

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

JOSH PHILIP KUPFERBERG,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 94B00012
UNIVERSITY OF OKLAHOMA)
HEALTH SCIENCES CENTER,)
Respondent.)
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JOSH PHILIP KUPFERBERG,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 94B00013
OKLAHOMA CITY, OKLAHOMA)
DEPARTMENT OF VETERANS)
AFFAIRS MEDICAL CENTER,)
Respondent.)
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ORDER OF INQUIRY
(September 23, 1994)

I. Procedural History

This is a case pursuant to Section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b. On January 25, 1994, Josh P. Kupferberg (Complainant or JPK) filed a complaint, pro se, on a complaint format provided by the Office of the Chief Administrative Hearing Officer (OCAHO). JPK alleges that he suffered an unfair immigration-related employment practice in violation of §1324b(a)(5) both by the Oklahoma City Veterans Affairs Medical Center (OKCVAMC) and by the University of Oklahoma Health Sciences Center (OUHSC).

The complaints are informative only by reference to copies of documents attached, i.e., letters dated May 12, 1993, from JPK to the Special Counsel for Immigration Related Unfair Employment Practices (OSC), and charges by JPK dated June 14, 1993 on an OSC format with additional narrative and the May 12 letter attached. Each complaint also encloses an OSC determination letter dated November 1, 1993 and a second OSC letter of January 14, 1994 transmitting a copy of the earlier one on the understanding that the November letter was not received by JPK or his attorney. The OSC determination letter advised in each case that it would not file a complaint before an administrative law judge because it did find sufficient evidence to support the claim. As to OKCVAMC, OSC rejected the charge also because of lack of §1324b jurisdiction over federal entities.

Filing of a charge with OSC is a condition precedent to filing a complaint with an ALJ. 8 U.S.C. §§1324b(b),(d)(2). In each of these private actions, JPK requests a hearing before an administrative law judge (ALJ) pursuant to §1324b(d)(2).

At all times relevant to his complaints, JPK, a native born U.S. citizen, was employed as a federal employee by OKCVAMC as a staff anesthesiologist and served as a faculty member in the anesthesiology department of OUHSC. The complaints in the two cases are essentially identical, as are the OSC charges, and attachments. As explained by JPK,

The OKCVAMC is a "Dean's Committee" teaching hospital, and members of the medical staff there are generally also OU faculty members who teach OUHSC residents at the OKCVAMC.

Attach. to OSC charge.

JPK recites that in 1991 his wife Priscilla Hensel, M.D. (Hensel), a U.S. citizen, filed §1324b claims against OKCVAMC and OUHSC, alleging that OCVAMC and OUHSC "failed to hire her due to her U.S. citizenship." *Id.* JPK contends in effect that the adverse personnel actions by OKVAMC and OUHSC were retaliation against him,

precipitated by my wife's legal claims under 8 U.S.C. §1324b, and by my support of those claims. There are no objective grounds for these adverse actions.

Attach. to OSC charge.

Specifically, JPK alleges (1) a lower than previous performance evaluation, (2) elimination of research activities with no increase in compensation to which he asserts he is entitled for being obliged to devote all his time to clinical work, (3) cessation of OUHSC compen-

sation, and (4) suspension of "privileges to practice unsupervised 'airway management.'" Curiously, although the formal OSC charges are dated June 14, 1993, the assembled documents stapled to the OCAHO complaint include, in addition to those already mentioned, a copy of a Department of Veterans Affairs Memorandum by D. Robert McCaffree, M.D., Chairman, Professional Standards Board, dated the next day June 15, 1993. The Memorandum appears to implicate JPK's physical condition:

1. In accordance with the bylaws, the Physical Standards Board evaluated the information available to it from your examinations and submitted that report to the Professional Standards Board. The Professional Standards Board unanimously accepted that report and its recommendations.
2. In summary, the Physical Standards Board focused on the results of the ophthalmologic and neuropsychologic function testing. It was the opinion of the Physical Standards Board that the impaired eyesight and low average to impaired motor functioning impair your expected level of functioning to the extent that you cannot safely function as an independent anesthesiologist.

* * * *

The substance of JPK's claim is that the personnel actions described above comprise unlawful retaliation against him by OKCVAMC for his having assisted his wife in her assertion of rights protected under 8 U.S.C. §1324b(a)(5).

Each Respondent filed an answer to the complaint against it, denying liability. In addition to other defenses, each asserts a lack of administrative law judge jurisdiction over the complaint. OKCVAMC contends that as a component of the Department of Veterans Affairs, the doctrine of sovereign immunity protects it from suit because Congress failed to waive immunity in §1324b, requiring that JPK's complaint be dismissed for lack of subject matter jurisdiction. OUHSC contends that the Eleventh Amendment to the Constitution of the United States bars the complaint because as an entity of the State of Oklahoma it is immune from suit absent consent of the State or Congressional abrogation of State immunity.

Each Respondent accompanied its answer to the complaint with a motion to dismiss. Inter alia, the motions recite in greater detail the respective jurisdictional barriers asserted in the answers. OKCVAMC requested alternatively that JPK's case be stayed pending disposition of other litigation. Reciting that OKCVAMC "has no objection," OUHSC asked that the two cases be consolidated.

JKP filed his complaints pro se. On March 16, 1994, counsel for JPK entered his appearance and filed separate responses in opposition to the respective motions to dismiss.

The pending litigation cited by OKCVAMC included an appeal to the United States Court of Appeals for the Tenth Circuit by Hensel from an adverse ruling by the administrative law judge on her citizenship status discrimination complaints. See Hensel v. Oklahoma City Veterans Affairs Medical Center; Hensel v. Univ. of Oklahoma Health Sciences Center, 3 OCAHO 532 (6/25/93) (granting respondents' motions to dismiss, without reaching the immunity issues, on the basis that Hensel failed to perfect an application for a position at OUHSC, and failed to satisfy a condition precedent to a position at OKCVAMC, i.e., appointment to OUHSC).

II. *Discussion*

On September 16, 1994, the Tenth Circuit held in Hensel v. Office of the Chief Admin. Hearing Officer, No. 93-9551, 1994 U.S. App. LEXIS 25802 (10th Cir. Sept. 16, 1994), dismissed Hensel's claims against OKCVAMC and OUHSC.¹ As to the federal claim, the court held that the "[P]etitioner has not demonstrated that the IRCA contains explicit and unambiguous language that waives the immunity of the United States. Id. at *11. As to the State claim, the court held that "[P]etitioner has not shown that Congress intended to abrogate the Eleventh Amendment in the IRCA. Id. at *5.

I am unaware of any OCAHO jurisprudence on the question of Eleventh Amendment immunity. Concerning federal immunity, citing

¹ The court prefaced Hensel, with a notice that its order and judgment "is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel," and citation of it is disfavored but nevertheless it "may be cited under the terms and conditions of the Court's General Order filed November 29, 1993. 151 F.R.D. 470." LEXIS 25802 at *1. It may be presumed from the court's Notice that Hensel is to be unpublished. The General Order (GO) "susends 10th Cir.R. 36.3" until December 31, 1995. The GO authorizes citation of an unpublished opinion, order or judgment "if it is believed that . . . [it] . . . has persuasive value with respect to a material issue in a case and would assist the court in its disposition," provided that a copy is attached to the brief or other document in which it is cited. Id. Because of the familial relationship of JPK to Hensel, and the fact that the respondents/appellees are identical in the two sets of cases, the court's GO is satisfied without enclosing copies of its ruling with this Order.

United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992),² the Hensel court equates the Supreme Court's requirement for an "unequivocal expression" of sovereign immunity with a requirement for "explicit" text. LEXIS 25802 at *11. Because the Hensel court refers only to petitioner's opposition to the claim of sovereign immunity, it appears from the Hensel ruling that the court may not have been advised of or was otherwise aware of OCAHO decisions on point, i.e., Roginsky v. Dept. of Defense, 3 OCAHO 426 (5/5/92) (Order, distinguishing Nordic Village) at 5-14; accord, Mir v. Federal Bureau of Prisons, 3 OCAHO 510 (4/20/93) (Order) at 1-11. In any event, the Tenth Circuit addressed the §1324b immunity issues and found waiver wanting both as state and federal respondents.

III. *Order*

1. The Tenth Circuit's Order and Judgment in Hensel necessitates an inquiry as to whether the complaints against OKCVAMC and OUHSC must be dismissed for lack of jurisdiction. The parties are invited to file comments which address the viability of JPK's claims against OKCVAMC and OUHSC in light of the ruling by the circuit court. JPK's response to the motions to dismiss asks for leave to amend the complaints "if the ALJ determines" that they are deficient or defective. His response to this Order should describe with specificity what amendment would survive the impact of Hensel.

2. Responses to this Order will be timely if filed not later than October 14, 1994. A party may reply to the filing of another party not later than October 24, 1994.

3. No party having objected, and absent any reason to the contrary, the motion to consolidate these cases is granted.

SO ORDERED.

Dated and entered this 23rd day of September 23, 1994.

MARVIN H. MORSE
Administrative Law Judge

² Acknowledging that the ambit of the federal sovereign immunity doctrine is unclear, Roginsky distinguished Nordic Village, 3 OCAHO 426 at 8.