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

September 21, 1992

OLEGARIO MUNOZ, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	Case No. 91200207
PASTEL FURNITURE MANUFACTURING COMPANY, Respondent.	)	

DECISION AND ORDER

Appearances: Olegario Munoz, pro se;
David Shalom, Vice President,
Pastel Furniture Manufacturing Company,
Los Angeles, California, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding addresses the Complaint of Olegario Munoz (complainant) against his former employer, Pastel Furniture Manufacturing Company (respondent), that respondent terminated his employment on February 14, 1991, based solely upon complainant's citizenship status and in having done so violated the pertinent provisions of the Immigration and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

On July 5, 1991, complainant timely filed a written complaint with the United States Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), alleging therein that respondent had engaged in a proscribed unfair immigration-related employment practice by reason of having terminated his employment on February 14, 1991, based solely upon complainant's citizenship status.

On October 15, 1991, OSC notified complainant by letter that it had completed its investigation of his charge, that it would not file a complaint with this office on complainant's behalf, and that complainant was entitled to file a complaint directly with an administrative law judge assigned to this office, if filed within 90 days of complainant's receipt of that correspondence.

On December 2, 1991, complainant commenced his private action by filing the Complaint at issue with this office, in which he reasserted the same allegations of citizenship status discrimination.

On January 13, 1992, respondent filed its Answer, stating therein that in the year 1992, respondent's sales were lower by some 40 per cent, that a cash flow problem had resulted in the sale of a 50 per cent interest in respondent firm to an outside investor, that the salaries of all of respondent firm's owners had been reduced by 35 per cent, that reductions in force were made in all departments in reducing the work force to a minimum level, that the salaries of the remaining employees had been reduced by 8 to 10 per cent, and that a portion of the leased production facilities had been vacated and returned to respondent's lessor in order to further reduce operating costs.

In its Answer, also, respondent further advised that, chronologically, following complainant's having been laid off on February 14, 1991, due to lack of work, complainant had filed an unemployment benefits claim on that same date, in which complainant advised the involved California agency that he had last worked on February 14, 1991, and that he had been laid off at respondent's firm due to lack of work; that on February 19, 1991, complainant filed a workmen's compensation claim in which he alleged job-related injuries including stress, psychological, head, neck, back, and stomach complaints; that on February 21, 1991, complainant filed an age discrimination charge against respondent at the Equal Employment Opportunity Commission (EEOC), in which he alleged that he had been laid off on February 14, 1991, because of his age; that on April 30, 1991, complainant filed another EEOC charge against respondent, in which he alleged that he had been laid off by respondent on February 14, 1991, in retaliation for having filed the earlier EEOC age discrimination charge; and that on July 11, 1991, complainant filed this complaint with OSC, alleging that he had been laid off on February 14, 1991, based solely upon his citizenship status.

Following due notice to the parties, the matter was heard before the undersigned in Los Angeles, California on April 29, 1992. A fully fluent Spanish interpreter was present throughout the proceeding.

Summary of Evidence

Complainant's evidence consisted of his interpreter-assisted testimony and one documentary exhibit which was marked and entered into evidence as Complainant's Exhibit 1. Respondent's evidence consisted entirely of the testimony of David Shalom, a vice president of respondent firm.

Complainant, a 48-year old native of Mexico, testified that he entered the United States illegally from Tijuana, Mexico in 1975. He stated that he became a legal resident alien in 1986 (T. 14), but he also testified that his status was that of illegal alien (T. 17) in December, 1987, the date he began working at respondent's furniture plant in downtown Los Angeles as a sewing machine operator, at an hourly salary rate of $4.75. Respondent's work force then numbered between 30-35 workers at its two (2) Los Angeles facilities.

He remained in respondent's employ form some 39 months, or until February, 1991, receiving some seven (7) twenty-five cent (.25) hourly increases over that period, resulting in a concluding hourly wage rate of $6.50.

He testified that he had been hired by Mr. Pourbaba, one of the owners of the respondent firm and the only person responsible for the citizenship status discrimination which complainant has alleged. That discrimination allegedly occurred in March or April, 1989, and consisted of Pourbaba's refusal to grant complainant's requests for wage increases and additional working hours (T. 19).

Complainant also stated that he had been fired on February 14, 1991, the same date that two (2) coworkers, one a fabric cutter and the other a furniture coverer, were laid off. He testified variously that he has no idea why those two (2) coworkers were laid off, but that he was told "that business was slow" (T. 22). He maintains, however, that he was fired solely because of his citizenship status, more specifically because his INS documentation was considered to be false (T. 106, 107). At the time of his alleged firing, respondent's workforce had increased to 60-70 employees.

Within a week after having been terminated on February 14, 1991, he retained an attorney and filed a claim for workmen's compensation benefits against respondent, alleging work-related psychological and physical complaints, including his back, neck, eyes, both shoulders, both wrists, stress, diarrhea, insomnia, and headaches, which were attributed to his having inhaled lacquer fumes (T. 62-66).

In February, 1991, shortly after allegedly having been terminated by respondent solely because of his citizenship status, complainant testified that he also filed an age discrimination with EEOC. After that claim was investigated, he was advised by an EEOC investigator that no age discrimination had been found since all three (3) of the workers separated on February 14, 1991, including complainant, had been laid off because of lack of work (T. 80-83).

In April, 1991, he filed another claim with EEOC, based upon retaliation owing to the fact that the other two (2) workers laid off on February 14, 1991 had been recalled and he had not (T. 82, 83).

In July, 1991, following his having been advised to do so by the EEOC investigator, he filed the charge at issue with OSC (T. 89).

In September, 1991, some seven (7) months following his alleged firing, he also filed a claim for unemployment compensation benefits (T. 62).

On February 17, 1992, he filed a written complaint with the INS District Director in Los Angeles against respondent, in which he alleged that at the same time respondent was laying off legal resident aliens respondent was hiring illegal aliens at lower wages (T. 142-144).

David Shalom, a vice president and initially a twenty (20) per-cent shareholder of respondent firm, a closely held corporation, testified strikingly opposite to that of complainant on all salient points at issue. Concerning the reason for complainant's separation in February, 1991, he testified that complainant's testimony, to the effect that he had been discharged solely because of his citizenship status, is "absolutely not true" (T. 112). Instead, he testified, complainant was laid off, together with nine (9) other workers in February, 1991, due to lack of work or because of cash flow problems (T. 113).

He stated that the respondent firm manufactures metal residential furniture, primarily, as well as wooden furniture frames, and sells directly to furniture retailers. For the fiscal year ending October, 1990, it enjoyed annual sales of $5-million. By the following year,

annual sales had dropped some forty (40) per-cent to $3-million. That resulted in severe cutbacks, including, among others, the closing of one of respondent's two (2) production facilities, layoffs and salary reductions for the remaining workers.

In 1991, also, owing to the current recession, several of respondent's retailers, while owing respondent well in excess of $250,000, filed for bankruptcy or simply "closed their stores and disappeared" (T. 122). Resultingly, in 1991 respondent wrote off some $260,000 in bad debts.

Owing to the cash flow problems caused by those significant uncollectible debt sums, and presumably lacking a secondary commercial line of credit, respondent found it necessary to seek venture capital in order to continue operating. One Farzad Amid acquired fifty (50) per-cent of the outstanding shares for an undisclosed sum, thus reducing Shalom's, as well as Pourbaba's, ownership interest from twenty (20) to ten (10) per-cent (T. 110).

Because of the lingering economic downturn, that infusion of working capital did not remedy respondent's financial ills and its work force, which numbered between 60-70 workers at peak, had fallen to some 25, or 20 production and five (5) office workers on the hearing date (T. 117). He stated that all remaining employees were to be laid off by June, 1992 and that respondent firm would be closed because their lending bank was taking action.

In addition to the strains which its reduced sales and uncollectible debt sums placed upon respondent's financial resources, the cost of its workmen's compensation premiums became burdensome, also. That because as respondent was forced to substantially reduce its workforce from 60-70 employees to 20, some 25 per-cent of those laid off filed workmen's compensation claims against respondent, alleging work- related psychological and physical impairments. Owing to the fact that respondent's premiums for that coverage were set retrospectively, or based upon respondent's past claims experience, the annual premiums increased four (4)-fold, or from $30,000 to $120,000 (T. 123).

He testified in somewhat forceful terms that complainant's citizenship status had played no part in his having been laid off, along with nine (9) others, in February, 1991. Instead, his layoff resulted from a lack of work and respondent's cash flow problems. Laid off workers were recalled only in the event that there was work in their respective departments, and not on the basis of seniority, which accounted for complainant's not having been recalled. Some of the nine (9) other

workers laid off with complainant in February, 1991, were recalled because there was work in their departments. Complainant had not been recalled because there was no work in his.

He also stated that complainant's age discrimination and retaliation claims filed with EEOC, as well as his citizenship status claim filed with OSC, had resulted in extensive, onsite investigations by investigators from both agencies. Those investigations included inspections of all related employment documents and interviews with respondent's personnel staff, and had resulted in both agencies having found no violations on respondent's part.

Issue

These disputed facts present a single issue for adjudication, that of determining whether, as complainant has alleged, respondent violated the unfair immigration-related employment practices provisions of IRCA, those set forth at 8 U.S.C. §1324b(1)(B), by having terminated his employment on February 14, 1991, solely on the basis of complainant's citizenship status.

Discussion, Findings, and Conclusions

The action being asserted by complainant herein is that which is set forth in Section 102 of IRCA, (Pub. L. 99-603, 100 Stat. 3374 (Nov. 6, 1986)), as amended by the Immigration and Nationality Act of 1990 (IA90), 8 U.S.C. §1324b, which amended Chapter 8 of Title II of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163; 8 U.S.C. §1101, et seq., by adding after section 274A of INA the following new section, in pertinent part:

> "Unfair Immigration-Related Employment Practices"
>
> Sec. 274B. (8 U.S.C. 1324b) (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.-
>
> (1) General Rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 274A(h)(3) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status. (Emphasis Added)

* * * * *

In view of those provisions, it can readily be determined that the scope of the statutory remedies provided for citizenship status discrimination, under the section of IRCA at issue, 8 U.S.C. §1324b, are narrow and permit actions of this type in only three workplace settings: (1) in the hiring of an individual; (2) in the recruitment or referral for a fee of an individual; or (3) in discharging or firing of an employee.

Complainant's evidence discloses that he bases his citizenship status discrimination charge upon respondent's failure to increase his hourly wage rate and working hours, as well as respondent's having terminated his employment because respondent considered complainant's INS documentation, bearing upon his employment eligibility, to have been false.

Complainant's claim that respondent has engaged in unlawful citizenship status discrimination based upon salary increases and working hours, is not actionable under IRCA. Instead, discrimination claims which are based upon working conditions, including but not limited to salary increases and working hours, must be brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (1982), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166 (Title VII). And even under that statutory scheme of redress, claims based solely upon citizenship status, as here, are expressly excluded. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

Accordingly, in order to prevail in this proceeding, complainant must demonstrate that respondent terminated his employment on February 14, 1991, solely because of his citizenship status, i.e. that respondent took that action because it considered complainant's INS documentation to have been false.

Since his charge of an unfair immigration-related employment practice is based upon citizenship status, complainant's evidentiary burden of proof is that of establishing by a preponderance of the evidence, 8 U.S.C. §1324b(g)(2)(A), that respondent knowingly and intentionally engaged in the discriminatory activity which he has alleged, 8 U.S.C. §1324b(d)(2).

In the event that complainant fails to successfully bear that evidentiary burden, an appropriate order dismissing his complaint must be entered, 8 U.S.C. §1324b(g)(3); 28 C.F.R. §68.50(c((1)(iv); Williams v. Lucas & Associates, 2 OCAHO 357 (7/24/91); Ryba v.

Tempel Steel Co., 1 OCAHO 289 (1/23/91); Adatsi v. Citizens, Etc., 1 OCAHO 203 (7/23/90); Akinwande v. Erol's, 1 OCAHO 144 (3/23/90).

The burden of proof which complainant must assume in pursuing his charge of citizenship status discrimination under IRCA parallels that which is required of litigants seeking redress under Title VII. Huang v. Queens Hotel, 2 OCAHO 364 (8/9/91); Williams v. Lucas & Associates, supra; Ryba v. Tempel Steel Co., supra; U.S. v. LASA Marketing Firms, 1 OCAHO 141 (3/14/90).

The gravamen of complainant's charge, as noted earlier, is that respondent knowingly and intentionally treated him differently, or disparately, than other employees similarly situated in the course of terminating his employment on February 14, 1991, and did so based solely upon complainant's citizenship status.

Because disparate treatment has been alleged, decisional guidance is available in the Supreme Court ruling in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the leading case concerning Title VII employment discrimination charges based upon disparate treatment in the hiring process. In discussing the evidentiary burden of proof which a prevailing party must successfully bear in that type proceeding, the Court ruled that the plaintiff therein was required to establish a prima facie case of discrimination and was further required to prove by a preponderance of the evidence:

> "(i) that he belongs to a racial minority;
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected; and
>
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

The order and allocation of proof in Title VII cases involving disparate treatment was further defined in a later Supreme Court ruling which involved the termination of an employee, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), where it was held that upon a showing of a prima facie case of discrimination by a preponderance of the evidence, an inference of discrimination arises and imposes upon the defendant a burden of rebuttal which respondent successfully assumes by articulating with specificity a legitimate, n o-n-discriminatory reason for not having hired/having terminated plaintiff. Given that showing, the plaintiff then has the

opportunity to prove, once more by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons for not having hired plaintiff, but instead were a pretext for intentionally discriminating against plaintiff. 450 U.S. at 249.

It can be seen that in order to present a prima facie case of citizenship status discrimination concerning his discharge and respondent's failure to rehire him, complainant must show: (1) that he belongs to a class of persons protected by the provisions of IRCA; (2) that he satisfied the normal job requirements for the job which he had performed; (3) that he was discharged and was not rehired; and (4) that following his discharge and respondent's failure to rehire him, respondent continued to employ or seek to employ persons with his qualifications. Id. Kenyatta v. Bookey Packing Co., 649 F.2d 552 (8th Cir. 1981), see McDonnell Douglas, 411 U.S. at 802.

By the use of the foregoing evidentiary parameters, we now assess complainant's evidence in order to determine its sufficiency. At the close of complainant's case-in-chief, his testimony standing alone to the effect that, but for the fact that respondent had questioned his citizenship status, his employment would not have been terminated on February 14, 1991, was sufficient to have established a prima facie case.

Given that fact, respondent was required to have shown a legitimate, n on-discriminatory reason for having terminated complainant's services on February 14, 1991. For the following reasons, I find that respondent has successfully articulated such a reason for having done so.

This evidentiary record more than amply demonstrates that on February 14, 1991, respondent elected to lay off three (3) employees, including complainant, owing to its imperiled financial condition. During the month of February, 1991, respondent was forced to lay off a total of 10 of its production work force, owing to reduced sales and cash flow problems. That monthly layoff total was not insignificant, given the fact that respondent's work force had peaked at 60 to 70 employees subsequent to December, 1987, some 39 months before. That layoff, and others which reduced the total employment force to 25 employees on April 29, 1992, confirms respondent's contention that the financial condition of the respondent firm dictated the layoffs, and that complainant's citizenship status simply played no part in that managerial decision.

I find that the evidence adduced by the respondent in connection with respondent's asserted reasons for having laid off complainant on February 14, 1991, are persuasive in determining that respondent has demonstrated a legitimate, non-discriminatory reason for that job action.

Given that finding, the evidence will be further analyzed to determine whether complainant has shown, by the required preponderance of relevant and credible evidence, that those legitimate, non- discriminatory reasons which respondent has advanced do not comprise the true reasons for complainant's layoff, and are merely a pretext for knowingly and intentionally having laid off complainant solely because of his citizenship status, that of resident legal alien.

Simply stated, I find that complainant has clearly failed to do so because he has offered little, if any, credible evidence upon which such an assertion can be reasonably based.

This factual scenario is not atypical of the financial plight which has overtaken a significant percentage of small manufacturing firms in urban America presently. In laying off complainant on February 14, 1991, respondent firm, which is very likely no longer in business at this writing, simply exercised sound managerial judgment rather than having even considered, much less having solely based that action upon, complainant's citizenship status.

Accordingly, complainant's request for administrative relief must be denied.

Order

Complainant's December 2, 1991, Complaint alleging immigration-related employment practices based upon citizenship status discrimination, allegedly in violation of the provisions of 8 U.S.C. §1324b(a)(1)(B), is hereby ordered to be and is dismissed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.