

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

ARNULFO MEDINA,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 95B00065
BEND-PACK, INC.,)
Respondent.)
_____)

FINAL DECISION AND ORDER
(August 9, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Arnulfo Medina, Complainant
Sandy K. Rathbun, Esq., for Respondent

I. Procedural History

On July 12, 1994, Arnulfo Medina (Medina or Complainant) filed a charge dated July 6, 1994 with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The charge alleged that Bend-Pack, Inc. (Bend-Pack or Respondent) discriminated against Medina because of his citizenship status.

By determination letter dated January 5, 1995, OSC informed Medina that "it has not made a determination as to your allegations of unfair immigration-related employment practices . . ." and "[b]ecause the 120-day investigatory and exclusive complaint-filing period specified in 8 U.S.C. § 1324b has ended, . . . you may now file your own complaint."

On April 7, 1995, Medina filed the Complaint at issue against Bend-Pack, alleging citizenship status discrimination in violation of section 102 of the Immigration Reform and Control Act (IRCA), as amended,

8 U.S.C. § 1324b. Medina filed his Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO).

Specifically, Complainant, a Mexican national who claims to have permanent residence status, alleges that he was fired on or about June 3, 1994 after requesting that Respondent grant workers a raise as well as other benefits. Complainant alleges that the manager of Bend-Pack denied such request and "said that for those workers who (had no legal working papers) to leave and to get out of the company." Attachment to the Complaint. Apparently, as one of those who conceded they lacked papers, Complainant did not have a work authorization card, and he was terminated.

On April 12, 1995, OCAHO issued a Notice of Hearing (NOH) which transmitted a copy of the Complaint to Respondent. In addition, the NOH warned the parties that all "proceedings or appearances will be conducted in accordance with Department of Justice regulations, appearing at 28 C.F.R. Part 68.¹

On May 16, 1995, Bend-Pack filed its Answer to the Complaint which denies that it discriminated against Medina on the grounds of his citizenship status. Instead, Respondent asserts that it terminated Complainant because he "walked off the job." Answer at 3. Furthermore, "Benk-Pak [sic] admits that, based on information from the Immigration and Naturalization Service, some Bend-Pak employees were advised that they must provide appropriate work authorization documentation before they could continue working, but denies that Mr. Medina, . . . [was] terminated because of any reason related to . . . [his] work authorization documentation." Id.

On June 14, 1995, an Order of Inquiry was issued asking the parties to comment on whether Medina is eligible to file a citizenship status discrimination complaint under IRCA. As stated in that Order,

[i]n order to be eligible to assert a citizenship status discrimination claim under § 1324b, a complainant must qualify as a "protected individual." See 8 U.S.C. § 1324b(a)(1)(B). As a permanent resident alien, Complainant would qualify as a protected individual. However, under § 1324b(a)(3)(B), a permanent resident alien is not a protected individual where he "fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization. . . ."

¹ See generally 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].

According to the Complaint, Medina obtained permanent resident status on May 12, 1980. He failed to make any entry on the OCAHO complaint form to indicate when, if at all, he applied for naturalization. If he failed to apply for naturalization in a timely fashion, he cannot qualify as a protected individual.

Responses to the Order of Inquiry were to be filed by June 30, 1995. On July 5, 1995, Respondent filed its Response which argues that Complainant is not a "protected individual" for purposes of § 1324b and that therefore the Complaint should be dismissed.

No response was filed by Complainant despite a warning in the Order of Inquiry to the effect that "failure to file a response may result in a ruling adverse to the party who fails to respond."

The result of Medina's failure to respond to the June 14 Order is that I am uninformed whether or when he applied for naturalization and therefore whether he is a protected individual entitled to claim citizenship status discrimination. 8 U.S.C. § 1324b(a)(3)(B). 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 another 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). In accordance with § 68.23(c), failure by Medina to comply with my Order invites me to conclude that his response would have been adverse to him. See 28 C.F.R. § 68.23(c)(1). Therefore, I find that Medina is not a protected individual under § 1324b and is ineligible to file a citizenship status complaint. In addition, Medina's failure to respond to the Order precludes him from introducing evidence "in support of or in opposition to any claim or defense. . . ." Id. at § 68.23(c)(3).

Furthermore, OCAHO regulations provide, in pertinent part, that "[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 or a request for hearing if . . . [he] fails to respond to orders issued by the Administrative Law Judge. . . ." 28 C.F.R. § 68.37(b) and (b)(1). Consistent with OCAHO regulations as well as OCAHO caselaw,² I deem Complainant's failure to respond to my Order to be an abandonment of his Complaint.

² See, e.g., Gallegos v. Magna-View, Inc. 4 OCAHO 628 (1994) (holding that a failure to respond to an order requesting information, in part on whether Gallegos applied for naturalization, to be an abandonment of his complaint); Chavez v. National By-Products, 4 OCAHO 620 (1994) (granting respondent's motion to dismiss on the grounds that complainant failed to reply to an order requesting information).

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SO ORDERED.

Dated and entered this 9th day of August, 1995.

MARVIN H. MORSE
Administrative Law Judge