

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

GLAUCO LUIZ ORTOLANO,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 94B00148
)
WORDPERFECT COMPANY,)
Respondent.)

)

FINAL DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS
(December 6, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Glauco Luiz Ortolano, Pro se
Jim F. Lundberg, Esq., for Respondent

I. Procedural History

By a charge dated March 1, 1994, Glauco Luiz Ortolano (Complainant or Ortolano) alleged that WordPerfect Company (Respondent or WordPerfect) retaliated against him based on his national origin and citizenship status, a practice prohibited by § 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a)(5). Ortolano filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Prior to May 18, 1993, the date on which Ortolano was discharged, he was employed by Respondent as a technical translator in Portuguese. Specifically, Ortolano alleged that he informed his supervisor that she

was engaging in discriminatory hiring practices by preferring alien workers over United States citizens. Complainant stated that WordPerfect hired three aliens while passing over his wife, a U.S. citizen, for a translating job. Ortolano claimed WordPerfect discriminated against his wife in favor of the aliens, pointing out that she is a native speaker of Portuguese and has a degree in Portuguese translation. For these reasons, he states he threatened to file a discrimination complaint against WordPerfect. Thereafter, according to Complainant the atmosphere at his place of employ became intolerable and he was eventually discharged.

By a determination letter dated July 14, 1994, OSC advised Ortolano that it elected not to file a complaint before an administrative law judge (ALJ) due to "insufficient evidence of reasonable cause to believe . . . [he was] discriminated against as prohibited by 8 U.S.C. § 1324b." OSC informed Ortolano that he could pursue a private cause of action directly with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

On August 11, 1994, Ortolano filed an OCAHO complaint. Complainant reasserted his claim that Respondent had retaliated against him because of his statements regarding WordPerfect's discriminatory hiring practices.

On August 15, 1994, OCAHO issued its Notice of Hearing (NOH), which transmitted to Respondent a copy of Ortolano's complaint.

On September 22, 1994, Respondent timely filed an answer, including affirmative defenses. As its first affirmative defense, WordPerfect alleges that Complainant has failed to state a claim upon which relief can be granted because the complaint does not state the basis upon which Ortolano was fired. Its second affirmative defense admits and denies the allegations of the complaint seriatim.

Respondent's third affirmative defense contends that the complaint was untimely because it was filed on March 1, 1994, over a year after the alleged discriminatory action took place, i.e., Complainant was discharged on May 18, 1993. Respondent also contends that Complainant waived his right to assert any claim against WordPerfect because he executed a written statement releasing WordPerfect from all liability in return for full consideration. Finally, Respondent asserts that Ortolano is collaterally estopped from asserting a claim of wrongful termination because he filed a previous claim before the Industrial Commission of Utah Department of Employment Security in

which the ALJ held he was not qualified for his position at WordPerfect.

On September 22, 1994, Respondent filed a motion to dismiss the complaint in which it reiterated its affirmative defenses. Complainant has not responded to the Motion to Dismiss.¹

II. *Discussion*

OCAHO rules of practice and procedure authorize the ALJ to dispose of cases, as appropriate, upon motions to dismiss for failure to state a claim upon which relief can be granted, 28 C.F.R. § 68.10 (1994), and motions for summary decision, 28 C.F.R. § 68.38(c). The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of OCAHO cases. 28 C.F.R. § 68.1. These Rules as well as fairness and judicial efficiency require that Respondent's motion to dismiss be treated as tantamount to a motion for summary decision. See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"). It is a condition precedent to summary decision that there is "no genuine issue as to any material fact." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). However, where the basis for dismissal is jurisdictional in nature, as it is in this case, there is no need to go through a factual analysis to determine the existence of disputed material facts.

Under 8 U.S.C. § 1324b(d)(3), "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." Ortolano alleges that WordPerfect's discriminatory employment practices culminated in his termination on May 18, 1993. He did not, however, file his charge with OSC until March 1, 1994, more than a year later. Unaccountably, OSC's determination letter did not address Ortolano's delay in filing his charge. In any case, whatever misconduct he may have conceived, the 180 day window of opportunity to file his charge began to run not later than the date he was fired. Moreover, Ortolano's failure to respond to the motion to dismiss and the absence of any other basis for a finding of equitable tolling preclude

¹ Under 28 C.F.R. § 68.38(a), the opposing party to a motion for summary decision or motion to dismiss "may respond to the motion . . ." "within ten (10) days after service. . ."

the need to find an excuse for his charge being filed late. Accordingly, his complaint must be dismissed.

III. *Ultimate Findings, Conclusions and Order*

I have considered the complaint filed by Ortolano, the answer and motion filed by WordPerfect, and other supporting documents filed by each party. All motions and other requests not specifically ruled upon are denied.

Without a timely filing of a charge with OSC, OCAHO lacks jurisdiction over the instant complaint. For this reason, I find and conclude that:

1. Respondent's Motion for Summary Judgment is granted;
2. The complaint is dismissed for lack of jurisdiction.

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

SO ORDERED. Dated and entered this 6th day of December, 1994.

MARVIN H. MORSE
Administrative Law Judge