

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

October 21, 1993

JIMMY-JACK JACKAI,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) Case No. 92B00181
DALLAS COUNTY-DATA)
SERVICES,)
Respondent.)
_____)

DECISION AND ORDER

Appearances: Irene Jackson, Esquire, Dallas, Texas, for complainant;
Henry J. Voegtle, Esquire, Dallas, Texas, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding addresses the complaint, as amended, of Jimmy-Jack Jackai (complainant) against his former employer, Dallas County Data Services Department (Data Services/respondent), that Data Services had engaged in unlawful employment-related discrimination practices against him. More specifically, complainant alleges that his employment was terminated on February 21, 1992, because of his national origin and citizenship status, in retaliation for his having filed an earlier failure-to-hire IRCA charge, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b(a)(1)(A), 8 U.S.C. §1324b(a)(1)(B), 8 U.S.C. §1324b(a)(5).

On November 20, 1990, while then having been employed since January, 1986 as a microprocessing specialist in the office of the Dallas County Auditor, another component of the Dallas County government, complainant filed a written complaint with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) of the United States Department of Justice, against

Data Services. In that complaint, complainant alleged that, despite having filed employment applications for some 15 programmer/analyst positions in Data Services during the year 1990, he had not been hired for any of those positions solely because of his citizenship status, that of an alien admitted for permanent residence, and also because of his national origin, that of being a citizen of the nation of Cameroon, Africa.

On December 10, 1990, the director of Data Services requested the authorization of the Dallas County Personnel/Civil Service Department to fill a new position, programmer analyst II, with a proposed hiring date of April 1, 1991.

On January 4, 1991, complainant interviewed for that position with William A. Moore, respondent's Division Manager in Charge of Financial Systems, who interviewed and jointly selected complainant for that job opening.

On February 1, 1991, complainant assumed his new job duties at Data Services, transferring from the Dallas County Auditor's Office.

On June 3, 1991, OSC notified Data Services' senior personnel administrator that following its investigation of complainant's November 20, 1990, employment-related discrimination charge based upon citizenship status and national origin, OSC had determined that there was no reasonable cause to believe that complainant's failure-to-hire charge was true, and resultingly, OSC was not bringing a complaint before an administrative law judge assigned to this office. Data Services was further advised in that correspondence that complainant was entitled to file a complaint directly with this office if he did so by June 18, 1991 (Complainant's Exh. 35 at 2, 3). Complainant did not file a complaint, presumably because he was then employed in Data Services.

On February 21, 1992, some one (1) year and 20 days following his assuming the programmer analyst II position in Data Services, and following his having received marginal performance appraisals in September, 1991 (Complainant's Exh. 7) and January, 1992, (Complainant's Exh. 10) complainant's employment was terminated.

On April 7, 1992, complainant amended his OSC complaint by alleging that Data Services had terminated his employment on February 21, 1992, allegedly in retaliation for his having filed the failure-to-hire charge with OSC on November 20, 1990, in violation of the provisions of 8 U.S.C. §1324b(a)(5).

On June 2, 1992, OSC advised complainant by letter that it had determined that there was no reasonable cause to believe that respondent had retaliated against him in the course of his February 21, 1992 termination, and for that reason OSC again decided not to file a complaint with this office. As it had done previously in connection with his November 20, 1990 charge, OSC advised complainant that he was entitled to file a private action directly with this office if he did so on or prior to August 5, 1992.

On August 14, 1992, complainant initiated this proceeding by filing the complaint at issue with this office. He alleged therein that on February 21, 1992 Data Services had terminated his services as a Computer Specialist/Programmer Analyst, whose duties consisted of application analysis and programming, solely as a result of "retaliation for filing a discrimination complaint under the guise of low performance." Complaint, paragraph 13(b). As grounds for his alleged retaliation charge, complainant stated:

"I complained for not (sic) been interviewed or hired based on citizenship and nationality 11/19/90. I was hired during the process but let (sic) alone to initiate myself in the computer system. I was made to work under an inexperienced management team that eventually was persuaded to give me low performance reviews to justify my discharge" Complaint, paragraph 14(a).

After due notice to the parties, an adjudicatory hearing was conducted before the undersigned in Dallas, Texas on February 9-11, 1993.

Summary of Evidence

Complainant's case consisted of his testimony and that of 16 other witnesses, as well as the introduction of 38 documents marked and entered into evidence as Complainant's Exhibits 1 through 38.

Complainant's witnesses were Lloyd Haff, a programmer analyst and coworker at Data Services; Joseph Ayyad, complainant's first line supervisor at Data Services; Joe Thekkekara, a coworker of complainant's in the Auditor's Office; Alice Trillo, a clerk and coworker in the Auditor's Office; Linda Brooks, senior personnel administrator in the Dallas County Personnel Department; Roy Wilkins, in charge of Data Service's recruitment and training during complainant's employment period; Debra Wann, Programmer Analyst III and complainant's supervisor at Data Services; Dwight Rottenberg, a computer operator and coworker at Data Services who underwent a portion of his training with complainant under Roy Wilkins; Virginia Porter, one of complain-

ant's supervisors in the Auditor's Office; Richard A. Schmid, who served as Director of Data Services while complainant worked there; Linda Benedict, an executive secretary at Data Services during the period at issue; Luis Requena, a Programmer Analyst III at Data Services during the period of complainant's employment there; Donald Dacon, a division chief at Data Services during that time, also; William Moore, a Data Services division manager who interviewed complainant and who, together with Richard A. Schmid, decided to hire complainant; Jerry Evans, another Data Services division manager during the period at issue; and Bobby Jack Poe, who served as a project manager at Data Services during complainant's period of employment.

Respondent's evidence was comprised of the testimony of Roy Frederick, who served as systems software manager at Data Services during complainant's employment period, and who continues to perform those functions for SCT Corporation, following the privatizing of those county functions. In addition, respondent placed into evidence two documentary exhibits, identified and marked as Respondent's Exhibits A and B.

Complainant testified that he is 43 years of age, is married, has two children, and is a citizen of the African nation of Cameroon. He was born on January 2, 1950 and was raised and educated in that country prior to beginning studies at age 25 at the University of Paris in October, 1975. He was awarded a Bachelor of Arts degree in June, 1978, majoring in mathematics and minoring in economics. His under-graduate studies did not include any courses in data processing because that department was on strike during his period of study (T. 215-217).

In December, 1978, he entered the United States on an F-1 student visa in order to attend the University of Texas - Arlington (UTA) and pursue a masters degree in French and foreign languages (T. 30). His career plans then were to return to Cameroon and teach French and foreign languages at the high school and college levels (T. 31).

Complainant took part time employment as a quality control clerk at the Dallas Morning News and while still so employed in January, 1980, some 13 months after his arrival in the United States, he began his two-year masters studies at UTA. He did not complete that program in January, 1982 as planned, however, since he dropped out of that school in May, 1982 after having earned only 27 of the required 36 credit hours in that curriculum.

He testified that he abandoned his French studies because he saw no job opportunities for French majors, as evidenced by the employment ads in the Dallas newspapers for persons so qualified (T. 33, 34). Complainant denied having then decided not to return to Cameroon, but stated that acquiring French teaching qualifications would not offer job opportunities in that field either in Cameroon or in the United States (T. 35).

Instead, he decided to switch careers and to attend business school "to study computers" (T. 34). He applied to several business schools and was accepted at the University of North Texas (UNT), located in Denton, Texas, some 40 miles north of Dallas, beginning his studies there in January, 1983. He was awarded a Master of Business Administration (MBA) degree in computer business information systems in August, 1987 and he noted that there were job openings in that field "locally, and overseas, especially where I come from." (T. 36-38). His studies at UNT, consisting of a 90-hour curriculum, included nine hours of COBOL training in 1985-1986, training in job control language (JCL), a first course in BASIC and a microcomputer application course which included several software programs (T. 219, 220). He took the COBOL courses in 1985 and 1986, received grades of C's and B's, and was told by his instructor to dedicate his total efforts to that course, but that he had been unable to do so because he had a family (T. 219, 238). Complainant's MBA degree was not a computer science degree, one in which the holder receives intensive training as a computer programmer (T. 236, 237).

Since arriving in the United States in December, 1978, he has returned to Cameroon on only one occasion, in December, 1986. He testified variously that he had returned at that time only to visit his parents, whom he had not seen for a long time, and also to apply unsuccessfully for employment, with IBM in Paris as a programmer analyst, and also with that Government of Cameroon ministry in which computer software is developed (T. 38-47).

On October 26, 1987, some two months after receiving his MBA degree, complainant became a temporary resident alien (Complainant's Exh. 4) and filed a Declaration of Intending Citizen form on February 2, 1988 (Complainant's Exh. 5).

At the time he earned his MBA at UNT, August, 1987, and from November, 1986, he was employed as a school computer mathematics teacher at DISD, a Dallas firm, at a salary of \$22,500 yearly. In 1987, he began applying for positions in the Dallas County government and was hired as a microspecialist, a clerical position (T. 229), at Dallas

County Auditor's Department at a salary of \$1,860 monthly, or \$22,320 yearly, beginning there in November, 1989 (Complainant's Exh. 23 at 2).

After serving in that position for six months, or until mid-1990 or so, complainant began applying for some 15 different computer analyst positions in Data Services. Complainant was of the opinion that he had not been hired or considered for any of those positions at Data Services because of his citizenship status, that of legal resident alien and his national origin, being a citizen of Cameroon.

On November 20, 1990, resultingly, he filed the previously-mentioned failure-to-hire complaint with OSC containing the charges of unfair immigration-related employment practices namely, citizenship status and national origin discrimination, arising out of his not having been hired, or considered, for some 15 programmer/analyst positions in Data Services during the year 1990.

On April 7, 1992, as noted earlier, complainant amended his complaint, alleging that he had been discharged on February 21, 1992, solely in retaliation for his having filed the initial failure-to-hire IRCA charge on November 20, 1990.

In essence, complainant alleges that respondent failed to hire him or, with the exception of a single interview in August, 1990, to even allow him to be interviewed for any of the 15 or so programmer/analyst positions for which he applied in 1990 because of his citizenship and national origin. He further charged that in hiring him in January, 1991 Data Services did so only because complainant had filed his November 20, 1990 failure-to-hire charge and knowingly and intentionally created workplace conditions that made it impossible for him to perform satisfactorily. In addition, he has alleged that Data Services arranged for two unsatisfactory job performance reviews, on September 9, 1991 and on January 10, 1992, in order to terminate his services on February 21, 1992, an action which in effect was taken in retaliation for complainant having filed his initial failure-to-hire charge with OSC on November 20, 1990.

On January 16, 1992, following his receipt of the January 10, 1992 performance review, complainant filed a Dallas County personnel grievance against Bob Poe, his project manager, alleging discrimination based upon race, color, age, sex and national origin (Complainant's Exh. 15).

In the IRCA charges at issue, complainant requests that he be reinstated to his former position in Data Services, that all negative notations be removed from his official personnel file and all other files of respondent, that he be awarded full back pay and benefits from February 21, 1992, that he be granted attorney's fees and any other appropriate relief to which he is entitled under the provisions of IRCA.

At the outset of the February 9, 1993 hearing, the undersigned dismissed those of complainant's allegations based upon national origin discrimination for lack of subject matter jurisdiction.

That because the undersigned's jurisdiction over claims of national origin discrimination under IRCA, 8 U.S.C. §1324b(a)(2)(A), is limited to claims against employers employing between four (4) and 14 employees. Yefremov v. New York City Department of Transportation, 3 OCAHO 466 (10/23/92); Curuta v. United States Water Conservation Lab, 3 OCAHO 459 (9/24/92). Since respondent employs well in excess of 14 employees, we will consider only those charges of complainant which are based upon citizenship status discrimination and retaliation.

Meanwhile, complainant must seek national origin discrimination relief under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (1982), before the Equal Employment Opportunity Commission (EEOC), the agency having exclusive jurisdiction over claims of national origin discrimination involving employers having 15 or more employees.

Complainant testified that his citizenship status discrimination charge is based upon the fact that he was the only Cameroon national then working in Data Services, that he spoke differently, owing to his native Cameroon accent, and also that when having been interviewed initially at Data Services in August, 1990, Roy Wilkins had inquired of his citizenship (T. 15, 16, 210, 211).

He also maintains that he was given inadequate supervision, in the person of Debra Wann, whose computer abilities he regarded as having been less than average, an opinion confirmed in testimony given by his former coworker, Lloyd Haff (T. 54). Complainant also testified that she had engaged in harassing activities, including, among other practices, her refusal to give him written, as opposed to oral, instructions and that she also took notes of their conversations for documentation purposes. She also requested, and received, his computer password in June, 1991 (T. 158-160).

Complainant is especially sensitive to a workplace incident which occurred on August 28, 1991, in which he was blamed for having "scratched", erased, or deleted a significant number of user files from a data base. He testified variously that he did not delete the files (T. 119), that he does not know whether he erased the files (T. 212), and that he could not definitively state that he did not accidentally enter the command "CBOO" rather than "CBO1" in using the TVAM routine to uncatalog files on August 28, 1991, and have erased the files in the course of having done so (T. 266).

He also feels that as a trainee he had been treated differently than a fellow trainee, Dwight Rottenberg, and that that disparate treatment resulted from his citizenship status and/or in retaliation for the failure-to-hire IRCA charge he filed earlier. His initial training at Data Services consisted of running eight test computer programs, all in the COBOL language and in an increasing level of difficulty (T. 250, 251). He conceded that in beginning his computer analyst duties at Data Services on February 1, 1991, he was some five to six years removed from his earlier COBOL courses at UTA (T. 219) and that he then also had no practical experience in COBOL programming (T. 239). Despite that, he does not believe that he would have benefited from a refresher course in COBOL when starting to work in Data Services on February 1, 1991 (T. 333).

Complainant stated the pattern of harassment at Data Services began during his training period in early February, 1991, taking the form of his having been given a defective chair, from which he fell and injured his back, of not having been assigned a terminal for some six weeks and not having received a telephone until October, 1991 (T. 277-279).

Complainant also testified that he filed an earlier IRCA charge with OSC against Frito-Lay Corporation of Dallas, Texas in April, 1988, in which he also alleged citizenship status and national origin discrimination as a result of his allegedly not having been granted an employment interview in October, 1987 for a computer analyst position because of his foreign citizenship. He retained an attorney, filed a charge with OSC and later settled that claim against Frito-Lay for an undisclosed sum, the amount of which, he testified, he could not divulge, owing to the confidential nature of that financial settlement (T. 372-377).

Other relevant portions of the composite testimony of some of the 16 witnesses subpoenaed by complainant to testify in his case-in-chief have also provided the following facts.

Linda Brooks, a senior personnel administrator in the Dallas County Personnel Department testified that complainant had transferred from the position of microprocessing specialist in the Auditor's Office to that of programmer analyst II in Data Services (T. 417). She was aware that complainant had received a marginal performance review in September, 1991 (T. 434) and a second one in late 1991 or early on in 1992, followed by his having been placed on a 30-day warning period (T. 437).

She recalled a conversation with complainant, in which they discussed whether he might transfer to another department. She also conferred with Data Services personnel in order to determine the nature of the problem and learned that there were issues concerning complainant's performance which simply could not be resolved (T. 437-439). Ms. Brooks called other departments on complainant's behalf, including the Auditor's Office, his former unit, without success. In contacting Mel Stepp in the Auditor's Office about a lower level position into which complainant could have been transferred, he refused to allow complainant to fill that position (T. 439).

She denied having a conversation with a then Dallas County Treasurer's Office employee identified only as Akabu to the effect that complainant had been "set up" and that he would inevitably be fired and also that Data Services' decision to hire complainant was directly related to complainant's initial failure-to-hire OSC charge (T. 441, 442).

Ms. Brooks further testified that complainant filed a Dallas County grievance concerning his termination and that on July 29, 1992 the members of the Dallas County Civil Service Commission conducted a hearing on all issues, including complainant's allegations concerning discrimination and harassment. She stated that complainant had testified in that proceeding. The Commission also reviewed the related documentation, interviewed employees in Data Services and then ruled against complainant in his attempt to reverse the earlier ruling that complainant had been properly terminated (T. 460-463).

Roy Wilkins, then a project manager in respondent's financial division, and who was also in charge of recruitment and training for Data Services' programmer analyst group, testified that he had seen several employment applications filed by complainant and had decided against interviewing him because the applications were incomplete, owing to the fact that the section concerning the applicant's citizenship status, as well as other sections, had been left blank, and also because complainant had repeatedly telephoned a secretary, Linda Benedict,

concerning an employment interview, despite the fact that she repeatedly advised him that he would not be interviewed. Wilkins regards failures to properly complete sections on an application as an indication that a person will not follow instructions (T. 496). He also felt that complainant's data processing skills were not current (T. 499).

Eventually, however, he did interview complainant, in the company of Brenda Olson, a programmer/analyst, and observed that complainant's accent had impaired his ability to communicate. For that reason, he decided not to hire complainant.

Following complainant's having filed his initial failure-to-hire OSC charge in November, 1990 complainant was hired, following an interview involving other Data Services personnel and, as is the case of all newly hired program analyst IIs, he was assigned to Wilkins for training.

That training syllabus consisted of assigning to each trainee some eight (8) to 10 programs or projects involving computer programming. Upon completing those training assignments, the trainees move into production. The initial assignment consisted of an entry-level program and subsequent tasks involved increasingly complex programming demands. He testified that complainant completed the first two assignments without difficulty but experienced problems on the third, although he did complete it.

Complainant also did well on the fourth project but the fifth, which consisted of a difficult teleprocessing program, required more compiles than it should. Similarly, the seventh training assignment, which required 298 compiles, caused complainant a great deal of difficulty and he stated that complainant did not seek his assistance, as he had been instructed to do (T. 484-487).

Wilkins noted complainant's plight and offered him additional assistance. Complainant was released for production when he was considered to have been trained sufficiently to function in a production environment (T. 490). He does not believe that complainant had been "set up" to fail (T. 514).

He recalled that another trainee, Dwight Rottenberg, had remained in training longer than most trainees, and also remembered that he had recommended that Rottenberg not be retained as a programmer/analyst (T. 492).

Debra Wann, who began work with Dallas County on October 1, 1990, was complainant's immediate supervisor and monitored his initial production programming assignments and had assisted in evaluating his performance. Her immediate supervisor was Bob Poe, the project manager for Data Services. In August, 1991, she began taking notes of her conversations with complainant, but not at Poe's suggestion, although he may have suggested it (T. 527). She spoke to Poe regularly about complainant's job performance and had input into his written evaluation.

Her instructions to complainant were oral, despite his request that she give him written directions. She declined, stating that written instructions would have contained gaps which could only be remedied by oral communication. As the oral directions were given to complainant, he would not acknowledge them (T. 533). Ms. Wann testified that she would repeat the oral instructions to complainant and he would prepare written notes.

She recalled the August 28, 1991 deletion incident in which complainant had been involved. Some programmer in their five-person unit had inadvertently deleted files by the use of the AMS procedure, which is essentially the same as a procedure known as TVAM. A meeting was called for all involved personnel in order to determine if anyone had engaged in deleting. Complainant stated that he had been deleting and had been using a VTAM procedure, one which Ms. Wann had shown him to use because it is the easiest and most simple and efficient way in which to delete data. If a programmer uses a global delete with an identifier, usually his/her initials, in the VTAM, there is no danger of erasing production files. It was for that reason that she had shown complainant to use VTAM rather than AMS for purposes of deletion. She asked complainant whether he had been using the VTAM procedure and he acknowledged that he had, using the identifier CBO1, and that he had experienced problems in doing so namely, his datasets had not been deleted (T. 540).

Ms. Wann testified that complainant's initial performance review had been prepared in September, 1991 and the second in January, 1992. The quantity of his work in the intervening period had increased but not the quality. She had received complaints about complainant's work or lack of oral communications skills from Data Services' users within the county government's Justice Division.

She stated that complainant's initial production effort involved a project designated R767, which he managed to move into production on September 26, 1991, or following his first performance review.

Although the projects assigned to complainant prior to his first review were not at all difficult, he could not complete any of them (T. 566).

Dwight Rottenberg testified that he had been a trainee at Data Services in 1990 and 1991 under Wilkins, and part of his training period overlapped that of complainant's. He found that programmer training to have been difficult and demanding. He has an MBA, also, and took COBOL courses in graduate school but had not used those programmer skills since that time. For that reason, he enrolled in outside courses in COBOL and JCL while a trainee at Data Services in order to succeed as a programmer. He completed his training and went into production as a programmer/analyst until September 30, 1992, when he joined another component of Data Services as a computer operator. That move was a demotion because his performance as a programmer/analyst had not been satisfactory (T. 609-612).

Richard A. Schmid, former director of Data Services, testified that the decision to hire complainant in January, 1991 was not related in any manner to complainant's having filed his failure-to-hire IRCA charge with OSC on November 20, 1990, nor was complainant's termination related to that filing.

Prior to October, 1991 he was advised that complainant was not progressing as well as other programmers and was not performing as well as others in the past. He stated that the incident of "scratching", or the deletion, of files was uncommon and had only occurred on six or seven occasions in his 12-year tenure at Data Services.

Donald Dacon, former division chief at Data Services, testified that he had supervised Bob Poe, a project manager, who was complainant's second level supervisor. Following the deletion incident on August 28, 1991, he concluded that complainant, despite his denial, had caused the files to have been deleted, and he was involved in the decision to issue the written reprimand and the final warning notice to complainant.

He stated that he was responsible for securing complainant's telephone and equipment and that the six-week delay in furnishing complainant a computer was routine and had been caused by the fact that another county department had to run cabling from the computer department to the mainframe.

He agreed with Poe concerning complainant's marginal performance ratings, based upon complainant's involvement in the files deletion incident and also on his overall job performance in Data Services. It

had been reported to him that complainant was slow in performing assignments, that he did not wish to document his assignments and that he had requested written instructions, a practice which was simply not done in Data Services since programmers are routinely expected to follow oral instructions.

Prior to his termination, complainant was given four assignments to complete within 30 days. These involved simple tasks, each of which should have been completed within three to four hours. Complainant completed only two, despite having been given three times the normal time allocation in order to have done so.

He testified that the decision to hire complainant, as well as his treatment in Data Services thereafter had not been influenced in any manner by the fact that complainant had filed his failure-to-hire charge with OSC.

Concerning the files deletion incident, he learned from Poe that complainant had been working on these files at that time, a fact confirmed by Roy Frederick, Jr., the systems software manager, whom he requested perform an evaluation of the deletion incident.

At a meeting in his office, attended by complainant and Poe, he issued the warning to complainant in order to impress upon him the seriousness of the file deletions. At that meeting, complainant requested that Dacon not place the warning in his personnel file and that he be allowed to seek another job in county government, to which Dacon replied that complainant could make such inquiries without the warning on his record (T. 694, 695).

Dacon also testified that no retaliation of any sort had been practiced upon complainant and that he was given a second written warning in January 1992 because he simply was not progressing as he should have, nor was he demonstrating that he possessed the basic technical skills to perform his programmer analyst II duties. He stated that while complainant had academic knowledge, he was unable to demonstrate that he could apply that knowledge in a practical manner (T.703).

William Moore, a division manager in charge of financial systems at Data Services and Wilkins' supervisor, made the joint decision, together with Dick Schmid, to hire complainant, despite Wilkins' expressed belief that complainant was not qualified to perform as a programmer/ analyst II.

Jerry Evans, a former division manager at Data Services, stated that he had recommended that another job be found for complainant within the county government since in his conversations with complainant he formed the opinion that complainant was not willing to take instructions from Poe or Dacon. He further stated that complainant had uni-laterally decided how he would perform his assigned job duties. Com-plainant simply did not wish to work for Poe or Dacon and Evans could find no evidence that either had treated complainant differently than any of their other employees. Likewise, he found no evidence of retaliation relating to complainant's failure-to-hire OSC charge (T. 714-722).

Bob Poe, project manager at Data Services during the period at issue, and complainant's second level supervisor, began his duties with Dallas County in November, 1990, after spending almost 20 years at a data processing manager in the public and private sectors.

He instructed Wann to work closely with complainant in his ongoing training activities and development in Data Services. Poe found that complainant performed his job duties in an unorthodox manner, not deliberately, but because his analytical abilities were flawed (T. 741).

He further testified that he teaches an evening class in computer science at UTA called CICS for the COBOL Programmer, and coincidentally, complainant had enrolled initially in one of his classes, although complainant later elected to audit that class, rather than complete it as a credit student (T. 751, 752).

He testified that at the time of the August 28, 1991, files deletion incident, he served as the projects manager and was involved in the related investigation. Upon learning of the problem, he advised his boss, Donald Dacon, the division chief, who called a meeting of the group to determine if anyone had been working with the criminal justice files. Only complainant stated that he had been working on those files.

The meeting was adjourned and the five-person group was required to work for the remainder of that day and most of that night in order to retrieve the deleted files (T. 761).

In order to determine what had occurred, he contacted Roy Fredericks, the senior software technician at Data Services, who identified the complainant's terminal as the one from which the delete command had been issued. The deletion almost resulted in the

permanent loss of the entire data base for the Dallas County criminal justice system (T. 761, 762).

He did not discuss with Dacon whether complainant may have deliberately deleted the files and assumes that the deletion had been accidental (T. 764, 765).

But the incident did figure in the marginal review which complainant received in September, 1991, and also resulted in a written disciplinary notice, the purpose of which was to impress upon complainant the seriousness of that incident.

He stated that complainant continued working in Data Services and continued to have projects assigned but that he was given fewer assignments than others in the group because he had difficulty completing his assignments. For example, complainant as one of a four-person group, accounted for 25 percent of that staffing, but produced only 10 to 11 percent of the group's work product (T. 766, 767).

Concerning complainant's charge of retaliation, he testified that at the time of the initial performance rating in September, 1991, he was unaware of complainant's OSC charge since he did not review complainant's personnel file until the period between the first review and the second, which was issued in January, 1992, or after the first rating had been given.

He commented upon the seemingly final four projects assigned to complainant, one on December 19, 1991, one on January 10, 1992, and two on January 14, 1992. The first two were to have been completed by January 22, 1992 and the latter two by February 21, 1992 (Complainant's Exh. 12). Complainant completed one of those assignments, turned in a completion form on the second, although there were several user complaints concerning that program, and the remaining two assignments were not begun (T. 776, 777).

On February 21, 1992, he reported that fact to Dacon, who then called complainant into his office and asked complainant whether he had completed the four assignments. Complainant replied that he had not, whereupon Dacon advised complainant that his employment was being terminated because of poor performance, the only basis upon which that decision was based (T. 777, 778).

Roy Frederick, Jr., respondent's sole witness, who served as the systems software manager at Data Services, as he does currently at

SCT Corporation, testified concerning his knowledge of the files deletion incident on August 28, 1991.

Poe advised him of the deletion of files from the MAST storage system and requested his assistance in determining how the deletion had occurred. His investigation revealed which specific job had performed the deletion, the time of that activity, the identity of the sign-on code that had been used, which was the one assigned to the complainant, and the type of command which had been used, more specifically a so-called "wild card request", which he considered unusual because it allows the user to delete a group of data sets in one command. All of that information was machine readable. He prepared a printout of it and gave it to Poe (T. 779-783).

Issues

The initial issues to be examined are two-fold: (1) whether, as complainant alleges, his employment at Data Services was terminated on February 21, 1992, solely as a result of complainant's citizenship status, that of permanent resident alien; and (2) whether, as complainant has also charged, that firing resulted from respondent's having retaliated against him for having filed his initial failure-to-hire charge with OSC on November 20, 1990.

Should either or both of those primary issues be resolved in complainant's favor, further consideration will be granted to complainant's requests, among others, that he be reinstated in his former position of programmer/analyst II at Data Services and that he be awarded full back pay and benefits from February 21, 1992, as well as attorney's fees. In the event that both issues are adjudicated in respondent's favor, complainant's requests for administrative review must be denied.

Discussion, Findings, and Conclusions

In the course of asserting these actions, complainant relies upon the enabling wording in Section 102 of IRCA, (Pub. L. 99-603, 100 Stat. 3374 (Nov. 6, 1986), 8 U.S.C. §1324b, which amended Chapter 8 of Title II of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163; 8 U.S.C. §1101, et seq., by adding after section 274A of INA the following new section, in pertinent part:

"Unfair Immigration-Related Employment Practices"

Sec. 274B. [8 U.S.C. 1324b] (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.-

(1) General Rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized aliens, as defined in Section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-

(A) because of such individual's national origin, or

(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

* * * *

(5) Prohibition of Intimidation or Retaliation. It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g), to have been discriminated against. (emphasis added)

Having demonstrated that complainant's factual allegations entitled him to have commenced these administrative actions, consideration must now be given as to whether he has the requisite standing to assert these causes of action, i.e. whether he is a "protected individual", as that term is defined in the provisions of 8 U.S.C. §1324b(a)(3):

(3) Definition of Protected Individual.-As used in paragraph (1), the term "protected individual" means an individual who-

(A) is a citizen or nation of the United States, or

(B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 210(a), 210A(a), or 245A(a)(1), 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.

In his Complaint, complainant avers that he became a permanent resident alien on May 9, 1989. Complaint, paragraph 6. As is clear from the provision quoted above, aliens lawfully admitted for permanent residence are generally included in the class of protected

individuals for purposes of citizenship status discrimination under IRCA. See id. However, aliens who fail to apply for naturalization within six (6) months of the date they first become eligible to apply, by virtue of period of lawful permanent residence, or within six (6) months of November 6, 1986, if later, are excluded from the class of protected individuals. 8 U.S.C. §1324b(a)(3)(B)(i).

The Immigration and Nationality Act (INA) establishes when a permanent resident alien becomes eligible to apply for naturalization. Brooks v. KNK Textile, OCAHO Case No. 92B00207 (Final Decision and Order)(8/3/93). Section 316 of the INA, 8 U.S.C. §1427, sets forth the residency requirements for naturalization, providing therein that an alien lawfully admitted for permanent residence is eligible to apply for naturalization after five (5) years of continuous residence in the United States. 8 U.S.C. §1427(a). Absence from the United States during that period may break the continuity of residence, delaying the date on which the alien is eligible to apply for naturalization. 8 U.S.C. §1427(b).

It is apparent from the record that complainant has not left the United States for any reason since receiving permanent resident status on May 9, 1989. Accordingly, complainant will first be eligible to apply for naturalization on May 9, 1994, and is therefore within the class of "protected individuals" for the purpose of asserting claims of citizenship status discrimination and retaliation.

Having found that complainant has standing, as a "protected individual", to assert his claims of citizenship status discrimination and retaliation, it is in order to determine his evidentiary burdens of proof on both charges. Since those burdens are identical, complainant must establish by a preponderance of the evidence, 8 U.S.C. §1324b(g)(2)(A), that Data Services knowingly and intentionally engaged in the discriminatory acts alleged. 8 U.S.C. §1324b(d)(2).

The necessary elements of that burden of proof can be determined by reviewing and adopting those decisions involving parallel claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (Title VII), Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92); Huang v. Queens Motel, 2 OCAHO 364 (8/9/91); Williams v. Lucas & Associates, 2 OCAHO 357 (7/24/91); Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/91); U.S. v. LASA Marketing Firms, 1 OCAHO 141 (3/14/90).

Under Title VII guidelines, complainant may, in either of two ways, establish Data Services' alleged discriminatory practices, those of

knowingly and intentionally having treated him differently, or disparately, than other employees similarly situated in the course of terminating his employment on February 21, 1992 solely because of his citizenship status and having done so in retaliation for having filed his failure-to-hire charge with OSC.

He can provide indirect, or circumstantial, proof of such discrimination, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), or he may adduce direct evidence of such discrimination, Price Waterhouse v. Hopkins, 490 U.S. 228 (1986), Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

Prior to June 25, 1993, should complainant's evidence have been viewed as direct evidence of discrimination, and thus establishes a prima facie case, the burden of production then shifts to Data Services to articulate a legitimate reason for his discharge. Should Data Services carry this burden, complainant will then have the opportunity to prove that the reasons articulated by Data Services are a mere pretext for discrimination. McDonnell Douglas Corp., 411 U.S. at 807. See also Texas Dept. of Community Affairs, 450 U.S. at 248. Moreover, "[t]he ultimate burden of persuading the trier of the fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 253.

In the event that complainant's evidence consists of direct evidence of discrimination, as opposed to indirect evidence of the same nature, the McDonnell test is not applicable since that evidentiary test is intended to be utilized in order to assist in discovering discrimination where only circumstantial evidence is available. Trans World Airlines, 469 U.S. 121, 122. Direct evidence will not only constitute a prima facie case of defendant's discriminatory conduct, it serves as plaintiff's entire case and imposes upon the defendant the burden of proving, by a preponderance of the evidence, that defendant would have discharged plaintiff even in the absence of the discrimination element.

On June 25, 1993, however, the U.S. Supreme Court modified the McDonnell Douglas framework by ruling in St. Mary's Honor Center v. Hicks, __ U.S. __, 61 U.S.L.W. 4782 (1993), a case involving alleged indirect, or circumstantial, evidence of discriminatory intent, that a discharged plaintiff alleging racial discrimination is not entitled to judgment as a matter of law after proving that all of the defendant's reasons were merely pretextual and that in order to prevail the plaintiff therein was further required to bear the ultimate burden of

persuasion of showing that the defendant therein had intentionally discriminated against him based upon his race.

By the use of those evidentiary parameters, we begin our analysis of complainant's allegations namely, that he was terminated on February 21, 1992 solely because of his citizenship status, that of permanent resident alien, and also that respondent unlawfully retaliated against him because of his having filed his initial, and since abandoned, failure-to-hire charge with OSC on November 20, 1990.

In support of his allegation that he was fired on February 21, 1992, solely because of his citizenship status, complainant urges essentially that he was allowed to transfer from the Auditor's Office to Data Services on February 1, 1991 as part of a "set up", or a managerial maneuver designed to insure that he would fail in his newly-assigned programmer/analyst II job duties and, in that manner, permit Data Services to fire him.

Complainant raises many assertions, among others, to confirm that allegation namely, that he was not provided with a safe chair in which to sit, that his computer, desk and telephone were installed tardily, that he received disparate treatment as a trainee, especially when compared to the treatment accorded to a peer, Dwight Rottenberg, that an inexperienced and incompetent first level supervisor, Debra Wann, was assigned to oversee his production efforts and that he was wrongfully accused of having deleted a number of sensitive production files on August 28, 1991.

Complainant's contention that he was fired on February 21, 1992 solely because of his citizenship status not only lacks the required factual bases but it conveniently overlooks a very obvious fact. In the event that his status of permanent legal resident status was in fact the precipitating factor in his separation and was a governing consideration in that Dallas County management decision, one wonders how he could possibly have been hired in the Auditor's Office of Dallas County initially in November, 1989, when he held an identical citizenship status.

Respondent's evidence has supplied more than ample satisfactory reasons concerning complainant's furniture and work station equipment. Similarly, complainant's belief that Dwight Rottenberg was treated differently is simply misplaced. A reading of the summary of evidence reveals that, unlike complainant, Rottenberg realized that his COBOL skills were not current upon beginning work at Data Services and he took 12 hours of computer courses, including COBOL,

in order to succeed as a programmer. Rottenberg found the training difficult, also, but completed it and subsequently, upon realizing that his programming skills were deficient, he accepted a demotion to the position of computer operator in another Dallas County office. A close analysis of complainant's alleged disparate treatment, at least as it related to Rottenberg, discloses that any differences between them involved work attitudes, not treatment.

The testimony of Debra Wann provided a different version of the workplace atmosphere in which complainant was attempting to function, such as demanding written rather than oral instructions concerning his work assignments. It was also clearly shown that complainant simply did not wish to take direction from superiors at any level, that he wanted to perform work duties in his own fashion, that his assigned projects were performed improperly, tardily, or simply neither begun nor completed.

Complainant's assertion that he had been improperly blamed for the August 28, 1991 deletion of certain production files which almost resulted in the permanent loss of all data concerning the entire Dallas County criminal justice system, is similarly mislaid.

Even a cursory reading of the summary of the testimony of several others in Data Services who investigated that incident, as well as the contradictory testimony of the complainant concerning his role in that matter, is simply nearly overwhelming in reaching the reasonable conclusion that complainant's lack of computer programming skills had in fact caused the deletion. In addition to the deletion, all of the others in complainant's five-person work group had to work into that evening/night, spending some 20 total hours or so, in order to retrieve the information that nearly became irretrievable.

Accordingly, in assessing the charge of complainant that his employment had been wrongfully terminated on February 21, 1992 solely because of his citizenship status, I find that the relevant evidence addressed to that allegation is persuasive in disclosing that complainant has failed to make a prima facie showing that his citizenship status was the motivating circumstance in his employment termination. Instead, and even in the event his evidence had made such a showing, complainant's job performance, or lack thereof, brought about his firing, and that complainant's citizenship status was not connected in any manner with the exercise of that managerial prerogative.

We next visit complainant's remaining assertion namely, that his employment at Data Services had been terminated on February 21, 1992, in retaliation for complainant's having initially filed his failure-to-hire charge against Data Services with OSC on November 20, 1990. For the following reasons, it is also found that that charge also lacks the necessary prima facie evidentiary support.

Complainant has unsuccessfully furnished the same evidence to support that charge. There is no probative evidence that Data Services engaged in conduct which can reasonably be considered retaliatory. Neither of complainant's OSC charges have appeared to overly concern the Dallas County government, and validly so in the light of this evidentiary record, and also because OSC investigated both allegations and declined to bring complaints against Data Services on either ground.

In assessing the efficacy of complainant's charge of retaliation one is taken with the nearly overwhelming weight of the credible evidence which favors Data Services. And when that evidence is considered in conjunction with the credibility factors which must be assigned on the basis of complainant's demeanor, as compared to that of his and opposing witnesses, the overall adverse evidentiary effect upon complainant's case-in-chief is amplified.

Complainant's charge of retaliation must also be denied because rather than having demonstrated that he was the object of unlawful retaliation, the evidence simply discloses that complainant applied for and was selected to perform programmer/analyst II job duties for which, as demonstrated by his subsequent job performance shortcomings, he was simply not qualified, either academically or by prior work experience.

In view of the foregoing, complainant's requests for administrative relief must be denied.

Order

Complainant's Complaint alleging immigration-related unfair employment practices based upon citizenship status discrimination, as well as retaliation, allegedly in violation of the provisions of 8 U.S.C. §1324b(a)(1)(A) and 8 U.S.C. §1324b(a)(1)(B) and 8 U.S.C. §1324b(a)(5), respectively, is hereby ordered to be and is dismissed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.