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

PATRICIA EUNICE PARKIN-FORREST, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 93B00025
VETERANS ADMINISTRATION, Respondent.	)	

FINAL DECISION AND ORDER
(April 30, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Patricia Eunice Parkin-Forrest, Complainant

Katherine Morgan, Esq., for Respondent,

I. *Background*

Complainant Patricia Eunice Parkin-Forrest (Parkin-Forrest) is a native of Jamaica and a citizen of the United Kingdom. She is a United States permanent resident alien and has applied for naturalization. The Veterans Administration employed her as a nurse at the VA Medical Center in Houston, Texas. Her appointment commenced on August 28, 1988 and was temporary. Parkin-Forrest suffered an employment-related injury in September 1990. Complainant contends that she was unlawfully discharged from employment on September 24, 1991 due to national origin and citizenship status discrimination.

On February 4, 1993, Parkin-Forrest filed this private action alleging violation of the prohibition against unfair immigration-related employment practices. 8 U.S.C. §1324b(d)(2). On March 3, 1993, Respondent Veterans Administration (VA) filed a single pleading as

its answer and motion to dismiss the complaint. There have been no additional filings.

VA's answer denies the critical factual allegations of the complaint. VA's motion to dismiss contends that (1) Parkin-Forrest is out of time because she filed her charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) more than 180 days after the date of the alleged discrimination. 8 U.S.C. §1324b(d)(3); (2) Parkin-Forrest was hired as a registered nurse on a temporary appointment under statutory authority which precludes employment of non-citizens except under specified circumstances which she could no longer satisfy once she became disabled from performing her nurse duties, and (3) because Congress has not waived sovereign immunity, VA, a federal employer, is not amenable to 8 U.S.C. §1324b.

II. *Discussion*

A. Summary Decision

The rules of practice and procedure for §1324b cases before administrative law judges provide for entry of summary decision if the pleadings, other filings by the parties, 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) [1992].

In the interest of efficient resolution of disputes which do not require an evidentiary confrontation, the Supreme Court has established standards for deciding motions for summary decision. The moving party on the motion has the initial burden. The party must identify those portions of materials on file that it believes demonstrate the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party satisfies its burden by pointing out to the adjudicator "that there is an absence of evidence to support the non-moving party's case." Celotex at 325. Subsequently, the burden of production shifts to the non-moving party which must set forth by affidavit or as otherwise required, "specific facts showing that there is a genuine issue for trial." Celotex at 323-4.

For an instructive discussion applying Celotex principles to OCAHO jurisprudence see U.S. v. Lamont Street Grill, 3 OCAHO 441 (7/21/92), citing T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R.

Civ. P. 56(e)), and citing Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-4 (9th Cir 1986), cert. denied, 484 U.S. 1066 (1988). As noted in Lamont Street Grill, with respect to specific facts offered by the non-moving party,

> the court does not make credibility determinations, T.W. Electrical Service at 630, or weigh conflicting evidence, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and is required to draw all inferences in a light most favorable to the non-moving party. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
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> The Supreme Court has stated that Rule 56(c), nevertheless, requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex at 322. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Liberty Lobby, 477 U.S. at 252. The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-2.

Lamont Street Grill, 3 OCAHO 441 at 3.

Title 28 C.F.R. §68.38 reflects the principles of Celotex and caselaw cited above. Because I conclude that there is no genuine issue as to any material fact determinative of the outcome, I grant VA's motion for summary decision for the reasons stated below.

B. National Origin Discrimination Claim Dismissed

While addressing Parkin-Forrest's citizenship status discrimination claim, VA ignores that both her OSC charge and her OCAHO complaint also allege national origin discrimination. I take official notice that VA's Houston Medical Center is an organizational component of the VA, that the Center's employment decisions are those of the VA itself, and that the VA employs more than fourteen individuals.

It is well understood in OCAHO jurisprudence that, with exceptions not pertinent here, administrative law judges lack jurisdiction over national origin discrimination complaints against employers of more than fourteen individuals.

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.

U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90) at 11.

See also Huang v. U.S. Postal Service, 1 OCAHO 288 (1/11/91), aff'd, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Mir v. Federal Bureau of Prisons, OCAHO Case No. 92B00225 (4/20/93)(Order); Yefremov v. New York City Dept. of Transportation, 3 OCAHO 446 (10/23/92)(Order Denying Respondent's Motion for Summary Decision/Miscellaneous Rulings); Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459 (9/24/92), appeal docketed, Curuta v. U.S. Water Conservation Lab., No. 92-70774 (9th Cir. 1992); Brown v. Baltimore City Schools, OCAHO Case No. 91200231 (6/4/92); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92); Williamson v. Autorama, 1 OCAHO 174 (5/16/90); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (8/2/89).

Accordingly, the national origin discrimination claim is dismissed.

C. Citizenship Status Discrimination Claim Dismissed

VA health care providers, including registered nurses, may generally only be appointed if they are U.S. citizens, 38 U.S.C. §7402(c). Subsection 7402(c) contains a proviso that triggers §7407, i.e., appointments may be made to noncitizens upon a determination "that it is not possible to recruit qualified citizens for the necessary services . . ." 38 U.S.C. §7407(a). Appointments pursuant to §7407(a) are made only under §7405, none of which are full-time permanent positions.

VA contends that Parkin-Forrest was employed pursuant to a temporary appointment which expired September 24, 1991. This contention is confirmed by Respondent's Notifications of Personnel Actions (SF 50s). It appears from the SF 50s filed in support of VA's motion that her excepted service appointment on August 28, 1988 for the period ending February 28, 1989 was converted in September 1988 to an excepted appointment ending September 24, 1991. The SF 50 entries are consistent with VA's argument that its authority to employ Parkin-Forrest depended on her availability to perform duties as a nurse.

Parkin-Forrest's SF 50 for the period ending September 24, 1991 cites as authority 38 U.S.C. §4114A/1/A (sic). Title 38 U.S.C. §7405 (note) explains that "provisions similar to those in this section were contained in section 4114(a) . . ." I have no reason to doubt that Parkin-Forrest was appointed under predecessor authority to §§7405(a)(1) and 7407(a), under which full-time appointments are limited to U.S. citizens. It follows that both the law and the documentation point to a temporary full- time hire in the excepted service, and not to permanent hire. Parkin-Forrest does not demurrer.

For purposes of this decision, I accept as true Parkin-Forrest's statement in her OSC charge that she had not been "made aware" at the time of hire that if she no longer served as a registered nurse she would be ineligible for other employment or retraining. Despite this miscommunication, VA can only employ a noncitizen under the limited authority which it utilized to bring her on board as a registered nurse.

I conclude that Parkin-Forrest was appointed pursuant to the proviso of 38 U.S.C. §7402(c). Once she could no longer fill the role of registered nurse, she became ineligible for a similar new appointment. Moreover, I am unaware of an obligation to retrain her for a position which satisfies Title 38 exceptions to the prohibition against VA employment of noncitizens.

VA's statement that it is not liable under §1324b because Parkin-Forrest no longer qualifies for excepted employment as the result of physical inability to serve as a nurse is incomplete. VA omits reference to the linchpin of its argument, i.e., the statutory exception to administrative law judge jurisdiction. Title 8 U.S.C. §1324b excepts from any otherwise applicable §1324b culpability,

> discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive
> order . . .

8 U.S.C. §1324b(a)(2)(C).

There is no basis for inferring that the law interposed by the employer as the bar to relief is misapplied. Accordingly, I conclude that the outcome in this case is controlled by the statutory prohibition against employment of noncitizens except as they are deemed eligible for hire under 38 U.S.C. §§7402(c), 7405 and 7407(a). It is unquestioned that as the result of her injury Parkin-Forrest can no longer perform duties as a registered nurse.

Accordingly, the citizenship status discrimination claim is dismissed.

D. Other Issues Not Decided

Because of the above result, it is unnecessary to reach the additional issues raised by VA as to timeliness and sovereign immunity.

III. *Ultimate Findings, Conclusion, and Order*

I have considered the pleadings, including the exhibits tendered by VA in support of its motion to dismiss. All requests not previously disposed of are denied. I find there is no genuine dispute of material fact such that the outcome would be affected. Upon consideration of the undisputed facts in light of 38 U.S.C. ch. 74, I conclude that 8 U.S.C. §1324b (a)(2)(C) excepts VA from coverage as to Parkin-Forrest. Accordingly, the complaint is dismissed.

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 30th day of April, 1993.

MARVIN E. MORSE
Administrative Law Judge