

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

TITO PONCE CHAVEZ,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 93B00218
NATIONAL BY-PRODUCTS)
Respondent.)
_____)

FINAL DECISION AND ORDER GRANTING MOTION TO
DISMISS

(March 18, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Tito Ponce Chavez, pro se.
Trisha A. Thelen, Esq., for
Respondent.

I. Procedural Background And Discussion

This is a case pursuant to Section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b. On December 9, 1993, Tito Ponce Chavez (Chavez or Complainant), filed a complaint in the Office of the Chief Administrative Hearing Officer (OCAHO), against National By-Products, Inc. (Respondent or By-Products).

Chavez alleges that he worked for Respondent from October 1983 until November 9, 1992, packaging animal carcasses for dog food. He claims that because of his national origin and citizenship status, Respondent unlawfully discharged him. Complainant also specifies retaliatory discharge. However, his narrative in support refers only to disparagement of his national origin and/or citizenship. Therefore, I do

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not understand him to have effectively alleged retaliation, intimidation, threat or coercion "for the purpose of interfering with any right or privilege secured under" §1324b, or for having asserted or sought relief under §1324b. 8 U.S.C. §1324b(a)(5).

By notice of hearing issued December 22, 1993, OCAHO forwarded the complaint to Respondent. Following receipt of the complaint on December 30, 1993, within the thirty day period provided in OCAHO rules of practice and procedure for filing an answer to a complaint, Respondent on January 28, 1994, filed a timely Motion to Extend Answer Date. 28 C.F.R. §§68.8(c)(2), 68.9(a).

By order dated February 7, 1994, I granted the requested extension until February 23, 1994, and noted that:

The motion recites that Complainant is one of five plaintiffs in a pending Federal litigation in which it is anticipated that amendment to the complaint will involve the same claims pending before me. The parties are advised that so much of the complaint before me as alleges citizenship status discrimination is presumptively within the exclusive jurisdiction of OCAHO.

The February 7, 1994 Order provided certain directions to each party, i.e.,

This Order directs Respondent to explain in its answer or another concurrent pleading, how the claim in the "pending Federal law suit" includes the citizenship status claim alleged in the OCAHO complaint.

This Order directs Complainant to advise in writing not later than February 18, 1994, whether and when he applied for naturalization to become a U.S. citizen (an entry which he did not provide, although requested, on the OCAHO complaint form, at paragraph 5). Complainant is advised that if he did not file for naturalization he may be ineligible for protection under the pertinent statute, 8 U.S.C. §1324b. If Complainant did apply for naturalization, he will be expected to provide copies of documents which evidence and establish that filing.

Failure to timely respond to the directions provided in this Order may result in a final order adverse to the delinquent party.

(Emphasis in original).

On February 23, 1994, Respondent filed a Motion to Dismiss and to Extend Answer Date. Respondent argues in effect that (a), Complainant cannot maintain his national origin claim under IRCA because of the no-overlap provision of IRCA, §1324b(b)(2), as he has a pendant national origin discrimination claim under Title VII of the Civil Rights Act of 1964, as amended, and that (b) Complainant cannot maintain his citizenship discrimination as he is presumptively not a

protected individual as necessary in order to maintain such a claim. 8 U.S.C §1324b(a)(3)(B). In support of its argument that Chavez lacks protected individual standing, Respondent points to the concerns expressed in the directions to Complainant set out in the February 7, 1994 Order. The contention is that as a permanent resident alien from and after February 2, 1987, Chavez can properly claim protection against citizenship status discrimination only if he filed for naturalization at the latest, within six months after five years following February 2, 1987, i.e., not later than August 1992.

Complainant failed to provide information on this critical matter when he filed his complaint on the preprinted OCAHO complaint format. Despite having been directed to provide the missing data in response to the February 7, 1994 Order, he has failed to file any response. Neither has he pleaded or otherwise responded to the pending motion served by Respondent on February 22, 1994, although a timely response was due by March 10, 1994. 28 C.F.R. §68.11(b). Chavez is now delinquent by more than three weeks in his obligation to respond to the February 7 Order and one week to respond to the motion. Accordingly, I draw the inference that his response to the direction to provide information would have ousted me of jurisdiction over his citizenship status jurisdiction claim.

According to the un rebutted evidence accompanying Respondent's motion, Chavez is one of several named plaintiffs in a national origin discrimination suit under Title VII, arising out of the discharge by By-Products. Ortega, et al v. National By-Products, Inc., Case No. 93-1294-MLB (D. KS). Complainant's national origin discrimination claim fails in light of the no-overlap jurisdiction prohibition. 8 U.S.C. §1324b(b)(2); Yefremov v. NYC Dep't of Transportation, 3 OCAHO 562 (9/21/93) at 3-4; Yefremov, 3 OCAHO 466 (10/23/92) (Order Denying Respondent's Motion for Summary Decision/ Miscellaneous Rulings) at 3.

Moreover, this is another case of an individual invoking protection under §1324b without accepting the responsibilities of a litigant reasonably to abide by established procedures as required by the presiding judge. Consistent with OCAHO rules of practice and procedure, I deem Complainant's unexplained failure to respond to the February 7, 1994 Order to be an abandonment of his complaint. 28 C.F.R. §68.37(b)(1); Holguin v. Dona Ana Fashions, 4 OCAHO 605 (2/1/94); Franco v. Tulsa Junior College, OCAHO Case No. 93B00171 (1/3/94); Brooks v. Watts Window World, 3 OCAHO 570 (11/1/93); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92).

II. Ultimate Findings, Conclusions, and Order

I have considered the complaint filed by Chavez and the pleadings and supporting documents filed by Respondent. Except as provided below, all motions and other requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude that:

1. The Motion to Dismiss and to Extend Answer Date is granted.
2. The national origin discrimination, citizenship status discrimination and retaliation claims are dismissed.
3. I find and conclude that Respondent has not engaged and is not engaging with respect to Complainant in unfair immigration related employment practices alleged and within the jurisdiction of this Office. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(3).

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative adjudication 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 18th day of March, 1994.

MARVIN H. MORSE
Administrative Law Judge