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

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| BASSEY J. UDOFOT, Complainant, | ) |
| v. | ) 8 U.S.C. §1324b Proceeding<br>) Case No. 92B00098 |
| VAPOR TECHNOLOGIES, INC., Respondent. | ) |

FINAL DECISION AND ORDER
(April 1, 1993)

MARVIN H. Morse, Administrative Law Judge

Appearances: Complainant, Bassey J. Udofot, pro se.
Respondent, Michael C. Walsh and Charles M. Hopkins, pro se.

## I. *Procedural History*

### A. Background

On May 7, 1992, Complainant Bassey J. Udofot (Udofot) filed a complaint alleging that he had been denied employment by Respondent Vapor Technologies, Inc. (Vapor) in violation of the prohibition of 8 U.S.C. §1324b against national origin and citizen status discrimination. An answer denying discrimination was timely filed.

Udofot resides in Colorado Springs. Vapor's place of business is in Boulder, Colorado. Upon the filing of the complaint, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a May 18, 1992 notice of hearing (NOH). The NOH anticipated that the hearing would be in the Denver, Colorado area.

### B. The Litigation Schedule

My order of July 2, 1992 scheduled a telephonic prehearing conference. On July 13, 1992, that conference was held as scheduled. As confirmed by order dated July 14, a second telephonic prehearing

conference was set for November 24. An evidentiary hearing was scheduled to begin in Denver on January 5, 1993.

At the November 24, 1992 conference, it was agreed to set a third conference for February 16, 1993, and to change the evidentiary hearing date from January 5 to March 16, 1993.[1]

On January 25, 1993, Vapor's president, Michael S. Walsh (Walsh), filed a letter pleading dated January 22. The pleading requested postponement of the February 16 conference. On January 28, I issued an order which addressed several matters including rescheduling the conference to March 3, 1993. Inter alia, the order stated,

> Absent prior settlement, I will expect the parties to assure me at the third prehearing conference of their readiness for hearing, scheduled to be held beginning March 16, 1993.

The third conference was held as scheduled on March 3. Discussion of procedural requisites and preparation for the hearing was confirmed in the Third Prehearing Conference Report and Order of March 4. The last paragraph stated,

> Absent a prior settlement, the evidentiary hearing will take place at the United States Tax Court, 1845 Sherman Street, Room 402, Denver, Colorado 80203. It will begin on Tuesday, March 16, 1993 at 9:00 a.m. and will continue Wednesday, March 17, 1993 at 8:30 a.m.

(Emphasis in the original.)

C. Subpoena Requests

During the March 3, 1993 conference, Udofot requested subpoenas for appearance at hearing of two named officials of the Colorado Department of Labor and Employment (DOL). These officials are stationed in Colorado Springs. During the conference Udofot represented that the DOL officials had agreed to testify on his behalf and were expecting the subpoenas. I advised the parties that upon their receipt of signed subpoenas from me, it was their responsibility to effect service.

Vapor said it would seek a subpoena but was uncertain of the address of its intended witness. After the conference, Vapor telephoni-

[1] The November 25 Second Prehearing Conference Report and Order confirming the new schedule, incorrectly characterized the February 16 and March 16 dates as in 1992 instead of 1993.

cally provided my office with the name and addresses of the DOL official whom it wished to subpoena as its witness. He was stationed in Denver.

I issued subpoenas in response to both parties' subpoena requests. All subpoenas were returnable to the U.S. Tax Court, 1845 Sherman Street, Room 402, Denver, Colorado. Complainant's subpoenas were returnable at 10:00 a.m., March 16, 1993. Respondent's subpoena was returnable on March 17, 1993. As in the usual course, the subpoenas were mailed only to the requesting party and not to the opposing party. Therefore, no confusion of dates could possibly have occurred on the basis of the issued subpoenas. Complainant's subpoenas were personally served by Udofot on the DOL officials, Joseph W. Fabac and Paul Sharp, at about 4:17 p.m. on Friday, March 12.

D. March 16, 1993: The Aborted Evidentiary Hearing

On March 16, 1993, prior to 9:00 a.m., Denver time, I arranged that the courtroom be open. The judge, the official stenographer, Walsh, Charles M. Hopkins, Vapor's vice president, and Vapor's employee, Chun Zhao (Zhao), were present at the appointed hour.[2] Udofot was not present.

As appears from the official transcript, although convened at 9:00 a.m., the hearing did not formally go on the record until 9:12 a.m. A few minutes later, I stated,

> Against the possibility that Mr. Udofot is in transit and, through no fault of his, temporarily detained in his arrival, we will go off the record and remain in place for a few moments. The hearing is now in recess.

Tr. 4.

Upon formally reconvening at 10:00 a.m., the record reflects that "Mr. Udofot, the complainant, has still not arrived." Tr. 5. I noted that the two individuals who had been subpoenaed at Udofot's request were now present in the courtroom. Although every communication with the parties, oral and written had contemplated that the hearing would start on March 16 at 9:00 a.m., I commented that,

> It is conceivable to me that complainant's unexplained absence might, in fact, be explained by his having formed the judgment that because the subpoenas were

[2] Vapor had agreed at the prehearing stage to make Zhao available to Udofot as his witness at the hearing.

> returnable for these individuals at 10, that for some reason, although it may be argued that it's not a very sound one, the hearing was not, in fact, to start until 10. We had given him no indication that this was so.

Tr. 5-6.

As noted in the record,

> I am constrained to keep us here a bit longer against the possibility that Mr. Udofot is in transit. The fact that he served these subpoenas as late as last Friday afternoon does suggest that he continues to prosecute this case to bring it forward. On the other hand, his failure to be here is a signal, perhaps, that he does not intend to continue.

Tr. 8.

I recessed the hearing and telephoned my office. I asked my staff whether any communication had been received from or on behalf of Udofot. No word having been received, I directed that an inquiry be made to Udofot's telephone number in Colorado Springs.

Referring to my secretary's telephone call to 719/380-0961 in the hearing, I reported that,

> The phone was answered by an individual who identified herself as Mrs. Udofot and said that her husband had understood the hearing was to commence on March 17, 1993, and planned to be here commencing on March 17, 1993, which is tomorrow's date.

Tr. 9.

I reported that I had directed my secretary, Debra M. Bush, to advise Mrs. Udofot that I needed a better explanation and that we were prepared to go ahead "today." I reported that Ms. Bush had read to Mrs. Udofot the underscored portion of the March 4 order "which confirmed that this hearing was scheduled to start at 9 a.m. on this date . . ." Tr. 10.

At that point, I announced that

> It is now approximately 7 or 8 of 11 on March 16. I am entering a judgment and order of default with prejudice against Mr. Udofot for failure to appear at the hearing at the time stated and described and as to which there can be no doubt on this record.

Id.

E. Complainant's Witnesses

Earlier on the 16th, with respect to the two DOL officials subpoenaed by Udofot, I commented that "[T]hey had agreed to testify on behalf of

complainant and are here pursuant to subpoena." Tr. 7. I had understood Udofot to indicate that the two had previously agreed to testify on Complainant's behalf. supra, at 2.

After announcing the default, I expressed appreciation to Complainant's subpoenaed witnesses. I noted,

> [A]nd I recall that while we were off the record, Mr. Sharp suggested that until, in fact, he received the subpoena last Friday afternoon, he had no reason to anticipate that he was being called as a witness.

Tr. 11.

In sharp contrast to my understanding of March 3 that "Mr. Udofot had already arranged with them to be present and was just going through the subpoena process as a matter of record and for their convenience," it appeared that neither official had any such prior understanding. Tr. 11-12.

F. The Events Memorialized

On March 16, 1993, my secretary placed a memorandum in the Udofot file. It states that on March 16, when the judge called from Denver, upon inquiry, Udofot's wife said her husband was not on his way to the hearing, but she knew where he was and could call him. The memorandum also recites that Mrs. Udofot told Ms. Bush that the hearing was "not until the 17th, that he [Udofot] was getting his papers ready for the hearing." I recall also that Ms. Bush told me on March 16 that Mrs. Udofot said, that her husband was at an employment office at the time of the phone call.

Also on March 16, 1993, my law clerk, Margaret K. Taylor, placed a memorandum in the Udofot file. It states that at about 12:45 p.m. EST, Udofot telephoned my office in Falls Church, Virginia. He represented that he had been on his way to the hearing. when His car had broken down. He decided to call home. His wife told him, the case had been dismissed. The memorandum reports that Udofot asked Ms. Taylor how he could have notified the judge of the car problem as, he was unable to phone the court facility in Denver. She suggested to him that he could have telephoned the judge's office exactly as he had now done. He responded that he had not been "brilliant enough" to think of that.

On March 19, 1993, Udofot filed a handwritten letter dated and postmarked March 16 which recites in pertinent part, as follows:

I honestly misread the prehearing date scheduled this morning and I mistaken the date to be 3-17-93. At the time I realized today that the starting prehearing date[3] was actually 3-16-93 through 3-17-93, It was too late for me to do anything about it. It also was impossible to use my slow running defected car to be at the hearing in Denver this morning. Therefore I made haste to the best of my ability at the time to call your temporary office in Denver but was unfruitful since I did not know that number to your office. I therefore called to your office in Falls Church, Virginia only to learn that the case was dismissed because I was not there at the hearing.

II. *Discussion*

It is axiomatic that courts disfavor defaults. Indeed, this judge has been reversed on administrative review in an 8 U.S.C. §1324a case for failure to grant default on the pleadings where an answer to the complaint was untimely filed. U.S. v. Koamerican Trading Corp., 1 OCAHO 63 (6/19/89). See also U.S. v. Tiki Pools, Inc., 1 OCAHO 76 (8/1/89). In any event, the rules of practice and procedure for cases before administrative law judges explicitly contemplate that failure of a party to appear for hearing is grounds both for dismissal and default.

* * * *

(b) Dismissal -- Abandonment by party. A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if:

(1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge; or

(2) Neither the party nor his or her representative appears at the time and place fixed for the hearing and either

(i) Prior to the time for hearing, such party does not show good cause as to why neither he or she nor his or her representative can appear; or

(ii) Within ten (10) days after the time for hearing or within such other period as the Administrative Law Judge may allow, such party does not show good cause for such failure to appear.

(c) Default -- Failure to appear. A default decision, under §68.9(b), may be entered, with prejudice, against any party failing, without good cause, to appear at a hearing.

28 C.F.R. §68.37 [1992].

[3] Udofot's letter characterizes the hearing as a "prehearing," a misstatement to which I attribute no decisional significance.

Title 28 C.F.R. 68.37(b)(1) was added in 1991. In a number of OCAHO cases prior to adoption of subsection (b)(1), failure of parties to respond to orders of judges was treated as equivalent to failure to appear for hearing, resulting in default. Williams v. Deloitte & Touche, 1 OCAHO 258 (11/1/90) at 5-6; U.S. v. Nu Line Fashions, 1 OCAHO 147 (3/30/90) at 3-4; Troncoso v. Ferlin Service Industries, 1 OCAHO 110 (12/5/89).

The reference to the default sanction for failure to appear at hearing in Nu Line Fashions is instructive.

> Title 28 C.F.R. §68.35(b) [now §68.37(b)(2)], however, authorizes dismissal of a case as a consequence of a party having failed to appear "at the time and place fixed for the hearing." This provision assures that the hearing process, and the judges assigned to it, will not be frustrated by failure of a party to respond to hearing schedules.

Nu Line Fashions, 1 OCAHO 147 at 3.

The 1991 revision resulting in the present text of §68.37(b), effectively codified the practice of the judges in those cases. The risk of not responding to judicial orders was clarified by explicitly raising such failure to the same level as one of the preexisting sanctions for failure to appear at hearing, i.e., dismissal of the complaint. As explained in the preamble to that revision, "[T]his provision allows an Administrative Law Judge more authority to dismiss a case where a complainant, for whatever reason, has seemingly abandoned his complaint." 56 Fed. Reg. 50049, 50051 (1991). Once codified, it became unnecessary to adapt the sanction against failure to appear for hearing to failures to obey orders of judges.

Applying the explicit authority of the revised rules, it has been held that failure to adhere to the judge's orders "cannot be permitted to frustrate sound case management." U.S. v. El Dorado Furniture Mfg. Inc., 3 OCAHO 417 (4/2/92). In Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92) at 9, although the pro se discrimination complainant "has not abandoned her complaint in fact," the complaint was dismissed for her failure to respond to the judge's orders. See also Egal v. Sears Roebuck and Co., 3 OCAHO 442 (7/23/92) at 12, n. 9.

III. *Conclusions*

Turning to the case at hand, it is understandable that after learning he had been defaulted, Udofot tried to put the best face on his failure to appear. Nothing submitted by him alters the fact that he did not appear, and made no effort to communicate with the judge or the judge's office until after he learned of the judge's action. His letter of

March 16 is consistent with an intent to attend a hearing on March 17, but not on March 16. Whatever credibility may be given to the stated condition of his automobile, it is absolutely clear that he had no intention to attend a hearing on March 16, 1993. Moreover, not until my staff initiated telephonic communication with his wife, did he make an effort to contact my office.

Immediately before I stated on the record that I was entering an order of default, I was told that Udofot's wife in Colorado Springs advised that he was at some location other than the hearing and that while she could get in touch with him, she explained that he had thought the hearing was to begin the next day. Mrs. Udofot is not a stranger to the circumstances alleged by Udofot to be implicated in his cause of action; as early as the July 13, 1992 prehearing conference, her husband had identified her as a potential witness. First Prehearing Conference Report and Order (7/14/92) at 2. His March 16 telephone conversations with the staff of my office are consistent with an intent not to appear for hearing on the 16th. His letter of that date, claiming he had mistaken the starting date, is to the same effect.

The record before me and which confronts Udofot is consistent with a hearing long scheduled to begin in Denver on the March 16, 1993. Udofot did not appear at the time and place fixed for the hearing; neither did any representative. His failure to appear can only be understood as deliberate, in light of his March 12 delivery to his own witnesses of subpoenas returnable on the 16th. His claim that he had car trouble is disingenuous at the least, in context of his conceded failure to call the judge's office until after he learned his case was being dismissed. Neither the alleged car trouble nor the alleged mistake of fact as to the starting date comprise a showing of good cause for his failure to appear. I find and conclude, as I did on March 16, that it is appropriate to deem Udofot abandoned his complaint that day.

Present at the scheduled time and place for the start of the hearing on March 16 were: the judge who traveled from the east coast, the official stenographer, the two principal officers of Vapor (an enterprise located in Boulder which employs approximately 13 people), and Zhao, one of its professional staff. Udofot's subpoenaed DOL witnesses from Colorado Springs also arrived in a timely manner.

Under the circumstances, judicial respect for the convenience of those who heed the call to appear at the specified place and times outweighs a complainant's right to proceed. I do not establish a bright line for all cases. It is sufficient here that the judge, court reporter,

opposing party and witnesses fruitlessly waited for Complainant for almost two hours.

The dual sanctions of dismissal and default with prejudice for failure to appear at hearing without good cause shown are not lightly imposed. However, litigants run the risk that if their recourse to the forum is exercised irresponsibly, as I find in this case, their conduct will be balanced against the needs of the forum and the public. The orderly functioning of any hearing process is frustrated when litigants fail in their obligation to meet their commitments. That failure is exacerbated where, as here, the jurisdiction is nationwide but the forum functions out of only two locations, requiring allocation of judicial and support resources case by case.

Even more than in cases warranting dismissal for failure to obey orders of the judge, the circumstances of March 16 compel application of 28 C.F.R. §68.37(b). No good cause having been shown for Udofot's failure to appear, he is deemed to have abandoned his complaint. In addition, lacking good cause for failure to appear, Udofot's conduct warrants entry of a default decision with prejudice. 28 C.F.R. §68.37(c).

IV. *Order*

1. This decision of default is entered, with prejudice, for failure of complainant Udofot without good cause to appear for hearing; for the same reason, he is deemed to have abandoned his complaint which is, therefore, dismissed.

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

**SO ORDERED**.

Dated and entered this 31st day of March, 1993.

MARVIN H. MORSE
Administrative Law Judge