

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

STEPHEN A. LEWIS,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 91200105
OGDEN SERVICES,)
Respondent.)
_____)

DECISION AND ORDER
(September 23, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Stephen A. Lewis, Complainant, pro se.
Paul J. Siegel, Esq. and Diane Windholz, Esq.
for Respondent.

I. Background

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Stephen A. Lewis is an individual who claims American national origin and United States citizenship, who, therefore, is authorized to work in the United States. Mr. Lewis (Lewis or Complainant) alleges that Ogden Services, Inc. (Ogden Services or Respondent) unlawfully discriminated against him on October 1, 1990 by "knowingly and intentionally (refusing) to hire him because of his American national origin."

II. Procedural Summary

On June 24, 1991 Lewis filed a Complaint dated June 24, 1991 in the Office of the Chief Administrative Hearing Officer (OCAHO) against Ogden Services. The Complaint together with a Notice of Hearing was mailed on July 1, 1991 to "Ogden Services, Vincent J. Corsaro, Manager, Room 292 C, Washington National Airport, Washington,

DC 20001." The file contains the returned certified mail receipt for the mailing, signed on July 2, 1991 by D. Young.

As stated in the Notice of Hearing, this case is before me as the assigned administrative law judge. As also stated in the Notice of Hearing, and according to the rules of practice and procedure for such cases, Respondent is entitled to thirty (30) days from receipt of a complaint in which to file an answer with the judge. 28 C.F.R. §68.8 (1990). The Notice cautioned that if no answer is timely filed, Respondent "may be deemed to have waived [its] right to appear and contest the allegations of the Complaint, and the Administrative Law Judge may enter a judgment by default along with any and all appropriate relief."

By Motion dated August 7, 1991, filed August 9, 1991 Complainant moved for default judgment against Respondent for failure to file a timely answer to the Complaint. More than 30 days had elapsed from Respondent's receipt of the Complaint on July 2, 1991. At that time, no answer or other pleading or communication had been received from or on behalf of Respondent.

Respondent defaulted by not filing its Answer within the prescribed 30 day time period. As I typically do in such default situations, I issued an Order on August 13, 1991 directing Ogden Services to show cause why a judgment by default should not be entered against it for failure to timely answer the Complaint, and to file its proposed Answer, if any, not later than August 27, 1991. On that date, I received from Respondent a timely response which included its Answer and Affirmative Defenses to the Complaint, an Affidavit by Vincent J. Corsaro, and a Memorandum of Law in response to the Show Cause Order.

Complainant filed a Request to Proceed with Motion for Default Judgment on September 6, 1991, claiming that Respondent failed to timely respond to my Order to Show Cause.

II. *Discussion*

A. *Judgment by Default Denied*

First, Complainant's September 6 request to proceed with a judgment by default against Respondent on the basis that it failed to respond to the show cause Order by August 27 is denied. Respondent timely replied to that Order.

Second, the August 9 Motion for Default Judgment is also denied. For the following reasons, in the exercise of my discretionary authority, I find that Respondent has shown sufficient cause to avail itself from a default. See 28 C.F.R. §68.8(b).

Generally, the law disfavors default judgments, and doubts are generally resolved in the favor of the defaulting party. U.S. v. Lea's Party Rental's, 1 OCAHO 111 (12/11/89) (Order Denying Complainant's Motion for Default), citing Wright and Miller, Fed. Prac. and Pro., 2681, at 402-403. The courts consider several factors to determine whether good cause is shown to set aside a default. U.S. v. DuBois Farms, 1 OCAHO 225 (8/29/90). See Fed. R. Civ. P. 55(c) (an entry of default may be vacated for "good cause shown"), and 28 C.F.R. §68.1 (the Federal Rules of Civil Procedure are to be used as a guideline for matters not otherwise covered by the regulations, statute or executive order); see also 6 Moore's Fed. Pract. Para. 55.10 (1985). Such factors are (1) whether the default was willful or in bad faith, (2) whether the defaulting party has a meritorious defense, and (3) whether the complainant would be prejudiced if the default should be set aside. Id. at 55-59; DuBois Farms, 1 OCAHO 225; Keegal v. Key West & Caribbean Trading Co., 627 F.2d 372 (D.C. Cir. 1984).

Here, there is no apparent willfulness or bad faith on the part of Respondent to show disrespect to this forum or abuse of process. Walter E. Heller Western Inc. v. Seaport Enterprises, Inc., 99 F.R.D. 36 (D. Ore. 1983). It is clear from the affidavit of Vincent J. Corsaro, Station Manager of Baltimore Washington Airport for Respondent, that he had a "good faith mistaken belief about this tribunal's procedural processes." Affidavit at para. 18. This is not an uncommon response. See Diaz v. Canteen Co., OCAHO Case No. 90200354 at 2 (5/22/91) (Respondent failed to understand that the Notice of Hearing initiated formal proceedings before OCAHO because it had already cooperated with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC)). IRCA is relatively new and unknown as a statute giving rise to immigration-related discrimination complaints. The procedural aspects of the law are even lesser known.¹

¹ OSC investigates, and discretionarily prosecutes before administrative law judges (ALJs) individual "charges" statutorily mandated to be brought first to them. 8 U.S.C. §1324b(b). After its investigation, OSC may decide to prosecute the charge and file a "complaint" before an ALJ; if it declines, the individual may then file his or her "complaint" directly before the judge. 8 U.S.C. §1324b(d). OSC must issue a "letter of determination" informing the charging party of its decision. 28 C.F.R. §44.303. Presumably, the responding party is similarly informed i.e., that OSC will not prosecute the charge and that the charging party may file a complaint before an ALJ.

Employers have frequently demonstrated confusion in responding to Notices of Hearing. It has not been unusual for them to rely on the OSC "determination" as a disposition of the entire dispute, when,
(continued...)

Moreover, there are meritorious defenses to the allegations of the Complaint. As discussed, *infra*, I find that this forum lacks jurisdiction to hear this case, and accordingly, *sua sponte* dismiss the Complaint. As to the third factor, I find there is no prejudice to the Complainant in vacating a default when this forum has no jurisdiction to hear the action in the first instance.

B. *Lack of National Origin Jurisdiction*

I do not have jurisdiction to entertain Complainant's charge of national origin discrimination in light of Respondent's Affirmative Defense and Affidavit of Vincent J. Corsaro in support. Accordingly, I *sua sponte* dismiss the Complaint for lack of jurisdiction.

As a citizen of the United States, Complainant is among the class of individuals protected against failure to hire because of national origin discrimination.² 8 U.S.C. §1324b(a)(3). Administrative law judges (ALJs) are not empowered, however, to adjudicate national origin employment discrimination claims which are within the jurisdiction of the Equal Employment Opportunity Commission (EEOC). 8 U.S.C. §1324b(a)(2). IRCA excludes from the definition of an unfair immigration-related employment practice "discrimination because of an individual's national origin if the discrimination . . . is covered under section 703 of the Civil Rights Act of 1964," 8 U.S.C. §1324b(a)(2)(B). That Act, codified at 42 U.S.C. §§2000e *et seq.*, generally covers national origin discrimination by employers of fifteen or more employees, conferring enforcement jurisdiction on EEOC and the district courts.

¹ (...continued)
in fact, formal adversarial proceedings under the Administrative Procedure Act (5 U.S.C. §554) begin only when a complaint is filed before an ALJ.

² Complainant claims American national origin, apparently a matter of first impression. While I am not certain that 8 U.S.C. §1324b is available for such a claim it may be arguable that American citizenship is a viable category for discrimination jurisdiction if, for example, an employer were to hire only United States citizens of Salvadoran national origin as opposed to other persons of "American" national origin.

The logic of the exception is plain. IRCA empowered ALJs to adjudicate claims arising out of the enlarged national origin jurisdiction, i.e., of employers with more than three employees and fewer than fifteen. Jurisdiction over national origin discrimination claims established before enactment of IRCA on November 6, 1986 was not to be disturbed. Case law under IRCA has clearly so understood. See, e.g., Romo v. Todd Corp., 1 OCAHO 25 (8/19/88), aff'd., United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990); Adatsi v. Citizens & Southern National Bank of Georgia, 1 OCAHO 203 (7/23/90), appeal dismissed, Adatsi v. Dep't. of Justice, No. 90-8943, slip op. (11th Cir. Feb. 25, 1991); Diaz, OCAHO Case No. 90200354; Martinez v. Lott Constructors Inc., 1 OCAHO 323 (4/30/91); Ryba v. Tempel Steel Co., 1 OCAHO 289 (1/23/91); Akinwande v. Erol's, 1 OCAHO 144 (3/23/90); and Bethishou v. Ohmite Mfg., 1 OCAHO 77 (8/2/89).

Here, Corsaro's affidavit at paragraph 20 attests that Respondent's Washington National Airport facility employs more than 15 individuals. Complainant has not countered that sworn factual assertion. Accordingly, because Respondent employs more than fourteen individuals, this case is dismissed for lack of national origin jurisdiction.

IV. Ultimate Conclusions and Findings

Based upon the pleadings and affidavit in support, I conclude and find:

1. That Respondent has shown good cause why a judgment by default should not be entered against it.
2. That Respondent did not act willfully or in bad faith in its failure to timely answer the Complaint.
3. That lack of subject matter jurisdiction is a meritorious defense which avoids a judgment by default.
4. That Respondent's Washington National Airport facility is an entity which employs more than fourteen individuals.
5. That Respondent's Washington National Airport facility is not subject to the jurisdiction of this forum for the charge of national origin discrimination as alleged by Complainant.

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6. That the Complaint is dismissed.
7. That Respondent's request for attorneys' fees and costs is denied.

This Decision and Order is the final administrative order in this case pursuant to 8 U.S.C. §1324b(g)(i). Not later than 60 days after entry, Complainant may appeal this Decision and 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." 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated this 23rd day of September, 1991.

MARVIN H. MORSE
Administrative Law Judge