

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

PATRICIA GENE LeEDWARDS,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) CASE NO. 92B00192
KUMAGAI INTERNATIONAL)
USA CORPORATION,)
KUMAGAI GUMI)
COMPANY, LIMITED, FUNDEX)
CORPORATION AND YOSHIRO)
OZEKI,)
Respondents.)
_____)

FINAL DECISION AND ORDER GRANTING JOINT MOTION TO
DISMISS COMPLAINT WITHOUT PREJUDICE

I. *Introduction*

Currently before me is a Joint Motion For Dismissal Without Prejudice, filed by the parties in this case on January 31, 1994. For the reasons stated below, the joint motion will be granted.

On August 29, 1992, Patricia Gene LeEdwards ("Complainant" or "LeEdwards"), filed a complaint against Kumagai International U.S.A. Corporation, Kumagai Gumi Company, Ltd., Fundex Corporation and Yoshiro Ozeki, (listed on Complainant's charge form filed with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices ("OSC") at para. 6 as Vice President of "the company"), alleging that on October 26, 1991, she was forced to quit her job working for Respondents in cash management, accounting and human resources because of "constant harassment and discrimination"

based on her U.S. citizenship and American national origin, in violation of § 102 of IRCA, 8 U.S.C. § 1324b.

II. *Procedural History*

Complainant initiated the proceedings in this case on February 10, 1992 by filing a charge with OSC, alleging that Respondents had discriminated against her based on her national origin and citizenship status. In a determination letter dated June 25, 1992, OSC informed Complainant's counsel that it had not made a determination as to Complainant's allegations, but was continuing its investigation, and advised Complainant's counsel that Complainant could file her own complaint. Pursuing her right to bring a private action, on August 28, 1992, Complainant filed the complaint in this case. On October 7, 1992, all Respondents except Ozeki filed an answer to the complaint. A hearing was set for April 12, 1993 in San Francisco, California.

Service of the complaint was perfected as to all Respondents except Ozeki. See Order of October 14, 1992 (stating that "[t]his office has been notified by the Case Management Section of the Office of the Chief Administrative Hearing Officer that it has been unsuccessful in serving Respondent Yoshiro Ozeki with the Complaint in this case.").¹

On January 13, 1993, the parties (except for Ozeki) filed a Stipulation for Continuance of Hearing, requesting a six-month continuance, because of their involvement in a civil action concerning related issues, which was (and is) presently pending before the United States District Court for the Northern District of California. See LeEdwards v. Kumagai International USA Corp., No. 692-03831 (N.D. Cal. filed July 30, 1992).²

On January 21, 1993, a telephonic conference was conducted to discuss the Joint Stipulation for Continuance and the status of discovery. It was agreed that on or before February 19, 1993, the

¹ The other Respondents stated that they employed Ozeki until July 31, 1992 and that they believed that Ozeki relocated to Japan and may be employed by Time Warner Entertainment Japan, Inc. See Response of Respondents Kumagai International U.S.A. Corporation, Kumagai Gumi Company, Ltd. and Fundex Corporation to October 14, 1992 Order of ALJ, filed October 23, 1992. Ozeki did not authorize the other Respondents or their counsel to accept service of any papers on his behalf.

² Complainant has also filed a complaint against Respondents for employment discrimination in state court. See LeEdwards v. Kumagai International USA Corp., No. 37592 (Cal. Super. Ct., San Mateo City, filed July 30, 1992).

parties to this matter would file a joint motion to continue this case until further order, and would include in that motion detailed information as to the status of the civil case filed in federal district court.

On February 18, 1993, the parties Kumagai International U.S.A. Corporation, Kumagai Gumi Company, Ltd. and Fundex Corporation filed a Joint Motion for Continuance of Hearing. The motion stated, regarding the civil action, that those parties had agreed to mediation in March, 1993 to settle that action. On February 23, 1993, I issued an order continuing the hearing date, as it was "in the best interest of [all] parties to try to reconcile the federal case first without having to deal with the litigation demands of the case at bar." I also ordered the Complainant to submit a status report to this office on the first Monday of each month, to begin Monday, April 5, 1993. Complainant submitted status reports for a period of nine months.

On December 8, 1993, I issued an order scheduling a telephonic conference for December 14, 1993, to discuss the feasibility of dismissing this case without prejudice. As a result of that telephonic conference, all parties (except Ozeki) agreed that a continuance of this case until January 14, 1994, would allow them enough time to determine if the federal case and the case at bar could be resolved through settlement. They agreed to file, on or before December 31, 1993, a joint motion to continue this case until January 14, 1994. They further agreed that if this case could not be settled before January 14, 1994, Complainant would file an appropriate motion to dismiss.

On January 3, 1994, Kumagai International U.S.A. Corporation, Kumagai Gumi Company, Ltd. and Fundex Corporation filed a Joint Motion for Continuance. On January 25, 1994, because Complainant had not yet filed a motion to dismiss, I issued an order to show cause why this case should not be dismissed without prejudice. On January 31, 1994, the parties (except Ozeki) filed a Joint Motion for Dismissal Without Prejudice.

III. *Discussion*

A. Legal Standards for Dismissal of a Complaint

The rules of practice and procedure governing these proceedings explicitly provide for dismissal of complaints under three circumstances: (1) "[w]here the parties or their authorized representatives or their counsel have entered into a proposed settlement agreement" (28

C.F.R. § 68.14); (2) when a complaint or a request for hearing is abandoned by the party or parties who filed it (28 C.F.R. § 68.37(b)); (3) by default (28 C.F.R. § 68.37(c)).

A joint motion to dismiss a complaint without prejudice is not specifically covered by the regulations. The regulations, however, state that in any situation not provided for or controlled by the regulations, the Administrative Procedure Act, or any other applicable statute, executive order or regulation, the Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in deciding a legal issue before the Administrative Law Judge. 28 C.F.R. § 68.1.

Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure allows the parties to dismiss an action voluntarily after an answer has been served "by filing a stipulation to dismissal signed by all the parties who have appeared in the action." Dismissal by stipulation is without prejudice unless the stipulation provides otherwise. Poloron Products, Inc. v. Lybrand Ross Bros. and Montgomery, 534 F.2d 1012 (2d Cir. 1976). The requirements of this subsection may be met either by filing a written stipulation or by making an oral stipulation in open court. Eitel v. McCool, 782 F.2d 1470, 1472-73 (9th Cir. 1986). In addition, under Rule 41(a)(2), the court may, under certain circumstances, order dismissal of an action "at the plaintiff's instance." Kovh v. Hankins, 8 F.3d 650, 651 (9th Cir. 1993). Such an order is proper only if a plaintiff has made a motion for dismissal. 9 C. Wright and A. Miller, Federal Practice and Procedure § 2364 at 160-61 (1971).

B. Case Analysis

Applying the general principles of Rule 41(a)(2) to the facts of this case, I find that the joint motion to dismiss filed by the parties satisfies the "written stipulation" requirement of Rule 41(a)(1)(ii) and that it is in the best interest of all parties and this agency to dismiss this case without prejudice because of the elimination of time and expense for filings status reports while Complainant's allegations of employment discrimination based on the same facts asserted in this case are being addressed in her federal and state court cases.³

³ The rules of practice and procedure governing these proceedings also provide that "[i]n circumstances where the Office of the Chief Administrative Hearing Officer or the Administrative Law Judge encounter difficulty with perfecting service [,] the Chief Administrative Hearing Officer or the Administrative Law Judge may direct that a party
(continued...)

ACCORDINGLY, the parties' Joint Motion to Dismiss the Complaint Without Prejudice is hereby GRANTED.

SO ORDERED this 11th day of February, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge

³(...continued)
execute service of process." 28 C.F.R. s 68.3(c). Furthermore, Rule 4(j) of the Federal Rules of Civil Procedure provides that:

[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not make within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. . . .

Based on the above, I find that my Order of October 14, 1992 provided Complainant with sufficient notice that her complaint against Ozeki would be dismissed because the Office of the Chief Administrative Hearing Officer was unsuccessful in serving him with the complaint.