

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

MARTIN A. HOLGUIN,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 93B00005
DONA ANA FASHIONS,)
Respondent.)
_____)

ORDER
(December 1, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Martin Holguin, *pro se*.
Daniel Parisi, on behalf of Respondent.

I. Procedural and Factual Background

A. Generally

In his complaint in this case, Martin A. Holguin (Holguin or Complainant) alleged national origin and citizenship status discrimination as well as retaliation, in violation of 8 U.S.C. §1324b. In its answer to the complaint, Respondent Dona Ana Fashions, Inc. (Dona Ana or Respondent), denied the allegations of the complaint and denied also that it had discharged Holguin.

A telephonic prehearing conference was held on May 11, 1993. The conference primarily focused on the question whether the case can be resolved on the basis of documentary filings or whether a full evidentiary hearing will be required.

During the conference, the parameters of jurisdiction under the Immigration Reform and Control Act of 1986, as amended, 8 U.S.C. §1324b, were described to the parties. With respect to Complainant's national origin allegation, the number of individuals employed by

Respondent is an essential factor. Respondent represented that it experiences seasonal fluctuations in the number of employees in its workforce, and did not have at hand the number of employees. Accordingly, the issue of national origin jurisdiction was reserved for future resolution.

Discussion of the citizenship discrimination allegation made clear that underlying facts remained at issue. Consequently, resolution of the question regarding the need for an evidentiary hearing was premature. The parties were directed to make submissions to provide a basis for resolving whether a confrontational evidentiary hearing is necessary. Following the conference, each party filed materials in substantial compliance with directions set out in the First Prehearing Conference Report and Order dated May 14, 1993. This order issues upon consideration of those filings.

B. Retaliation Claim Dismissed

Holguin's complaint also alleged retaliatory conduct in violation of §1324b. The prehearing conference report and order disposed of that claim:

The conference discussed Complainant's retaliation allegation. The Complaint states, "[I was] threatened vocally with physical violence." Complaint, Paragraph (14) (a). . . .

During the conference, Complainant explained that being abandoned by Respondent while he was in Mexico and being unemployed have caused him considerable physical duress. Complainant concedes that Respondent never physically struck him nor threatened him.

While the duress described by Holguin if real, may be significant, it is not retaliation as contemplated by 8 U.S.C. §1324b(a)(5). Accordingly, this Order strikes the retaliation claim from the Complaint.

Order (5/14/93) at 2.

C. Factual Considerations

From the pleadings and other documents of record, certain facts appear undisputed. Holguin is a native-born United States citizen formerly employed by Dona Ana Fashions, most recently as a truck driver.

Dona Ana is located in Las Cruces, New Mexico. As of June 11, 1992, Dona Ana employed fifty individuals. Dona Ana cuts, sews and finishes ladies' coats as an apparel contractor for a jobber, Suzette

Fashions, Inc. (Suzette), in New Jersey. A portion of the work by Dona Ana is performed by one of two contractors, each with factories in Mexico, one in Juarez, the other in Torreon. The Mexican factories return finished goods to Dona Ana for transshipment to Suzette's warehouse in Jersey City.

Prior to January 1992, the transportation of goods between Dona Ana and the Juarez contractor, ConGen S.A. de C.V. (ConGen), was by means of ConGen equipment. Starting in 1992, Dona Ana decided to use its own truck to supplement deliveries between Las Cruces and Juarez. Dona Ana offered the truck driver job to Holguin. Holguin had been employed by Respondent as a maintenance worker for at least two years prior to accepting the offer as a truck driver. For several months ended June 1992, Holguin drove between Las Cruces and Juarez, taking cut fabrics to ConGen, and returning the sewn goods to Dona Ana.

Complainant's allegation of national origin and citizenship status discrimination in violation of 8 U.S.C. §1324b is that he was replaced by an undocumented alien at a lower wage rate than his \$5.00 hourly rate. He identifies the substitute driver as an individual who resides in Juarez, Mexico. Respondent counters that rather than having replaced Complainant as its driver, it abandoned its truck route in June 1992. Respondent claims it was not cost effective or efficient to continue running its own truck. In June 1992 it abandoned that practice, and terminated the driver's position.

Dona Ana claims it has not replaced Holguin as a driver and that the trucking operation since mid-June 1992 has been operated, located, and run out of the Mexican factory by an employee of that enterprise. To support Respondent's claim, Respondent's filing, in response to my May 14, 1993 order, includes a statement over the signature of Joseph Del Florio Murolo (Del Florio), manager of ConGen. Del Florio stated that,

This operation was---terminated at Dona Ana and switched back to Congen in Mexico, where as-the truck would be based at Congen and its operation run controlled by-Congen utilizing one of my employees who is on the Congen Payroll and--paid by Congen, as the driver. He has been with me many years and has a good knowledge of customs procedores, [sic] he also has all the necessary---legal documents to drive the truck and to enter into the U.S.

II. Discussion

A. National Origin Discrimination Allegation Dismissed

The national origin discrimination claim is dismissed because Dona Ana employs more than fourteen individuals. National origin discrimination jurisdiction is limited under 8 U.S.C. §1324b. As has been held in a number of cases:

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.

Zolotarevsky v. U.S. Nuclear Regulatory Commission, OCAHO Case No. 93B00078 (9/24/93) at 4; Cortes v. Seminole County School Board, OCAHO Case No. 93B00038 (6/23/93); Monjaras v. Blue Ribbon Cleaners, 3 OCAHO 526 (6/15/93) quoting Williamson v. Autorama, 1 OCAHO 174 (5/16/90) at 4, quoting U.S. v. Marcel Watch Co., 1 OCAHO 143 (3/22/90) at 11.

See also U.S. v. Huang, 1 OCAHO 288 (4/4/91), *aff'd*, Huang v. U.S. Dept. of Justice, 962 F.2d 1 (list) (2d Cir. 1992); Pioterek v. Scott Worldwide Food Service, OCAHO Case No. 92B00261 (6/9/93); Parkin-Forrest v. Veterans Administration, 4 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedents cited).

B. Citizenship Status Discrimination Questions To Be Resolved

Consistent with the rationale for enactment of §1324b, and with its terms, a citizenship status discrimination claim can succeed on behalf of a citizen of the United States who establishes that an employer prefers to, and does, employ non-citizens in his stead. It is undisputed that Holguin's duties as a truck driver were terminated in June 1992. Holguin disputes Dona Ana's claim that it offered him his prior job.

Whether Holguin was discharged, in fact, constructively, or not at all, is an inquiry essential to resolution of this case only if the claim of discrimination is otherwise established. Whether or not the defense that he was offered his former job may, however, be a moot question because I have a substantial doubt, based on the filings to date, that Complainant can establish discrimination. This is so because on its face, Respondent's claim appears to be reasonable, i.e., that for business reasons it eliminated the truck route for which it employed Holguin. In that context, I can find in Complainant's favor only if he can make out a prima facie case of citizenship discrimination by showing that (1) Dona Ana's transportation arrangement after mid-June 1992, as described above, discriminated against him in violation of §1324b, and (2) that Dona Ana and/or Suzette, on behalf of Dona Ana, controls the business decisions of ConGen, in conse

quence of which ConGen as the agent for Dona Ana employed a non-citizen for employment some of which takes place in the United States. Even if both (1) and (2) are found in Complainant's behalf, the burden confronting him remains formidable for it is unclear whether §1324b has extra-territorial applicability, viz, whether the administrative law judge is authorized to find a violation of §1324b where the locus of employment is outside the United States.

The filings to date seem to suggest the use of a Mexican-based vehicle and employment by ConGen of a Mexican-based driver outside of Respondent's control and direction. If I am persuaded that those are the facts by filings in response to this order, I will probably find for Respondent as on a summary decision, i.e., that there is no genuine issue of material fact. In such event, there will be no need for a confrontational evidentiary hearing. 28 C.F.R. §68.38.

III. Directions to the Parties

Respondent

Respondent's filing in response to my May 14 order failed to exactly comply with the directions to the parties. For that reason, and in the interest of resolving this matter as fairly but efficiently as feasible, Respondent is directed not later than December 31, 1993 to file by affidavit --

1. A description of the contractual arrangements between Dona Ana and ConGen which explains whether, and to what extent, Dona Ana or any enterprise on its behalf, controls and directs the transportation and employment operations of ConGen, with particular reference to the period January through June 1992.

2. Identification of the vehicle previously driven by Complainant to transport goods between Dona Ana and ConGen, describing it by type, manufacturer, etc. In responding to this inquiry, and to #3 and #5, Dona Ana's attention is directed to the prehearing conference report which summarized the judge's understanding of Respondent's oral statements to the following effect:

Respondent represents that it no longer participates in the operation of the truck in transporting goods between New Mexico and Mexico. Rather, for cost control purposes, Respondent made its truck available to the Mexican concern but exercises no control over its operation. An employee of the Mexico entity took over the truck driving position from Holguin. Fashions represents that although it still owns the truck, the truck is under the complete control of the Mexico entity.

3 OCAHO 582

Order (5/14/93) at 2. (Emphasis supplied).

3. Identification of the vehicle operated by ConGen after Complainant no longer drove for Dona Ana, describing it by type, manufacturer, etc. If the vehicle formerly driven by Holguin continued in use by ConGen, describe the extent of Dona Ana's ownership and control of the vehicle and the arrangement by which it was operated by ConGen.

4. A statement which adopts as true, if true it be, or otherwise explains, the May 12, 1993 letter addressed to me by Suzette, forwarded as an enclosure to Dona Ana's June 1, 1991 letter to me (filed June 3, 1993).

5. A statement which adopts as true, if true it be, or otherwise explains, the May 17, 1993 letter addressed to me by ConGen, forwarded as an enclosure to Dona Ana's June 1, 1991 letter to me (filed June 3, 1993).

Complainant

Complainant may file not later than January 21, 1994, a reply to Respondent's filing. Any allegations of fact shall be by affidavit.

Complainant and Respondent

Both parties shall identify, by name and address, each witness to testify in event of a confrontational evidentiary hearing, with a summary of the anticipated testimony.

The parties are reminded that every filing case must be accompanied by a certificate of service, reciting truly that such filing was served on the opposing party. 28 C.F.R. §68.6(a).

SO ORDERED.

Dated and entered this 1st day of December, 1993.

MARVIN H. MORSE
Administrative Law Judge