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

August 9, 1996

EARL RUSSELL HORNE, JR., Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 96B00050
TOWN OF HAMPSTEAD, Respondent.	)	

ORDER CONFIRMING WITHDRAWAL OF COMPLAINT

MARVIN H. MORSE, Administrative Law Judge

I. *Procedural History*

On December 28, 1995, a charge was filed in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on behalf of Earl R. Horne, Jr. (Horne or Complainant) by John B. Kotmair, Jr. (Kotmair). The charge alleged that the Town of Hampstead, Maryland (Respondent) discriminated against Horne on the basis of both national origin and citizenship status on October 15, 1994, by not honoring his "statement of citizenship" and "affidavit of constructive notice" documents to support his claim that he was not subject to withholding of income taxes. In addition, the charge alleged that Respondent committed document abuse by refusing to honor these documents.

By an undated determination letter, OSC informed Kotmair, who as described by OSC was "listed as the representative" for Horne, that OSC "has determined that there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin under 8 U.S.C. §1324b." OSC also "determined that there is no reasonable cause to believe that

they state a cause of action for document abuse under 8 U.S.C. §1324b (a) (6)." Finally, OSC advised that "these charges were not timely filed." Therefore, OSC said it would not file a complaint on Horne's behalf.

On May 14, 1996, a Complaint was filed in the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status and national origin discrimination and document abuse in violation of 8 U.S.C. §1324b. The Complaint was filed by Kotmair on Horne's behalf pursuant to a "Privacy Act Release Form and Power of Attorney" from Horne to Kotmair dated May 2, 1996. Specifically, the Complaint alleged that Respondent refused to accept "statement of citizenship" and "affidavit of constructive notice" as documents presented to show eligibility to work in the United States even though "[b]oth documents assert the statutorily secured rights of U.S. Citizens to receive [sic] all money due as Citizens are not to be treated as Aliens for any purpose, reason, or practice. . . . "

On June 12, 1996, 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 would be conducted in accordance with OCAHO rules of practice and procedure (Rules), 28 C.F.R. pt. 68 (1995). A copy of the Rules was enclosed with each party's copy of the NOH. The NOH assigned the case to me.

On June 28, 1996, Respondent, by counsel, addressed a letter to Complainant stating that October 15, 1994, represents the date on which the alleged unfair practices occurred, and that Complainant's charge was not timely filed with OSC within the 180-day statutory limitation. The letter proposed to Complainant that he withdraw his Complaint by July 7, 1996. The letter promised that in the event of such withdrawal, Respondent would not take further action, would not incur the expense of preparing and filing an Answer and Motion to Dismiss, would not incur the costs of defending the Complaint, and would not file a claim for award of attorneys fees pursuant to 8 U.S.C. §1324b (h).

On July 3, 1996, Kotmair addressed a letter by facsimile mail to Respondent's counsel referencing his June 28, 1996, letter. Kotmair stated, "The facts and the law do not restrict [Horne] from resubmitting of his Statement of Citizenship and reasserting of his other rights, and if you wish he will do so and begin the Complaint process

with the DOJ again." Kotmair requested that Respondent's counsel respond by July 5, 1996, with a decision as to whether Respondent would proceed with the timeliness argument or waive the timeliness issue in order to argue other issues.

By a "Complainant Request for Withdrawal of Complaint" dated July 10, 1996, filed July 12, 1996, Kotmair, as "Power of Attorney for Mr. Earl Russell Horne, Jr.," requested that the Complaint be withdrawn and the case dismissed.

On July 12, 1996, Respondent filed its Answer dated July 11, 1996, including affirmative defenses. The affirmative defenses contend that: (a) the Complaint should be dismissed because it was filed under a power of attorney which does not authorize Kotmair to represent Complainant before OCAHO; (b) the Complaint is barred by the statute of limitations; and (c) Complainant's allegations of discrimination and document abuse should be dismissed for failure to state a claim upon which relief may be granted and should be dismissed also because Complainant failed to demonstrate that he was treated differently than similarly situated employees. Respondent requested fee shifting on the basis that Complainant's action is not based in law or fact, and that Respondent would be the prevailing party.

On July 16, 1996, Respondent filed its "Response to Complainant's Request For Withdrawal of Complaint," consenting to withdrawal of the Complaint only if the Complaint were dismissed *with* prejudice, in which case it would give up its fee claim. Respondent seeks an assurance that there be "no subsequent reassertion of Complainant's rights in this forum under the same or a similar set of facts. . . ." Attached to Respondent's July 16, 1996, filing were two items: Exhibit 1, a letter from Kotmair to Respondent's counsel dated July 3, 1996 (summarized above at page 2), and Exhibit 2, a letter from Complainant to Respondent dated July 15, 1996. Complainant's July 15 letter states that "due to the failure on the part of the town to proceed with the case in an effort to expedite matters, I have dismissed my complaint to the DOJ based on the acknowledged issue involving time-frame discrepancy. Therefore, we simply must begin the process again."

On July 19, 1996, Kotmair, as "Power of Attorney for Mr. Russell Horne, Jr.," filed "Complainant's Notification of the Lack of Authority of the Administrative Law Judge to Award Reasonable

Attorney's Fees, Grant Withdrawal With Prejudice, and Collaterally Estop or Bar Rights to Future Complaints." Kotmair states that the case has already been withdrawn and takes issue with Respondent's filing of July 16, 1996.

II. *Discussion*

A. *Dismissal without Prejudice*

Requests to withdraw complaints are not specifically provided for in the Rules, which, however, expressly refer to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance "in any situation not provided for or controlled by these [R]ules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. §68.1 (1995). Complainant's Request is akin to a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(i) which provides that, "an action may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment. . . ." Complainant's Request was served on July 10, 1996. Respondent's Answer was served a day later, on July 11, 1996. Both were served by mail, and were filed on July 12, 1996. Filing and service of documents by mail is provided for at Rule 28 C.F.R. §68.6(a).

I note that a *request* for withdrawal of the Complaint was filed, not a notification of withdrawal or dismissal. Requests and motions must both be ruled on by a judge in order to take effect. Once filed, however, a notice of dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i), is self-executory. In the present case, Complainant's intent to withdraw was clear, despite his failure to more appropriately caption his pleading as a "Notice of Dismissal." Complainant additionally failed to make reference to Fed. R. Civ. P 41(a)(1). As the Fifth Circuit noted in *Williams v. Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976), "Although Rule 41(a)(1) was not cited in the Motion for Dismissal, there is no question that plaintiffs were acting pursuant to it. That it was styled a 'Motion for Dismissal' rather than a 'Notice of Dismissal' is, in our opinion, a distinction without a difference."

As Complainant served his request for withdrawal a day prior to Respondent's service of its Answer and considering Complainant's clear intention to unilaterally dismiss his Complaint as buttressed by the choice of language in the July 19, 1996 filing, this case must be dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(i). Accordingly, the

Complaint is dismissed without prejudice, and Respondent's objections are overruled. This is the first dismissal of this case. If it were otherwise, Fed. R. Civ. P. 41(a)(1) would authorize me to dismiss with prejudice, notwithstanding Complainant's preference not to do so. While this dismissal does not represent an adjudication on the merits or otherwise, the discussion below is prompted by Complainant's suggestion that he contemplates another effort at once again confronting Respondent in a similar fashion.

B. *Other Relevant Issues*

In recognition that Complainant contemplates, by his July 15, 1996, letter revisiting this situation, the parties are on notice as follows:

First, in Complainant's Charge filed with OSC by Kotmair dated December 16, 1996, Complainant identified that Respondent has "15 or more employees." Complainant is advised that generally in such circumstance, "[a]s has been held in a number of cases: jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. S [sic] 1324b (a) (1) (A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees." *Pioterek v. Anderson Cleaning Systems, Inc.*, 3 OCAHO 590, at 2 (1993) (citations omitted). *See* 8 U.S.C. §1324b (a)(2)(B).

Second, the Eleventh Amendment to the United States Constitution 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." Inquiry should be made as to whether the Town of Hampstead is a state entity immune from suit under the Eleventh Amendment and from §1324b liability to Complainant. If Respondent successfully establishes this immunity as a bar, then OCAHO jurisdiction would be ousted.

Third, the file is replete with ambiguities regarding the relationship between Kotmair and Complainant such as to raise doubts about Kotmair's authority to represent Complainant. Of two "Privacy Act Release Form And Power of Attorney" documents in the file, the one dated December 1, 1995, relates to the "Equal Employment Opportunity Commission" and the document dated May 2, 1996, relates to "Town of Hampstead." Both are limited to in-

quiry and procurement of "information and any and all authenticated copies of the records pertaining to any matter involving: the withholding of taxes . . . for the purposes of persuading the release of monies due [Horne] by the IRS." These documents do not authorize Kotmair to file or act on Complainant's behalf in any case before an Administrative Law Judge (ALJ).

There is an apparent ambiguity as to Kotmair's representation. The term "pro se" designates an individual who appears in his own behalf, "as in the case of one who does not retain a lawyer and appears for himself in court." Black's Law Dictionary 1099 (5th ed. 1979). Here, there are pleadings which reference Complainant's "pro se" status while simultaneously identifying Kotmair as Complainant's representative: (a) the Complaint filed May 14, 1996, with "pro se" caption and signature of Kotmair under "power of attorney"; (b) "Complainant [sic] Request for Withdrawal of Complaint" filed July 10 1996, with "pro se" caption and signature of Kotmair as "Power of Attorney"; (c) "Complainant's Notification of the Lack of Authority of the Administrative Law Judge to Award Reasonable Attorneys Fees, Grant Withdrawal with Prejudice, and Collaterally Estop or Bar Rights to Future Complaints" filed July 19, 1996, with "pro se" caption and signature of Kotmair as "Power of Attorney." Complainant is either represented, or he is not, and cannot have it both ways.

Fourth, 8 U.S.C. §1324b (h) and Rule 28 C.F.R. §68.52 (c) (2) (v) both authorize discretionary fee-shifting: "The Administrative Law Judge in his or her 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." "Case law has interpreted 'prevailing party' to mean the party who has succeeded on any significant claim which afforded him some of the relief he sought, either pending the suit, during the actual progress of the suit, during litigation or at the end of litigation." *Jasso v. Danbury Hilton & Towers,* 3 OCAHO 566, at 4 (1993). *See Wije v. Barton Springs Edwards Aquifer Conservation District*, 5 OCAHO 785, at 52–57 (1995).

In *Wije,* assessing attorneys fees of $51,530.34 against the complainant for pursuing meritless claims, the ALJ noted congressional intent to "award reasonable attorneys fees to prevailing parties against whom or which . . . charges had been unreasonably brought." *Wije,* 5 OCAHO 785, at 53. Congress "prudently and quite fairly im-

posed a concomitant duty of proof namely, that those pursuing . . . causes of action demonstrate the efficacy of their charges by providing a preponderance of evidence in support." *Id.*

Finally, I note again Complainant's letter dated July 15, 1996, and Kotmair's letter dated July 3, 1996, which both express Complainant's intention to set up Respondent for a second litigation based on a similar factual scenario. It appears highly unlikely that Complainant's resubmission to Respondent of his statement of citizenship and similar actions to those taken by him vis a vis Respondent here, will yield a different result from OSC or Respondent. OCAHO precedent provides a relevant caveat against such an entrapment effort. *See Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991) (holding that "[n]othing in the logic, text or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment" and that refusal to provide a social security number does not implicate "discrimination justifiable under IRCA."). *Accord Westendorf v. Brown & Root Inc.*, 3 OCAHO 477, at 10 (1992) (finding no violation of 8 U.S.C. §1324b (a)(6) where the employer "did not request that Complainant produce his social security card in connection with the preparation of section 2 of his Form I–9. . . . ").

Pursuant to Fed. R. Civ. P. 41(a)(1)(i), this order confirms voluntary dismissal of the Complaint without prejudice.

SO ORDERED.

Dated and entered this 9th day of August, 1996.

MARVIN H. MORSE
Administrative Law Judge