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

March 23, 1993

GHAFFAR SEPAHPOUR, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 92B00232
UNISYS, INC. Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On March 24, 1992, counsel for Ghaffar Sepahpour (complainant) submitted a charge to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), alleging therein that complainant, a citizen of Iran and permanent resident alien, had been discharged by Unisys, Inc. (respondent) on January 29, 1992, based solely upon his national origin and citizenship status, in violation of the pertinent provision of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. section 1324b(a)(1).

By letter dated July 27, 1992, OSC informed complainant that the 120-day investigatory and exclusive complaint-filing period specified in IRCA had expired, and that, because OSC had failed to file a complaint with respect to his charge, complainant was allowed to file a complaint with this Office, which complainant failed to do. Subsequently, by letter dated September 9, 1992, OSC informed complainant that it had determined that there was insufficient evidence of reasonable cause to believe complainant had been discriminated against in the manners alleged. OSC again informed complainant that he was entitled to file a complaint directly with this Office, which complainant timely filed on October 16, 1992.

In his Complaint, complainant reiterated the allegations made in the charge he filed with OSC, in particular, that he was a permanent resident alien and a citizen of Iran, and that on January 29, 1992, he

was discharged by respondent because of his national origin and citizenship status, in violation the provisions of 8 U.S.C. section 1324b. In that private action, complainant sought reinstatement and backpay from the date of his discharge by respondent.

On December 4, 1992, respondent filed its Answer, averring therein that it offered complainant a position to work on the U.S. Army's TC/ACCIS contract, which complainant accepted on July 7, 1991. Respondent further averred that the U.S. Army directed it to separate complainant from the TC/ACCIS contract pursuant to respondent's contract with the Army, in accordance with the Industrial Security Regulation applying to the contract by virtue of the Department of Defense Contract Security Classification incorporated into the contract. Respondent averred that it protested respondent's termination, without avail, and terminated the employment of complainant effective February 12, 1992, upon the insistence of the Contracting Officers of the U.S. Army.

Respondent asserted three affirmative defenses in its Answer. As a first affirmative defense, complainant asserted that the Complaint fails to state a claim upon which relief can be granted. Secondly, respondent asserted that the undersigned lacks jurisdiction over complainant's national origin claim under IRCA, in that the Equal Employment Opportunity Commission (EEOC) has exclusive jurisdiction over this claim under Title VII. In its final affirmative defense, respondent asserted that the undersigned lacks jurisdiction over complainant's citizenship claim under IRCA, because the alleged discrimination was required by the U.S. Army pursuant to a Federal government contract specification incorporated into the contract.

On December 14, 1992, complainant filed a Reply to Answer of Respondent, asserting therein that, while respondent averred that it was directed to separate complainant from the TC/ACCIS contract by the U.S. Army, complainant had not been supplied with specific evidence of that directive, nor had it been supplied with the industrial security regulation applying to the relevant contract by virtue of the Department of Defense Contract Security Classification Specification.

Complainant also contested respondent's assertion that the undersigned lacks jurisdiction over his national origin claim, asserting that he has not filed a complaint with EEOC, that he was not given an option to accept or reject OSC's referral of his charge to EEOC, and that OSC did not advise him that referral of this matter to EEOC would preclude further processing of his Complaint before this Office.

On January 21, 1992, respondent filed a Motion for Summary Judgment with a supporting memorandum asserting therein that because the material facts of this matter fail to state a claim under IRCA, summary decision is appropriate.

The rules of practice and procedure for administrative hearings in cases involving allegations of unfair immigration related employment practices provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. Consequently, Federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and requirements needed to decide whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

The Supreme Court has held that summary judgment is properly regarded not as a disfavored procedural shortcut, but as an integral part of the Federal rules, designed to secure the just, speedy, and inexpensive determination of every action. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986). Summary judgment is proper only if the pleadings, discovery responses on file, and affidavits, if any, show that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10 (1986).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson, 477 U.S. at 248, 106 S. Ct. at 2510. In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Alvarez, 3 OCAHO 430, at 7; Egal, 3 OCAHO 442, at 9. Since complainant has not responded and the 10-day reply

period has expired, only respondent's motion is under consideration. 28 C.F.R. §68.38(a).

Attached to the memorandum submitted with the motion was respondent's statement of the facts at issue in this matter, with supporting affidavit and documents, in which respondent alleges the following:

Respondent entered into a contract (known as the Fort Huachuca contract) with the U.S. Army in October, 1987, under which the Army reserved the right to reject any of respondent's employees in the interest of national security. Respondent's Systems Services Division hired complainant, a citizen of Iran, in July, 1991, to serve as a Senior Applications Programmer, providing programming services required by the Army under the TC/ACCIS task order within the Fort Huachuca contract.

In October, 1991, the Army questioned respondent's use of foreign nationals on the Fort Huachuca contract, including work performed on the TC/ACCIS task order. The Army Contract Administrator instructed respondent that it could not employ any foreign nationals, including complainant, on the Fort Huachuca contract, and that personnel who were foreign nationals would be barred from access to contract facilities on the worksite. Respondent requested that the Army put the basis of its termination orders in writing, which it did. Thereafter, respondent initiated meetings with the Contract Administrator, Army security personnel in charge of the contract, worksite security personnel and representatives of the Defense Investigative Service and the Department of Justice, in an effort to convince the Army to allow foreign nationals to work on the contract. Consequently, the Army moderated its position, allowing respondent to retain previously hired foreign nationals, provided that they performed only unclassified duties, but expressly excluding "designated country foreign nationals" from any and all performance under the contract. Complainant's country of origin, Iran, is included on that "Designated Countries List".

Respondent requested that the Army make an exception for complainant because he was progressing toward citizenship and could pass a background investigation for the period beginning with his arrival in the United States. That request was declined and on February 12, 1992, complainant was terminated. Complainant continued to receive his full salary while respondent was negotiating with the Army to allow complainant to continue his employment, and also received severance pay upon his termination.

In its motion, respondent asserts that complainant's national origin claim must be summarily dismissed because this Office lacks jurisdiction over that claim, on the ground that respondent employs more than 14 full-time employees.

In general, the jurisdiction of the administrative law judges in this Office over claims of national origin discrimination under IRCA, 8 U.S.C. section 1324b(a)(1)(A), is necessarily limited to claims against employers employing between four (4) and 14 employees. Generally, therefore, an employer who employs more than 14 individuals is excluded from IRCA coverage with respect to national origin discrimination claims. 8 U.S.C. §1324b(a)(2)(B). See Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459, at 6 (9/24/92); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406, at 5 (2/26/92); Suchta v. United States Postal Service, 2 OCAHO 327, at 8 (5/16/91); United States v. Huang, 1 OCAHO 288 (1/11/91), aff'd sub nom., Huang v. United States Dep't of Justice, No. 91-4079 (2d Cir. Feb. 6, 1992).

However, there is an issue as to whether jurisdiction under IRCA arises as a result of the "national security exemption" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(g), as was suggested by the administrative law judge in dicta in Roginsky v. Department of Defense, 3 OCAHO 426, at 3 (5/5/92). The "exceptions" clause in IRCA, 8 U.S.C. section 1324b(a)(2), provides that the unfair immigration related employment practices provisions of IRCA do not apply to discrimination on the basis of national origin if said discrimination is covered under Title VII, section 703. The "national security exemption" provides that an employment requirement that otherwise would constitute actionable discrimination under Title VII is not actionable if the requirement complained of was imposed in the interest of national security. If the requirement in question involved national security, the logic goes, then it would arguably be actionable under IRCA, because it would not be "covered" under section 703 of Title VII.

However, this interpretation is contradicted in the legislative history of the Act. Representative Barney Frank, during House floor discussion over a provision identical to 1324b(a)(2)(B) in the "Frank amendment" (which formed the basis of section 1324b) explained:

> (T)itle 7, which this amendment would add to and not subtract from or modify, now kicks in at the 16th (sic) employee. What this (amendment) does is provide for national origin discrimininination for those who employ between 4 and 16 (sic) and for alienage all the way up and down."

130 Cong. Rec. H5642 (daily ed. June 12, 1984) (statement of Rep. Frank).

Clearly, were IRCA to grant jurisdiction over the employment practices described in 2000e-2(g) to the administrative law judges in this Office, it would effectively modify the "national security exemption" contained in Title VII and resultingly also modify Title VII, an effect which, as previously noted, was not the intent of the framers of IRCA.

Nor does it matter whether complainant has filed a charge with EEOC since the administrative law judges in this office have no jurisdiction over claims of national origin discrimination involving employers with more than 14 employees.

Accordingly, because respondent has established that there is no genuine issue as to the fact that the undersigned lacks jurisdiction over complainant's national origin discrimination claim, respondent's motion for summary decision is granted as it pertains to that claim. That portion of the Complaint alleging employment discrimination based on claimant's national origin is hereby ordered to be and is dismissed with prejudice to refiling.

Respondent next asserts that, because complainant's termination was directed by the U.S. Army pursuant to a Federal Government contract, it may similarly not be found to have violated those provisions of IRCA based upon alleged citizenship status discrimination inasmuch as the pertinent wording of IRCA provides that:

> It is an unfair immigration related employment practice for a person or other entity to discriminate against any individual...with respect to...the discharging of the individual from employment-(B) in the case of a protected individual...because of such individual's citizenship status.

8 U.S.C. §1324b(a)(1)(B). Complainant, as a permanent resident alien, is a protected individual for purposes of citizenship status discrimination under IRCA. 8 U.S.C. §1324b(a)(3)(B). See also Prado-Rosales v. Montgomery Donuts, 3 OCAHO 438 at 5-6 (6/26/92).

However, IRCA expressly exempts from coverage under the Act "discrimination because of citizenship status which is otherwise required in order to comply with law, regulation or executive order, or required by Federal, State, or local government contract...." 8 U.S.C. §1324b(a)(2)(C).

Respondent contends that the Army exercised its prerogative under its contract with respondent, as well as under Department of Defense regulations, to bar complainant, a citizen of a "designated" country, from the contract. Respondent further urges that it was legally and contractually obligated to comply with that decision. Therefore, respondent asserts, complainant's termination does not violate IRCA and resultingly, that portion of the Complaint alleging citizenship status discrimination must also be dismissed.

Respondent included as an attachment to its motion excerpts from the contract in question. In Section H.8 therein, the Army expressly reserved the right "to require removal from the contract any of Contractor's employees who endangers persons or property or whose continued employment is inconsistent with the interest of military security." Contract DAEA18-87-D-0086, §H.8. The contract further provides:

> H.14 ....The contractor shall comply with the DOD 5220.22 Industrial Security Manual for Safeguarding Classified Information requirements for this contract as set forth in DD FORM 254, Department of Defense Contract Security Specification....

Id., §H.14. The Industrial Security Manual for Safeguarding Classified Information, excerpted and included as an attachment to complainant's motion, states:

> When a classified contract is awarded to a contractor, the User Agency (UA) must incorporate a "Security Requirements Clause" and a "Contract Security Classification Specification" (DD Form 254) in the contract. The "Security Requirements Clause" contractually binds the contractor to this Manual and the DD Form 254 provides written notice of the security classification assigned to the information provided to the contractor.

Department of Defense, Industrial Security Manual for Safeguarding Classified Information (DOD 5220.22M), Chapter 1, §1, 1-100(f)(1991).

In a letter to respondent dated November 5, 1991, the Contracting Officer overseeing respondent's performance under the contract refused to permit foreign nationals to work on the contract, noting:

> ... in accordance with the Industrial Security Regulation all personnel performing on this contract must, as a minimum, be U.S. citizens subject to a favorable investigation and eligible to receive a security clearance if required. The Industrial Security Regulation applies to the contract by virtue of the Department of Defense Contract Security Classification Specification (DD 254) incorporated into the contract.

(Letter from Lindenmuth to Cox of 11/5/91 at 1.)

The Contracting Officer later amended this requirement, stipulating that only "designated country foreign nationals must be excluded from any and all performance under the contract". (Letter from Lindenmuth to Cox of 1/9/92 at 1.)

Respondent has demonstrated that it was contractually obligated to exclude complainant from performance under the Fort Huachuca contract, and consequently, to terminate complainant. It has also submitted the pertinent contract documents showing that the Army reserved the right to reject any of respondent's employees under the Fort Huachuca contract in the interest of national security. In addition, respondent submitted the affidavit of Owen Snyder, Director of Human Resources for respondent's Systems Services Division, averring that complainant, a citizen of Iran, was hired as a Senior Applications Programmer to perform services within the Fort Huachuca contract. Respondent has further submitted correspondence from the Contracting Officer in charge of the Fort Huachuca contract ordering the exclusion of all foreign nationals from "designated" countries from performance under the contract, and submitted the "list of designated countries", proving that complainant's country of citizenship, Iran, was a "designated" country for purposes of this contract.

Respondent has satisfactorily demonstrated the absence of a genuine issue of material fact in connection with its contention that it has not violated IRCA, as alleged in the Complaint, because the unfair immigration-related employment practice alleged namely, the termination of complainant on the basis of his citizenship status, was directed by the Army pursuant to a Federal government contract.

Because complainant has failed to demonstrate that there is a genuine issue for hearing in this matter, respondent's motion is granted, and that portion of the complainant alleging employment discrimination based upon complainant's citizenship status is also being ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.