

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

GRZEGORZ PIOTEREK,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 92B00260
ANDERSON CLEANING)
SYSTEMS, INC.)
Respondent.)
_____)

ORDER
(July 22, 1993)

I. Procedural History

Grzegorz Pioterek (Pioterek or Complainant) claims that Anderson Cleaning Systems, Inc. (Anderson or Respondent) discharged him. Complainant alleges that the discharge on October 11, 1993, was based on national origin and citizenship status discrimination in violation of 8 U.S.C §1324b. This Office issued its notice of hearing on January 6, 1993.

On January 22, 1993, Respondent filed a motion to dismiss the complaint. The motion contends that I lack subject matter jurisdiction due to a pending national origin discrimination claim. Respondent relies on the prohibition against §1324b jurisdiction where a national origin claim arising out of the same facts is pending under 42 U.S.C. §2000e-2 (Title VII of the Civil Rights Act of 1964, as amended), and also relies on the exception to §1324b jurisdiction where an employment is within the scope of 42 U.S.C. §2000e-2.

On January 27, 1993, I issued an order, 3 OCAHO 484, in this docket and in Pioterek v. Scott Worldwide Food Service, OCAHO Case No. 92B00261, directing the parties to make certain filings as a predicate

for determining what further procedures would be appropriate. That order also directed Respondent to file its answer to the complaint not later than February 17, 1993. Respondent timely filed its answer on February 1.

Pioterek's claim against Scott was for national origin discrimination alone and did not allege citizenship status discrimination. I dismissed the complaint in Scott by Final Decision and Order Granting Motion to Dismiss, 3 OCAHO__ (6/9/93). Dismissal was based on the fact that Scott employs more than 14 individuals and, therefore, is outside the jurisdiction of 8 U.S.C. §1324b, and because Anderson, not Scott was the employer at all times relevant to Pioterek's claims here.

The January 27, 1993 order, 3 OCAHO 484 at 3-4, addresses the controlling principles with respect to distinctions for jurisdictional purposes between national origin and citizenship status discrimination claims. Avoiding the need for repetition, that text is adopted and incorporated here as if fully set out. The materials filed by the parties are helpful, but not fully decisive, in resolving questions of jurisdiction over the complaint.

II. Discussion

This order will address the failure of the parties to have fully answered my inquiries of January 27, and will request supplemental responses. First, however, I will dispose of the claims in Respondent's answer that the original complaint was both untimely and fatally deficient.

A. The Complaint Was Timely And Sufficient

OSC's determination letter dated August 27, 1992, advised Pioterek that it would not file a complaint on his behalf, but that he could file his own complaint directly before an administrative law judge. Conceding that such a complaint was filed on November 25, Respondent contends it is untimely. I can only guess that Respondent counts November 25 as more than 90 days after August 27. It is commonplace in the law that, absent specific statutory or regulatory direction to the contrary, counting of days in which to accomplish an action starts with the day after the issuance of the command, not the day of the command. It follows that the complaint was filed 90 days following the day after the issuance date of the OSC determination letter. In any event, however, Complainant's 90 days did not begin to

run on either the day of issue or the next day. The direction in OSC's letter is consistent with §1324b(d)(2)(3) that OSC shall notify the charging party of the right "to file a complaint directly before such a judge within 90 days after the date of receipt of the notice." Absent any reason to suppose that Pioterek received the determination letter before or even on August 27, 1992, I conclude that his November 22, 1993 letter, filed November 25, 1992, is a timely filed complaint.

Respondent's answer claims that the complaint is deficient for "failure to state facts sufficient to be considered a complaint in this matter." OCAHO rules of practice and procedure set out the requirements for filing an 8 U.S.C. §1324b complaint. A close reading of the November 25 filing against the pleading requirements of 28 C.F.R. §§68.7(b) and (c) suggests less than perfect adherence to the Title 28 requirements. But the failure of Respondent to refer to any specific defect, to the controlling rules or to the relevant Federal Rules of Civil Procedure hardly provides a paradigm of informed pleading.

Only last week I dismissed an aggregation of §1324b complaints for inadequate pleading. George v. Bridgeport Jai-Alai, OCAHO Case No. 92B00155 (7/12/93) (3 OCAHO __). Bridgeport is distinguishable from the case at bar. In Bridgeport, the complainants were represented by counsel. Additionally, the complaints inaccurately specified the statute under which they were brought, and provided no address for the respondent. In further distinction, I held in Bridgeport that the amended complaints, i.e., format complaints, were so inadequate as to preclude their relating back so as to perfect the original filing; here the format complaint is unchallenged and sufficient.

Considering Complainant's pro se status and that the cumulative effect of the two complaints provides adequate notice of the claims alleged, I find that Complainant's filings are at least marginally sufficient to overcome Respondent's claims of deficient pleading.

B. National Origin Jurisdiction

As discussed in the January 27 order, I lack national origin discrimination jurisdiction where the employer has more than fourteen individuals on the payroll. To resolve the threshold jurisdictional issue, that order requested

- A schedule which shows the number of employees on the date in March, 1991 that Complainant began his employment, and the number of employees on October 11, 1991; also show the maximum and minimum number of employees during that period;

In response, Respondent filed exhibits from a proceeding in another forum. Those exhibits do not explicitly respond to the question asked. Unless Respondent is prepared to respond fully to the orders of this forum, it will be necessary to draw negative inferences from its failure to provide reasonably useful and meaningful information; raw data is not sufficient. Respondent will be expected to file a document which is responsive to the directions repeated above.

C. Citizenship Status Claim

Complainant's responses leave me unclear whether he perceives a difference between a claim of national origin discrimination and citizenship status discrimination. Accordingly, I repeat the last two questions of the January 27 inquiry. In preparing his response, Complainant must keep in mind that he has already articulated the reason he believes he was discriminated against on the basis of his Polish origin.

Complainant will provide:

- An explanation of the basis for the claim that he was discharged because of his Polish citizenship;
- An explanation of the basis for the claim that he was discharged because he was not a United States citizen.

Complainant's filing will be expected to include a statement which alleges facts and theory to assist the bench in resolving whether this case embraces a viable citizenship status discrimination claim, as distinct from a national origin discrimination claim.

D. Protected Individual Status

OSC responded to the January 27 inquiry by letter dated February 12, 1993 which stated, inter alia, its understanding "that Mr. Pioterek applied for asylum on February 15, 1990, and was granted asylum on January 17, 1992, after the alleged date of discrimination (October 11, 1991)." If OSC is correct, Pioterek can only be considered a protected individual for citizenship status discrimination purposes if on October 11, 1990 he was a permanent resident alien (which presumably he was not), a person admitted as a refugee under section 207 of the Immigration and Nationality Act (which presumably he was not) or an alien lawfully admitted for temporary residence (an amnesty applicant initially an illegal resident) (which presumably he was not).

Complainant will be expected to advise whether he has any basis for disagreeing with OSC as to the timing of his asylum grant. He should also state his current immigration status. Complainant should file copies of relevant documents issued by the Immigration and Naturalization Service, and by other government agencies.

III. *Responses*

Responses to this order, in affidavit form, will be timely if filed not later than August 16, 1993.

SO ORDERED.

Dated and entered this 22nd day of July, 1993.

MARVIN H. MORSE
Administrative Law Judge