

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

Errol Williams, Complainant v. Lucas Associates, Inc. (formerly Lucas & Associates), Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200552.

ORDER DENYING PENDING MOTION TO DISMISS, AND PROVIDING FOR FURTHER PROCEDURES

(November 28, 1990)

By Order issued October 22, 1990 I granted so much of Respondent's Motion to Dismiss dated June 28, 1990 as involves Complainant's national origin discrimination claim. In that Order Complainant was afforded an opportunity to show cause why his citizenship claim should not also be dismissed.

By a sworn statement dated October 31, 1990, filed November 5, 1990, complainant replied that he had not received my August 20, 1990 Order of Inquiry, and therefore had not responded to it. Complainant requested that my staff mail to him a copy of the August 20 Order by certified mail in order to insure his receipt. A sworn response to that Order of Inquiry was filed by Complainant on November 26, 1990.

The pleadings present a factual dispute, i.e., whether Respondent had inquired or was otherwise aware of Complainant's citizenship when it failed to refer him for a position for which it contends he was unqualified, implicating the issue as to whether he was not referred for employment because of his citizenship status. As a result of the apparent factual impasse there is reason to believe that Complainant may be able to establish that he is a protected individual entitled to redress for the citizenship status discrimination which he alleges. Accordingly, I conclude that such dispute can only be resolved outside the pleadings to date. See Fed. R. Civ. P. 12(b). Contrary to the challenge by Respondent, Complainant does state a claim upon which relief can be granted. Accordingly, Respondent's motion to dismiss the citizenship claim is denied.

To the extent that Respondent's motion is understood also to invoke summary decision under the rules of practice and procedure

of this Office, such result is denied on the basis that there is a genuine issue of material fact such as precludes a decision on the present state of the record. 54 Fed. Reg. 48593, 48604 (1989) (to be codified at 28 C.F.R. § 68.36(c)). See also Fed. R. Civ. P. 56 (to the extent contemplated by 28 C.F.R. § 68.1).

In context of the result reached in this Order, it is now appropriate to proceed with the remaining issue of citizenship discrimination as in the usual course, i.e., to schedule a telephonic prehearing conference. Pending that conference, the parties will be expected to explore the potential for an agreed disposition.

The prehearing conference will focus on the scheduling of an evidentiary hearing; in addition, the parties should be prepared to discuss trial preparation in the context of the rules of practice and procedure of this Office, particularly those sections governing prehearing statements and prehearing conferences, 54 Fed. Reg. 48593, 48599 (to be codified at 28 C.F.R. §§ 68.10(b) and 68.11(2)).

The parties will be expected to determine their availability and preferences for a telephonic prehearing conference on at least one of the following dates and times:

1. Wednesday, December 19, 1990 at 2:00 p.m., EST, 1:00 p.m., CST, or,
2. Friday, December 21, 1990 at 10:00 a.m., EST, 9:00 a.m., CST, or,
3. Monday, January 7, 1991 at 10:00 a.m., EST, 9:00 a.m., CST.

My staff will contact the parties by telephone within the next week to schedule the conference, and an order confirming the date selected will follow.

Complainant is advised that service of copies of all communications addressed to Respondent should go to counsel for Respondent, Regional H. Wood, Esq., Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 700 Louisiana, Suite 2400, Houston, TX 77002. A copy of Complainant's November 26, 1990 Response To Order of inquiry is forwarded to Respondent's counsel with this Order.

SO ORDERED.

Dated this 28th day of November, 1990.

MARVIN H. MORSE
Administrative Law Judge