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

Noemi Barragan-Mandujano Romo, Complainant v. Todd Corporation, Respondent; 8 U.S.C. 1324b Proceeding; Case No. 87200001.

FINAL DECISION AND ORDER

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FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: JOSE ROBERTO JUAREZ, Jr., Esq. and ANNE KAMSVAAG, Esq., for the Complainant.

BRADLEY S. HILES, Esq. and MARY McGRATH TONKIN, Esq., for the Respondent.

LAWRENCE J. SISKIND, Esq. and LISA K. CHANOFF, Esq., for the United States (Intervenor).

I. INTRODUCTORY STATEMENT

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), adopted significant revisions in national policy on illegal immigration. As a concomitant of the legalization and employer sanctions programs initiated by IRCA,[1] section 102 introduced a new venue by enacting section 274B of the Immigration and Nationality Act, as amended.

Section 274B, codified at 8 U.S.C. 1324b, provides that it is an ``unfair immigration-related employment practice'' to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status, provided that the individual is a United States citizen, or an alien who fits within one of the categories of protected individuals identified at 8 U.S.C. 1324b(a)(3)(B):

> ... an alien who--

[1] IRCA amended the Immigration and Nationality Act of 1952, (INA), codified at 8 U.S.C. 1101 et seq., by enacting the employer sanctions program at section 101 (INA section 274A, 8 U.S.C. 1324a), the legalization [amnesty] program at section 201 (INA section 245A, 8 U.S.C. 1255a), and the unfair immigration-related employment practices [anti-discrimination] program at section 102 (INA section 274B, 8 U.S.C. 1324b).

> (i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1255a(a)(1) of this title, is admitted as a refugee under section 1157 ..., or is granted asylum under section 1158 ..., and
>
> (ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen....

Congress authorized the establishment of a new venue out of concern that the employer sanctions program might lead to employment discrimination against those who are ``foreign looking'' or ``foreign sounding'' and those who, even though not citizens, are legally in the United States. The mechanism adopted, 8 U.S.C. 1324b, contemplates that individuals who believe they have been discriminated against on the basis of national origin or citizenship may bring charges before a newly established Office of Special Counsel for Immigration Related Unfair Employment Practices (Office of Special Counsel or OSC). OSC, in turn, is authorized to file complaints before administrative law judges who are specially designated by the Attorney General as having had special training ``respecting employment discrimination,'' id. at 1324b(e)(2).[2]

By providing that section 102 complaints shall be filed before and heard by judges, 8 U.S.C. 1324b(d) and (e), IRCA implicitly required the Department of Justice to establish a system of administrative law judges. Accordingly, the Attorney General ``created the position of Chief Administrative Hearing Officer [CAHO] ... responsible for generally supervising the Administrative Law Judge Program....'' Final Rule, 52 Fed. Reg. 44971, Nov. 24, 1987 (to be codified at 28 C.F.R. Part O) as corrected, 52 Fed. Reg. 48997-98, Dec. 29, 1987.

By interim final rule published November 24, 1987, 52 Fed. Reg. 44972-85, the Attorney General adopted rules of practice and procedure to be codified at 28 C.F.R. Part 68. The rules govern hearings before administrative law judges under both sections 101 and 102 of IRCA. As a consequence, a complaint is not filed directly with the judge but instead with the CAHO who assigns the case to a judge. 28 C.F.R. 68.2. If in response to a charge ``which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity,'' the Special Counsel declines or otherwise fails to file a complaint within the statutorily specified

[2]See Attorney General Order No. 1243-87, ``Special Designation of Administrative Law Judges,'' December 17, 1987. I was so designated by letter of the Chief Administrative Hearing Officer dated January 6, 1988, acting pursuant to authority delegated to him by that Order.

period after receiving the charge, the person making the charge may file a complaint before the judge, 8 U.S.C. 1324b(d)(2).[3]

[3]The parties disagree as to availability of the disparate impact standard in this proceeding. That issue arises in light of the limitation at 8 U.S.C. 1324b(d)(2) to the effect that where the Special Counsel, after receiving a charge ``respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a patter or practice of discriminatory activity, ...'' fails within the statutory 120-day time period to file a complaint before an administrative law judge, ``the person making the charge may ... file a complaint directly before such a judge.''

Subsection (d)(2) was necessarily implicated in this case when the Special Counsel declined to file a complaint, and Ms. Romo initiated a private action. Moreover, the question whether ``knowing and intentional'' discrimination barred Romo from prevailing under the less rigorous standard of proof required under the disparate impact test was implicated without regard to what standard applies to an alleged ``pattern or practice'' violation since there was no ``pattern or practice'' claim. As to cases initiated by the Special Counsel, the Department has defined unfair immigration-related employment practices to involve only ``knowing and intentional'' discrimination, 28 C.F.R. 44.200(a); preamble, Final Rule promulgating 28 C.F.R. Part 44, 52 Fed. Reg. 37402, at 37403-05, Oct. 6, 1987.

On November 6, 1986, when President Reagan signed IRCA into law he concurrently issues a statement which interpreted section 102 to require the disparate treatment (as distinct from disparate impact) standard of proof, i.e., requiring the person aggrieved to establish discriminatory intent. The President stated his understanding of the law to require that result. ``President's Statement on Signing S. 1200 into Law,'' 22 Weekly Comp. Pres. Doc. 1534, 1535-37 (Nov. 10, 1986). His statement did not distinguish between a proceeding initiated on a complaint filed by the Special Counsel before an administrative law judge and a complaint filed by the charging party ``directly before such a judge,'' 8 U.S.C. 1324b(d)(2). Interestingly, in neither the notice of proposed rulemaking which communicated the Department's intent to hold to the disparate treatment standard, 52 Fed. Reg. 9274 et seq., March 23, 1987, nor in its adoption of the final rule published October 6, 1987, supra, was there any reference to the President's signing statement.

In view of the result reached on this record, however, the availability of the disparate impact standard in private actions, or in any IRCA 102 case, it not resolved, but must await another proceeding.

II. STATEMENT OF FACTS

Noemi Barragan-Mandujano Romo, complainant (Ms. Romo or Romo), was born Noemi Barragan-Mandujano on February 12, 1962, in Mexico. She came to the United States, accompanying her parents, in 1976, as an undocumented alien. She attended school in the United States for a year and a half, through part of the tenth grade. Ms. Romo has resided continuously in the United States since her original entry in 1976.

Ms. Romo was apprehended by the Immigration and Naturalization Service (INS) in 1985. She retained Edward Nissman as counsel and met with him a few days after she was released by the INS. Mr. Nissman had previously represented Ms. Romo's parents. Following her arrest, Ms. Romo received a document entitled Order of Release on Recognizance issued by INS on June 5, 1985, was required to check in with INS first on a monthly and then on a semi-annual basis, and was told of the importance of carrying the document verifying her release on recognizance. In December of 1986, Ms. Romo met again with Mr. Nissman after having been informed that her ``papers'' although originally filed ``along with my parents as a unit'' now, ``had to be filed on my own'' Mr. Nissman agreed to continue as her attorney for the ``Immigration case.'' (Tr. 31)

On September 3, 1986, Ms. Romo began working as a full-time, hourly employee of Todd Corporation (Todd or respondent), as one of 10 production employees at Todd's plant located at City of Industry, California. Todd is an industrial launderer and uniform manufacturer which has forty plants nationwide. Ms. Romo had previously worked for Todd through a temporary agency. She started working at Todd in the stockroom and later was transferred to the department where uniforms are hung and dried. Her starting salary was $4.00 per hour, and by the time she left Todd's employ on April 3, 1987, she was earning $4.75 per hour.

It is undisputed that Ms. Romo's employment with Todd was terminated on April 3, 1987. However, the events of that day are in dispute.

On either April 1 or 2, 1987, a meeting was held at the City of Industry plant in which Mr. Steve Kallenbach, general manager of Todd's City of Industry plant, Janet McClellan, production manager, and approximately seven production employees were present. At the meeting, one of the employees inquired as to how the new immigration law was going to affect illegal alien employees in the plant. Mr. Kallenbach responded that he did not believe that there were any illegal aliens in the City of Industry plant. After the meeting, however, Janet McClellan told Kallenbach that she had heard rumors that there were some illegal aliens in the City of In-

dustry plant. In response to the rumors and to avoid problems with the INS, Kallenbach interviewed all of Todd's City of Industry employees and requested proof of their authorization to work in the United States. [4]

Ms. Romo recalled that on Friday, April 3, 1987, at around 11:00 a.m., she was called into Kallenbach's office, Kallenbach having just met with two other employees. As the two employees left his office, one commented to Ms. Romo that Kallenbach was asking for immigration papers.

As Ms. Romo testified, she understood Kallenbach to ask her for a green card which she did not have. Instead she showed him the order or release on recognizance. According to Ms. Romo, Kallenbach said he did not know much about laws regarding immigration. Romo informed him that she had an attorney, and Kallenbach asked permission to call Romo's attorney. She overheard the conversation between her attorney, Nissman, and Kallenbach because Kallenbach had called Nissman on a speaker phone while she was still in the office. According to Ms. Romo, Nissman told Kallenbach that the release document which Romo had presented was not a permit to work but rather authorized her presence in the country. Mr. Nissman informed Kallenbach that Romo intended to apply for amnesty but that it would not be possible to do so until May 5, 1987.

Ms. Romo testified that although Kallenbach did not directly ask her whether she intended to apply for amnesty, she informed him during the meeting that she was making application for her legalization papers but did not inform him under what law she was applying. During the meeting, Kallenbach asked Romo about the social security number which she had supplied to Todd when she began work, and which she conceded was not valid. Ms. Romo claims that she then left Kallenbach's office and returned to work.

According to Romo, she and two other female employees were called into another office to meet with Kallenbach later the same day. The three were given their paychecks; Kallenbach told the two other employees that they were being let go because they were not legally in the country. Kallenbach said Romo's case was different because she had a permit but it was not a permit for work, and that was why he had to let her go. Kallenbach added that if the

[4]Kallenbach's ``interpretation'' of ``the law'' was that as long as he ``abide[d] by Equal Opportunity Employment laws and question[ed] all of my people equally in the same manner and ask[ed] the same questions and ask[ed] for the same proof of work status, that this is within the law.'' (Tr. 105)

three terminated employees one day became legalized they could re-apply, and he would consider them.

According to Steve Kallenbach, he started questioning employees at approximately 1:00 p.m. on the same day as the meeting of managers and production employees. At 3:00 p.m. on April 3, 1987, with Janet McCellan present, Kallenbach, using a preexisting list of company employees, questioned Ms. Romo together with two others about their work authorization. Kallenbach agreed that Romo did not have a green card and presented only a document entitled ``Order to Release on Recognizance.'' Kallenbach suggested that Ms. Romo get a lawyer, apply for amnesty, and ``come back.'' He told all three employees being discharged that they would be eligible for rehire if they gave him something on paper, ``an application or an intent to apply'' that would allow him to rehire them. (Tr. 116)

Mr. Kallenbach denied calling Ms. Romo's attorney, Edward Nissman, during the questioning of Ms. Romo on April 3rd, but acknowledged receiving a call from Mr. Nissman during the following week. Kallenbach also denied that Ms. Romo told him that she was going to apply for amnesty; he speculated that she was afraid that if she told him she intended to apply for amnesty but was unsuccessful, then she would be deported.

According to Ms. Romo, after being fired, she consulted Nissman, who went with her to apply for her work permit. Frustrated in her effort to obtain a work permit with out first having her [deportation] hearing, Ms. Romo obtained the services of another attorney, Gloria Yda Lopez-Hicks. On May 1, 1987, Ms. Lopez-Hicks had Ms. Romo fill out an employment authorization form certifying that she was eligible to work. (Exh. D)

Steve Kallenbach recalled a phone call from Ms. Lopez-Hicks who, like Mr. Nissman, told Kallenbach that Ms. Romo had been fired illegally. Ms. Lopez-Hicks made several more phone calls to Kallenbach which he did not return. He later received a letter dated May 7, 1987, from Ms. Lopez-Hicks. (Exh. O) Kallenbach read the letter, called Barbara Shepard, Todd's legal and administrative manger at Todd's headquarters in St. Louis, Missouri, and Jeff Kramer, Todd's West Coast regional manager who was Kallenbach's supervisor, then sent the letter to Ms. Shepard. Kallenbach informed Ms. Lopez-Hicks by telephone that Ms. Shepard would be handling the matter from then on. By letter dated May 19, 1987, Ms. Shepard responded to Ms. Lopez-Hicks' letter to Steve Kallenbach. Rejecting any contention that Todd had improperly terminated Ms. Romo, Barbara Shepard's letter also stated that ``[i]f in fact,

Ms. Barragan-Romo is now entitled to seek employment in the United States, we would consider her for rehire.'' (Exh. P)

On June 15, 1987, Romo filed with the Office of Special Counsel a charge of discrimination in violation of IRCA. Ms. Romo testified that she had applied for legalization ``around June'' of 1987. She received a work authorization card from INS dated August 11, 1987. (Exh. E)

On October 19, 1987, the Acting Special Counsel notified Ms. Romo by letter to her attorney, Ms. Lopez-Hicks, that OSC would not file a complaint on Ms. Romo's behalf. The OSC letter advised that Romo's national origin claim appeared to be covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. and, therefore, that the national origin portion of the Romo charge was being forwarded by OSC to the Equal Employment Opportunity Commission (EEOC). The letter stated also that OSC rejected the Romo citizenship charge because Romo did not qualify as an ``intending citizen'' since she did not ``fall within'' one of the four categories of aliens listed in 8 U.S.C. 1324b(a)(3)(B)(i). (Exh. S)

On November 13, 1987, Ms. Romo executed a Declaration of Intending Citizen, Form I-772, which was mailed to INS on that same day. Due to an acknowledged failure by INS ``to properly file the declaration when it was received,'' INS considered Ms. Romo's Form I-772 to have been filed on the date it was received, i.e., November 18, 1987. (Exh. U) On or about November 24, 1987, Ms. Romo filed a separate charge with the EEOC alleging national origin discrimination by Todd. On December 14, 1987, Ms. Romo filed a complaint initiating this proceeding with the Office of the Chief Administrative Hearing officer, Department of Justice.

In early 1988, Ms. Romo obtained a temporary resident card bearing a July 22, 1987 issue date which presumably relates back to the original filing of her application.[5] At the time she was issued her temporary resident card, Ms. Romo was required to turn in her work authorization card.

On April 1, 1988, the Office of Special Counsel filed a Motion to Intervene in this proceeding. An evidentiary hearing was held in Los Angeles, California, on April 5 and 6, 1988.

III. DUAL PROCEEDINGS UNDER TITLE VII AND IRCA NOT BARRED

Because Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e et seq., includes national origin discrimination jurisdiction which Congress did not intend to disturb, 8 U.S.C.

[5].ExhF; see 8 C.F.R. 245a.2(s).

1324b(b)(2) specifies that jurisdiction under IRCA is not intended to overlap with charges filed before the Equal Employment Opportunity Commission.

This proceeding is the first to have reached a confrontational evidentiary hearing under section 1324b. The respondent has placed in issue the question which the statute addresses implicitly regarding jurisdiction of Department of Justice administrative law judges under IRCA on the one hand and that of the Equal Employment Opportunity Commission (EEOC) on the other hand. Accordingly, this decision discusses and decides that jurisdictional question at the threshold.

Respondent has contended since the onset of this proceeding that it is impermissible as a matter of law for Ms. Romo to prosecute actions arising out of an identical set of facts before both the EEOC and this Office. Respondent quotes 8 U.S.C. 1324b(b) which provides as follows:

> (2) No overlap with EEOC complaints-
>
> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.], unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

Todd concedes that by citing subsection (a)(1)(A), the overlap provision refers only to national origin discrimination. Todd claims, however, that the statutory bar should be construed to include citizenship discrimination to avoid making the statutory bar superfluous since national origin jurisdiction of EEOC does not apply to national origin claims under 8 U.S.C. 1324b and vice versa. Presumably, this argument is premised on the concept that the legislative text is rendered meaningless as a prohibition against duality if it does not also preclude citizenship claims before this Office arising out of the same facts as national origin claims before EEOC.

Todd urges also that because the legislative history of section 102 does not in terms distinguish between national origin and citizenship status claims, that history supports the conclusion that the ban against overlap bars the prosecution of a citizenship status claim here if a national origin claim is also being considered before EEOC.

Finally, Todd urges that because, in its view, IRCA limits liability to intentional discrimination, that standard of proof can be

evaded in a proceeding before the EEOC in a national origin case because the EEOC can entertain an action on the alternate theory of disparate impact.

Todd overlooks that the logic which supports a prohibition against protection from discrimination on the dual counts of national origin and citizenship pertains without regard to the forum whose jurisdiction was invoked. Similarly, if Congress intended that any difference in the standard of proof necessary to succeed in one forum or another should control, it presumably would have so provided. Section 1324b(b)(2) simply acknowledges that two agencies are empowered to enforce the statutory prohibition against national origin employment discrimination where the statutes confer jurisdiction differentiated by the size of the employer, a factor not always known by or clear to the protected individual at the outset.[6] Indeed, the EEOC in a policy statement adopted February 26, 1987 explicitly recognizes that the same conduct can be in violation of both the prohibition against national origin discrimination and against citizenship discrimination (See Interpreter Releases. Vol. 64, No. 12, March 26, 1987, p. 383 and Appendix III):

> Title VII bans employment practices which subject individuals to different or unequal treatment on account of their national origin. Consistent with this basic nondiscrimination principle, the Immigration Act requires an employer to verify that all individuals hired after the effective date of the Act are legally authorized for employment in the United States. An employer who seeks such documentation only from ``foreign looking'' applicants or employees may violate both the Immigration Act and Title VII. Thus, an employer who scrupulously complies with the requirements of the Immigration Act as to all new employees will eliminate one important source of potential discrimination.

Commentators appear to agree that IRCA authorizes administrative law judges to consider citizenship based claims while EEOC considers national origin based claims arising out of the same event. See, e.g., Roberts and Yale-Loehr, Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act, 21 Int'l Law. 1013, 1048 (1987) (``Because both Title VII and the Frank amendment [section 102] prohibit discrimination based on national origin grounds, the potential exists for two claims involving the same set of facts to be filed, one with the Special Counsel, and the other with the EEOC''); Abram, Visek, Christie et al., Immigration-Related Employment Discrimination: A Prac-

[6]For example, the jurisdictional threshold under Title VII affects only employers who have 15 or more employees ``for each working day in each of twenty or more calendar weeks,'' 42 U.S.C. 2000e(b). The preamble to the Department of Justice final rule makes clear that the Department will not use the 20 calendar week requirement to determine coverage under section 102 but will use it to determine whether EEOC jurisdiction should attach, 52 Fed. Reg. 37402, Oct. 6, 1987.

tical Legal Manual For Evaluating and Pursuing Claims in the Wake of IRCA 36-37 (1988) (`` ... some acts of discrimination can be challenged both as national original discrimination and as citizenship discrimination.'')

I am unpersuaded by Todd's argument that because in reporting out the bill (in text substantially identical to 8 U.S.C. 1324b(b)(2) as enacted), the House Committee on the Judiciary reference to preclusion against filing ``similar charges,'' as between EEOC and the Special Counsel, without further specification, connotes an intention to bar concurrent citizenship and national origin claims. See, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 70 (July 16, 1986). Considered in context of the language of the bill which refers only to the prohibition against national origin discrimination, the report implies no such constraint; ``similar charges'' is not a proxy for equating national origin and citizenship.

Congress is understood to have consciously extended redress for wrongs that sound in national origin discrimination where no remedy was available before. See, e.g., discussion by the House Committee on Education and Labor endorsing the bill reported favorably by the Judiciary Committee, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 2, at 12-13 (August 5, 1986).

The Special Counsel does not doubt that IRCA embraces charges both of citizenship and national origin discrimination arising out of a single set of facts. By intervening in this proceeding to assert the intending citizen status of Ms. Romo, the Special Counsel necessarily recognized that pendency of her national origin charge before EEOC does not foreclose the citizenship charge under IRCA. (See Exh. S; OSC Motion to Intervene dated April 1, 1988)

I hold that the prohibition against overlap between IRCA and Title VII applies, according to the plain terms of the statute, to charges of national origin discrimination only, without regard to pendency of citizenship status charges arising out of an identical set of facts.

IV. COMPLAINANT IS NOT AN UNAUTHORIZED ALIEN

Todd contends that Ms. Romo is not protected by section 102 of IRCA, 8 U.S.C. 1324b, because on April 3, 1987, she was an unauthorized alien. Todd is correct that the prohibition against unfair immigration-related employment practices excludes unauthorized aliens (and no others) from the categories of individuals listed in the law as entitled to protection against national origin or citizenship discrimination. 8 U.S.C. 1324b(a)(1) and (a)(3).

The term ``unauthorized alien'' appears in both sections 101 and 102 but is defined only in section 101 of IRCA, 8 U.S.C. 1324a(h)(3),

and in regulations implementing section 101. (Although prefaced by the phrase ``[a]s used in this section,'' the subsection (h)(3) definition does not preclude use of that definition for section 102.) The final rule published May 1, 1987, 52 Fed. Reg. 16221 provides, in terms substantially identical to the statute, as follows (8 C.F.R. 274a.1(a)):

> The term ``unauthorized alien'' means, with respect to employment of an alien at a particular time, that the alien is not at that time either: (1) Lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General.

Todd cites that provision to support its claim that Ms. Romo has no claim here because, she not only lacked the status of a permanent resident, but also lacked Attorney General work authorization on April 3.

Romo claims, in effect, to have been an authorized alien by virtue of a ``special rule'' made available to protect preapplication legalization-eligibles from being barred from the workplace by employers' fear of sanctions. See 8 C.F.R. 274a.11. Todd, however, disclaims amenability to the ``special rule'' provision of the May 1 regulations both because it post-dated the events of April 3 and because it was published pursuant to section 101 of IRCA.

Respondent cannot claim a litigating position which relies on one regulatory provision while rejecting another, each of which is contained in a single issuance which promulgated a single chapter containing both. It is immaterial whether any particular regulatory treatment of a provision of IRCA is contained in one or another set of regulations issued pursuant to authority of the Attorney General or of the Commissioner, INS. So long as the regulatory treatment is relevant and internally consistent, it represents departmental implementation of the law.

The ``special rule'' authorized an individual who claimed to be eligible for, who intended to apply, or who had applied for legalization ``to work without presenting an employer . . . with documentary evidence of work authorization.'' The ``special rule'' contemplated certain attestation to that effect by the employee incidental to completion of the employee's Form I-9. Obviously Ms. Romo could not have so attested on April 3, 1987 since the May 1 regulation was not yet in place. In any case, however, there would have been no requirement that she execute a Form I-9 as her employment predated November 7, 1986.

Todd cannot successfully rely on the May 1, 1987 regulation to render Ms. Romo unauthorized and at her peril for not having informed her employer of her intent while at the same time Todd claims that retrospective application of the May 1 rulemaking is

improper. The fact is that both the definition of ``unauthorized alien'' and the ``special rule'' regulatory text had already appeared in substantially identical form in the INS proposed rule of March 19, 1987, 52 Fed. Reg. 8763, 8766.

Concededly a proposed rule may not merit the same presumption of notice to the public as does an adopted regulation. Where, as here, however, the issue involves the regulatory implementation of a statutorily conferred right, the question is not one of imposing burdens on employers retroactively. The question rather is whether Todd can avoid statutorily imposed liability because it was impossible for Ms. Romo to obtain regulatory implementation before its time.

Todd concedes that May 1, 1987, the date of Romo's self-executed employment authorization, ``is the earliest Romo qualified as an `authorized' alien.'' However, section 102 of IRCA is a remedial statute which confers the rights not to be discriminated against on the basis of citizenship or national origin. Obviously, regulatory implementation is essential to fill in the interstices, to convert inchoate rights into actual remedies. Enactment of section 102 placed all employers on notice that it would thereafter be unlawful to discriminate against protected individuals, without regard to the timing of that implementation. Accordingly, as a rule of necessity, I find that Ms. Romo was authorized to be employed on April 3, 1987.

The ``special rule,'' effective according to its terms only until September 1, 1987, is consistent with the judgment expressed above that section 102 conferred on legalization-eligible aliens the right to work; the ``special rule'' reflects a phase-in work authorization consistent, as suggested by Ms. Romo, with the settlement agreement in Catholic Social Services, Inc. et al. v. Meese, Civil No. S-86-1343-LKK (E.D. CA, March 23, 1987). That settlement permitted undocumented aliens to self-certify that they believed they were legalization-eligible and intended to apply for legalization; the employer was then protected against employer sanctions liability until September 1, 1987. The March 23, 1987 settlement was published in the Federal Register on April 9, 1987, 52 Fed Reg. 11567-74.

In my judgment Ms. Romo was not an authorized alien on April 3, 1987. Events were moving rapidly in implementation of IRCA but employers who acted precipitously did so at risk whether or not aware of specific lawsuits or regulatory initiatives. Regardless of whether or not Ms. Romo's version of the events of that date are the more accurate, Todd was in error in firing her without making further inquiry.

V. COMPLAINANT FAILS TO QUALIFY AS A PROTECTED INDIVIDUAL UNDER SECTION 102

Compassion for Ms. Romo suggests that she ought to be an individual protected under section 102. In that context, she appears to have done nothing wrong on April 3, 1987; Todd appears to have done almost everything wrong. There was no need for Todd, by Kallenbach, to interrogate her concerning her work authorization. Her employment predated IRCA; Todd, therefore, had no prospect of liability for employment sanctions with respect to her and there is no reason to suspect that Todd had been informed otherwise. Todd has conceded that:

> At all relevant times, Steve Kallenbach was the General Manager of Todd's City of Industry Plant. General Managers are responsible for the day-to-day operation of Todd's plants. Accordingly, Kallenbach had overall responsibility for the City of Industry plant, including personnel. As General Manager, Kallenbach had the final authority to hire and fire production operators.[7]

Although on brief Respondent attempts to argue that Todd is not bound by Kallenbach's actions, it concession as to the breadth of his authority overwhelms any such argument, which, in any case, has no foundation in law or fact. Nothing in the record impeaches his authority to have taken the action he did on April 3. Barbara Shepard, as Todd's official to whom Kallenbach referred the Romo matter after he had fired Ms. Romo, ratified his conduct in her communication with Ms. Romo's attorney. Todd has not impeached Kallenbach's actions of April 3 but rather has steadfastly ratified them by its posture taken in this proceeding. An employer who has authorized its supervisory personnel to effect employment decisions is responsible under IRCA for the consequences of hiring and firing decisions of those supervisors.

For all that appears, Todd discharged Romo under a mistake of law. Although not vulnerable to sanctions for her continued employ, Kallenbach, without a pause, asked her to prove that she was eligible for employment and, reasoning that she could not, fired her on the spot.

Todd had never been raided by INS at its City of Industry plant although the industry and Todd's competitors suffered a reputation for employing undocumented aliens. Kallenbach testified that he feared a raid would interfere with plant production because personnel would be removed abruptly leaving him with a shortfall on the production line, yet on April 3, the same day he inquired of employees as to their eligibility to remain on the payroll, he summarily fired three of them. Clearly, his production capacity was as

[7]Respondent's Proposed Findings of Fact, No. 3.

much impaired as the result of his own precipitous action as it would likely have been had he risked a raid.

Sympathy for the charging party as the more innocent of the two parties is hardly enough to qualify her as a protected individual within the ambit of 1324b. Ms. Romo is only entitled to protection against an unfair immigration-related employment practice as a result of her discharge by Todd if she satisfies the statutory prerequisites.

The case at hand involves only citizenship status. Ms. Romo is not a U.S. citizen. Accordingly, she can only succeed in her action here if she is found to be a protected ``intending citizen'' discharged from employment because of that status, 8 U.S.C. 1324b(a)(1)(B).[8]

Section 102 protection is only available if she satisfies two requirements. To qualify as an intending citizen, the alien first must be either (a) lawfully admitted for permanent residence, or (b) granted the status of an alien lawfully admitted for temporary residence under the legalization program, or (c) admitted as a refugee under the INA, or (d) granted asylum under the INA. The second qualifying requirement to be satisfied is that the alien ``evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen'' and also satisfies certain statutory requirements as to time for application and subsequent achievement of naturalization, 8 U.S.C. 1324b(a)(3)(B).

The two requirements intersect but are not co-equal. An individual may obtain temporary resident status pursuant to the legalization program without having satisfied the requirement for evidencing intent to become a citizen ``through completing a declaration of intention....'' Such an intending citizen declaration cannot be supposed to have any effect unless it is completed by an individual who qualifies as a temporary resident, permanent resident, refugee or asylee.

Unquestionably, Ms. Romo, not having made a claim to be a permanent resident, refugee or asylee, can only qualify for protection if she can be found to have been lawfully admitted for temporary residence and, also to have completed a declaration of intention. Todd contends that she failed to satisfy either requirement as of April 3, 1987. Romo, relying on both judicial and regulatory precedent, claims she is within the protected class. As discussed below, I am unable to agree with her. Before that discussion, however, I note that the Acting Special Counsel declined on October 19, 1987, to file a complaint on the grounds, inter alia, that Ms. Romo did

[8]Certain exceptions to employer liability are set forth at 8 U.S.C. 1324b(a) (2) and (4). None of the exceptions have been brought into play in this litigation. 1324a (note).

not qualify as an intending citizen. The Special Counsel filed a motion to intervene in this proceeding on April 1, 1988, ``to bring its position into conformity with'' a Department of Justice March 30, 1988 regulation described by the Special Counsel as ``clarifying the definition of intending citizen.'' [9]

A. She Fails to Qualify as a Temporary Resident as of April 3, 1987

Prior to March 30, 1988, there had been no statement of policy explaining the Department's understanding as to when, and how, temporary resident status might be attained and proven for purposes of section 102. INS, from the outset, had made clear, however, that ``[t]he status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the date indicated on the application fee receipt issued at Service Legalization Office.'' 8 C.F.R. 245a.2(s).

The Attorney General by interim final rule published at 54 Fed. Reg. 10338, March 30, 1988, expressed a sense of urgency in order to ``make clear that eligible aliens may apply for temporary resident status and be protected from citizenship status discrimination, thus encouraging them to apply for legalization....'' The preamble to the rule explained also that prompt implementation was required ``to ensure that rights of aliens otherwise protected under section 102 of IRCA [8 U.S.C. 1324b] are not lost....'' The rulemaking commented with respect to the regulatory treatment of aliens lawfully admitted for temporary residence, that:

> [t]he definition is silent as to whether aliens who have applied for temporary residence under 8 U.S.C. 1255a(a)(1), but who have not yet been granted that status, are intending citizens. Thus, the existing regulation is not clear whether applicants for temporary residence are protected against citizenship status discrimination. This interim final rule makes clear that temporary resident status, once granted, relates back to the time the application fee is paid, i.e., from the time of application. Therefore successful applicants are protected against citizenship status discrimination from the time of application. (Emphasis added.)

By this amendment, inserting text to make clear that temporary resident status, once approved, relates back to the date ``indicated on the application fee receipt,'' the regulation shortens in part the gap created by enactment of inchoate rights prior to implementation.

Both the Special Counsel and complainant urge that it is fair to impute to Ms. Romo, as of April 3, 1987, the same protection afforded to an actual legalization applicant as of the time the appli-

[9] Concurrent with its motion to intervene, the Special Counsel filed a ``Memorandum of Points And Authorities On Whether Complainant Qualifies As An Intending Citizen.''

cation could have been filed. Obviously, it is no fault of Ms. Romo that she could not have filed on April 3 since, as appears from this record, the application machinery was not yet in place. In that context Ms. Romo is said to deserve the same judicial sympathy with which the court responded to plaintiffs in League of United Latin American Citizens (LULAC) v. Pasadena Independent School District, 662 F.Supp. 443 (S.D. TX, April 14, 1987).

The LULAC court, pending establishment of an ``administrative structure ... under the IRCA ...,'' granted a preliminary injunction against the employer school board. 662 F.Supp. at 446. The court enjoined the defendant from discharging plaintiffs, undocumented alien employees, who allegedly had violated its hiring policy when they obtained employment through use of false social security numbers. The Court concluded that defendant's actions had the effect of jeopardizing plaintiffs' rights under section 102 ``before they have had an opportunity to exercise those rights.'' Id. at 451.

OSC contends that had Ms. Romo been able to do so, she would have perfected her filing to attain lawful temporary resident status on or before April 3, 1987. She was unable to do so only because during the preapplication period, the machinery was not yet in place to effectuate the legalization program. Indeed, no legalization application filings were authorized until six months after enactment of IRCA, and no employer sanctions were authorized during the first six months. In contrast, the antidiscrimination features of IRCA, (section 102), became effective immediately.

By adopting the March 30, 1988 regulatory revision, the Department has filled the gap which concerned the court in LULAC, supra. See 28 C.F.R. 44.101(c)(2)(ii).

I do not understand the March 30, 1988 revision to be in derogation of either 8 U.S.C. 1324b or the LULAC decision. It may be regrettable that the regulation fails to confer eligibility for section 102 coverage on all members of the newly established class, i.e., aliens eligible for lawful temporary resident status. During the preapplication period, members of the class were not fully protected against employers who acted precipitously, out of ignorance or otherwise. Although section 102 of IRCA became effective without a statutory waiting period, no authority has been pointed to, and I have found none, to suggest that by adopting the March 30 regulation the Attorney General unlawfully delayed the effective date for identifying an alien as a lawful temporary resident.

Nor do I understand the LULAC court to have done more than to fill the gap pending Department of Justice implementation of section 102. That decision enjoined the school board from firing un-

documented alien employees who were-like Romo-potentially eligible for legalization and whose employment was protected under the ``grandfather'' clause of the employer sanctions program, IRCA, section 101(a)(3).[10] The initial LULAC decision, 662 F. Supp. 443, supra, was followed by an order in which the judge deferred ruling on a motion for entry of a permanent injunction pending opportunity for exhaustion of administrative remedies, noting that when the April 14, 1987 preliminary injunction was entered, ``the administrative process authorized under the Act to address allegations of discrimination was not yet in place.'' LULAC v. Pasadena Independent School District, 672 F. Supp. 280, 281 (S.D. TX, July 31, 1987).

Special Counsel's April 1, 1988 memorandum argues that the March 30 issuance is entitled to judicial deference, as consistent with the legislative history of section 102, and as consonant with a previously adopted regulation which informs as to the start of the time period ``during which temporary residents must wait before they can apply for permanent resident status. 8 C.F.R. 245a.2(s).'' (OCS Memorandum, 7-8). I agree. However, far from providing support for the argument that temporary resident status can relate back by virtue of Department of Justice regulation to the events of April 3, 1987, the March 30, 1988 issuance achieves a contrary result.

Whatever latitude there may be to avoid application of a regulation which may be distinguishable from a case at hand, this regulation is not so susceptible. The March 30 revision is explicit; for purposes of the Romo charge it is ineluctable. Special Counsel's argument that the revised regulation explains reversal on April 1, 1988 of the earlier OSC determination that Ms. Romo did not qualify as an intending citizen is unpersuasive. Nothing cited in the OSC or Romo arguments implicates in one way or the other the specificity with which the March 30 revision addresses temporary resident status.

With respect to the argument that I should apply judicial deference to the Department's implementation of section 102, I am of the opinion that I have no choice in the matter, although exercise of that deference obtains a different result than the proponent of the argument would have preferred.

[10]IRCA provides that employer sanctions do not apply to grandfathered'' employees, i.e., those who were hired before the date of enactment [November 6, 1986], and whose employment continued subsequent to that date. IRCA, section 101(a)(3), 100 Stat. 3359, at 3372; 8 U.S.C.1324a (note).

The concept of judicial deference to executive branch interpretation recognizes that as a practical matter it is the agencies that flesh out in the execution of the laws the bare bones provided in the legislative policy formulation. See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (``if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute'').

The concept of deference, however, implicitly connotes an option on the part of the one asked to pay deference. The Supreme Court has acknowledged administrative law judges to be ``functionally comparable'' to federal judges, Butz v. Economou, 438 U.S. 478, 513, 514 (1978). Moreover, administrative law judges who hear section 102 cases occupy a virtually unique role with respect to administrative adjudication. This is so because Congress has assigned finality to decisions by such judges, subject to no administrative review but rather to appeal directly to a United States court of appeals, 8 U.S.C. 1324b(g)(1) and (i), Nevertheless, we are, I suspect, less able than our counterparts in the Article III judiciary to avoid the implication of facially competent rules and regulations, duly promulgated, and not otherwise subject to evasion. I conclude that as applied to the case at hand I have no option but to defer to the March 30, 1988 rulemaking.

It may be speculated whether the Special Counsel had a role in the promulgation of the March 30, 1988 regulatory revision.[11] What is not speculation but fact is that I am bound on this record by 28 C.F.R. 44.101(c)(2)(ii) according to its terms.

Nothing contained in the revision suggests that it is not to be applied (beginning March 30, 1988) to events alleged to have occurred prior to the date a particular legalization application was filed. The stated purposes, inter alia, ``to ensure that rights of aliens otherwise protected under section 102 of IRCA ... are not lost ... and to effect Congressional intent ...,'' 53 Fed. Reg. 10338, supra, are understood to mean that no such rights are perceived by the Attorney General to have existed prior to the date a particular legalization application is filed.

The negative implication of the rulemaking revising 28 C.F.R. 44.101(c)(2)(ii) is inescapable: the Attorney General did not authorize temporary resident status for any alien during any period of time prior to the date that alien's fee-paid legalization application was filed.

[11]As to the March 30, 1988 rulemaking, compare respondent's post-hearing brief pp. 16-18, with complainant’s reply brief, p. 10.

Reliance by OSC and Romo on generalized and hortatory comments on IRCA cannot serve to relate Ms. Romo's temporary resident status back to a date prior to July 22, 1987.[12] In any event I find the relation-back provision, so far as it goes back, to be consistent with the quoted comments supplied to me; and I have not found others that are inconsistent.

I am, therefore, unable to conclude that Ms. Romo was, on April 3, 1987, an alien lawfully admitted for temporary residence in the United States within the meaning and scope of 8 U.S.C. 1324b and 28 C.F.R. Part 44.

B. Intending Citizenship Status Analyzed

Congress enacted the legalization and employer sanctions programs (IRCA, sections 201 and 101) and, concerned that the latter might lead to employment discrimination, enacted also the prohibitions against unfair immigration-related employment practices (IRCA, section 102). IRCA provided a 6-month waiting period before legalization-eligibles could apply and provided the identical transition period before sanctions could be imposed. No such transition period was established for the enforcement of section 102.

Since section 102 was enacted to provide an antidote for potential consequences of the employer sanctions program, and Congress being silent on this score, it might be reasonable to suppose congressional anticipation that there would be no need for section 102 implementation to become effective until the end of that 6-month period. That supposition, however, forms no part of the basis for decision in this case. Whatever time frame might have been anticipated, the regulations establishing ``standards and procedures for enforcement of section 102'' were published in the proposed rule on March 23, 1987, 52 Fed. Reg. 9274-80, followed by the final rule, published October 6, 1987, 52 Fed. Reg. 37402-11, to become effective November 5, 1987.

The proposed rule defined ``intending citizen'' only in statutory terms, and provided in the preamble that, upon filing a charge of discrimination, an aggrieved alien must have ``completed a declaration of intention to become a citizen and [must have provided] the date of such declaration.'' In the October 6 final rule, the definition is substantially unchanged, augmented, however, by reference to

[12]The identical excerpt from the House Committee on the Judiciary Report No. 682, supra, at 70, is relied upon both in support of the effort to qualify Ms. Romo as a temporary resident alien as of April 3, 1987 and to support the rulemaking which takes such status back only to the date the fee for a legalization application has been paid. Compare OSC Memorandum, supra, p. 8, with Interim Final Rule, 53 Fed. Reg. 10338, supra.

INS forms I-772 and N-315. The preamble to the final rule included this policy declaration (id. at 57406-07):

> We believe that the statute affords protection from citizenship discrimination only to those individuals who meet the statutory definition of ``citizen or intending citizen'' at the time of the alleged discriminatory acts. Therefore, the written declaration of intention must be completed prior to the occurrence of the alleged discrimination acts. However, because of the initial unavailability of the new INS form I-772, ``Declaration of Intending Citizen,'' this requirement will not apply to acts of discrimination occurring prior to December 1, 1987. Therefore, for purposes of determining whether individuals are ``intending citizens,'' the Special Counsel will deem them to have completed the new INS Form I-772 prior to any discriminatory act occurring between November 6, 1986, and December 1, 1987, if such individuals: (1) Complete the new INS form I-772 on or before December 1, 1987, and (2) assert in a charge that, prior to the alleged act of discrimination, they intended to become U.S. citizens, and would have completed this form had it been available. ``Completion'' of a declaration of intention to become a citizen means that the INS Form N-315, ``Declaration of Intention,'' has been filed with any court exercising naturalization jurisdiction (8 CFR 334a.1) or that an INS Form I-772, ``Declaration of Intending Citizen,'' has been filed with the Immigration and Naturalization Service. (Emphasis added.)

At least since October 6, 1987, the public, including employers, has been on notice that intending citizen declarations needed to have been filed by December 1, 1987 in support of charges arising out of the acts of discrimination alleged to have been committed between November 7, 1986 and December 1, 1987. For acts alleged to have occurred after December 1, 1987, the controlling rule, i.e., the preamble to the October 6, 1987 regulation, states that ``the written declaration of intention must be completed prior to the occurrence of the alleged discrimination. ...'' Id.

Todd contends that it is improper through subsequent action, i.e., the October 6, 1987 rulemaking, to deem the intending citizen declaration of Ms. Romo to have been effective on April 3, 1987. This contention, however, fails to recognize that it is IRCA which conferred rights and imposed burdens. Precedents relied upon to urge the impropriety of retrospective application do not deal, as does this case, with facts which arose after enactment. Todd relies principally on Cameron v. United States, 231 U.S. 710 (1914), and Miller v. United States, 294 U.S. 435 (1935).

In Cameron, the Court reviewed a criminal conviction arising from the use of testimony given under statutory immunity by the defendant, a witness in a prior bankruptcy action. Upon repeal of the prior immunity statute, the government unsuccessfully contended that repeal permitted it to rely on the testimony given under the earlier statute. The Supreme Court held, that (Cameron, supra, 231 U.S. at 720):

> [i]n the absence of a clearly expressed legislative intent to the contrary, the court will presume that the law-making power is acting for the future, and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force. (Emphasis added.)

Clearly, the Court found intolerable the government's reliance on repeal of a statute to impose criminal liability for a testimonial act performed under protection of an earlier statute. Obviously, that is not our case.

In Miller, the Court rejected the regulation at issue as an executive agency effort at legislation in the guise of regulation. Miller, supra, 294 U.S. at 439-40. But the Court also said that the statute implicated in the veteran's war risk insurance claim, enacted in 1919, was wholly inapplicable and the regulation in question, adopted in 1930, was ``inapplicable because it contains nothing to suggest that it was to be given a retrospective effect so as to bring within its purview a policy which had long since lapsed and which had relation only to an alleged cause of action long since matured.'' Id., at 439. (Emphasis added.) Referring to the principle that ``generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears,'' the Court noted that the same rule applies to an administrative regulation. Id.

In the present case there can be no question of the scope and intent of the regulation at issue, enforcing legislation effective November 6, 1986. Clearly, the Department intended that the declaration of intending citizenship relates back to the date of the alleged discrimination, but that temporary resident status relates back only to the date of the fee-paid application for legalization. The regulatory issuances which established these controlling principles left no doubt as to their applicability, 52 Fed. Reg. 37402, 37406-07, supra, preamble to Final Rule, 28 C.F.R. Part 44; 53 Fed. Reg. 10338-39, supra, amending 28 C.F.R. 44.101(c)(2)(ii).

By a Notice published March 24, 1988, 53 Fed. Reg. 9715, the Special Counsel expressed the concern that ``[c]onfusion has arisen over the timing of the filing'' of declarations of intent [because the rule as to timeliness was contained in the preamble only and not in the regulatory text per se to the October 6, 1987 regulation]. In contrast, Special Counsel pointed out that the I-772 instructions ``state that filing the I-772 is a prerequisite only `to assert a claim,' not to qualify for protection.'' The Special Counsel concluded that ``[t]o dispel any confusion ... this notice announces that the Justice Department views the declaration of intention filing requirement as satisfied as long as the declaration is completed and filed before the charge of discrimination is filed with ... [OSC] .... It

is not necessary to complete and file the declaration before the occurrence of the alleged discrimination.'' (Emphasis added.)[13]

I am unaware on what theory the policy of the Department, expressed by the Attorney General in implementing his broad responsibilities under the INA, in the October 6 preamble, becomes susceptible to modification by the Special Counsel through general policy announcement. A preamble, although more obscure and elusive than positive regulatory text which becomes codified in the code of federal regulations, is not, so far as I am aware, rendered thereby amenable to change except by the same official who promulgated the statement being charged, or his delegatee.

The Notice published March 24, 1988, renders it unclear at this point in time whether it is sufficient in order to perfect a charging party's status as an intending citizen to complete a declaration of intent immediately prior to charging discrimination in a filing with the Special Counsel. When the charge in this proceeding was filed and until the issuance of the regulation published October 6, 1987, there was no expression of policy which explained whether declarations of intent were considered to be conditions precedent to successful filing of charges with the Special Counsel, and, if so, when they needed to be filed.

In any event, however, the ``change'' announced by the Notice is of no moment in this case. This is so because I find that Ms. Romo perfected the filing of her Form I-772 not later than November 18, 1987. Consequently, this complainant obtained no benefit or detriment as the result of the Special Counsel's views published March 24, 1988, as to the effectiveness of intending citizen declaration filings.

It is important, as to cases arising from immigration-related acts of employment discrimination alleged to have occurred after December 1, 1987, for the public to be certain of the date an individual must have completed a declaration of intention to become a citizen by filing the appropriate form. To reduce the likelihood of uncertainty for future cases, the Department may want to consider an amendment to the positive text of title 28 Code of Federal Regulations, Part 44.

VI. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, proposed findings of fact and conclusions of

[13]The substantive portions of the Notice published in the Federal Register on March 24, 1988 were contained also in a form letter broadcast by the Office of Special Counsel a few weeks earlier. See Interpreter Releases, Vol. 65, No. 9, March 7, 1988, pp. 206-07 and Appendix I; Empl. Prac. Guide (CCH) para. 5144.

law submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

1. That the statutory bar against filing dual charges under IRCA, 8 U.S.C. 1324b, and under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, with respect to employment practices based on a single set of facts applies only to charges of discrimination due to an individual's national origin without regard to the pendency of a citizenship status discrimination charge; the bar to dual proceedings, 8 U.S.C. 1324b(b)(2), is inapplicable to charges with respect to citizenship status.

2. That, as discussed in this final decision and order, the Department's regulations implementing the rights and burdens conferred by section 102 represent implementation of enacted policy, not being either an enlargement or restriction of that policy but are, instead, a lawful exposition of congressionally conferred rights.

3. That an individual who is an ``unauthorized alien'' at the time of an alleged act of employment discrimination is precluded from prosecuting a charge of an unfair immigration-related employment practice, 8 U.S.C. 1324b(a)(1); the ``definition of unauthorized alien'' in section 101 of IRCA, 8 U.S.C. 1324a(h)(3), applies also to the use of that term in section 102, 8 U.S.C. 1324b. Ms. Romo was not an unauthorized alien on April 3, 1987, the date of the alleged discriminatory act.

Employers in the United States became subject to section 102 upon its enactment. Employers who discharged alien employees ``grandfathered'' by IRCA were at risk that aliens whom they discharged were authorized to work. Catholic Social Services, Inc., et al. v. Meese, Civil No. S-86-1343-LKK (E.D. CA, March 23, 1987), and the ``special rule'' confirm that on April 3, 1987, Todd should not have discharged Ms. Romo without making further inquiry as to her employment authorization.

4. That to be protected against citizenship status discrimination under 8 U.S.C. 1324b(a)(1)(B) an individual who, like Ms. Romo, is not a citizen of the United States must be an ``intending citizen'' at the time of an alleged unfair immigration-related employment practice. An intending citizen is an alien who satisfies one of the four criteria stipulated at 8 U.S.C. 1324b(a)(3)(B)(i) and satisfies the single criterion stipulated at 8 U.S.C. 1324b(a)(3)(B)(ii).

(a) Of the four criteria stipulated at 8 U.S.C. 1324b(a)(3)(B)(i), three were not at issue in this proceeding, i.e., Ms. Romo did not claim either that she was an alien lawfully admitted to the United States for permanent residence, or admitted as a refugee or as an

asylee; she claimed coverage under section 102 as having been ``granted the status of an alien lawfully admitted for temporary residence [under 8 U.S.C. 1255a]....''

(b) The additional criterion for section 102 coverage requires that the alien ``evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen...,'' 8 U.S.C. 1324b(a)(3)(B)(ii).

(c) Ms. Romo satisfied the regulatory implementation of the statutory criterion that a declaration of intention needed to be filed on or before December 1, 1987, when she effectively made a filing with the INS on an appropriate form on November 18, 1987. The Department of Justice stipulated in the final rule published October 6, 1987, that to support a charge under IRCA of employment discrimination alleged to have occurred between November 6, 1986 and December 1, 1987, a declaration was timely if filed not later than December 1, 1987. Final Rule, 52 Fed. Reg. 37402 (October 6, 1987), preamble, pp. 37406-07.

(d) Ms. Romo failed to satisfy the regulatory implementation of the statutory criterion that to qualify as an intending citizen she must also have obtained the status of a lawful temporary resident alien. Pursuant to the Department's interim final rule published March 30, 1988, applicants for temporary resident status qualify as such for the purpose of protection against citizenship status discrimination from the dates shown on their application fee receipts provided their applications are approved. Because her temporary resident status dated back only to July 22, 1987, that regulation forecloses a finding that Ms. Romo qualified as a lawful temporary resident on April 3, 1987. Interim Final Rule, 52 Fed. Reg. 10338, March 30, 1988, revising 28 C.F.R. 44.101(c)(2)(ii).

5. That, in view of the foregoing, I find and conclude that Ms. Romo failed to satisfy the statutory requirement, as implemented, that to be protected under section 102, an alien, such as she, must have qualified as an intending citizen at the time of the alleged employment discrimination; this she could not do because she could not qualify as a lawful temporary resident at that time, even though her declaration of intention to become a citizen was timely. Accordingly, I am unable to determine that Todd engaged in the unfair immigration-related employment practice alleged to have occurred on April 3, 1987. Pursuant to 8 U.S.C. 1324b(g)(3), the complaint in this proceeding is dismissed.

The section 102 subsection entitled ``Orders finding violations,'' 8 U.S.C. 1324b(g)(2), spells out what the final order of the judge shall and may contain ``[i]f, upon the preponderance of the evidence, ... [the judge] ... determines that ... any person or

entity named in the complaint [i.e., the respondent] ... has engaged in or is engaging in any ... unfair immigration-related employment practice ...''; the subsection entitled ``Orders not finding violations,'' 8 U.S.C. 1324b(g)(3) directs the judge to issue an order dismissing the complaint ``[i]f upon the preponderance of the evidence ... [the judge] ... determines that ... [the respondent] ... has not ...'' so engaged.

A ``preponderance of the evidence'' standard of proof for a determination of liability is traditional, fair, and reasonable. It would be innovative to introduce that standard as the hurdle to be overcome in order to reach a determination which exculpates the respondent; such a standard would also clash with accepted principles.

It is difficult to accept that Congress intended that respondents would be found not to have engaged in prohibited practices only if they could prove their innocence by a preponderance of the evidence. Such a standard would stand our jurisprudence on its head. Accordingly, the ``preponderance of the evidence'' clause of subsection (g)(3) is understood to mean only that if the judge cannot find liability under subsection (g)(2) upon the preponderance of the evidence, the judge shall take the action stipulated at subsection (g)(3).

6. Ms. Romo is a ``losing'' party; Todd is the ``prevailing'' party as those terms are used in 8 U.S.C. 1324b(h). That statutory provision confers discretion upon the administrative law judge to allow ``a reasonable attorney's fee'' to a prevailing party other than the United States in any section 102 complaint. The statute contains a formulation to guide the judge, i.e., that fees are to be awarded only upon a determination that ``the losing party's argument is without reasonable foundation in law and fact.'' This formulation so far as I am aware is sui generis.

Unconstrained by precedent, but considering the circumstances of this case, I cannot find that the ``argument,'' that is, the position taken by Romo was ``without reasonable foundation'' sufficient to mulct the complainant with Todd's attorneys' fees. This was the first section 102 case to be filed, to reach hearing and, so far as I am informed, to reach decision. The events alleged to constitute the wrongdoing occurred before implementing guidance had been finalized, and the complaint was filed before issuance of the regulatory provision found to be dispositive. Moreover, the Office of Special Counsel having initially declined, to file a complaint on the ground that Ms. Romo did not qualify as an intending citizen, on the eve of hearing reversed itself, contending that she qualified. Although this final decision and order disagrees with that contention, clearly the law is not so settled as to imply that the precondition for imposition of attorneys' fees is satisfied as to Romo.

As to liability of the United States which was not the complainant but an intervenor only, I am less certain of the reach of 8 U.S.C. 1324b(h), and do not decide.

7. That, pursuant to 8 U.S.C. 1324b(g)(1), this final decision and order is the final administrative order in this proceeding and ``shall be final unless appealed'' to a United States court of appeals in accordance with 8 U.S.C. 1324b(i).

SO ORDERED.

Dated this 19th day of August, 1988.

MARVIN H. MORSE
Administrative Law Judge

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

Noemi Barragan-Mandujano Romo, Complainant v. Todd Corporation, Respondent; 8 U.S.C. 1324b Proceeding; Case No. 87200001.

THIRD POST-HEARING ORDER
(Ruling on Intervention of the Office of Special Counsel)

It was agreed at the hearing, as confirmed in my April 21, 1988, Order, that Respondent might file a reply to the Memorandum of Points and Authorities which accompanied the Office of Special Counsel (OSC or Special Counsel) Motion to Intervene of April 1, 1988, and that the Complainant and OSC might reply by May 9, 1988. Both Respondent and OSC have perfected such filings. This Order disposes of two issues raised by that exchange between the parties, leaving all other aspects to a later date, perhaps the final decision.

First: Respondent, citing that portion of the Department of Justice regulations which establish standards and procedures for the enforcement of unfair immigration-related employment practices, governing the OSC, 52 Fed. Reg. 37402, October 6, 1987, (to be codified at 28 CFR Part 44), asks that I reconsider the prior grant of OSC's motion to intervene. OSC's motion was granted at the hearing on April 5, 1988 (Tr. I. 10). Respondent relies for its argument in substantial part on Section 44.303(d)(2) which provides that OSC may ``seek to intervene at any time in any proceeding before an administrative law judge brought by the charging party.'' Respondent argues that the phase ``seek to intervene'' limits OSC's right to intervene and Respondent suggests in this light that law and equity require that OSC's intervention right should be no greater than that of the Equal Employment Opportunity Commission (EEOC) whose right to intervene in a judicial proceeding is within the discretion of the court.

For reply, OSC correctly notes that Respondent's argument fails to mention Section 68.11(b) of the Interim Final Rules of Practice and Procedure of this Office, 52 Fed. Reg. 44972, 44976, November 24, 1987 (to be codified at 28 CFR Part 68), which authorizes the

OSC to intervene ``as a matter of right at any time'', although other interventions are within the discretion of the administrative law judge. Section 68.11(a). OSC notes that pursuant to Section 68.30(a) the administrative law judge may limit the extent of participation of any intervenor other than the Special Counsel.

OSC argues also that, unlike the EEOC before the courts, it has a special relationship to this Office: EEOC and the district courts are located in different branches of the federal government while both this Office and OSC are located in the one executive branch agency, the Department of Justice; moreover, says OSC, it is the enforcement arm of the ``specially designated administrative law judges'' to whom unfair immigration-related employment practice cases are assigned, ``authorized to enforce their orders in U.S. district court. 8 U.S.C. sec. 1324b(j)(l)...'' As will be discussed below, this argument provides no part of the basis for this ruling on intervention and it is rejected.

So much of Respondent's April 25, 1988, reply to OSC's motion to intervene and supporting memorandum as constitutes a request for reconsideration of the April 5, 1988, grant of the motion to intervene is granted but, having considered the arguments of the parties, the request for reversal is denied and the intervention is sustained: (1) OSC is obviously correct that our own rules of practice and procedure deny discretion to the judge to keep OSC out of a case as an intervenor or to limit the extent of participation of the Special Counsel as an intervenor.*[14] (2) The present intervention does not reach the constitutional dimension suggested by Respondent's April 25, 1988, Reply (p. 2). Indeed, Respondent, at hearing, was offered an opportunity in light of OSC's intervention and the position stated in its supporting memorandum of points and authorities to have the record kept open rather than adjourning the evidentiary phase of the proceeding as originally scheduled; that offer was declined. (Tr. II 244).

Respondent's reference to EEOC intervention posture in court is inapposite. That another federal agency is charged with analogous

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[14]* OSC's argument in support of intervention as of right starts with the proposition that because any person filing a charge with it is per se a party to any complaint before an administrative law judge, and that any other person may intervene only in the discretion of the judge, citing 8 U.S.C. 1324b(e)(3), it follows that the right to intervene by the person filing the charge and the OSC is beyond the discretion of the judge. This argument plainly ignores the statutory lesson that only the charging party before the OSC, and not the OSC itself, is contemplated to be automatically ``a party to any complaint before an administrative law judge'' Id. Moreover, if an absolute right to intervention were conferred by statute there would be no need to focus on the rules of practice and procedure of this Office to support that right.

program responsibility is no basis for implying ambiguity where the answer is clear: The rules governing administration of the substantive program to implement the statutory prohibition against unfair immigration-related practices (to be codified at 28 CFR Part 44), authorize OSC to seek intervention while the rules governing practice and procedure before administrative law judges in those cases in which the OSC elects to seek intervention (to be codified at 28 CFR Part 68) require the judges to admit OSC as an intervenor without limit on the extent of that intervention.

I am unaware of the policy dictates that prompted the apparently unfettered grant of intervention status of OSC, but I find no inconsistency between the provision that, as a matter of program administration, informs that OSC may seek intervention in those cases before administrative law judges which it does not initiate and the provision that, as a matter of practice and procedure, requires that, once sought, the intervention follows as of right. Moreover OSC is exactly right in its rejoinder to Respondent that ``to seek'' implies the requirement that it initiate a motion to obtain the desired intervention. Cf. Federal Rules of Civil Procedure 24(a), intervention of right, as cited by OSC.

It is speculative whether, in a given case, the timing and dimension of an OSC intervention may be so out of control as to invite constitutional or other fairness considerations. Certainly, the OSC ought not be permitted to use the intervention authority to obtain a litigating posture stronger that it would enjoy as a complainant. In my judgment, the constraint on judicial power to limit the extent of OSC participation as an intervenor must be understood as constraint only vis a vis the otherwise typical and unrestrained grant of power to the judge to limit the participation of an intervenor. Section 68.30(a). Stated differently, nothing contained in the regulatory treatment of intervention is understood as compromising the authority conferred upon the judge, i.e., Section 68.25, to regulate the conduct of the proceeding and to take actions authorized by the Administrative Procedure Act and, where applicable, the Federal Rules of Civil Procedures.

As appears from the discussion above, OSC may have its intervention without reliance on the argument that the OSC relationship to the administrative law judges who hear unfair immigration-related employment practice cases is per se sufficiently different from that of the EEOC and the district courts as to warrant any conclusion concerning OSC status as an intervenor. To avoid any misunderstanding, this order should be read as permitting intervention of right only because our rules of practice and procedure so require, and for no other reason. OSC claims it is the ``enforcement

arm'' of the ``specially designated administrative law judges'', presumably referring to the statutory requirement that the only judges who may be assigned to hear unfair immigration-related employment practice cases are those ``who are specially designated by the Attorney General as having special training respecting employment discrimination. ...'' 8 U.S.C. 1324b(e)(2). Nothing contained in that ``special designation'' has to do with any special relationship between the judges and OSC or any other party which appears before the judges. It is rather a statutory statement on a preference for parochial expertise in one area of the law on the part of judges expected to be neutral in dispute resolution between the parties.

That the OSC, and not some other official, is statutorily charged by statute with seeking judicial enforcement of final administrative orders of the agency is no basis for converting the status of the OSC as a party before the judge, whether as complainant or intervenor, to something more than that. The statute authorizes ``the person filing the charge'' to petition for enforcement in an appropriate United States district court upon failure of OSC to do so, but it is improbable that such person would be viewed as ``the enforcement arm'' of the judge. See 8 U.S.C. 1324b(j)(1). It is, after all, the vindication of the public interest and the rights of the parties that is involved in the effectuation of final administrative orders, not the interests of the administrative laws judge whose order constitutes the final administrative action of the agency.

Finally, that both OSC and the administrative law judges are in the same branch of government, much less the same department, is irrelevant to the question at hand. IRCA, at Section 102 (8 U.S.C. 1324b), by providing that hearings on complaints concerning unfair immigration-related employment practices ``shall be considered before'' administrative law judges, and by providing for a hearing on the record, implicitly but imperatively brought into play the provisions of the Administrative Procedure Act, including particularly 5 U.S.C. 554 which mandates separation of functions between the administrative law judge and the Special Counsel. See 5 U.S.C. 554(d):

* * * * * * *

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review ... except as a witness or counsel in public proceedings....

See also, Section 68.28 of our rules of practice and procedure which reiterates the statutory requirement. It follows that whatever the

policy rationale for the special entree to intervention by OSC accorded by our rules of practice and procedure, they do not reflect any ``special'' relationship to the administrative law judge. The interposition of the separation of functions doctrine requires the conclusion that for purposes of administrative adjudication, the functional relationship of the Special Counsel to the administrative law judges is no different than that between the EEOC and the United States district courts.

Second: Respondent's April 25, 1988, Reply takes issue with the scope of the OSC argument in the latter's April 1, 1988, memorandum of points and authorities on whether complainant qualifies as an intending citizen. Respondent asserts that by advocating make-whole relief for complainant, OSC exceeds its claim that its intervention is limited to the question whether Mrs. Romo qualified as an intending citizen on the date of her discharge, i.e., April 3, 1987.

Without reaching the merits as to the relief sought, it is sufficient to note that the OSC intervention was for the limited purpose of asserting that complainant ``qualifies as an intended citizen under Section 102....'' I do not find OSC's comments in its April 1 memorandum concerning relief available in event of a finding of discrimination to exceed OSC's self-imposed limit on the scope of its intervention. In any event, all parties including the Special Counsel, are bound by the stipulated statement of issues tendered to the bench at the hearing on April 6, 1988.

SO ORDERED.

MARVIN H. MORSE
Administrative Law Judge