

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

MARLENE PALACIO,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) CASE NO. 92B00245
SEASIDE CUSTOM)
HARVESTING and)
ZINN PACKING COMPANY,)
Respondents.)
_____)

FINAL DECISION AND ORDER

(August 11, 1994)

Appearances:

For the Complainant

Marilyn Mika Spencer, Esq.
Law Offices of Philip M. Cohen

For the Respondents

Larry A. Dawson, Esq.
Western Legal Associates

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. Introduction And Procedural History

On May 5, 1992, Marlene Palacio, ("Palacio" or "Complainant") initiated the proceedings in this case by filing a written charge with the United States Department of Justice, Office of the Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), in which she alleged that her employer, through its agent, constructively discharged her for following and abiding by the Immigration Reform and Control Act of 1986. Specifically, for "questioning incomplete, expired or incorrect I-9 forms." See Charge Form for Unfair Immigration-Related Employment Practices. In a letter dated September 8, 1992, OSC notified Complainant that after conducting an investigation, it had determined that there was insufficient evidence of reasonable cause to believe Complainant was discriminated against as prohibited by 8 U.S.C. § 1324b. OSC informed Complainant that she was entitled to file her own complaint directly with the Office of the Chief Administrative Hearing Officer ("OCAHO") within 90 days after receipt of their letter.

Complainant, a former employee of Respondents, Seaside Custom Harvesting ("Seaside" or "Respondent") and Zinn Packing Company ("Zinn Packing" or "Respondent"), filed a *pro se* complaint on November 2, 1992 alleging that Respondents committed an unfair immigration-related employment practice in violation of the Immigration Reform and Control Act of 1986 ("IRCA"), as amended, 8 U.S.C. § 1324b. Complainant alleges that Respondents unlawfully discharged her from her job as a time-keeper on February 20, 1992, in retaliation for her threat to file a complaint against Respondents with the U.S. Department of Justice, Immigration and Naturalization Service ("INS") disclosing that Respondents were not properly preparing their Employment Eligibility Verification Forms (INS Forms I-9.)

On December 4, 1994, Respondents, through their attorney, filed an Answer and Motion to Dismiss, pursuant to 28 C.F.R. § 68.76(1). In their motion, Respondents contend that the complaint filed by Complainant fails to contain a clear and concise statement of facts upon which relief can be granted, in violation of § 68.76(1). In addition, Respondents state that 8 U.S.C. § 1324b(a)(5) protects against discrimination based on citizenship or national origin, and that neither is alleged by Complainant as a basis for the alleged discharge, and that in ¶¶ 7 and 8 of the complaint, Complainant admits that she was not discriminated against because of national origin or citizenship status.

On December 18, 1992, I issued a Decision and Order Denying Respondents' Motion to Dismiss. That same day, I issued the Standard Order Directing Prehearing Procedures and a Notice Scheduling Hearing for April 19, 1993, in San Diego, California.

On February 22, 1993, Respondents filed a Resubmission of Motion to Dismiss in which they state that it is clear from Complainant's responses to Respondents' interrogatories and Complainant's failure to respond to Respondents' Request for Admissions, that Palacio never contemplated filing a complaint and therefore failed to state a claim under § 1324b(a)(5).

Because I looked outside the pleadings in resolving Respondents' Motion to Dismiss, I construed it as a motion for summary decision. On March 11, 1993, I issued an Order Denying the Motion to Dismiss and Setting the Case For an Evidentiary Hearing. In that order I stated that I had carefully reviewed all the interrogatories submitted to Complainant and her answers and did not find that the record was sufficiently clear as to the material facts to resolve Respondents' motion to dismiss. I also directed Complainant to be prepared at the hearing to testify to all the facts in support of her complaint and to provide me with any documents in support of her allegations. I directed Respondents and Complainant to advise this office and each other, in writing, of the names, addresses and phone numbers of all witnesses they planned to call to testify at the hearing. I also reset the hearing for April 9, 1993.

On April 8, 1993, Respondents filed a prehearing statement, in which they stated that "[n]o complaint was ever contemplated by Ms. Palacio until after she quit her job, during the middle of the season. Ms. Palacio can not establish a prima facie case." On April 16, 1993, I issued an Order and Notice of Hearing Procedures in which, among other things, I directed Complainant to file a summary of her evidence. On April 20, 1993, Complainant telephoned this office, requesting additional time to respond to the April 16, 1993 order. On April 21, 1993, I issued an order granting Complainant's request. Also on that day, Respondents filed a letter/pleading requesting that Complainant's evidence be immediately facsimile to Respondents' counsel on receipt by the Administrative Law Judge. Respondents maintained that if she did not submit the summary, the case should be dismissed for Complainant's failure to comply with my order and the resulting prejudice to Respondents. Respondents, also objected to my statement in the April 16, 1993 order that I would conduct direct examination of Complainant's witnesses.

On April 21, 1993 I, issued an order, denying Respondents' objection to my conducting Complainant's direct examination, stating that the most important part of the administrative hearing is to determine the relevant facts. I also informed the parties that the strict rules of evidence are not followed in administrative proceedings. I granted Respondents' request for expeditious processing of Complainant's summary of her evidence, but ordered Complainant not to facsimile, but to mail her summary by Federal Express to Respondents' counsel.

On April 23, 1993, Respondents filed a letter/pleading requesting that I reschedule the hearing because Respondents' counsel would not have time to receive Complainant's summary of her evidence before the date of the scheduled hearing. On April 28, 1993, after first informing the parties telephonically on April 23, 1993, I issued an order rescheduling the evidentiary hearing for June 14, 1993. I also ordered Complainant to file with this office, on or before May 7, 1993, a summary of evidence for each person she intended to call as a witness at the evidentiary hearing, and to ensure that she mail a copy of her summary to Respondents' counsel, on or before May 7, 1993.

On May 3, 1993, Respondents filed a letter/pleading requesting that I reschedule the hearing because Respondents' counsel had another trial appearance scheduled for June 15, 1993. On May 11, 1993, I issued an Order Denying Respondents' Request to Continue Hearing Date for the following reasons: (1) Respondents had not shown that there was any conflict in his schedule with the trial of this case on the date of June 14, 1993; (2) courtroom space is very difficult to obtain; (3) Respondent had had this case continued once before at great inconvenience to this office; and (4) I had determined that this case could be tried in a one-day hearing.

On May 7, 1993, Complainant filed several papers and pleadings with this office: (1) a letter dated April 28, 1993, requesting that I reschedule the hearing in this case on a date prior to May 25, 1993 because Complainant had a hearing with the Employment Development Department on that date, which could be affected by the outcome of this hearing; (2) a pleading that I construed as a motion requesting that Respondent provide her with a summary of its evidence and copies of any documents it intended on using at the hearing; and (3) in response to my previous order, a list of documents it intends to present at trial, a "Summary of the Complainant's Evidence" and "Presentation Summary of Complainant's Evidence".

On May 17, 1994, I issued an Order denying Complainant's request to reschedule the hearing, and stated that I would not require Respondents to file a Summary of Evidence because Respondents had provided Complainant with a statement of facts and a witness list.

On June 14, 1993, the evidentiary hearing in this case was held in San Diego, California. The parties called several witnesses and introduced exhibits. On June 25, 1993 I issued an Order Directing Parties to File Proposed Findings of Fact, Conclusions of Law and a Post-Hearing Brief. Pursuant to 28 C.F.R. § 68.52(a), Respondents were given sixty days after receipt of the transcript to file their brief and Complainant was given thirty days to respond to Respondents' brief.

After all post-hearing briefings were due, I permitted Marilyn Mika Spencer to enter her appearance as attorney for Complainant and granted her additional time to file a post-hearing brief. See Order of May 17, 1994. Although Complainant did not file any additional briefs, Respondents withdrew their claim for attorney fees. See Letter dated May 26, 1994 from Respondent's counsel.

II. Findings of Fact

A. Employment History

Zinn Packing Company is a commercial packing company in the business of packing and shipping fresh fruit and other produce. (Tr.. at 14.) Seaside Custom Harvesting, a custom harvester, performs the necessary field work (i.e. thinning, weeding and harvesting) to bring the crop to the packing shed. Both companies, located at 910 West Vale Road, Calipatria, California, are owned and operated by Rex Zinn. (Tr.. at 4, 11-14, 148, 226.)

Complainant began working for Zinn Packing on February 6, 1988 as a seasonal produce packer. (Tr.. at 14-15.) Her job was to sort and bunch asparagus tips and place them in containers. (Id. at 51-52.) Complainant also helped in the office part-time, assisting with typing, answering the phone, calculating the total hours and gross pay for payroll, and helping with daily costs. See Ex. 8. She worked for Zinn Packing until the week ending December 9, 1990. Complainant began working for Seaside on December 10, 1990. (Tr.. at 14-15.) Because one of the office workers had left, Seaside needed a new timekeeper. (Tr.. at 52-55.) Seaside employed Complainant as a timekeeper until the week ending November 10, 1991. Complainant then returned to

Zinn Packing during the week ending January 12, 1992, and worked until the week ending February 23, 1992, as a helper for her mother, Dora Roque who worked as Zinn Packing's shed supervisor. (*Id.* at 15-16.) See Ex. C-1.

Sometime in late February, 1992 Rex Zinn ("Zinn") discovered that Palacio had continued to involve herself in the company's I-9 processing, even after he ordered her not to do so. Zinn said to her: "[D]idn't I tell you I no longer wanted you to have anything to do with the INS or have anything to do with the foremans or anything to do with the office." (Tr.. at 82-83, 133.)

Although Zinn did not fire Palacio, he made it clear that he did not want her in the office. (Tr.. at 82-85.) As a result, Palacio went downstairs to the Zinn Packing area where she claims she was told that her former job in the shed was not available, but that her mother would set up a desk for her in the packing area and she could help her with the paperwork. Palacio refused the job. (Tr.. at 83-85, 137.) Sandra Moreno, Complainant's cousin and a bookkeeper at Seaside, testified that she was present during Palacio's discussion with her mother and remembers hearing Palacio's mother tell Palacio that she could have her old job back in the packing shed. (Tr.. at 197-198.)¹

As a timekeeper at Seaside, Complainant's job primarily consisted of visiting the fields to obtain payroll information, time sheets, and employee paperwork, such as social security numbers and I-9 forms, from the harvesting crew foremen. Complainant then would return to the office and set up the information for Sandra Moreno to input into

¹ Palacio's testimony shows that she is confused about whether she was discharged, laid off, or quit. It is clear that she was removed from performing any office duties upstairs, that she was laid off from her old job of packer but that she refused to perform any type of work in the downstairs portion of the building which was not air-conditioned. (Tr... at 83-85, 137.) Complainant submitted as an exhibit the finding of an Administrative Law Judge ("ALJ") for the California Unemployment Insurance Appeals Board that Complainant was laid off from her employment; and therefore, was not disqualified from receiving unemployment insurance benefits. See In the Matter of Marlene S. Palacio v. Zinn Packing Company, Case #SD-EUC-08854, California Unemployment Insurance Appeal Board. See Ex. C-2 at 1. That decision is not binding on this agency's findings. Although I find that Palacio quit her employment, whether she quit or was laid off or was constructively discharged is not significant to my findings in this case. See Boze v. Branstetter, 912 F.2d 801, 804 (5th Cir. 1990) (internal quotations omitted) ("The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.")

the computer system for purposes of payment and salaries. (Tr.. at 56-57.) Complainant testified that she would check the field workers' green cards and if she ever had a question or they looked "funny," she would telephone the INS. (*Id.* at 60.) Zinn warned her "not to get too much into investigating these farm laborers, their I-9s and Social Security." (Tr.. at 58.)

On November 18, 1991, Palacio's job duties changed. On that date, Zinn hired Alfonso Guzman Becerra as the new manager for the field. Becerra had previously worked for Bruce Church, one of the largest grower shippers in California and he had extensive knowledge about and experience with the preparation of I-9 forms. Soon after he was hired, Becerra told Zinn that he could handle the preparation of the I-9 forms and could train the other foreman to handle all of the paperwork in the field, thereby reducing the overhead. Zinn made it Becerra's job to administer the I-9 forms. (Tr.. at 229-230; *see* Ex. C-1 [Respondents' Statement of Facts].) When Becerra took over the job, Zinn advised Palacio that she was no longer responsible for the I-9 processing. As a result, Palacio was "limited to working in the office doing a little bit of calculating payroll, answering the telephone and doing work for her mother, Dora Roque, and working in the shed." (Tr.. at 230-231.) As Palacio stated: "I knew that he was going to come and take my job . . . He did all the paperwork." (*Id.* at 126-127; *see* Ex. C-1.)

Respondents assert that Palacio's job duties were changed because she had numerous problems with the foremen and the people in the office, related to issuing unnecessary insurance forms, providing evidence of coverage when eligibility was in issue, talking with her mother about interoffice conversations, attempting to usurp authority, interfering with others when she was not in charge of a particular job and not following or listening to instructions. She was also too aggressive in ensuring Form I-9 compliance, and would not follow directions in this area. *See* Ex. C-1. The record supports these assertions.

B. Palacio Was Unable To Work With Her Fellow Employees

The hearing testimony clearly shows that Palacio was unable to get along with anyone she worked with, and that this conflict between her and her fellow-employees was repeatedly brought to Zinn's attention. As Palacio admits, "[e]verybody in the whole office . . . didn't want me to work with the I-9s because apparently everybody was just tired of me complaining, okay?" (Tr.. at 128.)

The conflict, however, went beyond dealing with the I-9 forms. Palacio notes that "Sandra [Moreno] complained with (sic) me is because she was the main girl in charge of this company and here I come just to be helping her out, she didn't like it" (Tr.. at 128.) Moreno, Palacio's cousin, and a bookkeeper employed at Seaside for five years, viewed the matter differently. Moreno testified that Complainant assisted her with her payroll duties until Moreno complained to her supervisor that she could no longer work with Complainant. (Id. at 185-188.) Palacio acted like a supervisor, always trying to tell Moreno what to do, and called Moreno crazy, all of which Moreno related to Zinn. (Id. at 188-190.) Moreno told Palacio that she was the one who was crazy. (Id. at 190.)

Palacio was also unable to get along with Dorothy Smith, a bookkeeper at Zinn Packing. (Tr.. at 191.) Moreno testified that she could hear them arguing. (Id. at 191.) According to Palacio, "Dorothy knew I was doing a good job and I was getting all the attention, not her no more; that's what was making her mad." (Id. at 128.) Dorothy saw it differently, testifying that "every time there was any kind of--anything in the office that needed to be done [that Palacio did not like], Palacio would run downstairs and get her mother . . . and get her involved in it and that would cause problems." (Id. at 213-214.)

In addition, Amanda Armstrong, a bookkeeper and payroll clerk for Zinn Packing, did not enjoy working in the same office with Palacio. According to Palacio, "Amanda complained one time because she was being nosy . . . [and] I said I wish we had a curtain that we could put there so they wouldn't hear us no more what we're saying." (Tr.. at 129.) Armstrong testified that her big problem with Palacio was that she was constantly trying to be her boss. Armstrong also observed that Palacio had a hard time taking orders from others. (Id. at 220.)

Furthermore, Olga Lopez, a former employee who had worked for Zinn as a time-keeper and a custodial helper, also had difficulty working with Palacio. She noted that the other people in the office were unhappy with Palacio "because she was trying to do another person's job, that's why. She was only helping the other people but she was trying to do more than her job." (Tr.. at 148, 154-155.) Lopez had a particular problem with Palacio, because she demanded that Lopez do her job faster, even though Palacio was not her supervisor. (Id. at 154.)

In addition to hearing complaints about Palacio from the office workers, Zinn also heard complaints from the foremen. At the hearing, Palacio continually referred to the foremen as a "bunch of cheaters."

(Tr.. at 74, 101, 143.) Palacio was upset with the foremen because she believed they were allowing all of the field workers to get on the bus for work without green cards. Palacio spoke to the foremen about this but "they all took it the wrong way . . . and complained to Rex that I was always telling them things." (Id. at 105.)

C. Palacio Was Overzealous In Her Attempt To Obtain Proper Documentation From The Field Workers

Palacio believed that it was "one of my main jobs, to make sure that . . . I didn't have nobody out there without their cards." (Tr.. at 63.) In her mind, this meant "green cards that you got to have in order for you to work, to be authorized to work in the fields . . . [N]ow they're real strict about having nobody work in the field unless they have gotten green cards." (Id. at 59.) "Like we have our California driver's license and our ID, they have a little MICA (green card)." (Id. at 61.) "That's the way, I would tell them, please show me your ID and your social security card; in other words, show me your MICA cards." (Id. at 60.)

Palacio thought that the workers were "trying to get away with getting a payroll check and earning unemployment . . ." (Tr.. at 64.) "I was just really worried . . . how they could get welfare and unemployment and still try to get away with this and I . . . didn't want that." (Id. at 72.) Moreover, Palacio was concerned that the foremen were letting workers on the buses without proper "papers." (Tr.. at 103.) She noted, however, that no one ever found illegals because "I never let them be working without me getting their documents because I would go after them . . . I would go to Colexico to get them" and "I didn't give no money out (pay check) unless I made sure that everybody had a card out there." (Id. at 104, 112-116, 144.) "See, I would never let Rex have anybody working out there without no papers." (Id. at 115.) Zinn, however, continually warned Palacio that the company was not in the investigating business and that she should not to be so aggressive. (Id. at 58, 71-75, 104.) Zinn told her that "I could only go so far in asking these guys so many questions, these farm laborers; because they have their rights, I can only ask them so much." (Id. at 119.)

D. Palacio Refused To Refrain From Interfering In the Processing of the I-9 Forms

Palacio admits that at the time Becerra was hired, Zinn told her that "he no longer wanted me to have nothing to do with the I-9s or nothing to do with the foremen, period." (Tr.. at 66-69, 130, 217, 257-258.)

Despite this fact, Palacio testified that "I was still working with the I-9s behind Rex's back Whenever he came around, I would sort of cover it like the way I wasn't doing anything." (Id. at 131.)

As stated above, when Zinn discovered that Palacio had continued to involve herself in the I-9 processing even after he ordered her not to do so, he told her to no longer perform any office work. (Tr.. at 82-83, 133.) As a result, Palacio went downstairs to the Zinn packing area where she claims that she was told that her former job in the shed was not available, but that her mother would set up a desk for her in the packing area and she could help Donna Roque with the paperwork. As stated above, Palacio refused to take the job. (Id. at 83-85, 137.) It was not until after these incidents, probably on the next day, that Palacio told her mother that she intended "to get" Zinn. (Tr.. at 81, 86, 137-138.)

Dorothy Smith testified as to what happened on the last day of Complainant's employment at Zinn Packing:

She kept messing with the files that had the I-9s and stuff in it and she wasn't supposed to be in those files anymore because her job wasn't -- she wasn't responsible for anything in that any longer. And Rex came in and told her that she'd been asked to please stay out of the files and that since she couldn't do that that she was no longer going to work in the office, that she was to work downstairs in the packing shed.

(Tr.. at 209, 215.)

Zinn testified as to his problems with Complainant:

Well, she would cause the employees to be very upset. They would present a document to her and right away, on a lot of cases, she would dispute the validity of the documents. Which would be fine if it's a flagrant violation, but when it comes to almost everybody--there's suspecting and going beyond that on every single person that you hire, that's not what I wanted to do. I didn't want her to be an INS agent. All I wanted to do was fulfill my obligation to the federal government.

(Tr.. at 238.)

Zinn stated that he warned Complainant at least five times to stop having anything to do with the I-9s, but she continually failed to follow directions. (Tr.. at 257-258.) Zinn further stated that he continued to hire more employees after Complainant left because the season had not yet ended and in his mind, if Complainant had wanted to continue working, she could have worked with the asparagus tips. (Id. at 245-246.)

E. Palacio Refused To Work In an Area That Is Not Air-Conditioned

Although Palacio's mother offered her employment, Palacio refused to work in the downstairs area which was not air-conditioned. As Palacio admitted at the hearing:

After Rex had yelled at me and discharged me [from working in the office] and my mom says, well, if you don't want us to bring your desk down here, you can help Sandra still with paperwork--you know, I wasn't going to go from the air-conditioner to work downstairs in the hot, you know, that was just part of their retaliation, I was just doing too good at my job [checking the form I-9s] and they still wanted me to stay down there and work in the bottom, in the hot.

(Tr.. at 137.)

In other words, Palacio quit her job because she did not want to work in the packing area doing menial labor, in a hot and uncomfortable working environment.

F. Palacio's Involvement With The INS

David Bennett, an INS supervisory border patrol agent employed in El Centro, California stated that he became familiar with Complainant in connection with his duties and responsibilities as an INS official, when she began calling his office to ask the proper procedure for executing I-9 forms. Bennett testified that Complainant would tell him various problems she was having in preparing the forms. He stated that this contact went on for a number of years, and when he finally was given a business name, Seaside Custom Harvesting and Zinn Packing Company, he opened a case file. Bennett stated that when he is apprised of violations, the policy is to open a case and start the procedure for determining whether they are true or not. Bennett further stated that he was concerned that Respondents were hiring illegal aliens. He therefore told Complainant that he was going to open a file and submit the information to his supervisors, and that the INS would probably serve Zinn Packing and Seaside Custom Harvesting with a notice of intent to inspect their documents. Shortly after this, Bennett rotated out of the office, and another supervisor came in, who inspected the I-9 forms and found about six forms that were substantively incorrect, but not serious enough to warrant issuance of a notice of intent to fine. (Tr.. at 156-161.) Respondents were audited by the U.S. Department of Labor ("DOL"). After Palacio's departure, DOL inspected over 1000 of Respondents' I-9 forms. That inspection did not result in the issuance of any citation, but a warning regarding approximately 25 individual I-9 forms. (See Ex. C-1 at 2.)

Bennett stated that Complainant told him, "she had been demoted, basically for trying to do the right thing. And it sounded like it could possibly be a whistle blower's violation, so I contacted the attorneys in Washington, D.C. at central office. And I told them about that and they said would get in touch with Ms. Palacio and said they would call her. (Tr.. at 162.)

G. Palacio Did Not Notify Respondents That She Was Contacting the INS or Filing a Charge With The Office of Special Counsel

Palacio admitted in her testimony that she did not tell her employer prior to the date she was laid off or quit her job, or at anytime thereafter that she was going to contact INS or file a discrimination charge with OSC. She specifically stated that she did not tell Zinn; rather, she "kept it a secret." (Tr.. at 89-90, 137.)

III. *Conclusions of Law*

IRCA provides in pertinent part that:

It is . . . an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against.

8 U.S.C. § 1324b(a)(5).²

Section 1324b(a)(5) protects an employee from retaliation by his or her employer (1) for the purpose of interfering with any right or

² IRCA was amended by the Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, 104 Stat. 4978. Section 534 of the 1990 Act, codified at 8 U.S.C. § 1324b(a)(5), bars retaliation against those seeking to enforce their rights under section 102 of IRCA. This amendment applies to actions occurring on or after November 29, 1990.

OSC's regulations, codified at 28 C.F.R. § 44.201, already included an anti-retaliation provision which covered all actions occurring after the regulation's publication on October 6, 1987. The legislative history of section 534 of the 1990 Act makes clear that Congress intended to codify this anti-retaliation regulation which implements OSC's interpretation of section 102 of IRCA. *See* H.R. Rep. No. 955, 101st Cong. 2d Sess. 82-83 1990. OSC amended its existing regulation by recodifying section 44.201 as paragraph (a)(3) of § 44.200, and by correcting minor differences between § 44.201 and § 534 of the 1990 Act. *See* 56 Fed. Reg. 157, at 40247 and 40248 (August 14, 1991).

privilege secured under section 1324b or (2) because the employee intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under section 1324b. This provision only provides relief to a complaining party who is the alleged victim of the underlying alleged discriminatory conduct. Only the Office of Special Counsel for Unfair Immigration-Related Employment Practices or the alleged victim of the underlying allegedly discriminatory conduct or an individual on that person's behalf has standing to file a complaint. See 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(2).

I therefore conclude that IRCA's antidiscrimination provisions, 8 U.S.C. § 1324b do not provide a cause of action for an employee against an employer because that employer retaliated against the employee (by discharge, lay-off or demotion) because the employee told INS that his or her employer was not complying with IRCA's paperwork requirements or may have hired illegal aliens.³

Palacio is not claiming that her employer retaliated against her because she was pursuing a claim of national origin or citizenship discrimination on her own behalf. In order for Palacio to make a prima facie case of a § 1324b(a)(5) violation, she needs to establish that she filed her OSC charge based upon a reasonable, good faith belief that Respondents' reasons for demoting her or laying her off or causing her to quit her job were discriminatory. See Zarazinski v. Anglo Fabrics Co., OCAHO Case No. 92B00152 (Amended Decision and Order), at 23 (May 18, 1994).

If Complainant makes a prima facie case, she may only prevail on her retaliation claim by proving by a preponderance of the evidence that (1) she had a reasonable, good-faith belief that an IRCA violation occurred; (2) she intended to act or acted on it; (3) Respondent(s) knew of Complainant's intent or act and (4) Respondent(s) lashed out in consequence of it. See Zarazinski v. Anglo Fabrics Co. Inc., OCAHO Case No. 92B00152 (Final Decision and Order), at 17 (July 14, 1994). See also Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991) (setting forth a similar rule under Title VII).

³ Although 8 U.S.C. § 1324b does not provide a cause of action, INS regulations provide that an employee who is concerned that his employer is violating IRCA's employer sanction provisions may submit a signed written complaint in person or by mail to the INS office having jurisdiction over the business or residence of the potential violator. See 8 C.F.R. § 274a.9 (1994).

A. The Complaint Against Seaside is Dismissed

Section 1324b(a)(5) prohibits, inter alia, retaliation by a person or other entity against any individual for the purposes of interfering with any right or privilege secured under 8 U.S.C. § 1324b or because the individual intends to file or has filed a charge. In this case, Complainant alleged that her employer retaliated against her because she intended to file a charge against it.

The term "employer" is not defined in 8 U.S.C. § 1324b or the regulations promulgated to implement the section. The regulations promulgated to implement section 1324a, however, define "employer" as "a person or entity, including anyone acting directly or indirectly in the interest thereof, who engages the services of an employee to be performed in the United States for wages or other remuneration. 8 C.F.R. § 274a.1(g). I have previously applied this definition to determining allegations of discrimination under 8 U.S.C. § 1324b. See Rusk v. Northrop Corporation and Department of Defense, 4 OCAHO 607, at 14 (February 4, 1994).

In the case at bar, Complainant's evidence shows that at various times she was employed by both Respondents. As Rex Zinn testified, "A lot of the jobs that she was working for Zinn Packing but internally we bill another company or do work for Seaside, so sometimes when she says she's working for Seaside, she was working for Zinn Packing; it's an internal thing." (Id. at 145.) It is clear however that on the date she was laid off or quit, she was employed by Zinn Packing Co. Id. It is undisputed that it was Rex Zinn who told Palacio that she could no longer work in the office. (Tr. at 244-246.) Rex Zinn was the owner and managing officer for both of the Respondents. Complainant's theory of discrimination is that Rex Zinn's order removing her from any office work was an unfair immigration-related employment practice because it was retaliatory. Because Seaside was not Palacio's employer on the date she was laid off or refused to work and quit, the complaint against Seaside is dismissed.

B. The Complaint Against Zinn is Dismissed

Palacio did not allege in her charge with the Office of Special Counsel that she was discharged or laid off from her job because of her national origin or citizenship status. Rather, she alleged that Zinn discharged her because she questioned incomplete, expired and incorrect I-9 forms. See Ex. R-1 [Letter dated May 15, 1992 from OSC to Seaside Customs]. Moreover, her testimony at the hearing reaffirmed her belief that the

reason she was demoted or laid off was in retaliation for her finding mistakes with the preparation of the I-9 forms by Becerra and others.

To prove retaliation under IRCA, a complainant must make a prima facie case by a preponderance of the evidence. It is clear from the evidence, however, that Complainant has failed to make a prima facie case of retaliatory discharge as she has failed to establish that she filed her OSC charge based on a reasonable, good faith belief that Respondent's reason for discharging her was discriminatory. Therefore, her complaint against Respondent Zinn must be dismissed.

Although this case is dismissed for failure to prove a prima facie case, there are several alternative grounds for dismissal. The testimony of Zinn and other witnesses at the hearing clearly show that Zinn had legitimate business reasons for changing Palacio's job responsibilities and (1) demoting her to manual labor or (2) discharging her. Zinn was justifiably concerned that Palacio's actions in asking for green cards from all farm workers might violate 8 U.S.C. § 1324b(a)(6). As Zinn explained, it was Palacio's methods that were troublesome. She would "assume that every person that we take an I-9 from is an alien." (Tr... at 232-235.) Even Palacio admitted that Zinn tried to tell her that the workers have their rights. (*Id.* at 119.) Unfortunately, Palacio was unable to understand that her zeal was inappropriate. Instead, her testimony shows that she fantasized about being a junior immigration officer: "I loved my job. I did. I felt real important being an INS agent . . . I wasn't an INS agent but I was pretending to be an INS agent . . . I felt important. I felt real important because I like to make sure that when I--you know, I was going to get people--I mean, I knew nobody was going to cheat around me." (Tr... at 142.)⁴ As Zinn testified, it was an accumulation of the way that Palacio handled things that led to her removal from office work. (Tr... at 254.) Not only did he warn Palacio about her inappropriate activities as a "border patrol agent," but she was also unable to get along with her fellow workers. (Tr... at 234, 241-243, 252-253.) In addition to Palacio's refusal to perform her job correctly, she was disruptive to the whole business operation. She

⁴ At least one legal commentator foresaw that IRCA's employer sanction provisions would "create major new responsibilities for businesses, and in effect deputized them as junior immigration inspectors." See Maurice A. Roberts and Stephen Yale-Loehr, Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act, 21 *The International Lawyer* 1013 (1987).

Employers, however, need not be immigration experts as Congress specifically mandated that an employer may rely on a document that "reasonably appears on its face to be genuine." See 8 U.S.C. § 1324a(b)(1)(A).

could not get along with anyone including her own relatives. Under such circumstances, I find that Zinn had good cause to relieve her of her duties, either through discharge or by assigning her to another position.

The record also shows Palacio's discharge or lay-off was not caused by her decision to contact the INS or her filing a charge with the Office of Special Counsel. This is evident from Palacio's admission that she did not tell her employer prior to her discharge or layoff that she was going to report what she knew about the paperwork problems to the INS.

Consequently, her employer could not have retaliated against her for anything she may have said or done with the federal agencies who administer the employment sanctions and unfair immigration-related employment practices under IRCA.

IV. *Attorney Fees*

In any complaint respecting an unfair immigration-related employment practice, the ALJ may allow a prevailing party a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact. Although Respondents filed a brief in support of a request for attorney fees, they subsequently withdrew their request. See Respondent's Motion filed on January 14, 1994 and letter of withdrawal filed on May 27, 1994.

Although Respondents have withdrawn their request for attorney fees, it is important to point out that this lawsuit borders on the frivolous. It was not clear until the evidentiary hearing was completed that Palacio's allegations of retaliatory discrimination lacked any basis in fact or law. Moreover, her conduct throughout these proceedings has been disruptive to both this office and the Office of the Chief Administrative Hearing Officer in Fall Church, Virginia. She has made frequent telephone calls to both offices trying to engage in *ex parte* communication and has often ignored specific instructions to refrain from this inappropriate conduct.⁵

It is unfortunate that Palacio's employer has had to expend so much time and cost in defending these charges. The Supreme Court has, however, long held that courts must construe *pro se* complaints liberally, applying less stringent standards than when a plaintiff is represented by counsel. See *Hughes v. Rowe*, 449 U.S. 5, 9; *Haines v.*

⁵ As late as August 10, 1994, Palacio called this office, attempting to speak with the Administrative Law Judge.

Kerner, 404 U.S. 519, 520 (1972) (per curiam); see also Curuta v. U.S. Water Conservation Lab, U.S. Department of Agriculture, No. 92-70774 slip op. at 2 (9th Cir. Feb. 7, 1994); Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983) (per curiam). Following the Supreme Court's rule on pro se complaints, I liberally construed Complainant's allegations of retaliation, denied Respondents' motions to dismiss this case and held an evidentiary hearing. See Order Denying Motion to Dismiss, dated March 11, 1993.

Although I have liberally construed the complaint in this case and conducted an evidentiary hearing, Complainant is warned not to file any more frivolous complaints against her former employer, because Zinn Packing may not again be inclined to waive its right to attorney fees. See Kamal-Griffin v. Curtis, Mallet-Prevost Colt & Mosle, and Kamal-Griffin v. Cahill Gordon and Reindel, (unpublished) No. 93-4217 and No. 93-4239, slip op. at 4 (2d. Cir. June 22, 1994) (where complainant was cautioned that pursuit of her unsubstantial claim of unfair immigration-related employment practice against other law firms will subject her to distinct risk of sanctions, including substantial damages).

V. Conclusion

In conclusion, upon the preponderance of the evidence, I find that Complainant has failed to prove that Respondents have engaged in any unfair immigration-related employment practice and accordingly dismiss the complaint.

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(1). Not later than 60 days after entry, Complainant may appeal this Decision and Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. 8 U.S.C. § 1324b(i)(1).

SO ORDERED this 11th day of August, 1994 in San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge