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

July 24, 1996

| | | |
|---|---|---|
| ROBERT ANTHONY CHUNG,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. 1324b Proceeding |
| | ) | OCAHO Case No. 95B00134 |
| FEDERAL BUREAU OF<br>PRISONS, FCI GREENVILLE,<br>Respondent. | ) | |

**ORDER OF DISMISSAL**

On September 28, 1995, Robert A. Chung (complainant), then an inmate at the Federal Correctional Institution (FCI), located in Greenville, Illinois, filed a charge with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that the Federal Bureau of Prisons, FCI Greenville (respondent) had knowingly and intentionally discharged him from his commissary stock person assignment at FCI Greenville based solely upon his British national origin, in violation of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U. S. C. §1324b(a)(1)(A). Complainant further charged that respondent had intimidated, threatened, coerced or retaliated against him because he filed or planned to file a complaint under the INA, in violation of 8 U.S.C. §1324b(a)(5).

On February 14, 1996, Mr. John R. Shaw, Regional Counsel, North Central Regional Office, Federal Bureau of Prisons, filed a letter contesting OCAHO's jurisdiction on the grounds that the United States was immune from suit under the doctrine of sovereign immunity, citing recent decisions by the Courts of Appeals for the Ninth and Tenth Circuits. *See Hensel v. Oklahoma City Veteran's Affairs*

*Medical Center,* 38 F.3d 505 (10th Cir. 1994); *General Dynamics Corporation v. United States,* 49 F.3d 1384 (9th Cir. 1995).

For the following reasons, it is found that the United States is the real party in interest and that the provisions of IRCA do not waive the sovereign immunity of the United States. Accordingly, this Office is without jurisdiction to entertain complainant's allegations of national origin discrimination and retaliation.

The doctrine of sovereign immunity precludes private suits against the government without its consent. In the federal context, only Congress can waive the United States' sovereign immunity, *Minnesota v. U.S.,* 305 U.S. 382 (1939), and statutory consents to suit, when supplied by Congress, are strictly construed. *McMahon v. U.S.*, 342 U.S. 25 (1951).

Congress has waived immunity in a number of statutes. For example, the Tort Claims Act authorizes damage claims premised on the negligence of federal employees or agencies performing official functions. *See* 28 U.S.C. §§2401–02, 2671–80; and *generally,* 14 C. Wright, A. Miller & E. Cooper, *Jurisdiction and Related Matters* 2d §§3656–59.

In the past, OCAHO jurisprudence has conflicted over whether IRCA provides a waiver of federal sovereign immunity. Compare *Roginsky v. DOD,* 3 OCAHO 426 (1992)(waiver) and *Mir v. Federal Bureau of Prisons,* 3 OCAHO 510 (1993)(waiver) to *Kasathsko v. Internal Revenue Service,* 6 OCAHO 840 (1996)(no waiver).

The decisions in *Roginsky* and *Mir* considered IRCA as a whole, its legislative history, its relationship to Title VII, and its implementation by the responsible federal agencies, to find that Congress intended to and did waive sovereign immunity under 8 U.S.C. §1324b. The Administrative Law Judge in *Kasathsko,* on the other hand, could not find an explicit waiver of immunity in IRCA.

The issue of immunity in the context of IRCA has only been addressed by two United States Circuit Courts of Appeals. In *Hensel,* the Tenth Circuit refused to find a waiver of sovereign immunity because IRCA does not contain explicit and unambiguous language waiving immunity. 38 F.3d at 509. In *General Dynamics*, the Ninth Circuit also held that without an express waiver of sovereign immunity, the United States was not liable for attorney's fees under

IRCA's fee shifting provisions, 8 U.S.C. §1324b(h). 49 F.3d at 1388; *accord United States v. Zabala Vineyards*, 6 OCAHO 844 (1996).

*Hensel* and *General Dynamics* are not expressly binding upon this Office since an appeal from this decision would be directly to the United States Court of Appeals for the Seventh Circuit. Nonetheless, they are highly persuasive and were decided after the decisions in *Roginsky* and *Mir*. While the issue may not be completely free from doubt, I concur with the more recent decisions holding that IRCA's employment-related discrimination provisions fail to provide an express waiver of sovereign immunity, thereby depriving this Office of jurisdiction to hear complainant's discrimination claims.

The only remaining issue to decide is whether the United States is the real party in interest. That determination is made if it is found that the relief sought by the complainant requires "payment of money from the Federal Treasury, interferes with public administration, or compels or restrains the government." *Stafford v. Briggs*, 444 U.S. 527, 542 n.19 (1980). Since complainant's request for back pay would come from the United States Treasury, I find that the United States is the real party in interest.

Accordingly, complainant's Complaint is hereby ordered to be and is dismissed, with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

*Appeal Information*

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this 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, and does so no later than 60 days after the entry of this Order.