certified mail, return receipt requested.

On July 21, 1997, complainant filed a document requesting that the hearing be held in Lancaster, California, citing the following reasons: (1) that is the workplace location to which he had been assigned by Staryhab; (2) that is the situs of the alleged violations; (3) that is where the witnesses reside; and (4) that Lancaster will be more convenient for the witnesses.

On August 8, 1997, complainant filed a handwritten pleading advising this Office of his change of address.

On August 29, 1997, complainant filed a document entitled "RE: MOTION (REQUESTS)" in which he requests the entry of an order of default judgment with back pay from August 2, 1996, and trans-

portation costs to Kenya. In support of that relief, Monda cited respondent's failure to have filed an answer within the 30 day time period prescribed by the pertinent OCAHO rule, 28 C.F.R. § 68.9(a).

On October 14, 1997, complainant filed a pleading renewing his request for a default judgment.

On November 10, 1997, complainant requested a temporary work permit.

On November 24, 1997, respondent filed a pleading captioned Motion for Leave to File Answer Instanter, together with its answer, and a pleading captioned Memorandum in Opposition to Complainant's Motion for Judgment by Default.

On December 12, 1997, complainant filed a pleading opposing respondent's motion for leave to file an answer.

On April 14, 1998, respondent, through counsel, filed a statement advising that on August 31, 1996, respondent's firm then employed 30 persons.

On April 16, 1998, complainant requested a stay of proceedings in order to obtain legal representation.

On April 23, 1998, complainant filed a Motion to Recuse, in which he alleged that the undersigned "has already formed a negative opinion against me without looking at the evidence presented (sic) I feel he should not preside over my case (sic)".

On May 27, 1998, respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, together with an affidavit from Staryhab's president, Karen Stary, in which she stated that respondent had 22 employees at the time of the alleged discriminatory act(s). Monda has not responded to that Motion to Dismiss.

The Complaint and a Notice of Hearing were served upon the respondent on June 30, 1997, by certified mail, return receipt requested. Staryhab has not challenged the effectiveness of service of the Complaint and there is nothing in the record which discloses that service had not been properly obtained on June 30, 1997.

Therefore, under the applicable rule, and absent express authority from this Office enlarging the time to file its answer, Staryhab was to have filed an answer no later than July 30, 1997. 28 C.F.R. § 68.9(a). Staryhab filed its answer on November 24, 1997, or some 117 days late, and is therefore found to be technically in default. "[A] defendant who fails to answer within the time specified by the rules is in default even if that fact is not officially noted. Therefore, that defendant must request that the default be 'excused' and secure leave to answer before his responsive pleading will be recognized." 10A Charles Alan Wright et al., *Federal Practice and Procedure*, § 2692, p. 85 (3d ed. 1998).

Before ruling on the pending motions, a brief review of the pertinent facts contained in Monda's OSC charge, as well as those asserted in his OCAHO Complaint, is in order.

Monda, a citizen of Kenya, is an occupational therapist who presumably received his training in that field from an educational institution in Kenya. He was recruited and hired by Staryhab in March, 1996, while working at Kenyatta National Hospital in Kenya. Staryhab is a rehabilitation contract agency that specializes in the recruitment and placement of occupational and physical therapists with its clients in the United States.

Complainant and respondent executed a written employment contract in March, 1996, providing for a period of employment of 27 months commencing on April 1, 1996, for an annual salary of $38,480 (or $18.50/hour). Monda has submitted a copy of that contract. Staryhab also allegedly agreed to file the necessary INS paperwork in connection with Monda's obtaining an H–1B visa, allowing him to lawfully enter and work in the United States.

Accordingly, on May 15, 1996, Monda was admitted to the United States as a nonimmigrant temporary worker, whose status was that of an H–1B visa holder. Monda alleges that during the 76-day period beginning on May 16, 1996 through July 30, 1996, he received work assignments for only 10 days for which he was paid $1,948. Monda contends that the employment contract required Staryhab to provide full-time employment during that 76-day period.

Monda further alleges that on or about August 1, 1996, he was to commence an assignment at Lancaster Health Care Center in Lancaster, California. Staryhab had made arrangements for and

had agreed to pay Monda's travel and accommodation expenses, which consisted of the first month's rent and deposit for an apartment in Modesta, California, which he was to occupy beginning on August 2, 1996.

On August 2, 1996, after arriving in Modesta, California, Monda alleges that he was denied access to the agreed upon apartment. He then telephoned Staryhab and spoke with a representative of that firm, Leanne McSweeney, who advised him that "Staryhab was no longer responsible for his accommodation." (sic). Monda has repeatedly asserted that Staryhab's actions breached the terms of the employment contract.

II. *Complainant's Request For Work Permit, Request To Stay Proceedings, And Motion To Recuse*

Complainant has requested that he be issued a temporary work permit which would allow him to work legally in the United States. Both the jurisdiction and authority of this office are limited. It is beyond the authority of the undersigned to grant the relief complainant seeks. The procedure for obtaining employment authorization for eligible aliens is set out in 8 C.F.R. § 274a.13, and provides that such requests must be submitted to the Immigration and Naturalization Service, rather than OCAHO. The Request for Temporary Work Permit is therefore denied.

Complainant has also filed a statement in requesting a stay of proceedings while he attempts to obtain legal counsel. A stay of proceedings should not be granted absent a clear bar to moving ahead. *United States v. Tinoco-Medina*, 6 OCAHO 890, at 6 (1996); *United States v. Thoronka*, 5 OCAHO 725, at 36 (1995). Here, no bar to proceeding exists since, as explained shortly, the national origin claim is not properly under the jurisdiction of this Office and the retaliation claim has failed to state a claim upon which relief may be granted. Obtaining counsel will have no impact on the resolution of this case. Additionally, Monda has not obtained counsel during the two (2) month period since filing that request on April 16, 1998. The Request to Stay Proceedings is also being denied.

Complainant has also filed a motion requesting that the undersigned recuse himself from adjudicating this case. The applicable regulatory section provides:

> Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Administrative Law Judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The Administrative Law Judge shall rule upon the motion.

28 C.F.R. § 68.30(b).

In compliance with the above regulation, complainant has provided an affidavit stating the reasons for the requested disqualification. Specifically, he claims that "on April 2, 1998 [Judge] McGuire made a statement that *I had no case* and that when I tried to explain the circumstances which led to the [C]omplaint he dismissed it that they were *mere promises*." (emphasis in original) Therefore, Monda concludes, "since Honorable McGuire has already formed a negative opinion against me without looking at the evidence presented I feel he should not preside over my case."

While section 68.30(b) does not contain a standard for determining recusal, an analogous statute applicable to judges appointed pursuant to Article III of the Federal Constitution provides for disqualification when the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). Section 455 has been applied by analogy to administrative law judges. *E.g., Gibson v. FTC*, 682 F.2d 554, 565 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983). I will, therefore, refer to section 455 case law in ruling on Monda's motion for recusal.

It is clear that a judge forming an opinion during the course of litigation is an insufficient basis for recusal. The United States Supreme Court has stated, "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). As the First Circuit recently emphasized, "Judges constantly form personal opinions during proceedings.... Inaccurate findings based on those opinions may lead to reversal on appeal but not to recusal." *In re Martinez-Catala*, 129 F.3d 213, 219 (1st Cir. 1997). I have not, as Monda alleges, refused to listen to his evidence; rather, as discussed below, the evidence has been viewed in a light most favorable to him *when* this Office has jurisdiction over the claim. When the Office, as here, clearly lacks jurisdiction no ruling can

be made on the claim nor upon any facts offered in support thereof. For these reasons, the motion for recusal is also being denied.

III. *Staryhab's Motion To Dismiss For Lack of Jurisdiction*

Respondent's Motion to Dismiss is premised on the claim that it employed 22 employees on the date of the alleged discrimination, which would remove this Office's jurisdiction over Monda's national origin claim. "It is a fundamental fact that the administrative law judges in this Office may not act outside of their jurisdiction under IRCA, 8 U.S.C. § 1324b." *Yohan v. Central State Hosp.*, 4 OCAHO 593, at 16 (1994). OCAHO judges have jurisdiction over national origin claims only when the employer employs between four (4) and 14 employees. *See* 8 U.S.C. § 1324b(a)(2); *Lee v. AirTouch Communications*, 6 OCAHO 901, at 10 (1996); *Bent v. Brotman Med. Ctr.*, 5 OCAHO 764, at 364 (1995). Claims of national origin discrimination against employers having 15 or more employees are covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* and fall within the exclusive jurisdiction of the Equal Employment Opportunity Commission (EEOC), rather than this Office.

The importance of a court not acting beyond its jurisdiction was recently emphasized by the United States Supreme Court in *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003 (1998). The Court said that deciding cases before determining jurisdiction "carries the courts beyond the bounds of authorized judicial action, and thus offends fundamental principles of separation of powers." *Id.* at 1012. "For a court to pronounce on the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Id.* at 1016 (citations omitted). The Supreme Court also said that it was improper to assume jurisdiction and dismiss when jurisdiction is challenged *Id.* at 1012.

Respondent's motion challenges OCAHO's jurisdiction. It is therefore necessary to determine jurisdiction before deciding the merits of the national origin claim. The national origin violation alleged by complainant consists of his having been terminated on August 2, 1996, as well as various alleged violations of his agreements with Staryhab that the latter provide him with work, housing, and transportation.

Unlike Title VII of the Civil Rights Act, IRCA does not cover the terms and conditions of employment, but only protects against discriminatory hiring, firing, and referral or recruitment for a fee. *Fayyaz v. Sheraton Corp.*, 1 OCAHO 152, at 1083 (1990). Complainant has repeatedly alleged that Staryhab did not treat him fairly with respect to their employment relationship. A colleague in an earlier OCAHO opinion has instructed that "[t]he reality is that there is an infinite variety of workplace unfairness.... To prevail, a complainant must show particularized discrimination; a showing of generic unfairness is insufficient." *Monjaras v. Blue Ribbon Cleaners*, 3 OCAHO 526, at 1292 (1993).

This Office lacks jurisdiction to determine if the parties had an enforceable employment contract and whether it was breached. *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 811 (1992). If complainant desires to bring a breach of contract action for damages or specific performance, he will have to file a private civil action in the appropriate state court. It might be well to advise this unrepresented complainant that his claims may also be addressed by the United States Department of Labor, which has an administrative adjudication system in place to ensure employer compliance with the terms of the H–1B nonimmigrant visa program. Foreign workers who enter the United States in H–1B status have routinely been granted back pay awards for proven violations. *See generally*, Shusterman and Neal, "Survey and Analysis of H–1B Labor Condition Application Decisions", 72 Interpreter Releases 49 (Jan. 9, 1995). The regulations implementing the H–1B nonimmigrant visa program provide that where an H-1B nonimmigrant is dismissed from employment before the end of the period of authorized stay, the employer is liable for the reasonable costs of return transportation to the alien's last place of foreign residence. 8 C.F.R. § 214.2(h)(4)(iii)(E) (1997).

The alleged firing due to national origin discrimination is, by contrast, an action covered by § 1324b, but only if IRCA's provisions apply to the employer involved. Staryhab's Motion to Dismiss states that respondent employed 22 employees on August 1, 1996. This statement is supported by the attached affidavit from Karen Stary, who claims that Staryhab employed some 15 therapists and seven (7) administrative employees as of that date. Monda has not responded to respondent's motion and he stated in his OSC charge that he could not estimate the number of employees at Staryhab during the period at issue.

The filings clearly demonstrate that Staryhab had more than 14 employees at all times relevant. Therefore, this Office lacks subject matter jurisdiction to adjudicate Monda's national origin discrimination claim, as well as his claim that Staryhab breached his employment contract, since claims of that nature are not covered by the provisions of IRCA. Accordingly, the national origin claim is also being dismissed.

The Complaint alleges both national origin discrimination and retaliation. It is well settled that retaliation and national origin claims are independent violations of the statute and the dismissal of the latter, as here, does not preclude a party from pursuing a claim of retaliations. *Cruz v. Able Services Contractors, Inc.*, 6 OCAHO 837, at 5–6 (1996); *Zarazinski v. Anglo Fashions Co., Inc.*, 4 OCAHO 638, at 449 (1994).

Respondent's motion to dismiss does not limit itself to the national origin claim and is intended, presumably, to address both claims. However, unlike claims of national origin discrimination, this Office's jurisdiction for claims of retaliation are not limited to employers who employ, between four (4) and 14 employees. Thus the numerical limitation which served as the basis for dismissing the national origin claim has no impact on the retaliation claim alleged by respondent. Accordingly, the Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted as to the national origin discrimination claim, but denied as to the retaliation claim.

Since this Office has jurisdiction over Monda's claim of retaliation, I will now consider the complainant's request for default judgment as it relates to that claim, as well as the merits of the retaliation claim.

IV. *Complainant's Request For Default Judgment*

On August 29, 1997, Monda filed a motion for default judgment. Respondent has filed a memorandum opposing the entry of a default judgment, as well as a request to file an answer.

Although respondent was in default by failing to file its answer by July 30, 1997, the Administrative Law Judge has discretion in granting the motion for default. The OCAHO procedural rule pertaining to default judgments employs precatory language by providing that the "Administrative Law Judge *may* enter a judg-

ment by default" if an answer has not been timely filed. 28 C.F.R. § 68.9(b) (emphasis added). In addition, granting such requests is disfavored since it is the policy of this Office to dispose of claims on their merits whenever possible. *United States v. Alvarez-Suarez*, 4 OCAHO 655, at 569 (1994); *United States v. Continental Sports Corp.*, 4 OCAHO 640, at 457 (1994); *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986); *Janoske v. Porter*, 64 F.2d 958, 961 (7th Cir. 1933) (no party should be defaulted unless grounds authorizing it are authoritatively established and are so clear that litigants may know, without question, that they are subject to default if they do not act in a certain manner.).

The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of issues which are not addressed by the OCAHO rules. 28 C.F.R. § 68.1. Prior OCAHO case law has applied the 'good cause' standard of Federal Rule of Civil Procedure 55(c) to determine whether to permit the filing of an untimely answer. *Alvarez-Suarez*, 4 OCAHO 655, at 569; *United States v. Zoeb Enters., Inc.*, 2 OCAHO 356, at 421 (1991); *United States v. Shine Auto Serv.*, 1 OCAHO 70, at 446 (1989) (Vacation by Chief Administrative Hearing Officer of Administrative Law Judge's Order). Rule 55(c) provides that "for good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 60(b) is applicable once default judgment has been entered and is generally considered more stringent than Rule 55(c). *See* Wright et al., *supra*, § 2692 and § 2694, for a discussion of the relationship between Rules 55(c) and 60(b).

While courts have used numerous factors in analyzing the good cause standard, *id.* § 2694–2700, the factors being relied upon in this ruling are those enunciated in *United States v. Medina*, 3 OCAHO 485, at 890 (1993): "(1) whether [c]omplainant would be prejudiced; (2) whether respondent has a meritorious defense; and (3) whether culpable conduct on the part of the [r]espondent led to the default."

As to the first factor, there is no indication in the record that Monda is prejudiced in securing witnesses, or in the recollection of facts, or that his case would be otherwise more difficult to present due to the delay. The first factor supports granting leave to file an answer.

Concerning the second factor, respondent does have a meritorious defense. As noted earlier, the national origin discrimination claim is not within the jurisdiction of this Office and, as discussed momentarily, the retaliation claim fails to state a claim upon which relief can be granted. Therefore, the second factor strongly supports denying complainant's Request for Entry of Default Judgment.

As to the third consideration, Staryhab argues that the failure to timely file its answer was due to excusable neglect. In particular, Staryhab states:

> As concerns the instant matter (or any other sort of legal proceeding) only one (1) individual, the company President, Karen Stary, has any authority whatsoever to respond. In recent months (i.e., since July, 1997), Ms. Stary has been frequently away from the Cleveland office on business—Ms. Stary's travels during that time period have included multiple trips to Pennsylvania and southern Ohio, as well as trips to Kentucky, Zimbabwe, South Africa and Greece. Unfortunately, to date, Respondent has not had any effective way of ensuring that urgent matters such as the Complaint in this instance, are brought to the attention of Ms. Stary when she is traveling. Consequently, Respondent's timely response to the Complainant's Complaint has been handicapped by Ms. Stary's frequent absence coupled with poor corporate safeguards to ensure that critical issues are brought to Ms. Stary's attention or are otherwise appropriately addressed.

The justification of the default under these facts is solely attributable to the conduct of respondent's president, Karen Stary. Ordinarily, relief under the Rule 60(b) standard will be accorded if the party is blameless for the default, for example, where its attorneys have been negligent or dilatory. Where the party is at fault, however, the interests of the judicial system and its need for finality and efficiency in litigation predominate and courts are less solicitous in granting relief. *Continental Sports Corp.*, 4 OCAHO 640, at 458; *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988). However, courts have vacated entries of default judgement under Rule 60(b) due to the defaulting parties' out-of-state travels. Wright et al., § 2695, at 126. Under the lower standard of good cause of Rule 55(c), Stary's absences, while not completely mitigating the culpability of respondent's conduct, does lessen its impact; the respondent's conduct is culpable, but with some basis for mitigation.

In sum, complainant has not been prejudiced by the delay, the respondent has meritorious defenses and, while respondent's conduct has been culpable, the extensive travels of Stary lessen the

impact of respondent's culpability. Considering all relevant factors, respondent is entitled to relief based upon the good cause shown.

Accordingly, and mindful that cases should be decided on their merits whenever possible, Monda's motion for a default judgment is denied and further, for good cause shown, Staryhab's motion to file a late answer is granted. Accordingly, its answer is accepted as filed.

V. *Monda's Retaliation Claim Is Not Actionable Under IRCA*

Consideration must now be given to the substantive merits of Monda's retaliation claim to determine whether an evidentiary hearing will be necessary. Although respondent has not filed a motion to dismiss applicable to the retaliation claim, its answer asserts for its first affirmative defense the failure of the Complaint to state a claim upon which relief can be granted.

A *sua sponte* dismissal is appropriate when a complaint fails to state a claim upon which relief can be granted. *Winkler v. Timlin Corp.*, 6 OCAHO 912, at 7 (1997); *Mendez v. Daniels*, 2 OCAHO 392, at 745 (1991); 28 C.F.R. § 68.10.

The pertinent IRCA provision, 8 U.S.C. § 1324b(a)(5), provides: "It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section."

Accordingly, Monda must state facts indicating, at a minimum, that: (1) he engaged in section 1324b 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. *United States v. Hotel Martha Washington Corp.*, 5 OCAHO 786, at 537 (1995).

Monda provided the following statement of facts supporting his retaliation claim:

> When I reminded Staryhab Inc. that it was a breach of contract for failing to pay me they retaliated by withdrawing apartment payment and refused to

> pay for the hotel thus leaving me with no place to stay. Abandoned me and refused me air ticket.

Complaint at ¶13(a).

Monda has not alleged in his Complaint that respondent intimidated, threatened, coerced, or retaliated against him for the purpose of interfering with any right or privilege secured under section 1324b, nor has he alleged that he was intimidated, threatened, coerced, or retaliated against for intending to file or for having filed a charge with OSC initially and eventually with this Office, or for having participated in an investigation, proceeding, or hearing under that section.

Giving due regard to Monda's voluminous subsequent filings, which also contain repeated allegations that Staryhab had (i) fired him, (ii) breached the employment contract, and (iii) refused to pay the amounts owed under that contract and other expenses, it is also found that those filings have been insufficient to demonstrate the requisite causal connection that those adverse actions were the result of Monda having engaged in protected section 1324b activity.

Accordingly, complainant has failed to state a claim upon which relief can be granted, even considering the evidence in the light most favorable to him. The retaliation claim must therefore be dismissed.

VI. *Respondent's Request For Attorney's Fees*

In its answer, respondent requested that it be awarded an unspecified sum as and for reasonable attorneys' fees and costs incurred in defending this action. Under 8 U.S.C. § 1324b(h), discretionary fee shifting by the Administrative Law Judge is authorized. That section states, "In any complaint respecting an unfair immigration-related employment practice, an [A]dministrative [L]aw [J]udge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact."

As applied in this case, a grant of attorney's fees would require a finding (1) that the respondent was the prevailing party in this litigation, and (2) that complainant's argument was without rea-

sonable foundation in law and fact. A finding in favor of respondent on both factors would then necessitate an inquiry into attorney's time and related fee and expense data to determine reasonableness. 28 C.F.R. § 68.52(c)(2)(v).

Respondent, as the prevailing party in this litigation, has satisfied the first factor. To determine whether complainant's argument is without reasonable foundation in law and fact, OCAHO cases have utilized Title VII jurisprudence. The Supreme Court has held that a District Court may, in its discretion, award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Accordingly, in considering whether respondent is entitled to its attorney's fees and costs, we are mindful of IRCA's remedial purpose, as well as complainant's *pro se* status and apparent unsophistication in legal matters, and public policy which specifically encourages efforts by covered individuals to redress unlawful employment practices. In view of these considerations, I do not find that Monda acted unreasonably in having filed this action, albeit in an inappropriate forum. Accordingly, Respondent's request for reasonable attorney's fees and costs is hereby denied.

ORDER

Complainant's retaliation claim is *sua sponte* dismissed for failure to state a claim upon which relief can be granted.

Respondent's Request for Reasonable Attorney's Fees is denied.

Complainant's May 7, 1997 Complaint alleging immigration-related unfair employment practices based upon national origin and retaliation, in violation of the provisions of 8 U.S.C. § 1324b(a)(1)(A) and (5), 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 decision 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, Decision seeks a timely review of this, Decision 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 Decision.