

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

PRADO-ROSALES,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 92B00024
MONTGOMERY DONUTS, INC.)
Respondent.)
_____)

FIRST PREHEARING CONFERENCE REPORT AND ORDER
(April 6, 1992)

By order dated March 2, 1992, a prehearing conference was held April 3, 1992. To accommodate Complainant's counsel the conference time was changed from the morning to the afternoon. The prehearing conference began at 1:00 p.m. as agreed beforehand, but recessed until 1:45 p.m. due to Complainant's counsel late arrival.

Because an official court reporter was present and a transcript is pending, this Report and Order will be limited to a summary of issues discussed, rulings made, and the scheduling of an evidentiary hearing. Complainant, Maria Ofelia Prado Rosales (Rosales) was represented by Lorenzo W. Tijerina, Esq. Respondent, Montgomery Donuts, Inc. was represented by Irving De Roche, an individual whom Respondent regularly consults regarding personnel matters.

Respondent made two motions for summary decision. I overruled Respondent's motion which contended that Complainant failed to appear at the agreed time. 28 C.F.R. §68.37(b).

Respondent's second motion for summary decision is pending. Respondent asserts the likelihood of an untimely Complaint. In order to timely file a private action, a Complainant must file a Complaint with an administrative law judge within ninety days following Complainant's receipt of the Office of Special Counsel's (OSC) determination letter. 8 U.S.C. §1324b(d)(2).

In the case at bar, the OSC determination letter, addressed to Tijerina on behalf of Rosales, is dated October 28, 1991 and marked "BY CERTIFIED MAIL." The Complaint is timely if Respondent received the letter on or after November 1, 1992. Tijerina does not have a record of when he received the OSC letter. According to De Roche, OSC requires a formal Freedom of Information Act (FOIA) request to obtain OSC files containing the certified mail receipt showing the date of delivery. The parties agreed to my suggestion that I make the necessary inquiry of OSC. As of this date, OSC has not made the date of receipt available. A ruling on Respondent's motion will be forthcoming, after receipt of the appropriate information.

Should the threshold issue of timeliness be resolved in Complainant's favor, fundamental questions of law and fact are raised. Among these:

- (1) Is Complainant a protected person under 8 U.S.C. §1324b?
- (2) What is the basis of Complainant's citizenship discrimination complaint?
- (3) What was the sequence of events, regarding the Forms I-9, the social security cards, and the eventual termination of Rosales?

Pertaining to item (1) above, there was speculation at the conference of the relationship of the Complainant's putative permanent resident alien status to the conclusion in the OSC determination letter that Rosales was not a protected individual entitled to relief for citizenship status discrimination. In that context this order directs Complainant to advise by Counsel in pleading form when she obtained permanent resident alien status, the date if any she applied for naturalization, and the date she became eligible to so apply. 8 U.S.C. § 1324b(a)(3)(B). I advised the parties that resolution of this case would require considerable clarification of these and other issues.

Respondent confirmed that it has a copy of the Rules of Practice and Procedure for cases before Administrative Law Judges. The bench alerted Respondent that it must accompany all filings before the judge with a "certificate of service", *i.e.*, a statement that Complainant has also served copies of the filing on Respondent as well as the filing with the judge. 28 C.F.R. §68.6.

I encouraged the parties to negotiate a settlement. Since Montgomery Donuts, Inc., has already offered to rehire Rosales, only an accommodation regarding the terms of that offer remains. The parties each estimated 90-120 days after the conference in order to complete

discovery. Absent a settlement or dismissal on other grounds, the evidentiary hearing will be held on July 29 and 30, 1992, as agreed.

Appearances:

Counsel for Complainant

Lorenzo W. Tijerina, Esq.
800 North Taylor Street
Arlington, VA 22203

Respondent

Irving De Roche
7808 Marion Lane
Bethesda, MD 20814

SO ORDERED.

Dated and entered this 6th day of April 1992.

MARVIN H. MORSE
Administrative Law Judge