

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

CECILIA ARACELI BASUA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) CASE NO. 93B00053
WALMART #1554,)
Respondent.)
_____)

TECHNICAL CORRECTION
TO ORDER OF JULY 8, 1993

My order of July 8, 1993 shall be corrected, on page 4, to include the underlined language below:

the term "protected individual" means an individual who-

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B. is an alien who is lawfully admitted for permanent residence, is granted the status of alien lawfully admitted for temporary residence under section 210(a), 210A or 245A, is admitted as a refugee under section 207, or is granted asylum under section 208; but does not include (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 the date of the enactment of this section 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 Service's processing the application shall not be counted toward the 2-year period.

3 OCAHO 535

SO ORDERED this 16th day of July, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge

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) CASE NO. 93B00053
WALMART #1554,)
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_____)

ORDER CONFIRMING PREHEARING
TELEPHONIC CONFERENCE
AND
ORDER DISMISSING COMPLAINANT'S
NATIONAL ORIGIN CLAIM
AND
ORDER REQUIRING COMPLAINANT TO FILE EVIDENCE REGARD-
ING PROTECTED STATUS AS DEFINED
IN 8 U.S.C. 1324b
AND
ORDER REQUIRING THE PARTIES TO SUBMIT EVIDENCE
REGARDING ALLEGED RETALIATION

I. Procedural History

At this point in time, the relevant procedural history is as follows:

1. Ms. Cecilia Basua, Complainant, filed her Complaint with the Office of the Chief Administrative Hearing Officer on March 8, 1993 after receiving a determination letter from the Office of Special Counsel, dated January 19, 1993, in which she was advised that (a) the Office of Special Counsel would not be filing a complaint in her case as it had not found reasonable evidence of discrimination under 8 U.S.C. 1324b and (b) advising her of her right to file a Complaint on her own behalf;
2. A Notice of Hearing on Complaint Regarding Immigration-Related Employment Practices, dated March 22, 1993, and the Complaint, were served on the parties advising of the filing of the Complaint and Respondent's right to file a timely Answer;
3. On May 11, 1993, Complainant filed documents which, I inferred, were to support her Complaint;

4. On May 16, 1993, I issued an Order To Show Cause to Respondent indicating that, as it had not filed an Answer to the Complaint, I was empowered to issue an Order of Default and that should it not file an immediate Answer with a satisfactory explanation for its nonresponse to the Complaint, I would do so;
5. For good cause shown, on June 7, 1993, I granted Respondent's May 27, 1993 request for extension of time to file its Answer;
6. Respondent's Answer was filed on June 10, 1993;
7. Complainant filed a response to the Answer, with supporting documents, on June 21, 1993.

On July 7, 1993, I held a prehearing conference with the pro se Complainant, and Charlene Jarrells, Esquire, for Respondent. Also attending the conference was Anita Stamps, Ms. Jarrells' paralegal. The purpose of the conference was to discuss issues regarding jurisdiction and other pertinent matters.

II. Discussion

A. Complainant's Legal Counsel

Upon inquiry at the July 7, 1993 telephonic conference, Complainant indicated that she has not retained counsel in this matter as she could not afford representation and she has not been able to locate an attorney who would take the case on a pro bono basis.

B. Complainant's Claim Before the Equal Employment Opportunity Commission

Complainant stated that she has filed a claim with the Equal Employment Opportunity Commission (EEOC) but has not received any communication from them after the acknowledgment of her filing. Based on this representation, I strongly suggested that she contact the Commission to inquire about the status of her case.

C. Jurisdiction

1. National Origin

Complainant has alleged both national origin and citizenship discrimination by Respondent. In order to proceed, I must first inquire as to whether I have jurisdiction on either claim.

In order that there be no overlap with EEOC's jurisdiction, Congress has limited this Court's jurisdiction to hear national origin claims to cases where the Respondent employs more than three (3) and fewer than fifteen (15) employees. 8 U.S.C. 1324b(a)(2), (b)(2). In this case, both parties agree that Respondent employs more than fourteen (14) employees, and possibly as many as two hundred (200). Thus, I have no jurisdiction over the national origin claim; the proper jurisdiction is with the EEOC. See Jasso v. Danbury Hilton Hotel, OCAHO Case No. 92B00036 (May 20, 1992); Suchta v. U.S. Postal Service, 2 OCAHO 327. Therefore, I must dismiss the national origin claim. Id.

2. Citizenship

In order for this Court to have jurisdiction over Complainant's claim of citizenship status discrimination, Complainant must be a "protected individual" as defined under the statute, 8 U.S.C. 1324b(a)(3)(B). The relevant statutory language is as follows:

the term "protected individual" means an individual who-

B. is an alien who is lawfully admitted for permanent residence, is granted the status of alien lawfully admitted for temporary residence under section 210(a), 210A or 245A, is admitted as a refugee under section 207, or is granted asylum under section 208; but does not include (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 the date of the enactment of this section and (ii) an alien 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 Service's processing the application shall not be counted toward the 2-year period.

A review of the file reveals that Complainant may not be a protected individual. In the Complaint, Complainant represented that she had received her legal permanent residency status sometime in 1985 or 1986. She represented, further, that she had applied for naturalization sometime in 1984.

At the telephonic conference, upon inquiry, Complainant read to the Court the date that is on her green card as "May 17, 1985" and that her husband is not a United States citizen. Although she made no representations as to the basis of the granting of her legal permanent residency status, with the limited information before me, I cannot make a final determination as to Complainant's protected individual status. However, it appears that Complainant may not meet the requirements of the statutory definition, and if that proves to be true, then I must dismiss her citizenship status discrimination claim.

As I cannot make the determination of protected individual status based on the limited information before me at this time, by this Order, Complainant is directed to file with this Court any information she possesses, or can obtain, that will establish (1) the date she received her legal permanent residency status, (2) a clear photocopy of her green card, (3) any information regarding the basis on which she was granted legal permanent residency status, and (4) any information she may have regarding her application for naturalization. This information, which must be sent to Respondent at the same time it is sent to this Court, must be filed on or before July 21, 1993.

D. Retaliation

The record reveals that Complainant has also alleged a claim of retaliation. 8 U.S.C. 1324b(a)(5). By this Order, Complainant is directed to file a sworn statement detailing the alleged facts of the alleged retaliation by Respondent, i.e., what happened, when it happened, who was involved or was a witness to the events, and any other documentary evidence; Respondent is directed to file any evidence it has regarding Complainant's termination which might refute the claim of retaliation.

This information is to be filed by the parties on, or before July 21, 1993. Complainant is reminded that she must serve a copy of her document(s) on Respondent as well as on the Court. After I receive and review all the above information, I will set another prehearing telephonic conference to discuss the case with the parties.

SO ORDERED this 8th day of July, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge