

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

GABRIEL NIYI ADEPITAN,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) CASE NO. 91200107
U. S. POSTAL SERVICE,)
Respondent.)
_____)

FINAL ORDER AND DECISION
GRANTING DISMISSAL OF NATIONAL ORIGIN CLAIM
AND GRANTING RESPONDENT'S SUMMARY DECISION
OF CITIZENSHIP CLAIM

Introduction

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. § 1324b, these antidiscrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the

individual. If, however, the OSC does not file such a charge within 120 days of receipt of the claim, the protected individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three, but less than 15 employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three employees.

Procedural History

On January 24, 1991, Complainant filed a charge against Respondent, alleging discrimination based upon national origin in violation of section 274B of the Immigration and Nationality Act, 8 U.S.C. 1324b, hereinafter Act, with the Office of Special Counsel for Immigration Related Unfair Employment Practices, hereinafter OSC. In a letter dated May 24, 1991, OSC advised Complainant that it had not filed a complaint on his behalf within the statutorily specified investigation period and further advised that Complainant could file his own complaint within ninety (90) days.

On June 25, 1991, Complainant filed a complaint, pro-se, with the Office of the Chief Administrative Hearing Officer. On July 4, 1991, he amended his complaint to include a charge of citizenship discrimination and on July 23, 1991, this case was assigned to me.

The Notice of Hearing On Complaint and Notice of Acknowledgment, along with a copy of the pertinent regulations, was sent to the parties on July 23, 1991 and July 29, 1991, respectively. Respondent, as required, filed a timely answer on August 19, 1991 and presented two affirmative defenses, i.e., this Court's lack of jurisdiction over the national origin discrimination charge and Complainant's failure to state a claim upon which relief may be granted, in that the Complainant was terminated from his position for just cause.

An Order Directing Procedures For Pre-Hearing was sent to the parties on August 21, 1991, and a telephonic pre-trial conference was

held on September 3, 1991, at which time the pro-se Complainant was strongly urged to obtain legal representation in this matter as there were significant legal issues to be addressed. Respondent indicated that she would file a Motion To Dismiss shortly.

To date, I have had no notification that the Complainant has legal representation, and as discussed at the conference, and again mentioned in my September 3, 1991 Order, I have no authority to appoint an attorney to represent him. See 28 C.F.R. Section 68.34.* (All regulations cited in this Order have previously been sent to the parties.)

In a letter dated September 4, 1991, OSC notified the United States Postal Service that it did not intend to intervene on Complainant's behalf. However, they wished to be served with copies of Respondent's pleadings.

On September 27, 1991, Respondent filed a Motion For Summary Decision and a supporting memorandum. Complainant was served with a copy on September 24, 1991, but did not file any response. See 28 C.F.R. 68. 68.11(b); 28 C.F.R. 68.8(c)(2).

Although I had the authority to rule on, and grant, the Respondent's unopposed motion, on October 15, 1991 I issued an Order To Show Cause directing the Complainant to file a response to Respondent's motion and to submit to this Court any sworn declarations, affidavits, letters, written statements or other evidence which would establish that there was a genuine issue of fact material to his citizenship discrimination claim. In that Order, I also stated that I did not have jurisdiction over the national origin claim since the Respondent employed more than fifteen (15) employees and jurisdiction properly belonged with EEOC (Equal Employment Opportunity Commission). See 274B(a)(2)(B) of the Act; Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/1991).

On October 30, 1991, I received a motion from the Complainant requesting an extension of time to file his response to my Order To Show Cause. I granted his request based on his good faith and diligent efforts to secure legal representation. Complainant was given until December 2, 1991 to either file his responses or, in the alterna-

* All references to Part 68 of CFR are references to Part 68 as amended by the interim rule published in the Federal Register at vol. 56, no. 192, page 50059.

tive, to have his counsel file a Notice of Appearance. On November 22, 1991, I received a handwritten document from the Complainant entitled: "MATERIAL AND OATH CONCERNING ALLEGATION(S) OF DISCRIMINATION-OCAHO CASE NO. 91200107" which I have accepted as Complainant's response to my Order To Show Cause.

National Origin Discrimination Claim

Under Section 102 of the Act, I have jurisdiction to rule on national origin discrimination claims. It is common knowledge that Respondent employs more than fifteen (15) employees. Further, there is no argument contained in any of Complainant's filings asserting otherwise. At this point then, it is proper for me to dismiss Complainant's charges of national origin discrimination based on my lack of jurisdiction. Id.

Citizenship Discrimination Claim

Under Section 102 of the Act, I am given jurisdiction to hear citizenship discrimination claims against any employer of more than three (3) employees. Complainant amended his complaint on July 4, 1991 to include a charge of citizenship discrimination.

Under 28 C.F.R. 68.38, I may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision as a matter of law.

Based on the pleadings, motions, affidavits, letters and other documentation filed in the case, I make the following findings of fact.

Complainant, a native of Nigeria and legal permanent resident of the United States, was a casual labor employee of the U.S. Postal Service in December, 1989 and January, 1990, and again in late 1990. At the end of his employment in January 1990, he filed a claim for a work related injury.

During the Postal Service's investigation of his claim, it came to light that complainant had sustained a prior industrial accident. However, this information was not divulged on his employment application. He was fired on December 8, 1990.

Respondent alleges that the Complainant was fired when his super-visors became aware of the nondisclosure of his prior injury and that his termination was made in compliance with the postal regulations.

Complainant makes several bare allegations of discrimination as the reason for his termination, but does not support these with any facts. Most importantly, he does not put forth any support for his charges of citizenship discrimination. Specifically, in his letter to the Postmaster General, dated December 8, 1990, he stated, in part:

This letter regards my unfair dismissal from the U.S. Postal Service effective today December 8, 1990....

I was dismissed due to a previous industrial accident which I did not report on my application form....

I was informed by the manager of the Public Employment Commission that it was for this information that I have been dismissed from the Postal Service.

I believe that because of this I am being victimized and discriminated against unjustly....Now that I have become eligible for full time employment, I feel that this action was taken upon me.

The reason I did not inform the Postal Service of my present lawsuit was that I was applying for part-time employment.

I also note that in his letter to the Chief Administrative Hearing Officer, dated June 18, 1991, he stated, in part,:

2. The activities of the EEO was (sic) very disappointing and frustrating to me because the important issues of the matter was (sic) neglected. And the EEO representative of the matter told me that I should take it to court if I am (sic) not satisfied. But I appeals (sic) to them in gesture (sic) so that they can pay me for the job I did. But still all in vain (sic).

3. I noticed that I was discriminated by some supervisors including the General supervisor (Mr. John Moran) who abused me and pushed me out of the Federal building telling me that "if he sees me in the building he will call the police".

Mr. Voil (sic), Mr. Alex, Mr Jeff Ward are the other supervisors.

4. The other type of specific discrimination was based on my state of origin.

5. Handicap discrimination alleged disability (sic).

6. I was fired unjustly after (sic) completed all necessities and requirements for the Federal job without committing any crime or stealing.

In my Order To Show Cause dated October 15, 1991, I gave the pro-se Complainant specific and detailed instructions to send me any information and documentation he had that would support his citizenship discrimination claim. In response, Complainant filed a six (6) page handwritten motion. A careful reading leaves no doubt that Complainant is very upset about his firing and feels that the Postal Service's action was unfair. However, despite a detailed examination of his response, as well as all his other submissions to this Court, I can find no mention of, or substantiation for, discrimination based on citizenship.

In his response to my Order To Show Cause, Complainant asserts that he is now a citizen. He further explains the circumstances around his admitted nondisclosure of his prior accident. He states that he was a good and diligent worker who paid his taxes. He explains a sexual harassment charge brought against him and states that the investigation did not lead to his termination, although he was told not to speak with any of the women who had made the charges. He states: "I eventually asked if I can face them squarely but Mr Victor Veil told me I don't want you say anything or ask anyone about this and you shouldn't talk to anyone. At this point I knew that they are trying to get rid of me." He states further that he asked for a transfer after this incident, but the request was denied. He then states: "I suffered a lot of victimization not only discrimination at the Van Nuys post service."

In his motion, he repeatedly states that he is ready to take a sworn oath regarding his allegations. If this case were to proceed to hearing, that event would occur. However, in order to get to that point, there must be some genuine issue of material fact regarding citizenship discrimination. In this case, there is none.

Complainant states that he knew that he was fired for nondisclosure of his prior work related injury. He admits that he did not disclose that fact. Although he offers an explanation for his action, it is not within my jurisdiction or power to determine if the facts support forgiveness of the regulatory violation. Further, although the Complainant repeatedly makes assertions of discrimination, not one mentions a connection to his citizenship status.

It is obvious that the Complainant has many questions about his termination, the threat of police actions if he did not leave the postal facility upon his termination, and his treatment at the Van Nuys EEO office. However, it is not within my jurisdiction to rule on these

questions. In this case, I may only investigate and rule on questions of citizenship discrimination. The Complainant has not presented anything to me that would even hint at citizenship discrimination. Thus, I find that Complainant, a protected person under the Act, was terminated by the United States Postal Service for cause pursuant to their regulations and not to the alleged citizenship discrimination.

As such, based on the above, I find that Respondent has met her burden for granting of her Motion For Summary Decision and that there is no genuine issue of material fact to be determined and that Respondent is entitled to a summary decision as a matter of law.

This Decision and Order is the final administrative order in this case pursuant to 8 U.S.C. 1324b(g)(1). Not later than sixty (60) days after this Order's entry, Complainant may appeal this Decision and Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. 8 U.S.C. 1324b(i)(1).

Therefore, it is Ordered on this 10th day of December, 1991, in San Diego, California that:

1. All motions not previously ruled upon are denied.
2. Respondent's Motion For Summary Decision is granted.
3. Complainant's Complaint, filed on June 25, 1991 and his Amended Complaint, filed on July 4, 1991, alleging citizenship and national origin discrimination against the Respondent are hereby dismissed.

E. MILTON FROSBURG
Administrative Law Judge