

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

ZOILA PALMA,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 94B00210
FARLEY FOODS,)
Respondent.)
_____)

FINAL DECISION AND ORDER OF DISMISSAL
(May 3, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Zoila Palma, Esq., pro se.
Michael S. Gotkin, Esq. for the Respondent.

I. Procedural History

Zoila Palma (Complainant or Palma) filed a charge dated June 29, 1994, alleging that Farley Foods (Respondent or Farley) discriminated against her based on her national origin, a practice prohibited by section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a)(1)(A). Palma filed her charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Palma, a citizen of Guatemala, alleged that her period of employment (lasting four years) was terminated on July 19, 1991 because her employment authorization had expired. Respondent allegedly told Palma that she could return to work for Farley upon successful reapplication for employment authorization. After receiving her employment authorization, and reapplying for employment, Palma states that Respondent did not hire her, instead choosing to employ unauthorized aliens.

By a determination letter dated November 7, 1994, OSC informed Palma that it elected not to file a complaint on her behalf before an administrative law judge (ALJ) because "there is insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. § 1324b." OSC advised Palma of her right to file

her own complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO).

On December 6, 1994, Palma filed the Complaint at issue. Complainant reasserted her claim that Farley discriminated against her based on her national origin and added the allegations that (1) she was discriminated against because of her citizenship status, and (2) that Respondent retaliated against her for filing or planning to file a complaint under § 1324b.

On January 10, 1995, Respondent timely filed an Answer which denies all allegations in the Complaint. Respondent states that it legally terminated Complainant when her work authorization expired and did not rehire her when she renewed her work authorization because "she has a past history with the Respondent as potentially violent, untrustworthy (had two different social security numbers during her earlier employment with Respondent) and was uncooperative with a bad attitude, even during her employment application process." Answer at 5.

On March 3, 1995, counsel for Respondent filed a letter/pleading inquiring as to status of this case. No motions have been filed.

On March 13, 1995, I issued an Order of Inquiry, addressing specific inquiries to the parties, and stating in pertinent part:

The present state of the pleadings raises threshold questions of jurisdiction and invites inquiry whether Complainant has stated a prima facie case which warrants a confrontational evidentiary hearing or, instead, may be more justly and efficiently disposed of on a paper record. Accordingly, this Order addresses certain questions to each of the parties.

Order at 2.

Directing both parties to file responses in affidavit form, under oath, before a notary or other official authorized to administer oaths, not later than April 17, 1995, the Order recited that:

Failure to file a timely response may result in dismissal of the defaulting party's case and entry of an adverse judgment.

Order at 3.

Respondent filed a timely response on April 11, 1995. The response was filed by Michael S. Gotkin, Senior Vice President and General Counsel of Respondent. Respondent recites that it does not keep

records of the individual countries of origin of any of its employees, and thus is unable to tell from its own records how many employees were Guatemalan without individual file searches. There were approximately 2,000 employees at Farley Candy in the Chicago area during February-March 1994, the period during which Complainant reapplied for work at Respondent.

Respondent also states in its response that Palma had been working for Respondent since August 1987 with fraudulent papers, and that it had no knowledge they were fraudulent. Complainant first presented her correct documentation to Respondent in May 1989 and at her request, her social security number was changed. An I-9 report was submitted at that time which showed proper authorization. Palma's authorizations subsequently expired twice, in June 1989 and June 1990. She failed to produce additional extensions after a third authorization expired in June 1991, resulting in termination of her employment.

Respondent states the following reasons for rejecting Palma's application for employment: 1) she was rude in March 1994 to Elia Merino and Jose Lopez, two individuals involved in receiving employment applications on behalf of Respondent, by making accusations about the Respondent in front of other applicants, stating that Respondent was hiring illegal aliens, and 2) at the time Palma was terminated from employment in June 1991, she frightened some female employees in the Skokie plant by stating that she would be back, and if anyone touched her locker she would assault them. Respondent states that it cannot pinpoint any precise date beyond the fact that it was either February or March 1994 when Palma should have been aware that she would not be rehired by Farley. Respondent maintains that Palma did not continue to apply for work, but instead telephoned Jose Lopez at his home and inquired as to when she would be called back to work; he indicated there were no openings.

The time for filing a response to the March 13, 1995 Order having elapsed, i.e., April 17, 1995, Complainant still has not filed a response or other pleading.

II. *Discussion*

Because Palma did not respond to my Order of March 13, 1995 I issue this Final Decision and Order, dismissing her Complaint.

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OCAHO rules of practice and procedure provide that where a party fails to respond to the order of the administrative law judge, the judge may, take one or other of certain specified actions, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay.

28 C.F.R. § 68.23(c).¹

Failure by Palma to comply with my order invites me to, and I do, infer and conclude that her response would have been adverse to her, 28 C.F.R. § 68.23(c)(1); that the question of jurisdiction is established adversely to her, 28 C.F.R. § 68.23(c)(2), and that she is precluded from introducing evidence in support of her claim of jurisdiction over her citizenship status and/or national origin and retaliation claims, 28 C.F.R. § 68.23(c)(3).

Moreover, this is another case of an individual invoking protection under § 1324b without accepting the responsibility to abide reasonably by established procedures as required by the presiding judge. OCAHO rules are clear:

A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint if:

(1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge;

28 C.F.R. § 68.37(b)(1).

Consistent with OCAHO rules of practice and procedure, I deem Complainant's unexplained failure to respond to the March 13, 1995 Order to be an abandonment of her Complaint. 28 C.F.R. § 68.37(b)(1); Gallegos v. Magna-View, Inc., 4 OCAHO 628 (1994); Yohan v. Central State Hospital, 4 OCAHO 622 (1994); Chavez v. National By-Products, 4 OCAHO 620 (1994); Holguin v. Dona Ana Fashions, 4 OCAHO 605 (1994); Brooks v. Watts Window World, 3 OCAHO 570 (1993); Speakman v. Rehabilitation Hospital of South Texas, 3 OCAHO 476 (1992); Palancz v. Cedars Medical Center, 3 OCAHO 443 (1992).

¹ Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41, 243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

In its Answer to the Complaint, Respondent requests that I dismiss the Complaint with no adverse finding against it. That request is granted.

III. Ultimate Findings, Conclusions and Order

I have considered the Complaint filed by Palma and the pleadings and supporting documents filed by Respondent. All motions and other requests are hereby denied.

1. I find and conclude that Respondent did not violate the rights of Complainant within the jurisdiction created by 8 U.S.C. § 1324b upon the occasion of Respondent's decision not to rehire Complainant.

2. The Complaint is dismissed.

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 3rd day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge