

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

TULIN E. MANGIR,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) CASE NO. 93B00076
TRW, INC.,)
Respondent.)
_____)

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION TO DISMISS THE COMPLAINT

(August 2, 1994)

Appearances:

For the Complainant
Tulin E. Mangir, Pro Se

For the Respondent
Jonathan A. Boxer, Esquire

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. Introduction

Currently before me is Complainant's motion to voluntarily dismiss the complaint in this case without prejudice. For the reasons stated below this motion will be granted.

II. Procedural History

On September 22, 1992, Tulin E. Mangir ("Complainant" or "Mangir"), a native of Turkey and a naturalized U.S. citizen, initiated the proceedings in this case by filing a charge of discrimination with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices ("OSC"), alleging that TRW, Inc. ("TRW" or "Respondent") had discriminated against her on the basis of her national origin, by applying to her the "5/10 Rule" (Paragraph 3-403 of the DoD Personnel Security Program, Personnel Security Program Regulation No. 5200.2, formerly codified as 32 C.F.R. § 154.16(c)), in violation of § 102 of the Immigration Reform & Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324b.

On or about February 8, 1993, OSC informed Complainant that it "had determined that there [was] no reasonable cause to believe that the 5/10 rule was applied against [her]" and further stated that because her charge was not timely filed, it had decided not to file a complaint with an administrative law judge.

On April 12, 1993, Complainant, proceeding *pro se*, filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") against Respondent, alleging that on July 11, 1992, Respondent knowingly and intentionally fired and "constructively dismissed" her from her job as a chief engineer "for protesting against discriminatory practices by Respondent and for filing [discrimination complaints] with appropriate agencies." Compl. para. 13(b). Complainant further alleges in her complaint that she was discharged from her job because of her Turkish national origin and her citizenship status, in violation of 8 U.S.C. § 1324b.

Respondent filed its answer to the complaint, alleging as an affirmative defense that Complainant's charge with OSC was not timely filed because the discriminatory acts occurred more than 180 days prior to the time she filed her charge with OSC.

Subsequent to the filing of the answer, the parties had a brief but unsuccessful settlement conference and started discovery. From

December 1993 to June 1994 the parties were involved in various forms of discovery, and complainant, on at least one occasion filed a motion to compel. See Complainant's Motion to Compel, filed May 20, 1994.

On July 1, 1994, but prior to completion of discovery, Complainant filed a motion to dismiss the complaint without prejudice because of "failing health and dwindling financial resources." On July 5, 1994 I issued an Order Directing Respondent to File a Response to Complainant's Motion to Dismiss This Case Without Prejudice. In my order I stated that a dismissal without prejudice operates to leave the parties as if no action had been brought at all; I therefore wanted to provide Respondent with an opportunity to argue whether it objected to a dismissal without prejudice. I granted Respondent time to file a brief and also provided Complainant with an opportunity to respond.

On July 25, 1994 Respondent filed a response stating that it "does not (emphasis added) oppose Complainant's motion to dismiss without prejudice." in view of Respondent's position on dismissal, Complainant does not need to file a response.

III. Discussion

The rules of practice and procedure governing these proceedings explicitly provide for dismissal of complaints under three circumstances: (1) "[w]here the parties or their authorized representatives or their counsel have entered into a proposed settlement agreement," under 28 C.F.R. § 68.14 (1993); (2) when a complaint or a request for hearing is abandoned by the party or parties who filed it, under 28 C.F.R. § 68.37(b); and (3) by default, under 28 C.F.R. § 68.37(c). There is no regulation that covers the circumstances present in the instant case, where a complainant voluntarily seeks the dismissal of a complaint. The regulations, however, state that in any situation not provided for or controlled by the regulations, the Administrative Procedure Act, or other applicable statute, executive order or regulation, "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline" in deciding a legal issue before the Administrative Law Judge. 28 C.F.R. § 68.1.

Federal Rule of Civil Procedure 41(a) reads in pertinent part as follows:

(2) By Order of Court. Except as provided in paragraph (1) [which provides for dismissal by stipulation] . . . , an action shall not be dismissed at the plaintiff's instance save upon order of the court

and upon such terms and conditions as the court deems proper. .
 . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(a)(2) allows the Court to dismiss with or without prejudice, with the most important consideration being the interests of the defendant. Schwarz v. Folloder, 767 F.2d 125, 129 (5th Cir. 1985). If the plaintiff moves under Rule 41(a)(2) for voluntary dismissal and specifies that he or she wishes dismissal with prejudice, it has been held that the court must grant that wish. Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964); Shepard v. Egan, 767 F. Supp. 1158, 1165 (D. Mass. 1990); see also, 9 C. Wright and A. Miller, Federal Practice and Procedure ("Federal Practice and Procedure") § 2367 (1971). If, however, the plaintiff moves for dismissal under Rule 41(a)(2) and asks that the dismissal be without prejudice or does not specify that it be with or without prejudice, the matter is left to the sound discretion of the court. Kapowas v. Williams Insurance Agency, Inc., 11 F.2d 1380, 1385 (7th Cir. 1993); Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984, 986 (5th Cir. 1989). The court may grant dismissal without prejudice or may allow the dismissal only on the condition that it be with prejudice to a further action on the same claim. Gravatt v. Columbia University, 845 F.2d 54, 55 (2nd Cir. 1988); American Cyanamid Co. v. McGhee, 317 F.2d 295, 298 (5th Cir. 1963). See Ordinance Gauge Co. v. Jacquard Knitting Mach. Co., 21 F.R.D. 575 (E.D. Pa. 1958), aff'd, 265 F.2d 189 (3rd Cir. 1959), cert. denied, 361 U.S. 829 (1959) (where motion for dismissal was filed after receipt of notice from the clerk that the case would be deemed abandoned unless application was made to the court, and plaintiff was notified of the impending dismissal and moved promptly to avoid the penalty, dismissal would be without prejudice under the local rule.); United States v. E.I. du Pont de Nemours and Co., 13 F.R.D. 490 (N.D. Ill. 1953); Shaffer v. Evans, 263 F.2d 134 (10th Cir. 1958), cert. denied, 359 U.S. 990 (1959) (where action had been pending for six months at time of hearing on plaintiff's motion to dismiss without prejudice, depositions had been taken, defendant had made arrangements for medical testimony, pretrial conference had been held, and case was apparently ready for trial at the next jury term, trial court did not abuse its discretion in denying plaintiff's motion and dismissing the action with prejudice.); Sammons v. Larken, 38 F. Supp. 649 (E.D. Mass. 1941), vacated on other grounds, 126 F.2d 341 (1st Cir. 1942) (where plaintiff suing for copyright infringement moved to dismiss a second count in the complaint for trademark infringement and unfair competition, the motion was allowed with prejudice and without costs.).

Voluntary dismissal without prejudice is not a matter of right. Zagano v. Fordham University, 900 F.2d 12, 14 (2nd Cir. 1990). The purpose of Rule 41(a)(2) is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced, Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987), or unfairly affected by dismissal. McCants v. Ford Motor Co., Inc., 781 F.2d 855, 856 (11th Cir. 1986); LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976). Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and, the adequacy of plaintiff's explanation for the need to dismiss. See Bosteve Ltd. v. Marauszwiki, 110 F.R.D. 257, 259 (E.D.N.Y. 1986); Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14, 18 (S.D.N.Y. 1953); see also Wakefield v. Northern Telecom, Inc., 769 F.2d 109, 114 (2nd Cir. 1985) (claim withdrawn after trial but before submission to jury dismissed with prejudice for plaintiff's failure to show need for retrial elsewhere); Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969) (dismissal without prejudice properly denied where discovery considerably advanced and defendant's motion for summary judgment pending).

"A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action." Nemaizer v. Baker, 793 F.2d 58, 60 (2nd Cir. 1986). A dismissal with prejudice is res judicata not only as to matters actually litigated in the previous action, "but as to all relevant issues which could have been but were not raised and litigated in the suit." Id. (quoting Heiser v. Woodruff, 327 U.S. 726 (1946)).

In this case, Complainant has moved to dismiss her complaint against Respondent without prejudice. Respondent has unequivocally stated that it does not object to the complaint being dismissed without prejudice. In view of Respondent's position, I will grant Complainant's motion to dismiss the complaint without prejudice. Cf. Huesca v. Rojas Bakery, OCAHO Case #92B00248 (Final Decision and Order Granting Complainant's Motion to Dismiss the Complaint) (June 24, 1994) (where complainant filed a motion to dismiss the complaint without stating whether it was with or without prejudice and I dismissed the complaint with prejudice because the case was pending for 15 months before motion to dismiss was filed, the case was at an advanced stage of discovery, respondent had filed a motion for summary decision and

where complainant did not appear to have standing to bring his citizenship status claim).

Accordingly, Complainant's motion to dismiss this case without prejudice is granted. This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b (g)(1). Not later than sixty (60) days after entry, Complainant may appeal this Decision and Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred, or in which the employer resides or transacts business. 8 U.S.C. § 1324b(i)(1).

SO ORDERED on this 2nd day of August, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge