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

ARANKA M. PALANCZ, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 91200197
CEDARS MEDICAL CENTER, Respondent.	)	

DECISION AND ORDER
(August 3, 1992)

MARVIN H. Morse, Administrative Law Judge

Appearances:

Aranka M. Palancz, pro se.
James S. Bramnick, Esq. and
Elizabeth S. Syger, Esq., for Respondent.

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration and Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien with respect to hiring, recruitment, referral for a fee, or a discharge from employment because of that individual's national origin or citizenship status. . . ." The statute covers a "protected individual," defined at Section 1324b(a)(3) as one who is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee or granted asylum.

> Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in this country.[1] Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General. 8 U.S.C. §1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. §1324b(d)(2).

II. *Procedural History*

A. Background

Aranka M. Palancz (Complainant or Palancz) filed a citizenship and a national origin discrimination charge with the Office of Special Counsel (OSC) against Cedars Medical Center (Respondent or Cedars). Her charge was dated June 1, 1991 and accepted as complete by OSC on June 27, 1991. Complainant checked off both the boxes for national origin discrimination and citizenship discrimination on OSC's pre- printed charge form. The charge does not indicate the date of the alleged discrimination. OSC advised in a letter dated October 24, 1991 that, there is "no reasonable cause to believe that the charge of discrimination is true." In that letter, OSC notified Complainant that despite its determination, she was entitled to file a complaint directly before an administrative law judge within 90 days of receipt of the letter. 8 U.S.C. §1324b(d)(3); 28 C.F.R. §44.303(d)(2). Complainant complied with the deadline set out in OSC's determination letter.

On December 12, 1991, Palancz filed a pro se complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). In her complaint, Complainant specified that she applied for the position in question on or about "November/1990." In Complainant's Description

---

[1] "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986).

of Discrimination she alleged "serious discrimination against my immi-grant status." On an amended complaint form supplied to her by OCAHO, she checked only citizenship status discrimination and not national origin discrimination, in contrast to her charge which alleged both forms of discrimination. Following issuance by OCAHO of a notice of hearing transmitting the Complaint to Respondent, an Answer and Affirmative Defenses to Complaint and Amended Complaint were filed on January 16, 1992. On March 11, 1992, Respondent filed its first Motion for Summary Decision, a transcript of the deposition of Palancz which it had conducted on February 19, 1992, and a Motion to Compel responses to certain unanswered deposition questions.

An initial telephonic prehearing conference was held on March 13, 1992. Inter alia, two issues surfaced during the conference.

(1) In the event that complaint had alleged national origin discrimination, whether or not the ALJ had national origin jurisdiction in this case, as Respondent had already plead in its March 11 Motion for Summary Decision.

(2) Whether Complainant, who had refused to answer numerous questions during Respondent's deposition of her, should be compelled to respond to such questions, denominated in the transcript as certified questions.

B. The National Origin Issue

In the March 11, 1992 Motion For Summary Decision as well as during the first prehearing conference, Respondent counseled that the administrative law judge lacked national origin jurisdiction over Cedars because it employed more than fourteen (14) employees. 28 C.F.R. §68.38. Administrative Law Judge (ALJ) national origin jurisdiction extends only to employers employing between four (4) and fourteen (14) employees. 8 U.S.C. §1324b(a)(2)(B); U.S. v. Huang, 1 OCAHO 288 (1/11/91), aff'd, Ching-Hua Huang v. United States Dept. of Justice, No. 91-4079 (2d Cir. Feb. 6, 1992); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

Pursuant to Respondent's supplement to its first summary decision motion, supported by the affidavit of its Vice President of Human Resources stating that it employs approximately one thousand eight hundred forty (1,840) employees, I dismissed Complainant's national origin claim. The March 24, 1992 Order Granting Respondent's

Motion for Summary Decision in Part disposed of the national origin issue.

C. The Deposition Issue

During Respondent's attempted deposition of Complainant on February 19, 1992, it certified twenty four (24) questions which Complainant refused to answer. Some of the deposition topics which Complainant refused to address, regarding the alleged discriminatory non-hire are:

> --her educational background,
>
> --her past employment experience and the names of her prior supervisors,
>
> --the character of her current employment, including her current rate of compensation,
>
> --her 1991 income, including income from her primary place of employment and from her secondary employment, if any,
>
> --how she heard about the job opening at Cedars and
>
> --names of other individuals who might have some knowledge about the event(s) in question.

In response to Respondent's motion to compel responses to the deposition questions, I directed Complainant to review the transcript of the deposition and "to either answer each certified question or explain the reason for her refusal to answer." This direction was both verbal during the March 13 prehearing conference and written in the March 17, 1992 prehearing conference report and order. The order stipulated a deadline of ten days after March 27, 1992. Complainant did not comply.

Subsequently, my April 2 Order on Procedure stated,

> Complainant's attention is drawn to . . . the March 17 order. As of this date, the required deposition transcript corrections and the written responses to the deposition question cited in the March 17 order have not been filed. This order extends the filing date for those correction and responses . . . to April 17, 1992.

Id.

Instead of complying with my April 2 direction to address the questions certified in the deposition transcript, Complainant filed a request for relief from such compliance. Statement, April 11, 1992.

Her explanation was that she did not understand the direction, quoted above.

My April 24, 1992 order denied Complainant's request for relief and instead repeated the direction to Complainant to address the certified questions. This reiteration included a warning that should Complainant persist in her refusal to meet her litigatory obligation, she risked dismissal of the complaint because of her constructive abandonment of the complaint. Order, April 24, 1992; 28 C.F.R §68.37(b)(1). Complainant did not comply with the April 24 instructions. Complainant never has responded to any of Respondent's certified questions, despite numerous instructions by me to do so. Instead she filed the statement dated May 2 filed May 13, 1992, that "I do withdraw my consent to my deposition taking, because I feel I was being taken advantage of." The deposition issue, which initially came to my attention during the first prehearing conference, remains unresolved.

D. Respondent's Proposed Stipulation and First and Second Requests for Production

On March 27, 1992, Respondent, in compliance with directions in the March 17 prehearing conference report and order, filed copies of a proposed stipulation and request to produce.

At no time did Complainant indicate that the information and docu-ments requested by the Respondent were not in her control. On the contrary, in a statement dated March 30, 1992, she advised that,

> [t]he only person who would need my documents would be His Honour the Chief Administrative Officer to base his decision upon. I am willing to send my papers to the Office of the Chief Administrative Officer. Furthermore, the only case to review my papers would be when Cedars Medical Center would wish to hire me.

I draw the inference from Complainant's recitation that she had and continues to have control over the information and documents requested by Respondent, but prefers to dictate the time and place she will produce them.

The April 2 order instructed Complainant not only to answer the certified deposition questions as noted earlier, but also to reply to each of Respondent's twelve (12) proposed stipulations of fact. Additionally, this order excused Complainant from having to reply to that portion of Respondent's pleading entitled, "Statement of Law and Procedure." Complainant was excused because of her pro se status, and not

because that statement was objectionable. On April 3, Respondent filed a motion to compel and for sanctions in response to Complainant's conduct respecting her failure to comply with the previous requests for production.

In its April 3 Motion to Compel and for Sanctions, Respondent recites the following unrebutted chronology regarding its requests to Complainant for production of documents.

February 19 and 20 -- Respondent serves its first and second requests for production, requesting production not later than March 25 and 26, 1992.

March 24 --Respondent's counsel leaves message on Complainant's telephone answering machine, requesting that Complainant call counsel's office and offering to arrange either a single day for delivery or pick up by counsel's employee of the requested documents. The distance between Complainant's home and counsel's office is fifty miles.

March 26 --Counsel reiterates the above information in a letter, again requesting a telephonic response from Complainant.

March 27 --Complainant telephones Counsel's office stating that the requested documents would be available for pick up on April 1 at the Complainant's home.

April 1 --Counsel's employee drives to Complainant's home to pick up the documents. No documents were produced. Employee is given an envelope containing a letter. The letter states in pertinent part, "The only person who would need my documents would be His Honour the Chief Administrative Officer to base his decision upon."

In her Statement, filed April 20, 1992, Complainant replied to nine (9) proposed factual stipulations. On the whole these replies were inadequate and/or incomprehensible. She failed to address three stipulations, i.e. ## 8, 9 and 11. Besides repeating the order to Complainant to answer the certified deposition questions, as noted earlier, the April 24, 1992 order characterizes Complainant's April 20 filing, as follows,

> The "statement" is so procedurally and substantively deficient as to constitute noncompliance with the Judge's orders and with the rules of practice and procedure, even taking into account Complainant's pro se status.

Id.

Presumably in response to the April 24 order, Complainant addressed proposed stipulations ##8, 9 and 11 in a cursory fashion, in her statement filed May 13, 1992. In that statement she also offered her exclusive reply to Respondent's motion to compel. "Mr. Bremnick requested private information that according to the Privacy Act are illegal even to request."

E. Other Procedural Aspects of the Pleadings

Complainant made four filings during the course of this litigation. On June 6, 1991, she filed the OSC charge. On December 12, 1991, she filed the amended complaint. On April 20, 1992 and May 13, 1992, she filed documents which she denominated as "Statement." The former was dated April 11, 1992 and the latter was dated May 2, 1992.

These filings are significantly flawed. Specifically, most lacked certi-ficates of service and were filed in an untimely manner. Complainant was notified of procedural requirements not only by the rules forwarded to her by OCAHO, but also through the orders of January 27, 1992 and April 24, 1992 which dealt with these particular procedural requirements.

On March 18, 1992, Respondent supplemented its first motion for summary decision. It filed a second motion for summary decision on April 20, 1992. In my order of April 24, I explicitly notified Complainant of her responsibility to respond to these motions and extended the deadline for her reply.

> Complainant is on notice that I will expect a timely response to Respondent's Motion for Summary Decision, dated April 16. That motion, presently pending, was served on April 16. The rules of practice and procedure provide that responses to motions for summary decision must be filed within ten days after service. 28 C.F.R. §68.38(a). When a party serves a document on another party by mail that deadline is extended to 15 days. 28 C.F.R. §68.8(c)(2). Service is defined as the date of mailing, not receipt. 28 C.F.R. §68.8(c)(1). Complainant's response would have been due May 1. However, to provide Complainant a full 15 days from today's date to respond to all matters discussed in this order, a response to the motion for summary decision will be timely if filed, i.e., received by the Judge, by May 12, 1992. (emphasis added)

Id.

To date, Complainant has not responded to Respondent's summary decision motions.

III. *Discussion*

A. Complainant Failed to Comply with the Judge's Orders to Cooperate with Respondent

Complainant alleges that Respondent discriminated against her on the basis of citizenship status by not hiring her for a position at Cedars. As previously discussed at II. B. supra, as a matter of law Complainant's citizenship status discrimination charge is the exclusive allegation before me. In furtherance of its answer to the complaint, Respondent has:

(1) sought to depose Complainant,

(2) requested that Complainant produce certain specified documents, and

(3) requested that Complainant respond to Respondent's stipulation of facts.

Complainant has utterly failed to cooperate during discovery, and has failed to respond to the motions for summary decision.

I have repeatedly ordered Palancz to accede to Respondents discovery and stipulation requests and to respond to the motions for summary decision. The Bench informed Complainant as to those of Respondent's pleadings requiring her response and instructed her regarding the required structure of such a response. The Bench exerted substantial effort to provide Complainant with an opportunity to pursue her complaint. The fact that I instructed her to answer the certified deposition questions on at least four separate occasions, demonstrates the extent of that effort. First Prehearing Conference, March 13, 1992; First Prehearing Conference Report and Order, March 16, 1992; Order on Procedure, April 2, 1992; Order, April 24, 1992. The Bench provided Complainant similar instruction in other aspects of the litigation.

In addition to instructing Complainant regarding her litigation obligations, I modified deadlines, extending to Complainant ample opportunity to pursue her claim. I also informed her of the potential consequences of her continuing failure to meet those obligations. These measures attempted to maximize the feasibility of Complainant's compliance and to avoid and/or postpone an imposition of sanctions.

> Despite my instructions, deadline modifications, and warnings and despite Respondent's offers of assistance to the Complainant, Palancz engaged in a persistent evasion of her obligations as a litigating party. She has flagrantly disregarded the judge's orders and has rebuffed Respondent's efforts at civility. She apparently does not recognize that a litigating forum is an even playing field where the judge, not the parties, is in charge of the conflict. See, e.g., STANDARDS RELATING TO TRIAL COURTS §2.50 (American Bar Ass'n 1992) (". . . the court, not the lawyers or litigants, should control the pace of litigation.")

Complainant's case suffers from fundamental procedural shortfalls. Complainant has failed to remedy these shortfalls, even though instructed to do so and warned of the consequences of failure to do so. Complainant has provided no content to her barebones allegations. Although advised to supply specific facts regarding her allegations, few have been supplied. Such facts are reasonably necessary to resolve this dispute.

Accordingly, pursuant to 28 C.F.R. §68.37(b)(1), I impose the appro-priate sanction. U.S. v. Nu Look Cleaners of Pembroke Pines, Inc., Action by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge's Decision and Order, 1 OCAHO 274 (12/5/90) at 8 (ALJs are authorized to compel discovery and to sanction non-compliance to such orders.)

B. Constructive Abandonment

Complainant has not abandoned her complaint in fact, as evidenced, inter alia, by her periodic telephonic inquiries to OCAHO regarding the status of her case. Nevertheless, the OCAHO Rules of Practice and Procedure provide that a complaint can be treated as abandoned as a matter of law, i.e. constructively abandoned.[2] The rules state in pertinent part:

[2] BLACK'S LAW DICTIONARY 283 (5th ed. 1979) (The term "constructive" means "[T]hat which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments. That which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, or made out by legal interpretation; the word 'legal' being sometimes used here in lieu of 'constructive.'")

> A party shall be deemed to have abandoned a complaint or a request for hearing if . . . [a] party or his or her representative fails to respond to orders issued by the Administrative Law Judge.

28 C.F.R. §68.37(b); 28 C.F.R. §68.37(b)(1).

IRCA jurisprudence applying the abandonment doctrine is as yet scant. However, the doctrine was applied recently by an ALJ in an employer sanctions enforcement case under 8 U.S.C. §1324a. There, in similar fashion to the case at bar, a pro se party filed an insufficient pleading and failed to comply with the judge's order to amend. The pertinent portions of that decision state:

> Because Respondent has failed to respond adequately and has ignored the opportunity to cure its flawed answer and because Respondent did not expressly deny the allega-tions of the complaint, this Decision and Order grants judgment on the pleadings to [Complainant]. . . . Respondent's failure to comply with my order cannot be permitted to frustrate sound case management. . . [B]ecause Respondent failed to respond by March 23 to the March 2 Order on Procedure, I deem Respondent to have abandoned its request for hearing.

U.S. v. El Dorado Furniture Manufacturing Inc., 3 OCAHO 417 (4/2/92) at 3; see also Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962).

As stated in dicta in an 8 U.S.C. §1324b case, failure to respond to explicit directions contained in three orders of the judge is ground for dismissal as an abandonment. 28 C.F.R. §68.37(b)(1). Egal v. Sears Roebuck and Co., OCAHO Case No. 91200173 (7/23/92).

C. Analogy to Federal Rule of Civil Procedure 37(b)

The rules of this forum provide that the Federal Rules of Civil Procedure be used to supplement the IRCA rules where necessary.

> The Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by other applicable statute, executive order, or regulation. 28 C.F.R. §68.1.

28 C.F.R. §68.1.[3]

---

[3] It is a common practice for a court of limited jurisdiction to borrow developed jurisprudence from other fori and apply that jurisprudence to its own forum. See, e.g., Dusha v. Commissioner of Internal Revenue, 82 T.C. 592 (April 9, 1984) (Applying

(continued...)

Accordingly, I apply Federal Rule of Civil Procedure 37(b). Rule 37(b) serves as an illuminating analogue to 28 C.F.R. §68.37. Rule 37(b) states in pertinent part:

> (2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among other the following
>
> . . .
>
> (C) An order . . . dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;
>
> . . .

Rule 37(b) jurisprudence delineates when a trial court is justified in compelling discovery and defines the parameters of a trial court's discretion in the imposition of sanctions on parties disobedient to an order in aid of discovery.

The Supreme Court has held that a trial court must consider the following factors when issuing an order to compel in the discovery context:

> (1) Does the party control the information and documents in question? In other words, is a party's failure to produce due to that party's inability or is that failure instead due to that party's "willfulness, bad faith or any fault of [that party]?";
>
> (2) Is it possible that the requested information/documents might prove crucial in the litigation outcome?

Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197 (1958).

Because the facts of this case arise in the Eleventh Circuit, the law of that circuit is particularly authoritative in this case. Eleventh Circuit jurisprudence is replete with applications of Societe Internationale. The circuit determined that a party which has control of, i.e., access to, legitimately requested documents must produce them. Searock v. Stripling, 736 F.2d 650 (11th Cir. 1984). The Eleventh Circuit has also applied the other Societe Internationale factor(s). Chase & Sanborn Corp., Granfinanciera v. Nordberg, 872 F.2d 397 (11th Cir. 1989); Searock, 736 F.2d at 653.

---

[3](...continued)
Federal Rule of Civil Procedure 37(b) to a case arising under Rule 104(c), Tax Court Rules of Practice and Procedure.)

Rule 37(b) jurisprudence teaches that non-compliance with a court's order to comply with a discovery request exposes the non-complying party to judicially-imposed sanctions. Such sanctions serve both a penal and a deterrent function. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 537 (1976); Tolliver v. Northrop Corp., 786 F.2d 316 (7th Cir. 1986). Sanctions must also be imposed to preserve the integrity of the judicial system. Wabash R.R., 370 U.S. at 630-631. The following Fifth Circuit statement explains the rationale for sanctions in this area of the law.

> Regardless of [a plaintiff's] intentions, or inattention, which led to the flouting of discovery deadlines, such delays are a particularly abhorrent feature of today's trial practice. They increase the cost of litigation to the detriment of the parties enmeshed in it; . . . Adherence to reasonable deadlines is critical to restoring integrity in court proceedings.

McLeod, Alexander, Powel and Apfel v. Quarles, 894 F.2d 1482, (5th Cir. 1990), quoting Geiserman v. MacDonald, 893 F.2d 787, 792 (5th Cir. 1990).

Dismissal is the appropriate sanction for a party that has acted in bad faith. Id. at 1486. The Supreme Court held that the actions, described below, of the non-complying party in National Hockey League were in bad faith.

> [C]rucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and in many instances, beyond the eleventh hour, and notwithstanding admonitions by the Court . . . the Court must and does conclude that the conduct of the plaintiffs demonstrates a callous disregard of responsibilities . . . The practices of the plaintiffs exemplify flagrant bad faith, when after being expressly directed to perform an act by a date certain, viz. June 14, 1974, they failed to perform . . .

Id. at 2779, quoting and affirming the trial court, In Re: Professional Hockey Antitrust Litigation, 63 F.R.D. 641 (E.D. Pa. 1974). See also Buchanan v. Bowman, 820 F.2d 359 (11th Cir. 1987); Kleiner v. The First National Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985). Where a party has conducted itself in bad faith and where it has defied court orders to comply with discovery, a trial court is not required to warn a party of dismissal before imposing such a sanctions When a trial court also issues a warning, dismissal is unequivocally justified. Tolliver, 786 F.2d at 319.

A recent United States District Court decision is remarkably similar to the case at bar. Thomas v. Victoria's Secret Stores, 141 F.R.D. 456

(S.D. Oh. 1992). In that case a pro se plaintiff alleged employment discrimination when discharged by her employer. During the pleading stage of the litigation the de f endant/employer made numerous dis-covery requests. When the defendant attempted to depose the plaintiff, she refused to answer a number of questions. Upon defendant's motion, the judge ordered the plaintiff to make herself available for a second deposition and to answer all relevant questions. Despite the defendant's numerous efforts to accommodate the plaintiff's schedule, the plaintiff never attended the second deposition. The district court held,

> One of [the] rules [of litigation] . . . is the need for a party who has claimed wrongdoing on the part of another to appear at a deposition and to testify truthfully as to facts within her knowledge. If a party chooses not to fulfill that obligation, even after a clear court order is issued, that party is not treated unfairly if the case is dismissed.

Id. at 460. See also Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989) ("While dismissal is an extraordinary remedy, dismissal upon disregard of an order, especially where the litigant has been forewarned, generally is not an abuse of discretion. See State Exchange Bank v. Hartline, 693 F.2d 1350, 1352 (11th Cir. 1982) . . . If a pro se litigant ignores a discovery order, he is and should be subject to sanctions like any other litigant.")

I apply the rules and caselaw of this forum as amplified by Federal Rule 37(b) and its jurisprudence. It is undisputed that Complainant has, and has had throughout the pendency of this litigation, control of the information and documents requested by the Respondent. Addi-tionally, it is beyond doubt that Respondent would be prejudiced were this case to go to a confrontational evidentiary hearing without respon-ses to its discovery requests, i.e., that the requested information and documents must be crucial to the outcome.

Despite Respondent's repeated motions and despite repeated accom-modations and orders by the Judge, Complainant has failed and refused to answer the certified deposition questions. The deposition issue remains unresolved, due to Complainant's prolonged evasion of her responsibilities vis a vis the deposition. Regarding Respondent's request for production of documents, Complainant has demonstrated an abysmal lack of response and civility. Her responses to Respondent's proposed stipulations, provided only after coaxing from the Bench, are incomplete. Although the Bench has taken a paternalistic approach toward this pro se Complainant, ultimately she cannot use that status to avoid the sanctions dictated by her willful conduct.

Complainant's litigation conduct is procedurally flawed. Many of her filings were untimely. KPMG Peat Martwick of Puerto Rico v. United States Immigration and Naturalization Service, 943 F.2d 91, 93 (1st Cir 1991) (When petitioner's request for hearing is out of time in an employer sanctions context, "the Attorney General's imposition of the order shall constitute a final and unappealable order.") Most lacked certificates of service. Complainant never addressed Respondent's motions for summary decision. Even regarding these mechanical procedures, Complainant disregarded the judge's orders.

I find and conclude that Complainant's chronically recalcitrant conduct in this litigation epitomizes the bad faith standard set out by the Supreme Court. National Hockey League, 427 U.S. at 2779. I am satisfied that virtually any one of her considerable lapses would justify an imposition of sanctions. However, I here consider Complainant's lapses in the aggregate and in context of my numerous instructions, extensions and warnings. Autexpo. S.p.A. v. Midas International Corp., No. 81 C. 5818 (N.D. Ill. 1988) ("Were plaintiff's failure to produce . . . an isolated incident we might well find dismissal an unduly harsh sanction. However, this sequence of events, suggests a 'willful pattern of disregard for the court's orders and rules,' Ellingsworth, 665 F.2d at 185, and calls for the sanction of dismissal."). Such consideration leads to the inescapable conclusion that in the legal sense of the term, as defined in 28 C.F.R. §68.37, Palancz has abandoned her complaint.[4] Accordingly, I dismiss the complaint.

IV. *Attorney's Fees Denied*

Respondent asks reimbursement of attorney's fees pursuant to 8 U.S.C. §1324b(h). Subsection (h) of Section 1324b authorizes such fee shifting in the judge's discretion in favor of a prevailing party (other than the United States) "if the losing party's argument is without reasonable foundation in law and fact."

---

[4] The outcome of this case turns on application of 28 C.F.R. §68.37. However, analysis of the file suggests that Complainant's charge with OSC may have been filed out of time. On the OCAHO amended complaint form, Complainant indicates somewhat ambiguously that she was "not hired on or about November/1990." Complainant filed a charge with OSC on June 6, 1991. More likely than not, this filing did not meet the 180 day statutory charge filing deadline. The period counting from as late as December 1, 1990 to June 6, 1990 exceeds the 180 day statutory time frame for filing charges of IRCA prohibited discrimination. 8 U.S.C. 1324b(d)(3). Untimely filing of a charge is not jurisdictional. U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89); Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (8/8/90); Grodzki v. OOCL (USA), 1 OCAHO 295 (2/13/91).

The closest statutory analogue to subsection (h) is the formulation in Title VII of the Civil Rights Act of 1964 as amended. The Title VII standard for determining whether to award attorney's fees to a prevailing respondent was discussed in a recent ALJ opinion.

An outcome identical to that reached in this Decision and Order would also have been reached had the decision turned instead on this forum's rule on sanctions for failure to obey orders to compel discovery and sanctions. 8 C.F.R. §68.23. Had the Bench applied §68.23, the Complainant would have been precluded from offering testimony or evidence regarding those issues which she refused to address in the context of Respondent's discovery. Here where such unaddressed issues are so fundamental and pervasive, there is no significant difference between the consequences of preclusion and dismissal.

> Under Title VII, the standard is whether the non-prevailing Complainant's cause of action is "frivolous, groundless and without foundation, even though not brought in bad faith." See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) ("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 bad faith"). An award of attorneys' fees to a meritorious defendant is intended to "deter the bringing of lawsuits without foundation." Id. at 420.

Egal, OCAHO Case No. 91200173 at 14.

The discussion of prevailing party status in context of Equal Access to Justice Act fee shifting principles as applied to cases under 8 U.S.C. §1324a is also informative. See U.S. v. G.L.C. Restaurant Corp., OCAHO Case No. 89100063 (7/15/92) at 8 (finding prevailing party status for respondent despite dismissal before trial at request of com-plainant). Here, Cedars is obviously the prevailing party in fact. Consistent with the analysis in G.L.C. Restaurant, I conclude that Cedars is the prevailing party as a matter of law, even though the case failed to reach a merits hearing.

As a theoretical matter, the fact that a case is resolved without having reached the confrontational evidentiary phase of the hearing process does not preclude a finding that a party's "argument is without reasonable foundation in fact or in law." Complainant's behavior before the forum as already characterized in this Decision and Order provides a powerful impetus to order fee shifting. However, recognizing the relative resources of the parties, including communication skills, I exercise my discretion and withhold an award of attorney's

fees. Accordingly, it is unnecessary to decide whether Complainant's "argument" lacks a reasonable factual and legal foundation.

V. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, motions and accompanying documentary support as submitted by the parties. All motions and other requests not previously disposed of, are denied. Accordingly, as more fully explained above, I find and conclude that Complainant has abandoned her complaint as a matter of law. Accordingly, the com-plaint is dismissed. 8 U.S.C §1324b(g)(2). The hearing is canceled.

Pursuant to 8 U.S.C. §1324b(g)(1), this Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 3rd day of August, 1992.

MARVIN H. MORSE
Administrative Law Judge