

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

April 21, 1997

LYDIA ANNELLA ANDERSON,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
vs.)	
)	OCAHO Case No. 97B00009
NEWARK PUBLIC SCHOOLS,)	
Respondent.)	

ORDER OF PARTIAL DISMISSAL

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA) wherein Lydia Annella Anderson is the complainant and Newark Public Schools is the respondent. A complaint was filed with the Office of the Chief Administrative Hearing Officer on October 9, 1996 wherein it is alleged that respondent discriminated against complainant on the basis of her national origin and citizenship status. A Notice of Hearing, along with a copy of the complaint was mailed to respondent on October 18, 1996. An answer was timely filed on November 14, 1996.

Presently pending is respondent's Motion for Partial Dismissal of Complaint filed on December 10, 1996. Complainant has filed no response to this motion. As grounds for dismissal of the national origin portion of the complaint, respondent offers only the conclusory statement that this allegation is "clearly" covered by 42 U.S.C. 2000e-2. Respondent states no factual basis for its conclusion that OCAHO jurisdiction is lacking.

In ruling on a motion to dismiss ordinarily a complaint will not be dismissed unless, construing the factual allegations most favorably to the complainant, there is no set of facts which could be proved consistent with the allegations upon which relief could be granted. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

Among the attachments to the complaint is a copy of the charge complainant filed with Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on February 10, 1996 which asserts that respondent has 7000 employees. Jurisdiction of OCAHO administrative law judges over claims of national origin discrimination is ordinarily limited to employers of 4 to 14 employees. 8 U.S.C. § 1324b(a)(2)(B). That there appears to be no issue of fact as to the number of respondent's employees was confirmed in the telephonic prehearing conference held in this matter on December 16, 1996. Accordingly, there is no set of facts which could be proved which could entitle the complainant to relief as to her claim of national origin

discrimination.

Ordinarily where matters outside the complaint are considered, a motion to dismiss may be converted to one for summary decision upon proper notice to the opposing party. Where, as here, the matters are attached to the complaint, they may be considered as part of the complaint without converting the motion to dismiss. D.P. Technology Corp. V. Sherwood Tool, Inc., 751 F. Supp. 1038, 1039 (D. Conn. 1990). (“In determining whether to grant a [motion to dismiss], the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account.” citing 5A C. Wright and A. Miller, Federal Practice and Procedure, Civil § 1364. 475-80 (1990)).

The allegation claiming national origin discrimination is accordingly dismissed.

SO ORDERED.

Dated and entered this 21st day of April, 1997.

Ellen K. Thomas
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 1997, I have served copies of the foregoing Order of Partial Dismissal on the following persons at the addresses indicated:

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