

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

BERTALINA MONJARAS,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) Case No. 92B00263
BLUE RIBBON CLEANERS, INC.,)
Respondent.)
_____)

DENYING RESPONDENT'S MOTION FOR SUMMARY
DECISION
(March 10, 1993)

I. Procedural Summary

A. The Complaint and Answer

On November 27, 1992, Bertalina Monjaras (Complainant) filed a Complaint against Blue Ribbon Cleaners, Inc. (Respondent). She alleged national origin and citizenship discrimination. On December 3, 1992, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing (NOH) which transmitted the Complaint to Respondent. The Notice was served on Respondent on December 8, 1992, by certified mail as confirmed by the signed delivery receipt returned to this Office by the U.S. Postal Service.

Not having received a timely answer from Respondent, I issued an Order to Show Cause Why Default Judgment Should Not Issue on January 28, 1993. On the same day Respondent by counsel filed an untimely answer, followed by a Response to Show Cause filed on February 4, 1993. Counsel's response recited that because of Respondent's difficulty with the English language, it had initially failed to understand the significance of the NOH. By Order dated February 4, 1993, I held adequate Respondent's explanation of its tardy answer. A default judgment did not issue.

B. The Prehearing Conference and Respondent's Motion for Summary Decision

A telephonic prehearing conference was held on March 1, 1993. During the conference, Complainant, in effect, made a motion to amend her complaint to reflect her request for backpay relief. Such motion was granted orally during the conference, as confirmed in the Prehearing Conference Report and Order, dated March 1, 1993.

A fundamental issue of fact in this litigation is whether the Respondent agreed to provide Complainant a leave of absence from her job. If Respondent did agree to a leave of absence, sub-issues are:

What were the terms of that leave; and

Did Complainant comply with those terms?

During the conference, the parties discussed Respondent's putative condition that Complainant provide a temporary replacement in order to be granted an extended leave of absence.

On March 4, 1993, Respondent filed a Motion for Summary Judgment. The motion focuses in large part on the replacement issue. Counsel argues, in effect, that Complainant's failure to amend her complaint to reflect the issue is fatal to her claim. Counsel also asserts that,

The hiring of a Korean individual without further fact-specific allegations of discrimination does not constitute a sufficient basis for a discrimination claim based on citizenship or national origin.

Respondent's Motion for Summary Decision (3/4/93) at 2.

This order issues sua sponte without awaiting Complainant's response to Respondent's Motion for Summary Decision.

II. The Parties

Complainant participates in these proceedings pro se. She represents that she is an alien authorized to be employed in the United States. Complainant is a Salvadoran national, who speaks virtually no English.

Simon M. Osnos, Esq. and Scott B. Elkind, Esq. represent Respondent in these proceedings. Respondent is said to operate a small business. It's principal is a Korean national, who speaks virtually no English.

III. Discussion

A. The Replacement Issue Is Material

The replacement issue first surfaced during the conference. The issue had not been previously identified in Complainant's complaint, nor in Respondent's answer.

It is my understanding that both parties agree that the employer conditioned a leave of absence on Complainant's provision of a replacement. The parties differ as to whether Complainant complied with the employer's requirement. Complainant claims that she complied with Respondent's replacement requirement, but that Respondent arbitrarily rejected the individual she proffered as her temporary replacement; Respondent claims that Complainant did not comply or that her compliance was so inadequate, as to constitute constructive non-compliance. In its summary decision motion, Respondent further recites that the complaint does not address the replacement issue. Therefore, Respondent contends, it should not be required to defend on the basis of that issue.

The replacement issue is potentially outcome determinative in the context of this litigation. Therefore, I hold the issue to be material.

B. The Policy of Liberal Amendment

Consistent with the policy set out in the Federal Rules of Civil Procedure, it is the policy of this forum to allow liberal amendment of pleadings. FED. R. CIV. P. 15. This policy is apparent from a review of the procedural history of this case, as summarized above. Pro se litigants in particular require flexibility. Yefremov v. NYC Dept. of Transportation, OCAHO Case No. 92B00096 (10/23/92) (Order Denying Respondent's Motion for Summary Decision) at 5; Palancz v. Cedars Medical Center, OCAHO Case No. 91200197 (4/2/92) (Order on Procedure) at 1. Accordingly, I hold harmless Complainant's failure to formally amend her complaint to incorporate the replacement issue. I also hold harmless Respondent's failure to formally incorporate the issue into its answer in the form of an affirmative defense or other-

wise. Sua sponte, both the complaint and the answer are understood to incorporate the replacement issue in the respective pleadings thus curing any technical flaws.

C. Motion for Summary Decision Denied

28 C.F.R. §68.38 sets out the standard to be applied in making discretionary summary decision determinations. The regulation states in pertinent part:

The Administrative Law Judge may enter a summary decision for either party if the pleadings . . . or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

28 C.F.R. §68.38(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

I have held above that the replacement issue remains viable in this litigation, and that the issue is material.

In addition to the replacement argument, Respondent also moves for summary decision on the basis that the complaint lacks fact specific discrimination allegations. The complaint is sufficient. The claim overlooks the fact that the record has not yet been developed.

For the aforementioned reasons, I am not now prepared to conclude that there is no genuine issue of material fact. Accordingly, Respondent's Motion for Summary Decision is denied and the parties are expected to proceed with preparation for the evidentiary hearing, scheduled for Wednesday, April 7, 1993.

SO ORDERED.

Dated this 10th day of March 1993.

MARVIN H. MORSE
Administrative Law Judge