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

June 6, 1996

PAUL IWUCHUKWU, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00144
CITY OF GRAND PRAIRIE, Respondent.	)	

ORDER OF INQUIRY

On March 3, 1995, Paul Iwuchukwu (Iwuchukwu or Complainant) filed a charge dated February 27, 1995, with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The charge alleged that the City of Grand Prairie (Grand Prairie or Respondent) discriminated against Iwuchukwu by not hiring him for the position of Traffic Engineer even though he met all the required qualifications for the position.

By determination letter dated July 19, 1995, OSC informed Iwuchukwu that it "has determined that there is insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. §1324b." OSC stated that it had therefore decided not to file a complaint on Iwuchukwu's behalf.

On October 16, 1995, Iwuchukwu filed his Complaint against Grand Prairie alleging citizenship status and national origin discrimination in violation of section 102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. §1324b. Specifically, Complainant alleges that he "met and exceeded all the requirements for the position" listed in Respondent's employment advertisement. Iwuchukwu contends that he "learned that the position was awarded

to one of their employees who do not meet the minimum requirement prescribed [sic] in the job announcement."

On December 5, 1995, the Office of the Chief Administrative Hearing Officer (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 the OCAHO rules of practice and procedure, 28 C.F.R. pt. 68, a copy of which was enclosed with each party's copy of the NOH.

On March 7, 1996, Respondent filed its "Response to Notice of Hearing" (Answer) denying that it discriminated against Iwuchukwu on the basis of national origin and alleging that it cannot admit or deny the citizenship status of Iwuchukwu. Respondent asserted that the Complaint is "not in a form readily capable of response in the formal mode of the the [sic] federal pleading." Complainant acknowledged that Respondent was a finalist for the position of Traffic Engineer. According to Respondent, Complainant was denied the position because one of the candidates had more "direct leadership experience within the structure of the City of Grand Prairie, and a factor in his favor was that he was hired from within, and not a new hire." Answer, ¶VIII.

On April 15, 1996, Complainant filed a gratuitous letter/pleading dated April 4, 1996, responding to the Answer. Complainant details alleged "misrepresentations, distortions, and outright lies" in Respondent's "Position Statement: City of Grand Prairie." Iwuchukwu also relays an incident in which he allegedly overheard Mr. Russell Fox, an Engineering Technician, and another employee talking on the phone "about the possibility of a black man from Africa coming to supervise them."

In response to Complainant's letter, Respondent on May 3, 1996, filed its own gratuitous letter/pleading, denying discrimination and offering to provide information identifying employees who were not born in the United States. Respondent also expressed an inability to articulate exactly why a person was not hired and suggested that perhaps its interviewers had sensed a side to Iwuchukwu which was now revealed in his letter of April 4, 1996 as a basis for not hiring him for the Traffic Engineer position.

Lastly, on May 24, 1996, Complainant, again uninvited to do so, responded to Respondent's letter/pleading, reiterating that his basis for the citizenship status discrimination claim relates to the conversation between the Grand Prairie employees who had discussed the possibility of a black man from Africa in a supervisory position.

Before I can address the merits of Iwuchukwu's claims, certain threshold considerations must be addressed.

First, Iwuchukwu alleges discrimination based both upon citizenship status and national origin. However, as OCAHO case law makes clear, an administrative law judge (ALJ) only has jurisdiction pursuant to 8 U.S.C. §1324b over a claim of discrimination based upon national origin where there are four or more but fewer than fifteen employees. Since City of Grand Prairie asserts in its Answer, and it is undisputed that it employs more than fourteen employees, it would appear that OCAHO jurisdiction can only pertain to citizenship status, and not to national origin discrimination. *Huang v. United States Postal Service,* 2 OCAHO 313 (1991), *aff'd.* 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erols',* 1 OCAHO 144 (1990); *Adatsi v. Citizens & Southern National Bank of Georgia,* 1 OCAHO 203 (1990), *appeal dismissed*, No. 90–8943 (11th Cir. 1991); *Bethishou v. Ohmite Mfg.,* 1 OCAHO 77 (1989); *Romo v. Todd Corp.,* 900 F.2d 1 OCAHO 25 (1988), *aff'd., United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990).

Second, although not explicitly mentioned in Respondent's Answer, I cannot assume from Respondent's assertion that it could not respond to the Complaint because of its "form," that Respondent intended to waive any claim of immunity it might have under the Eleventh Amendment to the United States Constitution. Because if upheld such a claim ousts my jurisdiction, it is necessary to reach and resolve Respondent's constitutional posture.

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,[1] may be understood to act as the alter-egos to the state in which role they obtain the 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). Therefore, the initial inquiry in this case is whether City of Grand Prairie is a state agency immune under the Eleventh Amendment from §1324b liability to Iwuchukwu.

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

So far as I am aware, the question of state sovereign immunity has arisen in the context of §1324b only in the Tenth Circuit.[2] That court has held that the anti-discrimination provisions of IRCA do not contain an express waiver of states' rights under the Eleventh Amendment. *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), *reh'g denied* (Nov. 21, 1994) found that the charging party failed to demonstrate that §1324b contains "explicit and unambiguous language that waives the immunity of the United States." *Id.* at 509.

[1] See, e.g. Richards v. State of New York App. Div., 597 F. Supp. 689 (1984); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (1987); Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600 (9th Cir. 1986); May v. Supreme Court of the State of Colorado, 508 F.2d 136 (1974).

[2] Compare Kupferberg v. University of Oklahoma, 4 OCAHO 709 (1994) and Hensel v. Oklahoma City Veteran's Affairs Medical Ctr., 3 OCAHO 532 (1993), appeal dismissed, 38 F.3d 505 (10th Cir. 1994), reh'g denied, (Nov. 21, 1994) with Roginsky v. DOD, 3 OCAHO 426 (1992).

Although not necessarily controlling, there are parallel cases invoking sovereign immunity principles in the context of *federal liability* for alleged violations of §1324b. In *General Dynamics Corporation v. United States of America: Office of the Chief Administrative Hearing Officer,* 49 F.3d 1384 (9th Cir. 1995), the Ninth Circuit held that the United States was immune from General Dynamic's claim as the prevailing party for shifting of attorney's fees because there is no expression in the statute waiving sovereign immunity. *Id.* at 1385–1387.

In the federal context, there is OCAHO case law which found a waiver of sovereign immunity in §1324b. The ALJ in *Roginsky v. DOD,* 3 OCAHO 426 (1992), held that "[u]pon consideration of IRCA as a whole, its legislative history, its relationship to Title VII, and its implementation by the responsible federal agencies, I confirm the earlier conclusion that Congress intended to and did waive sovereign immunity under 8 U.S.C. §1324b." *Id.* at 14. *Accord, Mir v. Federal Bureau of Prisons,* 3 OCAHO 510 (1993). More recently, however, in *Kasathsko v. Internal Revenue Service*, 6 OCAHO 840 (1996), the ALJ reached the opposite conclusion. The *Kasathsko* ALJ relied on Supreme Court precedent which the *Roginsky* and *Mir* ALJ had earlier distinguished to the effect that waiver "cannot be implied, but must be unequivocally stated in the language of the statute." *Kasathsko,* 6 OCAHO 840 at 5, citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v. King*, 395 U.S. 1, 4 (1969). *Kasathsko* holds that absent a clear and explicit waiver, 8 U.S.C. §1324b does not waive federal sovereign immunity. *Id.* at 7.

Most recently, the Supreme Court addressed state sovereign immunity from suit in federal court in *Seminole Tribe of Florida v. Florida,* 116 S.Ct 114 (1996). The Court found that Congress unmistakably made clear its intent to abrogate state sovereign immunity but that its enactment lacked any constitutional underpinning so as to grant Congress such power.

This Order invites the parties to comment on the viability of Complainant's national origin discrimination charge and calls for a discussion as to state sovereign immunity in light of *Seminole, Kupferberg*, and *Hensel*, as well as federal and state case law and other sources interpreting the application of the Eleventh Amendment to state entities such as City of Grand Prairie.

Responses to this Order of Inquiry will be timely if filed *no later than July 8, 1996*. The parties are cautioned that failure to respond may result in a ruling adverse to the nonresponsive party. This Order does not impair the ability of a party to file a dispositive motion at any time in accord with the rules of practice and procedure of this Office, 28 C.F.R. pt. 68.

SO ORDERED:

Dated and entered this 6th day of June, 1996.

MARVIN H. MORSE
Administrative Law Judge