

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

February 25, 1994

OLATUNJI MOSHOOD)
FAKUNMOJU,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 92B00078
CLAIMS ADMINISTRATION)
CORP.,)
Respondent.)
_____)

ORDER GRANTING RESPONDENT'S MOTION TO COMPEL
COMPLAINANT TO AUTHORIZE DISCLOSURE OF HIS
IMMIGRATION AND NATURALIZATION SERVICE RECORDS,
AND ORDER EXTENDING HEARING DATE PENDING
RESOLUTION OF RESPONDENT'S MOTION FOR SUMMARY
DECISION

On February 3, 1994, respondent in the above-captioned matter filed a Motion to Compel Complainant to Authorize Disclosure of his Immigration and Naturalization Service Records or, in the Alternative, Motion to Enforce Subpoena.

Respondent asserts therein that it sought information from complainant concerning his immigration status in written discovery and at his deposition in order to determine whether complainant is a "protected individual", as that term is defined in the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §§ 1324b(a)(1)(B), 1324b(a)(3).

Respondent argues that despite its attempts, complainant has failed to produce documentation verifying his immigration status.

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For this reason, respondent contends, it served a subpoena on the District Director of the Immigration and Naturalization Service (INS) in Baltimore, Maryland, requesting production of documents pertaining to complainant's immigration status.

Respondent asserts that INS refused to comply with that subpoena without complainant's authorization. For this reason, respondent contends, it requested that complainant sign a Freedom of Information/Privacy Act Request authorizing release of his INS records.

Respondent avers that complainant refused to sign that request. Respondent's Memorandum, at 3.

Because the immigration records sought in its subpoena request are relevant to complainant's claim, respondent concludes, complainant should be compelled to execute a form authorizing disclosure of those records to respondent.

Complainant had 15 days from the date of service of respondent's motion, or until February 18, 1994, to respond to that motion. 28 C.F.R. §§ 68.8(c)(2), 68.11(b). To date, however, no response has been received from complainant.

The procedural regulation governing the scope of discovery, 28 C.F.R. section 68.18(b) provides:

Unless otherwise limited by order of the Administrative Law Judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

The pertinent procedural regulation governing the production of documents, 28 C.F.R. section 68.20, provides:

- (a) Any party may serve on any other party a request to
 - (1) Produce and permit the party making the request, or a person acting on his/her behalf, to inspect and copy any designated documents or things or to inspect land, in the possession, custody, or control of the party upon whom the request is served.

The procedural regulation governing motions to compel provides that if a party upon whom a discovery request is made "fails to respond adequately or objects to the request or any part thereof, ...the discovering party may move the Administrative Law Judge for an order

compelling a response or inspection in accordance with the request." 28 C.F.R. § 68.23(a).

The information sought by respondent is clearly relevant to complainant's claim that respondent discriminated against him because of his citizenship status in violation of IRCA, 8 U.S.C. §1324b(a)(1)(B).

To maintain a citizenship status discrimination claim under 8 U.S.C. §1324b(a)(1)(B), the alleged subject of the discrimination must be a "protected individual", as that term is defined under IRCA, 8 U.S.C. §1324b(a)(3). Brooks v. KNK Textile, 3 OCAHO 545, at 1 (8/3/93).

The term "protected individual" in this instance is defined as an individual who:

(A) is a citizen or national 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) (of the Immigration and Nationality Act (INA)), is admitted as a refugee under section 207 (of the INA), or is granted asylum under section 208 (of the INA).

8 U.S.C. §1324b(a)(3).

If complainant is not a protected individual, as defined in 8 U.S.C. §1324b(a)(3), this Office does not have subject-matter jurisdiction over complainant's citizenship status discrimination claim, and that claim must be dismissed. Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 476 (12/1/92).

Respondent asserts that it has attempted to determine complainant's immigration status through discovery, but has been unable to do so, and avers that there is no other avenue by which it may independently determine complainant's immigration status than by examining complainant's INS records. Motion, at 4.

Because respondent has requested that complainant authorize the release of his INS records and has had that request refused, and because the information sought is relevant to complainant's citizenship status discrimination claim, respondent's motion is granted.

Complainant is hereby ordered to authorize INS to disclose all records pertaining to Olantunji Moshood Fakunmoju to respondent's counsel, Joshua D. Holleb, Esq., Fox & Grove, 311 South Wacker Drive, Suite

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6200, Chicago, IL 60606-6622 and to have done so within 10 days of his acknowledged receipt of this order.

In the event that complainant fails to do so, appropriate sanctions will be ordered from among those enumerated at 28 C.F.R. section 68.23.

On February 15, 1994, respondent filed a Motion for Summary Decision, with supporting memorandum, asserting therein that it is entitled to summary decision in its favor because complainant is not a protected individual for citizenship status discrimination purposes, or, alternatively, because complainant's claims are barred as he made false representations on his job application.

On February 16, 1994, respondent's counsel filed a letter with this Office, requesting an extension of the hearing in this matter, set to begin at 9:00 a.m. on March 16, 1994 in Rockville, Maryland, pending resolution of respondent's Motion to Compel and Motion for Summary Decision.

A review of respondent's Motion for Summary Decision reveals that it is potentially dispositive of complainant's claims. For this reason, respondent's request is granted, and the hearing in this matter, set for March 16, 1994 is canceled and the matter continued generally, pending resolution of respondent's Motion for Summary Decision.

Should it become necessary to reschedule a hearing following determination on respondent's Motion for Summary Decision, a prehearing conference will be scheduled for that purpose.

JOSEPH E. MCGUIRE
Administrative Law Judge