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

ESTHER DIN BROOKS, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 92B00193
WATTS WINDOW WORLD, Respondent.	)	

ORDER
(August 31, 1993)

I. *National Origin Jurisdiction Established*

Upon review of the filings to date it appears that this case is within the jurisdictional limits of 8 U.S.C. §1324b. This is so because:

(1) The only cause of action, i.e., national origin discrimination, arises with respect to an employer of ten to eleven individuals. Administrative law judges have national origin discrimination jurisdiction over employers of between four and fourteen individuals. 8 U.S.C. §1324b(a)(2)(B).

(2) Because this case does not include allegations of citizenship status discrimination, it is immaterial whether Complainant, a permanent resident alien of Philippine citizenship, is a protected individual within the meaning of 8 U.S.C. §§1324b(a)(1)(B) and b(a)(3)(B). It is not disputed by Respondent, however, that Complainant was authorized for employment in the United States at the time she worked for Respondent. Complainant has been a permanent resident alien since at least April 1989. Brooks v. KNK Textile, OCAHO Case No. 92B00207 (8/3/93) (Final Decision and Order); see also Brooks v. KNK Textile, 3 OCAHO 528 (6/21/93)(Partial Summary Decision Dismissing National Origin Discrimination Claim and Order of Inquiry).

II. *Retaliation Dismissed*

Complainant's filings also assert that she was discharged as an act of retaliation, but the extensive pleadings and materials filed to date fail to reveal retaliatory conduct with respect to any claim of hers cognizable under 8 U.S.C. §1324b. The prohibited conduct is retaliation, intimidation, threat or coercion "for the purpose of interfering with any right or privilege secured under" §1324b. Retaliation for other conduct is not actionable under §1324b. Brooks earlier adverted to discharge because she had observed conduct of her employer. However, I conclude that she no longer pursues that claim. Significantly, her otherwise lengthy response of April 13, 1993 to my March 24, 1993 inquiry, 3 OCAHO 501, and her response of May 16, 1993 to my April 22 Order are each silent as to that claim. As stated in the March 24 order, "I have no jurisdiction over a discharge based on a complainant's alleged knowledge of an employer's alleged sexual indiscretion."

Although Brooks maintains her discharge was retaliatory, she fails to suggest that the discharge interfered with, e.g., followed, any steps she had taken or indicated she would take to secure her rights under §1324b. Absent reason given to the employer by the employee, or on her behalf, for the employer to anticipate the employee's acting pursuant to §1324b, discharge prior to filing a charge of discrimination under §1324b is not retaliation under §1324b. I understand from Complainant's failure to respond to my inquiries and comments on that claim that it is abandoned.

Previously, the First Prehearing Conference Report and Order (1/8/93) asked Complainant, inter alia, to state specifically:

> what evidence you rely on to prove your claim that Respondent or its representative Robert M. Watts, Sr., intimidated, threatened, coerced or retaliated against you because you filed or planned to file a complaint. Paragraph 14a of the complaint recited that Mr. Watts threatened you "when I filed my complaint." Explain whether paragraph 14 should be understood to mean "when I filed my charge" with the Special Counsel.

Complainant's January 27, 1993 response:

> Mr. Watts didn't say Special Counsel in particular but he just said about my complaint, the first time he threatened me was it was with the Special Counsel, the second time it was with the hearing officer.

Perhaps Complainant intended her allegation of retaliation to be understood as one of threat, coercion or intimidation after discharge and filing of her charge with the Special Counsel and/or filing of her complaint with the Office of the Chief Administrative Hearing Officer. To the extent that such a threat comprises her claim of retaliation, her lack of an answer to the question quoted, i.e., failure to explain what evidence she relies on to prove that claim, constitutes an abandonment.

Because Complainant's responses to the judge's inquiries fail to support the claim of retaliation, it is dismissed. See 28 C.F.R. §68.37(b)(1).

III. *Procedures to be Adopted*

The pleadings filed to date by the parties, accompanied by affidavits and other materials, imply that there may be a genuine issue of material fact, i.e, whether Complainant was discharged for the prohibited reason of her national origin. However, either party is entitled to make a showing as on a motion for summary decision that on the basis of the pleadings, affidavits, material obtained through discovery or otherwise, there is no genuine issue as to any material fact. Upon establishing that there is no genuine issue of material fact, a party is entitled to summary judgment in accord with the rules of practice and procedure of this Office. 28 C.F.R. §68.38.

The parties are encouraged to explore an agreed disposition of this dispute. Complainant is advised that her communication should be with counsel for Respondent unless she is informed to the contrary. Not later than September 24, 1993, the parties jointly if feasible, or if not, separately, shall inform the judge in writing, of their efforts at settlement. Both parties are reminded of the fee shifting provision at 8 U.S.C. §1324b(h).

Unless I am sooner advised that this case is settled, or unless there is intervening motion practice, my office will telephone the parties on or about the week beginning October 11, 1993, to arrange a telephonic prehearing conference. The conference will focus on the scheduling of an evidentiary hearing; in addition, the parties should be prepared to discuss trial preparation in the context of the final rules of practice and procedure of this Office, 28 C.F.R. Part 68, particularly those sections governing prehearing statements and prehearing conferences, i.e., §68.12(b) and §68.13(2). Not later than the date of the conference

each party shall have filed a prehearing statement which complies with §68.12(b) and shall be prepared to discuss the matters set out at §68.13(2) (i) through (ix), including the identification of witnesses and of documents to be introduced at an evidentiary hearing. In the event of a confrontational evidentiary hearing as distinct from decision on a paper record, the parties are cautioned that only the evidence presented at hearing will provide the basis for decision.

SO ORDERED.

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

MARVIN H. MORSE
Administrative Law Judge