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

CECILIA ARACELI BASUA,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) CASE NO. 93B00053
WAL-MART #1554,)
Respondent.)
_____)

FINAL ORDER DISMISSING
COMPLAINT BASED ON ABANDONMENT
(August 3,1993)

Appearances:

For the Complainant
CECILIA ARACELI BASUA, Pro Se

For the Respondent
CHARLYN S. JARRELLS, Esquire

Before:

E. MILTON FROSBURG
Administrative Law Judge

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I. Introduction

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. §1324b, these antidiscrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) should it find reasonable cause to believe that such discrimination occurred. If, however, the OSC does not file such a charge within 120 days of receipt of the claim, the protected individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three, but fewer than

fifteen employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three employees.

II. Procedural History

On September 3, 1992, Complainant, Cecilia Basua, a Mexican national and an alleged alien authorized for employment in the United States since sometime between 1985 and 1987, filed a charge with the OSC in which she alleged that Respondent, Wal-Mart #1554, had discriminated against her based on her national origin status. In a letter dated January 19, 1993, OSC informed Complainant that, based on its investigation, it had determined that there was not sufficient evidence that she had been discriminated against in violation of 8 U.S.C. § 1324b. On March 8, 1993, Complainant, exercising her statutory right, filed the instant Complaint alleging, again, that Respondent had discriminated against her based on her national origin and adding claims of citizenship status discrimination and intimidation.

In a Notice Of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices, dated March 22, 1993, Respondent was notified of the filing of the Complaint, the opportunity to answer the Complaint within thirty (30) days after receipt of the Complaint, the possibility of a default judgment should it not answer the Complaint, my assignment to the case, and the location of the hearing as in or around Chicago, Illinois. Proper service of the Complaint on Respondent on March 25, 1993 is evidenced by a file copy of a properly signed and dated return receipt for certified mail. On March 29, 1993, I issued a Notice of Acknowledgment advising Respondent of my receipt of this case and cautioned Respondent that an Answer, pursuant to 28 C.F.R. part 68.9¹, must be filed within thirty (30) days of its receipt of the Complaint.

On May 11, 1993, Complainant filed a packet of documents, without a cover letter, which I inferred was evidence she wished me to consider in support of her claim. In the interests of justice and fairness, on May 16, 1993, I issued an Order To Show Cause granting Respondent until May 24, 1993, to file a legally sufficient Answer and an explanation of why its Answer had not been timely filed. On May 27, 1993, Respon-

¹ Citations are to the OCAHO Rules of Practice and Procedure for Administrative Hearings, 57 Fed. Reg. 57669 (1992) (to be codified at 28 C.F.R. part 68) (hereinafter cited as 28 C.F.R. section 68) 8 U.S.C. § 1324a

dent filed a request for extension of time to file its Answer which was not opposed by Complainant and which I granted on June 7, 1993 for good cause shown. Respondent filed its Answer, pursuant to that Order, on June 10, 1993. On June 14, 1993, I issued an Order Directing Procedures for Prehearing.

On June 21, 1993, Complainant filed another packet of documents without a cover letter, including letters, petitions, doctor's medical notes, and a copy of her Form I-9, Employment Eligibility Form, which I inferred was her reply to Respondent's Answer. On June 29, 1993, I issued an Order Directing Procedures For Prehearing Telephonic Conference regarding a telephonic conference scheduled for July 7, 1993.

On July 8, 1993, I issued the following Orders: Order Confirming Prehearing Telephonic Conference, Order Dismissing Complainant's National Origin Claim, Order Requiring Complainant To File Evidence Regarding Protected Status as Defined in 8 U.S.C. § 1324b, and Order Requiring the Parties to Submit Evidence Regarding Alleged Retaliation. Complainant's national origin discrimination claim was dismissed for lack of jurisdiction as it was undisputed that Respondent employed more than fourteen employees. Complainant was advised to contact the Equal Employment Opportunity Commission, which has received her claim of national origin discrimination, to receive an update on its status.

Further, I stated:

In order for this Court to have jurisdiction over Complainant's claim of citizenship status discrimination, Complainant must be a "protected individual" as defined under the statute, 8 U.S.C. 1324b(a)(3)(B). The relevant statutory language is as follows:

the term "protected individual" means an individual who....

B..... is an alien who is lawfully admitted for permanent residence, is granted the status of alien lawfully admitted for temporary residence under section 210(a), 210A or 245A, is admitted as a refugee 1445 under section 207, or is granted asylum under section 208; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (ii) an alien who has applied on a timely basis, but has not been naturalized² as a citizen within 2 years after the date of the application, unless the alien can establish that

² The underlined portion was inadvertently omitted in the Order of July 8, 1993 and corrected in the Technical Correction Order of July 16, 1993.

the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

A review of the file reveals that Complainant may not be a protected individual. In the Complaint, Complainant represented that she had received her legal permanent residency status sometime in 1985 or 1986. She represented, further, that she had applied for naturalization sometime in 1984.

At the telephonic conference, upon inquiry, Complainant read to the Court the date that is on her green card as "May 17, 1985" and that her husband is not a United States citizen. Although she made no representations as to the basis of the granting of her legal permanent residency status, with the limited information before me, I cannot make a final determination as to Complainant's protected individual status. However, it appears that Complainant may not meet the requirements of the statutory definition, and if that proves to be true, then I must dismiss her citizenship status discrimination claim.

As I cannot make the determination of protected individual status based on the limited information before me at this time, by this Order, Complainant is directed to file with this Court any information she possesses, or can obtain, that will establish (1) the date she received her legal permanent residency status, (2) a clear photocopy of her green card, (3) any information regarding the basis on which she was granted legal permanent residency status, and (4) any information she may have regarding her application for naturalization. This information, which must be sent to Respondent at the same time it is sent to this Court, must be filed on or before July 21, 1993....

D. Retaliation

The record reveals that Complainant has also alleged a claim of retaliation. 8 U.S.C. § 1324b(a)(5). By this Order, Complainant is directed to file a sworn statement detailing the alleged facts of the alleged retaliation by Respondent, i.e., what happened, when it happened, who was involved or was a witness to the events, and any other documentary evidence; Respondent is directed to file any evidence it has regarding Complainant's termination which might refute the claim of retaliation.

This information is to be filed by the parties on, or before July 21, 1993. Complainant is reminded that she must serve a copy of her document(s) on Respondent as well as on the Court. After I receive and review all the above information, I will set another prehearing telephonic conference to discuss the case with the parties.

To date, Complainant has not filed any documentation with this Court or contacted it in any manner.

III. Discussion

Although Complainant is pro se, I find that her status is not the cause of her nonresponse to my Order of July 8, 1993. I base this belief on a review of the case file, both the literate and complete charge and Complaint that she has filed, the extensive documentation she has filed with the Court and well as the discussion we had at the

prehearing telephonic conference. Under 28 C.F.R. 68.37(b)(1), I may find that a party has abandoned its complaint or request for hearing if such party has failed to respond to the Court's orders. Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/92); United States of America v. McDonnell Douglas Corporation, OCAHO Case No. 90200363 (8/28/92); see also Arrieta v. Michigan Employment Security Commission, OCAHO Case No. 92B00149 (11/10/92); Egal v. Sears Roebuck and Company, 3 OCAHO 442 (7/25/92) at 12 note 9.

In addition to the fact that Complainant was telephonically advised of the necessity of filing the information regarding her "protected individual" status and the information regarding the allegation of retaliation, she was so advised by Order. I note that a review of the Court file reveals that no document served on Complainant by mail has been returned by the U.S. Postal Service since this case began and Complainant has not notified this Court of a change of address. Thus, I am satisfied that proper service of my Order of July 8, 1993 has been effected and that Complainant is aware of the consequences of a nonresponse.

As Complainant has not complied with my Order of July 29, 1993 and had sufficient access to this Court should there have been some problem with filing her response, I find that Complainant has abandoned her Complaint. 28 C.F.R. 68.37(b)(1). On this basis alone, I may, and do, dismiss this case.

This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. § 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 3rd day of August, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge