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

KRZYSZTOF ZARAZINSKI, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00152
ANGLO FABRICS, Respondent.	)	

ORDER

Complainant, who was born in Poland and is a naturalized U.S. citizen, filed a complaint in this case alleging an Unfair Immigration-Related Employment Practice against Anglo Fabrics ("Respondent"). The complaint specifically alleges that Respondent knowingly and intentionally failed to rehire Complainant for the job of floorman because of Complainant's citizenship status and national origin.

Apparently, Complainant was employed by Respondent for four years as a floorman until he suffered a work-related accident. According to Complainant, he was laid off his job and was not rehired or recalled by Respondent because of his national origin and citizenship status.

Respondent is a company located in Massachusetts which employs more than fifteen employees. Respondent filed its answer to the complaint on August 11, 1992, generally denying the allegations of the complaint relating to discriminatory conduct.

On August 20, 1992, I issued a standard pretrial Order directing the parties to, inter alia, begin discovery. I also set the case for an evidentiary hearing to be held on December 7, 1992, in Worchester, Massachusetts.

As of this date, there has not been any prehearing motions filed by either party. Complainant, however, is not represented by counsel and

it is understandable that he does not have the requisite understanding of the discovery tools to develop his case for summary decision or hearing.

The Respondent, on the other hand, is represented by counsel, but he has advised this office that there are material facts in dispute in this case and that he does not plan on filing a motion for summary decision. I do not completely understand why Respondent does not intend on filing a motion for partial summary decision, because it is clear from the record that I do not have jurisdiction to determine Complainant's allegations of national origin discrimination. Moreover, after completing an investigation, the Office of Special Counsel determined that there was insufficient evidence to find reasonable cause to believe Complainant was discriminated against by Respondent.

The jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a) (1)(A) is necessarily limited to claims against employers employing between four and fourteen employees. See 8 U.S.C. § 1324b(b)(2). Since it is undisputed from the record that Respondent employs more than fourteen employees, it seems clear that I do not have jurisdiction to determine Complainant's allegations of national origin discrimination.

Complainant is not entitled to an evidentiary hearing merely because he filed a complaint with the Chief Administrative Hearing Officer ("CAHO"). The regulations that govern these proceedings do provide for summary decision. See 28 C.F.R. § 68.38. Moreover, an administrative law judge, like a district court, may, sua sponte, enter summary judgment against a party when the party has been given adequate notice that summary judgment may be imposed against it. Enrique Martinez and Merlinda Martinez, Individually and d/b/a Enrique's Restaurant v. United States Department of Justice Immigration and Naturalization and Office of the Chief Administrative Hearing Officer (Petition for Review from Order of Chief Administrative Hearing Officer, No. 91-4792) (5th Cir. March 30, 1992); NL Industries, Inc. v. GHR Energy Corp., 940 F.2d 957, 965 (5th Cir. 1991); 10A C. Wright and A. Miller, Federal Practice and Procedure, section 2720, at 27-28 and n. 16 (1983). The purpose of this order is to notify the parties that I intend on obtaining the necessary factual information from both parties to determine whether or not a summary decision is appropriate in this case.

I am concerned that because Complainant is pro se that the necessity for an evidentiary hearing can not be determined until I have had an opportunity to learn what the specific factual differences are between the parties and what, if any, evidence Complainant can show that may prove Respondent failed to rehire him because of his citizenship status. I will therefore set forth the legal factors that must be considered in determining citizenship discrimination, including the respective burdens of producing evidence in a disparate treatment case. After I have set forth the applicable law, I will require each party to respond to a number of interrogatories to enable me to determine if a summary decision in this case is appropriate.

As first applied in United States v. Mesa Airlines, Nos. 8820001, 88200002, 1 OCAHO 74 (July 24, 1989), appeal dismissed, No. 89-9552 (10th Cir. 1991), the disparate treatment analysis of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k) (1964), is applicable to IRCA discrimination cases. In order to prevail on a disparate treatment issue, an IRCA complainant, just as a Title VII plaintiff, must show deliberate discrimination intent of the part of the employer. Statement of President Ronald Reagan upon signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1537 (Nov. 10, 1986); Salazar-Castro v. Cincinnati Public Schools, No. 90200373, 3 OCAHO 406 (Feb. 26, 1992).

The Complainant's claim of citizenship discrimination, therefore, may be analyzed under the "disparate treatment model," which applies when an "individual [has been] singled out and treated less favorably than others similarly situated on account of [citizenship]." Gay v. Waiters and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982). Direct or circumstantial proof of discriminatory motive is required. Spaudling v. University of Wash., 740 F.2d 686, 700 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

The Ninth Circuit has described the respective burdens of producing evidence in disparate treatment cases:

> In order to prevail in Title VII disparate treatment case, a plaintiff must first establish a prima facie case of discrimination. The burden of production then shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment decision. If the defendant carries its burden, the plaintiff is then afforded an opportunity to demonstrate that the 'assigned reason' was 'a pretext or discriminatory in its application.'

Diaz v. American Tel. and Tel., 752 F.2d 1356, 1358-59 (9th Cir. 1985) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (emphasis in Diaz). However, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dep't. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981). "'[T]he district court must decide which party's explanation of the employer's motivation it believes.'" Casillas, 735 F.2d at 342 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983)).

The McDonnell Douglas case enumerated the elements of Complainant's initial burden of establishing a prima facie case of discrimination; Complainant must show:

i) that he belongs to a protected class;

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 qualifications.

In order to determine whether or not there are any material facts in dispute in this case, I hereby direct that the Respondent file on or before November 30, 1992, affidavits or statements, including attach-ment of relevant documentation in support thereof, from witnesses with personal knowledge of the facts to answer the following interrogatories:

1. State the nature of Respondent's business, location and number of employees who worked for the company on or about July 1, 1991.

2. When was Complainant hired by Respondent and for how long was he employed? What was his job assignment, duties and respon-sibilities?

3. After Complainant was laid off, did he make application for employment with Respondent, either in writing or orally? If so, explain circumstances of application.

4. If Complainant was not rehired or recalled, state the specific reasons why he was not recalled or rehired.

5. State whether or not the Respondent had any policy in July of 1991 not to hire either naturalized U.S. citizens or citizens whose national origin was Polish. What was Respondent's hiring policy?

6. State, if known, how many employees who were employed by Respondent during 1991 were either U.S. citizens by birth or naturalized citizens. In order to answer this question, you should submit selected I-9 forms supporting your employment practice.

7. Complainant states in his complaint that Respondent intimated, threatened, coerced or retaliated against him because he filed or planned to file a complaint. In support of this allegation, Complainant says that "Anglo told me not to file this complaint." Please identify who Anglo is and what he may or may not have said to Complainant concerning this allegation.

8. Was Complainant qualified for any job that he applied for, including floorman?

9. After Complainant applied for a job with Respondent in July 1991, did Respondent continue to seek to employ others who were similarly qualified for the job?

It is further ORDERED that Respondent shall submit a memorandum of law on or before November 30, 1992, on the issue of whether a naturalized U.S. citizen who alleges discrimination based on an employer hiring only U.S. citizens by birth is making a claim of citizenship status discrimination or national origin discrimination. See Espinoza v. Farah Manufacturing Company, 414 U.S. 86 (1973).

It is further ORDERED that Complainant Zarazinski shall answer the following interrogatories by filing, on or before November 30, 1992, a written statement and/or submitting papers or documents including statements of third parties to prove:

1. When he became naturalized citizen.

2. What his prior work duties had been during the four years he was employed by Respondent. Be specific.

3. After Complainant was laid off work because of work-related injuries, did he file an application for a job with Respondent? Who did Complainant talk with after he was laid off about being rehired by Respondent, and what was said concerning Complainant wanting to return to work? What, if any, reason was given to Complainant by Respondent as to why Respondent did not or could rehire him for work.

4. What specific jobs did Complainant apply for and what were Complainant's qualifications for those jobs?

5. What specific evidence does Complainant have to prove that he was not hired or recalled to work by Respondent because he was a naturalized U.S. citizen?

6. You have stated in your complaint that Anglo told you not to file a complaint. Did he state what would happen to you if you did file a complaint? Did Anglo or any other employee or supervisor of Respondent threaten to do anything to you if you filed a complaint of discrimination? If so, identify that person and state what, if anything, was said to you.

Either party may also submit to this office any factual information, supported by appropriate affidavit, that they believe is important to enable the court to decide if this case can be decided by summary decision.

It if further **ORDERED** that the evidentiary hearing scheduled for December 7, 1992, is continued until further order.

SO ORDERED this 6th day of November, 1992.

ROBERT B. SCHNEIDER
Administrative Law Judge