

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

JOSE N. HERNANDEZ,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 94B00114
CITY OF SANTA ANA,)
Respondent.)
_____)

FINAL DECISION AND ORDER
(August 12, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Jose N. Hernandez, pro se.
Edward Cooper, Esq., for
Respondent.

I. Procedural Background

On June 8, 1994, Jose N. Hernandez (Complainant), filed a complaint in a private action against the City of Santa Ana, California (Respondent or City), in the Office of the Chief Administrative Hearing Officer (OCAHO), pursuant to 8 U.S.C. §1324b(d)(2). The complaint alleges in effect that Hernandez was fired from employment in City's Recreation and Parks Department, by reason of his citizenship status and national origin, and in retaliation for having filed or planned to file a complaint under 8 U.S.C. §1324b.

On June 27, 1994, City filed an answer to the complaint which contains a general denial of liability. City makes two affirmative defenses. First, City contends that Hernandez was "discharged for reasonable and sufficient cause," in support of which City attaches certain findings and conclusions of its Personnel Board which on October 2, 1991 affirmed Hernandez' discharge of August 29, 1990 for misconduct, including insubordination. Second, City claims that I lack jurisdiction because Hernandez was out of time in filing his underlying

charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), i.e., that the alleged discrimination occurred on August 29, 1990, more than 180 days before he filed a charge deemed acceptable by OSC.

Causes of action pursuant to 8 U.S.C §1324b may only be maintained if a charge is filed with OSC within 180 days of the conduct which is alleged to have violated §1324b. The complaint and answer created doubt whether Hernandez can successfully maintain a claim of national origin or citizenship status discrimination or retaliation. I issued an order on July 15, 1994, which directed the parties to file informational materials,

[I]n order to determine at the outset whether Hernandez has a cause of action cognizable under 8 U.S.C. §1324b.

Id. at 3.

The July 15 inquiries were the following:

Respondent shall file a statement under oath which informs as to the number of individuals in its employ on the dates subsequent to November 6, 1986 when employment and discharge actions took place with respect to Hernandez. That filing will also advise whether hiring decisions are made by Complainant's unit of assignment, independently of City hiring procedures generally, i.e., the Recreation and Parks Department or other employing unit, and if so, shall identify the number of employees in such independent unit(s) on those dates.

Complainant shall file a statement under oath which describes (a), how he understands he was discriminated against on the basis of his citizenship status, i.e., as a citizen of the United States, and (b), how he understands he was retaliated against for asserting or acting pursuant to rights protected under 8 U.S.C. §1324b.

Complainant's filing under oath shall specify the date on which he understands he was discharged by City (stated in the complaint to be August 29, 1990), and shall specify the basis for his understanding that he filed his charge arising out of that discharge stated in the complaint to be December 22, 1992 but described by OSC as having been "accepted as complete" on September 28, 1993. Complainant will be expected in his filing to specify the reasons, if any he has, why he waited more than 180 days after the date of discharge and more than 180 days after affirmance on October 2, 1991 by the City of his discharge, before filing his OSC charge.

Id. at 3-4.

On July 25, 1994, a response to the order was filed by Respondent. On August 2, 1994, a response was filed by Complainant. On August 1, 1994, OSC filed a letter-pleading which noted that the July 15 order:

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directs the parties to address a number of issues including the timeliness of Mr. Hernandez' charge of citizenship status discrimination. The Office of Special Counsel does not wish to intervene in this matter. However, we do want to assist the Court, and the parties, by providing copies of those documents from the investigatory file which are relevant to the issue of timeliness.

In his Complaint, Mr. Hernandez asserts that a charge was filed with the Office of Special Counsel on December 22, 1992. I have searched our records to determine if this is correct. The earliest correspondence I was able to find from Mr. Hernandez was received by the Office of Special Counsel on September 28, 1993, and was postmarked September 22, 1993. This correspondence consists of the charge form and several additional documents. I have reviewed all of the relevant files and found no record of any earlier correspondence from Mr. Hernandez to the Office of Special Counsel.

II. *Discussion*

The issues raised by the affirmative defenses and by my analysis of the complaint and OSC charge, resulting in the inquiries framed by my order of July 15, 1994, put the parties in effect into a posture as if a motion for summary decision were pending against Complainant. The order placed the parties on notice that the judicial inquiries were intended "to determine at the outset whether Hernandez has a cause of action cognizable under" §1324b. To his credit, Complainant candidly acknowledged as much at page 8 of his response:

IF JUDGE MARVIN H. MORSE FINDS THAT THIS CASE NO. 94B00114 IS NOT UNDER YOUR JURISDICTION UNDER 8 U.S.C. 1324B (sic), I WILL APPRECIATE IF [Judge Morse] HELP ME AND REFER THIS CASE TO EEOC, OR TO THE PROPER AGENCY FOR A FULL INVESTIGATION. . .

It is well settled in OCAHO caselaw that

The rules of practice and procedure governing these proceedings provides for 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).

Fakunmoju v. Claims Administration Corp., 4 OCAHO 624 (4/12/94) (Order Granting Respondent's Motion for Summary Decision) at 6.

The Federal Rules of Civil Procedure (Fed. R. Civ. P.) are available as a guideline to the extent OCAHO rules do not address a particular situation. 28 C.F.R. §68.1. Fed. R. Civ. P. 56(c) provides for summary judgment in cases pursuant to the Federal Rules. In light of the similarity of §68.38(c) to Fed. R. Civ. P. 56(c), administrative law judges have held that caselaw applying Rule 56(c) is instructive in determining the applicability to particular OCAHO cases of summary decision.

Fakunmoju at 6; Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92) at 7.

As well summarized in Fakunmoju:

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.

Id.

To determine whether there is a genuine issue of material fact, all facts and reasonable inferences to be drawn from them are viewed in a light most favorable to the party against whom summary decision is being considered. Matsushita, 475 U.S. at 587; Sepahpour v. Unisys, Inc., 3 OCAHO 500 (3/23/93) at 3; U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92) at 3; Egal v. Sears Roebuck & Co., 3 OCAHO 442 (6/23/90). Applying the established formulae, for the reasons explained below, I am unable to discern any genuine issue of material fact. Simply put, no fact alleged by Hernandez might affect the outcome of this case in his favor.

A. OSC Filing Held to be Out of Time

Complainant's August 2 filing in response to my order makes clear that his claim arises as the result of his discharge in 1990 from employment by Respondent. Hernandez specifies in his OCAHO complaint that he was fired on August 29, 1990, consistent with which he asks for back pay from that date. His August 2, 1994 filing recites that he was fired "effective August 29, 1990," following several incidents which date back to 1986/7. Entry of August 27, 1993 on his OSC charge form as the date of the alleged unfair practice is clearly in error; that is the same date entered opposite his signature on the OSC charge form.

Hernandez made putative efforts to discuss his grievances, including presumably his claim of unjust discharge from employment, with the mayor, city attorney and other City officials in 1991 and 1992, including specifically,

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ON DECEMBER 22, 1992 I WENT CITY HALL AND ASKED TO CITY ATTORNEY, MR. COOPER TO REINSTATE ME TO WORK AND TO COMPLIE [sic] WITH DECISION OF OCTOBER 1, 1991. . . .¹

Complainant's discharge was complete as of August 29, 1990. That a discharge is subject to administrative and judicial appellate review as attested to by Respondent in response to the July 15 order, does not extend the date of the effective adverse personnel action. I do not find the requests to reinstate or to take other action to be part of the course of conduct by which the employee was discharged so as to convert a completed adverse personnel action into a continuing course of conduct such as would toll limitations. Berlanga v. Butterball Company, OCAHO Case No. 94B00016, 4 OCAHO __ (7/25/94) at 5-6. I do not need to decide whether City's Personnel Board was correct in its decision.

As quoted above from OSC's transmittal letter, the documents provided by OSC reflect a charge postmarked September 22, 1993, received by OSC on September 28, 1993. In contrast, both his OCAHO complaint and his August 2 filing claim he filed a charge with OSC on December 22, 1992. Interestingly, he ties that date to his having seen a TV commercial in October 1992,

IN THE SPANISH CHANNEL 22 ABOUT DISCRIMINATION UNFAIR EMPLOYMENT PRACTICES. I CALLED AND THE PERSON I SPOKED WITH ASKED ME FEW QUESTIONS, THEN SHE TOLD ME THAT I WILL RECIBE [sic] A CHARGE FORM, IN THE U.S. MAIL. I SENT THIS CHARGE FORM ON NOVEMBER 17, 1992. THEN I SENT A COPY ON DECEMBER 22, 1992.

As already noted, December 22, 1992 was the date of an effort to meet with the city attorney. It is uncertain whether, as he claims to recall, Hernandez attempted to effect a filing with OSC in November/December 1992, in light of OSC's undertaking that its files contain no record of correspondence from him prior to his September 1993 filing. Assuming, arguendo, that Complainant can rely on October 2, 1991, the date City's Personnel Board affirmed his discharge of August 29, 1990, as the starting point for calculating the 180-day window of opportunity to file an OSC charge, even as of November/December 1992 he was out of time with respect to that action of City's Personnel Board. No basis is urged or perceived for equitable tolling of the 180-day limitations hurdle for filing of OSC charges. 8 U.S.C. §1324b(d)(3).

¹ The significance, if any, of the reference to October 1, 1991 is obscure, but does not invite speculation.

Even assuming, however, that Hernandez timely filed his charge with OSC, his complaint must be dismissed.

B. Size of City's Employment Force Defeats OCAHO National Origin Discrimination Jurisdiction

Complainant's OSC charge form acknowledges that City's payroll exceeds 14 employees. City's filing in response to my inquiry substantiates that at all times relevant to this case, City employed in excess of 1500 individuals. Employment procedures are uniform across the various City departments, including Complainant's former employer, the Recreation and Community Services Agency which itself is authorized 115 employees. Accordingly, neither OSC nor administrative law judges have jurisdiction over national origin discrimination allegations against City. This is so because, generally stated, a national origin claim cognizable under Title VII cannot also be the subject of an OCAHO national origin discrimination claim.² As has been held in a number of cases:

jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees.

Cardona v. Cosmetics Plus, OCAHO Case No. 93B00169 (12/30/93) at 3-4; Pioterek v. Anderson Cleaning Systems, Inc., 3 OCAHO 590 (12/29/93) at 2-3; DeGuzman v. First American Bank Corporation, 3 OCAHO 585 (12/13/93) at 3; Holguin v. Dona Ana Fashions, 3 OCAHO 582 (12/1/93) at 3-4; Zolotarevsky v. U.S. Nuclear Regulatory Commission, OCAHO Case No. 93B00078 (9/24/93) at 4; Cortes v. Seminole County School Board, OCAHO Case No. 93B00038 (6/23/93); Monjaras v. Blue Ribbon Cleaners, 3 OCAHO 526 (6/15/93) quoting Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4, quoting U.S. v. Marcel Watch Co., 1 OCAHO 143 (3/22/90) at 11. See also U.S. v. Huang, 2 OCAHO 313 (4/4/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (unpublished) (2d Cir. 1992); Pioterek v. Scott Worldwide Food Service, 3 OCAHO 530 (6/9/93) at 2; Parkin-Forrest v. Veterans

² Without doubt, there is no administrative law judge jurisdiction over Complainant's case against City. Hernandez asks that in such event I refer his claim to EEOC or another appropriate entity. It appears, however, from his OSC charge and OCAHO filings that he has made one or more filings with EEOC's office at 3660 Wilshire Boulevard, Los Angeles, California, 90010. In any event, it is not for this adjudicatory forum to effect such a reference. Instead, Hernandez may wish to pursue that possibility with EEOC directly, or with OSC.

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Administration, 3 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedents cited).

C. The Complaint fails to state a citizenship status discrimination claim cognizable under § 1324b

Hernandez is a citizen of the United States of Mexican national origin. His claim, as amplified by his filing in response to my order, and by OSC's filing in similar response, is replete with examples which, if true, suggest at most awareness by supervisors and other City officials, of his national origin. Nothing he alleges comports with citizenship status discrimination. His response to my inquiry is silent as to a factual predicate to suggest a prima facie or any showing of such discrimination.

The July 15 order admonished the parties that the premise for a claim of citizenship discrimination is obscure where the complaint fails to disclose who the beneficiary of such conduct may be in contrast to the disadvantaged citizen. Nevertheless, in his response, Hernandez provides no factual content to support his bald allegation of such discrimination. It boggles the mind to suppose that a municipality of more than 300,000 people, the ninth largest city in the State of California, discriminates in employment against citizens of the United States. Complainant's response to the July 15 inquiry provides zero nourishment to place on a citizenship discrimination platter, despite his having been directed explicitly to state "how he understands he was discriminated against on the basis of his citizenship status."

Taking his factual assertion as true for purposes of this final decision and order, the *raison d'etre* of Complainant's plea for assistance is that he was maligned, and worse, because he was of Mexican heritage. Whether his supervisors knew him to be a U.S. citizen is immaterial, absent any indice of citizenship status discrimination in his otherwise extensive narrative. National origin, but not citizenship, bias may well have been a factor in the workplace treatment about which he complains. Adverting to citizenship status discrimination does not establish a prima facie or any evidence of its existence. Absent an iota of colorable content to the allegation, I conclude Hernandez cannot show it occurred.

D. The Retaliation Claim Rejected

Complainant fails to identify any conduct which could reasonably be understood to implicate intimidation, threat, coercion or retaliation against him,

for the purpose of interfering with any right or privilege secured under this section [§1324b] or because the individual [he] intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

Title 8 U.S.C. §13243b(a)(5).

The retaliation that Hernandez alleges in his filings is devoid of any reference to his having previously or contemporaneously acted or having indicated an intent to act pursuant to §1324b. I do not speculate whether his filing such charge and complaint was influenced by the "Spanish Channel 22" broadcast about unfair employment practices. I do conclude that as to retaliation he has failed to state a claim on which relief can be granted.

III. *Ultimate Findings, Conclusions and Order*

I have considered the complaint filed by Hernandez, the answer filed by City, and the supporting documents filed by each party and by OSC in response to my order of July 15, 1994. All motions and other requests not specifically ruled upon are denied.

1. I find and conclude that City did not violate the rights of Hernandez within the jurisdiction established by 8 U.S.C. §1324b upon the occasion of Complainant's discharge by City in August 1990.
2. The complaint is dismissed with prejudice.

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 12th day of August, 1994.

MARVIN H. MORSE
Administrative Law Judge