

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

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|--------------------|-------------------------------|
| JOHN R. ALVAREZ, |) |
| Complainant, |) |
| |) |
| v. |) 8 U.S.C. § 1324b Proceeding |
| |) CASE NO. 91200149 |
| INTERSTATE HIGHWAY |) |
| CONSTRUCTION, |) |
| Respondent. |) |
| _____ |) |

ORDER

On September 27, 1991, Mountain States Employers Council, Inc. (MSEC), on behalf of Respondent, filed a timely Answer in letter format. MSEC is not a law firm but an association of employers who, inter alia, advise employers on employee relation matters and represent its members in administrative proceedings. Respondent is apparently a member of MSEC.

MSEC attached to the Answer a sworn affidavit from John D. Medberry, who is employed by Respondent as its corporate EEO officer, authorizing MSEC to act as Respondent's representative in this case.

The issue before me is whether or not the statute or regulations which govern these proceedings authorizes me to permit a non-lawyer to represent Respondent. If so, the Answer has been timely filed and the case can proceed to the next step in the administrative process which is discovery and a determination on whether or not there are any material facts in dispute.

The Administrative Procedure Act (APA), at 5 United States Code Section 555(b), provides that: "a person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified member. (Emphasis added) A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding."

The regulations that govern this proceeding are somewhat ambiguous on whether or not a non-lawyer can represent a party in this proceeding. 28 C.F.R. section 68.31 sets forth who may appear and represent a party. Subsection (a) deals with the right to appearance and examine and cross-examine witnesses and introduce into the record documentary or other relevant evidence of the party and any intervenor. Subsection (b) is captioned "Representation" and has six (6) subparagraphs. All the subparagraphs of subsection (b), except (6), clearly relate to attorneys, including their qualification, who may represent Respondent or the Department of Justice in these proceedings.

28 C.F.R. 68.31(b)(6) deals with the authority for representation and states: "Any individual acting in a representative capacity may be required by the Administrative Law Judge to show his/her authority to act in such capacity." Although this subparagraph arguably provides an ALJ with the power to require all lawyers to show their authority to represent a party, I think the better view is that it relates to those persons who are non-lawyers who have been authorized to represent a party. I take this view because (1) 28 C.F.R. 68.31(b)(5) requires each attorney representing a party to file a notice of appearance which would infer an authorization by a party to represent him; (2) the APA does provide for non-lawyers to represent a party; and (3) since a party can act pro se in these proceedings, it makes more sense to allow someone who is competent in these matters to assist the party than to have a party represent himself.

Although I find that the regulations do permit a non-lawyer to represent a party, prior to permitting such representation, I will require reliable proof that the non-lawyer has been authorized by the party to represent it in these proceedings. Moreover, I will require some evidence as to the competency of the non-lawyer who wishes to represent a party, including a familiarity with the statute and regulations that govern these proceedings.

After carefully reviewing the pleadings filed in this case by MSEC on behalf of Respondent, it is clear that they have been authorized to represent Respondent and understand the legal requirements for filing an answer in these proceedings. Accordingly, I will permit MSEC to represent Respondent in these proceedings and accept the answer filed as timely.

Under ordinary circumstances, I would direct both parties to begin the discovery process to determine whether or not there are any material facts in dispute and a summary decision is appropriate. Since both parties are not represented by attorneys, I shall identify the legal issues and initially direct the Complainant to

submit to me an original and two copies of the appropriate pleadings, affidavits or other documents necessary for me to determine whether or not there needs to be an evidentiary hearing in this case.

In order to determine whether or not I need to hold an evidentiary hearing, the first finding I will have to make is whether or not Complainant can prove a prima facie case of discrimination. Accordingly, Complainant is hereby ORDERED to:

1. Submit his statement or the statements of others, preferably under oath, stating, with specificity, the facts that support his allegations that he was terminated from his employment with Respondent because of citizenship or national origin discrimination. The statement of Complainant and others should show (supporting documents such as letters from Respondent or other documentary evidence should also be submitted if available) (1) his place of birth and how and when he entered the United States; (2) his citizenship status on the date of his termination; (3) any INS documents to prove (1) or (2); (4) a statement of his job duties on or about the date he was terminated from his employment and his prior working experience showing he was qualified for the job; (5) that he was performing the job he was terminated from in a satisfactory manner; (5) when and why he was discharged; and (6) after his discharge show who was hired to replace Complainant and what was his or her nationality or citizenship status.

It is further **ORDERED** that Complainant shall file its response to this order including all statements, affidavits and documents in compliance thereof on or before November 15, 1991.

It is further **ORDERED** that the parties shall not begin any discovery until I have had an opportunity to determine whether or not Complainant can prove a prima facie case of discrimination.

SO ORDERED this 15th day of October, 1991, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge