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

July 21, 1995

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

DECISION AND ORDER

Appearances: Chand Wije, pro se;
Ann Clarke Snell, Esquire,
William D. Dugat, III, Esquire,
Bickerstaff, Heath & Smiley, L.L.P.,
Austin, Texas, for respondent.

Before: Administrative Law Judge McGuire

Background

At issue are the claims of Chand Wije, a/k/a Chandrasiri Wijeyawickrema, in which he has alleged that Barton Springs/Edwards Aquifer Conservation District (Barton Springs/respondent) knowingly and intentionally refused to hire him because of his citizenship status and that Barton Springs also retaliated against him, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

On September 8, 1993, complainant filed an unfair immigration-related employment practice charge against Barton Springs with this Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

In completing OSC's standard filing document, Form OSC-1, complainant stated that he is a native of Sri Lanka and that he was then a work-authorized alien, having been granted permanent residence in the United States on June 12, 1989, and that he planned to apply for naturalization in June, 1994.

In that OSC charge, complainant alleged that on June 2, 1993, Barton Springs, which is located in Austin, Texas and which at all times relevant employed more than three (3) and less than 15 persons, had practiced national origin and citizenship status discrimination against him in the course of his having applied there for the position of Water Resources Planner. In his charge, he did not allege that Barton Springs had retaliated against him in any manner.

He further advised OSC in that filing that he had also previously filed additional discrimination charges, based upon the same facts, with the Equal Employment Opportunity Commission (EEOC) in that agency's San Antonio, Texas office on June 17, 1993, File No. 31C930864, assigned to the Texas Commission on Human Rights' (TCHR), Austin, Texas office.

Complainant did not identify the nature of those EEOC discrimination charges in his September 8, 1993, OSC charge, but in the course of the hearing in this proceeding he testified that the EEOC charges were based upon national origin discrimination, race discrimination, and age discrimination (T. 364).

As part of his OSC charge, complainant attached at least one (1) typewritten page providing the following information. He stated that on June 2, 1993, in response to an advertisement, he had applied at Barton Springs for the position of Water Resources Planner. He also advised OSC that "As far back as in (sic) October 1992, I was in communication with the District regarding any possible vacancy."

Some 10 days after applying for that position, he telephoned Barton Springs and learned that the position had been filled and that he had not been scheduled for an interview because he was "over qualified" and had been told "that even if I was hired I would not stay with the District."

Based upon a conversation with respondent's general manager, William E. Couch, complainant concluded that Couch had not seen, much less read, his resume, his cover letter, or his lengthy doctoral dissertation concerning Oklahoma's ground water conservation issues, which he had furnished to Barton Springs along with his job application.

Complainant also advised OSC that he later attempted to communicate with the members of Barton Springs' board of directors but that "the president of the Board, (sic) prevented it (sic) by keeping my letter a secret from at least two of the directors. One of the directors lied to me on a material fact."

He regarded Barton Springs' handling of his application as "discrimination against my education, training and experience" and stated that respondent gave "the usual answer that I was not the most suitable person for that position. He felt that he was not only the most qualified applicant, but the most suitable, also, since he had "the potential to learn the job quickly and to be promoted to the next higher level when a vacancy arise (sic)."

His EEOC complaint, filed on June 17, 1993, or some 83 days before his OSC charge, asserted that Barton Springs' failure to hire him had been based upon national origin discrimination, complainant being a Sri Lankan national; sex discrimination, even though another male had been hired for the Water Resources Planner for which he had applied; and age discrimination, complainant then having been 47 years of age. The EEOC complaint was assigned to TCHR for investigation.

Complainant testified that early on, and well prior to his having filed the OSC charge on September 8, 1993, the TCHR investigator assigned to investigate complainant's EEOC charges advised him that his claim against Barton Springs could "be amicably settled", even though one Robert Botto, who was hired for the advertised Water Resources Planner position, by then had been performing those duties for several weeks. The amicable solution which had been suggested to complainant by the TCHR investigator, according to complainant's hearing testimony, was that of negotiating with Barton Springs to offer him either a part time position or a temporary position (T. 180, 181).

Shortly thereafter, he telephoned Barton Springs' general manager, William E. Couch, who informed him that the Water Resources Planner position had been filled.

Complainant then sent letters to each member of Barton Springs' five (5)-person board of directors and followed up with telephone calls to the residences of each. In his hearing testimony, complainant denied that he had chosen to enlist the active assistance of the members of the board of directors in order to bring group pressure upon William E. Couch to offer complainant either a part time position or a temporary position.

Instead, as he explained under oath, he did so "Not to bring pressure on anybody, but I thought that the board is the supreme authority in the district so that in my case, if the board finds that there is some merit in my case, that they will be able to interfere and try to do something." (T. 181, 182).

An in reply to the specific inquiry as to whether his contacting the board members had been an attempt on his part to have Mr. Couch hire him as a part-time employee, complainant testified that it had been, "Part-time or whatever solution." (T. 182).

Elsewhere in his testimony, complainant stated that following his conversations with the TCHR investigator early on he had contacted the members of the board of directors in search of a solution, and "that maybe because the district has money, they might create some other position." (T. 188).

On September 8, 1993, upon receiving complainant's unfair immigration-related employment practice charge, based upon national origin and citizenship status discrimination, OSC began its investigation of the matter.

On October 20, 1993, complainant telephoned and discussed his EEOC and his OSC discrimination charges against Barton Springs with Alexander D. Price, Jr., the Assistant Claims Manager of Texas Municipal League (TML), an insurer which provides third party liability insurance coverages to Barton Springs for those type claims.

On October 29, 1993, Mr. Price corresponded with complainant, confirming that they had discussed the latter's claims in a conversation conducted on October 20, 1993. He advised complainant that no decisions concerning his claims under Barton Springs' liability coverages would be made until the EEOC and the U.S. Department of Justice had completed their investigations and rendered determina-

tions on those two (2) pending discrimination cases (Respondent's Exh. 5, at 5).

On November 4, 1993, some 140 days after filing his EEOC charges against Barton Springs and some 57 days after filing the OSC charges at issue, complainant corresponded with Barton Springs' general manager, not identified, but presumably William E. Couch, concerning "Corruption & Abuse of Public Office" and requested copies of a significant number of documents under the Texas Open Records Law (Complainant's Exh. I, at 21).

On November 9, 1993, in the course of replying to Mr. Price's letter of October 28, 1993, complainant directed correspondence to Mr. Price, on the subject "Office Corruption".

The second paragraph of that letter contains these four (4) sentences:

> Your letter gave me considerable trouble as I was not sure on (sic) how to begin or where to end my response. You write like a lamb, only I know that you are wolves. You and Ms. Arce have been playing a game of Humpty Dumpty with me. You have your own meaning for words!

That four (4)-page, typewritten letter accused TML's Ms. Arce, and Barton Springs' unidentified president, as well as its general manager, and one of its directors, identified only as "Johnson", of having engaged in a conspiracy to prevent some directors from performing their duties. TML was also accused of assisting Barton Springs' president in violating the Texas Open Meeting Law.

Complainant also advised Mr. Price that he, complainant, had contacted "Mr. Tex Martin of the District Attorney's Office on this matter (not on my discrimination complaint),", presumably concerning his possibly bringing criminal charges against unnamed persons (Respondent's Exh. 5, at 1).

On November 23, 1993, complainant sent a three (3)-page, typewritten letter to Ms. Belinda Murphy, an Internal Audit Officer employed by the City of Austin, concerning her role in a special purposes audit of Barton Springs. He stated that he planned to submit that audit as evidence in support of his discrimination charges against Barton Springs, and for that reason he requested a copy of that audit report, as well as copies of other specific documents, under the Texas Open Records Law.

He concluded that Ms. Murphy's audit report "may be worthless" and took her to task for three (3) statements attributed to her in that audit report. Complainant accused Barton Springs' general manager and its president as having "engaged in a naked abuse of power that I have experienced in (sic) their hand.". He also stated that Barton Springs' president had acted "in collusion with TML", and he asked that his request for those document copies be treated as "urgent" (Respondent's Exh. 7, at 2).

On December 28, 1993, or some 111 days into OSC's 120-day investigation deadline, complainant corresponded with Ms. Lisa Levine, the OSC investigator to whom complainant's charge had been assigned, who by then had questioned whether Barton Springs' general manager, William E. Couch, had ever been aware of complainant's citizenship status (Respondent's Exh. 1).

In that one (1)-page letter to her, complainant confirmed that he and Ms. Levine had discussed his case just seven (7) days earlier, on December 21, 1993, and complainant stated that he would be in a better position to help Ms. Levine resolve her question of whether Barton Springs' general manager actually knew that complainant was not a United States citizen if Ms. Levine would simply make certain information available to him from OSC's investigative file.

On January 6, 1994, after having completed its investigation of complainant's September 8, 1993, charges of illegal immigration-related discrimination based upon his national origin and citizenship status, OSC Attorney Rose A. Briceno notified complainant by certified mail that based upon their investigation there was insufficient evidence of reasonable cause to believe that he had been discriminated against based upon his citizenship status.

OSC also advised complainant in that correspondence that that Office did not have jurisdiction of his national origin discrimination charge, then and still pending at EEOC, because complainant had previously filed a charge of that type, based upon the same facts, with EEOC prior to filing his OSC charge on September 8, 1993. 8 U.S.C. § 1324b(b)(2).

For those reasons, complainant was informed that OSC had decided not to file a citizenship status discrimination complaint against Barton Springs on his behalf with an administrative law judge assigned to this Office. Complainant was also instructed that he could file a private action directly with our Office if he did so within 90 days of his receipt of that determination letter (Respondent's Exh. 2, at 12, 13).

On January 18, 1994, complainant replied to OSC's determination letter of January 6, 1994, by corresponding with Attorney Briceno, advising her that he had not decided whether to appeal OSC's adverse ruling by filing a private action with our Office.

In order to make that decision, he requested that OSC provide him with "copies of the correspondence that you have had with the Aquifer C.D. and/or its lawyers.". He further stated that Barton Springs "had not told the truth" and that respondent had treated the applicants for the position in question differently. Finally, complainant told Ms. Briceno in that letter that "I will be in a better position to either pursue or drop this matter after I see your correspondence." (Complainant's Exh. I, at 9).

On February 7, 1994, and while deciding whether to appeal OSC's January 6, 1994, unfavorable ruling to this Office, complainant filed a complaint with the Enforcement Division of the Texas State Board of Public Accountancy, against three (3) auditors employed by the City of Austin, in connection with a special purpose audit of Barton Springs which they had conducted (Respondent's Exh. 7, at 21-26).

In his six (6)-page, typewritten complaint against Ms. Karen Canales, Ms. Belinda Murphy, and Ms. Helen Niesner, all of whom he described as being Certified Public Accountants (CPAs) and employees of the City of Austin, who had been assigned to that audit, Austin City Audit No. S9211 (Annex 1), complainant leveled many extremely serious charges against those three (3) CPAs.

Included were allegations, among others, that they had engaged in "fraudulent and dishonest conduct", as well as an "audit cover-up (sic)", that the audit contained "serious omissions and errors", that there were "fraudulent statements in the audit report to cover-up (sic) corruption", that all three (3) had engaged in "corrupt behavior", and that there had been an "omission by mistake or by design."

On February 22, 1994, complainant corresponded with Thomas W. Prescott, a C.P.A. and a resident of Austin, who prepared a separate and unrelated independent audit report concerning Barton Springs, which became part of that district's 1993 annual report. Complainant advised Mr. Prescott that, even "as a layman, I have found so many mistakes, omissions, and attempts of audit cover-up (sic) of fraud in the city auditors' report" and that he was "surprised how as a professional auditor you overlooked all of this and more, and gave a 'letter of excellence'" to Barton Springs (Respondent's Exh. 7, at 27).

On February 17, 1994, some 40 days or so after complainant received OSC's unfavorable determination letter, and almost mid-way through the 90-day period in which he had to decide whether to file a private action with this Office, complainant directed joint correspondence to Ms. Cindy Arce, of TML, Barton Springs' insurer, and to Kent McCullough, Esquire, of Bickerstaff, Heath & Smiley, Inc., respondent's counsel of record (Complainant's Exh. I, at 24, 25).

In that two (2)-page letter, he stated that in view of OSC's determination letter there were "some serious questions of fact that remain unanswered on (sic) this matter, and I have serious doubts as to whether the Special Counsel's attorney considered these facts before she came to her decision."

He concluded that correspondence by requesting that Ms. Arce and Mr. McCullough provide copies of the following documents and answers to these questions:

1. questions (sic) asked from (sic) the District by the Special Counsel on my case (sic)

2. your (sic) deposition to the Special Counsel on my case (sic)

3. a (sic) copy of the District's application form for employment (sic)

4. whether (sic) any of the 38 applicants interviewed by the District included candidates who submitted either a resume or an application form only and not both?

5. whether (sic) the applicant selected for the position submitted only an application form or whether he submitted both an application form as well as a resume?

On February 18, 1994, after receiving no reply to his earlier letter of January 18, 1994, complainant again corresponded with OSC Attorney Briceno. He requested that she consider his request "as urgent" and that she assist him in resolving "this dilemma" by sending him the previously-requested information "as soon as possible" so that he could decide whether to appeal OSC's adverse ruling to our Office (Respondent's Exh. 2, at 3).

On February 25, 1994, J. Gregg Hudson, Esquire, of respondent's law firm, forwarded a copy of complainant's letter of February 17, 1994 to the Office of the Attorney General of Texas, in which he advised that that request for documents was the second such request by complainant under the Texas Open Record Act, which provides that parties receiving such requests are protected from disclosing such information upon a reasonable anticipation of litigation being instituted by the requestor (Complainant's Exh. I, at 25).

In his letter, Mr. Hudson provided copies of the responsive documents requested by complainant, for in camera review by the Texas Attorney General. Mr. Hudson sent a courtesy copy of that letter to complainant.

On February 25, 1994, also, Mr. Hudson sent a letter to complainant, advising him that the Texas Attorney General would determine whether Barton Springs was required to accommodate him in his request for copies of the documents he had requested (Complainant's Exh. I, at 27).

Following complainant's receipt of OSC's adverse determination letter of January 6, 1994, and prior to March 10, 1994, complainant contacted this Office for guidance in filing a complaint alleging an unfair immigration-related employment practice.

The certified mail reply correspondence from this Office included, as an enclosure, a Complaint/Questionnaire and the two (2)-page reply letter also contained this information: "Please be advised that under the law, in any complaint alleging an unfair immigration-related employment practice, an Administrative Law Judge may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact."

On March 10, 1994, following his receipt of that admonition concerning the possibility of his incurring Barton Springs' attorney's fees, complainant timely filed the Complaint at issue in this Office, alleging that on June 2, 1993, Barton Springs had knowingly and intentionally engaged in national origin and citizenship status discrimination, as well as having retaliated against him, in not having hired him as a Water Resources Planner, a position for which he had applied on the latter date (Respondent's Exh. 2, at 4-11).

Complainant advised in that Complaint that he had resultingly made two (2) "appeals to the Board of Directors". In the first, which he directed to the president of the board, he stated that the president had concealed his letter from the other board members. He then sent a second letter to each member of the board, but the president of the board "prevented board members" from discussing his second appeal. Complainant also stated in his Complaint that one (1) unidentified board member, in collusion with TML, which he described as Barton Springs' insurance agent, had lied to him concerning that appeal, as had several unidentified persons at TML.

He also advised OCAHO in his Complaint that as of that filing date, March 10, 1994, he had uncovered unidentified documents which would "indicate" that Barton Springs "knew that I was not a U.S. citizen." and for that reason he had not been given an opportunity to complete an application form for the Water Resources Planner position.

The relief initially sought by complainant in his OCAHO complaint included a request that Barton Springs be ordered to hire him as a Water Resources Planner with back pay from June 1, 1993.

The relief to which complainant believed he was entitled increased very significantly during the pendency of this matter, according to his August 15, 1994, sworn answers to Barton Springs' interrogatories, which had been propounded to complainant in the discovery phase of this case.

More specifically, in reply to respondent's Interrogatory No. 8, in which complainant was requested to itemize in detail the damages claimed as a result of not having been hired as a Water Resources Planner at Barton Springs, complainant attested that his damages were at least $828,000, itemized as follows. Lost wages - $28,000, or $2,000 monthly for the 14-month period from June, 1993 to August, 1994; $600,000 in actual damages as a result of emotional, physical, mental and psychological factors involving complainant, as well as the members of his family; and $200,000 in punitive damages (Respondent's Exh. 3, at 9).

In replying to Interrogatory No. 11 in the same set, complainant asserted that before and after Mr. Botto had been interviewed at Barton Springs for the Water Resources Planner position, five (5) individuals at Barton Springs, William E. Couch, Patrick L. Cox, Ronald G. Feiseler, Cheryl Vogel, and Tammy Charlson knew that complainant was not a citizen of the United States (Respondent's Exh. 3, at 10).

In answering Interrogatory No. 24, complainant stated that since earning his doctorate degree in 1986 he has held nine (9) jobs. For some five (5) years, beginning on August 1, 1987, and ending on August 20, 1992, he served as an assistant professor at Kent State University, located in Kent, Ohio. The beginning annual salary was $26,000 and his salary upon leaving was $30,000 annually. He listed his not having been granted tenure as his reason for leaving.

He moved to Austin, Texas in August, 1992 and was unemployed for the next seven (7) months, or until March, 1993. He resumed work as

a part time employee in March, 1993 in that city and held six (6) other part time jobs there over the next 12-month period, or until March, 1994. His hourly rate of pay in those seven (7) part time jobs ranged from $4.25 to $7. In March, 1994 he began work as a researcher at $7 per hour for another firm in Austin but left that firm on July 31, 1994, or less than one (1) month prior to the hearing in this matter, because that employer moved its business to San Antonio, Texas, some 85 miles from Austin, and complainant did not wish to relocate, or to commute, apparently (Respondent's Exh. 3, at 18).

On July 27, 1994, some 29 days prior to complainant's adjudicatory hearing in this proceeding, complainant was advised by letter by the Texas State Board of Public Accountancy that after reviewing his complaint against Karen Canales, Belinda Murphy and Helen Niesner at its July 13, 1994 meeting, that agency's Technical Standards Review Committee "did not find any violations of the Board's rules or of the Public Accountancy Act. Further, it did not find any material departures from industry or government standards.", and that the Committee had decided "to dismiss the investigation." (Respondent's Exh. 7, at 1).

Following the timely filing of respondent's Answer to the Complaint, the parties began this proceeding's discovery phase, which was unduly complicated by the unrepresented, but legally trained complainant's egregious conduct, consisting partially of his abject refusal to follow the pertinent procedural rules, by his ongoing attempts to introduce extraneous matters which were totally irrelevant to any issues framed by the pleadings, by his reluctance to give deposition testimony, and his very concerted efforts to delay the scheduling of an adjudicatory hearing, which he had implicitly requested in the course of having filed his March 10, 1994, OCAHO Complaint.

After due notice to the parties, this matter was heard before the undersigned in Austin, Texas on August 25 and 26, 1994.

Summary of Evidence

Complainant's evidence consisted of his testimony and that of nine (9) persons who were employees, officers, and directors of Barton Springs during the relevant period, and all of whom had been subpoenaed by him.

Those witnesses were Cheryl Vogel, who worked at Barton Springs as a Water Resources Planner; Robert B. Botto, employed there since June 14, 1993 as a Water Resources Planner, the position at issue in this

proceeding; Tammy Charlson, an administrative employee; Ronald G. Feiseler, who currently supervises two (2) EPA grant operations at Barton Springs; Mrs. Sue Johnson, Patrick L. Cox, Alton B. Laws, Jr., and Donald R. Turner, all four (4) of whom are members of the five (5) person board of directors; and William E. Couch, Barton Springs' general manager.

Complainant also provided copies of a significant number of documents comprising seven (7) exhibits, which were marked and entered into evidence as Complainant's Exhs. A through I.

Respondent's evidence consisted of the testimony of William E. Couch, as well as those facts which were established in the cross-examination of complainant, the information set forth in complainant's replies to discovery inquiries, and those documents which constitute the seven (7) exhibits which have been identified and entered into evidence as Respondent's Exhs. 1 through 7.

From those sources, as well as the pleadings, the following facts have been established.

Cheryl Vogel, a Water Resources Planner at Barton Springs, testified that her duties involved testing the quality of water in wells, by the use of portable testing equipment similar to that used in testing water in residential swimming pools. She was hired as an intern and received on-the-job training for her present duties. Prior to working at Barton Springs, she was employed in the restaurant industry for 12 years.

She recalled receiving a telephone call at Barton Springs in October, 1992 from complainant, who sought general information about the district. She does not recall having sent him a post card (Complainant's Exh. A) containing general information about Barton Springs. On the reverse side of that card the addressees were requested to telephone the agency in the event they wished to have their names placed on Barton Springs' mailing list. She does not recall having received a resume from complainant or any further telephone calls from him concerning a resume.

Robert B. Botto, who was hired as a Water Resources Planner at Barton Springs, the position at issue, began his job duties there on June 14, 1993. He has a Bachelor of Science Degree in Applied and Physical Geography from Southwest Texas State University, and a minor in Mathematics.

His duties, among others, consist of collecting water samples, maintaining and developing user conservation and drought emergency plans, and reviewing water pollution abatement plans. He stated that Barton Springs enjoys a very high profile in the communities it serves and his job duties place him in contact with a large number of people, some of whom are disgruntled.

He formerly worked in San Antonio, Texas for Tejas Environmental Service for two (2) years or so collecting soil and water samples in settings which involved leaking underground storage tanks.

For some 13 years, not continuously, he worked in restaurants, most recently for three (3) years as a maitre d', a position in which he stated that he had acquired an ability to interface with members of the public, in the course of dealing with a large number of diners, individually and in groups. He believes that those skills have served him well in carrying out his duties as a Water Resources Planner at Barton Springs.

Through networking, he learned of a Water Resources Planner job opening at Barton Springs. He telephoned William E. Couch, the agency's general manager, for an appointment and submitted the name of Leroy Goodson, Chairman, Texas Water Conservation Association, as a reference.

On May 25, 1993, he met with Mr. Couch, who informed him that he was accepting applications for the vacant Water Resources Planner position. The date upon which he was hired was not established through his testimony, but, as noted earlier, he began his present work duties on June 14, 1993.

Tammy Charlson's testimony, and those attestations contained in her affidavit of October 11, 1993 (Complainant's Exh. B), established that complainant visited Barton Springs on June 4, 1993 and delivered his resume, browsed through some agency literature and departed.

Between June 4, 1993 and June 17, 1993, complainant telephoned her to inquire whether the Water Resources Planner position had been filled. She replied that it had been, whereupon he became upset and hostile and asked why he had not been interviewed. She suggested that he might find work in his field at the Texas Water Commission, Texas Water Development Board, or the Lower Colorado River Authority.

She testified that complainant complained of having been required to work nights at minimum wage levels, despite his education and experience. She explained to him that the Water Resources Planner position was an entry level job for which, in her opinion, he seemed to be more than qualified and which was also a position that was not sufficiently challenging, which could possibly result in his becoming bored and not staying on at Barton Springs.

On June 22, 1993, complainant telephoned her again and informed her that he had filed unidentified charges with EEOC, stating that it was not anything personal against Barton Springs, rather he was tired of being turned down for positions for which he felt he was qualified.

Ronald G. Feiseler stated that he has worked at Barton Springs since September, 1989, having performed almost all job duties there. His present job is that of Water Resources Planner II. He prepared the job description for the Water Resources Planner I position and conducted the only interview, which was a lengthy one, that of Robert B. Botto, the person selected to fill the position.

He stated that Barton Springs is funded by user fees collected from the owners of permitted wells within the agency's jurisdictional boundaries and there is a strong public relations aspect to all positions performed by the small work force at Barton Springs, including that of the vacant position of Water Resources Planner I, for which a newspaper ad appeared in the Sunday, May 30, 1993 edition of the Austin American Statesmen (Complainant's Exh. D).

Mrs. Sue Johnson, a member of Barton Springs' board of directors, testified that she recalled having received a telephone call from complainant at her residence on August 9, 1993. Complainant began to discuss his qualifications and was told by her that she was not going to discuss the matter by telephone. She refused complainant's request that she provide her home address to him.

During the course of this witness' testimony, complainant stated that he had telephoned Mrs. Johnson's residence on three (3) occasions. He also advised that he did not receive a single reply to any of the two (2) letters he mailed to each of Barton Springs' five (5) directors over the seven (7)-month period between August 2, 1993 to March, 1994. In addition, he placed three (3) telephone calls to the residences of each of those five (5) directors.

Mrs. Johnson further testified that members of the board of directors are elected from geographical precincts, that the board meets every two

(2) months, that the board establishes Barton Springs' broad policies, that the board's role is one of oversight, and that its members are not involved in the day-to-day operations, those being the responsibility of Barton Springs' general manager.

Patrick L. Cox, another member of the board of directors, testified that he received correspondence from complainant, dated August 2, 1993, which referred to the latter's EEOC complaint against Barton Springs, which was then being investigated by TCHR (Complainant's Exh. E), as well as a copy of complainant's August 18, 1993 letter to Barton Springs' board of directors (Complainant's Exh. F).

Alton B. Laws, Jr., the third member of Barton Springs' five (5)-member board of directors subpoenaed by complainant to appear at the hearing, testified that complainant had placed and completed several telephone calls to his home concerning complainant's dispute with Barton Springs. He also stated that he routinely records all issues discussed in such telephone calls if they involve "something that might be serious", but he did not record the issues presented in any of complainant's calls, or any of the dates upon which those calls were placed (T. 267).

He also stated that "as a director and a minority member of the board, many times I am left out of the loop of activity at the district office." (T. 268), and further that he knew only that complainant was a Sri Lankan national but was unaware of his citizenship status (T. 273).

Donald Ray Turner, the fourth member of the Barton Springs' board of directors placed under subpoena by complainant, testified that upon learning of complainant's EEOC charge, the first such charge filed against Barton Springs, he contacted complainant by telephone (T. 285, 286).

He also spoke to Barton Springs' attorney, Mr. Dugat, about that EEOC charge and subsequently the board discussed that matter in executive session. He also stated that he had received between six (6) and eight (8) letters from complainant, including ones dated August 2, 1993 and August 18, 1993.

William E. Couch, Barton Springs' current general manager, as well as at all times relevant, was complainant's ninth (9th) and final witness. He testified that the position in which complainant was interested, Water Resources Planner I, is an entry level position which was the subject of a newspaper ad on May 30, 1993 (Complainant's Exh. D).

The starting annual salary for that job was $20,000 - 24,000, depending upon the applicant's experience and qualifications.

At the same time that the Water Resources Planner position was being filled, applications were being accepted for two (2) other vacant positions. Resultingly, interviews were to be conducted for those three (3) openings and over 100 resumes had been received, including one received from complainant in June, 1993 captioned "Curriculum Vitae". He reviewed that document and concluded that complainant had a strong academic background and that he had spent several years in a university setting. He also testified that he did not view the vacant Water Resources Planner position as being one which requires a strong academic background, such as complainant's, and he also felt that complainant's Curriculum Vitae simply did not demonstrate that he had presented either the required prior work experience or the necessary qualifications (T. 336).

When asked by complainant whether he had read the research papers authored by complainant, which had been attached to his resume, Couch stated that he had read only an abstract of the 35 to 45-page Curriculum Vitae submitted by complainant because he does not regard scholastic dissertations as qualifying practical experience.

He also told complainant that in reviewing his Curriculum Vitae package he had noted that complainant had presented a nearly exclusive academic background and had no significant amount of public involvement or contacts with members of the public, which are required in order to carry out the Water Resources Planner job duties. That because in that position, one is required to deal closely with a variety of customers whose educational backgrounds vary. He also advised that at all times relevant he was unaware of complainant's citizenship status.

Respondent's evidence, beginning with the cross-examination of complainant, has made available the following information.

Complainant stated that on June 4, 1993, some five (5) days after seeing the newspaper ad concerning the Water Resources Planner position, he mailed a seven (7)-page Curriculum Vitae to Barton Springs, and attached 22 pages of materials describing his academic activities in connection with his having earned a doctorate degree. Upon having been requested to examine closely the contents of that Curriculum Vitae, he admitted that that 29-page submission did not contain any work experience, nor did it demonstrate that complainant had any hands-on experience involving the taking of water samples,

drilling or digging (T. 397-403). He also conceded that that 29-page document contained no information concerning his citizenship status (T. 405).

He described Respondent's Exh. 1 as being a copy of his December 23, 1993 letter to OSC's Ms. Levine, in which, in response to an inquiry by her, he had advised Ms. Levine that he did not know whether Barton Springs' general manager had been aware of his citizenship status (T. 422).

He denied having filed his OCAHO Complaint on March 10, 1994, without then having known whether Barton Springs was aware of his citizenship status, despite his having written to OSC's Ms. Briceno on February 18, 1994 (Respondent's Exh. 1, at 3), in which he clearly stated that "if I do not get your information on time, I will be forced to make (sic) the appeal based on facts which I could not verify first."

In that cross-examination, complainant also testified that he received his education in his native country, Sri Lanka, as well as in Canada and the United States and that the Curriculum Vitae supplied to Barton Springs contained the information that he had earned a Law Degree in Sri Lanka (T. 455). That fact is confirmed in the Curriculum Vitae package mailed to Barton Springs by complainant on June 2, 1993. That source also reveals that in 1967 he earned a Bachelor of Arts Degree in Geography from the University of Ceylon in Sri Lanka, that in 1976 he received a Bachelor of Laws Degree from the University of Sri Lanka, that in 1981 he received a Master of Arts Degree in Geography at the University of Windsor, in Ontario, Canada, and that in 1986 he was awarded a Doctorate of Philosophy in Geography at the University of Oklahoma.

His publications, among a host of others, include articles entitled Teaching Law and Geography, which appeared in the Journal of Geography in 1991, Applied Law and Applied Geography, which appeared in 1990 in the Operational Geographer, a 1967 publication entitled Report on the Status of Environmental Management Laws in Sri Lanka, and Environmental Management Laws in Sri Lanka, published in 1976.

William E. Couch, in addition to having been subpoenaed to testify in complainant's case-in-chief, also testified on Barton Springs' behalf. He stated that Barton Springs is a ground water district created by the Texas legislature for the purpose of preserving the Barton Springs/ Edwards Aquifer. The agency has a five (5)-person board of directors, whose members are elected and who are given authority to hire a gene-

ral manager, who is responsible for the district's day-to-day operations, subject to the orders of the board of directors, as well as their policy determinations.

In June, 1993, Barton Springs had five (5) operational employees and was in the process of hiring three (3) additional persons, a Water Resources Planner I, to replace Cheryl Vogel who had left in May, 1993, and two (2) other persons to fill administrative assistant positions. Mr. Couch estimated that only one (1) to two (2)-percent of his time is spent in handling job inquiries and in making hiring decisions.

In mid May, 1993, he received a telephone call from Robert B. Botto concerning the Water Resources Planner I position. Botto mailed a resume and cover letter, dated May 17, 1993, which arrived on or before May 25, 1993, the day Botto visited him in his office. In the course of that meeting, Couch was favorably impressed by Botto, whom he found to be enthusiastic and well qualified for the Water Resources Planner I position (T. 472).

Botto was advised that the position was to be advertised in the Austin American Statesman on May 30, 1993, and that applications would be taken from interested persons. After Botto visited his office on May 25, 1993, Couch received three (3) favorable and supportive telephone calls on Botto's behalf from Phil Ferrington, an employee of the Edwards Underground Water District in San Antonio, Dr. Richard Boehm, Chairman, Department of Geography and Planning, Southwest Texas State University, and Leroy Goodson, Executive Director, Texas Water Conservation Association (T. 473).

Replies to the May 30, 1993 newspaper advertisement, in which all applicants were required to submit resumes and salary requirements, began arriving on the following day. Based upon those resumes, three (3) applicants were selected to be interviewed and all were required to complete employment applications prior to the interviews (T. 278, 279).

Those three (3) applicants included an unidentified young lady, one Dennis Wilson, who failed to appear for his interview, and Robert B. Botto. Couch referred the latter's interview to Ronald G. Feiseler and Nikko Howard, who jointly interviewed Botto on June 9, 1993. On the following date, Botto attended a Barton Springs Board of Directors meeting and on June 11, 1994 was invited to Couch's office and was offered the position. He began work at Barton Springs on June 14, 1993.

Couch also testified that Barton Springs has on file every employment application and cover letter it has received since the district was created in 1989. A search of their files, as well as having directed inquiries to all staff members, including Messrs. Feiseler and Howard, failed to locate the resume which complainant reportedly provided to Barton Springs in October 1992. The only document on file is the Curriculum Vitae package which was received on June 4, 1993 (T. 480).

He also stated that he was unaware of complainant's citizenship status prior to having hired Botto on June 11, 1993, and had only learned of complainant's citizenship status as a result of complainant's EEOC complaint and his OSC charge.

Couch recalled having spoken to complainant by telephone in June, 1993. Complainant had called Barton Springs and Ms. Tammy Charlson, then a new employee, had taken the call. Upon noting her apparent frustration in dealing with complainant, Couch had the call transferred to his office, whereupon complainant stated "Excuse me, I did not mean (sic) to talk to you". He testified that he identified himself as the general manager and offered his assistance (T. 484, 485).

Complainant advised Couch that he had filed a complaint against Barton Springs because he had not been hired for the advertised position, even though he was the most qualified applicant. Couch then advised complainant that the position had been filled but that in the 1994 fiscal year, which began on September 1, 1993, additional positions may become available and that complainant could apply for those.

He stated that two (2) such positions did become available, those of Environmental Analyst and a Geographic Information Systems Coordinator, which were advertised and filled after June, 1993 (T. 486, 487). The latter position was a higher level position than the Water Resources Planner I position for which complainant had applied.

In reviewing complainant's Curriculum Vitae, as well as his cover letter of June 4, 1993, Couch determined that complainant simply did not have either the background or work experience to perform as a Geographic Information Systems Coordinator. And the Environmental Analyst position was filled in 1994 by promoting an employee from within the district (T. 488).

He also denied having retaliated against complainant as a result of his having filed either of his pending discrimination charges. Upon receiving those complaints, he notified Barton Springs' legal counsel,

TML, and the president of the district's board of directors, as well as the other four (4) members of the board.

Couch also denied complainant's allegations involving his having allegedly tampered with documents which complainant has forwarded to Barton Springs. He explained that he is responsible for all of the district's records and all incoming mail is handled in accordance with established policies, to which he has adhered.

He also testified that complainant has alleged that Barton Springs, as well as various individuals and groups, had engaged in a conspiracy against complainant, including Couch, members of his staff, the members of the district's board of directors, Barton Springs' law firm, TML, and possibly state and federal agencies (T. 495, 496).

Issues

Under these disputed facts, two (2) issues are presented, as well as one of a contingent nature. First, it must be determined whether, as complainant has charged, Barton Springs knowingly and intentionally refused to hire him as a Water Resources Planner I solely because of his citizenship status, in violation of the provisions of the unfair immigration-related employment practices provisions of IRCA, 8 U.S.C. § 1324b(a)(1)(B).

Secondly, we must ascertain whether Barton Springs also violated the provisions of 8 U.S.C. § 1324b(a)(5) by having retaliated against complainant for having exercised his right to file with OSC an unfair immigration-related employment practices charge under IRCA.

In the event that rulings in Barton Springs' favor are entered on those two (2) issues, consideration must be given to Barton Springs' re-quest that as the prevailing party it be awarded the sum of $51,530.34 as its reasonable attorney's fees.

Discussions, Findings, and Conclusions

In the course of filing his charges that Barton Springs knowingly and intentionally refused to hire him based solely upon his citizenship status, that of being a work-authorized alien to whom permanent resident status had been granted on June 12, 1989, as well as retalia-

tion for having exercised rights protected under IRCA, complainant relies upon the applicable provisions of 8 U.S.C. § 1324b, which provide:

UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

8 U.S.C. 1324b(a) Prohibition of Discrimination Based on National Origin or Citizenship Status.- (1) GENERAL RULE.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-

(A) because of such individual's national origin, or

(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

* * * *

(5) Prohibition of Intimidation or Retaliation.- 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, for purposes of subsections (d) and (g), to have been discriminated against.

8 U.S.C. §§ 1324b(a)(1)(A)(B) and 1324b(a)(5) (emphasis added).

In view of the foregoing, it can be seen that complainant may assert a claim of citizenship status discrimination against Barton Springs since the alleged unfair immigration-related employment practice allegedly occurred in the course of complainant's attempt to be hired for the Water Resources Planner position, providing that he qualifies as a "protected individual".

The term "protected individual" is defined as a person who is either a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee, or one who has been granted asylum. 8 U.S.C. § 1324b(a)(3). See Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (1992). Complainant has established that at all times relevant his status was that of permanent resident alien and he is therefore a protected individual for purposes of IRCA.

Complainant's evidentiary burden of proof is that of establishing by a preponderance of the evidence that Barton Springs knowingly and

intentionally engaged in the discriminatory practices which he has alleged. See 8 U.S.C. §§ 1324b(d)(2) and 1324b(g)(2)(A).

More specifically, in order to prevail complainant must demonstrate by a preponderance of the evidence that Barton Springs knowingly and intentionally refused to hire him as a Water Resources Planner based solely upon his citizenship status and that he was also unlawfully retaliated against for having exercised rights protected under IRCA.

And that burden of proof equates to that which is required in a claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (Title VII). Yefremov v. NYC Dep't of Transp., 3 OCAHO 562 (1993); Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532 (1993); Alvarez v. Interstate Highway Constr., 3 OCAHO 430 (1992); Huang v. Queens Motel, 2 OCAHO 364 (1991); Williams v. Lucas & Assoc., 2 OCAHO 537 (1991).

Pursuant to Title VII guidelines, a complainant may establish liability for an alleged discriminatory practice in one (1) of two (2) ways. First, under a disparate treatment theory, complainant must show that he was knowingly and intentionally treated less favorably than other job applicants similarly situated and he must also prove that Barton Springs had a discriminatory intent or motive. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988). The second method for establishing Title VII liability involves the disparate impact theory, which requires the complainant to show that discrimination resulted from an employer's practices, that although being facially neutral, nevertheless created significant adverse effects on a protected group. Under this theory a complainant need not prove intentional discrimination on the part of the employer. Watson, 487 U.S. at 986-87.

All claims brought under IRCA, 8 U.S.C. § 1324b, must be proven according to a disparate treatment theory of discrimination, which requires evidence of knowing and intentional discrimination. See, e.g., Yefremov v. NYC Dep't of Transp., 3 OCAHO 562, at 21-23 (1993). Accordingly, in order for complainant to prevail he must prove his allegation by a preponderance of the evidence that Barton Springs, in filling the Water Resources Planner position on May 30, 1993 and thereafter, knowingly and intentionally treated him differently than other applicants and did so based solely upon his citizenship status.

Because complainant has alleged disparate treatment namely, that he was knowingly and intentionally treated less favorably than other applicants similarly situated based solely upon his citizenship status, it is appropriate to examine the applicable case law namely, the

seminal United States Supreme Court decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In that refusal-to-hire ruling, the Supreme Court defined the order and allocation of proof required in Title VII cases dealing with disparate treatment. The Court announced that the plaintiff therein was required to establish a prima facie case of discrimination and was further required to prove by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualification.

McDonnell Douglas, 411 U.S. at 802.

Upon a showing of a prima facie case of discrimination by a preponderance of the evidence, an inference of discrimination arises and imposes upon the defendant a burden of rebuttal which respondent successfully assumes by articulating with specificity a legitimate, non-discriminatory reason for not having hired plaintiff. Given that showing, the plaintiff then has the opportunity to prove, once more by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons for not having hired plaintiff, but instead were a pretext for intentionally discriminating against plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 249 (1981).

In order for complainant to prevail under IRCA, he must produce evidence of a prima facie case of citizenship status discrimination concerning Barton Springs' failure to hire him. The elements of that prima facie case require complainant to demonstrate: (1) that he belonged to a class of persons protected by the provisions of IRCA; (2) that he applied and was qualified for the Water Resources Planner position for which Barton Springs was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and that Barton Springs continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas, 411 U.S., at 802.

Under Title VII guidelines, complainant may, in either of two (2) ways, establish Barton Springs' alleged discriminatory practices, those of having knowingly and intentionally having treated him differently, or disparately, than other job applicants in the course of having failed to hire him for the position of Water Resources Planner based solely

upon his citizenship status and also by having retaliated against him for having asserted rights extended under the provisions of IRCA.

Complainant can offer indirect, or circumstantial, proof of such discrimination, Texas Department of Community Affairs v. Burdine, supra; McDonnell Douglas Corp. v. Green, supra, or he may provide direct evidence of such proscribed conduct. Price Waterhouse v. Hopkins, 490 U.S. 228 (1986); Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

Should complainant's evidence disclose indirect evidence of discrimination, and thus establish a prima facie case, the burden of production then shifts to Barton Springs to articulate a legitimate reason for its refusal to hire him. Should Barton Springs carry that burden, complainant will then have the opportunity to prove that the reasons articulated by Barton Springs are a mere pretext for discrimination. See McDonnell Douglas, 411 U.S. at 807; Burdine, 450 U.S. at 248. Moreover, "[t]he ultimate burden of persuading the trier of the fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253.

In the event that complainant's evidence demonstrates direct evidence of discrimination, as opposed to indirect evidence of the same nature, the McDonnell Douglas test is not applicable since that evidentiary test is intended to be utilized in order to assist in discovering discrimination where only circumstantial evidence is available. Trans World Airlines, 469 U.S. at 121-22. Direct evidence will not only constitute a prima facie case of defendant's discriminatory conduct, it also serves as plaintiff's entire case and imposes upon the defendant the burden of proving, by a preponderance of the evidence, that defendant would not have hired plaintiff even in the absence of the discrimination element.

A recent ruling of the U.S. Supreme Court has modified the McDonnell Douglas framework. In St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), a case involving alleged indirect, or circumstantial, evidence of discriminatory intent, the Court held that a discharged plaintiff alleging racial discrimination was not entitled to judgment as a matter of law after proving that all of the defendant's reasons were merely pretextural. Id. at 2749-51. To the contrary, in order to prevail the plaintiff therein was further required to bear the ultimate burden of persuasion of showing additionally that the employer had intentionally discriminated against him based upon his race. Id. at 2756.

By the use of the foregoing recognized evidentiary parameters, we would ordinarily analyze complainant's charges in the light of those

facts which the moving party's evidence has adduced in order to have placed upon the evidentiary record a sufficiency of credible facts to establish a prima facie case.

However, it is patently self-evident that in order to prevail in his charge of citizenship status discrimination complainant must show that at all times relevant Barton Springs was aware of his citizenship status. This he has failed to do, since complainant has adduced no evidence in order to demonstrate that Barton Springs had actual, or even constructive, knowledge of his citizenship status prior to filling the position of Water Resources Planner. Therefore, that evidentiary shortcoming standing alone entitles Barton Springs to a favorable ruling on that allegation.

And the same conclusion must be reached in ruling upon complainant's separate allegation that Barton Springs had improperly retaliated against him as a result of pursuing an IRCA citizenship status discrimination claim. That because complainant has failed to provide any evidence which supports that proposition, either.

In might be well, at the risk of injecting repetition, to conduct a sequential review of the relevant facts.

On May 30, 1993, Barton Springs ran a newspaper advertisement for the position of Water Resources Planner I, in which all replying applicants were required to send a resume and salary requirements to Personnel, 1124-A Regal Row, Austin, Texas 78748.

On June 4, 1993, in response to that advertisement, which complainant alleges was misleadingly worded, complainant filed a seven (7) page Curriculum Vitae, in lieu of the required resume, and attached thereto a 22-page document which described his dissertation activities in connection with his having earned a doctorate degree.

Shortly thereafter, and prior to June 17, 1993, complainant telephoned Barton Springs to learn whether the Water Resources Planner position had been filled. Upon learning from Tammy Charlson that it had been, complainant became upset and hostile and asked her why he had not been interviewed. He also complained to her that, despite his education and experience, the only employment which he could obtain in the Austin area required him to work nights at minimum wage levels.

On June 17, 1993, some 18 days after the Water Resources Planner newspaper ad ran, complainant filed a complaint with EEOC, alleging

that in having failed to hire him for that position Barton Springs had engaged in illegal national origin discrimination, sex discrimination and age discrimination. Complainant did not allege citizenship status discrimination in that EEOC complaint because discrimination of that type is not covered under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (1982) (Title VII), Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

On June 22, 1993, just five (5) days after filing his complaint with EEOC, complainant again telephoned Barton Springs and spoke to Tammy Charlson. He informed her that he had filed the EEOC complaint as a result of not having been selected for the Water Resources Planner position and assured her that that complaint was not to be interpreted as anything of a personal nature against Barton Springs. Instead, complainant was simply tiring of being rejected in his attempts to secure jobs for which he felt he was qualified.

In July, 1993, in the early stages of his EEOC complaint, complainant very probably met the TCHR investigator to whom that matter had been assigned and who, according to complainant's testimony, advised complainant that the EEOC complaint could very likely "be amicably settled" by complainant's simply negotiating with Barton Springs for either a part time position or a temporary position.

It was not established whether the EEOC investigator had gratuitously made that suggestion to complainant in an effort to conclude the EEOC matter informally at that juncture, rendering unnecessary his impending lengthy investigative efforts, nor was it determined whether the investigator had suggested enlisting the assistance of the Barton Springs board of directors in bringing pressure upon General Manager William E. Couch to gain such a position for complainant.

However, in his testimony complainant initially stated that he did not contact the members of the board of directors for that purpose, but conceded nearly in the same breath that "if the board finds that there is some merit in my case, that they will be able to interfere and try to do something".

Nor was it determined whether the TCHR investigator may have suggested to complainant that he file a charge of citizenship status and national origin discrimination with OSC under IRCA, knowing that the final ruling under IRCA in this proceeding would, in the ordinary course of events, be issued far sooner than complainant's complaint under Title VII at EEOC, given the sizeable backlog of such cases at

that agency. At any rate, this hearing record clearly discloses the following additional sequential happenings.

On August 9, 1993, just 53 days after complainant filed his EEOC complaint, he placed the first of three (3) telephone calls to the residence of Mrs. Sue Johnson, a Barton Springs director, in order to discuss with her his differences with the district.

Complainant testified that in the seven (7)-month period between August 2, 1993, some 46 days after he filed his EEOC complaint, and March, 1994, he sent two (2) letters to each of the five (5) board members of the Barton Springs Board of Directors and telephoned each director at their residences on three (3) occasions, or a total of 15 telephone calls.

On September 8, 1993, some 83 days after he filed his EEOC complaint, complainant filed his OSC charge.

On October 20, 1993, complainant contacted TML's Alexander D. Price, Jr., by telephone in order to discuss his EEOC and OSC discrimination charges against Barton Springs.

Thereafter, complainant continued an obviously planned campaign of telephone calls and correspondence to various agencies and individuals alleging, among other matters, corruption, abuse of public office, possible criminal activities, conspiracies, violations of the Texas Open Meeting Law, fraudulent and dishonest conduct, fraudulent statements in audit reports, cover ups, and an obviously energetic, albeit futile, attempt to have OSC make available to him the relevant contents of its investigative file which would provide complainant with the critical information which he desperately sought namely, whether Barton Springs was in fact aware of complainant's citizenship status prior to having filled the position of Water Resources Planner.

On December 21, 1993, in resuming our recapitulation of the sequential pertinent occurrences of interest, complainant telephoned the OSC investigator, Ms. Levine, and learned that her investigation had not established a highly critical fact namely, whether Barton Springs' general manager, William E. Couch, ever had knowledge of complainant's citizenship status.

On December 28, 1993, just seven (7) days later, complainant corresponded with Ms. Levine. He confirmed their December 21, 1993 conversation and offered to assist her in resolving her question of whether Barton Springs knew of complainant's citizenship status, and

requested that she provide data to him for that purpose from OSC's investigative file.

On January 6, 1994, OSC sent its adverse determination letter to complainant advising him that its investigation revealed insufficient evidence of reasonable cause to believe that Barton Springs had discriminated against him based upon his citizenship status. Complainant was advised that he had 90 days in which to file a private action with OCAHO.

On January 18, 1994, after receiving that unfavorable ruling from OSC, and mindful that in the event that he timely filed a private action with this office within 90 days, he would still be required to show as a precondition that Barton Springs knew his citizenship status in order to prevail, complainant actively renewed his concerted efforts to fill in the anticipated evidentiary gaps by directing a letter to OSC Attorney Briceno. Specifically, he requested that she make available to him "copies of the correspondence that you have had with the Aquifer C.D. and/or its lawyers."

On February 17, 1994, in the absence of having received a reply from OSC Attorney Briceno, complainant sent a two (2)-page letter to TML's Ms. Cindy Arce and to Barton Springs' attorney Kent McCullough, Esquire, in which he requested the same documentation, as well as the replies to five (5) specific questions he enumerated (Complainant's Exh. I, at 24, 25).

On February 18, 1994, the following day, mindful that his 90-day OCAHO filing deadline of March 10, 1994, was approaching, complainant again corresponded with Attorney Briceno. He described his request for the previously-requested information from OSC's investigative file "as urgent" and again sought assistance in resolving "this dilemma" namely, his inability to determine whether Barton Springs had in fact ever had knowledge of his precise citizenship status. That correspondence contained the tacit admission that "if I do not get your information on time, I will be forced to make (sic) the appeal based on facts which I could not verify first." (Respondent's Exh. 2, at 3).

On an undetermined date between receiving OSC's determination letter of January 6, 1994 and March 10, 1994, complainant was advised in a letter from OCAHO, that, under clearly outlined conditions, he could be held liable to Barton Springs for its reasonable attorney's fees in the event he instituted an unsuccessful appeal of OSC's adverse ruling to OCAHO.

On March 10, 1994, despite that warning, the legally trained complainant filed his OCAHO Complaint, in which he stated that, in some undescribed manner, he had obtained documents, which were not further identified, which would "indicate" that Barton Springs "knew that I was not a U.S. citizen." and for that reason he had not been granted the opportunity to complete an application for the Water Resources Planner position.

Thereafter, and extending to August 25, 1994, the date of the commencement of the adjudicatory hearing which complainant had impliedly requested in filing the OCAHO Complaint at issue on March 10, 1994, complainant engaged in a continuing course of dilatory tactics, not unlike those which one would expect to experience in the event that a key evidentiary fact which complainant was aware that he had to demonstrate at the hearing, i.e. Barton Springs' knowledge of complainant's citizenship status, had still not been ascertained by him.

When viewing this evidence even in the light most favorable to complainant, one reasonably arrives at the inescapable conclusion that soon after filing his citizenship status discrimination charge against Barton Springs at OSC on September 8, 1993, complainant became aware that in order to prevail it was incumbent upon him to clearly demonstrate that Barton Springs knew, or was constructively aware, of his citizenship status at the time of filling the position of Water Resources Planner. From that date until the two (2)-day adjudicatory hearing involving this interesting factual scenario was concluded at 12:07 pm on Thursday, August 25, 1994 in the Travis County Courthouse in Austin, Texas, it is glaringly apparent that complainant has quite obviously been unable to do so.

In view of that fact, it is found that complainant has failed to demonstrate, by the required preponderance of evidence, that Barton Springs violated the pertinent provisions of IRCA by having engaged in the alleged citizenship status discrimination or by having retaliated against him for having exercised his rights under IRCA.

Owing to the foregoing conclusions, complainant's March 10, 1994 OCAHO Complaint must be dismissed.

Even in the event that complainant's evidence had established a prima facie case, and thus shifted the burden of production to Barton Springs to articulate a legitimate reason for not having hired him, complainant's evidence has failed to disclose that Barton Springs' reasons are merely pretextural.

In having selected Botto for the Water Resources Planner position rather than complainant, Barton Springs merely selected the more qualified applicant and complainant's citizenship status quite obviously played no part in that management decision. It is that simple. Based upon his education and experience, as well as his people skills and demeanor, which were clearly demonstrated to this fact finder only because complainant had subpoenaed him to testify in complainant's case-in-chief, Botto was quite deservedly selected for the position.

We now must examine the third issue presented for adjudication, Barton Springs' request that, as the prevailing party, it be awarded the sum of $51,530.34 at its reasonable attorneys' fees incurred in defending complainant's IRCA charges.

The provisions of IRCA, at 8 U.S.C. § 1324b(h), provide that "In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact."

The applicable procedural regulation dealing with the award of attorney's fees in this type proceeding, 28 C.F.R. § 68.52(c)(2)(v), provides also that "Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed."

I find that Barton Springs has compellingly demonstrated that it is the prevailing party within the meaning of 8 U.S.C. § 1324b(h).

We turn now to resolving the question of whether complainant's argument has been shown to have been without reasonable foundation in law and fact.

By enacting the unfair immigration-related employment practice provisions of IRCA, Congress quite obviously sought to grant a cause of remedial action to those persons upon whom national origin or citizenship status discrimination had been wrongfully practiced.

In granting such persons the right to sue, as it were, Congress also prudently and quite fairly imposed a concomitant duty of proof namely, that those pursuing those causes of action demonstrate the efficacy of their charges by providing a preponderance of evidence in support of such allegations.

Congress also felt strongly that in those instances in which the losing party's argument was without reasonable foundation in law and fact, it would only be equally fair to award reasonable attorney's fees to prevailing parties against whom or which those charges had been unreasonably brought.

In doing so, Congress was merely following the ruling of the U.S. Supreme Court in Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694, 16 F.E.P. 502 (1978), wherein it was held that a court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Id. at 420.

And more recently that court has announced that "the initial estimate of a reasonable attorney's fees is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 109 S. Ct. 939, 103 L. Ed. 2d 67, 49 F.E.P. 1 (1989).

Returning to the inquiry concerning whether complainant's argument is without reasonable foundation in law and fact, I find that it is not.

Even a cursory reading of the detailed sequential events in question disclose that from the very outset complainant was aware that he could not hope to prevail in this proceeding in the absence of his being able to show that Barton Springs was aware, or had actual and determinable knowledge, of his citizenship status at the time it filled the position of Water Resources Planner in June, 1993.

This hearing record is equally clear that OSC was quite aware of that circumstance and so advised complainant during its 120-day investigation period, and quite obviously chose not to file citizenship status discrimination charges against Barton Springs because it could not be determined that Barton Springs was aware of complainant's citizenship status.

Complainant, whose Curriculum Vitae discloses that he has been privileged to have been awarded a Bachelor of Laws Degree in his native country, Sri Lanka, was made aware of that fact, also, very early on and rather than having accepted that circumstance and simply chosen not to file a private action with OCAHO, he decided to become a mischief maker of sorts and followed a preconceived course of frivolous, unreasonable, unfounded, and unrelated allegations in an obvious attempt to harass, inconvenience and subject Barton Springs to significant adverse publicity and institutional embarrassment which was quite obviously intended to force Barton Springs to bring an end

to such despicable conduct by offering complainant a position of employment, be it even a part time position or one of a temporary nature.

Complainant is free to engage in such conduct, but in having done so he has overlooked the obvious namely, that conduct carries consequences, which under these facts equates to having this adverse ruling entered on his claims of citizenship status discrimination and retaliation, as well as having an order entered which grants Barton Springs the sum of $51,530.34, as and for its reasonable attorneys' fees incurred in defending the meritless claims of complainant.

And complainant may not claim surprise upon learning of this $51,530.34 fee shifting ruling since he was advised in writing prior to having filed his OCAHO Complaint that an administrative law judge may, upon finding that a losing party's argument is without reasonable foundation in law and fact, allow a reasonable attorney's fee to a prevailing party. Nor may he complaint that OSC's determination letter of January 6, 1994 did not contain such an admonition.

The only remaining matter to be resolved is that of determining whether Barton Springs' request that it be reimbursed the sum of $51,530.34, as and for its reasonable attorneys' fees in this proceeding, is in order.

In arriving at the requested attorneys' fee, Barton Springs' counsel of record provided the following itemized statement of charges extending from April 15, 1994, the date upon which Ann Clarke Snell, Esquire, and William D. Dugat, III, Esquire, Bickerstaff, Heath & Smiley, L.L.P., entered their appearances as counsel of record for Barton Springs, through January 18, 1995:

Ann Clark Snell, Esquire	
Partner, 187.7 hours @ $185 -	$ 34,724.50
William D. Dugat, III, Esquire	
Associate Attorney, 67.8 hours @ 120 -	8,136.00
Gregg Hudson, Esquire	
Associate Attorney, 3.1 hours @ 75 -	232.50
Jan K. Soderman,	
Paralegal, 4.5 hours @ 45 -	202.50
J. Craig Hopper,	
Law Clerk, 134.9 hours @ 45 -	6,817.50
Total Legal Fees	$ 50,113.00
Total Expenses - copying, postage, messenger, and out-of-pocket expenses	$ 1,417.34
Total Attorneys' Fees	$ 51,530.34

The sum of $51,530.34 is found to be reasonable, both as to the time expended in preparing this case for hearing and the $185 hourly rate charged by trial counsel, Anne Clarke Snell, Esquire, who advises that her usual and customary rate for representing local government entities in litigation is $195 hourly. Similarly, the billing hours and rates for associate counsel, and those covering the efforts of the paralegal and the law clerk, as well as the nature and total sum of the miscellaneous expenses are also found to be reasonable.

Accordingly, I find that Barton Springs is entitled to attorneys' fees in the amount of $51,530.34.

In summary, because complainant has failed to show that Barton Springs violated the provisions of 8 U.S.C. § 1324b(a)(1)(A)(B) and 1324b(a)(5) by having engaged in citizenship status discrimination and by having unlawfully retaliated against complainant for having exercised him rights under IRCA, complainant's March 10, 1994 OCAHO Complaint must be dismissed.

In addition, as the losing party, complainant's argument is found to be without reasonable foundation in law and fact, and it is further found that Barton Springs is entitled to the sum of $51,530.34 as its reasonable attorneys' fees.

Order

Complainant's March 10, 1994 Complaint, alleging citizenship status discrimination and retaliation, in violation of the provisions of 8 U.S.C. §§ 1324b(a)(1)(A)(B) and 1324b(a)(5), respectively, is hereby ordered to be dismissed.

It is further ordered, in accordance with the provisions of 8 U.S.C. § 1324b(h), that complainant pay to Barton Springs the sum of $51,530.34 as reasonable attorneys' fees.

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.