

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

May 31, 1995

BRENDA BENT,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 95B00047
BROTMAN MEDICAL CENTER)
PULSE HEALTH SERVICES,)
Respondent.)
_____)

ORDER DISMISSING COMPLAINT

On September 22, 1994, Brenda Brent (complainant), filed a discrimination charge with the Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). That charge, which was filed on the standard three-page Form OSC-1, along with a four-page handwritten statement, alleged that complainant's former employer, Brotman Medical Center, Pulse Health Services (respondent), had engaged in an unfair immigration-related employment practice in the course of terminating her employment on August 23, 1994.

In particular, complainant alleged that respondent terminated her employment based solely on complainant's national origin, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952 (INA), as amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 4978 (1990).

On the second page of that September 22, 1994 charge, complainant described herself as an alien authorized to work in the United States, Alien Registration Number A029534681, lawfully admitted for permanent residence on April 5, 1989. Complainant described respondent's business as having 15 or more employees.

Complainant, when requested to describe the alleged unfair employment practice on the third page of the charge form, responded that she was fired because she looked and sounded foreign. Complainant also informed OSC that she had been treated differently than other employees and was constantly being harassed by respondent's supervisors.

On January 26, 1995, OSC notified complainant by certified mail that it had not completed its investigation of her national origin discrimination charge, and advised complainant that she could now file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO), provided that she did so within 90 days of her receipt of that letter.

On March 13, 1995, complainant timely filed the Complaint at issue with this Office, alleging therein that respondent discriminated against her based on her national origin, and also retaliated against her, in violation of IRCA. 8 U.S.C. §§ 1324b(a)(1)(A); 1324b(a)(5).

On April 6, 1995, respondent filed a letter/pleading which is accepted as an Answer/Motion to Dismiss. In that responsive pleading, respondent denied that complainant had been discriminated against, denied that complainant had been fired because she looked and sounded foreign, and also denied that complainant had been treated differently than other similarly situated employees. To the contrary, respondent asserted that complainant was fired because she "had a performance deficiency problem." Respondent contended that she had been counseled on numerous occasions, had received unsatisfactory performance reviews, and was suspended prior to being terminated. Respondent concluded by arguing that complainant's claims "are without merit and are totally unfounded," and as such requested the undersigned to dismiss the Complaint.

The pertinent procedural rule governing motions to dismiss in unfair immigration-related employment practice cases provides that:

The respondent, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the

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Administrative Law Judge determines that the complainant has failed to state such a claim, the Administrative Law Judge may dismiss the complaint.

28 C.F.R § 68.10.

A motion to dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R. Section 68.10 is similar to and based upon Rule 12(b)(6) of the Federal Rule of Civil Procedure, which provides for the dismissal of cases in Federal court. See Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994). In considering such a motion, a federal court liberally construes the complaint and views it in the light most favorable to the complainant. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Therefore, a complaint should not be dismissed for failure to state a claim unless the complainant can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Complainant has alleged that respondent discriminated against her based on her national origin. In determining whether this Office has jurisdiction over a complainant's national origin discrimination claim, it is necessary to ascertain whether the alleged discrimination acts fall under the coverage of IRCA, 8 U.S.C. Section 1324b, or under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. See 8 U.S.C. §§ 1324b(a)(1)(A); § 1324b(a)(2)(B).

Administrative law judges assigned to this Office have limited subject matter jurisdiction over claims based upon national origin discrimination, since IRCA statutorily limits claims to employers employing between four (4) and 14 individuals. See 8 U.S.C. §§ 1324b(a)(1)(A); 1324b(a)(2)(A); 1324b(a)(2)(B); see also Yohan v. Central State Hosp., 4 OCAHO 593, at 5 (1994). Therefore, an employer who employs more than 14 individuals is excluded from IRCA coverage with respect to national origin claims. See, e.g., Tal v. Energia, 4 OCAHO 705, at 15 (1994); Gallegos v. Magna-View Inc., 4 OCAHO 628, at 3 (1994); Yohan, 4 OCAHO 593, at 5.

Respondent's business has employed over 1150 employees for the last 20 years. Therefore, because respondent employs more than 14 individuals, this Office lacks subject matter jurisdiction over complainant's claim of discrimination based upon national origin. See 8 U.S.C. § 1324b(a)(2)(B). Accordingly, that portion of the Complaint alleging discrimination based upon national origin is ordered to be and is dismissed.

Having dismissed the national origin discrimination charge, complainant's second and final charge will now be examined, specifically that respondent retaliated against her for asserting rights protected under IRCA. In pertinent part, IRCA provides:

It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced or retaliated against shall be considered, . . .to have been discriminated against.

8 U.S.C. § 1324b(a)(5).

When complainant was requested to describe the retaliation in the Complaint, she responded that:

I was discharge (sic) for reasons beyond my control, if (sic) my supervisor spoke with me about any subject regarding my job. I was unfairly disciplined, she always double (sic) issues against me until I was discharge (sic). They stop (sic) me from receiving my unemployment benefits.

March 13, 1995 Complaint, at 5.

This Office has subject matter jurisdiction over a claim of retaliation only when that particular claim implicates a right or privilege secured under Section 1324b, or involves a proceeding under that section. See 8 U.S.C. § 1324b(a)(5); see also Forden v. Griessbach, 5 OCAHO 735, at 16 (1995); Yohan v. Central State Hosp., 4 OCAHO 593, at 9 (1994). Complainant has not alleged that respondent interfered with a right or privilege secured under Section 1324b, nor has she alleged that she was retaliated against for filing a complaint with OSC initially and also with this Office, nor for having participated in an investigation, proceeding, or hearing under this section.

For these reasons, complainant's charge that respondent retaliated against her for asserting protected rights must also be dismissed.

In summary, respondent's April 6, 1995 Motion to Dismiss is granted as it pertains to complainant's allegations that respondent discriminated against her based on her national origin and also that respondent retaliated against her in violation of IRCA, 8 U.S.C. § 1324b. In view of the foregoing, complainant's requests for administrative relief must be denied.

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Accordingly, complainant's March 13, 1995 Complaint alleging national origin discrimination as well as retaliation, allegedly in violation of 8 U.S.C. §§ 1324b(a)(1)(A) and 1324b(a)(5), respectively, is hereby ordered to be and is dismissed, with prejudice to refiling.

In view of the foregoing, the hearing scheduled to be conducted at 9:00 a.m. on Thursday, June 15, 1995, in Los Angeles, California is hereby cancelled.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.