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

October 31, 1994

DORON A. TAL, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding OCAHO Case No. 92B00143
M. L. ENERGIA, INC., Respondent.	)	

DECISION AND ORDER

Appearances: Doron A. Tal, pro se;
Moshe M. Lavid, Ph. D., president of respondent firm, pro se.

Before: Administrative Law Judge McGuire

Background

This proceeding involves the complaint of Doron A. Tal (complainant), against his former employer, M. L. Energia, Inc. (respondent/Energia), in which he alleges that respondent knowingly and intentionally fired him from his Visiting Research Staff position and did so because of his citizenship status, that of nonimmigrant alien and holder of a temporary worker type visa, and also because of his Israeli national origin.

Complainant further alleges that in having done so, respondent violated the pertinent provisions of the Immigration Reform and

Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952 (INA), as amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 4978 (1990).

The relief sought by this unrepresented complainant includes requests that the respondent firm: (1) be ordered to cease and desist from discriminatory practices; (2) that it be required to reemploy complainant for the eight and one-half (8-1/2) month period from November 15, 1991 to July 31, 1992, with full back pay from August 13, 1990; (3) that respondent be ordered to pay reasonable attorney fees; and (4) that complainant be granted any other relief deemed appropriate.

The filings in this incredibly rancorous, protracted and broadly over-documented proceeding were initiated on February 3, 1992, the date upon which complainant timely filed a written charge with this Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

In that charge, which took the form of complainant's completing the standard filing form, Form OSC-1, signed and dated December 19, 1991, as well as those recitations contained in complainant's attached two-page typewritten letter, dated January 27, 1992, complainant advanced the following facts, among others.

Complainant described himself as then a resident of Plainsboro, New Jersey whose status was that of resident alien and holder of an "H-1 visa" who, with his family, had been lawfully admitted to the United States as an Israeli national from his permanent home in Karmiel, Israel to "visit" respondent's laboratory in nearby Princeton, New Jersey as an "Alien of Distinguished Merit and Ability."

In his January 27, 1992, letter to OSC, complainant described Energia as a firm which employed between four and 14 persons during the period at issue and that its business consisted of conducting research under contracts with several Federal agencies identified as NSF, EPA, DOD, and NSA, as well as the Gas Research Institute.

The second paragraph of that letter succinctly summarizes complainant's feelings towards the respondent firm: "Following my arrival, I realized that there was quite a gap between the agreements and the reality. I was employed by ENERGIA, since my arrival to (sic)

the USA on August 13, 1990 - until I was outrageously expelled, on November 21, 1991."

The correspondence went on to accuse Energia of unfair labor practices, exploitation, slave-like treatment, use and abuse, inhumane treatment, discrimination based upon his national origin, retaliation based upon complainant's refusal to cooperate with his employer's efforts to practice deception and fraud upon Federal agencies, threats of deportation, of having been locked out at his place of employment, and of having been denied access to his former's employer's premises in order to remove his personal belongings.

Complainant further advised OSC in that letter that he had contacted the personnel in the Immigration and Naturalization Service (INS) office in Jersey City, New Jersey and had been interviewed there on December 9, 1991. He was advised that as an "H-1 visa" holder he could not accept alternate nonprofessional employment in the United States nor could he accept any other job unless the prospective United States employer filed a visa application on his behalf, as Energia had done for him earlier.

Complainant further informed OSC in his January 27, 1992, letter that he had applied for unemployment benefits under New Jersey law, over Energia's objections, and that he had also sought to recover "delayed and reduced" wage amounts in another separate action he filed with another New Jersey state agency. Both of those related claims were denied and complainant's appeals are pending.

Complainant also told OSC that "I cannot accept a unilateral suspension from ENERGIA and return at once to my home country." because "I insist that my four children finish this school year, as planned."

He had also expected to complete his scientific research on a "Phase-II project for GRI (Gas Research Institute).", on which he had invested considerable efforts, and stated that he regarded his personal papers and written documents which he had left in his work station at Energia as his intellectual property, and thus he believes that he should be allowed to reenter Energia's premises in order to obtain those items.

OSC was also advised by complainant in that letter that "I have consulted with several honored private attorneys. All of them recommended that I would (sic) continue my contest through Federal and

State (sic) Authorities (sic). Respected lawyers would not deal as mediators in a case of fraud and deception of Federal Authorities (sic).".

In the second last paragraph of that letter, signed by complainant as a "Senior Visiting Scientist in the USA", complainant advised OSC that "My detailed story would be presented in a subsequent letter.".

On April 8, 1992, after having investigated complainant's February 3, 1992, charges of illegal employment-related discrimination based upon his citizenship status, that of a nonimmigrant alien in the United States on a visa, and also based upon his Israeli national origin, OSC notified complainant by certified mail that based upon its investigation of his charge, that office would not file a complaint on his behalf with an administrative law judge in this Office.

More specifically, complainant was advised by OSC in its April 8, 1992, correspondence that:

> Based on this Office's investigation, the Special Counsel has determined that:
>
> (1) there is insufficient evidence of reasonable cause to believe you were retaliated against, over-documented, or discriminated against because of your national origin as prohibited by 8 U.S.C. § 1324b, and
>
> (2) you are not a protected individual under the statute for purposes of citizenship status discrimination.

Therefore, this Office has decided not to file a complaint with an administrative law judge regarding this matter.

You are entitled to file your own complaint directly with the Office of the Chief Admin-istrative Hearing Officer within 90 days after your receipt of this letter. Complaints filed after the 90-day period will not be accepted. The address for filing complaints is:

> Office of the Chief Administrative Hearing Officer
> 5107 Leesburg Pike, Suite 2519
> Falls Church, Virginia 22041

On June 24, 1992, complainant timely filed the Complaint at issue in this Office. In the transmitting correspondence, dated June 21, 1992, complainant advised this office that between June 23, 1992 and July 19, 1992, he would be in California and that during that period his "formal address" was MBR Research, Inc., 601 Ewing Street, C-22, Princeton, New Jersey 08540, described by him as his "current sponsor".

On May 11, 1993, following extensive motion practice by these unrepresented parties, nearly all of which was initiated by complainant, the undersigned issued an Order Granting Partial Summary Decision in respondent's favor with respect to one (1) of complainant's two (2) allegations namely, his claim that he had been discharged on the basis of his citizenship status.

That Order found that complainant, whose status is that of a nonimmigrant resident alien to whom INS had issued a visa described by complainant as an "H-1" visa for the express purpose of accepting employment at Energia, could not maintain his claim of employment-related discrimination based upon citizenship status because complainant fails to meet the precondition that he is a "protected individual", as that term is defined in 8 U.S.C. § 1324b(a)(3).

That section of IRCA provides that the term "protected individual" means an individual who is either a citizen or national of the United States, or one who is lawfully admitted for permanent residence, or one having been granted temporary residence, or one having been admitted as a refugee, or an individual to whom asylum has been granted. Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92).

Since complainant did not qualify under any of those categories and thus could not qualify as a "protected individual", his citizenship status claim against Energia was ordered to be dismissed and complainant was advised that the sole remaining issue for adjudication was his alleged claim of having been discharged solely because of his Israeli national origin.

Accordingly, after due notice to the parties, that single remaining issue was addressed in an adjudicatory hearing attended by both parties and conducted in Princeton, New Jersey on Wednesday, July 13, 1994.

Summary of Evidence

Complainant's evidence consists of his sworn testimony and the information contained in those seven (7) documents identified and entered into evidence as Complainant's Exhibits A through G. That of respondent is comprised of his sworn testimony. From those sources, as well as the contents of document filings and discovery replies, the following facts have been established.

The complainant, Doron Abraham Tal, whose family name until 1969 was Tirkel, is 47 years of age, having been born in Jerusalem, Israel on March 5, 1947. He is an Israeli citizen, is married, has four (4) children, and his permanent residence is in Karmiel, Israel. In 1970, at age 23, he began his studies at Technion-Israel Institute of Technology, where he was also employed as an electronics technician from 1970 until 1973 and as a member of its academic staff from 1974 until 1976. On April 29, 1975, he was awarded a Bachelor of Science degree in Physics and he also received a Master of Science degree in Physics at that institute on October 23, 1977 (Complainant's Exh. G).

In 1977, complainant accepted civil service employment as a physicist at RAFAEL, which is the State of Israel's Ministry of Defense, or the counterpart of our Department of Defense, and was assigned to its Armament Development Authority in Haifa, Israel. He was promoted eventually to project manager, the position he held upon starting a two-year sabbatical leave in August, 1990, in order to accept a Visiting Research Staff position in Energia's laboratory, located in Princeton, New Jersey, starting on August 1, 1990 (Complainant's Exh. B) for which it was mutually agreed, in writing, that his annual compensation (salary, moving expenses, rent, etc.) was "thirty thousand U.S. Dollars ($30,000)." (Complainant's Exh. A).

Complainant testified that RAFAEL's work force, which is highly unionized, reached the 5,000 to 7,000-person level prior to a recent reduction in force which has reduced that number to less than 3,000 workers (T. 106). His last assignment there was that of a non-supervisory project manager, being responsible for, but not directly supervising, some 55 employees working on a two-year, $13-million research project funded principally by the United States government which involved research concerning the installation of infrared cameras on Cobra helicopters for use by the United States Marine Corps.

He found that working for Energia, then a seven-person, for profit firm in the private sector of the United States was totally different than working as a permanent civil servant for RAFAEL, where it is very difficult "to be fired for no reason"(T. 89).

At RAFAEL, he was a member of a union comprised of all of that firm's 1,500 or so research personnel. Other unions represented RAFAEL's workforce, one for each sector. He testified that although not elected or even selected to do so, he voluntarily assisted other RAFAEL employees in filing grievances or claims and occasionally he negotiated special matters with management on their behalf, such as

terms and conditions of work. He denied having attempted to represent his three (3) associates at Energia in the same manner, but feels that Dr. Lavid believes that he had in fact done so (T. 269-273).

For civil servant managers in his sector, RAFAEL's compensation package included sabbaticals, earned at the rate of one (1) year, with full pay, for each six (6) years service. In 1989, having then worked at RAFAEL for 12 years, complainant had earned and arranged for a two-year sabbatical in the United States, beginning on August 1, 1990, for himself and his family. He choose the United States because he had been a visitor here on three (3) occasions, including two (2) trips to the Washington, D.C. area on business-related negotiations. For his work area, he selected Princeton, New Jersey, an area which he had not visited but about which he had received mostly positive reports, especially its educational assets (T. 115, 116).

Utilizing his RAFAEL and networking contacts, complainant began his efforts to secure employment in that part of the United States, and testified that "I was in a hurry just to have a job in the United States" (T. 59). He learned about Energia and was furnished the telephone number of Dr. Moshe Lavid, respondent firm's president. He contacted Dr. Lavid by telephone in Princeton, New Jersey and eventually received a job offer from Energia, as reflected in the two (2) letters, both dated May 31, 1990, which he received in early June, 1990 from Ms. Nira Lavid, Vice President, Finance and Administration, Energia, Inc. (Complainant's Exh. A), and from Dr. Moshe Lavid, that firm's president (Complainant's Exh. B).

In the letter of Ms. Lavid, who is the wife of Dr. Moshe M. Lavid, she offered complainant the position of a Visiting Research Staff person in Energia's laboratory beginning in the summer of 1990. The annual compensation was stated to be "thirty thousand U.S. dollars ($30,000)." and consisted of "(salary, moving expenses, rent, etc.)".

Ms. Lavid requested that complainant notify her of his arrival date and that he also sign and return to her an acceptance copy of that letter. At the lower portion of that letter appeared the word "Accepted:", which was positioned above a line which was provided for complainant's dated signature. On the copy of that letter appears the signature " D Tal", as well as the date of "June 11, 1990" (Complainant's Exh. A).

In his letter of May 31, 1990 to complainant, Dr. Moshe Lavid stated that he was offering him the position of a Visiting Research Staff

person in Energia's laboratory beginning on August 1, 1990 (Complainant's Exh. B).

Complainant does not deny that he accepted that $30,000 job offer as a Visiting Research Staff person at Energia beginning on or about August 1, 1990, by having affixed his June 11, 1990, signature to the lower portion of Ms. Lavid's letter and returning the fully executed letter to her, as requested.

Instead, he testified that he was under the impression that his position at Energia was to be that of a "Visiting Scientist"(T. 29), who "is like a scientist in the university who may come and go whenever he likes to come and go.", and that he also gained the impression "that my salary would be $60,000 per year." (T. 42). He also believed that if he worked a 40-hour week for Dr. Lavid his annual salary would be $60,000 (T. 62).

After signing Ms. Lavid's letter on June 11, 1990, and accepting her $30,000 job offer, he learned that the cost of living in the Princeton, New Jersey area is more than twice that of Israel. He testified that if he had been aware of that fact he would not have agreed to work as a research person for that salary. In retrospect, he concedes that he simply erred in accepting Ms. Lavid's written offer on June 11, 1990 (T. 117).

He further stated that he arrived in the United States on August 13, 1990, together with his wife and four (4) children, and began his job duties at Energia on Tuesday, September 5, 1990. Energia is housed in the IRL Building, a one (1) story structure in Princeton, New Jersey, and consists of two (2) large laboratories, two (2) smaller rooms, and a storeroom, all of which can accommodate no more than 10 workers (T. 68).

There were four (4) Research Visiting Staff members, consisting of complainant and three (3) other men, another two (2) or three (3) consultants who worked at the university, a part time secretary, and Ms. Lavid, who worked there irregularly, as well as Dr. Lavid, who worked the regular 40-hour Monday through Friday schedule, starting at 8:30 a.m. each workday.

From the outset, he sensed that his three (3) associates were dissatisfied with their working conditions, as was complainant, who testified that he believed early on that Dr. Lavid had misled him concerning his employment at Energia (T. 72).

While employed at Energia at $30,000 annually, complainant testified that he received monthly sums from RAFAEL ranging from $3,000 to $3,600 and that those payments had the effect of raising his total salary at Energia to a level which exceeded his RAFAEL salary in Israel (T. 86). He does not regard those payments as salary from RAFAEL while on his two-year sabbatical, however. Rather, he refers to those as his "savings", as opposed to a supplemental wage (T. 75, 86).

Upon starting work on September 5, 1990 at Energia, a closely held family corporation in which Ms. Lavid holds a 51 percent interest and Dr. Lavid the remaining 49 percent share, he regarded it as a profitable firm which had only five (5) or six (6) employees and an annual gross income in excess of $500,000, a figure he believed "would be doubled in a short time" (T. 95, 96).

But in July or August, 1991, when he had been with Energia only 10 or 11 months, a financial reversal occurred, in the form of a loss of a $500,000 NSF Phase II award. That award cancellation was announced to the Energia research staff by Ms. Lavid's letter dated October 18, 1991, in which all staff members were requested to accept a 10 percent reduction in salary, retroactive to October 1, 1991, rather than reducing the size of the research staff (Complainant's Exh. C).

Complainant testified that he refused to accept that 10 percent reduction in salary, as did his three (3) associates, because he had been "let down by Dr. Lavid" (T. 108). He again testified that his "H-1" visa status, which Dr. Lavid had secured for him from INS, should have entitled him to be a consultant at a $60,000 annual salary rather than a research person at only $30,000 yearly. And complainant testified that he held that conviction despite his having received checks from RAFAEL each month in amounts between $3,000 and $3,600, in addition to his agreed upon $30,000 annual salary from Energia (T. 108).

On October 30, 1991, complainant and his three (3) research staff associates, Drs. Arthur Poulos, Suresh Gulati, and Vladmir Zamansky, prepared and jointly signed a letter in which they refused to accept the unilateral 10 percent retroactive salary reduction (Complainant's Exh. E).

They placed that letter in Dr. Lavid's office mailbox at about 12 noon on Friday, November 1, 1991. Some two (2) hours later, Dr. Lavid spoke to all four (4) research staff associates, announcing "You idiots.

This is not Israel. You're not a union.", whereupon all four (4) left the premises (T. 131).

It is that mid afternoon Friday, November 1, 1991, statement by Dr. Lavid upon which complainant relies most heavily, if not almost entirely, as evidence of his assertion that Energia fired him solely because of his Israeli national origin.

He also believes that he was singled out by Dr. Lavid because of complainant's Israeli nation origin, as evidenced by the fact that in the Energia workplace, and in the presence of his three (3) research staff associates, Dr. Lavid conversed with him in Hebrew, rather than in English (T. 187).

Complainant also believes that he was treated differently than his three (3) co-workers because of his Israeli national origin, as evidenced by the fact that only he received a termination letter on November 2, 1991, and further because he was the only person in the group of four (4) who was not allowed to continue his employment at Energia (T. 188).

Complainant also testified that in connection with his long-term dispute with Dr. Lavid over the size of complainant's annual wage, Dr. Lavid took advantage of and abused him based on the fact that he viewed RAFAEL's monthly payments to him as part of complainant's compensation package (T. 189).

Complainant's hearing testimony, as well as the documentary evidence which he has provided (Complainant's Exh. F), clearly discloses that the basis, as well as the full extent of, his problems at Energia involved a dispute over his salary, both as to the $30,000 annual amount and, beginning in mid-October, 1991, whether that amount should have been reduced by 10 percent, retroactively to October 1, 1991.

The hearing testimony discloses that complainant and Dr. Lavid conducted unsuccessful attempts to resolve their salary impasse, beginning as early at Saturday, November 2, 1991, when complainant was told, in the course of a meeting with Dr. Lavid at Energia, that he had been fired, effective November 15, 1991, and was ordered to remove his personal belongings from his desk. Complainant testified that he had refused to remove his personal belongings at that time, as ordered, because he had been told to do so on the Sabbath (T. 148), but

that he would have done so if that request had been made on Friday, November 1, 1991 or on Monday, November 4, 1991 (T. 149).

In connection with complainant's declared sensitivity concerning his activities on the Sabbath, Dr. Lavid stated that complainant had worked at Energia on many Saturdays (T. 159, 160), to which complainant replied that he had done so on only three (3) occasions, including November 2, 1991 (T. 160-163).

Elsewhere in his testimony, complainant stated that he didn't intend to leave Energia until he was allowed to discuss all the disputed issues with both of the Lavids (T. 145). He also testified that he "did not agree to be fired", that he didn't wish to leave Energia and wanted to continue working there until returning to Israel in the summer of 1992 and regain possession of their residence in Karmiel, which they had leased for two (2) years, or until August, 1992 (T. 166-168). In addition, complainant's wife, a school teacher who presumably had also taken a sabbatical or a two-year leave from her teaching duties, was also apparently anxious to return home to Israel.

Complainant stated that despite his having received oral and written termination notices from Dr. Lavid on Saturday, November 2, 1991, and also having been requested by him to remove his belongings from his desk in the course of their meeting at Energia on that date, he returned to work at the usual time just two (2) days later, on the morning of Monday, November 4, 1991 (T. 164).

He worked through Thursday of that week, before taking off on Friday, November 8, 1991, in order to vacation briefly in Boston, and he also worked all five (5) workdays of the next week before spending his last workday at Energia on Friday, November 15, 1991 (T. 164, 165).

After having been fired, effective on that date, he visited Energia on two (2) occasions afterwards in the course of engaging in unproductive discussions with Dr. Lavid (T. 165). Meanwhile, he remained on RAFAEL's payroll and continued to receive his monthly allowance sums (T. 174).

On November 22, 1991, according to complainant's testimony, he went to Energia without prior notice at about 8:30 a.m. (T. 243) and sat at his desk whereupon Dr. Lavid, in the presence of his three (3) former research associates, stated "Go out immediately. I don't want to see you here." (T. 244). Complainant stated that he remained seated and

refused to leave because he wished to speak to the Lavids (T. 248) and that Dr. Lavid called the police and had him escorted out of the office (T. 250).

On November 24, 1991, complainant filed for unemployment benefits, in the amount of $291 weekly, with the appropriate New Jersey state agency but that claim was denied on December 16, 1991, based upon complainant having been ineligible for those benefits because it was found that, owing to his visa requirements, he was unavailable for work and for the additional reason that he had been discharged for work-related misconduct.

Complainant appealed that adverse determination and requested a hearing, which was conducted on June 6, 1992, and in the course of which complainant and Dr. Lavid testified, as did two (2) of complainant's three (3) research associates, Drs. Poulos and Gulati. On July 7, 1992, the New Jersey Department of Labor's Appeal Tribunal affirmed the denial of benefits and found that complainant had last worked on November 15, 1991 because of a salary dispute with Energia. The appeals examiner also found that complainant was not eligible for unemployment benefits because "he was unavailable for work" and also because "he was discharged for misconduct connected with the work" (Complainant's Exh. F).

On December 9, 1991, as noted earlier, complainant visited the INS office in Jersey City, New Jersey to file a complaint.

In December, 1991, also, complainant began a search for alternate employment (T. 169) which resulted in a conditional job offer in April, 1992 from a firm which is presumably located in the Princeton area, also, but which complainant refused to identify. Complainant testified that that job offer was conditioned upon complainant's receiving an H1-B visa status from the United States Department of Labor (DOL), the application for which was filed by that prospective employer (T. 181).

That conditional job offer involved a research consultant position, which would have allowed complainant to come and go at will, as he had wished to do at Energia, and complainant demanded an annual salary of $60,000 but accepted that firm's conditional offer of $48,000 annually (T. 182).

He did not formally begin his research consultant duties there because the approval for the change in visa status from "H-1" to H-1B

was not received by his prospective employer until July, 1992, or less than one (1) month prior to his planned return to Israel in August, 1992 (T. 182).

But complainant apparently performed some unexplained tasks for that firm during an undetermined period between April, 1992 and his leaving the United States in August, 1992, since he testified that "I was associated with this company without gainfully working. I just provided help of service without getting any cent." (T. 183).

He returned to Israel about August 1, 1992, and remained an employee of RAFAEL, but in view of the incident with Dr. Lavid he decided to resign and take retirement benefits shortly thereafter (T. 226). He remained an employee of RAFAEL until March, 1993(T. 82). While negotiating the amount of his early retirement benefits with RAFAEL, based upon 16 years of service, he continued receiving $3,000 - $3,600 monthly from RAFAEL (T. 235), as he continued his sabbatical (T. 236).

After extended discussions with RAFAEL, his monthly early retirement benefits were determined to be 40 percent of his last gross monthly wage, or $3,000 monthly (T. 229), and he began receiving monthly pension checks on May 1, 1993 (T. 239).

Complainant testified that he is presently self-employed in two (2) areas of business activity, one involves writing patent applications and prototypes "worldwide" and the other endeavor is that of selling life insurance (T. 83).

Dr. Lavid's testimony disputed complainant's in the following respects, among others. Complainant testified that Dr. Lavid had advised the INS in completing that agency's visa application form (Complainant's Exh. G at 2) that his annual salary at Energia would be $60,000. In his testimony, Dr. Lavid stated that in completing the first page of INS Form 1-129B (Complainant's Exh. G at 2), he had advised INS that complainant's $60,000 yearly salary was being jointly paid by Energia and RAFAEL, or $30,000 by each (T. 73, 74).

He also testified that he doubts that complainant had in fact received a bona fide conditional offer of employment as a consultant in April 1992, conditioned on complainant having been issued an H-1B type visa since consultants are independent contractors who are not eligible to receive that type visa. Instead, H-1B visas are only issued to salaried

employees who are on a payroll and from whose wages taxes and other deductions are withheld (T. 185).

Dr. Lavid stated that he did not fire complainant, but in the event that he had terminated him complainant's Israeli national origin would have played no part in that decision. He stated that he was also born and raised in Israel, that he had served in the Israeli Army and that his mother and son live in Israel (T. 205).

Dr. Lavid testified that complainant came to Energia on the morning of Monday, November 18, 1991, and asked to speak to Ms. Lavid, to which he replied "Make an appointment. Get back to work." Complainant refused unless he first spoke to Ms. Lavid, whereupon he was ordered to return home. Dr. Lavid assigned another person to the research complainant had been performing, and did so because of a deadline on that project. He stated that complainant learned of that and returned to Energia on the morning of Friday, November 22, 1991, and was ordered to leave (T. 203, 204).

He also testified that another of RAFAEL's employees, Yahuda Vocshon, had completed an identical research sabbatical at Energia and had returned to Israel one (1) month before complainant arrived. Dr. Lavid described Vocshon as a peer Israeli with whom he had a "beautiful relationship" (T. 205).

Dr. Lavid regarded complainant as a troublemaker who did an excellent job of "stirring the pot", who had enjoyed and missed his RAFAEL role as a manager and leader, who was a power conscious individual, and whose ego had been bruised in the course of having to join a four-person research staff as an equal associate (T. 207).

Issue

The only remaining issue for adjudication, as noted earlier, is whether, as complainant has alleged, respondent has violated the pertinent provisions of IRCA, 8 U.S.C. § 1324b(a)(1)(A), and the implementing regulations, 28 C.F.R. § 44.200(a) by having knowingly and intentionally fired complainant on or about November 15, 1991 based solely upon his Israeli national origin.

Discussion, Findings, and Conclusions

In filing this unfair immigration-related discrimination practice charge against Energia based upon citizenship status and national

origin, complainant relies upon the provisions of 8 U.S.C. § 1324b(a)(1)(A) and (B), which provide:

> "Unfair Immigration-Related Employment Practices"
>
> 8 U.S.C. 1324b(a) PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS.
>
> (1) GENERAL RULE.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in Section 274A(h)(3)) with respect to the hiring, or recruitment or referral fora fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status. (Emphasis Added) * * * *

That wording demonstrates that in enacting IRCA, Congress provided for a narrow range of remedies for those filing employment-related discrimination charges under its provisions.

Congress revisited that legislative area in the course of enacting IMMACT, more specifically § 534(a) therein, and expanded the reach of § 1324b(a)(1) by providing that on or after November 29, 1990, it would also be an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce or retaliate against any individual asserting IRCA rights or testifying, assisting, or participating in any manner in an investigation, proceeding or hearing.

And in enacting § 535(a) of IMMACT, 8 U.S.C. § 1324b(a)(6), Congress also declared that certain document abuse practices committed on or after November 29, 1990, would also be treated as an unfair immigration-related employment practice.

It can readily be seen then that in having enacted IRCA, as amended by IMMACT, Congress provided for a less than broad range of remedies by limiting relief to situations involving these five (5) employment-related scenarios: hiring, firing, recruitment or referral for a fee, retaliation and document abuse.

The statutes' intended beneficiaries are required to file written charges with OSC, which is tasked with investigating alleged violations and enforcing IRCA's provisions. Those charges must be based upon national origin and/or citizenship status discrimination, document abuse, or retaliation. And, as discussed earlier, the immigration-related employment practice allegations involving citizenship

status may only be asserted by those who further qualify as protected individuals.

In contrast to the relatively limited scope of remedies available under IRCA, as amended by IMMACT, the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (1982) (Title VII) provide considerably broader employment discrimination protections based upon national origin in the areas of hiring, firing, recruitment and retaliation, as does IRCA, but in addition it accommodates claims based upon race, color, religion, and sex and does so in expanded areas, including the terms and conditions of employment covering, but not limited to, salaries, raises, promotions, and benefits. All claims under Title VII must be filed with the Equal Employment Opportunity Commission (EEOC), which investigates and enforces those claims.

Because Title VII does not cover employment discrimination based upon citizenship status, or alienage, or a persons' non-citizen status, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973), the inclusion of such coverage in IRCA remedied that void.

Among other distinctions between IRCA and Title VII, the coverages of the latter statute apply to larger employers than those of IRCA, since the provisions of Title VII concern employers having 15 or more employees "for each working day in each of twenty or more calendars weeks in the current or preceding calendar year." 42 U.S.C. §10003(b). Resultingly, the provisions of Title VII do not apply to any employer whose work force numbers 14 or fewer persons.

Meanwhile, the national origin provisions of IRCA apply to smaller employers, those employing between four (4) and 14 employees. The threshold level of four employees results from the fact that IRCA specifically exempts employers with three (3) or fewer employees, 8 U.S.C §1324b(a)(2)(A), 28 C.F.R. § 44.200(b)(1)(i), and, as noted in the preceding paragraph, all national origin claims filed against persons or entities having 15 or more workers must be brought under Title VII.

It can readily be noted then that in the event a complainant alleges employment-related national origin discrimination, the size of the employer's, or prospective employer's, work force determines whether that charge must be filed at EEOC or at OSC. If it numbers between four (4) and 14 employees, the complaining party must proceed under the protections of IRCA and file that charge with OSC, as complainant was forced to do under these facts.

But in the event that the employer's work force numbers 15 or more employees, the aggrieved individual must file that national origin charge under the provisions of Title VII and do so by filing that charge with EEOC.

In the event that the claim of employment related discrimination is based upon citizenship status, we have previously seen that there is no relief available under Title VII. Espinoza v. Farah Mfg. Co., supra. Instead, claims of that nature are permitted to be filed against persons or other entities employing four (4) or more employees, and the charging party must file the claim with OSC under IRCA and further establish that he/she is a protected individual before being permitted to pursue that claim.

With that background having been established, complainant's allegations will be examined further. As previously discussed, complainant is not a protected individual and therefore cannot maintain his citizenship status under IRCA and cannot proceed under Title VII, either, because, as noted earlier, allegations of that nature are not covered by that statute.

Therefore, complainant must assert his remaining claim, that which is based solely upon his Israeli national origin, under IRCA since Energia's work force, at all times relevant, numbered between four (4) and 14 employees (T. 66, 68), and therefore that fact precludes consideration of the national origin discrimination claim under Title VII, given that statute's previously noted 15-employee numerical jurisdictional threshold.

Closer analysis reveals that in the event that the relevant and credible evidence discloses that complainant's employment related discrimination charge is, in fact, based upon or supported by, any foundation other than his national origin, such as salary and/or working conditions, complainant cannot prevail in this proceeding because all employment related discrimination complaints based upon disputes involving salaries/wage and/or working conditions, including the number of hours worked, must be filed under Title VII since complaints of that nature are not addressed by IRCA.

But in the event that complainant had instituted a timely-filed claim at EEOC under Title VII based upon his assertion that his annual salary at Energia should have been $60,000 rather than $30,000, and that he should not have been required to work 40-hour work weeks on a Monday thru Friday schedule, he could not have been granted relief

under Title VII, either, because Energia's work force, at all times relevant, did not equal or exceed the mandatory 15-person Title VII coverage threshold.

After reviewing the evidence contained in this hearing recording, and assigning to these disputed facts the reasonable inferences to which they are entitled, it must be simply and emphatically stated that this dispute does not, as complainant alleges, involve national origin discrimination. Instead, the hearing testimony and the documentary evidence and filings indisputedly demonstrate that the controversy at issue is one which solely involves complainant's salary and his work conditions, and is therefore not actionable under IRCA.

In retrospect, complainant wishes to misapply the national origin provisions of IRCA in order to attain salary sums and working conditions which he failed to bargain for at arms length with the Lavids before leaving Israel with his wife and four (4) children in beginning a two(2)-year sabbatical, with full pay from RAFAEL, beginning on August 1, 1990.

As noted previously, the Lavids extended a written job offer to complainant in a letter dated May 31, 1990. Complainant was to receive $30,000 annually for a position described as "Visiting Research Staff" in Energia's Princeton, New Jersey laboratory. Complainant gave his written acceptance of that offer on June 11, 1990, and returned Ms. Lavid's letter by mail from his home in Karmiel, Israel.

In view of that fact, complainant knew precisely, and well in advance of leaving Israel, that his assigned duties at Energia were to be those of a "Visiting Research Staff" person, and not that of either an "Alien of Distinguished Merit and Ability", or a "Visiting Scientist" (T. 29), as he had subsequently described himself in his OSC charge and in his hearing testimony, respectively.

Complainant testified that upon his arrival in the United States on August 13, 1990, he was of the opinion that in addition to continuing to receive his full salary of $60,000 in American dollars from RAFAEL, Energia would pay him an additional $60,000 annually, despite his agreed upon $30,000 employment contract sum, and also permit him to "come and go" in the manner in which he testified that scientists in university settings are permitted to do.

Complainant also feels that he should not have been expected to adhere to an 8:30 am to 5 pm Monday thru Friday work schedule, even

though his three (3) research staff associates at Energia did so. In forming that opinion, complainant drew upon his then 12-year career experience at RAFAEL, an Israeli government agency whose work force at all levels was highly unionized and in whose employment setting complainant had for many years voluntarily assisted other RAFAEL personnel in their grievances/claims with management concerning terms and work conditions.

But in expressing that opinion, complainant is unmindful of his status as a H1-B visa holder. That nonimmigrant visa privilege is extended to foreign workers of any nationality who enter the United States to perform specialty occupations which require the theoretical and practical application of a body of highly specialized knowledge. Receiving firms, such as Energia, are required to file a Labor Condition Application with the U.S. Department of Labor, as well as a written petition with INS. An H1-B visa is valid for three (3) years and extensions for up to three (3) additional years, may be obtained.

The documentary evidence discloses that on or about July 2, 1990, Energia filed an INS petition for an H-1B visa on behalf of complainant (Complainant's Exh. G, at 2-5). That document discloses that INS was advised that complainant would work 40 hours weekly and be jointly paid the total sum of $60,000 annually by Energia and RAFAEL (at 1).

Given that background, it is not difficult to see that complainant's total work experience in Israel did not prepare him for the easily predictable differences he would experience in joining a seven-person, nonunion, for profit firm in the United States, and whose president and 49-percent shareholder, Dr. Lavid, was one of that firm's workforce who worked with and observed the same work schedule as the others.

In addition, and unlike RAFAEL, Energia is a very small, closely held corporation, the assets of which very likely represent the entire personal fortunes of the Lavids, or nearly so. As employers in the host country, the Lavids may impose reasonable rules and disciplines in their workplace, including salary arrangements and hourly work schedules. And those working conditions are enforceable especially where, as here, a foreign national, to whom temporary worker visa privileges have been extended under our immigration laws, has given his written consent to become employed for a term performing specific job duties and for a predetermined and agreed upon annual salary sum.

For the foregoing reasons, it is found that the claim asserted by complainant is not actionable under IRCA since it solely involves a

dispute over salary and, to a lesser extent, working conditions, as opposed to the basis which complainant has alleged, that of his Israeli national origin. Accordingly, complainant's request for administrative relief on that ground must be denied.

Even in the event that these disputed facts had demonstrated that complainant's Israeli national origin had been involved, this evidentiary record reveals that complainant has failed to meet the required evidentiary burden of proof in support of that allegation.

The necessary elements of that burden of proof under IRCA are those set forth in decisions involving parallel claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (Title VII), Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92); Huang v. Queens Motel, 2 OCAHO 364 (8/9/91); Williams v. Lucas & Associates, 2 OCAHO 357 (7/24/91); Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/91); U.S. v. LASA Marketing Firms, 1 OCAHO 141 (3/14/90).

Because complainant has alleged disparate treatment namely, that he was knowingly and intentionally treated less favorably than other employees similarly situated at Energia based solely upon his Israeli national origin, we begin our discussion of the applicable law, as expressed in the seminal Supreme Court ruling in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In issuing that ruling, the order and allocation of proof in Title VII cases dealing with disparate treatment was defined. The Court announced that the plaintiff therein was required to establish a prima facie case of discrimination and was further required to prove by a preponderance of the evidence:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected; and (iv)that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualification." 411 U.S. at 802.

Although the facts in McDonnell involved an illegal refusal to hire setting, the Court subsequently announced that that order and allocation of proof were also applicable in those cases, as here, which involve illegal firings. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In the latter ruling it was held that upon a showing of a prima facie case of discrimination by a preponderance of the evidence, an inference of discrimination arises and imposes upon the defendant a burden of rebuttal which respondent successfully assumes by articulating with specificity a legitimate, non-discriminatory reason for not having hired/having fired plaintiff. Given that showing, the plaintiff then has the opportunity to prove, once more by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons for not having hired/having fired plaintiff, but instead were a pretext for intentionally discriminating against plaintiff. 450 U.S. at 249.

It can be seen that in order to present a prima facie case of national origin discrimination concerning his discharge by Energia complainant must show: (1) that he belongs to a class of persons protected by the provisions of IRCA; (2) that he satisfied the normal job requirements for the job which he had performed; (3) that he was discharged and was not rehired; and (4) that following his discharge, Energia continued to employ or seek to employ persons with his qualifications.

Under Title VII guidelines, complainant may, in either of two ways, establish Energia's alleged discriminatory practice, that of knowingly and intentionally having treated him disparately, differently, or less favorably than other employees similarly situated in the course of terminating his employment on November 15, 1991, solely because of his Israeli national origin.

He can provide indirect, or circumstantial, proof of such discrimination, Texas Department of Community Affairs v. Burdine, supra, McDonnell Douglas Corp. v. Green, supra, or he may adduce direct evidence of such discrimination, Price Waterhouse v. Hopkins, 490 U.S. 228 (1986), Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

In the event that complainant's evidence discloses indirect evidence of discrimination, and thus establishes a prima facie case, the burden of production then shifts to Energia to articulate a legitimate reason for his discharge. Should Energia carry that burden, complainant will then have the opportunity to prove that the reasons articulated by Energia are a mere pretext for discrimination. McDonnell Douglas Corp., 411 U.S. at 807. See also Texas Dept. of Community Affairs, 450 U.S. at 248. Moreover, "[t]he ultimate burden of persuading the trier of the fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 253.

In the event that complainant's evidence consists of direct evidence of discrimination, as opposed to indirect evidence of the same nature, the McDonnell test is not applicable since that evidentiary test is intended to be utilized in order to assist in discovering discrimination where only circumstantial evidence is available. Trans World Airlines, 469 U.S. 121, 122. Direct evidence will not only constitute a prima facie case of defendant's discriminatory conduct, it serves as plaintiff's entire case and imposes upon the defendant the burden of proving, by a preponderance of the evidence, that defendant would have discharged plaintiff even in the absence of the discrimination element.

Very recently, however, on June 25, 1993, the U.S. Supreme Court modified the McDonnell Douglas framework by ruling in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), a case involving alleged indirect, or circumstantial, evidence of discriminatory intent, that a discharged plaintiff alleging racial discrimination is not entitled to judgment as a matter of law after proving that all of the defendant's reasons were merely pretextural and that in order to prevail the plaintiff therein was further required to bear the ultimate burden of persuasion of showing additionally that the defendant therein had intentionally discriminated against him based upon his race.

In McDonnell, as noted earlier, the Supreme Court dealt with a refusal to hire scenario, as opposed to an illegal discharge, but in that ruling the Supreme Court announced that the order and allocation of proof adopted therein could be adapted to cover other factual settings, such as an illegal discharge, as complainant has alleged under these facts. And subsequent Supreme Court rulings have adjusted the McDonnell formula for use in discharge cases. Texas Dep't. of Community Affairs v. Burdine, supra; McDonald v. Sante Fe Transp. Co.. 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976).

By utilizing those accepted evidentiary parameters, we will now analyze and assess complainant's charge that he was knowingly and intentionally fired at Energia on November 2, 1991, effective on November 15, 1991, solely because of his Israeli national origin.

Complainant's evidence in support of that charge consists principally of Dr. Lavid's previously-quoted statement on the afternoon of Friday, November 1, 1991, to complainant, as well as to his three (3) staff research associates, "You idiots. This is not Israel. You're not a union." (T. 131). In addition, he alleges that Dr. Lavid treated him differently, or disparately, or less favorably than his fellow research colleagues by reason of his having spoken to complainant in the Energia workplace

in their native Hebrew language (T. 187), and also because he was the only one of the four (4) research associates who was not allowed to continue working at Energia following the November 1, 1991 incident (T. 188).

We have noted previously that in order to establish a prima facie case that he had been illegally terminated because of his Israeli national origin, complainant need only present facts which give rise to an inference of intentional discrimination. Based upon this evidentiary record, he has failed to do so, but even if he had done so and thereby imposed upon Energia a burden of rebuttal, consisting of specifically showing that complainant had been fired for a legitimate and non-discriminatory reason, such as misconduct or insubordination in the workplace, I find that Energia has successfully articulated a legitimate reason for complainant's discharge.

Given the evidence in that posture, complainant must then show, again by the preponderance of the evidence, that the reason offered by Energia as having been legitimate was, in fact, not legitimate and instead was merely a pretext on Energia's part for having intentionally discriminated against him by having terminated his services solely because of complainant's Israeli national origin. Complainant has again failed, and by a significant margin, to make that required showing.

Without again particularizing the detailed and previously summarized facts bearing upon the argumentation of the parties, it is quite discernible that complainant admittedly began his job duties at Energia on September 5, 1990, with a good deal less fervor and enthusiasm than one normally brings to new employment surroundings. As noted previously, complainant believes that Dr. Lavid did not treat him fairly in their employment relationship, as evidenced entirely by his $30,000 annual salary, and also by Dr. Lavid's requirement that he work a 40-hour, five (5) day work week, as did Dr. Lavid and complainant's three (3) research associates.

Those two (2) areas of controversy, namely salary and working conditions, are unarguably central to and totally comprise all of complainant's allegations against Energia. But should complainant concede that fact, as he logically and realistically must, he has no actionable remedy against Energia on those grounds, since they are not covered by IRCA.

Complainant's claim, because it consists entirely of a dispute involving salary and working conditions, presents subject matters which must be addressed, and exclusively so, under the provisions of Title VII. But, as noted previously, that statute's provisions are of no benefit to complainant, either, since they do not extend to Energia because that firm employed fewer than the required 15-employee threshold at all times relevant to these facts.

In view of the foregoing, complainant's June 24, 1992, Complaint seeking administrative relief under the pertinent provisions of IRCA, must be denied.

Order

Complainant's June 24, 1992, Complaint alleging immigration-related unfair employment practices based upon national origin and citizenship status discrimination, in violation of the provisions of 8 U.S.C. §1324b(a)(1)(A) and (B), is hereby ordered to be and is dismissed.

_____
JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this 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, and does so no later than 60 days after the entry of this Order.