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

Wahab E. Ekunsumi, Complainant vs. Hyatt Regency Hotel of Cincinnati, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200186.

INTERIM ORDER GRANTING IN PART WITHOUT PREJUDICE, AND DENYING IN PART, RESPONDENT'S MOTION TO DISMISS

Statement

On May 24, 1988, Wahab E. Ekunsumi filed a charge against ``Hyatt Regency Hotel,'' whose address was given in the charge as 5th and Elm Street in Cincinnati, Ohio, with the Equal Employment Opportunity Commission (``the EEOC'') and the Ohio Civil Rights Commission (``the OCRC''). This charge alleged that Hyatt, allegedly an employer with more than 15 employees, had violated Title VII of the Civil Rights Act of 1964 by discharging Mr. Ekunsumi on May 20, 1988, and by previously passing him over for promotion and failing to give him his 6-month evaluation, all because Mr. Ekunsumi's national origin is Nigerian. The ``notice of the charge'' of discrimination sent to Hyatt on May 26, 1988, stated, inter alia;

> While EEOC has jurisdiction (upon the expiration of any deferral requirement if this is a Title VII charge) to investigate the charge, EEOC may refrain from beginning an investigation and await the issuance of the [OCRC's] final findings and orders . . . In many instances the [EEOC] will take no further action . . .

In the absence of any contention otherwise, I assume that this charge is still pending and has not been processed beyond the investigatory state.

On November 2, 1988, the Special Counsel for Immigration Related Unfair Employment Practices of the United States Department of Justice (``the Special Counsel'') received from Mr. Ekunsumi a charge (here called the Special Counsel charge) against ``Hyatt Regency Hotel,'' whose address was given as 5th and Elm Street in Cincinnati, Ohio, alleging that Hyatt had discriminated against

him on May 20, 1988, the discharge date alleged in his EEOC/OCRC charge, in violation of 8 U.S.C. § 1324b (the Immigration Reform and Control Act, herein sometimes called the IRCA). Material portions of the Special Counsel charge are described in ``Analysis,'' infra. The Special Counsel charge stated that a charge based on the same set of facts had been filed with the EEOC; moreover, attached to the Special Counsel charge was a copy of the sworn statement which Mr. Ekunsumi had filed on May 24, 1988, with the EEOC. By letter to Mr. Ekunsumi dated November 8, 1988, the Special Counsel stated, in part:

> Pursuant to the Immigration Reform and Control Act of 1986, the Office of Special Counsel will undertake an investigation of your charge in order to determine whether there is reasonable cause to believe that it is true. If the Special Counsel determines that there is reasonable cause to believe your charge is true and that a complaint should be filed, a complaint with respect to your charge will be brought before a specially designated administrative law judge, Office of the Chief Administrative Hearing Officer, U.S. Department of Justice. 8 U.S.C. §1324b(d)(1).
>
> If within 120 days, by March 2, 1989, the Special Counsel has not filed a complaint regarding this matter, you may file your own complaint directly with such a judge. 8 U.S.C. §1324b(d)(2). If at the end of the 120-day period you choose to file such a complaint, you will have an additional 90 days, until May 31, 1989, in which to do so. Complaints filed after the end of this additional 90-day period will not be accepted.

By letter to Hyatt dated November 8, 1988 (less than 180 days after Mr. Ekunsumi's discharge), the Special Counsel stated, inter alia, that his discharge ``is being investigated as a charge of citizenship discrimination.''

By letter to Mr. Ekunsumi dated March 2, 1989, the Special Counsel stated, in part:

> This is to advise you that as of March 2, 1989, the 120-day investigatory period is over; however, this Office is continuing its investigation.
>
> You are further advised that you may file your own complaint directly with an administrative law judge at any time within 90 days from the end of our 120-day investigative period or until May 31, 1989. 28 C.F.R. §44.303(c)(2). The Special Counsel retains the right to intervene in any action brought by you based upon your charge. Any complaint should be filed with the Office of Chief Administrative Hearing Officer, United States Department of Justice . . .

On April 14, 1989, Mr. Ekunsumi filed the instant complaint with the office of the chief administrative hearing officer. This complaint alleges that respondent violated 8 U.S.C. §1324b by firing Mr. Ekunsumi, but does not specify a date; as previously noted, his EEOC charge alleges that he was discharged on May 20, 1988. Material portions of the complaint are described in ``Analysis,'' infra. By letter dated May 3, 1989, the Special Counsel advised Mr. Ekunsumi and Hyatt that the Special Counsel would not file a complaint regarding ``citizenship status discrimination . . . This

office lacks jurisdiction to make a determination on Mr. Ekunsumi's national origin charge because the Hyatt Regency employs more than 15 employees.''[1]

On May 30, 1989, Hyatt filed a motion to dismiss the complaint which Mr. Ekunsumi had filed against it with the office of the chief administrative hearing officer and which was thereafter assigned to me. Hyatt appears to rely on 28 CFR §44.300(d), which provides:

> No overlap with EEOC complaints. No charge may be filed respecting an unfair immigration-related employment practice described in §44.200(a)(1) [which forbids certain kinds of national-origin discrimination] if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this section, unless the charge is dismissed by the Special Counsel as being outside the scope of this part.

Also relevant to this claim by respondent are the following provisions of 8 U.S.C. §1324b(b)(2):

> No Overlap with EEOC complaints.--No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section [which subsection forbids certain kinds of national-origin discrimination] if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

On June 2, 1989, I issued an order to Mr. Ekunsumi to show cause, on or before June 30, 1989, why Hyatt's motion to dismiss should not be granted. No timely reply has been received from Mr. Ekunsumi, who (as previously noted) is a layman not represented by counsel.[2]

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[1]See 8 U.S.C. §1324b(a)(2)(B); 42 U.S.C. 2000e(b). Hyatt's motion to me contains no averment regarding the size of its work force, and does not request me to take any action on that basis. I note that Mr. Ekunsumi's charges both allege that Hyatt employs more than 15 employees. Hyatt's answer to the complaint admits that it employs more than 3 employees.

[2]By letter to Mr. Ekunsumi dated June 2, 1989, I drew his attention to his right to be represented, at his own expense, by an attorney. No attorney has yet filed a motion of appearance on his behalf.

Discussion

I. The Claim of Discharge because of National Origin

I agree with Hyatt that at least the literal language of 28 CFR §44.300(d) (as well as 8 U.S.C. §1324b(b)(2)) calls for dismissal of the complaint to the extent that it alleges that Hyatt discharged Mr. Ekunsumi because of his national origin.[3]However, I am aware (1) that the EEOC charge is still pending; (2) that at least theoretically, that charge may eventually be dismissed as being outside the scope of Title VII; and (3) that if the national-origin complaint herein is dismissed solely because of the concurrently pending charge before the EEOC alleging a discharge because of national origin, and that portion of the EEOC charge is thereafter dismissed as being outside the scope of Title VII, a proceeding thereafter initiated by Mr. Ekunsumi, again alleging that in May 1988 he was discharged because of his national origin in violation of 8 U.S.C. §1324b, may be subject to dismissal on the basis of 8 U.S.C. §1324b(d)(3), which provides, ``No complaint may be filed respecting any immigration-related unfair employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel;'' I note that Hyatt's answer to the complaint before me alleges that it ``is barred by the statute of limitation specified in 28 CFR §44.301(d)[4]and any other applicable time limitation on complaints.'' This result would strike me as palpably unjust, particularly because Mr. Ekunsumi has not even arguably either failed to take whatever timely action he could have taken to protect his rights, or engaged in any abuse of process by initiating proceedings with more than one agency based on the same allegations of a discharge because of his national origin. His claim that he was discharged on May 20, 1988, in violation of Title VII was set forth in a charge which he filed with the EEOC no later than May 26, 1988. He then waited for 5 months, during which the EEOC failed to dismiss his charge on the ground that it was ``outside the scope'' of Title VII, before filing his November 2, 1988, charge with the Special Counsel. Not until after the Special Counsel (while his investigation was still pending) advised Mr. Ekunsumi by letter

[3]See also 8 U.S.C. §1324b(a)(2)(B), which provides that IRCA's prohibition of discrimination by a person or entity against an individual because of his national origin does not apply to ``discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered'' by Title VII of the Civil Rights Act of 1974.

[4]``If the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice.''

dated March 2, 1989, that he could file a complaint directly with an administrative law judge until May 31, 1989, but not thereafter (see 28 CFR §44.303(c)(1)(2)), and the EEOC had still failed to dismiss his May 1988 charge on the ground that it was outside the scope of Title VII, did he file the instant complaint on April 14, 1989.

I shall dismiss the complaint without prejudice to the extent that it alleges that respondent discharged Mr. Ekunsumi because of his national origin. However, in taking such action, I rely not only on the statutory and regulatory provisions regarding action to be taken with respect to charges filed before both the EEOC and the Special Counsel, but also on the absence of any suggestion that the EEOC would be warranted in dismissing the charge before it as outside the scope of Title VII. Thus, the 1986-1987 edition of the Red Book issued by the American Hotel Association Directory Corporation states at p. 555 that the ``Hyatt Regency--Cincinnati;'' at 151 W. 5th Street in downtown Cincinnati, Ohio, has 484 rooms. I need not and do not consider what action I would take on a showing of (1) a real issue as to whether a respondent is within the scope of Title VII and (2) an arguable case that if not so subject, that respondent is covered by the IRCA.[5]I hope that by the time (if ever) such a problem is presented, the relevant statutes and/or regulations have been clarified so that a national-origin discrimination claim otherwise cognizable under the IRCA is not even arguably subject to dismissal, with prejudice, solely because a timely charge under such provisions was precluded by the fact that EEOC's dismissal of a like charge before it, on the ground that it was outside the scope of Title VII, did not issue until more than 6 months after the discrimination complained of. Cf. Memorandum of Understanding between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration Related Unfair Employment Practices, 54 F.R. 32499 (August 8, 1989); Interim Agreement Between the Equal Employment Opportunity Commission and the Office of Special Counsel for Immigration Related Unfair Employment Practices, 53 F.R. 15904 (May 4, 1988).

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[5]The discrimination provisions of the Civil Rights Act of 1964 do not apply to (1) employers who are not engaged in an industry affecting commerce or who have fewer than 15 employees per day in each of at least 20 calendar weeks per calendar year; (2) Indian tribes; or (3) bona fide, tax-exempt membership clubs. See 42 U.S.C. §2000e(b). Although inapplicable to employers with fewer than 3 employees (8 U.S.C. §1324b(a)(2)(A)). 8 U.S.C. §1324b contains none of the aforementioned limitations on its scope.

II. The Alleged Claim of Discharge Because of Citizenship Status

Hyatt contends that the dismissal of the complaint with respect to discharge because of national origin requires the dismissal of the complaint in its entirety. I disagree. Initially, I disagree with Hyatt that the complaint alleges only discharge because of national origin, and accept Mr. Ekunsumi's contention that the complaint also alleges that he was discharged because of his citizenship status. According to the Special Counsel's memorandum (p. 2) dated August 8, 1989, in preparing his pro se complaint Mr. Ekunsumi used a form complaint designed to accommodate either or both types of allegations. Printed portions of this form state (underlining and brackets also printed) ``[for Citizenship charges insert 2A]/2A (Complainant, include address) is a [citizen], [national], or [intending citizen] of the United States of America, as defined by 8 U.S.C. §1324b(a)(3).'' Mr. Ekunsumi underlined the words ``intending citizen.'' The form specifically called for ``2A'' for ``Citizenship charges;'' moreover, as Mr. Ekunsumi correctly points out, such an allegation would have been immaterial if his allegation of unlawful motive had been limited to national origin.[6] Moreover, paragraph 6 of the printed form states (underlining and brackets in original),'' . . . (the Respondent) knowingly and intentionally [fired] OR [refused to hire] [complainant] because of his/her [citizenship status] OR [---------- national origin] in violation of 8 U.S.C. §1324b.'' Mr. Ekunsumi did not delete any portions of this printed material, but merely underlined the words ``intentionally [fired]'' and inserted the word ``Nigerian'' before the printed words ``national origin.'' In addition, paragraph 7 of the printed form states (underlining and brackets in original), ``[After] or [Although] (Complainant) was [refused employment] or [fired], [the position remained open and (Respondent) continued to seek applications from individuals with (Complainant's) qualifications.] OR [similarly situated individuals of a different citizenship status (or national origin) were not fired.]'' Mr. Ekunsumi did not delete any portions of this material, but merely underlined the words ``fired'' and ``qualifications.''

Hyatt further contends that even if the complaint does include an allegation (as I have found it does) that Mr. Ekunsumi was discharged because of his citizenship status, that portion of the complaint must be dismissed because the underlying charge allegedly affords insufficient support under 8 U.S.C. §1324b(b)(1) and (d)(2).

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[6]Compare 8 U.S.C. §1324b(a)(1)(A), which forbids certain discrimination because of ``such individual's national origin,'' with 8 U.S.C. § 1324b(a)(1)(B), which forbids such action ``in the case of a citizen or intending citizen . . . , because of such individual's citizenship status.”

Hyatt relies upon the fact that on the charge form signed by Mr. Ekunsumi, after the statement that ``Injured Party Was Discriminated Against Because of (check one or both),'' no check mark appears in the box before the word ``Citizenship,'' but a check mark does appear in the box before the words ``National Origin,'' after which appears the handwritten entry ``(Nigerian).''[7] As to the procedurally necessary relationship between a charge and a complaint, I am unaware of any cases arising under 8 U.S.C. §1324b. However, I agree with the Special Counsel that appropriate authority is provided by decisions under Title VII of the Civil Rights Act. I so conclude because both statutes forbid discharge or refusal to hire because of national origin (although with respect to different actors), because under certain circumstances national origin and/or citizenship-status discrimination charges filed with EEOC are referred by it to the Special Counsel and vice versa (see Memorandum of Understanding, supra, and Interim Agreement, supra), and because (as discussed infra) the considerations which underlie such Title VII decisions are likewise present in IRCA cases, See U.S. v Mesa Airlines, 8 U.S.C. §1324b proceeding, Case No. 8820001, July 24, 1989 (Administrative Law Judge Marvin H. Morse), at p. 26. Under Title VII, ``Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.'' General Telephone Co. v. EEOC, 446 U.S. 318. 331 (1980). Thus, in holding that a charge alleging racial discrimination was sufficient to support a Title VII action alleging discrimination on the basis of sex, the Court of Appeals for the Sixth Circuit (within whose jurisdiction the instant case arose) stated (Equal Employment Opportunity Commission v. McCall Printing Corp., 633 F.2d 1232, 1235 (1980)):

> . . . The rule in this Circuit in that the EEOC's complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charges of discrimination . . . Charges of discrimination, which this Court noted are often filed by lay complainants, should not result in the restriction of subsequent complaints based on procedural technicalities or the failure of the charges to contain the exact wording which might be required in a judicial pleading. Tiplet v. E.I. duPont de Nemours & Co., 443 F.2d 125, 131 (6th Cir. 1971).

See also, Farmer v. ARA Services, Inc., 660 F.2d 1096, 1105 (6th Cir. 1981); Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164, 167-169 (7th Cir 1976), cert. denied 429 U.S. 986 (1976); and cases cited. I note, moreover, that the considerations set forth

[7]This charge includes a check mark in a box before the printed entry ``Has completed a declaration of intention to become a citizen,'' and the entry ``10-29-88'' in a blank after the printed entry ``Date of Declaration.'' As previously noted, this allegation is material only to a claim of citizenship-status discrimination.

in these cases as calling for liberal interpretation of charges under the Civil Rights Act of 1964--namely, the fact that they are often filed by lay complainants--are equally true as to charges filed under the IRCA.

I agree with the Special Counsel that Mr. Ekunsumi's allegation of discharge because of citizenship status falls within the scope of the Special Counsel's investigation reasonably expected to grow out of a charge of discharge because of national origin. As the Supreme Court said in Espinoza v. Farah Mfg. Co., 414 U.S. 86,92 (1973):

> . . . there may be many situations where discrimination on the basis of citizenship would have the effect of discrimination on the basis of national origin. In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.

See also, Memorandum of Understanding, supra, 54 FR at 32501. Thus, Mr. Ekunsumi's affidavit which he filed in connection with his EEOC/OCRC charge, and which was eventually forwarded to the Special Counsel, averred that his supervisor at Hyatt discriminated in favor of employees who were ``American born''--an allegation which would bear on both national-origin and citizenship-status discrimination allegations.[8] Moreover, although the scope of the judicial complaint is not limited to the actual EEOC investigation (Woodrum v. Abbott Linen Supply Co., 428 F.S. 860, 862 (S.D. Oh., W.D. 1977)), I note that the Special Counsel did conduct an investigation as to whether Mr. Ekunsumi was discharged because of citizenship status; so advised respondent less than 180 days after Mr. Ekunsumi's discharge; and, in dismissing his charge on May 3, 1989, advised respondent that the investigation had included this issue.

III.

For the foregoing reasons, (1) the motion to dismiss the complaint is hereby granted, without prejudice, to the extent that it alleges that complainant was discharged because of his national

[8]An undated document signed by Mr. Ekunsumi and captioned ``Order to show cause why motion for leave to file reply and judgment in favor of the Plaintiff '' was received by me on August 23, 1989, in an envelope postmarked August 16, 1989. This document states,'' In my charge, I allege both National Origin and Citizenship Status discrimination in violation of 8 U.S.C. §1324b.'' I give little weight to this assertion, in view of the fact that its significance was pointed out by the Special Counsel in an amicus curiae memorandum mailed to Mr. Ekunsumi (inter alia) on July 24, 1989.

origin; and (2) the motion to dismiss the complaint is denied, to the extent that it alleges that complainant was discharged because of his citizenship status.[9]

Dated: February 1, 1990.

NANCY M. SHERMAN
National Labor Relations Board
Division of Administrative Law Judges
Hamilton Building--Suite 1122
1375 K Street, Northwest
Washington, DC 20005-3307

[9]In contending that Mr. Ekunsumi at no time contended that he was discharged because of his citizenship status, respondent relies, inter alia, on an undated document filed by Mr. Ekunsumi, shown by internal evidence to post-date respondent's answer dated May 30, 1989, but filed before August 2, 1989 (the date of respondent's memorandum referring thereto). Until respondent forwarded a copy to me with a covering letter dated January 16, 1990, I had never seen a copy of this document, which according to respondent was submitted to the chief administrative hearing officer. Respondent relies on the following statement in this document: ``It is an unfair immigration-related employment practice for a person or entity to be denied for promotion, and not given a 6 (six) month evaluation, and discharged of his duty because of his National origin and race.'' However, claims of discrimination based on race or with respect to promotion and denial of an evaluation are not cognizable, at least ordinarily, under the IRCA and are not even arguably advanced in Mr. Ekunsumi's Special Counsel charge or IRCA complaint. Moreover, Mr. Ekunsumi's EEOC/OCRC charge contains (under the section ``Cause of discrimination'') a check mark before ``National origin'' but not ``Race;'' and states, inter alia, ``I believe that all of the above actions [discharge, failure to promote, and denial of evaluation] were taken against me because of my national origin, Nigerian.'' In view of the foregoing, I do not believe that this document either negates the existence of a citizenship-status claim, or reasonably misled respondent into believing that no such claim was being advanced.