

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

GRZEGORZ PIOTEREK,)
Complainant)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 92B00260
ANDERSON CLEANING)
SYSTEMS, INC.)
Respondent.)
)
GRZEGORZ PIOTEREK,)
Complainant)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 92B00261
SCOTT WORLDWIDE)
FOOD SERVICE,)
Respondent.)
_____)

ORDER, INCLUDING REQUEST TO
OFFICE OF SPECIAL COUNSEL TO FILE AN ADVICE
(January 27, 1993)

I. Procedural History

A. Initial Pleadings

On November 25, 1992, Grzegorz Pioterek (Pioterek or Complainant) filed a complaint amended in each of these cases by complaints dated December 30, 1992, filed January 4, 1993. These complaints invoke the jurisdiction of an administrative law judge under the pertinent provision of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b. Complainant seeks redress for unlawful discharge from employment in violation of the prohibitions against immigration-related unfair employment practices.

Complainant alleges that he was unlawfully discharged from employment on October 11, 1991 by both respondents. He alleges, in effect, that his firing:

(1) by Anderson Cleaning Services was a pretext for national origin and citizenship status discrimination, and

(2) by Scott Worldwide Food Service, was a pretext for national origin discrimination only.

The Special Counsel for Immigration Related Unfair Employment Practices (OSC) issued a determination letter on August 27, 1992. OSC advised as follows:

Based on this Office's investigation, the Special Counsel has determined that there is insufficient evidence of reasonable cause to believe you were discriminated against on the basis of your citizenship status, as prohibited by 8 U.S.C. § 1324b. In addition, you are not a protected individual under the statute. The Office of Special Counsel does not have jurisdiction of your allegations of national origin discrimination because of the number of individuals employed by this employer. (Emphasis added.)

Subsequently, Pioterek timely filed these cases as private actions.

Initially, Pioterek had filed a single OSC charge against Anderson and Scott. Upon filing his November 25, 1992 OCAHO complaint, the OCAHO staff informed him that he must perfect his claim by completing and returning a "questionnaire/complaint." The staff instructed him to complete a separate questionnaire/complaint for Anderson and Scott, if he intended to allege discrimination "by more than one company or employer." However it appears from Complainant's own filings, buttressed by the November 18, 1992 initial determination of the Equal Rights Division, Wisconsin Dep't of Industry, Labor and Human Relations, that he was at all relevant times an employee of Anderson, not of Scott. Exh. B to Anderson's motion. Scott was Anderson's customer. Apparently, Anderson assigned Complainant to duties at Scott's facility.

As a matter of efficiency and economy, this order is set forth as a single issuance. As of this date, I have not formally consolidated these cases.

On January 6, 1993, the Office of the Chief Administrative Hearing Officer (OCAHO) addressed notices of hearing transmitting the December 30 complaints to Anderson Cleaning Services and to Scott Worldwide Food Service (Anderson, Scott, or Respondent). OCAHO

files confirm receipt by Anderson and Scott of the notices of hearing on January 11, 1993.¹

B. Respondent's Motion to Dismiss

On January 22, 1993, counsel for Anderson filed a motion to dismiss the complaint against Anderson on the basis that Pioterek had filed a national origin discrimination charge arising out of the firing by Anderson. Anderson claims that Pioterek has a pending national origin discrimination charge arising out of the firing by Anderson both in this forum and before the U.S. Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended. Anderson's motion attaches documents to support its claim. To the same end, the motion quotes 8 U.S.C. §1324b(a)(2)(B) for the proposition that a national origin claim cognizable under Title VII cannot also be the subject of any IRCA discrimination claim.

The motion also asks for a period of thirty days in which to answer the complaint in the event the motion to dismiss is overruled.

II. Discussion

A. Citizenship Discrimination Claims and Protected Person Status

To be entitled to IRCA citizenship discrimination protection, an individual must be either a citizen or national of the United States, or an alien (1) admitted for permanent residence, (2) an IRCA amnesty applicant, (3) a refugee, or (4) an asylee. 8 U.S.C. §1324b(a)(3). Pioterek's OSC charge claimed at paragraph 5 of the OSC charge form that he "has been granted asylum under 8 U.S.C. §1158."

Pioterek's complaint indicates that he is a native born citizen of Poland authorized to work in the United States and that he applied for citizenship on February 2, 1990. On the questionnaire/complaint the only opportunity for an alien to show the basis for status as a protected individual under IRCA, 8 U.S.C. §1324b(a)(3), is to enter the date that permanent residence status was obtained. Because Complainant made no entry at that point on the questionnaire/complaint, it is evident that as of December 30, 1992 he had not yet become a permanent resident alien.

¹ Anderson's motion is filed on behalf of Anderson Cleaning Systems, Inc. which it recites is the proper name of Complainant's former employer.

Pioterek's assertion that he is an asylee appears to be inconsistent with OSC's conclusion that he is not a protected individual. Lack of protected status precludes IRCA citizenship status coverage. There-fore, it is critical to efficient adjudication to obtain the OSC's expert views on Complainant's eligibility for that coverage. Accordingly, this Order requests that OSC file a statement explaining the basis for its conclusion that Pioterek is not a protected individual.²

B. National Origin Claims Under IRCA

Regardless of Complainant's protected individual status vis a vis his citizenship status claim, he cannot maintain an IRCA national origin discrimination claim if a national origin claim arising out of the same circumstances is filed with EEOC, unless the EEOC charge is dis-missed as being outside the scope of Title VII. 8 U.S.C. §1324b(b)(2). A Title VII claim appears to be pending at EEOC. Exhibit C to Anderson's motion.

Even absent an EEOC filing, an individual cannot maintain an IRCA national origin claim if there are more than 14 employees on the employer's payroll. 8 U.S.C. §1324b(a)(2)(B). Palancz v. Cedars Medical Center, 3 OCAHO 443 at 3 (8/3/92); Brown v. Baltimore City Public Schools; U.S. v. Huang, 2 OCAHO 313 (5/7/91), aff'd, Huang v. U.S. Dept. of Justice, Case No. 91-4079 (2d Cir. 2/6/92); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92).

IRCA caselaw has clearly established that jurisdictional limits on national origin jurisdiction of administrative law judges does not affect jurisdiction over citizenship status discrimination. Romo v. Todd Corp., 1 OCAHO 25 (8/19/88), aff'd, 900 F.2d 164 (9th Cir. 1990); Yefremov v. N.Y.C. Dept. of Transportation, OCAHO Case No. 92B00096 (Order, 10/1/92) at 2; Palancz v. Cedars Medical Center, OCAHO Case No. 91200197 (Order Granting Respondent's Motion For Summary Decision In Part, 3/24/92); Salazar-Castro, 3 OCAHO 406. Therefore, absent a showing that Complainant is not a protected per-son, the citizenship status discrimination claim survives the present motion, even if it is necessary to dismiss the national origin claim.

² There is precedent in cases before administrative law judges pursuant to 8 U.S.C. §1324b for OSC to participate as amicus curiae to provide such assistance. See, e.g., Brown v. Baltimore City Public Schools, OCAHO Case No. 91200231 (6/4/92) at 4 ("OSC suggested that its familiarity 'with the developing law' might assist the judge on the question of 'Complainant's standing to pursue a citizenship status discrimination claim under 8 U.S.C. §1324b(a)(1)(B)'").

III. Orders and Requests

The parties are directed to respond to this order as follows:

Not later than February 17, 1993, Complainant will file (and serve on counsel for Anderson):

- An explanation of the basis for asserting he has been granted asylum (with copies of documents in support);

- A statement of his immigration status during the period beginning March 1991 to date (with copies of documents in support);

- A statement regarding whether he was an employee of Anderson at all times from March 1991 to October 11, 1991;

- An explanation of the claim that he was concurrently a Scott employee and an Anderson employee;

- An explanation of his understanding that he was discharged in contrast to Anderson's claim that he was merely reassigned from the Scott location;

- An explanation of the basis for the claim that he was discharged because of his Polish national origin;

- An explanation of the basis for the claim that he was discharged because of his Polish citizenship;

- An explanation of the basis for the claim that he was discharged because he was not a United States citizen.

Not later than February 17, 1993, Anderson will file (and serve on Complainant):

- A schedule which shows the number of employees on the date in March, 1991 that Complainant began his employment, and the number of employees on October 11, 1991; also show the maximum and minimum number of employees during that period;

- An explanation whether Complainant was Anderson's employee during that entire period or was ever employed by Scott (with copies of documents in support), explaining whether as Anderson's employee he was assigned duties at Scott;

- A statement whether Complainant was discharged when he was removed from Scott and, if so, the reasons for his discharge; if he was not fired, state whether, how and by whom he was informed that he was being reassigned, not fired;

- A statement of Anderson's citizenship and national origin policies and considerations with respect to hiring and firing employees (with copies of documents in support);

- A statement whether and under what conditions as to salary, etc., Anderson is prepared now to reemploy Complainant.

The responses to this order by each party should be submitted under oath.

On the basis of the responses the bench will decide whether:

- the entire dispute or any part thereof should be disposed of on the pleadings;
- the case against Scott is viable; and
- Anderson's motion is meritorious.

OSC is requested to make a filing which explains its conclusion that Pioterek is not a protected individual with respect to his charge. Such advice will be most helpful if filed by February 17, 1993.

An answer to the complaint by Anderson will be timely if filed not later than February 17, 1993.

The style of OCAHO Case No. 92B00260 is changed to Grzegorz Pioterek v. Anderson Cleaning Systems, Inc.

SO ORDERED.

Dated and entered this 27th day of January, 1993.

MARVIN H. MORSE
Administrative Law Judge