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

December 5, 1997

AHADU TADESSE,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 97B00118
UNITED STATES POSTAL)
SERVICE,)
Respondent.)
)

ORDER DISMISSING COMPLAINANT'S NATIONAL ORIGIN CLAIM, GRANTING OSC'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, DENYING RESPONDENT'S MOTION TO DISMISS, AND GRANTING RESPONDENT'S REQUEST TO FILE EXHIBITS

1. Procedural History

On November 11, 1996, Ahadu Tadesse, a putative work-authorized alien,[1] filed a Charge with the United States Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). Tadesse alleged that on October 15, 1996 the United States Postal Service committed document abuse by refusing to accept as proof of eligibility to work in the United States: (1) "the I–551 stamp on . . . [his] passport," and (2) "the receipt from Immigration & Naturalization Service for the Replacement of . . . [his] registration card." Tadesse claimed that:

> They insisted that I will not be hired unless I bring the plastic alien registration card. The confirmation by Immigration Officer here about my status did not help.

OSC Charge at ¶9.

[1]Alien Registration No. 44895084.

By letter dated March 18, 1997, OSC informed Tadesse that "there is not reasonable cause to believe the charge is true . . . but that the [OSC] investigation is not concluded," and that he had the right to file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days.

On June 4, 1997, Tadesse filed an OCAHO Complaint. He identifies himself as a citizen of Ethiopia, who obtained permanent resident status on December 7, 1995. Tadesse alleges that on October 15, 1996, in St. Paul, Minnesota, the Postal Service discriminatorily refused to hire him because of his citizenship status and national origin, and committed document abuse by refusing to accept for employment eligibility verification purposes his I–551 passport stamp and a receipt from the INS confirming that he had applied for a replacement alien registration card. On June 17, 1997, OCAHO issued a Notice of Hearing.

On July 25, 1997, the Postal Service filed its Answer to the Complaint, admitting that Tadesse "was not hired because he did not produce a Form I–551 indicating permanent resident status," but asserting that the employee "who disqualified the Complainant erred in not accepting the Complainant's passport stamped for 'I–551,' and thus, failed to follow postal regulations instructing postal officials to accept such documents." As an affirmative defense, the Postal Service contends that Tadesse fails to state a claim upon which relief can be granted,

> in that there was no intentional discrimination as required by 8 U.S.C. 1324b(a)(1)(1966) because the complainant was not selected through administrative error and other individuals of his national origin were selected.

Id.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009, at *3009–670, §421, amended Section 274B(a)(6) of the Immigration and Nationality Act (codified as 8 U.S.C. §1324b(a)(6)), effective September 30, 1996, to the following effect:

> A person or entity's request . . . for more or different documents than are required . . . or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related labor practice ***if made for the purpose or with the intent of discriminating against an individual*** [in violation of the prohibition against national origin or citizenship status discrimination] . . .

8 U.S.C. §1324b(a)(6) (emphasis added).

By Order dated October 21, 1997, I directed Respondent to brief its understanding of the meaning of the terms "for the purpose or with the intent of discriminating." Asking OSC to assist the forum by providing its understanding of the impact of the new terminology, I invited a motion, either as *amicus curiae* or party intervenor, to file its comments. I also invited Complainant to file comments. Both OSC and the parties were asked to address the intent standard in the context of OCAHO caselaw interpretations under the predecessor statute, with particular attention to the legislative history of the amendment, with specific reference to Senator Alan K. Simpson's April 30, 1996 remarks during Senate floor debate.[2]

On December 1, 1997, Complainant, Respondent (in the form of a dispositive motion), and OSC filed timely responses to the October 21, 1997 Order.

Tadesse responds that the Postal Service's agent was "a hiring officer, someone in authority and in a position to know the policies and regulations of the Postal Service." Comment, ¶4. Therefore, reasons Tadesse, the agent's action was not error, as the Postal Service claims. Tadesse also asserts that:

> the employee who refused to accept the document asserted at the time that the action was taken in conformity with the policy of the Postal Service. This statement by the postal employee was confirmed to the attorney from the Office of the Special Counsel who tried to resolve the matter at the time.

Comment, ¶3. Tadesse further recites that:

> Respondent . . . never expressed any concern or suspicion on the authenticity of the document and instead insisted on a specific document (the plastic green card). . . . Respondent was not willing to accept any confirmation by the local immigration office despite repeated telephone calls by an immigration officer.

Comment, ¶¶1, 2.

The Postal Service moves to dismiss, claiming that there is no evidence of *intentional* discrimination, and provides a Memorandum in Support. Implying that as a result of the 1996 amendment to §1324b(a)(6) a complainant must now prove actual *animus* on an employer's part, the Postal Service argues that its Personnel

[2] *See* 142 Cong. Rec. S4401–01, S4410–S4412 (daily ed. Apr. 30, 1996) (statement of Sen. Simpson).

Operations Handbook, EL–311, §312.21 (Exhibit 1),[3] embodies a policy of hiring permanent resident aliens as well as citizens. The Postal Service suggests that, absent some overt proof of discriminatory intent, this policy immunizes it against discrimination charges:

> the Postal Service's actions . . . show no evidence of an intent to discriminate. There is no dispute that postal policy appropriately required that Complainant's documentation be accepted. . . . [T]here is no evidence that other qualified aliens were excluded or that other persons of Complainant's national origin were excluded from hiring.

Memorandum in Support, pp. 4–5. The Postal Service requests permission to submit exhibits referenced in (but not included with) its Memorandum: Exhibit 2, a June 11, 1992 POSTAL BULLETIN "making clear that . . . documents . . . which bear an I–551 stamp [such as that proffered to the Postal Service by Tadesse] may . . . be accepted to demonstrate permanent resident status," and Exhibit 4, a declaration of Brenda Tolbert, to the effect that, among the approximately 500 people hired at the time Tadesse applied, were "persons of complainant's national origin as well as permanent resident aliens." Memorandum in Support, p. 2. On December 2, the Postal Service filed Exhibit 2 ("New Employment Documentation Requirements," POSTAL BULLETIN, June 11, 1992, p. 24, 21817).

The Postal Service includes with the Memorandum: Exhibit 1, an extract dated April 1990, captioned Personnel Operations, which sets out at paragraph 312.2 the eligibility for employment of permanent resident aliens, and specifies that such eligibility requires, *inter alia*, "the appointee to have an Alien Registration Receipt Card (Form I–151 or I–551)," and Exhibit 3, an undated one-page advertisement for the hire of temporary employees at facilities in the Twin Cities area.

OSC's *Amicus Curiae*'s Memorandum of Points and Authorities provides its panoramic overview of the legal impact of the new IIRIRA text, "for the purpose or with the intent of discriminating against an individual in violation of [8 U.S.C. §1324b(a)(1)]," on the document abuse provision at §1324b(a)(6). Drawing on OCAHO case law, IIRIRA's legislative history, and remarks made during the

[3]HANDBOOK EL–311, April 1990, §312.21, p. 62 ("Noncitizens of the United States who have been accorded (granted) permanent resident alien status in the United States are eligible for appointment to all Postal Service Positions, levels EAS–19 and below, except positions designated by the Postal Service as *sensitive*").

Senate debate by Senators Simpson and McCain, OSC outlines the two-part test it argues a complainant must satisfy under the revised statute to prove document abuse:

> a complainant must now prove that the employer either: (1) requested more or different documents than are required for employment eligibility verification purposes; **or** (2) rejected documents that on their face reasonably appeared genuine; **and** (3) that the employer acted for the purpose or with the intent of discriminating on the basis of national origin or citizenship status.

Amicus Curiae's Memorandum of Points and Authorities, p. 2.

However, OSC contends that "intent to discriminate" "does ***not*** require discriminatory animus or motivation." *Id.*

> It merely requires a showing that the respondent purposely treated the injured party differently or less favorably based on his or her citizenship status or national origin. . . . The necessary intent to discriminate may be proven in many ways, including by direct, circumstantial or statistical evidence. Under this standard, most document abuse practices found illegal under previous case law remain illegal under the new intent standard.

Id. at pp. 2–3. Intent to discriminate, argues OSC, may be implied where the employer who requests "more or different" documents than those required to prove employment eligibility has ***no*** "reason to suspect that the . . . [applicant or employee] is an illegal alien." *Id.* at pp. 13–14 (citing sponsor remarks during Senate floor debate[4]).

2. *Discussion*

This case poses an issue of first impression in OCAHO jurisprudence, *i.e.,* as to what constitutes "intent" for the purpose of

[4]Statements by legislative sponsors are "accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). *See* remarks of Senator Alan K. Simpson ("Employers should be able to ask an employee for additional documents ***only when*** they have reason to suspect that the new employee is an illegal alien") ("An employer who has ***constructive knowledge*** that an alien is unauthorized to work is permitted to ask for other documents"). 142 CONG. REC. at S4411 (April 30, 1996) (emphasis added). *See also* remarks of Senator John McCain ("I believe this change in the law strikes a proper balance between the need to protect against discrimination and the need not to punish employer's [sic] who ***reasonably*** suspect that an employee or applicant is not authorized to work"). 142 CONG. REC. at S4608 (May 2, 1996) (emphasis supplied). Under the Simpson/McCain "reasonable suspicion" standard, administrative error would not necessarily bar a finding of document abuse; an employer may not ask for more or different documents ***unless*** he has some ***reason*** to suspect that the applicant or employee is not work-authorized.

establishing a violation of 8 U.S.C. §1324b(a)(6), as amended effective September 30, 1996. The events alleged by Tadesse took place on October 15, 1996, two weeks after the effective date of the amendment.

This case also poses a more familiar pendant question, *i.e.*, assuming an act of discrimination, does an employer avoid liability on the basis that its personnel so acted in derogation of its prescribed personnel policy?

A. *Tadesse's National Origin Complaint Is Dismissed For Lack of Subject Matter Jurisdiction*

The Supreme Court has instructed that federal administrative law judges are "functionally comparable" to Article III judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the administrative law judge is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures. *Boyd v. Sherling,* 6 OCAHO 916 (1997), at 6, 1997 WL 176910, at *5 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912, at 4 (1997), 1997 WL 148820, at *3 (O.C.A.H.O.); *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 5 (1997), 1997 WL 131346 (O.C.A.H.O.).

"Lack of subject matter jurisdiction, unlike many other objections to the jurisdiction of a particular court, cannot be waived. It may be raised at any time by a party to an action, or by the court *sua sponte.*" *Berger Levee Dist., Franklin County, Missouri v. United States*, __ F.3d ____ (8th Cir. 1997), 1997 WL 686006, at *2 (8th Cir. 1997) (citation omitted). Because "subject-matter jurisdiction cannot be waived . . . it is our duty to raise the issue *sua sponte*." *State of Missouri ex rel. Mo. Highway and Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1334 (8th Cir. 1997). To determine subject matter jurisdiction is a court's first duty because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). In order to "determine whether or not they have jurisdiction to entertain . . . [a] cause [courts must] . . . construe and apply the statute under which . . . asked to act." *Chicot*, 308 U.S. at 376. When evaluating the reach of its jurisdiction, the forum cannot

expand or constrict its statutory jurisdiction. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

Tadesse alleges discrimination based on national origin. Enactment of the Immigration Reform and Control Act of 1986 as amended (IRCA), specifically §274B of the Immigration and Naturalization Act, codified as 8 U.S.C. §1324b, was not intended to supersede Equal Employment Opportunity (EEOC) jurisdiction over national origin claims where an employer's workforce exceeds fourteen employees. 8 U.S.C. §1324b(b)(2). Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three and fewer than fifteen individuals. §1324b(a)(2)(B); *Huang v. United States Postal Serv.*, 2 OCAHO 313, at 102 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), *aff'd, Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990), 1990 WL 512148, at *2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.*, 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at *3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at *20 n.6 (O.C.A.H.O.), *aff'd, United States v. Todd Corp.,* 900 F.2d 164 (9th Cir. 1990).[5] It is a matter of common knowledge, and I take official notice, that the Postal Service employs thousands of employees. ALJs are only empowered to hear cases of national origin discrimination where an employer employs four through fourteen individuals. Lacking ALJ jurisdiction as a matter of law, Tadesse's national origin complaint is dismissed.

B. *OSC's Motion for Leave To File Brief As Amicus Curiae Is Granted*

OSC's Motion is granted. The parties are encouraged to attempt a joint fact stipulation, and OSC is encouraged to assist the parties in developing such a fact stipulation.

[5]Citations to OCAHO precedents printed in bound Volumes 1–5 of ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICE LAWS OF THE UNITED STATES reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1–5 are to specific pages, *seriatim* of the entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

C. *Respondent's Motion To Dismiss Is Denied Because a Substantial Dispute of Material Fact Regarding the Intent of the Postal Service Exists*

The Postal Service contends that Tadesse has failed to state a claim upon which relief can be granted, and moves to dismiss. The Postal Service claim, coupled with its motion to dismiss, augmented by its exhibits, converts its motion to dismiss to a motion for summary judgment. FED. R. CIV. P. 12(b); *D'Amico v. Erie Community College*, 7 OCAHO 948, at 4 (1997), 1997 WL 562107, at *2 (O.C.A.H.O.).

"It is axiomatic that summary judgment is warranted only if, 'after viewing the evidence in the light most favorable to the non-moving party, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 962 (8th Cir. 1997) (quoting *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997)). In considering the Postal Service's Motion To Dismiss, I must construe all evidence in the light most favorable to Tadesse, drawing every inference in his favor. *Miller v. Citizens Sec. Group, Inc.*, 116 F.3d 343, 345 (8th Cir. 1997). Summary judgment is improper if genuine issues of material fact remain. *Kunkel v. Sprague Nat. Bank*, __ F.3d ____ (8th Cir. 1997), 1997 WL 641366, at *3 (8th Cir. 1997); FED. R. CIV. P. 56(c). Summary judgment will not be granted against a party who makes "a showing sufficient to establish the existence of . . . element[s] essential to that party's case," on which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Are Sikeston Ltd. Partnership v. Weslock Nat., Inc.*, 120 F.3d 820, 827 (8th Cir. 1997); *Conrod v. Davis*, 120 F.3d 92, 95 (8th Cir. 1997). If a reasonable fact-finder could favor Tadesse, summary judgment is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Summary judgment is denied because Tadesse alleges a *prima facie* case of citizenship discrimination, establishing the elements of his claim, and because a reasonable fact-finder could find in his favor. Specifically, Tadesse has established (and the Postal Service admits): (1) that he was a lawfully admitted, work-authorized alien, a member of a class protected by 8 U.S.C. §1324b(a)(3); (2) that he applied for a temporary position with the United States Postal Service; and (3) that he was denied employment because the Postal

Service refused to honor tendered documents suitable for verifying his work eligibility.

The Postal Service denies that it committed a legal wrong, contending that in rejecting Tadesse it acted without malice and in good faith and that it is, therefore, not liable under §1324b(a)(6) by virtue of the "intent" standard introduced by the 1996 amendment to §1324b(a)(6). I cannot credit the Postal Service's sweeping interpretation of §1324b(a)(6), nor accept its written policy of non-discrimination as a shield sufficient, *per se*, to preclude a finding of purpose or intent to discriminate. To grant the motion on the present record would swallow up the §1324b(a)(6) prohibition against over-documentation by foreclosing inquiry into the reason for the failed employment application. While compliance with established policy may immunize an employer against §1324b(a)(6) liability, failure to comply raises inferences of culpability. Here, the employer concedes that the written policy was breached.

The Postal Service contention that it did not discriminate against Complainant because it hired others of his national origin or citizenship status may be of probative value, but it is not dispositive of the question whether this particular individual was a victim of discrimination. In the Title VII context, for example, an employer does not successfully defend a charge of racial or gender discrimination by a failed applicant *solely* by establishing that others of the complainant's race, gender, etc., were hired.[6] A determination of discrimination turns ultimately on the employer's treatment of the individual complainant. Moreover, subject to a finding of "purpose" or "intent," a request "for more or different documents" or refusal to "honor documents that on their face reasonably appear to be genuine" where disparate treatment of an individual is alleged is a violation of §1324b(a)(6), not dependent on comparative analysis. The command of §1324b(a)(6) that document abuse ***shall*** be treated as an unfair immigration-related employment practice does not invite statistical comparisons.

To determine on a motion for summary decision whether there is a genuine dispute of material fact and whether the moving party is

[6]This case involves disparate treatment of an individual on the basis of membership in a protected group, not systemic disparate impact of an employer's policy on the group as a whole. In any event, the employer's putative policy does not discriminate against permanent resident aliens.

entitled to judgment as a matter of law, the facts are assumed in favor of the nonmoving party. Tadesse intends to rebut the Postal Service assertion of innocent error by proving that a responsible official of the Postal Service, knowledgeable about employment regulations, refused to accept his proferred documents and that Postal Service personnel refused the intervention of immigration officers. If Tadesse can prove his claims, such persistence may well overcome the defense of good faith.

Furthermore, for the purpose of ruling on the Postal Service's motion, I find significant Senator Simpson's explanation that, in order to avail itself of the "good faith" defense, an employer must demonstrate constructive knowledge or reasonable suspicion that an employee or applicant is illegal. The Postal Service has not articulated a defense based on this predicate. A reasonable fact-finder could rule in Tadesse's favor. While this Order denies the Postal Service Motion To Dismiss, it is not a final adjudication of the meaning of "purpose" or "intent" as applied to the Tadesse claim.

D. *Respondent's Request To File Exhibits Is Granted*

To the extent the enumerated exhibits have not been filed, Respondent's request is granted, any filing to be perfected by **Friday, December 12**.

3. *Order*

The national origin discrimination claim is dismissed for lack of jurisdiction 8 U.S.C. §1324b(a)(2)(B).

OSC's Motion for Leave To File Brief As *Amicus Curiae* is granted.

Respondent's Motion To Dismiss is denied because it would be premature to conclude that the Postal service is entitled to judgment as a matter of law and because there is a substantial dispute of material fact in context of the 1996 amendment to 8 U.S.C. §1324b(a)(6)—*i.e.,* whether the Postal Service *purposefully or intentionally* discriminated against Ahudu Tadesse, a work-authorized alien, when in derogation of its own regulation it refused to accept as proof of his eligibility to work in the United States "the I–551 stamp on . . . [his] passport" and "the receipt from Immigration & Naturalization Service for the Replacement of . . . [his] registration card."

Within the next several weeks, my office will initiate arrangements with the parties and OSC for a prehearing conference to focus, *inter alia,* on the potential for an agreed disposition and/or preparation for a confrontational evidentiary hearing.

SO ORDERED.

Dated and entered this 5th day of December, 1997.

MARVIN H. MORSE
Administrative Law Judge