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

JUAN ANTONIO CARDONA GODINEZ, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 92B00246
ARMGUARD SECURITY PATROL, Respondent.	)	

FINAL ORDER DISMISSING COMPLAINT

I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. §1324b, these anti-discrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) should it find reasonable cause to believe that such discrimination occurred. If, however, the OSC does not file such a charge within 120 days of receipt of the claim, the protected individual is authorized to file a

claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three, but fewer than fifteen employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three employees.

II. *Procedural History*

On January 3, 1992, Complainant, Juan Antonio Cardona Godinez, a G-uatamalian and an alleged alien authorized for employment in the United States since May 9, 1989, filed a charge with the OSC in which he alleged that Respondent, Armguard Security Systems, his former employer with more than than fifteen (15) employees, had discriminated against him based on his national origin. In a letter dated June 10, 1992, OSC informed Complainant that, based on its investigation, it had determined that there was insufficient evidence for reasonable cause to believe that Respondent had discriminated against him in violation of 8 U.S.C. 1324b and that it would not be filing a Complaint. Exercising his statutory right, on November 2, 1992, Complainant filed the instant Complaint alleging that Respondent had discriminated against him based, both, on his national origin and his citizenship status, in violation of 8 U.S.C. 1324b.

In a Notice Of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices, dated November 5, 1992, Respondent was notified of the filing of the Complaint, the opportunity to answer the Complaint within thirty (30) days after receipt of the Complaint, the possibility of a default judgment should it not answer the Complaint, my assignment to the case, and the location of the hearing as in or around Los Angeles, California. Proper service of the Complaint on Respondent on November 12, 1992 is evidenced by a file copy of a properly signed and dated return receipt for certified mail. On that same date, I issued a Notice of Acknowledgment advising Respondent of my receipt of this case and cautioned Respondent that

an Answer, pursuant to 28 C.F.R. part 68.9[1], must be filed within thirty (30) days of its receipt of the Complaint.

On December 2, 1992, Respondent attempted to file an Answer to the Complaint; however, as it did not contain a Certificate of Service indicating that it had been served on Complainant, I granted Respondent an extension of time to file a proper Answer, which was filed on December 23, 1992.

On January 13, 1993, I issued an Order Directing Complainant To Contact This Court by telephone or in writing, on or before January 25, 1993, so that I might be able to set a prehearing conference, as repeated attempts to contact Complainant at the telephone number he had supplied to the Court had failed. When Complainant did not comply with my Order, I issued an Order To Show Cause Why This Case Should Not Be Dismissed as I was sensitive to the fact that Complainant was pro se. In that Order, I granted Complainant until February 3, 1993 in which to contact this Court or face a dismissal based on abandonment.

Complainant did timely contact this Court and a telephonic conference was held on February 10, 1993.

At that time, I dismissed the national origin claim of discrimination for lack of jurisdiction as it was undisputed that Respondent employed more than fifteen (15) employees. 8 U.S.C. 1324b(b)(2).

I further directed Complainant to file an affidavit, on or before February 25, 1993, detailing when, and under what basis, he obtained his legal permanent resident status, so that I could make some determination of jurisdiction on his claim of citizenship discrimination in violation of 8 U.S.C. 1324b. This information was crucial to this determination, not only because Complainant needed to satisfy the threshold requirement of being a "protected individual" as defined by 8 U.S.C. 1324b(a)(3), but because Complainant's assertions regarding his citizenship status at the prehearing telephonic conference were contradictory to his allegations on this subject made in his Complaint. Although I might infer that these contradictions were the result of his pro se status, the information is so crucial to my determination of jurisdiction that I determined that a sworn statement was in order.

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[1] Citations are to the OCAHO Rules of Practice and Procedure for Administrative Hearings, 57 Fed. Reg. 57669 (1992) (to be codified at 28 C.F.R. part 68) (hereinafter cited as 28 C.F.R. section 68) 8 U.S.C. §1324a

A further issue that I directed Complainant to address in his affidavit was what act(s) by Respondent he alleged to be citizenship discrimination as prohibited by 8 U.S.C. 1324b. This was necessary as Complainant had presented no facts, either in the charging form or in the Complaint, which amounted to citizenship discrimination by Respondent. All that was before me was the bold allegation. Complainant's affidavit was to contain the identity of the individual who allegedly discriminated against him and the organization which employed that individual. This was necessary as it appeared from the Complaint and charge form that the employee who Complainant alleged had discriminated against him was an employee of Hertz Rent-A-Car and not an employee of Respondent's.

Complainant was advised in my written Order of February 10, 1993, that should he not file his affidavit on or before February 25, 1993, I would have no choice but to dismiss his case. To date, Complainant has not filed his affidavit and has not contacted this Court in any manner.

III. *Discussion*

Although Complainant is pro se, I find that his status is not the cause of his nonresponse to my Order of February 10, 1993. I base this belief on a review of the case file which contains Complainant's literate charge form and Complaint and Complainant's compliance with my Order To Show Cause of January 26, 1993. Thus, based on Complainant's past efforts in this case as noted above, it is clear to me that Complainant was capable of understanding and responding to my Order of February 10, 1993, in which he was directed to file an affidavit which would help establish the jurisdiction of this Court.

Under 28 C.F.R. 68.37(b)(1), I may find that a party has abandoned its complaint or request for hearing if such party has failed to respond to the Court's orders. Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/1/92); United States of America v. McDonnell Douglas Corporation, OCAHO Case No. 90200363 (8/28/92); see also Arrieta v. Michigan Employment Security Commission, OCAHO Case No. 92B00149 (11/10/92); Egal v. Sears Roebuck and Company, 3 OCAHO 442 (7/25/92) at 12 note 9.

In addition to the fact that Complainant was telephonically advised of the necessity of filing his affidavit, he received written warning of the possibility of dismissal should he not file the affidavit in my Order. I note that a review of the Court file reveals that no document served on Complainant by mail has been returned by the U.S. Postal Service

since this case began in October, 1992, and Complainant has not notified this Court of a change of address. Thus, I am satisfied that proper service of my Order of February 10, 1993 has been effected and that Complainant is aware of the consequences of a nonresponse.

As Complainant has not complied with my Order of February 10, 1993 and had sufficient access to this Court should there have been some problem with filing his response, I find that Complainant has abandoned his Complaint. 28 C.F.R. 68.37(b)(1). On this basis alone, I may, and do, dismiss this case.

It should be noted that I may also grant dismissal for lack of jurisdiction as Complainant has not established that he is a protected individual under the Immigration and Nationality Act. 28 C.F.R. 68.10, 68.28; 8 U.S.C. 1 3 24b(a)(3)(B); Arrieta. I may also dismiss on the grounds that Complainant has failed to state a claim upon which relief may be granted since he has not alleged any facts which show that he was the recipient of any act of citizenship discrimination in violation of 8 U.S.C. 1324b by Respondent.

Based on Complainant's statements in his charge form and his Complaint, I hold that Complainant did not establish that he is a protected individual as defined in Section 274B(a)(3)(B) of the Act and did not allege any act of citizenship discrimination as prohibited by 8 U.S.C. 1324b by Respondent. Therefore, under this alternate analysis, as a matter of law, this case must be dismissed and the hearing to be scheduled is canceled.

This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 1st day of March, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge