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

June 19, 1997

FREDERICK J. HARRIS, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00082
HAWAII GOVERNMENT EMPLOYEES ASSOC., Respondent.	)

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Background*

On May 8, 1996, Frederick J. Harris (complainant or Harris), filed a charge with the Office of Special Counsel (OSC), U.S. Department of Justice, in which he alleged that Hawaii Government Employees Association (respondent) committed unfair immigration-related employment practices in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA). That charge concerned Harris' March 28, 1996 letter application for employment at the respondent association, in response to an advertisement published in the March 24, 1996 edition of The Honolulu Advertiser concerning a Communications Specialist position.

More specifically, complainant, who identified himself as a Canadian national who became a naturalized U.S. citizen on October 1, 1996, alleged that the respondent association had violated the provisions of 8 U.S.C. §1324b in three manners namely, citizenship status discrimination, retaliation for his having asserted those IRCA rights protected under 8 U.S.C. §1324b, and by also having engaged in document abuse, by reason of respondent's having refused to accept a valid document or by having demanded more or different

documents than those required for completing the Immigration and Naturalization Service (INS) Form I–9. Harris also advised that the respondent association employed 15 or more persons at all times relevant.

On June 20, 1996, following its investigation of complainant's charges, OSC forwarded a determination letter to Harris in which he was advised that OSC had determined that there was insufficient evidence of reasonable cause to believe that the respondent association had discriminated against him in the manners he had alleged in his May 8, 1996 charge. For that reason, OSC advised complainant that it would not file a complaint on his behalf with this Office.

In that correspondence, also, OSC advised Harris of his right to file a private action with this Office if he filed a complaint within 90 days of his receipt of that determination letter.

On July 19, 1996, Harris timely filed a Complaint with this Office, but alleged only two violations of IRCA, as opposed to the three violations set forth in his May 8, 1996 OSC charge. In the instant Complaint, Harris did not reallege that respondent engaged in document abuse. Instead, he alleged only that on or about May 2, 1996, respondent committed national origin discrimination against him and subjected him to retaliation for his having filed an unrelated claim of national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (1982) (Title VII), with the Honolulu, Hawaii Office of the Equal Employment Opportunity Commission (EEOC) on November 1, 1995, presumably in connection with Harris' having filed for another position at the respondent association prior to that date.

It should be noted that on December 13, 1995, the Honolulu, Hawaii Office of EEOC advised Harris in writing that his earlier charge had been dismissed because their investigation disclosed no Title VII violations.

In his July 19, 1996, OCAHO Complaint, Harris stated that he did not know whether respondent had also discriminated against him because of his citizenship status. Owing to that fact, complainant has waived any claim of that nature because the pertinent procedural rule, 28 C.F.R. §68.7(b)(3), mandates that complaints shall contain a clear and concise statement of facts for each violation alleged

to have occurred. *George v. Bridgeport Jai-Alai*, 3 OCAHO 537, at 7 (1992). Since the Complaint recites only two (2) allegations, an unfair immigration-related employment practice based upon national origin, as well as a claim of alleged retaliation, our areas of inquiries and discussion will be confined accordingly.

On August 19, 1996, the respondent filed a responsive pleading that is sufficiently detailed to constitute denials of both allegations set forth in the July 19, 1996 Complaint.

On September 9, 1996, complainant telefaxed a letter to this Office requesting a continuance of this matter for 90 days because of his required absence from the United States. Harris' request was granted and an order was entered staying proceedings until December 9, 1996.

On December 16, 1996, complainant telefaxed a letter to this Office requesting that he be provided counsel, whose legal fees would be paid by the federal government, since he no longer had the personal resources to prosecute his claims further or to hire counsel in this matter. He also advised that in the event that his request for counsel was denied, he would move to voluntarily dismiss the Complaint without prejudice to refiling.

On January 6, 1997, the respondent association filed a pleading captioned Motion to Dismiss Complaint, together with a supporting memorandum, asserting that the respondent association is a "labor organization engaged in an industry affecting commerce", as that term is defined in sections 2000e(d) and (3) of Title VII. Respondent further urges that given that circumstance, this Office does not have subject matter jurisdiction since the pertinent provision of IRCA provides that any national origin claims covered under 2000e.2 of Title VII are exempted. Respondent further maintains that in view of that fact complainant's national origin discrimination claim must be filed with EEOC, as opposed to this office.

Complainant has not filed a response to respondent's pending dispositive motion.

II. *Discussion*

The previously-mentioned December 16, 1996, telefaxed letter of complainant also included allegations that he had been compelled to

leave the United States because of respondent's discriminatory practices. Some of the more relevant portions of that letter follow:

> . . . the plain fact of the matter is that I am a United States citizen who has been driven from the United States to my country of origin by the discriminatory employment practices of the above-styled employer. . . .
>
> . . . I no longer have the personal resources either to prosecute further these matters or to obtain legal counsel to assist me so that the matters can be heard . . . I respectfully request that the honorable court consider [my] complaint on the basis of the information I have provided to date and on that basis decide whether the U.S. Department of Justice will authorize the complainant to engage competent legal counsel whose professional fees are to be paid for by the United States government . . . absent legal counsel I will be compelled to file a Motion to the Court where I will request dismissal without prejudice . . . with the related costs to be borne by the respective parties. . . .

Complainant did not provide respondent with a copy of that telefaxed letter, resulting in respondent not having been advised of those requests and allegations, as required under the procedural rules. *See* 28 U.S.C. §68.36.

Harris' request that he be provided counsel at the government's expense is not well taken since neither the applicable OCAHO regulations nor constitutional due process provide for such authorization. *See* 28 C.F.R. §68.33(b); *United States v. Carpio-Lingan*, 6 OCAHO 871, at 3 (1996).

In its motion to dismiss, as noted earlier, respondent argues that the EEOC has sole jurisdiction over complainant's claims because it is defined as a labor organization under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq*. (1982). That argument, however, is based upon a misunderstanding of the parameters that determine which agency may exercise jurisdiction over discrimination claims.

It is well settled that the provisions of Title VII confer upon EEOC exclusive jurisdiction over claims of national origin discrimination involving any employer or other entity having 15 or more employees. In the event the employer has less than 15 but more than three (3) employees, exclusive jurisdiction over such claims is conferred upon OCAHO. These statutory limitations concerning the proper fori for claims of national origin discrimination, however, do not extend to and thus deprive OCAHO of its exclusive jurisdiction over claims in-

volving retaliation against protected individuals asserting rights under IRCA, as opposed to Title VII.

The term "employer" or "entity" is not defined in 8 U.S.C. §1324b nor in the implementing regulations, but the latter define "employer" as "a person or entity, including anyone acting directly or indirectly in the interest thereof, who engages the services of an employee to be performed in the United States for wages or other remuneration." 8 C.F.R. §274a.1(g). This definition has previously been applied to determine allegations of discrimination under 8 U.S.C. §1324b and is sufficient to encompass labor unions, thus muting respondent's argumentation. *See Rusk v. Northrop Corporation and Department of Defense*, 4 OCAHO 607, at 14 (1994).

Thus, with respect to this claim of national origin discrimination, we need only determine whether the respondent association employs 15 or more employees during the period in question. In his original charge filed with OSC, and throughout these proceedings, complainant has alleged that respondent employed 15 or more employees. Accordingly, respondent is entitled to dismissal of this claim of discrimination based upon national origin.

Therefore, since OCAHO is without subject matter jurisdiction to hear the national origin claim, that allegation is hereby ordered to be dismissed with prejudice to refiling.

Turning now to Harris' claim that respondent wrongfully retaliated against him for having asserted his IRCA rights set forth in 8 U.S.C. §1324b. In order to prevail on that claim, complainant must show: (1) that he engaged in a protected activity; (2) that respondent was aware of the protected activity; (3) that he suffered adverse treatment following the protected activity; and (4) that there is a causal connection between the protected activity and the adverse action. *See United States v. Hotel Martha Washington Corp.*, 5 OCAHO 786, at 5 (1995).

As this prima facie burden of evidence suggests, this Office has subject matter jurisdiction over a claim of retaliation only when that particular claim implicates a right or privilege secured under section 1324b, or involves a proceeding under that section. *See* 8 U.S.C. §1324b(a)(5); *see also Forden v. Griessbach*, 5 OCAHO 735, at 16 (1995); *Yohan v. Central State Hosp.*, 4 OCAHO 593, at 9 (1994).

Complainant's retaliation claim rests upon the assumption that in having filed an EEOC claim, as opposed to having filed a claim with OSC, he has asserted an IRCA right or privilege secured under section 1324b. Whether that conduct is regarded as a protected activity under IRCA for purposes of the retaliation provisions has never been explicitly addressed in prior OCAHO rulings. However, in *Cruz v. Able Service Contractors, Inc.*, 6 OCAHO 837, at 10 (1996), the Administrative Law Judge noted that courts liberally construe remedial anti-retaliation provisions to encompass a broad range of conduct.

We need not address that issue, because it is quite clear that he has failed to meet additional elements of his prima facie case. For example, complainant provided the following statement of facts in support his retaliation claim:

> Employer sent me a letter stating "we are currently considering a handful of other applicants . . . and at this point in time we feel comfortable that a decision will be made from this group." Employer would consider "other" applicants, thus implying it would consider others, but not me.

These allegations by Harris, which must be taken as true, fail to establish a causal link between the protected activity and the adverse action that would properly satisfy the fourth element of his prima facie case.

Moreover, even assuming that Harris' evidence had presented a prima facie case sufficient to permit an inference of retaliatory motive, respondent has successfully articulated with specificity a legitimate, non-discriminatory reason for not having hired him, or even have granted him a pre-employment screening interview.

Respondent's evidence also discloses that on or about March 28, 1996, the date of Harris' employment application letter, respondent received some 94 applications for the advertised position of Communications Specialist. Given that overwhelming response, and in accordance with the unambiguous wording of its newspaper advertisement, respondent considered only those applicants who possessed a bachelor's degree in journalism and had two or more years of demonstrated journalism writing experience. Only those applicants who met those criteria, some 42 in all, were selected for further consideration and of that number, approximately five were interviewed, including the person ultimately hired.

After carefully reviewing the materials submitted by complainant, respondent was unable to determine whether Harris had the requisite writing experience, and on that basis alone, declined to extend further consideration to his application. The respondent association had every right to establish the non-discriminatory experience criteria which it applied to the 94 applicants and given that fact it is quite discernible that Harris' national origin played no part in that legitimate screening mechanism. It is equally apparent that his earlier and unrelated EEOC filing against respondent was not considered or given any weight, either, and thus that filing cannot reasonably support Harris' claim of retaliation.

In summary, complainant has not provided the required probative evidence to demonstrate a genuine dispute under this factual scenario. Instead, Harris has sought to delay an expeditious determination of this matter, has made unsubstantiated allegations against the respondent and seeks dismissal without prejudice on the basis that he cannot afford to pursue his claims at this time, leaving respondent with the prospect of having to expend additional resources to defend these unmeritorious claims at a later time.

Accordingly, and because the respondent's motion to dismiss is well taken, complainant's retaliation claim is also being hereby ordered to be dismissed with prejudice to refiling.

Order

In view of the foregoing, complainant's July 19, 1996, Complaint, which alleged unfair immigration-related employment practices, consisting of national origin discrimination and retaliation, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b(a)(1)(A) and (a)(5), is hereby ordered to be dismissed with prejudice to refiling.

All motions and requests not previously disposed of are hereby denied.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.