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

EUSEBIO HUESCA, Complainant, v. ROJAS BAKERY, Respondent.	))))))))	 8 U.S.C. § 1324b Proceeding CASE NO. 92B00248

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION TO DISMISS THE COMPLAINT

(June 24, 1994)

Appearances:

For the Complainant
Peter E. Torres, Esquire

For the Respondent
Mark S. Drucker, Esquire

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. *Introduction*

Currently before me is Complainant's motion to voluntarily dismiss the complaint in this case. The complaint alleges that Respondent Rojas Bakery, committed unfair immigration-related employment practices against Eusebio Huesca, in violation of section 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), as amended, 8 U.S.C. § 1324b. For the reasons stated below, Complainant's motion will be granted.

II. *Procedural History & Factual Summary*

Eusebio Huesca ("Huesca" or "Complainant") is a native and citizen of Mexico. He entered the United States in 1988 without inspection, married a U.S. citizen on May 1, 1989 and in September 1993, based on cooperation with the U.S. Department of Justice, Immigration & Naturalization Service in an investigation that concluded successfully, was granted permission to work in the United States.[1] Complainant's Brief in Opposition to an Award of Attorney's Fees, at 1. Huesca initiated the proceedings in this case by filing a charge on May 5, 1992 with the Office of Special Counsel for Unfair Immigration-Related Employment Practices ("OSC"), in which he alleges that Rojas Bakery discriminated against him in violation of IRCA by failing to hire him based on his citizenship status. More specifically, Complainant asserts: I went whis (sic) my friend to ask for work the owner say that come back in a week to star (sic) to work, when I went back he say no I don't need nobody now but I know that he was lien (sic) to me. He has illegal alien working." Charge, ¶ 8. Huesca claimed in his charge that he was an alien lawfully admitted for permanent residence. See id. at ¶ 5.

In a letter dated September 8, 1992, OSC advised Complainant that as of that date the Special Counsel had not yet determined whether there was reasonable cause to believe that his charge was true or whether to bring a complaint with respect to the charge before an administrative law judge ("ALJ"). OSC also advised Complainant of his right to file a private action directly before an ALJ within 90 days of receipt of OSC's determination letter, as the Special Counsel had not filed a complaint within 120 days of receipt of his charge. See 8 U.S.C. § 1324b(d)(2).

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[1] The September 1993 date may be a typographical error as if it is accurate, it shows that Complainant was not authorized for employment at the time of the alleged discrimination in this case. See Complainant's Response to ALJ's Interrogatories, at 2. Complainant's counsel, however, has not stated that it is an error.

On October 23, 1992, Huesca received an OCAHO form complaint/ questionnaire regarding unfair immigration-related employment practices. On November 9, 1992, Huesca, acting pro se, filed the complaint in this case, alleging that he applied for a job as a helper with Rojas Bakery on May 5, 1992, and that Respondent knowingly and intentionally refused to hire him because of his citizenship status and national origin, in violation of 8 U.S.C.§ 1324b(a)(1)(A) and (B).[2] Complainant asserts that Respondent did not hire him "[b]ecause they only want people withs (sic) no paper that way they don't pay taxes." Complaint ¶ 12(b). Complainant further alleges in his complaint that Respondent asked him for his green card and refused to accept the documents Complainant presented to show that he is authorized to work in the United States, in violation of 8 U.S.C. § 1324b(a)(6).

It is undisputed that in mid-April 1992, Huesca entered Rojas Bakery and asked Eugenia Rojas if there was a job opening. Eugenia Rojas Aff.1 ¶ 2. Complainant asserts that he and his friend, Victor Rosas, sought employment with Rojas Bakery "knowing that they needed employees because there had been an Immigration raid and Rojas did not have any employees." Complainant's Brief in Opposition to an Award of Attorney's Fees, at 1. Complainant further asserts that Eugenia Rojas told Huesca and his friend that there were jobs available at Rojas Bakery and to return. Compl.'s Answers to ALJ's Interrogatories, ¶ 8. Eugenia Rojas asserts that she told Huesca that the owner was not there and that if Huesca could return in about a week, he then could speak to the person in charge. Id. Miguel Rojas has stated that when Complainant later came to Rojas Bakery and asked him if there was a position available, Rojas asked Complainant to leave his name and telephone number and stated that he would call Huesca if there was an opening. Miguel Rojas Aff. ¶ 3. Miguel Rojas further states "I did not have him fill out an employment application as I saw there was no need to do so at the time, since there was no position available." Id. Complainant, however, asserts that: "On the date Complainant met Mr. Miguel Rojas, Mr. Rojas had the Complainant and Mr. Rosas complete I-9 forms and produce proof of permission to work. After presentation of their authority to work in the U.S., they were informed that there were no available positions." Id.

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[2] According to Respondent, Rojas Bakery, a corporation, was dissolved at the end of 1992--after the alleged discrimination occurred-and a new corporation, Golito Baking Corporation d/b/a Rojas Bakery was formed. Respondent's Answers to Complainant's Interrogatories 5 and 6. As Complainant has not named Golito Baking Corporation as a respondent in this case, I need not address the issue of successorship.

On January 7, 1993, Respondent filed its answer and a motion to dismiss the complaint, in which it denies that it discriminated against Complainant because of his national origin or citizenship status. The answer and motion to dismiss further state that Respondent did not hire Complainant because there were no positions available at the time he submitted his application. Those pleadings also state that the bakery owners themselves are of Mexican national origin and they employ numerous employees whose national origin is also Mexican. In support of their pleadings, Respondent filed affidavits of the Vice-President of Rojas Bakery, Miguel Rojas ("Miguel Rojas Aff."), and Miguel's sister and part-time manager of Rojas Bakery, Eugenia Rojas ("Eugenia Rojas Aff.1").

On May 20, 1993, I issued an order ("Order of May 20, 1993"), in which I construed Respondent's motion to dismiss as a motion to dismiss and/or for summary decision under 28 C.F.R. §§ 68.10 and 68.38. In that order, I also directed Complainant to respond to ten interrogatories and requested that Respondent submit additional information, including another affidavit from Eugenia Rojas. On June 4, 1993, in response to the Order of May 20, 1993, Respondent filed an affidavit of the President of Rojas Bakery, Ana Maria Rojas ("Ana Maria Rojas Aff."), and a second affidavit of Eugenia Rojas ("Eugenia Rojas Aff.2").

On June 4, 1993, Peter E. Torres, Esq. filed a notice of appearance for Complainant, stating that Complainant retained his office on May 27, 1993 and requesting an extension of time to answer interrogatories I had issued. I granted that request and on July 6, 1993, Complainant filed answers to my interrogatories. On July 22, 1993, Complainant filed its First Set of Interrogatories Directed to Defendant. On August 30, 1993, Respondent filed its answers to those interrogatories. On September 1, 1993, Complainant filed a notice of motion along with a motion to compel Respondent to answer specified interrogatories which were submitted to Respondent on or about July 22, 1993.

On September 13, 1993, Respondent filed a Request to Dismiss Complainant's Notice of Motion Dated August 30, 1993, to which it attached a certification under oath regarding its answers to Complainant's First Set of Interrogatories. In that request, Respondent renewed its request to dismiss the complaint, arguing that Complainant is not a "protected individual" as defined under 28 C.F.R. § 44.101(c). Also on September 13, 1993, Respondent filed Additional Answers to Complainant's First Set of Interrogatories, answering interrogatories number 19 and 21, but not answering interrogatory number 22 and objecting to answering

interrogatory 24 because the "question is irrelevant and has no bearing on the complaint." On September 20, 1993, Complainant filed a Rebuttal to Respondent's Answer to Motion to Compel Answers to Complainant's Interrogatories. In his rebuttal, Complainant argues that Respondent must answer interrogatories number 22 and 24 in order for Complainant to adequately address Respondent's motion to dismiss. Complainant also seeks reasonable attorney's fees and costs for that motion.

On September 24, 1993, I issued an Order Staying a Ruling on Complainant's Motion to Compel Respondent to Answer Interrogatories 22 and 24 and Ordering Complainant to File Brief and Additional Proof on the Issue of National Origin Jurisdiction and on Whether Complainant is a Protected Individual. In that order, I clarified the issues in the case and pointed out the hurdles that Complainant must overcome in order to prevail on his claims. See Order of September 24, 1993 at 4-8. I also directed Complainant to file a brief by October 15, 1993.

As Complainant failed to file a brief and additional proof as directed, on October 27, 1993, I issued a Show Cause order, directing Complainant to file on or before November 12, 1993 a pleading showing why the complaint should not be dismissed, including a brief as previously ordered and an explanation as to Complainant's non-compliance with the prior order. On November 29, 1993, the Show Cause order was returned to this office because it had an incorrect address.[3] On January 5, 1994, my office staff telephoned Complainant's counsel to obtain his correct address, at which time Complainant's counsel stated that "we have vacated the case." Complainant's counsel was informed that he should file a motion to dismiss the case, to which he responded that he would do so by the following week. On January 18, 1994, because Complainant had not filed a motion to dismiss, I issued an Order to Show Cause Why Case Should Not Be Dismissed With Prejudice. On February 10, 1994, because Complainant is not a "protected individual" under IRCA, he filed a motion to withdraw his complaint, which I construe as a motion to dismiss.

On March 2, 1994, I issued an order informing the parties that this case would be dismissed with prejudice and providing a deadline for Respondent to file a motion for attorney fees. On March 24, 1994, Respondent filed a request for attorney fees and a supporting brief ("Resp.'s Br.") with an appendix. On March 31, 1994, Complainant filed

[3] Complainant's counsel had failed to provide this office with his new address.

a request for an extension of time to file a responsive brief, which I granted. On April 22, 1994, Complainant filed a timely brief in opposition to an award of attorney fees ("Compl.'s Br.").

III. *Discussion*

The rules of practice and procedure governing these proceedings explicitly provide for dismissal of complaints under three circumstances: (1) "[w]here the parties or their authorized representatives or their counsel have entered into a proposed settlement agreement," under 28 C.F.R. § 68.14 (1993); (2) when a complaint or a request for hearing is abandoned by the party or parties who filed it, under 28 C.F.R. § 68.37(b); and (3) by default, under 28 C.F.R. § 68.37(c). There is no regulation that covers the circumstances present in the instant case, where a complainant voluntarily seeks the dismissal of a complaint. The regulations, however, state that in any situation not provided for or controlled by the regulations, the Administrative Procedure Act, or other applicable statute, executive order or regulation, "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as as general guideline" in deciding a legal issue before the Administrative Law Judge. 28 C.F.R. § 68.1.

Federal Rule of Civil Procedure 41(a) reads in pertinent part as follows:

> (2) By Order of Court. Except as provided in paragraph (1) [which provides for dismissal by stipulation] . . ., an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(a)(2) allows the Court to dismiss with or without prejudice, with the most important consideration being the interests of the defendant. Schwarz v. Folloder, 767 F.2d 125, 129 (5th Cir. 1985). If the plaintiff moves under Rule 41(a)(2) for voluntary dismissal and specifies that he or she wishes dismissal with prejudice, it has been held that the court must grant that wish. Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964); Shepard v. Egan, 767 F. Supp. 1158, 1165 (D. Mass. 1990); see also, 9 C. Wright and A. Miller, Federal Practice and Procedure ("Federal Practice and Procedure") § 2367 (1971). If, however, the plaintiff moves for dismissal under Rule 41(a)(2) and asks that the dismissal be without prejudice or does not specify that it be with or without prejudice, the matter is left to the sound discretion of the court. Kapowas v. Williams Insurance Agency, Inc., 11 F.2d 1380, 1385 (7th Cir. 1993); Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984,

986 (5th Cir. 1989). The court may grant dismissal without prejudice or may allow the dismissal only on the condition that it be with prejudice to a further action on the same claim. Gravatt v. Columbia University, 845 F.2d 54, 55 (2nd Cir. 1988); American Cyanamid Co. v. McGhee, 317 F.2d 295, 298 (5th Cir.1963). See Ordinance Gauge Co. v. Jacquard Knitting Mach. Co., 21 F.R.D. 575 (E.D. Pa. 1958), aff'd, 265 F.2d 189 (3rd Cir. 1959), cert. denied, 361 U.S. 829 (1959) (where motion for dismissal was filed after receipt of notice from the clerk that the case would be deemed abandoned unless application was made to the court, and plaintiff was notified of the impending dismissal and moved promptly to avoid the penalty, dismissal would be without prejudice under the local rule.); United States v. E.I. du Pont de Nemours and Co., 13 F.R.D. 490 (N.D. Ill. 1953); Shaffer v. Evans, 263 F.2d 134 (10th Cir. 1958), cert. denied, 359 U.S. 990 (1959)(where action had been pending for six months at time of hearing on plaintiff's motion to dismiss without prejudice, depositions had been taken, defendant had made arrangements for medical testimony, pre-trial conference had been held, and case was apparently ready for trial at the next jury term, trial court did not abuse its discretion in denying plaintiff's motion and dismissing the action with prejudice.); Sammons v. Larken, 38 F. Supp. 649 (E.D. Mass. 1941), vacated on other grounds, 126 F.2d 341 (lst Cir. 1942) (where plaintiff suing for copyright infringe-ment moved to dismiss a second count in the complaint for trademark infringement and unfair competition, the motion was allowed with prejudice and without costs.).

Voluntary dismissal without prejudice is not a matter of right. Zagano v. Fordham University, 900 F.2d 12, 14 (2nd Cir. 1990). The purpose of Rule 41(a)(2) is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced, Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987), or unfairly affected by dismissal. McCants v. Ford Motor Co., Inc., 781 F.2d 855, 856 (11th Cir. l986); LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976). Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and, the adequacy of plaintiff's explanation for the need to dismiss. See Bosteve Ltd. v. Marauszwki, 110 F.R.D. 257, 259 (E.D.N.Y. 1986); Harvey Aluminum, Inc. v. American Cyanamid Co, 15 F.R.D. 14, 18 (S.D.N.Y. 1953); see also Wakefield v. Northern Telecom, Inc., 769 F.2d 109, 114 (2nd Cir. 1985) (claim withdrawn after trial but before submission to jury dismissed with prejudice for plaintiff's failure to

show need for retrial elsewhere); Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969) (dismissal without prejudice properly denied where discovery considerably advanced and defendant's motion for summary judgment pending).

"A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action." Nemaizer v. Baker, 793 F.2d 58, 60 (2nd Cir. 1986). A dismissal with prejudice is res judicata not only as to matters actually litigated in the previous action, "'but as to all relevant issues which could have been but were not raised and litigated in the suit.'" Id. (quoting Heiser v. Woodruff, 327 U.S. 726 (1946)).

In the instant case, Complainant has moved to withdraw his complaint against Rojas Bakery, but does not indicate in his motion whether he seeks a dismissal with or without prejudice. I conclude that this case should be dismissed with prejudice based on the following. This case was pending for 15 months before Complainant, without explanation, filed its motion to dismiss. Furthermore, the case was at an advanced stage as discovery had taken place and Respondent's motion to dismiss and/or for summary decision was pending. In addition, the record indicated that Complainant did not even have standing to bring his citizenship status discrimination claim. Finally, Complainant's claim of national origin discrimination[4] and claim that Respondent asked him for too many documents in the processing of I-9 forms can only be litigated in this forum. Accordingly, Complainant's motion to dismiss is GRANTED and the complaint in this case is dismissed with prejudice.

IV. *Attorney's Fees*

Respondent has filed a motion requesting recovery of $2,100.00 in attorney's fees from Complainant. IRCA provides that "[i]n any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C.§ 1324b(h); see also 28 C.F.R. § 68.52(c)(2)(v).

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[4] As Respondent employed 12 individuals at the time of the alleged discrimination, Ana Maria Rojas Aff. ¶ 3, Complainant does not have a Title VII claim. See 42 U.S.C. § 2000e(b).

In order to grant Respondent's request for attorney fees, I must find that (1) Rojas Bakery was the "prevailing party" in this litigation and (2) that Huesca's argument was without reasonable foundation in law and fact. 8 U.S.C. § 1324b(h). If I find in Respondent's favor on both of these factors, I will then have discretion to award Respondent attorney's fees. If I decide to award fees, I will inquire into attorney time and related fee and expense data to determine the reasonableness of the requested fee. 28 C.F.R. § 68.52(c)(2)(v).

A. Rojas Bakery is a Prevailing Party

Although IRCA gives administrative law judges discretion to award attorney fees to the "prevailing party," the statute does not define the term "prevailing party." Whether a respondent in a § 1324b case becomes a prevailing party when the complainant moves to dismiss its case and the ALJ dismisses it with prejudice, is an issue of first impression.[5]

It is well settled that a case need not proceed to a final judgment on the merits in order for a party to "prevail." See Texas State Teachers Assoc. v. Garland Independent School Dist., 489 U.S. 782, 791 (1989) (interpreting the term "prevailing party" as used in civil rights statutes to mean a "party . . . who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation."); see generally 10C Federal Practice and Procedure § 2667 (1983) ("a dismissal of the action, whether on the merits or not, generally means that defendant is the prevailing party."); cf. Noxell Corp. v. Firehouse No. 1 Bar-b-que Restaurant, 771 F.2d 521, 525 (D.C. Cir. 1985) (quoting H.R. Rep. 1418, 96th Cong., 2d Sess. 11 (1980) ("The legislative history of the Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1982), indicates that the identical phrase 'prevailing party' in that legislation 'should not be limited to a victor only after entry of a final judgment following a full trial on the merits,' but applies even 'if the plaintiff has sought a voluntary dismissal of a groundless complaint.'").

Courts have not established whether a defendant to a Title VII claim becomes a prevailing party when a plaintiff voluntarily withdraws his

[5] In United States v. G.L.C. Restaurant, Inc., 3 OCAHO 439 (July 15, 1992), a case dismissed with prejudice under section 101 of IRCA, 8 U.S.C. § 1324a, however, in analyzing the respondent's request for an award of attorney's fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, the ALJ held that the respondent was a "prevailing party".

Title VII complaint. In Tang v. Telos Corp. and Jet Propulsion Laboratory, OCAHO Case No. 88200065 (Order Granting Dismissal of Complaint and Denying Attorney Fees) (Nov. 10, 1988) (unpublished), however, where I had granted the complainant's voluntary motion to dismiss without prejudice, I relied on a test set forth in Fernandez v. Southside Hospital, 593 F.Supp. 840 (E.D.N.Y. 1984), addressing the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988, which indicates that the circumstances surrounding a voluntary dismissal determine whether the defendant/respondent is a prevailing party. I held in Teng that the respondent was not a "prevailing party" because (1) the respondent's pleadings did not suggest that the allegations of the complaint were frivolous, but instead indicated a significant dispute as to the reasons why the respondent had not rehired the complainant; (2) there had been no proceedings on the merits; and (3) there had been no prehearing discovery. Id. at 7.

When the plaintiff's case is dismissed with prejudice as it was in the case at bar, at least some circuits view a civil rights defendant as a prevailing party. See, e.g., Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 517 (5th Cir. 1985) (stating in dicta that "a civil rights defendant is deemed a prevailing party when the plaintiff's entire case is dismissed with prejudice"). But see Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F.2d 1311 (10th Cir. 1974) (court held that where the plaintiff voluntarily dismissed the action with prejudice, the defendant was not a "prevailing party" for purposes of awarding costs under Fed. R. Civ. P. 54(d)).

The Second Circuit, finding it unnecessary to address whether a defendant in an action that is dismissed with prejudice at the plaintiff's request may be considered a prevailing party for the purpose of a statutory fee award under Title VII, discussed the issue of awarding attorney fees in such circumstances in Greenberg v. Hilton International Co., 870 F.2d 926 (2nd Cir. 1989). In that case, a former employee brought an action against her former employer under the Equal Pay Act and Title VII. After the plaintiff's motion for dismissal with prejudice was granted, the defendant filed a motion for sanctions. The court stated that "[i]f plaintiff's case, viewed as a whole, was objectively 'frivolous, unreasonable, or without foundation,' the court should award [attorney] fees [under Title VII] even though plaintiff survived motions to dismiss for failure to state a claim or for summary judgment. 870 F.2d at 940. Apparently concluding that the plaintiff should not share her counsel's liability because she did not have actual knowledge of her counsel's wrongful conduct, however, the court of appeals held that "an award of Rule 11 sanctions for the discovery

abuses in question satisfies the statutory purposes of Section 2000e-5(k) in the present circum-stances and no purpose would be served by ordering the plaintiff herself to pay fees." Id.

Because a dismissal with prejudice is tantamount to a judgment on the merits for the purposes of res judicata, I conclude that Rojas Bakery is a prevailing party within the meaning of 8 U.S.C. § 1324b(h).[6] See Anthony v. Marion County General Hospital, 617 F.2d 1164, 1169-70 (5th Cir. 1980) (upholding trial court's finding that the hospital was a "prevailing party" under 42 U.S.C. § 2000e-5(k), stating that "[a]l-though there has not been an adjudication on the merits in the sense of a weighing of facts, there remains the fact that a dismissal with pre-judice is deemed an adjudication on the merits for the purposes of res judicata.").[7]

B. Huesca's Claim Was Not Without Reasonable Foundation in Law and Fact

Under 8 U.S.C. § 1324b(h), the prevailing party may be awarded attorneys' fees only upon a finding that the opposing party's arguments were without reasonable foundation in law and fact. Several OCAHO cases have addressed the issue of whether to grant a prevailing respondent attorney fees. See, e.g., Jasso, 3 OCAHO 566, at 3-6 (ALJ denied such fees); Nguyen, 3 OCAHO 489, at 17-20 (same);

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[6] I now expand my definition of "cases" for the purpose of § 1324b analyses which I previously defined as proceedings decided on the merits, and, as such, result in clearly identifiable 'prevailing parties' and 'losing parties.'" Banuelos v. Transportation Leasing Co., 1 OCAHO 255, at 16 n.7 (Oct. 24, 1990), aff'd in unpublished decision, Banuelos v. United States Dep't of Justice, No. 91-70005, (9th Cir. Aug. 3, 1993); reh'g denied (9th Cir. Oct. 4. 1993).

[7] My finding that Rojas Bakery is a prevailing party is confirmed under the analysis used in some IRCA discrimination cases which have looked to the prevailing party standard of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973c, 1972 as set forth in Commissioner Court of Medina County, Texas v. United States, 683 F.2d 435, 440 (D.C. Cir. 1982), in which the court stated: "first, the party must have substantially received the relief it sought, and second, the lawsuit must have been a catalytic, necessary or substantial factor in attaining the relief." See Jasso v. Danbury Hilton & Towers, 3 OCAHO 566, at 4 (Oct. 1, 1993); Nguyen v. ADT Engineering, Inc., 3 OCAHO 489, at 18 (Feb. 18, 1993); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406, at 11-12 (Feb. 26, 1991). Rojas Bakery clearly meets that standard as its defense of the suit, in which it pointed out that Complainant was not a "protected individual" under IRCA, resulted in the relief Respondent sought--dismissal of the case. See Jasso, 3 OCAHO 566, at 5; Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964) (a dismissal with prejudice is a full adjudication of the case in favor of the defendant because if the defendant has not counterclaimed, it is the best possible result for which a defendant could hope).

Salazar-Castro, 3 OCAHO 406, at 11-14 (same); Banuelos, 1 OCAHO 255, at 15-20 (I granted a respondent attorney's fees).

Title VII case law is also relevant to the issue of whether Huesca's arguments were without reasonable foundation in law and fact because it applies a similar standard for determining attorneys' fees requests by prevailing respondents. See Section 706 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k).[8]

In interpreting 42 U.S.C. § 2000e-5(k), the Supreme Court has distinguished between prevailing plaintiffs and prevailing defendants. A court may award attorneys' fees to a prevailing Title VII plaintiff in "all but very unusual circumstances." Albermarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975). In contrast, a court may award attorney's fees to a prevailing Title VII defendant only in narrow circumstances: when the "court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). While "plaintiff's subjective bad faith' might provide 'an even stronger basis for charging him with attorneys' fees incurred by the defense," id., it is not "a necessary prerequisite to a fee award against him" Id. at 421.

"This distinction advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980). The rationale for awarding attorneys fees to a prevailing plaintiff is that "[t]he prevailing plaintiff vindicates federal law and policy and any award made is against a violator of federal law." Sobel v. Yeshiva University, 619 F.Supp. 839, 843 (S.D.N.Y. 1985). In contrast, attorney fees must be awarded to prevailing defendants in a circumspect manner to avoid "a chilling effect upon the prosecution of legitimate civil rights lawsuits" which are less than airtight. Sassower v. Field, 973 F.2d 75, 79 (2d Cir. 1992), cert. denied, 113 S.Ct. 1879 (1993).

The Supreme Court has cautioned district courts to "resist the temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unrea-

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[8] 42 U.S.C. § 2000e-5(k) provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as party of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

sonable or without foundation." Christiansburg, 434 U.S. at 421. The Court has further stated that "[e]ven when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 422.

Respondent argues that Complainant's argument is without reasonable foundation in law and fact because Complainant is not a "protected individual" as defined by 8 U.S.C. § 1324b(a)(3). Complainant likewise asserts that he withdrew his complaint "since he is not a 'protected individual.'" Compl.'s Br. at 1. I agree with the parties that Complainant is not a "protected individual" under 8 U.S.C. § 1324b(a)(3) and conclude that Huesca therefore lacked standing to bring a citizenship status claim. The parties misconstrue the statute, however, as status as a "protected individual" under IRCA is only required in order to have standing to bring a claim of citizenship status discrimination. Compare 8 U.S.C. § 1324b(a)(1)(B) with 8 U.S.C. § 1324b(a)(1)(A) and (a)(6). See also United States v. Guardsmark, Inc., 3 OCAHO 572, at 7-15 (Nov. 2, 1993) (holding that it is a § 1324b(a)(6) violation to engage in an act of document abuse against any work-authorized individual and discussing in dicta that Congress did not limit protection against national origin discrimination to "protected individuals.").

Section 1324b(a)(6) provides that:

> For purposes of paragraph (1) [which prohibits unfair immigration-related employment practices], a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

Because 8 U.S.C. § 1324a(b) only comes into play where an employer (or recruiter) has hired (or recruited) an individual and Respondent never hired Complainant, Respondent could not have violated 8 U.S.C. § 1324b(a)(6). In addition, Complainant has submitted no evidence indicating that Respondent discriminated against him based on national origin discrimination. Rather, Complainant asserts only discrimination based on citizenship/ immigration status, stating that Respondent hired individuals unauthorized for employment in the United States "[b]ecause they only want people withs (sic) no paper that way they don't pay taxes." Complaint ¶ 12(b). Furthermore, the record indicates that the owners of Rojas Bakery and many of its employees are Mexican.

Complainant asserts that "Having authorization to work, Huesca believed he had obtained certain rights and benefits that he could exercise including the filing of a discrimination claim against Rojas." Compl.'s Br. at 1. Respondent argues that "[t]he fact that the Complainant retained an attorney to pursue this lawsuit must hold him to a higher standard in comparison to pro se complainants without legal sophistication." Resp.'s Br. at 8. Complainant, however, did not seek counsel until May 27, 1993, Compl.'s Br. at 2, and did not obtain counsel until June 4, 1993, eleven months after he filed his charge with OSC and seven months after he filed his complaint.

Complainant checked off a box on his charge form which falsely indicated status as a permanent resident, although he did not indicate permanent residence status in his complaint. See Complaint ¶ 6. Respondent argues that "Complainant intentionally lied about his immigration status in order to qualify under IRCA." Resp.'s Br. at 6-7. Respondent argues that "[a]lternatively, even if there had been a typographical error in the [1993 date on which Complainant asserts he obtained work authorization], the Complainant is still not a protected individual as he has not produced any evidence to support such a finding." There is insufficient evidence in the record for me to find that Complainant brought his complaint or continued to litigate it in bad faith.

Despite the inconsistencies in Complainant's charge and complaint, at the time he filed them he was proceeding pro se. I conclude that Complainant did not understand that he lacked standing to bring his citizenship status claim and that because Respondent did not hire him, Respondent could not have violated the prohibitions of 8 U.S.C. § 1324b(a)(6).[9] Cf. Banuelos, 1 OCAHO 255, at 19 (stating that the Christiansburg standard should be applied in pro se cases with attention to the complainant's ability to recognize the merits of his or her claims). Furthermore, it is not clear whether Complainant could have made a prima facie case of national origin discrimination as the parties dispute whether Respondent had the position available for which Complainant had applied. Where there is a disputed issue of material fact, it is impossible to prove that a complainant's case is meritless without a trial on the merits which might reveal that the plaintiff's case was "without reasonable foundation in law and fact." I therefore con-

[9] Both parties' counsel have misconstrued which § 1324b claims require "protected individual" status. I will not hold Complainant, a native of Mexico who has been in this country for six years to a higher standard than his counsel.

clude that Complainant's case was not without reasonable foundation in law and fact.[10] Respondent's request for attorney's fees is therefore DENIED.

V. *Miscellaneous*

Any motions not previously disposed of are DENIED.

VI. *Appeal Rights*

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(1). 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 this 24th day of June, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge

[10] Even if I found that the complaint in this case was without reasonable foundation in law and fact, I would still have refused to award fees. See Brown v. Anheuser-Busch, Inc., 1992 WL 176955, *2 (D. Colo. 1992) (where plaintiff had voluntarily dismissed her case with prejudice, court found that an award of attorney's fees would be inappropriate where (1) very little discovery had been conducted because the plaintiff filed her motion to dismiss four months after the complaint was filed; and (2) the plaintiff acted promptly in moving to dismiss the case as soon as it became apparent that she would not be able financially to continue with the litigation); Brooks v. Watts Window World, 3 OCAHO 570 (Nov. 1, 1993) (where complainant had abandoned her complaint, Respondent was the prevailing party and complainant's case lacked foundation in law and fact, ALJ exercised his discretion to withhold attorney's fees); compare Banuelos, 1 OCAHO 255 (awarding prevailing respondent fees where complainant attempted to bring the same claim repeatedly even though it was found by other courts and administrative tribunals to lack merit).