

6 OCAHO 917

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

March 3, 1997

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|--------------------------|---|----------------------------|
| CARLOS ALBERTO MARTINEZ, |) | |
| Complainant, |) | |
| |) | |
| v. |) | 8 U.S.C. §1324b Proceeding |
| |) | Case No. 96B00078 |
| NOAH'S NEW YORK BAGELS, |) | |
| INC., |) | |
| Respondent. |) | |
| _____ |) | |

**ORDER ESTABLISHING PRIMA FACIE CLAIM,
AND ANTICIPATING SCHEDULING A TELEPHONIC
PREHEARING CONFERENCE**

On December 18, 1995, Carlos Alberto Martinez (Martinez or Complainant) filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The Charge alleged that on December 12, 1995, Noah's Bagels of New York, Inc. (Noah's or Respondent) discriminated against Complainant by refusing to accept documents tendered by him in response to a company-wide audit requiring all employees to reverify their immigration status.

On July 12, 1996, Martinez filed a timely Complaint against Noah's, alleging document abuse in violation of section 102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. §1324b.

On July 12, 1996, OCAHO issued a Notice of Hearing (NOH) which transmitted a copy of the Complaint to Respondent. In addition, the NOH warned the parties that all proceedings or appearances would be conducted in accordance with the OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68, a copy of which was enclosed with each party's copy of the NOH.

6 OCAHO 917

On September 5, 1996, Respondent telefaxed a letter/pleading requesting a 30-day extension of time to file its answer, which request was orally granted.

On October 10, 1996, Respondent filed its Answer, denying the allegations of the Complaint, and asserting five affirmative defenses.

On December 17, 1996, I issued an Order of Inquiry to Respondent and Invitation to the Office of Special Counsel. Respondent's reply was filed on January 21, 1997, and the OSC filed an Amicus Brief on January 31, 1997.

Upon review of Respondent's reply to the Order of Inquiry and Martinez's affidavit filed with the Complaint (as originally attached to the OSC Charge), it appears that both parties are in general agreement regarding the facts. Noah's, however, maintains that it did not commit an unfair document practice in violation of 8 U.S.C. §1324b (a)(6) by refusing to accept the receipt Complainant obtained from Immigration and Naturalization Service (INS) and presented to Noah's on Friday, December 8, 1995.

A material fact remains at issue. On Friday, December 8, 1996, Martinez applied, at the INS San Francisco office, for a duplicate green card and paid a \$75.00 processing fee. Attached to the complaint is a copy of Form I-90, "Application to Replace Alien Registration Card," dated Dec. 8, 1995, which confirms payment of a \$75.00 processing fee. Respondent rejected the Form I-90 as insufficient compliance with the reverification exercise. According to Respondent, upon its inquiry to the INS District Counsel for guidance, the response was that INS could not confirm whether this receipt was acceptable as I-9 compliance. Noah's made the determination that this document was not acceptable.

In *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO 414, at 7 (1992), the respondent argued that it fired the injured party in reliance on information contained in the INS Handbook for Employers and on the advice of a border patrol agent. The Administrative Law Judge, granting the Complainant's motion for summary decision, citing cases to similar effect, concluded that "an [erroneous] oral representation by an INS agent does not establish an estoppel nor does it relieve the employer of liability." See *United States v. Manos & Assoc., d/b/a The Bread Basket*, 1 OCAHO 130 (1989).

6 OCAHO 917

Respondent's answer to question 3 concedes that, "Noah's was aware of the opportunity for an employee upon initial hire to submit a receipt for missing documents and does not dispute the fact that the same rule would most likely apply on reverification." The copy of the "Application to Replace Alien Registration Card" attached to the complaint is the necessary receipt which INS issues pending replacement of missing documents. *See* 8 C.F.R. §264.5.

On the following business day, Monday, December 11, 1995, Martinez returned to INS and applied for a temporary green card, Temporary Form I-551, which he obtained that day. This document was also refused by Noah's, this time on the basis that its (self-imposed) deadline had already passed.

The pertinent regulation, at 8 C.F.R. §274a.2(b)(1)(vi) states:

If an individual [at the time of hire] is unable to provide the required document or documents within the time periods . . . , the individual must present a receipt for the application of the replacement document or documents within three business days of the hire and *present the required document or documents within 90 days of the hire* [emphasis added]. . . .

This Order holds that reverification of an individual's eligibility for employment in the United States is not subject to employment eligibility verification requirements more severe than on initial hire. In light of the foregoing, I conclude that Complainant has established a *prima facie* case which warrants further development of his claim.

Accordingly, my office will arrange a telephonic prehearing conference in accord with 28 C.F.R. §68.13. Meanwhile, the parties are encouraged to attempt to achieve a settlement between them. Within a week or so, you may expect a telephone inquiry as to a mutually convenient date and time for the conference, to be held in March, 1997.

SO ORDERED:

Dated and entered this 3d day of March, 1997.

MARVIN H. MORSE
Administrative Law Judge