

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

BARBARA EVA LABOMBARBE,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) CASE NO. 92B00199
UNITED STATES AIR)
FORCE, d.b.a.,)
CHILD DEVELOPMENT CENTER,)
438th AIRLIFT WING, McGUIRE)
AIR FORCE BASE, NEW JERSEY,)
Respondent.)
_____)

FINAL DECISION AND ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

I. Introduction

Complainant, Barbara Eva Labombarbe ("Labombarbe" or "Complainant"), acting pro se, filed this action under section 102 of the Immigration Reform and Control Act of 1986 ("IRCA"), amended by the Immigration Act of 1990, 8 U.S.C. § 1324b, claiming that the Child Development Center ("CDC") discriminated against her by failing to hire her for the job of child development assistant because of her citizenship status.¹

This matter is before me on Respondent's Motion to Dismiss for lack of subject matter jurisdiction. Respondent argues that I do not have

¹ After the complaint was filed, the Respondent filed a motion to designate the proper party as Child Development Center, 438th Airlift Wing, McGuire Air Force Base, New Jersey. In support of its motion, Respondent attached an affidavit from Lt. Col. D. Novy which states inter alia that the CDC is an entity of the 438th Airlift Wing Morale, Welfare Recreation and Service Squadron, McGuire Air Force Base, New Jersey, which operates with appropriated and nonappropriated funds. Based upon the affidavit, I find that the appropriate party Respondent in this case is the United States Air Force, d.b.a., Child Development Center ("USAF/CDC").

jurisdiction to hear this case because Complainant was not a protected individual and/or because IRCA's antidiscrimination provisions do not apply to federal agencies. For the reasons stated below, Respondent's motion will be granted.

II. The Facts

A. Refusal to hire.

The material facts involved in the refusal to hire Labombarbe in this case by Respondent are not complex and are not in dispute. Labombarbe was born in Fulda, Germany, in 1966 and is a German citizen. She entered the United States in July, 1985, and was at that time married to a U.S. citizen. She obtained her permanent resident alien status on the date she entered the United States. She divorced her husband in February of 1990 but was remarried to another U.S. citizen on May 20, 1990. In response to my interrogatories, Complainant has admitted that she has never applied for U.S. citizenship.

Complainant has worked as a child care assistant at Child Development Center in Moffett Field, California, for three years. The United States Air Force at McGuire Air Force Base located in New Jersey also operates a Child Development Center (CDC). Sometime in the spring of 1992 a friend of Complainant's told her that USAF/CDC at McGuire Air Force base was looking for a teacher's assistance. On April 4, 1992, Complainant applied for the job and was immediately offered the position. The following day, however, she was asked by an representative of CDC if she was a citizen of the United States. When Complainant told Respondent that she was not a U.S. citizen, she was told that she could not be hired. It was this refusal to hire her that is the basis for the complaint in this case.

B. OSC's Determination

As a result of Respondent's refusal to hire Complainant, Labombarbe filed allegations of unfair immigration-related employment practice under 8 U.S.C. § 1324b against Respondent for refusal to hire her with the Office of Special Counsel, U.S. Department of Justice ("OSC") on April 16, 1992. On August 17, 1992, OSC mailed a letter to Complainant advising her that it had not made a determination as to her allegations against the CDC and was continuing its investigation. OSC's letter also told Complainant that because the 120-day investigatory and exclusive Complainant-filing period specified in IRCA has

ended, and OSC has not filed a complaint in her case, she could file her own complaint with the Chief Administrative Hearing Officer ("CAHO") within ninety days of receipt of OSC's letter. See 8 U.S.C. § 1324b(a).

On September 17, 1992 OSC sent a letter to the Human Resource Officer, Department of the Air Force, McGuire Air Force Base, New Jersey, stating that it had completed its investigation of Complainant's allegations of discrimination and determined that there was insufficient evidence of reasonable cause to believe Labombarbe was discriminated against as prohibited by 8 U.S.C. § 1324b. OSC's letter also stated that Labombarbe was not a "protected individual" under the statute for purposes of citizenship status discrimination. Finally, OSC advised Respondent that the Department of Justice ("DOJ") had recently determined that OSC lacks jurisdiction to pursue citizenship claims against federal agencies. See John C. Harrison, Deputy Assistant Attorney General, Office of Legal Counsel's Memorandum for Craig S. King, General Counsel, Department of the Navy dated August 17, 1992, Re: Enforcement Jurisdiction of Special Counsel for Immigration Related Unfair Employment Practices ("OLC Memorandum").

C. OCAHO Complaint.

Labombarbe filed a private action with OCAHO on September 8, 1992, pursuant to 8 U.S.C. § 1324b(d)(2). Respondent filed an answer on October 22, 1992, alleging two affirmative defenses: (1) that this agency lacks jurisdiction because of lack of statutory waiver of sovereign immunity citing to the OLC memorandum; and (2) that Complainant has failed to invoke the jurisdiction of this agency with respect to her claim of citizenship status discrimination as Complainant has failed to show that she is a "protected individual" within the meaning of 8 U.S.C. § 1324b(a).

On December 7, 1992, Respondent filed a motion to dismiss the complaint, contending that these affirmative defenses were fatal flaws in Labombarbe's complaint. On January 19, 1993, I issued an order directing Complainant to answer the motion to dismiss. Complainant failed to respond to this order. On February 5, 1993, Respondent renewed its motion to dismiss. Prior to ruling on Respondent's motion to dismiss, I requested Complainant to answer a number of interrogatories. See Order of April 16, 1993.

III. Discussion, Findings and Conclusions

For the reasons stated herein, I will not have to decide whether Respondent, a federal agency, is protected against liability under IRCA by virtue of the doctrine of sovereign immunity. See Roginsky v. Dept. of Defense, 3 OCAHO 426 (5/5/92) holding that the defense of sovereign immunity is not available to shield a federal entity from liability under IRCA); and Adnan Niaz Mir v. Federal Bureau of Prisons, OCAHO Case No. 92B00225 (4/20/93) (Order dismissing Complainant's national origin discrimination claim and calling upon Complainant to submit a statement which describes Complainant's basis for a claim of citizenship status discrimination as distinct from the national origin claim...adhering to the decision and order in Roginsky and holding that the OLC memorandum dated August 17, 1992, was not binding nor persuasive.).

In order to be eligible to bring a claim of citizenship status discrimination under IRCA, a Complainant must be a "protected individual" as defined at 8 U.S.C. § 1324b(a)(3). The group of individuals protected by the prohibition against citizenship status discrimination includes United States citizens and nationals and aliens with the immigration status of permanent resident, temporary resident, asylee refugee, subject to the following exclusions:

- (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 [9th date IRCA was enacted] and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in [the Immigration and Naturalization Service's] processing the application shall not be counted toward the 2-year period.

Complainant has the burden of showing that she does not fit within either of the two exclusions to protection under IRCA, See Dhillon v. The Regents of the University of California, OCAHO Case No. 92B00097 (Final Order and Decision Granting Respondent's Motion for Summary Decision)(3/10/93) at 12 and Valenzuela v. J.R. Hale Contracting Co., Inc., OCAHO Case No. 92B00226 (Order Directing the parties to Conduct Discovery to Determine Whether Complainant is a Protected Individual)(11/24/92).

A permanent resident alien is first eligible to file for naturalization once he or she has resided in the United States for at least five years

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after attaining status as a lawful permanent resident. Immigration and Nationality Act of 1952 ("1952"), as amended, § 316(a), 8 U.S.C. § 1427(a). This period is shortened to three years for a permanent resident living with a United States citizen spouse. 8 U.S.C. § 1430(a).

Since Complainant was married to a U.S. citizen when she entered the United States in July of 1985, she was eligible for naturalization and U.S. citizenship in July of 1988. Since Complainant has admitted, however, that she has never applied for naturalization and U.S. citizenship, she is excluded from the protection of IRCA. 8 U.S.C. § 1324b(a)(3)(B)(i).

Accordingly, Respondent's motion to dismiss is hereby GRANTED and the complaint is hereby DISMISSED.

SO ORDERED this 27th day of April, 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge