

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.)
_____)

FINAL DECISION AND ORDER
(August 3, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Esther Din Brooks, pro se.

Yong A. Spears, pro se.

I. Procedural Background

The complaint in this case alleges both national origin and citizenship status discrimination. On June 21, 1993, I dismissed the national origin portion of the complaint. As discussed in the Partial Summary Decision Dismissing National Origin Discrimination Claim and Order of Inquiry, 3 OCAHO 528 (6/21/93), the national origin claim is outside jurisdiction of 8 U.S.C. §1324b. This is so because KNK Textile, the employer, employs more than fourteen individuals. An employer with more than fourteen employees is within the ambit of the Civil Rights Act of 1964, as amended, and not the Immigration Reform and Control Act of 1986 (IRCA), as amended. 8 U.S.C. §1324b(a)(2)(B).

To determine whether an administrative law judge has jurisdiction over a complainant's citizenship status discrimination claim, it is necessary to ascertain whether that person is a protected individual as defined in the Immigration Reform and Control Act of 1986, as amended, 8 U.S.C. §1324b(a)(3). In other words, in order to assess Complainant Esther Din Brooks' eligibility to maintain her citizenship

status discrimination claim she must first establish that she is a protected individual. As a precondition to deciding whether Brooks can maintain this action, the judge must determine whether Complainant is a protected person. Prado Rosales v. Montgomery Donuts, 3 OCAHO 438 (6/26/92). See also Speakman v. Rehabilitation Hospital of South Texas, 3 OCAHO 476; Castillo v. Hotel Casa Marina (Marriott), 3 OCAHO 508 (4/12/93). As more fully discussed in the June 21 Order of Inquiry, 3 OCAHO 528 at 4-5, certain inquiries were addressed to Complainant to assist the bench in making that determination.

On July 8, 1993, Complainant timely filed her response to the Order of Inquiry. That response, together with the data set forth in her prior filings, requires the conclusion that Complainant lacks protection as to her citizenship status discrimination claim.

II. Discussion

A. Complainant Is Not A Protected Individual

As set forth in the June 21 order:

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.

Complainant, a permanent resident alien of Philippine citizenship, asserted in her charge filed with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), that she was lawfully admitted into the United States for permanent residence on September 14, 1988. Her response filed July 8, 1993 to the June 21, 1993 Order of Inquiry also states that she entered the United States on September 14, 1988. Her response establishes that she was married in Bossier City, Louisiana, on October 15, 1988 to William G. Brooks.

The complaint in this case states that Brooks obtained permanent resident status on April 17, 1989. She twice provided copies of Immigration and Naturalization Service (INS) documentation on February 23, 1993, in response to the January 8, 1993 First Prehearing Conference Report and Order, and on July 8 in response to the June 21, 1993 inquiries. The complaint and her February 23 filing suggest that she obtained conditional permanent resident status on April 17, 1989. It appears from the INS documents that Brooks applied for conditional permanent resident status on April 14, 1989, and subsequently was converted to unconditional permanent resident status. The April 17, 1989 date is in contrast to the claim to OSC that she entered the country as a permanent resident alien on September 14, 1988.

The Immigration and Nationality Act (INA), as amended, establishes when a lawful permanent resident alien becomes eligible to apply for naturalization. INA makes clear that an alien spouse in the United States as a lawful permanent resident on a conditional basis is treated as a permanent resident alien for naturalization purposes as of the date the conditional permanent resident status attaches. 8 U.S.C. §1168a(e). For purposes of this case, Complainant's permanent resident status attached either on September 14, 1988 or April 14, 1989.

Continuous residence in the United States with her husband for three years after attaining lawful permanent resident status established Complainant's eligibility for naturalization either in October 1991 (three years after marriage, if she was a lawful permanent resident when she married) or April 1992 (three years after obtaining conditional permanent resident status). 8 U.S.C. §1430(a).

Brooks' complaint, filed on the format provided by this Office, recites that as of the date she signed the complaint she had not applied for naturalization. The detailed inquiries in my orders of January 8, 1993 and June 21, 1993, effectively directed her to update information as to her citizenship status. More specifically, the January 8 order required her to "confirm citizenship status to the present date." Nothing in her responses suggests she has applied for naturalization.

This decision resolves ambiguity as to the date she obtained lawful permanent resident status in her favor, by identifying the more recent of the two dates, April 1989, not October 1988, as the date her eligibility commenced. Nevertheless, I conclude from her silence on that subject in her February 23, 1993 filing, that as of six months after April 1992 Brooks had not yet applied for naturalization. Indeed, her

July 8, 1993 filing, provided under oath in response to the June 21 Order of Inquiry, emphasizes removal of the conditional basis of her permanent resident status but is devoid of any reference to naturalization.

The failure of Brooks' July filing to refer to naturalization is particularly informative. This is so because the June 21 Order explicitly advised Brooks that (1) an alien loses protection against citizenship status discrimination by failure to apply within six months of eligibility, and (2) eligibility attaches after only three years in the case of a permanent resident alien living with a citizen spouse. It is reasonable to conclude, and I do, that as of July 1993, but even more certainly as of February 1993, Brooks had not yet filed for naturalization. Since February 1993 is more than three years and six months after April 1989, she is not a protected individual under 8 U.S.C. §1324b.

By operation of law, Brooks is excluded from the class of individuals entitled to protection against citizenship status discrimination. I have no option, but to find and conclude that Complainant failed to apply for naturalization and therefore is not a protected individual within the protection of the prohibition against citizenship status discrimination.

B. No Prima Facie Citizenship Status Discrimination

The June 21, 1993 order stated an understanding that the allegations of the complaint include citizenship status discrimination. Analysis of her responses to the January 8, 1993 inquiry, however, makes obvious that she has no citizenship status claim as distinct from the national origin claim dismissed on jurisdictional ground by the June 21 order. The January 8 inquiry contained, inter alia, these questions:

10. Explain your understanding of the basis for your claim of national origin discrimination.
11. Explain your understanding of the basis for your claim of citizenship status discrimination.
12. State specifically what evidence you rely on to prove your claim that Respondent discharged you for reason of your national origin and/or citizenship status and not, as she alleges, that there was insufficient work and that she retained workers with more seniority.

Nothing in the responses to those questions implicates citizenship status discrimination. By the same token that the judge reads the complaint broadly in favor of this pro se complainant, he recognizes also that the distinction between national origin and citizenship status claims may be very elusive. Nevertheless, the responses to the judge's inquiries establish that to the extent that any putative discrimination can be discerned, it is the employer's preference for Koreans. Complainant's allegations of that preference, explained in detail, omit any reference to citizenship. I conclude that Complainant's claim of discrimination sounds in national origin and not at all in citizenship. As such, I find there is no genuine dispute of material fact such as to warrant a hearing on Complainant's claim of citizenship status discrimination.

III. Ultimate Findings, Conclusions and Order

I have considered the pleadings, including the responses to the judge's inquiries. All requests not previously disposed of are denied. Accordingly, as more fully explained above, I find and conclude that Complainant is not a covered individual under 8 U.S.C. §1324b as to the citizen status discrimination alleged. Also, I find and conclude on the basis of the responses to the judge's inquiries that even if Brooks were a protected individual, her complaint must be dismissed for failure to state a claim of citizenship status discrimination as distinct from the national origin claim previously dismissed. As to national origin, the Partial Summary Decision Dismissing National Origin Discrimination Claim and Order of Inquiry, 3 OCAHO 528 (6/21/93), is adopted and incorporated in this Final Decision and Order as fully as if here set forth.

Accordingly, the complaint is dismissed. The hearing is canceled.

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 3rd day of August, 1993.

MARVIN H. MORSE
Administrative Law Judge