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

MIGUEL A. GALLEGOS, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 93B00207
MAGNA-VIEW, INC. Respondent.	)	

FINAL DECISION AND ORDER

(April 19, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Miguel A. Gallegos, pro se
Heriberto (Herb) de Leon, Esq., for Respondent

I. *Procedural Background*

On November 18, 1993, Miguel A. Gallegos (Gallegos or Complainant), filed a handwritten complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The handwritten complaint alleges that the general manager of his former employer, Magna-View, Inc. (Magna-View or Respondent), told him he was being laid off because he could obtain post-employment benefits, while other employees who were not fired could not obtain such benefits because they were illegals. Gallegos alleges also that the illegals work at the proprietor's ranch for whatever he wants to pay them, presumably at less than competitive wages.

Upon receipt by OCAHO of his handwritten complaint, Gallegos was provided with a preprinted "Questionnaire/Complaint" format which he filled out in part, signed and dated December 26, 1993, and filed with

OCAHO on January 6, 1994. Where appropriate, the two documents are referred to collectively in my March 15, 1994 Order as the complaint; references to numbered paragraphs of the Gallegos preprinted complaint format are identified simply as complaint paragraphs.

On January 27, 1994, OCAHO issued a notice of hearing, which transmitted to Respondent a copy only of the Gallegos preprinted complaint, and which assigned the case to me. Gallegos alleges he is a native and citizen of Mexico who obtained permanent residence status in the United States on February 12, 1988. Complainant recites that he was employed by Respondent, located in Dallas, Texas, from July 1980 until January 1, 1993 to seal machines. Respondent filed its answer to the complaint by facsimile transmission on February 23, 1994, followed by a signed, mailed copy filed February 28, 1994. Respondent's timely answer denies that it discriminated against Complainant on either national origin or citizenship status grounds. Respondent asks also that I find that "Complainant's argument is without reasonable foundation in law and in fact," and that it be awarded attorney's fees.

By Order issued March 15, 1994, 4 OCAHO 619, I addressed specific inquiries to each of the parties. I stated in pertinent part that,

> There are significant omissions in and contradictions among Complainant's entries on the preprinted complaint. Superficially, the entries on the preprinted format could be understood, as claimed by the answer, to not allege discrimination at all. In contrast, I understand the complaint to allege discriminatory discharge. It is by no means clear, however, whether Gallegos intended to allege national origin and/or citizenship status discrimination. This order addresses only those omissions and contradictions relevant to determining whether Complainant can make out a jurisdictional prima facie case of discrimination in violation of § 1324b.

4 OCAHO 619 at para. 4.

Directing both parties to file responses in affidavit form or otherwise under oath not later than Wednesday, March 30, 1994, the Order recited that,

> Failure by a party to make a timely filing in response to this order may result in dismissal of the case of the defaulting party.

4 OCAHO 619 at para. 10.

Respondent's response was filed on March 25, 1994. Respondent's filing is in the form of an affidavit of G. P. Frierson (Frierson), as

vice-president of Magna-View. Frierson recites that seventeen was the average number of individuals employed by Respondent during Gallegos' employment, the highest number reaching 22. On January 14, 1987, the day Complainant was hired, eighteen employees were on the payroll; there were seventeen employees on January 11, 1993, the date he was laid off.

The Frierson affidavit states also that Gallegos was one of two employees discharged due to a decline in sales, both of whom would be rehired if production returned to its prior level; as of the date of the affidavit, March 24, 1994, he asserted it had not.

More than two weeks after the due date for response to the March 15, 1994 order, Complainant has still not filed a response or other pleading.

II. *Discussion*

The result of Gallegos' failure to respond to the March 15, 1994, order is that I am uninformed whether or when he applied for naturalization, and, accordingly, whether he is a protected individual entitled to claim citizenship status discrimination. 8 U.S.C. § 1324b(a)(3)(B). Similarly, I am uninformed as to whether he intended to claim national origin discrimination, a claim which, presumptively, I cannot adjudicate in light of Respondent's unrebutted showing that it employs more than fourteen individuals. 8 U.S.C. § 1324b(a)(2)(B). OCAHO rules of practice and procedure provide that where a party fails to respond to the order of the administrative law judge, the judge may, take one or another of certain specified actions,

> for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay.

28 C.F.R. § 68.23(c).

Failure by Gallegos to comply with my order invites me to, and I do, infer and conclude that his response would have been adverse to him, 28 C.F.R. § 68.23(c)(1), that the question of jurisdiction is established adversely to him, 28 C.F.R. § 68.23(c)(2), and that he is precluded from introducing evidence in support of his claim of jurisdiction over his citizenship status and/or national origin discrimination claims, 28 C.F.R. § 68.23(c)(3).

Moreover, this is another case of an individual invoking protection under § 1324b without accepting the responsibility to reasonably abide

by established procedures as required by the presiding judge. OCAHO rules are clear:

> A complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint if:
>
> (1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge;

28 C.F.R. § 68.37(b)(1).

Consistent with OCAHO rules of practice and procedure, I deem Complainant's unexplained failure to respond to the March 15, 1994 Order to be an abandonment of his complaint. 28 C.F.R. § 68.37(b)(1); U.S.A. v. McDonnell Douglas Corp., OCAHO Case No. 90200363 (4/12/94) (Order Granting Dismissal); Yohan v. Central State Hospital, OCAHO Case No. 93B00048 (4/8/94); Chavez v. National By-Products, 4 OCAHO 620 (3/18/94); Holguin v. Dona Ana Fashions, 4 OCAHO 605 (2/1/94); Franco v. Tulsa Junior College, OCAHO Case No. 93B00171 (1/3/94); Brooks v. Watts Window World, 3 OCAHO 570 (11/1/93); Speakman v. Rehabilitation Hospital of South Texas, 3 OCAHO 476 (12/192); Palancz v. Cedars Medical Center, 3 OCAHO 443 (8/3/92).

Patently, Respondent is the prevailing party in this litigation. Respondent's answer to the complaint requests that I award attorney's fees. I do not do so because I am unable to agree with Respondent that the underlying predicate for fee shifting is necessarily present here, i.e., that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h). The Gallegos complaint may be understood to state a § 1324b cause of action. It may be speculated that at least this pro se complainant possessed standing to allege a prima facie case lost by failure to comply with orders of the bench. I do not predict that in another case, the procedural result reached here will necessarily prevail. However, it should be noted that,

> The Supreme Court has a "double standard" with regard to fee awards in civil rights cases, which makes it "easier for plaintiffs than for defendants to recover fees to enable plaintiffs with meager resources to hire a lawyer to vindicate their rights" while at the same time "'protect[ing] defendants from burdensome litigation having no legal or factual basis.'" Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978). The Supreme Court has cautioned district courts to "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg, 434 U.S. at 421. The Court has further stated that "[e]ven when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 421-22. Attorney fees therefore

> must be awarded to prevailing defendants in a circumspect manner to avoid "a chilling effect upon the prosecution of legitimate civil rights lawsuits" which are less than airtight. Sassower v. Field, 973 F.2d 75, 79 (2d Cir. 1992), cert. denied, 113 S.Ct. 1879 (1993).
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> Rusk v. Northrop Corporation, 4 OCAHO 607 (2/4/94) at 24.

This final decision and order adopts the discussion in Northrop, and rejects the request that I assess Respondent's attorney's fees against Gallegos.

II. *Ultimate Findings, Conclusions and Order*

I have considered the complaint filed by Gallegos and the pleadings and supporting documents filed by Respondent. All motions and other requests are hereby denied.

1. I find and conclude that Respondent did not violate the rights of Complainant within the jurisdiction created by 8 U.S.C. § 1324b upon the occasion of Respondent's discharge of Complainant in January 1993.

2. The request for attorney's fee shifting is denied.

3. The complaint is dismissed.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED. Dated and entered this 19th day of April, 1994.

MARVIN H. MORSE
Administrative Law Judge