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

LEANDRO MIRANO AGUINALDO, Complainant, v. MCDONNELL DOUGLAS CORPORATION, Respondent.	)))))))))	8 U.S.C. § 1324b Proceeding Case No. 94B00052

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. *Introduction*

This case arises under § 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), as amended, 8 U.S.C. § 1324b.

II. *Procedural History*

On November 2, 1993, Leandro Mirano Aguinaldo ("Complainant" or "Aguinaldo") filed a charge on a charge form (Form OSC 1, Nov. 91) with the Office of Special Counsel ("OSC"), alleging that McDonnell Douglas Corporation ("Respondent" or "McDonnell Douglas") discriminated against him based on his citizenship, in violation of IRCA, by not hiring him to work on the C-17 Aircraft Program at Edwards Airforce Base on October 6, 1993.

In a letter dated March 9, 1994, OSC notified Complainant that it had investigated the charges and determined that he is not a protected individual under IRCA and, therefore, that OSC would not file a complaint with an administrative law judge on this matter.

Pursuing his right to bring a private action under 8 U.S.C. § 1324b(d)(2), on March 24, 1994, Aguinaldo, proceeding as a pro se Complainant, filed a Complaint with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer ("OCAHO"), alleging unfair immigration-related employment practices by McDonnell Douglas. The complaint alleged that Complainant had been discriminated against because of his citizenship status when he was not hired for the position of Service and Repair Mechanic to modify C-17 airplanes to its latest configuration. It further alleges that Complainant "was intimidated, threatened, coerced or retaliated against because [he] filed or planned to file a complaint . . ." Complainant alleges such retaliation came in the form of a demotion. See Complaint, ¶ 15(a).

Aguinaldo alleged in his Complaint that he was "an Alien authorized to be employed in the United States," while remaining a citizen of the Philippines. Id. at ¶¶ 2-4. He further alleges that he obtained permanent residence status on July 7, 1987 and applied for naturalization on October 13, 1993. Id. at ¶¶ 5 and 7. At the time of the Complaint, Complainant had not yet become a naturalized citizen. Id. at ¶ 6.

On April 7, 1994, I was assigned to hear this case by the Chief Administrative Hearing Officer ("CAHO").

On May 6, 1994, Respondent filed its Answer to the Complaint of Leandro Mirano Aguinaldo, which included the assertion of six (6) affirmative defenses. In its Answer, Respondent denied the charges that it discriminated against Complainant, and also denied the charge of retaliation for filing the Complaint.

The affirmative defenses Respondent asserted in its Answer are: Failure to State a Cause of Action; Failure to State a Claim Under 8 U.S.C. § 1324b(a)(1); Failure to State a Claim -- 8 U.S.C. § 1324b(a)(3)(B)(i); Failure to State a Claim -- 8 U.S.C. § 1324b(a)(2)(C); Lack of Damages; and, Good Faith and Absolute Privilege. See Answer, ¶¶ 22 - 27.

On May 6, 1994 Respondent filed McDonnell Douglas Corporation's Notice of Motion and Motion to Dismiss for Failure to State a Claim

Upon Which Relief Can Be Granted, pursuant to 28 C.F.R. § 68.10. Respondent argues:

> Aguinaldo has failed to state a claim upon which relief can be granted, because 8 U.S.C. § 1324b . . . applies only to citizenship or national origin discrimination with respect to hiring, firing, or recruitment or referral for a fee, and does not cover terms and conditions of employment. As he admits in his Complaint itself, Complainant was neither fired nor refused employment; rather, Complainant's selection for a work assignment at Edwards Air Force Base was withdrawn as a result of federal regulations, and Complainant simply continued working in the same work assignment (repair and modification of C-17 airplanes) at Long Beach. Complainant, who has been employed by [McDonnell Douglas] since 1989, remains employed there today in his regular work capacity. OCAHO therefore lacks jurisdiction over Aguinaldo's claim.
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> Aguinaldo has failed to state a claim under 8 U.S.C. § 1324b(a)(1)(B) upon which relief can be granted because 8 U.S.C. § 1324b(a)(3) (B)(i) specifically exempts from the category of "protected individuals" any alien who fails to apply for naturalization within six months of the date the alien first becomes eligible to apply for naturalization. Aguinaldo was admitted to permanent resident status on July 7, 1987, and therefore became eligible for naturalization on July 7, 1992. However, as set forth in the Complaint at ¶ 5, he did not apply for naturalization until October 13, 1993; accordingly, Aguinaldo did not apply within the required six-month time frame and he therefore is not a protected individual and cannot bring a claim under 8 U.S.C. § 1324b(a)(1)(B).
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> Aguinaldo has failed to state a claim for which relief can be granted because 8 U.S.C § 1324b(a)(2)(C) expressly exempts citizenship status discrimination which is required in order to comply with law, regulation or executive order, or required by Federal, State, or local government contract. The purported citizenship discrimination alleged in the Complaint was required in order to comply with United States Air Force ("USAF") regulations based on national security which govern the eligibility of non-citizens for security clearances and which therefore prevented [McDonnell Douglas] from assigning Complainant to a work detail at Edwards Air Force Base. [McDonnell Douglas'] conduct was therefore exempted from the provisions of IRCA.

See Respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted, at 1-3.

On June 3, 1994, Pro Se Complainant sent a letter to this office requesting a thirty (30) day extension of time to respond to the Motion to Dismiss. Complainant stated that he was still in the process of trying to secure legal counsel.

On June 8, 1994 I issued an Order Granting Complainant's Request For Extension of Time to Respond to Respondent's Motion.

On July 11, 1994, Complainant sent another letter to this office asking for an additional sixty (60) day extension of time to respond to

the Motion to Dismiss. On that same date, Respondent filed an objection to Complainant's request for an extension of time.

Also on July 11, 1994, I denied Complainant's request for a 60-day extension of time to respond to the motion to dismiss, but did allow him until July 22, 1994 to respond to the motion.

On July 21, 1994 Complainant filed his Response to the Motion to Dismiss in the form of a letter. In this response Complainant explains that he has been unable to secure legal counsel. Complainant argues that the case should not be dismissed because:

> The withdrawal of my work assignment was not because Air Force regulation prevents non-U.S. citizens to work at the base, as per the declaration of Mr. Guy Lowery, Site Manager for McDonnell Douglas Corporation, the base security informed him that non-citizens would only be allowed into controlled areas on the base if the person were escorted by a U.S. citizen, . . . who possesses a permanent unescorted access authorization badge for 100% of the time that the non-citizen was present on the base. So I present to you that there was a way for me to work on the base . . . . I strongly believe that the main reason that my assignment was withdrawn was because I tried to seek for my right (sic) by calling the Air Force Base Security and inquiring how I can work on the base by not being a U.S. citizen (sic), and [McDonnell Douglas] management did not like the fact that I did not just let the matter go . . . .
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> Mrs. Gwen Meyers, Business Unit Manager, . . . tried to help me by talking to the management in charge (sic) of the Rams team, that if there was a problem with my citizenship, why not send me to Tulsa, Oklahoma, where the site is not an Air Force Base but belongs to American Airlines, so I should be able to work there instead of being broken back (sic), but their response to her was I still need my U.S. citizenship first. So Mrs. Meyers told me that she did what she could do to help me and I need to get my U.S. citizenship first . . . .
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> I was demoted back to my previous classification, "K2A Aircraft Assembly Mechanic" on November 15, 1993 . . . I was transferred back to the production line. I was no longer doing the same repair and modification of C-17 live aircraft as what I was doing when I was promoted to "J7D Overhaul and Repair Mechanic." I do agree that I was not fired from my job, and I did not lose my rate of pay, but I did lose the opportunity to work on the Rams team at Edwards Airforce Base where I would have made $1700.00 per month in addition to my normal rate of pay . . . . So in essence you can see that I indeed lose money due to the citizenship issue at hand . . . .
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> In regards to my applying for citizenship, I wasn't aware nor did the I.N.S. inform me that there is a statute which leaves me unprotected in discrimination acts if I do not apply for citizenship within 6 months of my eligibility . . . .

See Complainant's Response to Respondents Motion to Dismiss, at 1-2.

On August 1, 1994, Respondent filed its Reply in Support of Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. Respondent argues that in his Response to Respondent's

Motion to Dismiss Complainant concedes important facts which confirm that the complaint "is barred as a matter of law and must be dismissed in its entirety." Specifically, "Aguinaldo . . . acknowledges at page two that he was neither denied nor fired from employment at [McDonnell Douglas], but was simply withdrawn from the temporary work assignment at Edwards, and remained in his current work assignment at Long Beach, doing the same work and receiving the same pay." See Respondent's Reply in Support of Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, at 1-2.

Furthermore, "Aguinaldo concedes on page two, that he failed to apply for naturalization within six months of the date that he first became eligible to apply for naturalization." Id. at 2. Therefore, Respondent argues, Complainant is not a protected individual under 8 U.S.C. § 1324b(a)(3)(B)(i) and cannot maintain this action.

III. *Findings of Fact and Conclusions of Law*

A. Undisputed Facts

Complainant was hired by McDonnell Douglas on April 19, 1989. See Respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted ("Motion"), at 4 (referring to employment information attached to the Motion as Exhibit A). Complainant was continuously employed by McDonnell Douglas from that date until after he filed the complaint. Complaint, ¶ 13(d). Complainant was not fired from his job, and did not receive a reduction in his wage rate from the alleged citizenship discrimination. Complainant's Response to Respondent's Motion to Dismiss, at 2.

Complainant is a citizen of the Philippines. Complaint, ¶ 4. He obtained permanent residence status on July 7, 1987. Id. at ¶ 7. Complainant applied for naturalization on October 13, 1993, and has not yet become a naturalized citizen. Id. at ¶¶ 5 - 6.

B. Legal Standard

The rules for practice and procedure governing these proceedings provide that:

> [A] respondent, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the Administrative Law Judge determines that the complainant has failed to state such a claim, the Administrative Law Judge may dismiss the complaint . . . .

See 28 C.F.R § 68.10.

A motion to dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R § 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (May 18, 1994). In considering such a motion, a federal court liberally construes the complaint and views it in the light most favorable to the plaintiff [or complainant]. Id., citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A court will not dismiss a complaint merely because the plaintiff's allegations do not support the particular legal theory it advances, as the court is under a duty to examine the complaint to determine if the allegations provide a basis for relief under any possible theory. Id. Therefore, as is well established in the federal courts, a complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

C. Motion To Dismiss: Analysis

1. Complainant's complaint is not covered by IRCA

Title 8 U.S.C. § 1324b(a)(1) provides that:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment. . . . (B) in the case of a protected individual . . . because of such individual's citizenship status.

IRCA does not cover discrimination in conditions of employment. See Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 11 (December 2, 1992) (citing Ortiz v. Moll-Tex Broadcasting Co., OCAHO Case No. 92B00106 (July 15, 1992); Ipina v. Michigan Dept. of Labor, 2 OCAHO 386 (Nov. 7, 1991); Huang v. Queens Motel, 2 OCAHO 364 (August 9, 1991)).

Jurisdiction under 8 U.S.C. § 1324b is limited to charges which implicate hiring, recruitment or referral for a fee, or discharge. Alleged discriminatory practices involving compensation, terms, conditions, or privileges of employment, are not covered by IRCA. Rather, claims involving such items as promotions, benefits, salaries, raises and conditions of employment are covered, for example, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. See, e.g., Ipina v. Michigan Dept. of Labor, 2 OCAHO 386, at 11 (Oct.

17, 1991); Fayyaz v. The Sheraton Corp., 1 OCAHO 152, at 5 (April 10, 1990).

Complainant, in his Response to Respondent's Motion to Dismiss, states that the alleged discriminatory act against him involved "the withdrawal of [his] work assignment," and that he was not fired from his job and did not have his salary lowered. While Complainant alleged in his complaint that he was "knowingly and intentionally not hired," the evidence supplied by both Respondent and the Complainant himself supports the conclusion that this complaint involved the withdrawal of a temporary work assignment which included a daily per diem to compensate for relocation, housing and food, not a promotion with a pay rate increase. This withdrawal of a work assignment is a condition of Complainant's employment with Respondent, and therefore is not actionable under IRCA.

2. Complainant is not a protected individual

For a citizenship discrimination claim to be valid, the Complainant must meet an initial requirement of being a "protected individual" under the statute. The term "protected individual" is defined in § 1324b(a)(3) as:

> A citizen of the United States, or . . . an alien who is lawfully admitted for permanent [or temporary] residence, . . . is admitted as a refugee, . . . or is granted asylum.

The statute goes on to explain that individuals in the following categories do not qualify as protected individuals:

> (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period

See 8 U.S.C. § 1324b(a)(3)(B).

Under this statute, for Complainant to validly plea a citizenship discrimination claim he has the burden to demonstrate that he is a protected individual. See Briceno v. Farmco Farms, 4 OCAHO 629, at 14 (April 28, 1994) citing Dhillon v. Regents of the University of California, 3 OCAHO 497, at 12 (March 10, 1993). Under 8 U.S.C. § 1427(a), a permanent resident may file for naturalization only if he or she has resided in the United States for at least five years after being

admitted as a lawful permanent resident. This time period is shortened to three years for permanent residents who have resided continuously in the United States and during those three years have been living in marital union with their citizen spouse, subject to certain conditions pursuant to 8 U.S.C § 1430(a).

Under the guidelines of 8 U.S.C. § 1324b(a)(3)(B), as discussed above, an individual does not have standing to bring a citizenship discrimination claim as a protected individual if they do not apply for naturalization within six months of the time they become eligible to do so, or, if they have applied for naturalization on a timely basis, if they have not been naturalized within two years after the application date. Complainant obtained permanent residence status on July 7, 1987. See Complaint, ¶ 7.

In his complaint Complainant alleges that he is an alien (with citizenship in the Philippines) authorized for employment in the United States. Id. at ¶¶ 2 - 3. Complainant alleges that he applied for naturalization in the United States on October 13, 1993. Id. at ¶ 5.

Under 8 U.S.C. § 1427(a), as discussed above, Complainant was eligible to apply for naturalization five (5) years after obtaining permanent residence status. Therefore, Complainant was eligible to apply for naturalization on July 7, 1992. To be a protected individual for a citizenship discrimination claim under IRCA Complainant would have had to have applied for naturalization within six (6) months of that eligibility date, or on January 7, 1993. As he did not apply for naturalization until October 13, 1993, or fifteen (15) months after becoming eligible, Complainant is not a protected individual and is not protected by IRCA's prohibition against citizenship status discrimination. As he lacks standing to bring such a claim, his claim must be dismissed under 8 U.S.C. § 1324b(a)(3)(B).

3. Complainant's retaliation claim rejected

IRCA provides in pertinent part that:

> [i]t is . . . an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individuals for the purpose of interfering with any right or privilege secured under this section [1324b] because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under under this section . . . .

8 U.S.C. § 1324b(a)(5).

To prevail on a claim of retaliation, Complainant must make out a prima facie case by proving by a preponderance of the evidence that: (1) he had a reasonable, good-faith belief that an IRCA violation occurred; (2) he intended to act or acted on it; (3) Respondent(s) knew of Complainant's intent or act; and (4) Respondent(s) lashed out in consequence of it. See Palacio v. Seaside Custom Harvesting and Zinn Packing Company, OCAHO Case No. 92B00245 (Final Decision and Order) at 9 (August 11, 1994), citing, Zarazinski v. Anglo Fabrics Co. Inc., 4 OCAHO 661, at 17 (July 14, 1994).

Complainant alleges that Respondent retaliated against him for filing a complaint in this case by demoting him. Complaint at ¶ 15. However, Complainant further states that he was not fired and "did not lose his rate of pay." Response to Respondent's Motion to Dismiss, at 2. Therefore, as no demotion took place, and no other retaliatory action is alleged by Complainant, I find that Complainant has failed to state a claim on which relief can be granted as to retaliation under 8 U.S.C. § 1324b(a)(5).

IV. *Conclusion*

I hereby GRANT Respondent, McDonnell Douglas Corporation's, Motion to Dismiss for Failure to State Claim Upon Which Relief Can Be Granted based on my findings that (1) Complainant's allegations are not within my jurisdiction as they are not covered by IRCA; (2) Complainant does not have standing to assert a citizenship discrimination claim under IRCA as he is not a protected individual as defined in 8 U.S.C. § 1324b (a)(3); and, (3) Complainant has failed to state a claim for retaliation under 8 U.S.C. § 1324b(a)(5).

V. *Appeal Process*

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 employer resides or transacts business. 8 U.S.C. § 1324b(i)(1).

IT IS SO ORDERED on this 17th day of November, 1994, in San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge