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

FRANK THOMAS BROWN, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 91200231
BALTIMORE CITY PUBLIC SCHOOLS, Respondent.	)	

DECISION AND ORDER GRANTING MOTION TO DISMISS
(June 4, 1992)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Frank Thomas Brown, pro se.
Eileen Carpenter, 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. . . ." Also prohibited is intimidation or retaliation as the result of recourse to protection under §1324b, and over-documentation in compliance with the employer sanctions program under 8 U.S.C. §1324a. Section 1324b covers "protected individual[s]." Such individuals include aliens lawfully admitted for either permanent or temporary residence. 8 U.S.C. §1324b(a)(3).

Congress established the §1324b cause of action out of concern that the employer sanctions program, 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. "Joint Explanatory Statement of the Committee of Conference," Conference Report, H.R. REP. NO. 1000,

99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must initially 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).

In the event that OSC does not file a complaint before an administrative law judge within a 120-day period, IRCA permits private actions. Upon receipt of notification by OSC that it will not file a complaint, the person making the charge has 90 days to file a complaint. 8 U.S.C. §1324b(d)(2).

II. *Procedural Summary, Including Discussion*

Complainant, Frank T. Brown, Jr. (Brown), filed a discrimination charge with OSC against the Baltimore City Public Schools (BCPS) on August 6, 1991. OSC advised Complainant by letter dated December 6, 1991 that it had determined not to file a complaint. On December 9, 1991, OSC wrote Brown that its previous letter had been sent to him "mistakenly." In fact, the second letter stated, "we are still investigating your charge." In that letter, OSC advised further that because it had not filed a complaint within the 120 day statutory investigation period, Brown could file his own complaint no later than 90 days from December 9, 1991.

On December 20, 1991, Brown filed a holographic pro se complaint dated December 15, 1991. On January 21, 1992, he filed an amended complaint dated January 17 on a form presumably provided by the Office of the Chief Administrative Hearing Officer (OCAHO) for complaints pursuant to 8 U.S.C. §1324b. In the blanks on the amended complaint form "for National Origin Charges," he identified himself as a permanent resident alien of South African national origin. He left blank the "Citizenship Charges" portion of the complaint form. In his complaint, Brown contended that in January 1991 he applied for a teaching position. Brown alleged that BCPS refused to hire him as a teacher, although the position remained open and BCPS continued to seek applications from individuals with his qualifications.

Specifically, the complaint format at paragraph 6 contains the following entries:

6. On ***Jan - 4 - 91***, ***Baltimore City Public Schools***
date Respondent
knowingly and intentionally [fired] OR [refused to hire]
Frank T. Brown because of his/her [citizenship status]
Complainant
AND/OR [***National Origin*** national origin] in violation of 8 U.S.C. §1324b.

(Italics and double underscoring represent entries by Complainant).

On January 22, 1992, OCAHO issued its notice of hearing transmitting the complaint to Respondent. On February 28, 1992, BCPS filed a February 25 motion for extension of time until March 13 to answer the complaint. Respondent asserted inter alia that the complaint had not been received until "on or about" January 27, 1992. On February 28, I granted the requested extension. No answer having been filed, on March 23 I issued an order to show cause why BCPS should not be defaulted, directing it to file a response, if any, "which shows such cause together with its proposed answer, not later than March 30, 1992."

On March 26, 1992, BCPS filed its answer dated March 10. Apparently, the answer had been mailed on March 12. The Postal Service deemed the addressed envelope so incomplete as to frustrate delivery and marked the wrapper undeliverable. On April 3, Brown filed a letter transmitting a copy of a March 28 letter from him to OSC. In that letter he asked why the judge on March 23 had extended BCPS's time to answer "for the 2nd time?". In fact, however, BCPS had already attempted to file its answer.

I issued an April 7, 1992 order scheduling a telephonic prehearing conference for April 13, as previously arranged by my office. Brown asserted that he had not received BCPS's answer despite its March 10 certification of mail service. By order issued April 8, I forwarded a copy of the answer to him. Following the April 13 prehearing conference, the report and order of the same date included the following text:

> For the benefit of Complainant, unrepresented by counsel, I explained that under 8 U.S.C. §1324b, my jurisdiction is limited to complaints of national origin discrimination and citizenship discrimination. National origin discrimination jurisdiction covers only employers employing more than 3 and less than 15 individuals. 8 U.S.C. §§1324b(a)(2)(A), 1324b(a)(2)(B).
>
> IRCA also defines the circumstances under which a complainant may obtain relief against alleged citizenship discrimination. 8 U.S.C. §1324b(a)(1)(B). In order to

prevail in a citizenship discrimination complaint, Mr. Brown would have to show that BCPS did not hire him

(1) because he is not a United States citizen or

(2) because BCPS has a policy against hiring citizens of South Africa.

Having been previously employed by the Respondent, Complainant's burden of proof pursuant to a citizenship discrimination complaint would be more difficult than if he had not been previously employed by BCPS. Additionally, complainant would have to show that he is a "protected individual." During the course of the conference, Mr. Brown informed the bench that he has resided in the United States more than eighteen (18) years. He has not filed for naturalization and he does not intend to so file in the future. 8 U.S.C. §1324b(a)(3)(B).

Complainant represented that the exclusive basis of his discrimination complaint against BCPS is his national origin, and not his citizenship status. Respondent's counsel stated her intent within a week's time to file a motion to dismiss Mr. Brown's national origin discrimination complaint, on the grounds that BCPS employs more than fourteen (14) individuals.

On April 16, Complainant filed a letter dated April 13, 1992, enclosing certain documents. He referred to the conference, commenting as follows:

As mentioned the citizenship issue was not my grievance, as one dont (sic) need to be a citizen to work professionally in the USA.

On April 21, 1992, a letter dated April 16 was filed by Mrs. Sylvia Brown. On April 27, 1992, OSC filed an April 23 motion for leave to file an amicus curiae memorandum, in reference to the potential protected person issue highlighted by the April 13 report and order. OSC suggested that its familiarity "with the developing law" might assist the judge on the question of "Complainant's standing to pursue a citizenship status discrimination claim under 8 U.S.C. §1324b(a)(1)(B)."

On April 27, 1992 I issued an order. I commented on the ex parte nature of Mrs. Brown's letter, and granted OSC's motion, including the following text:

Throughout this litigation, Complainant has steadfastly alleged national origin and not citizenship status discrimination. Complainant persists in identifying his claim as one arising out of his national origin. As confirmed by the First Prehearing Conference Report and Order dated April 13, 1992, I explicitly informed Complainant during the April 13 prehearing conference that I do not have national origin jurisdiction, i.e. power to rule, where a respondent/employer employs more than fourteen (14) individuals. 8 U.S.C. §1324b (b)(2).

> In this respect I note receipt on April 21, 1992 of a handwritten letter from Mrs. Sylvia Brown, dated April 16, 1992. I read that letter as underscoring Complainant's intent to obtain vindication of Respondent's alleged wrongdoing as a national origin discrimination claim and not a citizenship discrimination claim. . . .
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> * * *
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> In light of all the filings and statements submitted to date both by the Complainant himself and by Mrs. Brown on his behalf, I understand Complainant's focus to be solely on national origin and not on citizenship discrimination.
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> * * *
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> . . . OSC's motion recites that its proposed memorandum will exclusively address the issue of Complainant's standing as a protected person who seeks protection from citizenship status discrimination.
>
> Independent of Complainant's insistence that he is not pursuing a citizenship status discrimination claim, OSC has an institutional interest in the outcome of 8 U.S.C. §1324b discrimination cases. Accordingly, I find that it is in the public interest and not prejudicial to either party to allow OSC to file an amicus curiae memorandum from OSC.

OSC filed its memorandum on May 1, 1992. OSC addressed the question whether a permanent resident alien, such as Complainant, falls out of the class protected against citizenship status discrimination after residing in the United States for an extended period, e.g., eight-een years, without applying for naturalization. The relevant provision, 8 U.S.C. §1324b(a)(3)(B)(i), excludes from protection against citizen status discrimination:

> an alien who 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. . . . (emphasis added.)

OSC's informative discussion concerning standing with respect to claims of citizen status discrimination is inapposite where the only issue is national origin discrimination. I hold here that the naturalization eligibility/application requirement applies only to citizen status claims and not at all to complaints premised on national origin discrimination. Title 8 U.S.C. §1324b(a)(3)(B)(i) comprises part of the definition of "protected individual" stipulated at §1324b(a)(1)(B) with respect to citizenship status claims only and not to national origin claims.

Under IRCA, all individuals who are not unauthorized aliens are eli-gible for protection against national origin discrimination claims to the extent that the employer employs between four and fourteen employ-

ees. 8 U.S.C. §1324b(a)(1). For the definition of an unauthorized alien Subsection b(a)(1) refers to 8 U.S.C. §1324a(h)(3) which provides that,

> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act [i.e., the Immigration and Naturalization Act, as amended] or by the Attorney General.

On May 4, 1992, BCPS filed a motion to dismiss the complaint on the basis that an administrative law judge lacks jurisdiction with respect to a national origin discrimination claim against an employer of more than 14 employees. The motion is accompanied by an affidavit of Chester F. Preyar, Assistant Superintendent, Division of Human Resources and Labor Relations, BCPS, to the effect that BCPS "employs more than fifteen (15) employees."

On May 11, 1992, Complainant filed a letter dated May 8, 1992 in reply to the April 27 order. Inter alia, the letter states that in March 1991 Dr. Preyar had "raised the issue of being a citizen and the impor-tance of being, if not (sic) being one for hiring practices." While the letter contends that BCPS wrongly refused to hire Mr. Brown, and dis-cusses his claim before the Equal Employment Opportunity Commission, I understand it to disavow any claim of citizenship status discrimination.

III. *Conclusion*

Complainant has consistently asserted that he is not maintaining a citizenship status discrimination claim. He has persisted in that posture despite having been informed both of the difference between the two kinds of claim and of the procedural consequences, i.e., that I lack jurisdiction over national origin claims where there are more than fourteen employees. Accordingly, on consideration of all the pleadings filed, I find that Complainant has asserted only a national origin discrimination claim.

I am satisfied that BCPS employs more than 14 individuals. As an employer in the United States, it is covered under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2. Consequently, I lack national origin jurisdiction in this case. The March 24, 1992 discussion in Palancz v. Cedars Medical Center is controlling here.

> As has been held repeatedly in cases under 8 U.S.C. §1324b,

> It has become commonplace that 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 (4) and fourteen (14) employees. Since Respondent employs more than fourteen (14) employees, U.S.C. §1324b(a) (2) (B), it is excluded from IRCA coverage with regard to the national origin discrimination claims.

Williamson v. Autorama, OCAHO Case No. 89200540, May 16, 1990. See also 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); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

Palancz v. Cedars Medical Center, OCAHO Case No. 91200197 (Order Granting Respondent's Motion For Summary Decision in Part), (quoting Salazar-Castro v. Cincinnati Public Schools, OCAHO Case No. 90200373 (2/26/92)).

IV. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, including letters filed, memoranda and arguments submitted. All motions and requests not previously resolved are denied.

Although the forum recognizes that Complainant is unrepresented and that he asserts a grievance against BCPS, his own statements make clear that he has not alleged or urged a citizenship status discrimination claim. Accordingly, Respondent's motion to dismiss is granted.

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

SO ORDERED.

Entered this 4th day of June 1992.

MARVIN H. MORSE
Administrative Law Judge