

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

May 13, 1994

CHAND WIJE,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 94B00046
BARTON SPRINGS/EDWARDS)
AQUIFER C.D.,)
Respondent.)
_____)

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY
DECISION AND ATTORNEY'S FEES AND ORDER GRANTING
MOTION FOR PROTECTIVE ORDER

On September 10, 1993, Chand Wije (complainant) commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), alleging therein that on June 2, 1993, Barton Springs/Edwards Aquifer C.D. (respondent), an entity employing between four (4) and 14 individuals, refused to hire complainant, an alien authorized to work in the United States, because of complainant's national origin and citizenship status, in violation of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

By letter dated January 6, 1994, OSC informed complainant that it had concluded its investigation of complainant's charge, and had determined that there was insufficient evidence of reasonable cause to believe that complainant had been discriminated against on the basis of his citizenship status, and had further determined that it lacked jurisdiction over complainant's national origin discrimination charge because complainant had filed a charge with the Equal Employment

Opportunity Commission (EEOC) prior to having filed a charge with OSC. For these reasons, OSC indicated, it had decided not to file a complaint on complainant's behalf.

In that letter, OSC also informed complainant of his right to file a complaint directly with an administrative law judge assigned to this Office.

Subsequently, on March 14, 1994, complainant filed the Complaint with this Office, alleging therein that on June 2, 1993, he applied for a position with respondent as a water resources planner, a position for which he was qualified and for which respondent was seeking applicants, but was not hired for that position because of his citizenship status and national origin. In addition, complainant asserted that he was intimidated, threatened, coerced or retaliated against because he filed or planned to file a complaint, or to keep him from assisting someone else from filing a complaint, and also asserted that respondent refused to accept documents that complainant presented to show that he was authorized for employment in the United States.

On April 19, 1994, respondent filed its Answer, denying therein complainant's allegations that it had committed unfair immigration-related employment practices, and also asserting that the Complaint is without merit and should be dismissed.

On April 19, 1994, respondent also filed a Motion for Summary Decision and Attorney's Fees. In support of its motion, respondent asserts that the record on file in this proceeding, and the record assembled by OSC (a copy of which was attached to respondent's motion) establish that summary decision in respondent's favor is appropriate in this matter.

For this reason, respondent requested that the undersigned take official notice of the documents, affidavits, evidence, and other materials filed with OSC, EEOC, and the Texas Commission on Human Rights (TCHR), render summary decision in respondent's favor, and grant respondent reasonable attorney's fees and any other appropriate relief to which it is entitled.

The rules of practice and procedure governing these proceedings provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c).

Because this rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases, it has been held that case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986); Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532, at 7 (6/25/93). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Hensel, 3 OCAHO 532, at 7. In determining whether there is a genuine issue of material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Sepahpour v. Unisys, Inc., 3 OCAHO 500, at 3 (3/23/93); U.S. v. Lamont St. Grill, 3 OCAHO 441, at 3 (7/21/92); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

Regardless of which party would have the burden of persuasion at trial, the movant assumes the initial responsibility of informing the court of the basis of its motion and of identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," that the movant believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); Russ v. International Paper Co., 943 F.2d 589, 592 (5th Cir. 1991); Johnson v. Southwestern Bell Tel. Co., 819 F. Supp. 578, 580 n. 6 (E.D. Tex. 1993); Vega v. Parsley, 700 F. Supp. 879, 881 (W.D. Tex. 1988).

Once the movant has carried its burden, the party opposing the motion must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Anderson, 477 U.S. at 250, 106 S. Ct. at 2511; Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Hensel, 3 OCAHO 532, at 8; Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524, at 4 (6/10/93); Sepahpour, 3 OCAHO 500, at 3.

Although respondent has presented a large volume of evidence in support of its contention that it is entitled to summary decision, respondent has failed to indicate which portions of the documents

submitted establish its entitlement to summary decision, and has failed to elaborate on the legal theory or theories upon which that contention is based.

Rather, respondent relies solely on the determinations of the investigatory agencies to which complainant has submitted charges, particularly EEOC, TCHR, and OSC in support of its motion. While those determinations may be instructive in suggesting grounds for dismissal of complainant's claims, or for providing possible affirmative defenses thereto, they have no effect on the validity of those claims in actions before this Office.

Furthermore, respondent ignores the fact that IRCA and its implementing regulations specifically provide for a right to a private cause of action in instances where OSC determines not to file a complaint on behalf of a charging party. See 8 U.S.C. § 1324b(d)(2); 28 C.F.R. § 44.303(c). Adopting respondent's argumentation would result in nullifying that right.

Respondent, in having failed to point out the legal basis for its entitlement to summary decision in this matter, has deprived complainant of the opportunity to be heard in response thereto. Texas Nat'l Bank v. Sandia Mortgage Co., 872 F.2d 692, at 697 (5th Cir. 1989). In particular, complainant cannot attack the legal justification of respondent's argument, because respondent has not set forth its justification. Id.

Because respondent did not properly carry its burden of pointing out the legal basis of its entitlement to summary decision, respondent's motion for summary decision is denied.

On April 14, 1994, respondent also filed a Motion for Protective Order, requesting therein that all documents and information from its files regarding personnel be utilized for purposes of this proceedings only, and that no individual or entity outside these proceedings be given access to such materials.

As justification for its request, respondent asserts that confidentiality and privacy interests of third parties not involved in this proceeding, protected under Texas law, could be infringed by disclosure of materials contained in the personnel files in question.

The procedural regulation governing protective orders, 28 C.F.R. section 68.42, provides:

Upon application of any person, the Administrative Law Judge may limit discovery or introduction of evidence or issue such protective or other orders as in his/her judgment may be consistent with the objective of ...protecting data and other material the disclosure of which would unreasonably prejudice a party, witness or third party.

For good cause shown, respondent's motion is granted, and the undersigned hereby orders that the use of the personnel documents and responses attached to Respondent's Motion for Summary Decision be limited to this proceeding, and further orders that the parties are prohibited from disclosing any information contained in those documents and responses.

JOSEPH E. MCGUIRE
Administrative Law Judge