

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

JOSE N. HERNANDEZ,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 94B00114
CITY OF SANTA ANA,)
Respondent.)
_____)

ORDER

(July 15, 1994)

On June 8, 1994, Jose N. Hernandez (Complainant) filed a complaint against the City of Santa Ana, California (Respondent or City), alleging that he was fired from employment in City's Recreation and Parks Department, by reason of his citizenship status and national origin, and in retaliation for having filed or planned to file a complaint under 8 U.S.C. §1324b. On June 27, 1994, City filed an answer which contains a general denial of liability. City makes two affirmative defenses. First, City contends that Hernandez was "discharged for reasonable and sufficient cause," in support of which City gratuitously attaches certain findings and conclusions of its Personnel Board which on October 2, 1991 affirmed Hernandez' discharge of August 29, 1990 for misconduct, including insubordination. Second, City claims that I lack jurisdiction because Hernandez was out of time in filing his underlying charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), i.e., that the alleged discrimination occurred on August 29, 1990, more than 180 days before he filed a charge deemed acceptable by OSC.

On July 12, 1994, Complainant filed an undated, handwritten letter/pleading which asserts a miscellany of grievances against City, and transmits an assemblage of unindexed documents in support. The

parties are advised that it is premature to submit materials of an evidentiary nature unless and until, if at all, the confrontational evidentiary phase of the hearing process is reached, or as documents in support of motion practice within the scope of the rules of practice and procedure for cases in this Office. Accordingly, Complainant's copy of this order returns to him the enclosures to his letter/pleading filed July 12, 1994. Because City's documentary support forms an integral part of its answer to the complaint, that material will be retained in the file but without evidentiary credibility attaching to it at this juncture, except to the extent it recites that on October 2, 1991, City's Personnel Board affirmed the discharge.

It is undisputed that Complainant is a United States citizen of Mexican national origin. In contrast, the reason for his discharge is in dispute. It may well be that he is the victim of one or more of the discriminatory actions alleged in the complaint, as described in greater detail in the July 12 filing. Discrimination on account of race or disability is outside the jurisdiction of administrative law judges pursuant to §1324b. That jurisdiction is limited to discrimination in hiring and firing as the result of citizenship status and, depending on the number of employees, as the result of national origin discrimination, and retaliation with respect to §1324b causes of action.

At the threshold, Complainant's case appears dubious. First, the premise for a claim of citizenship discrimination is obscure where the complaint fails to disclose who the beneficiary of such conduct may be in contrast to the disadvantaged citizen. Second, the premise for national origin discrimination appears to be lacking where it appears from the OSC charge sheet filed by Hernandez that City employs more than fourteen individuals. National origin discrimination jurisdiction is limited under 8 U.S.C. §1324b to cases not cognizable by the Equal Employment Opportunity Commission (EEOC) pursuant to section 703 of Title VII of the Civil Rights Act of 1964, as amended. 8 U.S.C. §1324b(a)(2)(B).

Generally stated, a national origin claim cognizable under Title VII cannot also be the subject of an OCAHO national origin discrimination claim. 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.

Cardona v. Cosmetics Plus, OCAHO Case No. 93B00169 (12/30/93) at 3-4; Pioterek v. Anderson Cleaning Systems, Inc., OCAHO Case No.

92B00260 (12/29/93) at 2-3; DeGuzman v. First American Bank Corporation, OCAHO Case No. 93B00099 (12/13/93) at 3; Holguin v. Dona Ana Fashions, OCAHO Case No. 93B00005 (12/1/93) (Order) at 3-4; 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, 3 OCAHO 313 (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, 3 OCAHO 530; Parkin-Forrest v. Veterans Administration, 3 OCAHO 516 (4/30/93) at 3-4 (additional OCAHO precedents cited).

Third, the complaint, even in light of Complainant's July 12, 1994 filing, fails to describe any basis for a claim of retaliation cognizable under §1324b, i.e., it lacks a description of a state of facts,

showing that (1) he was engaged in a protected activity or intended to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under §1324b, (2) that the respondent intimidated, threatened, coerced, or retaliated against the complainant, and (3) that there was a causal connection between the two.

Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 626 (4/18/94) (Order Directing Complainant to Submit Evidence Regarding His Claim of Threat in Violation of IRCA) at 1. Zarazinski provides guidance also as to the essentials to establish a prima facie case of retaliation, i.e, that a complainant may only prevail,

if(1) he had a reasonable good-faith belief that an IRCA violation occurred; (2) he intended to act or acted on it; (3) Respondent knew of Complainant's intent or act and (4) Respondent lashed out in consequence of it.

Id. at 2.

In order to determine at the outset whether Hernandez has a cause of action cognizable under 8 U.S.C. s1324b, the parties are directed as follows:

Not later than Monday, August 1, 1994.

Respondent shall file a statement under oath which informs as to the number of individuals in its employ on the dates subsequent to November 6, 1986 when employment and discharge actions took place with respect to Hernandez. That filing will also advise whether hiring

4 OCAHO 663

decisions are made by Complainant's unit of assignment, independently of City hiring procedures generally, i.e., the Recreation and Parks Department or other employing unit, and if so, shall identify the number of employees in such independent unit(s) on those dates.

Complainant shall file a statement under oath which describes (a), how he understands he was discriminated against on the basis of his citizenship status, i.e., as a citizen of the United States, and (b), how he understands he was retaliated against for asserting or acting pursuant to rights protected under 8 U.S.C. §1324b.

Complainant's filing under oath shall specify the date on which he understands he was discharged by City (stated in the complaint to be August 29, 1990), and shall specify the basis for his understanding that he filed his charge arising out of that discharge stated in the complaint to be December 22, 1992 but described by OSC as having been "accepted as complete" on September 28, 1993. Complainant will be expected in his filing to specify the reasons, if any he has, why he waited more than 180 days after the date of discharge and more than 180 days after affirmance on October 2, 1991 by the City of his discharge, before filing his OSC charge.

SO ORDERED.

Dated and entered this 15th day of July, 1994.

MARVIN H. MORSE
Administrative Law Judge