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

ABDUL HAMID KADIR, Complainant,	)	
v.	)	8 U.S.C. § 1324b
	)	Proceeding CASE NO. 93B00173
REGAL DENTAL CERAMICS Respondent.	)	

FINAL DECISION AND ORDER DENYING COMPLAINANT'S MOTION FOR CONTINUANCE AND DISMISSING COMPLAINT

(January 18, 1994)

Appearances:

For the Complainant
Abdul Hamid Kadir, Pro Se

For the Respondent
James D. Rohde, Esq.

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

There is currently pending before me, Complainant's motion to continue this case for at least six months because of a temporary total disability. For reasons stated herein, Complainant's motion is Denied.

On October 4, 1993 Abdul Hamid Kadir, ("Complainant" or "Kadir"), acting pro se, filed a complaint against Regal Dental Ceramics, Inc., ("Respondent" or "Regal Dental"), a California corporation, with the Chief Administrative Hearing Officer ("CAHO") alleging that he was knowingly and intentionally fired because of his national origin and citizenship status in violation of § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324b, as amended.

More specially, the complaint alleges that Kadir was born in Guyana, South America, and became a United States naturalized citizen on March 15, 1988. Compl. at ¶¶ 3, 4 and 6. The complaint further alleges that he was employed by Respondent from October 21, 1991 to May 15, 1992 in the job of "fabrication of understructure of dental crowns/bridges." Compl. at ¶¶ 11 and 12. The complaint further alleges that he was fired on May 15, 1992 because he "complained of Mr. Bjursten's discriminating attitude and actions towards me."[1] Also, "differential treatment in terms and conditions of employment to that of my non-east Indian co-workers, such as being held to differential performance standards and expectations. Also, although I was fired, other workers in my situation of different nationalities or citizenship were not fired." Compl. at ¶ 14 (b) and (c).

Respondent filed an answer to the complaint on November 1, 1993 denying that it fired Kadir because of his national origin, but rather because of "his lack of skill and/or failure to do the assigned work." Answer at ¶ 3. In support of its answer to the complaint, Respondent has attached a number of documents, including a letter dated October 26, 1992 from Respondent's counsel to Medardo Claveria, who is a consultant with the State of California's Department of Fair Employment and Housing, and a letter dated April 2, 1992 from Respondent's counsel to Linda R. White, an attorney with the U.S. Department of Justice, Special Counsel for Immigration Related Unfair Employment Practices.

These letters from Respondent's counsel provide additional factual information, including statistics on the employment of foreign workers

[1] Bo Bjursten is the owner and operator of Respondent. Compl. at ¶¶ 7 and 9.

by Respondent, to refute the allegations of the complaint.[2] According to these two letters, Mario Pacheo, who worked for Respondent as a dental technician injured his hand and was unable to perform his work. Pacheo recommended to Respondent that Kadir replace him. Based upon Pacheo's recommendation and allegedly false and misleading statements made by Kadir during the interview process to Respondent about his job skills and ability to perform Pacheo's technical work, Respondent hired him.[3] After Pacheo's injuries improved, Respondent asked him if he would like to return to his job, but he declined. Respondent then placed an ad in the newspaper to obtain a replacement for Kadir.

The Respondent's statistical evidence shows that eleven of its fourteen employees are foreigners; 80 percent of its employees over the last 25 years have been foreigners, and most have been employed by Respondent for ten years or more; and at the present time, six of fourteen dental technicians who work for Respondent are of Oriental descent. At least one of Respondent's current employees is a naturalized U.S. citizen. Answer, Ex. #3 at ¶ 8. Respondent states that it fired Kadir because his workmanship and skill was very poor; it had received numerous complaints from dentists about the poor quality of his work; and, because he refused work that was assigned to him by Respondent.

On November 3, 1993 I issued an order setting this case for an evidentiary hearing on February 28, 1994, and ordered the parties to commence discovery.

On December 16, 1993, Respondent filed a motion requesting that I continue this case because he has a temporary, but total disability which is expected to continue for at least six months. In support of his motion, Complainant attached a medical report dated October 13, 1993 from Dr. Barbara A. McQuinn, a neurologist, sent to Ms. Lila Rahim,

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[2] Respondent's pleadings also show that Kadir has filed other claims relating to his discharge by Respondent, including a claim for unemployment compensation that was denied, and a worker's compensation claim for an alleged injury that occurred on January 1, 1992 that was not reported until more than a year after it allegedly occurred. Ans. Ex. 3 at ¶ 14.

[3] Since 1975, Respondent has terminated only three or four employees, two of which were rehired. Kadir was one of those employees who was discharged by the previous owner of Respondent, Gene Squires. After Bjursten acquired the business, he rehired Kadir.

an attorney, who apparently is representing Complainant on another matter. She does not, however, represent Complainant in this case.

The medical report states that Kadir provided Dr. McQuinn with an MRI scan of his cervical spine taken at San Francisco General Hospital. Dr. McQuinn states that the MRI scan indicates that Kadir has degenerative disk disease at C4-5, C5-6 and C6-7. The MRI scan had been ordered by Kadir's treating neurosurgeon, Dr. Gauger, who is in the process of determining whether Kadir needs surgery. Dr. McQuinn indicates that a CT myelogram and an EMG and nerve conduction study of Kadir's right arm to check for denervation, will need to be taken to determine if he needs surgery. Dr. McQuinn also states that she last saw Kadir four months ago and, if he does not need surgery, he may have reached a "Permanent and Stationary status." She further states that if Kadir has surgery it will take at least six months from the date of surgery for him to reach a Permanent and Stationary status. Dr. McQuinn's diagnosis was that Kadir is "temporarily totally disabled."

On January 5, 1994 Respondent filed an objection to Complainant's motion for a continuance arguing that:

> "The temporary total disability referred to for a workman's compensation claim that Mr. Kadir has also filed against Regal Dental after working for them only a short time and which was made nearly a year after he left the employment of Regal Dental is hardly the type of disability that would prevent him from participating in the scheduled hearing."

The regulations that govern this proceeding require that "such proceedings shall be conducted expeditiously and the parties shall make every effort at each stage of the proceeding to avoid delay." 28 C.F.R. § 68.1. The regulations also provide for continuances in cases of "undue hardship or a showing of other good cause." The regulations further provide for dismissal of a complaint or a request for a hearing "upon its abandonment by the party or parties who filed it." 28 C.F.R. § 68.37(b). The regulations further state that the Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act or any other applicable statute, executive order or regulation." 28 C.F.R. § 68.1.

In my opinion a continuance of this case for six months to allow Complainant to recover from possible surgery, or to hope that his current medical condition improves sufficiently for him to participate in the completion of discovery and an evidentiary hearing, is not fair or

reasonable because of the uncertainty of his improvement, the apparent weakness of his case and the prejudice to Respondent. I have previously referred to the problems of long delay in prosecuting a discrimination case by the failure to locate and serve a Respondent with the complaint after ten months. Enrique Morales Zamora v. Custom castings, OCAHO Case No. 92B00237 (9/16/93) (dismissing complaint for abandonment pursuant to 28 C.F.R. § 68.37(b)(1).

Rule 41(b) of the Federal Rules of Civil Procedure allows a federal district court to dismiss an action involuntarily. The rule permits a court to do this on defendant's motion, though it has been held that if the ground for dismissal is want of prosecution, the court has inherent power to act on its own motion. Jones v. Caddo Parish School Board, 704 F.2d 206, 215 (5th Cir. 1983); Tyler v. City of Omaha, 780 F. Supp, 1266, 1274 (D. Neb.), remanded, 953 F.2d 648 (8th Cir. 1991). Once a case is commenced it remains pending until it is either dismissed or adjudicated. Hackner v. Guaranty Trust Co. of New York, 117 F.2d (2nd Cir. 1941), cert. denied, 313 U.S. 559 (U.S.N.Y. 1941). Rule 41(b) allowing dismissal for failure to prosecute, is intended as a safeguard against delay in litigation and harassment of a defendant. Colokathis v. Wentworth-Douglass Hosp., 693 F.2d 7, 9 (lst Cir. 1982), cert. denied 461 U.S. 915 (U.S.N.H. 1983); McDermott v. Lehman, 594 F. Supp, 1315, 1319 (D.C. ME. 1984). In my view 28 C.F.R. 68.37 (b)(1) serves the same purpose.

Federal decisions have held that illness of the plaintiff, his attorney, or a key witness may excuse their failure to appear at the appointed time, but if the delay is due to an incurable disability of the plaintiff, the court may require the action to be tried on depositions, or in the alternative, be dismissed for want of prosecution. Ten v. Svenska Orient Linen, 573 F.2d 772 (2nd Cir. 1978), cert. denied, 439 U.S. 834 (U.S.N.Y. 1978) (Longshoreman's complaint against shipowner and employer, dismissed for failure to prosecute when longshoreman's counsel refused to proceed to trial due to absence of longshoreman, should be reinstated where absence of longshoreman was not anticipated, but was due to his unexpected hospitalization in Puerto Rico for unexpected medical complications and where longshoreman's counsel offered to take longshoreman's deposition after he could leave hospital and offered to pay expenses defendants incurred in bringing witnesses from another country); McCombs v. Pittsburg-Des Moines Steel Co., 426 F.2d 264 (10th Cir. 1970) (error to dismiss tort case where witness was a patrolman who became ill prior to trial and was hospitalized); Davis v. Operation Amigo, Inc., 378 F.2d 101 (10th Cir. 1967) (court held it was error to dismiss, when the case was only four

months old and counsel asked, on the basis of a letter from a doctor saying that plaintiff was suffering from virus pneumonitis and could not come to court); Field v. American-West African Line, Inc., 154 F.2d 652 (2nd Cir. 1946) (Where more than five years had expired since issue was joined, and plaintiff was insane and probably would never recover his reason, but depositions of plaintiff and a supporting witness had been taken, a dismissal for lack of prosecution would be conditioned on granting plaintiff's counsel an alternative of trial upon the deposition taken).

In the case at bar Complainant is not represented by counsel and has a debilitating medical condition that may or may not respond to surgery. If I were to grant Complainant's motion to continue this case until six months from this date, there is no guarantee that he will be in a position to conduct discovery and present his case at an evidentiary hearing. The original complaint filed with OSC was filed almost one year ago. The complaint filed with the CAHO was filed three months ago and involves events that occurred in May of 1992.

The pleadings filed in this case also show that Respondent employed in excess of four dental technicians in Oct. of 1992. Answer, Ex. 1, p.2. I do not have jurisdiction over Complainant's allegation of National Origin discrimination if Respondent employed in excess of four employees on the date of the alleged discriminatory discharge. See Cromwelll's Tavern Restaurant, 3 OCAHO 524 (6/10/93)

In my view it would be unfair to Respondent to continue this case for six months with the uncertainty that the case may not proceed thereafter. Complainant's medical condition suggests that he is unable to conduct extensive discovery, including the taking of depositions and participation in a lengthy evidentiary hearing. Although I find that there is sufficient reason to deny Complainant's request to continue the hearing in this case, I do want to provide the Complainant with an opportunity to pursue his claim, but only when he is physically and mentally able to handle discovery and an evidentiary hearing. At the same time, I do not want to burden Respondent with the time and costs of conducting extensive discovery when Complainant, because of a physical disability may not be able to pursue his claim. Moreover, it would not be fair to Respondent to have this case pending for six months or longer because witnesses' memories of the events may fade, documents may be misplaced, and the reputation of the company may be harmed because of the pending lawsuit, especially where there has been no evidence submitted in this case to support a finding that Respondent unlawfully discharged Complainant. I find, therefore, that

Complainant has abandoned his request for a hearing because he has stated that he is physically unable to attend the evidentiary hearing scheduled for February 28, 1994, and has requested a six month continuance. Pursuant to 28 C.F.R. § 68.37(b) the complaint in this case is dismissed without prejudice.

Accordingly:

1. Complainant's motion for a six month continuance is DENIED.

2. Complainant's complaint is hereby DISMISSED, but WITHOUT PREJUDICE, to enable him at some future date to refile the same complaint with the CAHO when he is physically able to conduct discovery and participate in an evidentiary hearing.

3. It is further suggested that prior to filing a new complaint, Complainant consult first with Paul Montanes, District Director (415-744-6505) or Alex Durbin, State and Local Coordinator (415-744-7403), of the San Francisco EEOC Office, located at 901 Market Street, Suite 500, San Francisco , CA 94103 or William Tamayo, Asian Law Caucus, 476 Bush Street, 3rd Floor, San Francisco, California 94198 (415-391-0366) or contact the Regional Hotline Number 1-800-446-5998 for free legal service on the merits of his case.

4. This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. § 1324b(i) and 28 C.F.R. § 68.53(b), any person aggrieved by this Final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

SO ORDERED.
Dated: January 18, 1994

ROBERT B. SCHNEIDER
Administrative Law Judge