

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

GEORGE, et al.,                    )  
Complainants,                    )  
  )  
v.                                    ) 8 U.S.C. §1324b Proceeding  
  ) OCAHO Case No. 92B00155  
BRIDGEPORT JAI-ALAI,            )  
Respondent.                        )  
\_\_\_\_\_                            )

ERRATA  
(July 21, 1993)

The next to the last line, page 7 of the Final Decision and Order Granting Respondent's Motion to Dismiss dated July 12, 1993, is corrected by changing "July 22," to "July 21."

**SO ORDERED.**

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

\_\_\_\_\_  
MARVIN H. MORSE  
Administrative Law Judge

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

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v. ) 8 U.S.C. §1324b Proceeding  
 ) OCAHO Case No. 92B00155  
BRIDGEPORT JAI-ALAI, )  
Respondent. )  
\_\_\_\_\_ )

FINAL DECISION AND ORDER  
GRANTING RESPONDENT'S MOTION TO DISMISS  
(July 12, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: William B. Barnes, Esq., for Complainants.  
Thomas Walsh, Esq., for Respondent.

I. Background

A. Charges and OSC Correspondence

(1) Charges

On January 2, 1992, Jaycees James George (George) filed a discrimination charge against Bridgeport Jai-Alai (Bridgeport or Respondent) with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) under the Immigration Reform and Control Act of 1986 (IRCA). 8 U.S.C. §1324b. It appears also that the record contains portions of OSC charge forms signed by Thomas Andrea (Andrea), Luigi Cammarota (Cammarota), Stephen Foldy (Foldy) and David Charles Gray (Gray).

George charged national origin discrimination and citizenship status discrimination. He claimed that Bridgeport discriminated against him

on December 1, 1991, by replacing him with "Basque Spain foreign nationals with no regard to level of competence, i.e., distinguished merit and ability in playing jai alai."

As required by 28 C.F.R. §68.7(b)(5), a copy of George's OSC charge form was filed with the Complaints in the Office of the Chief Administrative Hearing Officer (OCAHO). The OSC charge forms of Andrea, Cammarota, Foldy and Gray filed with the OCAHO Complaints contain only the first and last page. Each recites that Respondent has hired replacements who are "Basque Spain foreign nationalists with no regard to level of competence, i.e., distinguished merit and ability in playing jai alai." These forms do not show whether the charging party claims national origin discrimination and/or citizenship status discrimination.

George indicates that he is a United States citizen. The other charge forms do not indicate citizenship status.

(2) OSC Correspondence

On May 1, 1992, OSC mailed a determination letter to William B. Barnes (Barnes), as attorney for George and others. OSC advised that it had determined that "there is insufficient evidence that [Barnes'] clients were discriminated against because of their citizenship status." The letter added that because Respondent employs more than fourteen people, OSC lacked jurisdiction to investigate the national origin discrimination allegations. OSC recited that it forwarded the national origin charges to the Equal Opportunity Commission (EEOC) for further consideration.

OSC informed Barnes that a private action could be filed with an administrative law judge, within ninety days of receipt of the determination letter. The OSC letter also stated,

I presume that you represent all ten of the men who filed charges against the fronton: Jaycee George, Luigi Cammarota, Stephen Foldy, Tony Silva, Robert Macolino, Anthony Adiletta, Adam Albrycht, Thomas Andrea, Arthur Botsford and David Gray. If you do not represent any of these men, please notify me immediately so that I can provide them with notice that the 90 day limitations period for them to file a complaint is currently running.

The record does not disclose whether OSC and counsel for the charging parties had further correspondence regarding counsel's representation of the individuals identified in the OSC letter.

B. Complainants' Filings of July 21, 1992 and December 21, 1992

(1) July 21, 1992

On July 21, 1992, Complainants filed a letter pleading in this office dated July 21, 1992. Complainants characterize the pleadings Complaints. The substantive paragraphs are set out below:

This office represents David Gray, Jaycee George, Luigi Cammarota, Gary Anastasia, Stephen Foldy, Tom Andrea, Mike Maiorino, Antonia Silva and Anthony Adiletta.

My clients believe that they were discriminated against because of their citizenship status as prohibited by 8 U.S.C. Sec. 1342b [sic]. This letter is a complaint against Bridgeport Jai-Alai. We respectfully request that you assign this complaint a number and forward to us such further documents as may be necessary to fully develop the facts.<sup>1</sup>

Attached to the letter pleading are the charge form of George and parts of the charge forms of Andrea, Cammarota, Foldy and Gray.

(2) December 21, 1992

A complaint format provided to Barnes by OCAHO was filed December 21, 1992, dated as follows:

DATE: 11 / 09 / 92  
      day  month  year  
      12   19   92

At paragraph #1:

"My name is Jaycee George (and see attached).

The names and addresses of Gray, Cammarota, Anastasi, Foldy, Andrea and Maiorino are listed on a sheet of paper attached to the back of the Format Complaint.

The Format Complaint recites that Complainants are United States citizens. Complainants allege that Respondents made employment decisions discriminatorily based on their citizenship status and national origin. It is not clear however whether Complainants' allegations refer to a failure to hire, a failure to replace or a failure to

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<sup>1</sup> See attached appendix consisting of the full text of Complainants' July 21, 1992 letter.

renew an employment contract. The Format Complaint bears the signatures of Barnes and George.

B. Notice of Hearing and Respondent's March 11, 1993 Filings

(1) Notice of Hearing

OCAHO issued a Notice of Hearing (NOH) on February 8, 1993. The NOH transmitted the Complaint to Respondent.

(2) Respondent's March 11, 1993 Filings

On March 11, 1993, Respondent filed a timely Answer, a motion to dismiss and a memorandum of law in support of the motion to dismiss.

(a) Answer

For Answer to the Complaint, Respondent assumes that there are seven Complainants, *i.e.*, George and the individuals listed on the attachment to the Format Complaint. Respondent denies both national origin and citizenship status discrimination allegations.

Respondent asserts as affirmative defenses that: (1) the Complaints are time-barred; (2) 8 U.S.C. §1324b national origin jurisdiction is lacking as Bridgeport at all times employed more than fourteen individuals; (3) national origin jurisdiction is lacking as to at least three individuals, *i.e.*, George, Maiorino and Anastasia because they have pending EEOC complaints; and (4) Maiorino is not qualified since he lacks the requisite license to play jai-alai.

(b) Motion to Dismiss and Supporting Memorandum of Law

Respondent moves to dismiss the Complaint for failure to state a claim upon which relief can be granted. Citing 28 C.F.R. §§68.7(b)(1), 68.7(b)(2), 68.7(b)(3), 68.7(b)(4), and 68.7(b)(5), Respondent argues that neither Complainants' July 21 letter pleading nor Complainant's December 21 Format Complaint pleading comport with the minimum standards required for the filing of pleadings in general, and complaints in particular. Respondent asserts, in effect, that no Complaint has been filed in the case at bar.

Respondent reasons that since Complainants' July 21 letter is not a complaint, it cannot serve to toll the running of the statutory time

period. The December pleading cannot relate back, even if it were construed to be sufficient. Therefore, the December pleading is grossly untimely. Respondent also reiterates its national origin jurisdiction affirmative defenses.

Respondent notes that as no OSC charges were filed for Anastasia or Maiorino, these two individuals lack standing to maintain this Complaint.

C. Complainants' Motion for an Extension of Time and Memorandum in Opposition to Motion to Dismiss

(1) Motion for Extension of Time

On April 7, 1993, Complainant filed an untimely motion for an extension of time to respond to Respondent's motion to dismiss. On April 7, I granted a one week extension, in part because Respondent had filed a subsequent supplement to its March 23 motion to dismiss.

(2) Memorandum in Opposition to Motion to Dismiss

On April 14, 1993, Complainants<sup>2</sup> filed a memorandum in opposition to the motion to dismiss. Complainants argue that their letter pleading was timely filed, i.e., within ninety days of receipt of the OSC determination letter. Complainants, by counsel, assert that they were "advised that a letter would be sufficient . . ." and that OCAHO rules do not mandate adherence to the Federal Rules of Civil Procedure. Furthermore, by utilizing the OCAHO-generated complaint format, Complainants claim compliance with the procedural requirements of the forum.

Complainants concede that those individuals who did not file OSC charges should be dismissed, but assert as to the other putative Complainants that "Respondent's motion is founded on technical objections which have no impact on substantial rights."

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<sup>2</sup> For convenience, this discussion assumes that there is more than one Complainant.

## II. Discussion

### A. Dismissals

If the Administrative Law Judge determines that the complainant has failed to state . . . a claim [upon which relief can be granted], the Administrative Law Judge may dismiss the complaint.

28 C.F.R. §68.10.

Although motions for judgment on the pleadings are disfavored, they are granted. Osorno v. Geroldo, Owner Reliable Graphics, Inc., 1 OCAHO 275 (12/5/90) (Order Granting Respondent's Motion for Judgment on the Pleadings) at 6; Pioterek v. Scott Worldwide Food Service, OCAHO Case No. 92B00261 (6/9/93).

The OCAHO Rules of Practice and Procedure expressly refer to the Federal Rules for guidance. 28 C.F.R. §68.1. Respondent's Motion to Dismiss is akin to a motion under Federal Rule 12 (b)(6), "failure to state a claim upon which relief can be granted." A Rule 12 (b)(6) dismissal issues where the claim for relief is formally insufficient. Gauvin v. Trombatore, 682 F. Supp. 1067, 1070 (N.D.Cal. 1988).

I conclude that Complainants have failed to timely state a claim upon which relief can be granted. I grant Respondent's motion to dismiss for the reasons stated below.

### B. Two of the Complainants Have No Standing

In order to pursue an IRCA discrimination claim, an individual must file a charge with the OSC within 180 days of the alleged unfair immigration-related employment practice. If after 120 days OSC decides not to file a complaint on behalf of the charging party, the party may file a private action with this office. 8 U.S.C. §1324b(d)(2); 28 C.F.R. §68.4(c). The OSC charge is a prerequisite to an OCAHO complaint.

Anastasia and Maiorino appear not to have filed OSC charges. Therefore, they have no standing to pursue their discrimination claims with the present Complaints. Accordingly, I dismiss Anastasia's and Maiorino's national origin discrimination and citizenship status discrimination claims.

### C. National Origin Jurisdiction is Lacking

Complainants allege both national origin discrimination and citizen-ship status discrimination. I do not have jurisdiction over the national origin allegations.

An exception to 8 U.S.C. §1324b coverage excludes those employers who have sufficient employees to meet the jurisdictional requirement of Title VII of the Civil Rights Act of 1964, as amended, *i.e.*, more than three but fewer than fifteen employees. See 8 U.S.C. §1324b(a)(2)(B); Morales v. Cromwell's Tavern Restaurant, OCAHO Case No. 93B00036 (6/10/93); 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 precedent cited therein).

Respondent pleads that it has, at all times pertinent to this litigation, employed more than fifteen individuals. That pleading is un rebutted. Accordingly, I find that Respondent is too large to fit within IRCA's national origin jurisdiction. Complainants' national origin discrimination allegations are dismissed.

D. The Complaints Are Defective

- (1) The Complaints do not meet the pleading standards of the OCAHO rules of practice and procedure

OCAHO rules of practice and procedure set out the requirements for filing an 8 U.S.C. §1324b complaint. The controlling rule is mandatory, not permissive. Inter alia, a complaint

(b) shall contain . . .

- (1) A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated;
- (2) The names and addresses of the respondents, agents and/or their representatives who have been alleged to have committed the violation;
- (3) The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred; and,
- (4) A short statement containing the remedies and/or sanctions sought to be imposed against the respondent. . .

(c) . . . Complaints filed pursuant to section 274B of the INA shall be accompanied by a copy of the charge previously filed with the Special Counsel. . .

28 C.F.R. §§68.7(b), 68.7(c).

The July 21, 1992 Complaints fail to meet the standards set out in 28 C.F.R. §68.7 in a number of ways. They fail to recite facts to support either an assertion of jurisdiction or violation of law. 28 C.F.R. §§68.7(b)(1), 68.7(b)(3). The Complaints omit Respondent's address. 28 C.F.R. §68.7(b)(2). The Complaints fail to accurately identify the statute under which it is brought, *i.e.*, "8 U.S.C. Sec. 1342b. 28 C.F.R. § 68.7(b)(3).<sup>3</sup> The Complaints fail to seek a remedy or sanction. 28 C.F.R. §68.7(4). The compilation of these flaws results in obscure Complaints which fail to provide Respondent fair notice as to what the claim entails. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 149 n.3 (1984).

Attempting to overcome their pleading inadequacies, Complainants represent that OCAHO staff informed their attorney that a letter format would constitute an acceptable complaint. The putative dialogue offers Complainants limited refuge.

OCAHO has made deliberate efforts to provide pro se complainants an opportunity to pursue their rights under IRCA. This accommodation has engendered a liberal pleading policy, as pertains to form rather than substance. Complaints filed in letter format are not per se rejected because they lack a particular structure. Nevertheless, a complaint, in whatever format, must meet the minimal substantive standards set out above.

Title 28 C.F.R. §68.7 is explicit as to the required content of OCAHO complaints. The July 21 letter does not comply. Examining Complainant's July 22 letter against the regulatory prescription, I hold such filing to be patently deficient.

Complainants' subsequent pleading, filed five months after the letter, *i.e.*, December 21, 1992, also fails to meet the standards of 28 C.F.R. §68.7. The Format Complaint is so unclear that it is impossible to determine with certainty the identity of all the Complainants. Aggravating the inadequacies of the two complaint filings is the inconsistency between them, *i.e.*, the Letter/Complaint includes the names of two individuals who are not included among the seven identified as Complainants in the Format pleadings. Additionally, the Format Complaint lacks a statement of facts. Moreover, the OSC

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<sup>3</sup> Despite the Complaints' invocation of "8 U.S.C. §1342b," I assume, as apparently Respondent does also, that it was intended to invoke 8 U.S.C. §1324b.

charges for some Complainants are incomplete and for others, missing entirely. Complainants' filings fail to specify whether the gravamen of the complaints is failure to hire or unlawful discharge. Although less significant but illustrative of the pervasive pleading inadequacies, are the unexplained dual signatures, *i.e.*, William B. Barnes, Esq. and Jaycee George, et al, and dual dates, November 9, 1992 and December 19, 1992 on the last page of the format. The Format Complaint falls short of providing Respondent with adequate notice of the essentials of Complainants' cause of action.

(2) The Complaints do not meet the pleading standards of the Federal Rules of Civil Procedure used under Title VII.

Title 8 U.S.C. §1324b cases often rely on Title VII caselaw for persuasive precedent. U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89) at 41, appeal dismissed, 951 F.2d 1186 (10th Cir. 1991), (applying Title VII jurisprudence from the McDonnell Douglas/Burdine line of cases). Accord Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92) at 7. Title VII practice and procedure implicates the Federal Rules of Civil Procedure. The pertinent OCAHO rule closely tracks the Federal Rule and is guided by the Federal Rules. 28 C.F.R. §68.1.

A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

FED. R. CIV. P. 8(a).

The purpose of the rule is to give the respondent/defendant fair notice of what the complainant/plaintiff claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S. 41, 47 (1957).

The Supreme Court has held that a filing by a pro se party of a right-to-sue letter in lieu of a complaint does not constitute the commencement of a Title VII action. Despite acknowledging the remedial purposes of Title VII and the unrepresented status of the complainant, the Court concluded that the filing was insufficient to meet the standards of Rule 8. Baldwin, 466 U.S. at 149.

A recent Title VII case granted a motion to dismiss, on the basis that a complaint did not meet the pleading standards of Rule 8, even where the complainant was not represented by counsel. The complaint

provided "insufficient factual support for a . . . discrimination claim," i.e., failure to allege complainant's job qualifications, and the employer/respondent's hire of another person. Brown v. Prince George's County Health Department, Civil Action No. HAR 90-51 (D.C. Md. 1992).

Complainants' July and December filings are at least as deficient as the pro se complaint in Brown. The District Court's rationale in dismissing the deficient pro se complaint is even more compelling in the case at bar where Complainants' pleadings have been filed by counsel.

Code pleading replaced archaic and arcane common law rules of procedure in order to make judicial disposition of disputes more accessible to the public. Nothing in the evolution of new pleading principles, however, replaces the obligation to provide fair notice. Fair notice is lacking in Complainants' filings here.

Because the Complaints are deficient, the timeliness issue is moot. Even if it could be said that the initial letter/Complaints tolled the filing time, those pleadings cannot be rehabilitated by subsequent defective pleadings. While the delay of five months in filing is not determinative, it makes the reasons for dismissal even more compelling. See e.g., Prado-Rosales v. Montgomery Donuts, 3 OCAHO 438 (6/26/92) at 5 (Complaint dismissed because complainant not a protected individual, but the complaint had also been untimely filed.) As the Supreme Court succinctly stated, "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin, 466 U.S. at 151.

(3) Conclusion

I hold that neither the July nor December filings meet the standards of 28 C.F.R. §68.7. By analogy to Title VII precedent, I find the filings in this case to be fatally flawed. Essentially, there are no Complaints pending before me. Therefore, this action cannot be sustained.

Accordingly, Respondent's motion to dismiss is granted, and the putative Complaints and the Format Complaints are dismissed.

III. Ultimate Findings and Order

I have considered the pleadings and accompanying documentary support submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as more fully explained above, I find and conclude that

1. Two Complainants, Anastasia and Maiorino, lack standing because they were not included among those individuals identified as having filed OSC charges. 8 U.S.C. §1324b(d)(2).

2. So much of the Complaints as allege discrimination based on national origin are not cognizable under 8 U.S.C. §1324b due to the number of individuals employed by Respondent.

3. The Complaints are dismissed for failure to state a claim upon which relief can be granted, in breach of the requirements of 28 C.F.R. §68.7(b) and Federal Rule of Civil Procedure 12(b)(6).

Pursuant to 8 U.S.C. §1324b(g)(1), this Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i).

**SO ORDERED.**

Dated and entered this 12th day of July, 1993.

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MARVIN H. MORSE  
Administrative Law Judge

APPENDIX

ROSENSTEIN & BARNES

Attorneys At Law

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WILLIAM B. BARNES

FAX: (703) 305-1448

July 21, 1992

Office of the Chief Administrative

Hearing Officer

5107 Leesburg Pike, Ste. 2519

Falls Church, VA 22041

RE: DISCRIMINATION CHARGE FILED AGAINST  
BRIDGEPORT JAI-ALAI, INC.; CHARGE #14-14

To Whom It May Concern:

This office represents David Gray, Jaycee George, Luigi Cammarota, Gary Anastasia, Stephen Foldy, Tom Andrea, Mike Maiorino, Antonia Silva and Anthony Adiletta.

My clients believe that they were discriminated against because of their citizenship status as prohibited by 8 U.S.C. Sec. 1342b. This letter is a complaint against Bridgeport Jai-Alai. We respectfully request that you assign this complaint a number and forward to us such further documents as may be necessary to fully develop the facts.

Thank you for attention.

Very truly yours,

WILLIAM B. BARNES

WBB: sjg

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