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

FLORINDA KATTAN, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding) CASE NO. 93B00096
UNION LEAGUE CLUB OF CHICAGO, Respondent.	)

ORDER TO SHOW CAUSE WHY SUMMARY DECISION SHOULD NOT BE GRANTED

I. *Procedural History*

On October 11, 1992, Complainant, Florinda Kattan, an alleged legal permanent resident, filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practice (OSC) against Respondent, Union League Club of Chicago, alleging discrimination based upon national origin in violation of § 274B of the Immigration and Nationality Act (Act), 8 U.S.C. § 1324b.

On April 2, 1993, OSC notified Complainant that it was continuing its investigation of her charge and that a determination of whether to file a Complaint was being held in abeyance pending further review of the evidence concerning her charge. However, because the 120-day investigatory period specified in 8 U.S.C. § 1324b had ended, and the OSC had not filed a Complaint, Mrs. Kattan was notified that she could file a Complaint on her own with the Office of the Chief Administrative Hearing Officer no later than 90 days from the date she received this notification.

On May 16, 1993, Complainant filed her Complaint with OCAHO alleging that she was discriminated against based on her national origin. Additionally, she alleged that she was intimidated, threatened, coerced and/or retaliated against because either, 1) she filed a com-plaint, 2) had planned to file a Complaint; and/or 3) to keep her from assisting someone else from filing a Complaint. Specifically, the Complainant stated, "I was abused verbally and physically by the

supervisor. If I asked her not to be that way, I was told that if I did not like it, I should go back to my own country."

On June 2, 1993, OCAHO issued a Notice of Hearing On Complaint Regarding Unlawful Immigration-Related Employment Practices which notified the parties of the filing of the Complaint and Respondent's obligation to file an Answer within thirty (30) days after receipt of the Complaint so as not to suffer the possibility of a Default Judgment. On June 9, 1993, I issued a Notice of Acknowledgment in which Respondent was again cautioned that a timely Answer to the Complaint was due in order to forestall the issuance of a Default Judgment.

On June 21, 1993, Respondent's counsel, Mark A. Lies, II, Esquire, filed a Notice of Appearance and a letter dated June 8, 1993, and received on June 14, 1993, wherein OSC notified Mr. Lies, that on the basis of their investigation, OSC had determined that there was no reasonable cause to believe that Ms. Kattan's charge was true. Therefore, it was dismissing the charge.

Counsel requested that I conduct a telephone pretrial conference to determine whether the matter could now be resolved with a nominal financial settlement so as to avoid further legal fees and expenses. Respondent stated it believed that it had acted properly and would vigorously defend the suit if settlement were not possible. Based on Respondent's request, on June 24, 1993, I ordered the parties to appear at a telephonic conference at 9:30 a.m. Pacific Time on June 30, 1993.

At the prehearing conference, Complainant indicated the following:

1. that she did not know why she had been fired;

2. that she had worked for Respondent for almost five (5) years and that, with no prior notice, on September 26, 1992, she had been barred from the premises by security; and,

3. that she has been unable to obtain a new job as Respondent has been giving potential employers an extremely detrimental reference on her behalf.

In response, the Respondent represented that it employed approximately two hundred ninety (290) employees and that it had terminated Complainant for cause after a prior warning. Specifically, Respondent alleged that Complainant, prior to being terminated, had

been involved in a physical altercation with another housekeeping employee, for which both were equally disciplined and warned that if there was another incident of that type, Respondent could effectuate termination.

It was the Respondent's representation that after this warning, another physical altercation did occur involving Complainant, and that as a result, Complainant was terminated. Further, Mr. Lies stated that his instructions to Personnel, with regard to requests for a job reference from potential employers for Complainant, had been to only release information regarding Complainant's hiring and termination dates. Had any additional information been released, it was unauthorized.

In an effort to speedily resolve this case, Respondent offered to pay the Complainant seven hundred fifty dollars ($750.00). As Complainant was not ready to accept this offer, I directed Complainant to file, within one week, a written statement indicating whether she wished to accept Respondent's settlement offer, or whether she would prefer to continue litigation.

On June 30, 1993, the Respondent filed its Answer and Affirmative Defenses to Complaint Regarding Unfair Immigration-Related Employment Practice. In its Answer, as Respondent alleged that it could not answer or respond to the specific allegations in the Complaint because they were incomplete, Respondent denied the allegations of discrimination. Respondent's First Affirmative Defense was that Complainant failed to state a cause of action for discrimination on the basis of national origin. Its Second Affirmative Defense was that Respondent was a private association, a not-for-profit corporation under Section 501(c)(7) of the Internal Revenue Code, and, thus not subject to jurisdiction under 8 U.S.C. § 1324b. Respondent's Third Affirmative Defense was that it employed in excess of two hundred employees and thus was not subject to this court's jurisdiction under a claim of national origin discrimination. Respondent requested that the court enter judgment in its favor and dismiss the Complaint and award Respondent such other relief as the court deemed just and appropriate.

On July 2, 1993, Complainant filed a letter, as ordered, indicating that she was rejecting Respondent's offer of settlement.

On July 19, 1993, Complainant filed a letter pleading indicating the conditions in which she would accept settlement of this case. The conditions were: 1) that she receive a written apology from the club

for the way they treated her upon unfair dismissal, 2) that she receive a written letter of recommendation for the five years of good work she served to the club, 3) that her personal files be cleared of all false allegations raised against her, and, 4) that she receive a settlement of $9,290.00 for alleged losses.

As it appeared that this case would not be settled promptly, on August 30, 1993, I issued an Order Directing Procedures for Prehearing so that the parties could start discovery.

In my Order Confirming Prehearing Telephonic Conference under date of September 27, 1993, I found that the Respondent employed more than fourteen (14) persons and, therefore, I did not have subject matter jurisdiction regarding Respondent's claim for national origin discrimination. As Respondent had indicated that it would be filing a Motion for Summary Decision, I directed that it be filed within thirty (30) days from the date of this order and that Complainant respond within thirty (30) days after receipt of said Motion.

At that time, I also informed the parties that the court was interested in the allegation of intimidation in the Complaint. See § 274B(a)(5) of the Act. Additionally, as the parties stated that they were amenable to settlement, but, had not been able to agree on a monetary sum, I ordered them to file a joint status report within thirty (30) days of the order.

On October 25, 1993, Respondent filed its Motion for Summary Decision. In the Motion, Respondent indicated that the action for national origin should be dismissed for lack of subject matter jurisdiction, pursuant to 8. U.S.C. § 1324b(a)(2)(B), since the Respondent employed more than fifteen (15) employees. Further, Respondent indicated that the Complainant's termination could not have been the result of intimidation or retaliation against her for her assertion of her rights under 8 U.S.C. § 1324b(a)(5), because she did not assert any such rights until after the date of her termination. In support of its position, Respondent quoted §1324b(a)(5) of the Act:

> It is also an unfair immigration related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section...

The Respondent indicated that according to paragraph 14(c) of Com-plainant's Complaint, she was fired on January 6, 1989. However, she

did not file a charge with the Office of Special Counsel until October 11, 1992. This action was not filed until May 1993. Respondent argues that Complainant has not alleged that she was in any way intimidated or retaliated against prior to the date of her termination or that Respondent had any knowledge that she intended to assert her rights under this section prior to her termination.

II. *Legal Standards for Summary Decision*

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially- noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 1555 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); see also Consolidated Oil & Gas, Inc., v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

The relevant regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise...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.

III. *Discussion*

In the pending Motion for Summary Decision, the Respondent has raised two (2) arguments which could result in the dismissal of this case should either of them be found to be proper. The first is that the court does not have subject matter jurisdiction pursuant to 8 U.S.C. § 1324b(a)(2)(B), because Respondent employees more than fourteen (14) employees.

As Complainant has not disputed this fact, I find that Respondent employs more than fourteen (14) employees. Thus, Respondent is correct in his assertion that the court lacks subject matter jurisdiction. Therefore, I dismiss Complainant's allegations of national origin discrimination.

Respondent's second argument concerns the allegation of intimidation and/or retaliation. Respondent concluded that Complainant is unable to allege with specificity how she was intimidated or retaliated against, although she indicated that she was abused verbally and

physically by a supervisor under this section of the Act. Respondent continues to argue that Complainant does not have a plausible action under IRCA as Complainant did not allege that she was, in anyway, intimidated or retaliated against prior to the date of her termination or that the Respondent had any knowledge that she intended to assert her rights under § 1324b(a)(5) prior to her termination.

To date, Complainant has not responded timely to the Respondent's Motion for Summary Decision. Under the regulations and case law, the burden is on the Complainant to prove by, a preponderance of the evidence that a discriminatory act took place under 8 U.S.C. § 1324b. Under 28 C.F.R. 68.10, I may dismiss or grant the Motion for Summary Decision if I find that Complainant has not stated a claim upon which relief can be granted. In this case, at least at the present time, upon a careful review of the record, I am inclined to grant Respondent's Motion. However, I am sensitive to the fact that Complainant is acting pro se. Among my concerns is the possibility that Complainant might be in possession of relevant information which she has not brought to the court's attention due to her unfamiliarity with the legal burdens concerning her right to relief under the Act.

As such, and in the interest of fairness and justice, I am issuing this order for the Complainant to Show Cause Why Respondent's Motion for Summary Decision should not be granted and directing Complainant to file a proper response to Respondent's Motion to Dismiss on or before fifteen (15) calendar days from the receipt of this Order. Complainant should address each argument that Respondent has raised. In other words, Complainant must supply information and/or evidence which will show that she would be entitled to relief under the Act, supported by affidavit or other supportive evidence. She may not rest upon her previously filed documents.

In the event that Complainant does not file her response to this Order within the time frame stated above, I will thereafter consider Respondent's Motion for Summary Decision.

IT IS SO ORDERED this 14th day of December, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge