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

Jesse C. Jones, Complainant v. De Witt Nursing Home, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 88200202.

FINAL DECISION AND ORDER

(June 29, 1990)

SYNOPSIS

1. A citizen born in the United States, who is neither foreign-looking nor foreign-sounding, is an individual covered by the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment practices and as such is protected from citizenship status discrimination.

2. An employer who discharges an individual solely for failure to present a specific document after such individual has already presented legally sufficient documentation to satisfy an employer's obligation under the employment verification system of IRCA violates the prohibition against unfair immigration-related employment practices.

3. Upon a finding of unlawful citizenship status discrimination under IRCA, the discriminatee is entitled to be reinstated to the position lost due to the unlawful act and to be awarded back pay from the date of such act until the date of judgment, less interim earnings, absent a showing by the employer that the discriminatee was not duly diligent in mitigating his lost earnings.

4. In a private action pursuant to 8 U.S.C. § 1324b(d)(2), where the employer's ``argument is without reasonable foundation in law and fact,'' 8 U.S.C. § 1324b(h), because the defense is found to be without merit, the discriminatee is allowed reasonable attorneys' fees, to be awarded upon a proper showing therefor.

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MARVIN H. MORSE, Administrative Law Judge

Appearances: **LUCAS E. ANDINO**, Esq., on behalf of Complainant.
WILLIAM AUERBACH, Esq., on behalf of Respondent.
ANITA J. STEPHENS, Esq., on behalf of United States, Intervenor.

I. Statutory and Regulatory Background

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986), enacted a prohibition against unfair immigration-related employment practices at section 102, by amending the Immigration and Nationality Act of 1952 (INA § 274B), codified at 8 U.S.C. §§ 1101 et seq. Section 274B, codified at 8 U.S.C. § 1324b, provides that ``[I]t is an unfair immigration-related employment practice to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. . . .'' (Emphasis added). Discrimination arising either out of an individual's national origin or citizenship status is thus prohibited. Section 274B protection from citizenship status discrimination extends to an individual who is a United States Citizen or qualifies as an intending citizen as defined by 8 U.S.C. § 1324B(a)(3).

Congress established new causes of action out of concern that the employer sanctions program enacted at Section 101 of IRCA (INA § 274A), 8 U.S.C. § 1324a, might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding''
and those who, even though not citizens of the United States, are lawfully in the United States. See ``Joint Explanatory Statement of the

Committee of Conference,'' Conference Report, IRCA, H.R. Rep. No. 1000, 99th Cong., 2d Sess., at 87 (1986). Title 8 U.S.C. § 1324b contemplates that individuals who believe that they have been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Special Counsel or OSC). OSC, in turn, is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination.'' 8 U.S.C. § 1324b(e)(2).

IRCA also explicitly authorizes private actions. Whenever the Special Counsel does not within 120 days after receiving a charge of national origin or citizenship status discrimination file a complaint before an administrative law judge with respect to such charge, the person making the charge may file a complaint directly before such a judge. 8 U.S.C. § 1324b(d)(2).

II. Procedural Summary

On April 19, 1988 Jesse C. Jones (Jones or Complainant) filed a charge with the Office of the Special Counsel (OSC) against De Witt Nursing Home (De Witt or Respondent) alleging an unfair immigration-related employment practice in violation of 8 U.S.C. § 1324b(a)(1)(B). By letter dated August 17, 1988 OSC advised that it had found no reasonable basis ``on which to conclude that Mr. Jones was terminated . . . because of his citizenship status.'' OSC advised that it therefore would not file a complaint before an administrative law judge but informed Jones that he could file his own action.

On November 16, 1988 Jones filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that De Witt had discriminated against him on the basis of his citizenship status in violation of 8 U.S.C. § 1324b. On November 22, 1988, OCAHO issued its Notice of Hearing advising the parties of my assignment to the case, and forwarding the Complaint to Respondent. On December 14, 1988, Respondent timely filed its Answer to the Complaint, in part denying and in part conceding the allegations of the Complaint.

Six prehearing conferences were held between March 2 and October 25, 1989, five by telephone. On September 12, 1989 a conference was held in person, in New York City, to deal with the issue raised by counsel for Complainant who had sought to be relieved from representation on the ground that it was difficult to maintain contact with Complainant. On the understanding that Complainant

would better maintain such contact, counsel agreed with the bench to remain in the case.

The evidentiary hearing was held in New York City on November 7-8, 1989. Pending post-hearing briefing by the parties pursuant to the schedule agreed to at hearing, as confirmed by my Order dated December 7, 1989, OSC filed a Motion to Intervene on February 9, 1990. OSC contended that ``because this case presents for the first time the interrelationship of the documentation requirements of Section 101 and the citizenship status discrimination prohibitions of Section 102 [of IRCA] . . . its participation would `` `contribute materially to the proper disposition of the proceeding,' ⌊28 C.F.R. § 68.13.''[1]

By order issued March 5, 1990, amended March 9, 1990, I granted OSC's motion to intervene, determining that ``in light of its statutory role, its intervention at this stage'' was appropriate. In light of the OSC intervention, that order modified the briefing schedule so that all parties, including the intervenor, filed opening briefs on March 30, and reply briefs on April 20; on May 4, 1990 Respondent filed a reply brief to OSC's reply brief.

On April 19, 1990 Complainant filed a Motion For Leave To Supplement the Hearing Record pursuant to 28 C.F.R. § 68.49 [Now superseded by 28 C.F.R. § 68.48 of the rules of practice and procedure of this Office, issued at 54 Fed. Reg. 48593 et seq., Nov. 24, 1989, to be codified at 28 C.F.R. Part 68]. Complainant requested the record be reopened to receive as an exhibit Respondent's collective bargaining agreement with its Union with respect to computation of ``wages and benefits applicable to Complainant's position as a cook at De Witt.'' On April 26, Respondent filed an Opposition, contending, inter alia, that receipt of such exhibit would necessitate evidence in response. On May 1 Complainant filed a Motion for Leave to Submit Reply, claiming equity grounds in support of his prior Motion. Respondent, on May 8, 1990, filed its Memorandum in Opposition, reiterating its objections to reopening the record.

III. Statement of Facts

Jesse C. Jones was born in 1949 at Harlem Hospital in New York City. He received an Associate Degree in Social Sciences from Chamberlin Junior College, spent a year at Boston College, and in 1984 obtained a certificate for catering and general cooking from New York Food and Hotel Management School. At the time of

[1] But see United States v. Marcel Watch Corp., OCAHO Case No. 89200085 (March 22, 1990) as amended (May 10, 1990), Empl. Prac. Guide (CCH) 5263 (discussing such interrelationship).

hearing Jones was working at Manhattan College, employed by the Marriott Corporation.

On February 3, 1988 Jones applied to Respondent for employment as a cook. At the time of the alleged discrimination, Respondent employed 560 individuals. After filling out an application, Jones spoke with Mr. Harold Schweiger, Respondent's Food Service Director (now retired), about the position, duties, and salary.

On deposition, taken November 2, 1989, Exh. 9,[2]Schweiger stated that he was fully responsible for food service in the kitchen, including hiring and verifying employment eligibility on the Form I-9,[3]which he usually filled out by hand at the interview. Schweiger requested Jones to obtain a food protection certificate from the New York City Department of Health, and to take a physical examination. On February 8, the State agency certified that a replacement food protection certificate was being processed; Complainant took a medical exam and had the ``papers filled out by the doctor.'' Tr. 40. He presented these documents to Schweiger who then approved his application

Jones began to work at De Witt on February 18, 1988. The parties disagree as to when and what Jones was asked to present by way of documentation necessary to satisfy an employer's obligations under the employment verification system established by and pursuant to IRCA.

A. Complainant's Version

Jones testified that he was neither asked for nor did he provide his New York State Identification card (ID) or Social Security card to Schweiger on the day he applied, although he always carries his Social Security card in his wallet. Jones never filled out a Form I-9 at De Witt. Schweiger asked for a birth certificate and a Social Security card two days after Jones began work. Instead, Jones gave him a Social Security card and a New York State ID to take to the personnel office. About an hour later, Schweiger returned the documents to Jones.

On Monday or Tuesday of the Next week, i.e., February 22 or 23, Ms. Gracia Yap, Chief Dietician at De Witt, asked Jones for his birth certificate. He was unable to produce it at that time because

[2]Title 28 C.F.R. § 68.22(a)(4) provides that ``[T]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the Administrative Law Judge finds: . . . (iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena. . . .'' Tr. 276.

[3]The Form I-9, Employment Eligibility Verification Form, is explained in more detail in Section IV.B. A specimen Form I-9 is set out as an appendix to this Decision and Order.

his mother had it with her in Virginia. Jones telephoned his mother and asked her to bring the certificate on her return to New York.

The day after he spoke with Yap, Jones called Schweiger for a time to report to work the following day. Schweiger replied that he could not come to work without a birth certificate. Jones explained that his mother was bringing it back with her from Virginia. Schweiger repeated that Jones could not work without the birth certificate. Subsequently, Yap and Jones also spoke and she reiterated that without a birth certificate, he would be unable to work.

Jones' mother forgot to bring his birth certificate when she returned to New York; she called her boyfriend in Virginia and told him to mail it. The following day, Schweiger called Jones and his mother about the birth certificate; she told Schweiger that the ``birth certificate was on its way.'' Tr. 55. Schweiger again said that if Jones did not have it, he did not have a job. Jones replied to Schweiger that he did not ``think the birth certificate is something to stop me [Jones] from working.'' Tr. 55. Schweiger repeated his previous statement.

De Witt fired Complainant on or about February 26, 1988. Two weeks later, Jones started working for the Riese Organization at Friday's where he filled out an I-9, providing his New York State ID and his Social Security card. Starting March 20, 1989 and continuing through the dates of the hearing, he was working at Manhattan College, employed by the Marriott Corporation, for which he also provided his Social Security card and his New York State ID to complete the I-9. In fact, for his job immediately prior to De Witt at the Hotel Plaza Athenee, Jones also had filled out an I-9 producing his Social Security card and his Florida ID. The Plaza Athenee directed him to obtain a New York State ID.

About a week after he was fired by De Witt, Jones obtained his birth certificate but did not personally notify Schweier. Instead, Jones requested assistance from Mr. Gin, his ``influential friend.'' Tr. 81. Gin referred Jones to an individual from Union Local District Four. Unable to reach Schweiger, this individual contacted a Ms. Lichtman at De Witt who refused to discuss Jones with him. Jones was then referred by another individual to Mr. Boneta at MFY Legal Services.

On March 2, Boneta called De Witt and spoke with Schweiger. Boneta requested that Jones be rehired, Stating that Jones had a birth certificate, New York State ID, and a Social Security card. Schweiger refused Boneta's request that De Witt rehire Jones. Jones was present during these phone calls, although he did not speak to anyone at De Witt personally; Jones preferred ``somebody

with authority that was more aware of the handling of the system,'' TR. 81, to speak for him.

B. Respondent's Version

On deposition, Schweiger stated that at his interview Jones presented only his New York driver's license, which Schweiger copied. Exh. C. It was his ``practice to make a copy of anything like that at the time that it was given'' to him. Exh. 9 at 48. The copy of Jones' New York ID in his personnel file at De Witt is endorsed: ``Seen the original copy on 2/3/88,'' bearing Schweiger's signature and the date of 2/3/88. Exh. C. He stated that at the interview he told Jones that he needed his ``Social Security number, his green card, so forth . . . and his reply, again, I stated, is that_I believe_it's in North Carolina . . . [and] he would get it in a day or two. . . .'' Exh. 9 at 29.

Schweiger was positive that he did not see a Social Security card, although he had no recollection whether Jones gave him his Social Security number; had he seen the card he would have copied it. He kept after Jones to produce some documentation, a green card, Social Security card or birth certificate, ``any one of the three.'' Id. at 54. Jones said he would produce the proper identification, but never did. On his weekend off, Schweiger left word for Yap to remind Jones that De Witt ``needed his proper identification.'' Id.

Schweiger did not remember speaking with either Jones or his mother on the phone regarding the birth certificate. He and Ms. Janice Cole-Blake, who was Respondent's In-Service Coordinator,[4]agreed that without the ``proper identification'' Jones could not work at De Witt. Cole-Blake said to Schweiger that ``proper identification'' would be a ``Social Security card, . . . green card . . . birth certificate.'' Id. at 35. From February 3 to February 19, 1988, Jones still had not produced ``anything,'' because if he had, Schweiger stated, ``it would have been immediately taken up to Ms. Coleblake [sic] and put on file.'' Id. at 58.

C. Not in Dispute Between the Parties

Jones' personnel file contains an unsigned, unattested Form I-9 in which Part 1 contains typewritten entries but is otherwise blank. Both the incomplete I-9 and Jones' employment application dated February 3, 1988 include his Social Security number. The Social Security number on the employment application appears to have been entered by a different hand with different ink than the

[4]The In-Service Coordinator is responsible for making sure that all legal requirements have been complied with before a person is oriented and starts work regularly.

bulk of entries. The Social Security number also appears on De Witt's February 4, 1988 reference inquiry form to Jones' previous employer, Hotel Plaza Athenee. Above Schweiger's signature on the form there are typed entries, which identify the employee and the previous employer being queried, but the entries by the previous employer are handwritten. Since a Social Security number is included among the typed data, it may be inferred that Respondent, and not Jones' previous employer, made that entry.

Complainant's personnel file also contains a note from Cole-Blake dated 2/18/88, stating that she ``[N]otified Mr. Swiger [sic] that this new employee [Jones] cannot be given general orientation until after March 14th. I need to see original proof of Legal Immigration status.'' Exh. C. On the same page, in an entry dated 2/19/88, she notes that ``Ms. Yap stated that employee is sending to Virginia for birth certificate. I cannot be held responsible for employee until I see proof.'' Exh. C.

Yap testified at hearing that she first spoke to Jones when Schweiger told her specifically to ask for the birth certificate to verify employment status on Cole-Blake's request. Yap stated that Schweiger did not discuss with her what he had or had not seen of Jones' documents. She personally discussed the birth certificate with Jones at work.

Yap told Schweiger that Jones had said that the certificate was in Virginia. Schweiger indicated that he was going to relay that information to Cole-Blake. In contrast to Schweiger's failure to recall whether he had phoned Jones at home, Yap testified that she phoned Jones. She discussed with Jones what Schweiger had told him on the phone. Yap recalled Jones telling her that Schweiger had said Jones could not come to work if he could not produce the birth certificate.

Schweiger signed and dated Jones' termination notice on February 26, 1988, which provided only that Jones was terminated ``because he could not prove that he is a United States citizen.'' Exh. C. Jones picked up his final check on March 2, 1988. Jones was replaced at De Witt by Mr. Gregory Johns, a resident alien.

Complainant worked at Friday's from approximately March 11, 1988 through late September, 1988, earning $7.00 per hour for a 45-hour week. From approximately March 20, 1989 until the date of the hearing, Respondent was working at Manhattan College, starting at $7.00 per hour for a 37.5-hour week. After one month, his hourly wage was raised to $7.25. Exh. A.

The record includes fourteen Forms I-9 of De Witt employees (plus four more of individuals who either applied for employment but were not hired or had been terminated for failure to submit

verification documentation). Exhibit 7 contains eight I-9s; Exhibit 8 is the I-9 for a Willie Ledbetter; five I-9s were discussed at the hearing by Ms. Jovita Carolipio, De Witt's administrative assistant to the administrator. Tr. 150-168. Ms. Carolipio testified that even though it is not the practice of Respondent to require more than what is necessary, when someone brings in all their documents the additional documentation is normally put on the I-9. She also made clear, however, that documents she generally looks for are ``either a U.S. Passport, Certificate of Naturalization, or a birth certificate. . . .'' Tr. 114; Tr. 112-13.

IV. Discussion

The merits of this case are integrally linked to the broader question of what constitutes adequate documentation for complying with the employment verification system of IRCA. INS regulations and the INS Handbook for Employers implementing IRCA[5] describe the documentary requirements for satisfying identification and employment eligibility verification. This case turns on findings as to (a) which documents De Witt, the employer, was entitled to expect Jones, the new employee, to produce for examination, and when; (b) which documents Jones actually produced for De Witt; and (c) whether, on the basis of (a) and (b), De Witt's actions constituted an unfair immigration-related employment practice as to Jones based on his citizenship status.

A. Jurisdiction Over the Claim

Complainant, as a person born in the United States, is a citizen of the United States by birth. 8 U.S.C. § 1401(a). As such, he is protected by IRCA against unfair immigration-related employment practices. 8 U.S.C. § 1324b(a)(1)(B). U.S. citizens can challenge discriminatory hiring practices based on citizenship or non-citizenship status. House Committee on the Judiciary, Immigration Control and Legalization Amendments Act of 1986, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 70 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5674; U.S. v. Marcel Watch Corporation, OCAHO Case No. 89200085 (March 22, 1990) as amended (May 10, 1990). Accordingly, I have jurisdiction of Complainant's claim since De Witt employs more than three individuals, 8 U.S.C. § 1324b(2)(A).

[5]Absent any constraint on redelegation by the Attorney General, the programmatic and enforcement aspects of the employer sanctions law, such as issuing regulations, are within the purview of the INS Commissioner. 8 U.S.C. § 1103(a); U.S. v. Mester Mfg., OCAHO Case No. 87100001 (June 17, 1988) at 5; aff'd, Mester Mfg. v. INS, 879 F.2d 561 (9th Cir. 1989).

B. Documentary Requirements Under IRCA

IRCA establishes an employment verification system as part of the employer sanctions provisions of IRCA. 8 U.S.C. § 1324a(b). In addition to providing a predicate for rational enforcement of prohibitions against employment of unauthorized aliens, this system was adopted to protect both the persons or entities subject to penalties, i.e., employers, and the members of minority groups legally in this country, i.e., employees.[6]To satisfy I-9 requirements Complainant, a U.S. citizen, need only present such documentation as required by INS to meet employment verification requirements, without designation by the employer of particular documents to establish identity and employment eligibility. See discussion, infra at IV.D.

It has been suggested, however, that the multiplicity of acceptable documents to verify citizenship status and identification, coupled with employers' concern for compliance with IRCA, have caused confusion among employers ``seeking to confirm whether job applicants are eligible to work.'' Immigration Reform: Employer Sanctions and the Question of Discrimination, 1990 GAO Report GGD-90-62, (B-125051) at 62. This concern has prompted congressional interest in employment document standardization and simplification. 67 Interpreter Releases 466 (April 23, 1990); Wash. Post, April 18, 1990, at A25.

Title 8 U.S.C. § 1324a, INS regulations at 8 C.F.R. Part 274a, and the Handbook for Employers (INS Document M-274) identify documents acceptable for verifying (1) both identification and employment eligibility, (2) identification alone, and (3) employment eligibility alone. Title 8 U.S.C. § 1324a(b)(1) provides as follows with respect to the employment verification system:

> [T]he person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining (i) a document described in subparagraph (B), or (ii) a document described in subparagraph (c) and a document described in subparagraph (d). . . . If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document. (Emphasis added)

As directed by 8 U.S.C. § 1324a(b)(1), INS has designated the Form I-9 as the form to be used in complying with the requirements of verifying employment eligibility. 8 C.F.R. § 274a.2(a)(1990).

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[6]H.R. Rep. No. 682, supra, at 60 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5664; Senate Committee on the Judiciary, Immigration Reform and Control Act of 1985, S. Rep. No. 132, 99th Cong. 1st Sess., at 8 (1985).

Under IRCA, INS regulations and the Handbook, documents acceptable under List A of the Form I-9, U.S.C. § 1324a(b)(1)(B), establish an individual's identity and employment eligibility. Documents which satisfy List A include, but are not limited to, a U.S. Passport, an Alien Registration Card [commonly known as a Green Card] with photograph, and a Certificate of U.S. Citizenship. Documents acceptable under List B of the I-9, 8 U.S.C. § 1324a(b)(1)(D), establish only identity. Documents which satisfy List B include, but are not limited to, a state driver's license, a state identification card, and a U.S. Military Card.[7]Documents acceptable under List C of the I-9, 8 U.S.C. § 1324a(b)(1)(C), establish only employment eligibility and include, but are not limited to, a Social Security Card, a birth certificate, and an unexpired INS Employment Authorization.[8]

An individual ``unable to provide the required document or documents within [three days] . . . must present a receipt for the application of the document or documents within three business days of the hire and present the required document or documents within 21 business days of the hire.'' 8 C.F.R. § 274a.2(b)(1)(vi). (Emphasis added). Jones was hired and began working on February 18, 1990. He was asked by Respondent to show his documents within 3 days of hire, as required by 8 C.F.R. § 274a.2(b)(l)(ii).

The regulatory opportunity to produce verification documents by means of an initial receipt for a missing document may be reasonably satisfied in a given case by evidence of a good faith effort to obtain the required document within the requisite period. Although not determinative, because this case is decided on other grounds, see infra Section IV. D., I note that Complainant's effort to obtain his birth certificate began by the third day, but was frustrated by his discharge before the 21st business day, i.e., March 2, 1990.

Respondent,not alone among employers, was confused as to the verification requirements of IRCA. The I-9s of employees other then Jones clearly demonstrate (a) Respondent's misunderstanding

[7]Compare previous INS regulations which provided that a state driver's license or identification card without a photograph was acceptable if it included identifying information ``such as: Name, date of birth, sex, height, color of eyes, and address,'' 8 C.F.R. § 274a.2(b)(1)(v)(B)(l)(i) [1988], with the present regulations which now require a photograph, to the exclusion of such licenses/cards which lack photo identification, 8 C.F.R. § 274a.2(b)(1)(v)(B)(l)(i) [1990]. To the contrary, both the Handbook for Employers and the Form I-9 appear to authorize use of state driver's licenses or identification cards without photographs if they contain other requisite identifying information.

[8]``An individual may use any one of 17 different documents to establish work eligibility.'' GAO Report, supra, at 62. As appears on the I-9, at least 13 categories are acceptable to establish identity.

of the proper documents, standing alone or in combination, required under IRCA and (b) the erroneous preference it assigned to the birth certificate as verification of employment eligibility and identification for U.S. citizens.

As to (a), for example, half of Respondent's 14 I-9s in evidence contain inadequate documentation. In six of the seven, Respondent accepted a Social Security card and birth certificate as sufficient to satisfy both identification and work eligibility verification. Those two documents alone, however, do not fulfill an employer's obligation under IRCA as both are List C documents, establishing only work eligibility. On the seventh I-9, Ms. Cole-Blake accepted a Social Security card and an H-1 Permit [INS employment authorization], both List C documents. Accordingly, Ms. Cole-Blake's attestation on at least four such I-9s was legally deficient.

Five of the remaining seven I-9s are overdocumented. Four of these include a birth certificate, incorrectly entered in List A, twice being checked off as ``Certificate[s] of Citizenship.'' The fifth overdocumented I-9 shows a temporary resident card which, although a List A document, was entered on List C (along with a Social Security Card); a temporary resident card signifies that the holder is not a U.S. citizen. It should be noted that although overdocumentation is not a violation of 8 U.S.C. § 1324a, Respondent's overdocumented I-9s demonstrate a preference for birth certificates. The remaining two are legally sufficient without being overdocumented.

As to (b), Cole-Blake, the In-Service Coordinator responsible for making sure Jones' documents were in order, attested to four of the deficient I-9s, each of which was supported by a birth certificate where the employee was a U.S. Citizen. Since it is not common practice when applying for employment for individuals to carry their birth certificates, I conclude that each employee who provided a birth certificate was asked, as Schweiger did of Jones, to provide it after the hiring decision was made.

Additionally, colloquy between Respondent's counsel and the bench makes clear that as late in time as the hearing, Respondent persisted in misplacing emphasis on birth certificates to satisfy I-9 requirements as to both identification and work eligibility. Tr. 160-61, 163-64. Respondent's emphasis on birth certificates permeated its I-9 compliance; among those attested to by Cole-Blake, only the I-9s for the two non-citizens omit birth certificate entries. Cole-Blake's entry of the temporary resident card at List C appears to me to be a proxy for a birth certificate which she required of a U.S.-born individual.

On balance, Jones' recollection of events leading to his discharge is more credible than Respondent's version. Respondent's preoccu-

pation with birth certificates distorted its I-9 practices, reflecting a pervasive misunderstanding of I-9 requirements, and lending further support to Jones' testimony.

C. Factual Dispute Resolved in Jones' Favor

The critical factual dispute is whether or not Jones showed his Social Security card to Respondent or whether he showed only his New York State ID for purposes of compliance with the employment verification requirements of IRCA. I conclude that Jones showed both his Social Security card and New York State ID to Schweiger, Respondent's Food Service Director. Schweiger acted on instructions from Ms. Cole-Blake, the In-Service Coordinator.

The Jones version is the more credible for several reasons. First, his Social Security number appears in three places in his personnel file_in his semi-completed I-9, in his employment application, and in De Witt's reference inquiry to his previous employer_showing that Respondent knew Jones' Social Security number.

Second, Jones produced his Social Security card when he applied for the job he held at the time of hearing and for those jobs immediately preceding and subsequent to the one at De Whitt. The worn condition of Jones' Social Security card also supports his statement that he always carries his card with him in his wallet, Tr. 49.

Third, while Jones and Yap are generally consistent, Schweiger has difficulty recalling key facts or appears to contradict Yap, a former fellow employee. For example, Schweiger does not recall that he spoke with Jones on the phone, while Yap stated that she called Jones and discussed with him what Schweiger had previously told him on the phone. In addition, Schweiger said that he told Yap to call Jones to remind him to obtain proper identification; Yap stated that he specifically told her to ask Jones about his birth certificate. I am only able to asses Schweiger's credibility on the basis of his deposition since he disobeyed the subpoena issued for his appearance at hearing and further efforts to obtain his testimony were unsuccessful. Although Yap's testimony at hearing was not consistent in detail with her deposition, it is essentially consistent with Jones' version.

Finally, in light of Respondent's I-9 practices already discussed, it is reasonable to conclude that misplaced emphasis on birth certificates for U.S. citizens led Respondent to require Complainant to produce his birth certificate. Accordingly, I draw the inference that repeated emphasis on a birth certificate to the exclusion of a Social Security card reflects a preference for the one and a total disinterest in the other. Failure to ask for the Social Security card implies that either Jones had already produced it or that Respondent did

not care whether he had one or could produce one. It is reasonable to conclude, as I do, that in addition to his Social Security card and New York State ID, Respondent specifically requested Jones' birth certificates.

Respondent contends on brief that at no time did Jones state that he told De Witt that he had already presented his Social Security card. Nevertheless, it is solely the duty of the employer to ensure that the Form I-9 is properly filled out, U.S. v. J.J.L.C., OCAHO Case No. 89100187 (April 13, 1990) at 5-6. Schweiger, however, did not specifically ask Jones for his Social Security Card, nor suggest that Jones denied having one. In fact, Jones told Schweiger in one phone conversation that he did not ``think the birth certificate is something to stop me [Jones] from working,'' Tr. 55, to which Jones said Schweiger replied ``[I]f you don't have no [sic] birth certificate, you don't have a job.'' Tr. 56.

Respondent's challenge to Complainant's credibility turns in part on Schweiger's statement that he copied Complainant's New York State ID at the initial interview. In contrast, Jones recalled being asked at the interview only to obtain a food handling health certificate and to take a physical. Jones stated that he did not show his ID until two days after he started to work at De Whitt. Apparently Schweiger did copy the ID on February 3. Moreover, Respondent knew Jones' Social Security number as early as February 4, 1988. Exh. C. Respondent's files confirm the receipt of Jones' ID card and Social Security number on or before February 4. The files provide more support to Complainant's testimonial recollection than to Respondent's claim that Complainant is not be to believed. Jones's recollection is inaccurate as to when he produced documentation, not what he produced, a discrepancy of minimal proportion.

Respondent is correct that Jones' personnel file contains a copy of his ID, but not of his Social Security card. That such a copy may have been misplaced, however, is acknowledged by Carolipio who conceded that sometimes ``a paper from one file gets misfiled into another file.'' Tr. 266. In addition, the only typewritten I-9 in evidence is the incomplete I-9 from the Jones file. Schweiger's affirmation that he filled out all the I-9s by hand reveals another irregularity in the Jones file. Considering the evidence of Respondent's I-9 practices, I am not persuaded that absence of a copy of the Social Security card informs the record that Complainant did not show his card to Respondent.

D. Respondent Has Established Citizenship Status Discrimination by a Preponderance of the Evidence

Complainant must establish intentional discrimination i.e., ``knowing and intentional discrimination,'' 8 U.S.C. § 1324b(d)(2), by a preponderance of the evidence, 8 U.S.C. § 1324b(g)(2)(A). As discussed below, I find that Complainant has established by direct evidence that Respondent discriminated against him on the basis of his citizenship status by unnecessarily requiring him to produce his birth certificate in addition to his New York State ID and his Social Security card.

The IRCA requirement that an individual provide a legally sufficient document or combination of documents that reasonably appears to be genuine is not to be construed as requiring the employer ``to solicit the production of any other document or as requiring the individual to produce such a document.'' 8 U.S.C. § 1324(b)(1)(A). An employer may not specify which document or documents an individual must present to satisfy IRCA employment verification requirements. 8 C.F.R. § 274a.2(b)(1)(v). This provision is intended to assure cautious employers that they are not in violation for accepting a document that ``reasonably appears on its face to be genuine,'' and to protect prospective employees by requiring that employers accept such documents ``without requiring further investigation.'' When the verification procedure is followed, ``the language is intended to make clear that there is no requirement that an employer request additional documentation or that an employee produce additional documentation.'' H.R. Rep. No. 682, supra, at 62 1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5666.

An employer's preference for one document over another is a breach of the prohibition of 8 U.S.C. § 1324a which can also constitute a violation of 8 U.S.C. § 1324B. For example, insistence on a green card for Puerto Ricans constitutes direct evidence of impermissible citizenship status discrimination. Marcel, supra at 15. Selectively requiring documentation not called for by IRCA or any other colorable authority violates Section 102. Id. at 21. Requiring Complainant to produce additional employment authorization also constitutes an unfair immigration-related employment practice in violation of IRCA. U.S. v. Lasa Marketing Firms, OCAHO Case No. 88200061 (Nov. 27, 1989), as amended (March 14, 1990) at 28.

As concluded in Marcel, ``[C]onsidered together, Sections 101 and 102 of IRCA provide a conscious legislative balancing of sanctions enforcement and antidiscrimination provisions. Although to an employer whose conduct is incautious, IRCA inherently introduces risk of noncompliance with one or the other provision, Sections 101

and 102 can be harmonized in the case of the reasonably prudent employer.'' ``Marcel, supra, at 21.

The situation here is analogous to Marcel. Here, De Witt discharged Jones because he could not produce his birth certificate as proof of United States citizenship where the documents already produced, i.e., a state identification card and a Social Security Card, satisfy the employment verification requirements of IRCA. An identification card is a List B document which establishes only identity. A Social Security Card is a List C document which establishes only employment eligibility. An employer satisfies its obligations under the employment verification system by examining both of these documents. A birth certificate being yet another List C document is redundant; its production, therefore, is unnecessary. Where, as here, the employee is found to have presented sufficient qualifying documents, the employer's insistence on a birth certificate, at risk of discharge, is per se a violation of the prohibition against citizenship status discrimination.

Title VII jurisprudence has become an essential part of our national civil rights legacy. Title VII served as a point of departure in drafting what became Section 102 of IRCA. See e.g. Joint Explanatory Statement of the Committee of Conference, Conference Report, Immigration Reform and Control Act of 1986, H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess., at 87-88 (1986) reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5842.

Employment discrimination jurisprudence based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), turns on whether an employer who intentionally treats persons differently on a prohibited basis violates antidiscrimination laws, regardless of what motivates that intent. Disparate treatment is found when an employer intentionally treats some people less favorably than others because of their status. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); International Bhd. of Teamsters, 431 U.S. 324, 335 n. 15. (1977).

Liability under Section 102 is proven by a showing of deliberate discriminatory intent on the part of an employer. Statement of President Ronald Reagan Upon Signing S.1200, 22 Weekly Comp. Pres. Doc. 1534-37 (November 10, 1986). Provided that a prima facie case is established on behalf of the aggrieved individual, disparate treatment is precisely what the antidiscrimination provisions of IRCA sought to remedy. President's Statement, supra. See also Note, ``Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986.'' 41 VAND. L.REV. 1323, 1338 (1988). See generally U.S. v. Mesa Airlines, OCAHO Case Nos. 88200001-02 (July 24, 1989), appeal pending, No. 89-9552 (10th Cir.).

A plaintiff/complainant may establish a prima facie disparate treatment discrimination case either by indirect evidence, e.g., McDonnell Douglas Corp. v. Green, supra, or by direct evidence demonstrating that a discriminatory action occurred, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Direct evidence alone can establish that discrimination was a significant factor in the employment decision. TWA v. Thurston, supra.

Here, the preponderance of the evidence is to the effect that Jones used the Social Security card in prior and subsequent employment I-9s, had it at hearing, and, as found above, presented it to Respondent within three days of reporting to work. Respondent misapprehended the value to be accorded the birth certificate, unnecessarily insisting that Jones produce it, and failed to suggest that he apply for replacement of the birth certificate or the allegedly unseen Social Security Card. Respondent's policy of preferring passports, green cards, naturalization certificates or birth certificates, discriminates against U.S. citizen applicant-employees who produce sufficient I-9 documentation other than birth certificates.

By requiring Jones to present a birth certificate at risk of losing his employment, Respondent discriminated against him based on his citizenship status. Intent to exclude him from employment for that reason, not motive to discriminate, satisfies the statutory command against knowing and intentional discrimination. Marcel, supra, at 15. Accordingly, Complainant has established a prima facie case of disparate treatment by direct evidence.

Reckless prescreening of prospective employees as a rationale for complying with employer sanctions imperatives violates 8 U.S.C. § 1324b. Marcel, supra, at 22-23. Consistent with that conclusion, the discharge of an individual for failing to produce documentation in addition to that sufficient to comply with the verification requirements of IRCA also violates the prohibition against unfair immigration-related employment practices.

IRCA, INS regulations and the Handbook for Employers all identify the documents which satisfy the employment verification system. Rejection of proffered, qualifying documents and insistence on unnecessary ones (i.e., a birth certificate, when the two documents already given would suffice under IRCA), whether or not in a good faith effort to comply with Section 101, is no justification for disparate treatment. Marcel, supra, at 18. See also Bollenbach v. Monroe-Woodbury Central School District, 659 F. Supp. 1450, 1471 (S.D.N.Y. 1987); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 65-66 (S.D.N.Y. 1981); Montana v. First Federal Savings and Loan Assn. of Rochester, 869 F.2d 100 (2d Cir. 1989).

As entered on his termination form, Jones was dismissed because he could not prove he was a U.S. citizen. De Witt persisted unnecessarily in its efforts to obtain Jones' birth certificate, resulting in a facially discriminatory discharge. Where, as here, the trier of fact finds that there is direct evidence that the defendant acted with a discriminatory motive, the ultimate issue of discrimination is proved. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Thompkins v. Morris Brown College, 752 F.2d 558, 563 (11th Cir. 1985); Miles v. M.N.C. Corp. 750 F.2d 867, 875 n.9 (11th Cir. 1985); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984). I conclude that Respondent required the birth certificate as a preferred form of proof of eligibility for citizen employees in violation of the prohibition against unfair immigration-related employment practices. 8 U.S.C. § 1324b(a)(1)(B). The only remaining question on the issue of liability is whether Respondent was justified in discharging Jones.

E. Respondent Has Failed to Rebut Complainant's Proof

Respondent can successfully rebut Complainant's claim of discrimination only by providing by a preponderance of the evidence that the same decision to discharge Jones have been made absent any discriminatory motive. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1792 (1989); Mt. Healthy, supra, at 287; Miles v. M.N.C., supra, at 875-76; Bell, supra, at 1557; Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982). Respondent has failed to meet that burden here.

Respondent's arguments that it did not discriminate against Complainant based on his citizenship status are essentially factual. First, as already discussed and rejected, Respondent claims that Jones never showed his Social Security card, and that it did not insist only upon a birth certificate but wanted some proof of citizenship status. As found, however, the evidence of record proves otherwise.

Second, Respondent contends that Jones is discredited as a witness because his counsel had sought to withdraw due to Jones' failure to stay in contact and because counsel found Jones frustrating to deal with. The record of the prehearing conference, however, confirms only the fact of earlier communication difficulties. There is no reason to infer that such past difficulties reflect adversely on the veracity or demeanor of Complainant [or, his counsel]. The contention is rejected.

Third, Complainant's failure to call as witnesses those he testified had telephoned De Witt on his behalf does not impair his

credibility because any testimony about such conversations is immaterial to the findings on this record. Fourth, In contrast to Respondent's urging, Complainant's relatively large number of short-term employments is wholly irrelevant.

Finally, Respondent's misplaced emphasis on the birth certificate resulted from its misunderstanding of the verification requirements of § 1324a. Claims of compliance with Section 101, whether or not in good faith, do not legitimize an unfair immigration-related employment practice. See discussion, at p. 16, supra.

I conclude that Jones was discharged solely because of his citizenship status. This is so because Respondent insisted, as a condition of continued employment, that he present his birth certificate after having presented sufficient documentation. Upon failure to present his birth certificate, Jones was discharged ``because he could not prove that he is a United States citizen,'' Exh. C. Since Respondent has not shown by a preponderance of evidence, or otherwise, that it would have made the same decision, i.e., discharge, even absent the misplaced reliance on Complainant's need to present a birth certificate to verify his work eligibility, I find by a preponderance of the evidence that Respondent discriminated against Complainant by discharging him in violation of 8 U.S.C. § 1324b(a)(1)(B).

VIII. Remedies

A. Orders for Cease and Desist, Records Retention and Civil Penalty Discussed

Having found that Respondent engaged in an unfair immigration related employment practice against Complainant, I am obliged as a matter of law to issue an order that Respondent cease and desist from such practice. 8 U.S.C. § 1324b(g)(2)(A). Respondent is so ordered. Every other remedy contemplated by Section 102 is within the discretion of the judge. 8 U.S.C. § 1324b(g)(2)(B); Marcel, supra, at 26; Lasa Marketing, supra, at 29; Mesa Airlines, supra, at 55.

Title 8, U.S.C. § 1324b(g)(2)(B)(i) authorizes an order ``to comply with'' Section 101 of IRCA ``with respect to individuals hired. . . . during a period of up to three years.'' In fixing an appropriate period of time within the three-year framework it is relevant to acknowledge the tension which confronts employers between sanctions compliance on the one hand, and liability for national origin or citizenship status discrimination on the other hand. In the present case, Respondent's presumably good faith but flawed and misguided I-9 compliance effort mired it in discrimination liability and denied an employment opportunity to a U.S. citizen who neither looks nor sounds foreign. Accordingly, upon my consideration

of the whole record and recognizing the paucity of adjudications under Section 102, I determine that it is just and appropriate for such an order to remain in effect for a period of one year. See Marcel, supra, at 26 (one-year compliance order), Lasa, supra, at 33 (three-year compliance order); Mesa, supra, at 55 (two-year compliance order).

Considering Respondent's misunderstanding of the paperwork requirements of IRCA, it will be expected during that one year period to retain ``the name and address of each individual who applies, in person or in writing, for hiring for an existing position . . . for employment in the United States.'' 8 U.S.C. § 1324b(g)(2)(B)(ii). Consistent with its obligations under IRCA and as suggested by OSC, Respondent will be expected ``to thoroughly educate all its employees about the antidiscrimination requirements of IRCA,'' OSC Brief at 27, during the one-year period of recordkeeping directed in this paragraph (and, generally, thereafter). Of course, such training should include a proper understanding of Section 101 and Section 102.

The Complaint asks for a civil penalty of $20,000,00. OCS proposes in its post-hearing brief that I order a penalty payable to the United States of $1,000.00, the statutory maximum 8 U.S.C § 1324b(g)(2)(B)(iv)(I). In context of OSC's failure to initiate this case to vindicate the interests of the Government, and its intervention only after the record closed, I disagree that a civil money penalty is called for on this record. No penalty is adjudged.

B. Reinstatement and Back Pay

Title 8 U.S.C. § 1324b(g)(2)(B)(iii) authorizes the judge to direct the employer ``to hire individuals directly and adversely affected, with or without back pay. . . . .'' Complainant requests both reinstatement and back pay for lost earnings as a result of the discrimination.

Title VII case law involving reinstatement and back pay must be considered in adjudications under Section 102 of IRCA. See IV.D., supra. It is reasonable to conclude, therefore, that Title VII case law provides an important springboard for discussion of remedies under Section 102. See Williamson v. Autorama, OCAHO Case No. 89200540 (May 16, 1990) at 6 (discussing applicability of Title VII precedents to attorneys' fees under Section 102 of IRCA). Title VII case law, however, does not control in all respects. See e.g., Prieto v. News World Communications, Inc., OCAHO Case No. 88200164 (Nov. 17, 1989) (Order Denying Motion for Enforcement of Settlement) (distinguishing Section 102 of IRCA from Title VII with respect to a party's adherence to executory settlement agreements).

Generally, upon a finding of discrimination, the trial court is obliged to place the injured party in the position he or she would have had absent the discriminatory conduct, i.e., make-whole relief. Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); Frank v. Borman, 424 U.S. 747, 764 (1976); Rios v. Enterprises Ass'n Steamfitters Local 638, 860 F.2d 1168, 1175 (2d Cir. 1988); Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496, 504 (2d Cir. 1980); EEOC v. Kallir, 420 F.Supp. 919, 923 (S.D.N.Y 1976), aff'd. 559 F.2d 1203 (2d Cir. 1977), cert. denied, 434 U.S. 920 (1977).

(1) Reinstatement Ordered

In fashioning make-whole relief, the trial court has discretion to order reinstatement of a wrongfully discharged employee. Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978); Francoeur v. Corroon & Black, 552 F.Supp. 403, 413 (S.D.N.Y. 1982). It is the exceptional case where reinstatement is not ordered, Nort v. United States Steel Corp. 758 F.2d 1462, 1470 (11th Cir. 1988); Garza v. Brownsville Independent School Dist., 700 F.2d 253, 255 (5th Cir. 1983). Reinstatement may be ordered when the victim of discrimination has found equivalent employment, as long as such reinstatement would further the purposes of ending discrimination and making the victim whole. Phelps Dodge v. N.L.R.B., 313 U.S.C. 177, 196 (1940). No exceptional circumstances have been shown on this record. To end such discrimination and to make Complainant whole, notwithstanding that he has found other employment, Respondent will be expected to reinstate Complainant to the position from which he was unlawfully discharged, at the prevailing wage and with commensurate benefits.[9]

(2) Back Pay Adjudged

Back pay is typically ordered to compensate a discriminatee for earnings lost as a result of an unlawful discrimination. The back pay remedy has the dual purpose of reimbursing plaintiffs
for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges. N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

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[9]As to limitations on the employer's duty to effect reinstatement, see e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 375 (1977); Romasanta v. United Air Lines, Inc., 717 F.2d 1140, 1152 (7th Cir. 1983), cert. denied, McDonald v. United Air Lines, Inc. et al., 466 U.S. 944 (1984); Briseno v. Central Technical Community College Area, 739 F.2d 344, 347-48 (8th Cir. 1984); Schlei & Grossman, Employment Discrimination Law 516-17 (Five-Year Cumulative Supplement 1989).

Back pay is also understood as ``the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page of this country's history.'' Albemarle, supra, at 417-18. Back pay has been characterized as the fundamental remedy for job bias which ``should only be denied for reasons which, if applied generally, would not frustrate the central statutory purposes'' of ending employment discrimination and compensating its victims. Albemarle, supra, at 421 n. 14; Carrero v. New York City Housing Authority, 890 F.2d 569, 580 (2d Cir. 1989); Cohen, supra, at 504. Given a presumption in favor of back pay, any denial must be well supported. Albemarle, supra, at 421 n.14; Franks, supra, at 774; Carrero, supra at 580.

A prevailing discriminatee such as Complainant, however, has a duty to mitigate damages by reasonable diligence in seeking employment substantially equivalent to the position he lost. Ford v. EEOC, 458 U.S. 219, 231 (1982); Carrero, supra, at 580. Interim earnings or amounts earnable with reasonable diligence by the victim of discrimination operates to reduce the back pay otherwise allowable. Cowan v. Prudential Insurance Co. of America, 852 F.2d 688, 690 (2d Cir. 1988); Sias, supra, at 696; Kallir, supra, at 924; EEOC v. Sage Realty, 25 Empl. Prac. Dec. ♀31,529 (S.D.N.Y. 1981). IRCA demands no less of prevailing victims of discrimination. Section 102 limits back pay liability to amounts which have accrued not more than ``two years prior to the date of the filing of a charge with an administrative law judge,'' and reduces any award by the amount of interim earnings or amounts earnable ``with reasonable diligence by the individual . . . discriminated against . . .'' 8 U.S.C. § 1324b(g)(2)(C).

(a) Award Computed

Two weeks after he was fired by De Witt, Complainant found another cook's position at Friday's where he was employed through September, 1988. For all that appears on the record, he was unemployed from October 1988 until March 20, 1989, when he started his present job with the Marriott Corporation. Complainant promptly sought other employment after leaving De Witt; his involuntary termination at Friday's resulted from a reduction in force. The record is barren, however, of evidence as to the extent of his diligence in seeking employment between October, 1988 and March 1989.

It is commonplace that employers found liable for discrimination bear the burden of proving a victim's lack of diligence in mitigat-

ing his or her earnings loss. Sias, supra, at 696; Kallir, supra, at 924; Mastro Plastics, supra, at 175. Conduct which bars recovery of back pay under the National Labor Relations Act has been characterized as a clearly unjustifiable refusal to take desirable new employment or a willful loss of earnings. Phelps Dodge, supra, at 199-200; Heinrich Motors, Inc. v. N.L.R.B., 403 F2d 145, 148 (2d Cir. 1968); Mastro Plastics, supra, 354 at 175; In other words, an employer must show that the course of conduct by a discriminatee was so deficient as to constitute an unreasonable failure to seek employment.

The range of reasonable conduct with respect to mitigation is broad; an injured plaintiff must be given the benefit of every doubt in assessing his conduct. Kallir, supra, at 925. For example, absent compelling circumstances, back pay is computed from the date of the discriminatory act until the date of judgment. Anderson v. Group Hospitalization, Inc., 820 F.2d 465, 473 (D.C. Cir. 1987); Thorne v. City of El Segundo, 802 F.2d 1131, 1136 (9th Cir. 1986); see Nobler v. Beth Israel Medical Center, 715 F. Supp. 571, 573 (S.D.N.Y. 1989) (stating that back pay may be available to the date of judgment if at trial plaintiff proves unlawful discrimination). For the trial court to deny back pay for any period prior to judgment has been held contrary to the ``make whole'' purpose of Title VII. Nord, supra, at 1472-73; Schlei & Grossman, supra note 9, at 528-29.

Following hearing, Complainant's opening brief and separate motion request that the record be reopened to admit Respondent's collective bargaining agreement as the basis for accurately determining the compensation to which Complainant is entitled as the result of the discrimination. Respondent has strongly objected. As Complainant concedes on brief, his request is out of time, first having been raised in late March 1990, almost five months after the record closed on November 8, 1989. The rules of practice and procedure of this Office provide that documents may be admitted in evidence after the hearing closes but only in the discretion of the administrative law judge and only if tendered ``not later than twenty (20) days after the close of the hearing except for good cause shown, and not less than ten (10) days prior to the date set for filing briefs. . . .'' 28 C.F.R § 68.48.

I reject the tender. First, based on the rules of practice and procedure of this Office, it is so out of time that arguably I cannot grant it.[10]The first iteration of such a request was contained in

[10] Subsection 68.48 is amenable to the interpretation that while good cause may provide a basis for receiving post-hearing evidence more than 20 days after hearing,

Complainant's brief dated March 29, 1990, filed the next day. Second, assuming that the good cause exception applies, the proffer is not of the sort which is susceptible to a simple opening of the record per se. Not only is the collective bargaining agreement the sort of document which, if introduced, would warrant cross-examination by Respondent, but Respondent correctly argues that it would necessitate evidence in response. Indeed, Complainant's motion acknowledges that its documentary proffer would need to be augmented by testimony pursuant to subpoena. Moreover, Respondent's April 23, 1990 Opposition, implying that an arbitrator's award may have superseded the agreement in salient part, illustrates the quagmire that would result from reopening to receive the agreement. Compare, e.g. Complainant's Motion for Leave to Submit Reply, at paras. 11 and 12. Complainant's requests to reopen, including his motions dated April 16 and April 23, 1990, are denied for all the above reasons, and for lack of good cause.

Although neither party fully developed the record with respect to back pay, it does provide a basis for fashioning an appropriate remedy for Complainant. Exhibit A, Complainant's Response to Respondent's First Set of Interrogatories, details Complainant's jobs, duration, and salaries subsequent to his job at De Witt. From that exhibit I conclude that Complainant worked at Friday's from approximately March 11, 1988 through late September, 1988, earning $7.00 per hour for a 45-hour week. From approximately March 20, 1989 until the hearing, Respondent worked for Marriott Corporation at Manhattan College, starting at $7.00 per hour for a 37.5-hour week. After one month, his hourly wage was raised to $7.25.

It may be argued that because of the paucity of proof adduced by Complainant in support of his claim to back pay, Respondent is excused from failing to prove lack of diligence by Complainant in mitigating his lost earnings. Certainly neither party informed the record in a generous manner on this point. Indeed, Respondent introduced details of earnings not with respect to back pay entitlement but to discredit Jones as a witness by showing the transient character of his work history. For whatever purpose the earnings record was introduced, however, it provides an adequate record on which to support a finding of reasonable diligence on Complainant's part.

At least one court has focused on a record similarly deficient on the issue of damages. In Sprogis v. United Air Lines, 517 F.2d 387, 393 (7th Cir. 1975), the court held that the trial judge was correct

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there is no good cause [or other] exception to the closure of the record within ten days prior to the first date set for filing post-hearing briefs.

in approving the master's order finding reasonable diligence where plaintiff filled out at least one formal job application and obtained a temporary two-month job during a two-year period of unemployment.

Complainant's unemployment from October 1988 until March 20, 1989 is unexplained, not having been probed on the record by either party. I am constrained by the principle announced in Sprogis and the general tenor of the authorities cited above, however, to conclude that Respondent retained the burden to persuade that Complainant fell short of proving due diligence in mitigating his lost earnings. Absent proof on this issue, I am unable to conclude that Complainant was not duly diligent in seeking employment for those periods during which he was unemployed. To the contrary, Jones found suitable employment two weeks after his discharge from De Witt and is presently employed. This shows that Jones was diligent in seeking alternative employment. Therefore, I have no basis for excluding from Complainant's back pay award those periods during which he is not shown to have been employed.

I find that from February 26, 1988 to March 11, 1988 (after he worked at De Witt until he began at Friday's) and from October 1, 1988 to March 20, 1989 (after he worked at Friday's and until he began with Marriott), he was available for employment but was unemployed. As his employment with Marriott continued until the date of hearing, I infer that he remained so employed at all times relevant to such award. For those periods of employment to date, back pay is awarded as computed below to take into account his interim[11] earnings:

(1) # weeks of work, 2/27/88-6/29/90		122
(2) Compensation @ $10.00/hr, @ 40 hrs/wk = $400/wk		$48,800.00
(3) Less interim earnings: \11\		
2/27/88-3/10/88		($0.00)
3/11/88-9/30/88		(9,135.00)
10/1/88-3/19/89		(0.00)
3/20/89-4/14/89		(1,050.00)
4/15/89-6/29/90		(17,128.13)
Total interim earnings		$27,313.13
Total Back Pay Award		$21,486.87

[11]For 29 weeks (3/11/88-9/30/88) @ $7.00/hr per 45-hour week; for 4 weeks (3/20/89-4/14/89) @ $7.00/hr per 37.5-hour week;for 63 weeks (4/15/89-6/29/90) @ $7.25/hr per 37.5-hour week.

(b) Prejudgment Interest Denied

I am authorized to award prejudgment interest. The Supreme Court instructs that the failure to mention interest in statutes which create obligations does not preclude prejudgment interest, and that such award is within the discretion of the trial judge. Rodgers v. United States, 332 U.S. 371, 373 (1947); U.S. v. Seaboard Sur. Co., 817 F.2d 956, 965-66 (2d Cir. 1987). While the award of prejudgment interest has been held to be an element of damages in Title VII actions, its inclusion in backpay awards is discretionary. Although the circuits are divided as to the guidelines for such awards, under Title VII there is no obligation to make prejudgment interest part of the back pay remedy. Larson, Employment Discrimination. Section 55.37 (b)(iii). Taylor v. Philips Industries, Inc., 593 F.2d 783, 787 (7th Cir. 1979) clearly articulated this principle (``While . . . interest on wages due and owing is an available remedy . . . in a Title VII action . . . whether or not to award such interest is within the discretion of the trial court.'') Accord Ungar v. Consolidated Foods Corp., 657 F.2d 909, 919 (7th Cir. 1981).

On considering whether to award prejudgement interest, some courts have utilized a balancing of the equities test. See e.g. Segal v. Gilbert Color Systems, Inc., 746 F.2d 78, 82-83 (1st Cir. 1984). Even though such a test weighs the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed, such a balance must be viewed in light of how much actual money damages the breach of obligation imposed.

In Marcel Watch, supra, a modest award of prejudgment interest as calculated in a ``backpay analysis'' submitted by OSC, accompanied the back pay award. Id. at 30. In the present case, no back pay analyses were submitted by any party. While I have been able to derive a back pay award from the record, it would be sheer speculation to add an interest component. Moreover, the award to Complainant is substantial and, there being no evidence to support offsets, no prejudgement interest is charged; Complainant essentially has been made whole. Accordingly, both on a balancing of the equities basis and in the exercise of discretion, I deny prejudgment interest.

C. Attorneys' Fees Authorized

Complainant is a prevailing party within the meaning of 8 U.S.C. 1324b(h). Subsection (h) confers discretion on the administrative law judge to ``allow a prevailing party, other than the United States, a reasonable attorneys' fee, if the losing party's argument is without reasonable foundation in law and fact.'' For the reasons discussed below, I find the Respondent's argument to be without

reasonable foundation in law and fact, within the meaning of ⌊8 U.S.C. § 1324b(h).

In two early decisions under Section 102, I stated that it was too soon in the administration of the new law to shift fees even where I found the losing parties' arguments to be ``without reasonable foundation in law and fact.'' See Wisniewski v. Douglas County School District, OCAHO Case No. 88200037 (October 17, 1988) Empl. Prac. Guide (CCH) ♀ 5191; Bethishou v. Ohmite Mfg. Co., OCAHO Case No. 89200175 (August 12, 1989) Empl. Prac. Guide (CCH) ♀ 5244. Although I found for the respondent in each case, I refrained from awarding fees because (1) the statutory standard for recovery under IRCA appeared to be innovative and untested; (2) they were the first and second dispositions on the merits involving pro se complainants in IRCA discrimination cases before administrative law judges, and (3) potential complainants may not yet have been made adequately aware of exposure to liability for the attorneys' fees of the prevailing party.

More recently, in Williamson v. Autorama, OCAHO Case No. 89200540 (May 16, 1990), upon analyzing the prevailing respondent's request for attorneys' fees I found the complainant's filing not to be ``unreasonable or, as a prudential matter as distinct from legal niceties, lacking foundation,'' and accordingly denied the request. Id. at 8.

To date, attorneys' fees have been awarded in only one case under Section 102. In Becker v. Alarm Device Manufacturing Co., OCAHO Case No. 89200013 (November 28, 1989) (Order Granting Respondent Union's Motion to Dismiss Complaint As to It and Granting in Part Respondent Union's Request for Attorneys' Fees), the administrative law judge awarded attorneys' fees to the prevailing respondent where the complainant had filed charges with the Office of Special Counsel (OSC) more than 180 days after the date of the alleged discrimination, thereby exceeding the limitations period. The award was based on the conclusion that filing the complaint, in the face of OSC's advice that the charge had been untimely, constituted an argument without reasonable foundation in law and fact.

The respondent has been the prevailing party in every Section 102 decision implicating fee shifting. The question of attorneys' fee awards to prevailing complainants, however, has not yet been decided.[12] The present case requires that the question be addressed.

[12] The previous Section 102 cases in which complainants have prevailed, Mesa Airlines, supra, Lasa Marketing, supra, and Marcel, supra, were all initiated and prosecuted solely by the United States; as the result, no fee shifting was involved. ⌊8 U.S.C. § 1324b(h).

Like Section 706(k) of Title VII, as amended, 42 U.S.C. § 2000e-5(k), Section 102 of IRCA was enacted to redress covered discrimination. Unlike IRCA, Title VII does not articulate a formula for award of attorney's fees. Rather, Title VII authorizes a court, in its discretion, to award ``a reasonable attorneys' fee as part of the costs, and the United States shall be liable for costs the same as a private person.'' 42 U.S.C. § 2000E-5(k).

As noted at IV.D., supra, Title VII jurisprudence served as a point of departure for what later became Section 102 of IRCA and provides an essential starting point for a discussion of attorneys' fees under Section 102. The standard for awarding attorneys' fees to prevailing plaintiffs in discrimination cases was early laid out in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). In Piggie Park, the Supreme Court held that a prevailing plaintiff under Title II of the Civil Rights Act of 1964 ``should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'' 390 U.S. at 402. The Piggie Park standard for awarding attorneys' fees to a successful plaintiff is equally applicable to cases under Title VII. Abermarle Paper Co. v. Moody, supra, at 415; Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978); Henry v. Gross, 805 F.2d 757. 769 (2d Cir. 1986).

Title VII jurisprudence creates a presumption in favor of attorney fee awards to a prevailing plaintiff,[13]whereas under IRCA there first must be a finding that the losing party's argument was ``without reasonable foundation in law and fact.'' The legislative history of Section 102, however, makes clear that this IRCA standard was not intended as a bar to prevailing complainants. Rather, the words of limitation on the fee shifting discretion of the administrative law judge were intended primarily to deter harassment and extortion on the part of meritless complainants. Chairman Rodino said as much in floor debate:

> We clearly do not expect to see harassment suits initiated under this language, nor efforts to extort jobs from small employers through the threat of administrative action. In this regard, we incorporated into the attorneys' fees provisions of the Frank amendment limitations on recovery. We agreed that attorneys' fees should not be awarded unless the losing party's argument `is without reasonable foundation in fact or law.' This language is intended to frustrate frivolous suits by taking away the incentive to bring them.

[13]Christiansburg, supra, at 422. A prevailing defendant is entitled to fees only where the plaintiff's case was ``frivolous, unreasonable, or groundless . . . [or] brought or continued . . . in bad faith . . . Id. In clarifying the rationale for defendants' awards in Title VII actions, the court adopted definitions for ``meritless'' actions and also for those which were ``groundless and without foundation'' and ``vexatious.'' Id. at 421. Bad faith is not the sole prerequisite for a fee award. Id.

132 Cong. Rec. H32248 (1986) (statement of Mr. Rodino).

Faced with Mr. Rodino's explanation of the purpose of the limiting language in subsection (h), I am constrained to conclude that fee shifting on behalf of a prevailing complainant under Section 102 need not depend on satisfying a significantly higher standard of proof than is required of a discriminatee under Title VII. Giving meaning to the Section 102 standard, it is my judgment that a prevailing complainant satisfies Section 102 where the record shows that the respondent's claim is without merit.[14]To conclude that IRCA requires more would defeat the congressional purpose in enacting Section 102; victims of discrimination would rarely invoke a right of action for fear that even if they prevail they might be liable, except in the most egregious cases, for their own attorneys' fees. Similarly, the filing of charges with OSC might also be discouraged because the charging party is automatically a party to any proceeding brought by the Special Counsel. 8 U.S.C. § 1324b(e)(3).

I find that Respondent's ``argument is without foundation in law and fact,'' i.e., its defense is without merit, thereby qualifying Jones for an award within the discretion of the judge. The factual findings make clear that Respondent's recklessness in its I-9 compliance effort as applied to Jones rendered him unemployable absent a birth certificate, compelling the conclusion that Respondent's argument has no reasonable factual foundation. Whatever its intentions, Respondent's erroneous preference for birth certificates over other forms of identification exceeded both its statutory and regulatory obligations. As applied to Complainant, that preference lacked foundation in law and its reiteration in this forum is to the same effect.

The policy reflected by the fee shifting provision, 8 U.S.C. § 1324b(h), warrants award in the instant case. Complainant filed his charge which OSC concluded was worthless. Believing otherwise, Complainant, by counsel, initiated his private action here which OSC joined as intervenor on his behalf after the close of the record. Not only does Complainant's claim have merit, he has prevailed in this action. Therefore, to deny attorneys' fees would leave a substantial gap in the make-whole relief implied by enactment of Section 102. Accordingly, I conclude that Complainant is eligible for fee shifting under 8 U.S.C. § 1324b(h) and, as a matter of discre-

[14]See Christiansburg, supra, at 421 (interpreting merit to mean ``groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case. . . .'').

tion, I will make such an award upon a proper showing as provided below.

The award in this case will reflect the factors approved in United States Football League v. National Football League, 887 F.2d 408, 415 (2d Cir. 1989); cert. denied, 110 S.Ct. 1116 (1990), where the court affirmed the district court which had taken into consideration the factors adopted in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974) in determining a reasonable fee. Those factors to consider in determining the number of hours reasonably expended on a case and a reasonable hourly fee for that time include the following: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the ``undesirability '' of the case; (11) the nature and length of the professional relationship with the client and (12) awards in similar cases.[15]

Complainant is allowed reasonable attorneys' fees upon a proper showing within the time prescribed in this paragraph, subject to reply by De Witt as to the calculation of such award. Complainant shall have 30 calendar days after the date of this Decision and Order in which to submit a brief on the calculation of attorneys' fees which, at a minimum, should address each of the twelve factors outlined in U.S. Football League, supra, at 415. Respondent may file a response within 20 calendar days after the date of Complainant's filing with me.

VIII. Ultimate Findings, Conclusions, and Order

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments and proposed findings of fact and conclusions of law submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already specified, I make the following determinations, findings of fact and conclusions of law:

[15]These factors are consistent with those recommended by the American Bar Association's Model Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106 (1989), and have gained wide judicial acceptance. See, e.g., Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939 (1989), Mammano v. Pittston Co., 792 F.2d 1242 (4th Cir. 1986). But see Blanchard, supra, 109 S.Ct. at 946 (Scalia, J., concurring in part and concurring in the judgment).

1. That Jesse C. Jones is a citizen of the United States born in New York, New York.

2. That Jesse C. Jones began working as a cook at De Witt Nursing Home on February 18, 1988.

3. That a citizen of the United States is entitled, by virtue of the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment practices, to protection from citizenship status-based discrimination in discharge from employment.

4. That Jones timely filed with OSC [the office responsible for investigating and prosecuting before administrative law judges charges of violations of the antidiscrimination provisions of IRCA, 8 U.S.C. § 1324b(c)(2)] a charge of an unfair immigration-related employment practice based on his citizenship status arising out of his discharge by Respondent on or about February 26, 1988.

5. That Complainant timely filed a complaint as his private action after OSC elected not to file a complaint before an administrative law judge. 8 U.S.C. § 1324b(d)(2).

6. That even though OSC declined to file a complaint, it was granted intervention pursuant to 28 C.F.R. § 68.13 after the close of the record on the evidentiary phase of the proceeding.

7. That De Witt Nursing Home, an entity which regularly employs more than three individuals, by and through its employees, required Jones to produce documents to establish identity and employment eligibility in compliance with the employer sanctions requirements of 8 U.S.C. § 1324b with respect to employment in New York.

8. That within three days of reporting for duty in New York after hire by Respondent as a cook, Jones presented to Respondent both his New York State ID, a Form I-9 List B document, and his Social Security card, a Form I-9 List C document. List B documents satisfy employment verification requirements for establishing identity and List C documents satisfy the requirements for establishing employment authorization as prescribed by 8 U.S.C. § 1324a(b) and as implemented by regulation.

9. That De Witt, through its agents, insisted that Jones present his birth certificate, notwithstanding that he had already presented documents sufficient to satisfy employment verification requirements of IRCA, consistent with its usual practice of requiring employee-applicants to present green cards, naturalization certificates, passports or birth certificates to comply with the employment verification regime.

10. That when Jones failed to produce his birth certificate within an unreasonably short period of time, despite protestations he was

obtaining it from his mother, De Witt discharged him solely for the reason that he failed to prove that he was a United States citizen.

11. That by insisting Jones present his birth certificate, notwithstanding that he had presented documents sufficient to satisfy the requirements of 8 U.S.C. § 1324a(b) as found in paragraph 9 above, Respondent unreasonably exceeded the requirements for compliance with the employment verification system of the employer sanctions provisions of IRCA by violating the stricture of 8 U.S.C. § 1324a(b)(1)(A) against requiring a particular document.

12. That by unreasonably exceeding the requirements of 8 U.S.C. § 1324a by requiring Jones to produce a birth certificate, a document which in the case of U.S. citizens evidences employment authorization but does not do so in the case of non-citizens, Respondent discriminated against him on the basis of citizenship in violation of 8 U.S.C. § 1324b.

13. That Jones has shown a prima facie case of an unfair immigration-related employment practice, i.e., discrimination in discharge from employment, by a preponderance of the evidence where it is established that Respondent discharged Jones while continuing to hire for the position which he had held.

14. That De Witt has failed, in turn, to prove by a preponderance of the evidence or at all that it was lawfully entitled to discriminate against Jones by insisting on a birth certificate and discharging him when he failed to produce it within a week after he began his employment.

15. That De Witt has failed to prove by a preponderance of the evidence or at all that it would have discharged Jones even in the absence of citizenship status discrimination.

16. That, based upon the preponderance of the evidence, I determine that De Witt Nursing Home knowingly and intentionally engaged in an unfair immigration-related employment practice, within the meaning of and in violation of 8 U.S.C. § 1324b, when it discharged Jones, a U.S. citizen born in the United States who neither looks nor sounds foreign.

17. That De Witt Nursing Home shall:

(a) Cease and desist from the unfair immigration-related employment practice found in this case, including, without limiting the generality of the foregoing, preferring one form of employment verification over any other;

(b) Comply with the requirements of 8 U.S.C. § 1324a(b) during a period of one year from the date of this Decision and Order, during which it shall retain the name and address of each individual who applies, in person or in writing, for hiring for an existing position for employment by De Witt Nursing Home in the United States;

(c) Thoroughly educate all its employees about the antidiscrimination requirements of IRCA.

(d) Reinstate Complainant to the position from which he was discharged, at the prevailing wage and with commensurate benefits;

18. That De Witt Nursing Home shall pay:

(a) To and on behalf of Mr. Jones a total sum of $21,486.87 in back pay which constitutes what Jones would have earned at De Witt from February 26, 1988, the date of discharge, through the date of this Decision and Order, less mitigation, i.e. the total sum he earned in employments after his discharge from De Witt.

19. That prejudgment interest is denied.

20. That, for the purposes of 8 U.S.C. § 1324b(h) De Witt's ``argument is without reasonable foundation in law and fact'' and Complainant as the prevailing party is allowed reasonable attorneys' fees, to be awarded upon a proper showing therefor. Complainant's submission for such award, if any, will be timely if filed within 30 days after the date of this Decision and Order; De Witt's reply, if any, will be timely if filed within 20 days after the date of Complainant's filing.

21. That, pursuant to 8 U.S.C. § 1324b(g)(1), this Decision and Order is the final administrative order in this case and ``shall be final unless appealed'' to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED: Dated this 29th day of June, 1990.

MARVIN H. MORSE
Administrative Law Judge