

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

ESTHER DIN BROOKS,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 92B00207
KNK TEXTILE,)
Respondent.)
_____)

PARTIAL SUMMARY DECISION
DISMISSING NATIONAL ORIGIN DISCRIMINATION CLAIM
and
ORDER OF INQUIRY
(June 21, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Esther Din Brooks, pro se.
Yong A. Spears, pro se.

I. Background

A. Charge, OSC Correspondence and Complaint

On February 10, 1992, Complainant, Esther Din Brooks (Brooks or Complainant) filed a discrimination charge against KNK Textile (KNK or Respondent) with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). She charged that KNK discriminatorily discharged her during the "1st or 2nd week Sept., 1991." Brooks alleged only national origin discrimination. In the charge Brooks recites that on September 14, 1988, she was lawfully admitted for permanent residency.

By letter dated June 11, 1992, OSC informed Brooks that its 120 day investigation period had elapsed. OSC advised Brooks that she could

file a complaint with an administrative law judge even though OSC had at that time not yet completed its investigation. OSC informed her that in order to preserve her cause of action, she would have to file such complaint within ninety days of receipt of the June 11 letter. The docket file does not indicate whether OSC is continuing to investigate this charge or whether it has made a final determination.

Proceeding pro se, Brooks filled out a complaint format provided by the Office of the Chief Administrative Hearing Officer (OCAHO) to assist unrepresented parties in formulating and filing their claims. She filed her Complaint and Amended Complaint with OCAHO on August 28, 1992 and September 21, 1992, respectively.

In paragraph #5 of the Amended Complaint, Brooks indicates that as of the date she signed the Complaint, i.e., September 15, 1992, she had not applied for naturalization. In paragraph #6, she states that she obtained permanent residence status on April 17, 1989.

In paragraph #7 of the Amended Complaint, Brooks claims that she was discriminated against because of her national origin. She left blank paragraph #8, which provides as follows:

I have been discriminated against because of my citizenship status. Yes
 No

However, in paragraph #13 Brooks indicates that she was discharged because of her "citizenship status and national origin."

B. Notice of Hearing and Answer

OCAHO issued a Notice of Hearing (NOH) on September 30, 1992. The NOH transmitted the Complaint to Respondent.

Respondent, in effect, filed an Answer to the Complaint on November 3, 1992, by letter pleading. Respondent is also unrepresented. The Answer admitted that Respondent had laid off Complainant on September 14, 1991. Respondent denies that the layoff related to Brooks' race or national origin. Instead, Respondent asserts that it laid off Complainant and five other workers because of a downturn in business. The Answer does not explicitly address Complainant's citizenship status discrimination allegation.

C. Prehearing Conference and Parties' Replies to Judge's Inquiries

(1) Prehearing Conference

A telephonic prehearing conference was held on January 7, 1993. A Prehearing Conference Report and Order issued on January 8. Incorporated in that order were a series of inquiries directed to each party. Inter alia, Respondent was instructed to state the number of employees who worked for Respondent during the pertinent time period. Complainant was instructed to provide documentation regarding her citizenship status. Both parties timely responded to the order.

(2) Respondent's Reply

On February 16, 1993, Respondent forwarded its reply by facsimile transmission (fax). The following day, Respondent filed a mailed copy of that pleading. The statement, signed by Respondent's principal, is sworn and subscribed to before a notary public.

Respondent recites, in pertinent part, that during the year in question, it employed as many as fifty employees. At the time of the alleged discrimination, September, 1991, KNK employed twenty two employees.

(3) Complainant's Reply

On February 8, 1993, Complainant filed her reply. In response to my inquiry regarding documentation of her citizenship status, she provided copies of two items of correspondence she had received from the Immigration and Naturalization Service (INS). One INS letter states,

The records of this Service indicate that you entered the United States as a conditional permanent resident on 4/17/89.

Brooks also filed a copy of her permanent residency card, which shows expiration in the year "02."

II. Discussion

A. National Origin

(1) The Parameters of National Origin Jurisdiction

National origin discrimination jurisdiction is limited under 8 U.S.C. §1324b. As has been held in a number of cases

jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees.

Monjaras v. Blue Ribbon Cleaners, OCAHO Case No. 92B00263 (6/15/93) quoting Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4 quoting U.S. v. Marcel Watch Co, 1 OCAHO 143 (3/22/90) at 11.

See also U.S. v. Huang, 1 OCAHO 288 (4/4/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Pioterek v. Scott Worldwide Food Service, OCAHO Case No. 92B00261 (6/9/93); Parkin-Forrest v. Veterans Administration, 4 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedent cited therein).

Respondent has filed a sworn statement to the effect that at all times pertinent to this litigation, it employed more than fourteen individuals. There is no factual dispute as to the number of individuals employed by Respondent. Therefore, 8 U.S.C. §1324b jurisdiction is lacking.

(2) Summary Decision

In the interest of efficient resolution of disputes which do not require an evidentiary confrontation, the Supreme Court has established standards for deciding motions for summary decision. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The rules of practice and procedure for §1324b cases before administrative law judges provide for entry of summary decision if the pleadings, other filing by the parties, 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." 28 C.F.R. §68.38(c) [1992]. Title 28 C.F.R. §68.38 reflects the principles of Celotex as applied in OCAHO caselaw. See e.g. Morales v. Cromwell's Tavern Restaurant, OCAHO Case No. 93B00036 (6/10/93); U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92).

Complainant's national origin discrimination allegation is dismissed because there is no genuine issue of material fact as to the number of individuals employed by KNK. Accordingly, I find that KNK is entitled to summary decision. I dismiss that portion of the Complaint which alleges national origin discrimination.

B. Citizenship Status Allegation

Although Brooks' charge and complaint are somewhat inconsistent and ambiguous, I read her filings broadly. I understand her allegations to encompass citizenship status discrimination.

In order to maintain a citizenship status discrimination claim, an individual must be a "protected person." 8 U.S.C. §1324b(a)(1)(B). An alien lawfully admitted for permanent residency is generally a protected individual unless that alien

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.

8 U.S.C. §1324b(a)(3)(B).

Generally, a permanent resident becomes eligible to file for naturalization upon residing in the United States for at least five years after attaining status as a lawful permanent resident. 8 U.S.C. §1430(a). However, a permanent resident living with a citizen spouse becomes eligible after only three years. 8 U.S.C. §1430(a). Prado Rosales v. Montgomery Donuts, 3 OCAHO 438 (6/26/92) at 5.

As a precondition to deciding whether Brooks can maintain this action, the judge must determine whether Complainant is a protected person. Prado Rosales, 3 OCAHO 438; Speakman v. Rehabilitation Hospital of South Texas, OCAHO Case No. 92B00186 (11/6/92) at 6 ("A threshold determination that must be made in this case to determine whether this Court has jurisdiction over Complainant's claim is whether Complainant is a protected individual as defined in 8 U.S.C. 1324b(a)(3)(B). . . . It is Complainant's burden to establish this fact."); Castillo v. Hotel Casa Marina (Marriott), 4 OCAHO 508 (4/12/93).

Accordingly, Complainant is directed to submit a statement as follows:

- (1) State her current marital status.
- (2) State her marital status at the time of the alleged discrimination.
- (3) If she is or was married, state the citizenship of her spouse.

(4) If she is or was married, state when and where her marriage occurred.

(5) If she is or was married, state whether she was married at the time of her initial entry into the United States or whether she married at a later date.

Additionally, Complainant is directed to document her status change from conditional permanent resident to unconditional permanent resident and to state the date of that change of status.

Complainant is directed to file a statement as set out above not later than July 9, 1993. Responses shall be sworn to as by affidavit and shall provide and include as attachments copies of documents in support.

SO ORDERED.

Dated and entered this 21st day of June, 1993.

MARVIN H. MORSE
Administrative Law Judge