

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

IN RE CHARGE OF)
KATALIN BALAZS-KILGORE)
)
UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 93B00109
AUBURN UNIVERSITY,)
Respondent.)
_____)

FIFTH PREHEARING CONFERENCE REPORT AND ORDER

(June 15, 1994)

The fifth telephonic prehearing conference was held on June 14, 1994, as previously scheduled. The conference focused on a motion to withdraw, filed June 10, 1994 by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). Upon inquiry, OSC advised that it had discussed withdrawal with the charging party, Dr. Balazs-Kilgore (Balazs), prior to filing the motion. OSC said that her initial reaction to its pending withdrawal was that she would not maintain the case as a private action. Subsequently, however, following communication by Balazs with certain members of Congress, a telephonic conference was held between OSC and Balazs; at that juncture, she indicated she might maintain the private action despite OSC's withdrawal.

I gave as my opinion that as a matter of procedure, Balazs may maintain a private action without need to intervene as she is already a party. 8 U.S.C. § 1324b(e)(3). See U.S. v. Farmers Insurance Group of Companies, OCAHO Case No. 88200010 (6/30/88)(Report of Status Conference; Order Granting Motion of the Office of Special Counsel to Dismiss its Complaint and Granting Charging Party's Petition to File Complaint).

I instructed OSC to file a report which describes its dialogue with Balazs in context of the questions raised during the prehearing conference. That report is to be filed by June 20, 1994. By that pleading

or another document to be addressed by OSC to Balazs, she is to be instructed by OSC to inform me in writing (on notice to Respondent and OSC), by June 27, 1994 whether or not she wishes to pursue this case.

As discussed, Respondent may respond to Complainant's motion to withdraw not later than July 12, 1994. While counsel for Respondent concurs in termination of OSC's cause of action, he reserved on the question of fee shifting, awaiting the filing by Balazs and pending consultation with the client.

I noted that OSC was candidly explicit in reciting the premise for its withdrawal, i.e., that:

in light of an in-depth analysis of all the currently available evidence that it will be unable to meet its burden, as required by 8 U.S.C. § 1324b(a)(1)(B), of proving that Respondent's decision not to hire Dr. Katalin Balazs-Kilgore was made on the basis of her citizenship status.

With respect to fee shifting, OSC assured me that it had alerted Balazs, as the charging party contemplating a private action under 8 U.S.C. § 12324b(d)(2), to the significance of OSC's premise for withdrawal. I noted also that eligibility for fee shifting under 8 U.S.C. § 1324b(h) as against OSC may turn on analysis of the reasonableness of the factual and legal foundation for its "argument" as of the time it initiated the action without benefit of what it may have learned during the litigation through discovery or otherwise. In contrast, the reasonableness of the charging party's going forward may turn on analysis of the circumstances at the time that decision is made by her, i.e., in light of notice by OSC of the premise for its motion to withdraw.

The parties understand that OSC's motion addresses its posture as a party, not as an attorney for a party. It is understood also that I may convene another telephonic prehearing conference after receipt of the filings contemplated by this Order. Depending on the content of those filings, I will reserve judgment on (1), whether Balazs should be asked to participate in such a conference and the pending motion and (2), on who should participate in the conference.

SO ORDERED.

Dated and entered this 15th day of June, 1994.

MARVIN H. MORSE
Administrative Law Judge