

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

July 21, 1994

CHAND WIJE,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 94B00046
BARTON SPRINGS/EDWARDS)
AQUIFER C.D.,)
Respondent.)
_____)

ORDER DENYING COMPLAINANT'S MOTIONS FOR
SUPPLEMENTARY COMPLAINT OF RETALIATION BY MR.
WILLIAM COUCH, GENERAL MANAGER OF THE
RESPONDENT DISTRICT AND FOR SUPPLEMENTARY
COMPLAINT OF RETALIATION BY MEMBERS OF THE BOARD
OF DIRECTORS OF THE RESPONDENT DISTRICT

On June 24, 1994, complainant filed a pleading captioned Motion for Supplementary Complaint of Retaliation by Members of the Board of Directors of the Respondent District Against Complainant, asserting therein that members of the Board of Directors of respondent control district have engaged in what complaint terms "retaliatory acts," which, complainant asserted, are prohibited by the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a)(5).

On June 24, 1994, complainant also filed a pleading captioned Motion for Supplementary Complaint of Retaliation by Mr. William Couch, General Manager of the Respondent District Against Complainant, asserting therein that William Couch (Couch), after having been informed of complainant's charge, engaged in what complainant termed a "systematic pattern of retaliation" against complainant, in violation of IRCA, 8 U.S.C. § 1324b(a)(5).

On July 7, 1994, respondent filed a Response to Motion for Supplementary Complaint of Retaliation by Members of the Board of

Directors of Respondent District, denying generally complainant's allegations of discrimination, and asserting that complainant's additional retaliation claims do not comply with the statutory requirements of IRCA, 8 U.S.C. § 1324b.

On July 7, 1994, respondent also filed a Response to Motion for Supplementary Complaint of Retaliation by Mr. William Couch, General Manager of the Respondent District, again denying generally complainant's allegations of discrimination, and asserting that complainant's additional retaliation claims fail to comply with statutory requisites.

The procedural regulation governing amendments and supplemental pleadings, 28 C.F.R. section 68.9(e), provides:

If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make the pleading conform to the evidence. The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth occurrences, or events which have happened or new law promulgated since the date of the pleadings and which are relevant to any of the issues involved.

28 C.F.R. § 68.9(e).

Rule 15 of the Federal Rules of Civil Procedure also provides guidance in determining whether to allow amendments to pleadings. United States v. Mr. Z Enters., 1 OCAHO 162 (4/27/90). That rule provides that "leave (to amend a pleading) shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

In his charge filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), complainant asserted that Barton Springs/Edwards Aquifer Control District had discriminated against him because of his national origin and citizenship status, in violation of IRCA, 8 U.S.C. § 1324b. Complainant did not, however, assert that he had been subject to retaliation as defined under that statutory provision.

In the Complaint, however, complainant has asserted that he was subjected to both discrimination and to retaliation actionable under

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IRCA, 8 U.S.C. § 1324b(a)(5), by Barton Springs/Edwards Aquifer Control District.

In his claim alleging retaliation, complainant asserted:

I made two appeals to the Board of Directors. The first was to the President of the Bd. He hid this letter from the members of the Bd. The second was to the members of the Bd. The President prevented Board members from discussing my appeal. In collusion with its Insurance agent (TML), one Bd. Bd. member lied to me on this matter. Insurance agents lied several times.

Complaint, ¶ 15(a).

In its responses, respondent contends that complainant's claims against the members of the Board of Directors and the General Manager of respondent district are precluded by IRCA, in particular by 8 U.S.C. § 1324b(g)(2)(D), which provides, in pertinent part:

In applying (the "orders finding violations") subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

Respondent contends that this provision prevents complainant from supplementing his Complaint to assert claims against the members of the Board of Directors of respondent district because the members of the Board of Directors of respondent district do not make employment decisions on their own, but may only act as a body.

Respondent further argues that, as the board makes the employment decisions for the respondent district, and as the authority of the General Manager of respondent district is delegated by respondent's district's board, the cited statutory provision prevents complainant from asserting claims against the General Manager of respondent district.

The validity of respondent's argument is questionable because the provision has never been interpreted in the manner advanced by respondent. See Diaz v. Canteen Corp., 1 OCAHO 332, at 4-5 (5/22/91); Huang v. United States Postal Serv., 1 OCAHO 313, at 4-5 (4/4/91) (no national origin jurisdiction where separate facilities employing less than 15 individuals of entities employing 15 or more not "subdivisions" under 8 U.S.C. § 1324b(g)(2)(D)).

Respondent further asserts in its responses that complainant's motion to supplement the Complaint should be denied because, as the undersigned has the authority to order adequate remedies against respondent district to resolve complainant's claims, respondent district is a sufficient respondent with regard to complainant's retaliation claims against both the members of the Board of Directors and the General Manager of respondent district.

Respondent fails, however, to offer any support for this assertion.

Finally, respondent asserts in its responses that, to the extent that complainant's motion to supplement the Complaint raises new issues or seeks to name new individuals or entities as respondents, complainant has failed to exhaust his administrative remedies. In particular, respondent asserts, complainant has failed to file a charge against the supplementary respondents with OSC, as required under IRCA, 8 U.S.C. §§ 1324b(b)(1) and (d)(2).

IRCA provides:

... any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice... may file a charge respecting such practice or violation with (OSC).

8 U.S.C. § 1324b(b)(1). The statute further provides:

If (OSC), after receiving such a charge..., has not filed a complaint... with respect to such charge, (OSC) shall notify the person making the charge of the determination not to file such a complaint... and the person making the charge may... file a complaint directly...

8 U.S.C. § 1324b(d)(2).

Filing a charge with OSC alleging an unfair immigration-related employment practice has therefore been found to be a prerequisite to filing a complaint with this Office. See George v. Bridgeport Jai-Alai, 3 OCAHO 537, at 6 (7/12/93).

However, as noted above, the procedural regulation governing provides that the Administrative Law Judge may "permit supplemental pleadings setting forth transactions, occurrences, or events which have happened... since the date of the pleadings...." 28 C.F.R. § 68.9(e).

The retaliation provision of IRCA prohibits retaliation "against any individual... because the individual intends to file or has filed a charge or a complaint...." 8 U.S.C. § 1324b(a)(5). Retaliation by a named

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respondent resulting from the filing of a complaint before this Office would constitute an event "reasonably within the scope of the original complaint" occurring since the date of the pleadings, and a claim asserting that retaliation could be added to a complaint before this Office by a supplemental pleading under 28 C.F.R. section 68.9(e).

In his motions to supplement, however, complainant asserts claims against individuals not currently named as respondents in the Complaint. Those claims are not within the scope of the original Complaint in this matter, and therefore should be asserted by a charge filed under 8 U.S.C. § 1324b(b)(1), and not by a supplemental pleading filed under 28 C.F.R. section 68.9(e).

For this reason, complainant's supplemental pleadings, which set forth claims of retaliation against members of the Board of Directors and General Manager of respondent district, none of whom had been named as parties in the charge filed by complainant with OSC, will not be permitted in this proceeding.

Accordingly, complainant's Motions for Supplementary Complaint of Retaliation are hereby denied.

JOSEPH E. MCGUIRE
Administrative Law Judge