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

LUIGIA WIESNER, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 95B00005
CIT TOURS, INC., Respondent.	)	

FINAL DECISION AND ORDER
(June 20, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Luigia Weisner, pro se
David Zarfes, Esq.
Alan A. D'Ambrosio, Esq.
for Respondent

I. *Procedural History*

By a charge dated August 9, 1994, Luigia Wiesner (Wiesner or Complainant) alleged that CIT Tours (CIT or Respondent) discriminated against her based on her citizenship status and national origin, practices prohibited by § 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b. Wiesner filed her charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Wiesner was employed as office manager at the New York branch office of CIT. Wiesner alleges that, on or around April 1, 1994, after approximately one year of employment, she was terminated so that CIT could replace her by an alien of Indian descent who was unauthorized for employment in the United States.

By a determination letter dated December 7, 1994, OSC advised Wiesner that it elected not to file a complaint before an administrative

law judge (ALJ) due to "insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. § 1324b." OSC informed Wiesner that she could pursue a private cause of action directly with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

On January 11, 1995, Wiesner filed her OCAHO Complaint in which she reasserted her claims that CIT discriminated against her based on her national origin and citizenship status.

On February 22, 1995, Respondent timely filed an Answer denying all allegations of unlawful and/or improper termination and discrimination. Respondent asserts two affirmative defenses: (1) that OCAHO lacks jurisdiction over this Complaint and (2) that Complainant has failed to state any claim upon which relief can be granted.

On March 2, 1995, Complainant filed an Opposition to Motion to Dismiss the Complaint in which she argued that "[a]part from the fact, that the two so called Affirmative Defenses, supra, are tantamount to motions to dismiss and should have been made as such, they are based on a misleading statement that 'Complainant's replacement . . . is a fully documented worker. . . .'" Opposition at 3.

On March 2, 1995, Respondent filed a letter/pleading in order to "draw . . . attention to the fact that CIT Tours has not yet made a formal motion to dismiss Ms. Wiesner's Complaint." Letter at 1. In addition, Respondent proffers exhibits to support the claim that the employee who replaced Complainant is an authorized alien. The exhibits are photocopies of two Employment Authorization Cards of the substitute employee valid from August 1993 through August 1995.

The pleadings demonstrated threshold questions of jurisdiction. Accordingly, on March 14, 1995, I issued an Order of Inquiry, addressing certain questions to each of the parties. The parties were explicitly advised that, from their answers to the Order of Inquiry, it would be decided "whether Complainant has stated a prima facie case which warrants a confrontational evidentiary hearing or, instead, may be more justly and efficiently disposed of on a paper record."

On March 15, 1995, Complainant filed a second Motion in Opposition to Respondent's Motion to Dismiss or at least what she characterizes as its Motion to Dismiss.

In response to the Order of Inquiry, the parties filed the following pleadings: (1) Affidavit of Complainant dated April 18, 1995, (2) Affirmation of David Zarfes (Attorney for Respondent) dated April 20, 1995, and (3) Affidavit of Silvio Amori (President of Respondent corporation) dated March 14, 1995, but not signed or notarized until April 25, 1995, in which form it was filed on April 27, 1995.

On April 27, 1995, Complainant filed a Motion/Affidavit to Strike Respondent's Affirmative Defenses.

II. *Discussion*

In a case involving allegations of discrimination, a complainant must prove by a preponderance of the evidence "'[1] that he is a member of a class entitled to the protection of . . . [IRCA], [2] that he was discharged without valid cause, and [3] that the employer continued to solicit application for the vacant position.'" Nguyen v. ADT Engineering, 3 OCAHO 489 at 11 (1993) (quoting Potter v. Goodwill Industries, 518 F.2d 864, 865 (6th Cir. 1975) (citing Shah v. General Electric Co., 816 F.2d 264, 268 (6th Cir. 1987)). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); United States v. Marcel Watch Corp., 1 OCAHO 143 (1990).

Once Complainant meets her burden of establishing a prima facie case, a presumption of unlawful discrimination arises and the burden of production shifts to the employer to prove that the discharge was not a mere pretext for discrimination. Dhuria v. Trustees of the University of D.C., 827 F. Supp. 818, 826 (D.D.C. 1993) (citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)). Notwithstanding this shift in burdens, the ultimate burden of persuasion always remains with the complainant to prove that there was discriminatory intent. In other words, once the employer produces evidence "'which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus,'" the complainant bears the final burden of proving that "'the proffered reason was not the true reason for the employment decision [and] that she has been the victim of intentional discrimination.'" Dhuria, 827 F. Supp. at 826 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

In the instant case, to prove that she was qualified and that a non-protected class member was chosen to replace her, Wiesner alleges that, after nearly one year of employment with Respondent, she was fired in April, 1994 without reason and in preference for an

unauthorized alien of Indian nationality, Oswald Athayde (Athayde). She states that, consequently, "my termination was unlawful and discriminatory as prohibited by Law 8 U.S.C. § 1324b. . . ." Opposition to Motion to Dismiss at 2.

In response, Respondent asserts that Athayde is authorized to work in the United States and includes copies of his employment authorizations for 1993 and 1994. As evidence to refute such authorization, Complainant attaches to her Response to the Order of Inquiry an Immigration and Naturalization Service (INS) letter stating that Athayde did not obtain employment authorization until August 4, 1994; she contends that therefore, he was unauthorized at the time of hire. As Complainant acknowledges, however, an alien's employment authorization is granted on an annual basis and therefore the INS letter does not establish that Athayde was not authorized prior to August 4, 1994. At any rate, whatever his status, she has not met her burden of showing prima facie that there was discriminatory intent with regard to her termination.

Respondent states that "Wiesner was hired for the position of office manager at CIT. . . ." Amori Affidavit at 2.

> The position in question required strong organizational and managerial skills. Shortly thereafter, business consideration required CIT Tours to reduce the staff at its Canadian subsidiary, CIT Canada, in Montreal, and to eliminate the position of Chief Financial Officer in that office; the Chief Financial Officer in Canada performed accounting and financial functions for CIT Tours in New York. CIT Tours' management decided to hire a junior accountant/bookkeeper in New York to perform (i) the accounting and financial functions previously performed by the Chief Financial Officer in Canada, and (ii) to function as office manager of CIT Tours' New York office. Mr. Oswald Athayde was selected for this purpose.
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> . . .
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> Mr. Athayde possesses a broad and substantial accounting background and initially was recommended to CIT Tours by the accountant for CIT Tours. Additionally, Mr. Athayde possesses strong organizational and managerial skills.

Id.

It is axiomatic that it is not the judge's role "'to second-guess an employer's business decision, but to look at evidence of discrimination.'" Yefremov v. NYC Dep't of Transportation, 3 OCAHO 562 at 45 n.15 (1993) (citing United States v. General Dynamics Corp., 3 OCAHO 517 at 59 (1993) (quoting Cotton v. City of Alameda, 812 F.2d 1245, 1249 (9th Cir. 1981)). See Nguyen, 3 OCAHO 489 at 12. See also Douglas v. Anderson, 656 F.2d 528, 534 (9th Cir. 1981) (stating "[t]he reason for

a business decision need not meet the unqualified approval of the judge or jury, so long as it is not based on [a protected characteristic]"). Accordingly, I do not decide Complainant's contention that, because she had more experience in the travel industry than her replacement, she would have been comparatively better qualified for the job.

In response to Complainant's assertion that she was discriminated against on the basis of her Italian ancestry and U.S. citizenship, CIT states that it "is a wholly owned subsidiary of an Italian Corporation" which, as implicitly conceded by Complainant, specializes in travel involving Italian-speaking persons. Amori Affidavit at 2. It is obvious from Respondent's filings that a significant number of CIT employees were of Italian origin; the majority were U.S. citizens while Complainant was also an employee. Indeed, Respondent's Response includes a chart indicating that Athayde is only one of a small percentage of non-U.S. citizens on the payroll. The chart of employment which shows CIT's personnel makeup as of March 11, 1994 demonstrates that during Complainant's employment (April, 1993 to April, 1994), CIT employed 15 individuals,[1] only four of whom were not citizens of the United States. Amori Affidavit at 3. Of the four, three, including CIT's president, Silvio Amori, were of Italian citizenship; the other eleven, including Complainant, were U.S. citizens whose national origin does not appear of record. Id. The fact that, substituting for Wiesner, Athayde came on board as a non-U.S., non-Italian is of no significance in light of the dominant U.S. citizen participation and CIT's substantial Italian orientation. Looking at the submissions on motion practice in a light most favorable to Wiesner, there is not a glimmer of basis for concluding that she was discriminated against on the basis of either national origin or citizenship status. While CIT may have terminated Wiesner because of financial or other reasons, it was not because she was of Italian origin or a U.S. citizen.

OCAHO rules of practice and procedure authorize the ALJ to dispose of cases upon motions to dismiss for failure to state a claim upon which

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[1] From the employee chart provided by Respondent, it appears that Respondent combined both CIT's New York and Los Angeles offices to show that CIT employed 15 individuals during Wiesner's tenure. Respondent admits, however, that "[a]t the time Ms. Wiesner's [sic] was hired, CIT Tours employed 11 individuals . . ." and "at the time of Ms. Wiesner's termination, CIT Tours employed 13 individuals. . . ." Amori Affidavit at 4-5. For purposes of this Final Decision and Order, I find that the allegation of national origin discrimination falls within OCAHO jurisdiction as Respondent employed more than three but fewer than 15 individuals for a period of "twenty or more calendar weeks in the current or preceding calendar year. . . ." 42 U.S.C. § 2000e. See also 8 U.S.C. § 1324b(a)(2)(B).

relief can be granted. 28 C.F.R. § 68.10.[2] Ordinarily, such a motion to dismiss is filed by the opposing party and is treated as tantamount to a motion for summary decision. See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").[3]

It is well settled that an ALJ may "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. § 68.38(c). See Adame v. Dunkin Donuts, 5 OCAHO 722 at 6 (1995). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof. In determining whether the movant has met its burden of proof, it must be kept in mind that all evidence and inferences to be drawn there from are to be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Upon submission of specific facts by the moving party, it is incumbent on the other to set forth specific facts showing that there is a genuine issue for trial. United States v. David Nursery, Inc., 4 OCAHO 694 at 8 (1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985)). Absent direct evidence, indirect evidence can establish discrimination. The analysis of such evidence, discussed in Burdine follows accepted principles authored by the Supreme Court in McDonnell Douglas. Here, there is no reason to invoke the McDonnell Douglas construct because patently Wiesner's case contains not a scintilla of proof of discriminatory conduct on the basis of national origin or citizenship status by CIT.

Complainant, a U.S. citizen of Italian national origin claims discrimination at the hands of an Italian-oriented travel agency. CIT's principal, Amori, is Italian as were two of the other non-U.S. personnel

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[2] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

[3] The Federal Rules of civil Procedure are available as a general guideline for the adjudication of OCAHO cases. 28 C.F.R. § 68.1.

while Wiesner was an employee. Eleven of 15 on CIT's payroll during that time were U.S. citizens. Complainant does not dispute Amori's statement that numerous employees in CIT's offices in New York, Los Angeles and Montreal "are of Italian ancestry. . . ." Amori Affidavit at 2-3. This is a case where there is no credibility to the claim of § 1324b discrimination. Complainant simply has no case, prima facie or otherwise.

Based on the Complaint, Answer and submissions in response to the Order of Inquiry, I find that there is no genuine issue as to any material fact and that Complainant failed to state a claim upon which relief can be granted.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, the Answer, and the pleadings filed by both parties. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. Complainant fails to state a claim upon which relief can be granted.

2. The Complaint is dismissed.

All motions and other requests not specifically ruled upon are denied.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 20th day of June, 1995.

MARVIN H. MORSE
Administrative Law Judge