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

February 22, 1994

ELIZABETH S. MENGARPUAN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 93B00199
ASBURY METHODIST VILLAGE, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO DISMISS, AND ORDER TO SHOW CAUSE WHY COMPLAINANT'S CITIZENSHIP STATUS DISCRIMINATION CLAIM SHOULD NOT BE DISMISSED

On April 15, 1993, Elizabeth S. Mengarpuan (complainant), a citizen of Liberia authorized for employment in the United States, filed a charge with the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC).

In that charge, complainant asserted that on February 16, 1992, she was hired by Asbury Methodist Village (respondent), at which time she produced a driver's identification and unrestricted Social Security card for the purpose of establishing her identity and employment eligibility.

On March 23, 1993, complainant asserted, respondent's personnel department required that she complete a new Employment Eligibility Verification Form (Form I-9), at which time she produced the documents that she had originally provided for that purpose upon hire. Complainant contended that respondent refused to accept those documents for employment eligibility verification purposes, demanding instead that complainant produce a permit issued by the Immigration and Naturalization Service (INS).

Complainant asserted that she assented to this request under protest, producing a Form I-688 with an expiration date of March 27, 1993, a copy of a timely extension request, and an INS notice that temporary protected status (TPS) had been extended for Liberia.

On March 25, 1993, complainant alleged, respondent issued a letter of termination. Complainant asserted that she telephoned respondent to inform it that INS had granted her requested extension, only to be told that she was able to reapply for employment, but that there were no available positions.

By letter dated August 13, 1993, OSC informed complainant that although the 120-day investigatory period specified in IRCA, 8 U.S.C §1324b, had expired, OSC had not made a determination to complainant's allegations. For that reason, OSC explained, complainant had a right to file her own complaint directly with this Office within 90 days of her receipt of that determination letter.

On November 12, 1993, complainant filed a Complaint with this Office, followed by an amended Complaint filed January 4, 1994.

In her Complaint, complainant asserted that on March 27, 1993, respondent knowingly and intentionally fired her because of her citizenship status and national origin, refused to accept documents offered for the purpose of demonstrating employment authorization, and asked for too many or the wrong documents than required to show employment authorization.

In particular, complainant alleged that respondent refused to accept an unrestricted Social Security card, a Maryland driver's license, proof that complainant's TPS permit extension was timely filed, and an INS notice that TPS had been extended for Liberians, requesting instead that complainant produce an INS-issued work permit.

On February 4, 1994, respondent filed its Answer, denying therein complainant's specific allegations that it had engaged in unfair immigration related employment practices, and asserting five affirmative defenses.

As a first affirmative defense, respondent asserts that complainant's claim that respondent violated the document abuse provision of IRCA, 8 U.S.C. §1324b(a)(6), should be dismissed for failure to state a claim. In particular, respondent asserts that the document abuse provision only applies to the hiring of individuals. Because complainant was an

incumbent employee of respondent, respondent argues, she does not have a claim under the document abuse provision of IRCA.

As a second affirmative defense, respondent asserts that under 8 U.S.C. §1324b(a)(2)(B), this Office does not have jurisdiction over complainant's claim of national origin discrimination, because that claim is covered under Title VII of the Civil Rights Act of 1964.

In its third affirmative defense, respondent asserts that this Office does not have jurisdiction over complainant's claim of citizenship status discrimination because complainant failed to raise that claim in the charge she filed with OSC.

As a fourth affirmative defense, respondent asserts that complainant's document abuse claim is not actionable because the document complainant produced as evidence of her employment authorization is not acceptable for the purpose of establishing employment authorization under IRCA, 8 U.S.C. §1324a(b)(1)(B) or 8 U.S.C. §1324a(b)(1)(C). Moreover, respondent denies that it demanded that complainant produce an INS-issued work permit.

On February 4, 1994, respondent also filed a Motion to Dismiss, asserting therein that complainant's discrimination and document abuse claims are defective as a matter of law and should be dismissed.

The procedural regulations governing administrative hearings in cases involving allegations of unfair immigration-related employment practices provide for the dismissal of a complaint where the administrative law judge determines, upon motion by respondent, that complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. §68.10.

A motion to dismiss for failure to state a claim is a means for testing the legal sufficiency of the complaint. United States v. Fairchild Indus., 766 F.Supp. 405, 409 (D.Md. 1991).

In determining whether to dismiss a complaint, the trial court should view the well-pleaded allegations in the light most favorable to complainant, with the facts alleged by complainant accepted as true. Schatz v. Rosenberg, 943 F.2d 485, 489 (4th Cir. 1989); Islam v. Jackson, 782 F.Supp. 1111, 1113 (E.D.Va. 1992); Herlihy v. Ply-Gem Indus., Inc., 752 F. Supp. 1282, 1285 (D.Md. 1990). See also Scheuer v. Rhodes, 461 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974).

In general, motions to dismiss should be granted only in very limited circumstances. Rogers v. Jefferson, 883 F.2d 324, 325 (4th Cir. 1989). A motion to dismiss should not be granted unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984); Duane v. Government Employees Ins. Co., 784 F.Supp. 1209, 1211 (D.Md. 1992). See also Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 101-102 (1957).

Concerning complainant's allegation of document abuse, respondent asserts that that should be dismissed on the ground that the document abuse provision applies only to newly hired employees, and not to incumbent employees like complainant.

The document abuse provision, 8 U.S.C. §1324b(a)(6), was not included in the original Immigration Reform and Control Act of 1986, passed by Congress and signed by President Reagan on November 6, 1986, but was instead added by the Immigration Act of 1990 (IMMACT 90).

Even before the document abuse provision was added to the anti--discrimination provisions of IRCA, a request that an individual present additional or specific proof of employment authorization either as a prerequisite to or after hire was recognized as an unfair immigration related employment practice. See Jones v. DeWitt Nursing Home, 1 OCAHO 189 (6/29/90); United States v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90); United States v. LASA Mktg. Firms, 1 OCAHO 106 (10/27/89).

IRCA was amended by IMMACT 90, effective November 29, 1990. Section 535(a) of IMMACT 90 amended 8 U.S.C. §1324b by adding the following paragraph to the unfair immigration related employment practices provision:

> TREATMENT OF CERTAIN DOCUMENTARY PRACTICES AS EMPLOYMENT PRACTICES - For purposes of (8 U.S.C. §1324b(a)(1)), a person's or other entity's request, for purposes of satisfying the requirements of (the employment verification system), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals

8 U.S.C. §1324b(a)(6).

Respondent asserts that the phrase "shall be treated as an unfair immigration-related employment practice relating to the hiring of

individuals" in the above-cited provision indicates that the document abuse provision is only applicable in a hiring situation, and does not apply to subsequent verification or reverification.

The statement in the document abuse provision that an instance of document abuse "shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals" does not limit document abuse to the hiring situation, as respondent asserts.

Rather, that statement provides that an instance of document abuse in any situation constitutes discrimination "with respect to the hiring ... of (an) individual for employment" as prohibited under 8 U.S.C. §1324b(a)(1). See, e.g., United States v. Louis Padnos Iron & Metal Co., 3 OCAHO 414 (3/27/92) (document abuse under 8 U.S.C. §1324a(b)(6) found where employer requested INS-issued extension of work authorization during reverification process).

For this reason, respondent's motion to dismiss is denied as it pertains to complainant's document abuse claim.

In connection with complainant's national origin discrimination charge, respondent next contends that complainant's claim of national origin discrimination must be dismissed because that claim is covered under Title VII.

Where the administrative law judge in an 8 U.S.C. §1324b action does not have subject-matter jurisdiction over a complainant's claims, those claims must be dismissed. Brown v. Baltimore City Pub. Sch., 3 OCAHO 480 (6/4/92).

IRCA expressly excludes from the definition of an unfair immigration related employment practice "discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964 (Title VII)...." 8 U.S.C. §1324b(a)(2)(B).

Section 703 provides:

> (a) It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual...because of such individual's... national origin...

42 U.S.C. §2000e-2. Further, that section provides:

> (b) It shall be an unlawful employment practice for employment agency to fail or refuse to refer for employment... any individual because of his national origin...

Id.

The term "employer" is defined for purposes of Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. §2000e(b).

Therefore, an employer who employs more than 14 individuals is excluded from IRCA coverage with respect to national origin discrimination claims. Jackai v. Dallas County Data Serv., 3 OCAHO 569, at 6 (10/21/93); Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, at 2 (10/19/93); Brooks v. Watts Window World, 3 OCAHO 558, at 1 (8/31/93); Yefremov v. New York City Dep't of Transp., 3 OCAHO 466 (10/23/92); Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459, at 6 (9/24/92).

In the charge complainant filed with OSC, she admitted that respondent employed more than 15 individuals. Charge, ¶3. For this reason, this Office lacks subject-matter jurisdiction over complainant's claim of national origin discrimination, and that claim is ordered to be and is dismissed.

Finally, in addressing complainant's claim of citizenship status discrimination, respondent urges that that allegation must be dismissed because complainant failed to include such a charge in her initial allegations filed with OSC.

In paragraph 4 of the charge, complainant was asked to describe the unfair immigration related employment practice that she asserted she had suffered. Complainant checked the boxes pertaining to "National Origin Discrimination" and "Document Abuse", leaving the box pertaining to "Citizenship Status Discrimination" unchecked. Charge, ¶4.

In paragraph 14 of the Complaint, however, complainant indicated that she was fired because of her citizenship status and her national origin.

Respondent argues that asserting a claim in a charge filed with OSC is a prerequisite to asserting that claim in a complaint filed with this Office. Because complainant failed to expressly assert a claim in her charge that she was discharged on the basis of her citizenship status, respondent concludes, this Office lacks jurisdiction over that claim.

Where a national origin claim has been dismissed for lack of jurisdiction, the "widest ambit of administrative review" has been given to pro se complainants by judges in this Office in considering whether a case of citizenship status discrimination exists with respect to that claim. See Sellaro v. Elektra Records, 3 OCAHO 495, at 13-14 (3/9/93); Ryba v. Tempel Steel, 1 OCAHO 289, at 10 (1/23/91). See also Klimas v. Department of the Treasury, 3 OCAHO 419, at 14 (4/6/92) (where complainant asserted citizenship status claim in charge but not complaint, and judge determined that he lacked jurisdiction over national origin discrimination claim, "widest ambit of administrative review" was applied to find citizenship status discrimination claim).

When asked on the charge form to describe the unfair employment practice of which she complained, complainant asserted, "I... believe that this particular personnel officer was intentionally using the sanction aspects of the law to terminate foreigners." Charge, ¶9.

Black's Law Dictionary defines "foreigner" as a "(p)erson belonging to or under citizenship of another country." Black's Law Dictionary 582 (5th ed. 1979). Therefore, following the logic in Ryba and Sellaro, I find that complainant's assertion that respondent was using the sanctions provisions to discriminate against "foreigners" constitutes a claim of citizenship status discrimination.

However, it appears that complainant's citizenship status discrimination claim must be dismissed because complainant does not have standing to assert that claim.

Upon examining complainant's OSC charge, it is noted that she asserted that she is "otherwise authorized to work" under the temporary protected status program (TPS). TPS is granted under section 244A of the INA, 8 U.S.C. §1254a.

In particular, 8 U.S.C. §1254a(a)(1) provides that the Attorney General:

> (B) shall authorize the alien to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

In order to maintain a citizenship status discrimination claim under IRCA, 8 U.S.C. §1324b(a)(1)(B), the alleged subject of the discrimination must be a "protected individual", as that term is defined under IRCA, 8 U.S.C. §1324b(a)(3). Brooks v. KNK Textile, 3 OCAHO 545, at 1 (8/3/93).

The term "protected individual", as it apples to the citizenship status discrimination provision of IRCA, means an individual who:

> (A) is a citizen or national of the United States, or
>
> (B) an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 210(a), 210A(a), or 245A(a) (of the Immigration and Nationality Act (INA)), is admitted as a refugee under section 207 (of the INA), or is granted asylum under section 208 (of the INA).

8 U.S.C. §1324b(a)(3).

Because TPS is not among the alien status classifications listed under 8 U.S.C. §1324b(a)(3), it appears that complainant is not a protected individual for the purpose of citizenship status discrimination.

Complainant bears the burden of establishing that she is a protected individual. Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 469, at 5 (11/6/92); Prado-Rosales v. Montgomery Donuts, 3 OCAHO 438 (6/26/92). For this reason, complainant is ordered to show cause why her citizenship status discrimination claim should not be dismissed on the ground that she is not a protected individual, as defined in 8 U.S.C. §1324b(a)(3), and to have done so within 15 days of her acknowledged receipt of this order.

In the event that complainant fails to do so, her claim of citizenship status discrimination shall be dismissed for lack of subject matter jurisdiction. Speakman v. Rehabilitation Hosp. of S. Texas, 3 OCAHO 476 (12/1/92).

Accordingly, respondent's motion to dismiss is denied as it pertains to complainant's document abuse claim and is granted, as it pertains to complainant's national origin discrimination claim.

Complainant is ordered to show cause, within 15 days of her acknowledged receipt of this order, why her citizenship status discrimination claim should not be dismissed on the ground that she is not a protected individual, as that term is defined in IRCA, 8 U.S.C. §1324b(a)(3). In the event that complainant fails to do so, complainant's citizenship status discrimination claim shall be dismissed.

A telephonic prehearing conference will be scheduled shortly for the purpose of determining an appropriate hearing date and location in this matter, in accordance with the pertinent procedural regulation, 28 C.F.R. section 68.5(b).

JOSEPH E. MCGUIRE
Administrative Law Judge