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

TYRONE ROBINSON, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 94B00211
NEW YORK STATE FAMILY COURT, Respondent.	)	

FINAL DECISION AND ORDER OF DISMISSAL
(November 1, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Tyrone Robinson, pro se
Stephen E. Gross, Esq.
for Respondent

I. *Procedural History*

On June 15, 1994, Tyrone Robinson (Robinson or Complainant) filed a charge dated June 8, 1994 with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The charge alleged that the New York State Family Court (NY Court or Respondent) discriminated against Robinson by refusing to accept valid documentation or demanding more or different documents than are required for completing the employment eligibility verification form (Form I-9).

By determination letter dated September 15, 1994, OSC informed Robinson that it "has determined that there is insufficient evidence of reasonable cause to believe your allegations of document abuse are true."

Therefore, OSC stated that it had decided not to file a complaint on Robinson's behalf.

On December 6, 1994, Robinson filed the Complaint at issue against NY Court, alleging citizenship status discrimination in violation of section 102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. § 1324b. In addition, Robinson alleged (1) that he had been retaliated against in violation of § 102, and (2) that Respondent had refused to accept the documents presented by Robinson to prove employment eligibility in the United States.

According to Robinson, he was not hired by NY Court because "I did not present the documentation for U.S. work eligibility the agency demanded." Complaint at 4. With regard to his allegation of retaliation, Complainant asserted that "[s]ince the Unified Court System was informed of my complaint I have been turned down for the same position in the Family and other courts including the Criminal Court of the City of New York for which I was accepted for prior to the complaint." Id. at 6.

On February 24, 1995, OCAHO issued a Notice of Hearing (NOH) which transmitted a copy of the Complaint to Respondent. In addition, the NOH warned the parties that all proceedings or appearances will be conducted in accordance with Department of Justice regulations, appearing at 28 C.F.R. Part 68, a copy of which was enclosed with each party's copy of the NOH.

On March 20, 1995, Respondent filed its Answer to the Complaint denying that it discriminated against Robinson. Respondent asserted that "Complainant failed to appear at the scheduled time and did not follow the procedures he was required to follow to secure an appointment." In addition, NY Court stated that it "declined to hire complainant because he arrived late for the processing of various employment forms, failed to have the required money order needed for fingerprint processing and smelled of alcohol." Moreover, according to Respondent, "[n]o demand was made that complainant satisfy the Form I-9 requirement by submitting all the documents specified in paragraph '17' of the complaint." As an affirmative defense, Respondent asserted that "Complainant has failed to state a claim upon which relief can be granted" because OSC declined to file a complaint after investigating Complainant's charge.

By Order of Inquiry issued on September 22, 1995, I asked the parties to comment on two threshold jurisdictional issues:

(1) whether a complainant is entitled to raise before the Administrative Law Judge a claim under 8 U.S.C. § 1324b not specified in his OSC charge.

. . .

(2) whether NY Court is a state agency immune under the Eleventh Amendment from liability to Robinson under § 1324b.[1]

The Order of Inquiry directed responses to be filed no later than October 27, 1995. The parties were cautioned that failure to respond may result in a ruling adverse to the nonresponsive party.

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[1] Specifically, the Order of Inquiry stated that "although not explicitly mentioned in Respondent's Answer, I cannot be certain whether NY Court's 'failure to state a claim' defense is intended to implicate a claim of immunity under the Eleventh Amendment to the United States Constitution." Order at 2. Although I do not reach that issue in this Order, my preliminary discussion of Eleventh Amendment immunity as found in the Order of Inquiry is set forth here for future reference:

The Eleventh Amendment provides that,

> [t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Although the language of the Eleventh Amendment refers directly only to lawsuits against a state by citizens of another state, judicial interpretation makes clear that it may also serve to bar suits against a state by its own citizens, and by the federal government. See 13 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524 (2d ed. 1985).

It is well-established that state agencies and entities, including state courts, may be understood to act as alter-egos to the state in which role they obtain Eleventh Amendment immunity. See, e.g., Frank H. Julian, The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities, 36 S. TEX. L. REV. 85 (1995). The threshold issue in this case is whether NY Court is a state agency immune under the Eleventh Amendment from liability to Robinson under § 1324b.

Notwithstanding the possible constitutional bar to filing a lawsuit against a state or arm of the state, an exception may apply which allows this § 1324b claim against NY Court. The preeminent exception is found, where it exists, in express statutory abrogation of the Eleventh Amendment by Congress. WRIGHT, supra. Another ground for avoiding Eleventh Amendment immunity exists where there is a basis for finding consent to suit by the state. Alternatively, a respondent entity might be unable to claim immunity because the state is unwilling to extend its immunity to it.

On October 26, 1995, Respondent filed its Response to the Order of Inquiry. Complainant has filed no response.

II. *Discussion*

The result of Robinson's failure to respond to the September 22, 1995 Order is that I have only Respondent's response on which to resolve the issues set forth in the Order of Inquiry.

OCAHO rules of practice and procedure provide that where a party fails to respond to the order of the administrative law judge, the judge may take one or another of certain specified actions "for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay. . . ." 28 C.F.R. § 68.23(c). In accordance with § 68.23(c), failure by Robinson to comply with my Order invites me to conclude that his response would have been adverse to him. See 28 C.F.R. § 68.23(c)(1).

Furthermore, OCAHO regulations provide, in pertinent part, that "[a] complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if . . . [he] fails to respond to orders issued by the Administrative Law Judge . . ." 28 C.F.R. § 68.37(b) and (b)(1). Consistent with OCAHO regulations as well as OCAHO case law,[2] I deem Complainant's failure to respond to my Order to be an abandonment of his Complaint. Accordingly, the Complaint is dismissed. In light of this disposition, I do not reach the issues posed by the Order of Inquiry.

SO ORDERED.

Dated and entered this 1st day of November, 1995.

MARVIN H. MORSE
Administrative Law Judge

[2] See, e.g., Gallegos v. Magna-View, Inc., 4 OCAHO 628 (1994) (holding that a failure to respond to an order requesting information, inter alia, as to whether Gallegos applied for naturalization, to be an abandonment of his complaint); Chavez v. National By-Products, 4 OCAHO 620 (1994) (granting respondent's motion to dismiss on the grounds that complainant failed to reply to an order requesting information). See also Medina v. Bend-Pack, Inc., 5 OCAHO 791 (1995); Palma v. Farley Foods, 5 OCAHO 758 (1995).