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

Hector Cascante, Complainant v. Kayak Club, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 89200530.

ORDER DISMISSING ACTION FOR LACK OF PROSECUTION PURSUANT TO FRCP RULE 41(b)

Procedural History

On or about October 16, 1989, Complainant, acting pro se, filed a Complaint in Spanish with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer. On November 7, 1989, Complainant filed an amended Complaint, in English. The Complainant alleges that he was fired from his employment at the Kayak Club because of his national origin and citizenship, which is in violation of section 102 of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b.

A Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practice was mailed to Respondent, on November 30, 1989. The amended Complaint was served on Respondent on December 29, 1989.

On May 24, 1990, I issued An Order to Show Cause Why Default Judgment Should not Issue.

A response to my Order to Show Cause was filed by Respondent on June 20, 1990, wherein Respondent stated his reasons for not answering the Complaint in a timely manner as set forth in the regulations at 28 C.F.R. § 68.8.

On June 21, 1990, I issued an Order permitting and directing Respondent to File a late Answer to the amended Complaint.

On July 9, 1990, Respondent filed its Answer to the Complaint, specifically addressing each allegation.

On July 9, 1990, this Court's Attorney/Advisor received a call from Complainant regarding Complainant's desire to amend the Complaint to include the City of Anchorage. Complainant was advised to send a letter to the Court setting forth the specific allegations he intended to make and to distinguish these allegations from his claim against the Kayak Club.

On July 11, 1990, Complainant filed a letter with the Court urging a decision on this case.

On July 19, 1990, I issued an Order Directing Pro Se Parties to File Appropriate Motions and Pleadings.

On July 27, 1990, the Attorney/Advisor tried to call the Complainant at the telephone number of record, because the Order Directing Pro Se Parties to File Appropriate Motions and Pleadings had been returned to this office marked ``Return to Sender.'' The telephone number had been disconnected.

On August 9, 1990, Respondent filed a Motion for Summary Decision. Respondent certified that he served Complainant with a copy of the Motion.

Respondent, in its Answer to the Complaint and in its Motion for Summary Decision, has stated that Respondent voluntarily quit his job. In support of its position, Respondent has submitted several exhibits attached to his Answer to the Complaint. Exhibit B, a written statement made by the general manager, Exhibit C, a Notice of Nonmonetary Determination from the Alaska Department of Labor, Employment Security Division, and Exhibit D, a Personnel Action Form, all support Respondent's position that Complainant voluntarily terminated his employment with Respondent.[1]

Pursuant to 28 C.F.R. §§ 68.9(b) and 68.7(c)(2), Complainant has ten days from the date of service plus five days for mailing to respond to Respondent's Motion for Summary Decision. Thus, any response Complainant wishes to make must be made on or before August 24, 1990. No response has yet been received by this office.

Jurisdiction of Administrative Law Judge

Complainant alleges in his Complaint that on October 18, 1988, Respondent knowingly and intentionally fired Complainant from his job as a dishwasher because of Complainant's citizenship status or Costa Rican national origin in violation of 8 U.S.C. § 1324b.

8 U.S.C. § 1324b(a)(1) prohibits a person or entity from discriminating against an employee based on the employee's national origin or citizenship status. However, 8 U.S.C. § 1324b(a)(2) lists three situations in which it excludes a person or entity from liability under IRCA. Subsection (A) excludes a person or entity who em-

[1] Respondent's Motion for Summary Decision appears to have merit because there is no evidence in the record that suggests Complainant was terminated based on his citizenship status; indeed, Respondent's documented contention is that Complainant voluntarily walked off the job, and Respondent would re-hire him as dishwasher if he would re-appear for work. Alternatively, however, because Complainant has abandoned prosecution of this case without responding to Respondent's Motion for Summary Decision, I have decided to dismiss this case pursuant to Rule 41(b). Infra.

ploys three or fewer employees from liability under IRCA. Subsection (B) excludes a person or entity from liability under IRCA if the discrimination charge is based on national origin and the alleged discrimination is covered under section 703 of the Civil Rights Act of 1964; and subsection (C) excludes a person or entity from liability under IRCA if the discrimination charge is based on citizenship status which is otherwise required in order to comply with, inter alia, law, regulation, or executive order.

Thus, in accordance with subsection (B), if the Complaint alleges national origin discrimination and the employer is covered under section 703 of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) has sole jurisdiction. See, Wisniewski v. Douglas County School District, OCAHO Case #88200037 (October 17, 1988), at 3; Frye and Klasko, Employers' Immigration Compliance Guide, section 4.03(1)(a). Under title VII, an employer is defined as ``a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding years.'' 42 U.S.C. § 2000e(b). Although IRCA does not include the twenty week minimum in its definition of an employer, the Courts do consider this factor when determining if the allegation is within the jurisdiction of EEOC. Wisniewski at 3. If the national origin discrimination claim falls within the jurisdiction of EEOC, then the claim is precluded from the jurisdiction of IRCA.

Thus, under IRCA, the jurisdiction of this Court with respect to national origin discrimination claims is limited to claims against persons or entities who employ more than three persons and less than fifteen persons. See, 8 U.S.C. § 1324b (a)(2)(A); and also 8 U.S.C. § 1324b(a)(2)(B) and 42 U.S.C. § 2000e(b).

Therefore, in the case at bar, since it is undisputed that Respondent employs more than fifteen persons, the discrimination claim based on national original falls within the jurisdiction of EEOC, and thus precludes this Court's jurisdiction. See Charge Form for Unfair Immigration-Related Employment Practice at 2 attached to the Complaint; and see, Respondent's Answer to Complaint at 1.

Without jurisdiction, this Court has no power to decide the national origin discrimination claim. Thus, I turn my attention to Complainant's citizenship claim.

Legal Analysis

The regulations governing this proceeding allow the Court to use the Federal Rules of Civil Procedure ``as a general guideline in any situation not provided for or controlled by these rules, or by statute, executive order, or regulation.'' 28 C.F.R. § 68.1.

Rule 41(b) of the Federal Rules of Civil Procedure allows for the involuntary dismissal of an action for, inter alia, failure to prosecute the claim. Although Rule 41(b) states the defendant ``may move for a dismissal'' (emphasis added), the Supreme Court has held that

> [t]he authority of a court to dismiss sue sponte for lack of prosecution has generally been considered an `inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Link v. Wabash Railroad Co., 82 S.Ct. 1386, 370 U.S. 626 (1962).

No rigid time limits or precise rules govern when a dismissal for lack of prosecution pursuant to Rule 41(b) is appropriate. See, Huffmaster v. U.S., 186 F. Supp. 120 (D.C. Cal 1960). The particular circumstances of each case must be considered when deciding if a Rule 41(b) dismissal for lack of prosecution is justified. See, Sheaffer v. Warehouse Employees Union, Local No. 730, 408 F.2d 204, 132 U.S. App. D.C. 401 (C.A. 1969), certiorari denied, 395 U.S. 934, 86 S.Ct. 1996.

Dismissal for lack of prosecution is a penalty for dilatoriness. It is a procedural device to avoid unnecessary delay in litigation and harassment of defendant. Wright and Miller, Federal Practice and Procedure, sec. 2370; see also Barget v. Baltimore & O.R. Co., 130 F.2d 401, 75 U.S. App. D.C. 367 (C.A. 1942).

During the course of this proceeding, Complainant has informed the Court of at least one change of address and telephone number. However, more recently, Complainant has failed to inform the Court of his current address and telephone number.

The regulations require that ``[s]uch proceedings shall be conducted expeditiously and the parties shall make every effort at each stage of a proceeding to avoid delay.'' 28 C.F.R. § 68.1.

As stated above, numerous bilingual attempts were made by this office to assist pro se Complainant in his effort to understand the procedural requirements necessary to allege a violation of section 1324b. Regrettably, however, and consistent with the too-frequently encountered situation of unrepresented parties in IRCA proceedings, the Complainant has filed nothing in this case which merits its being kept open for further investigation Thus, in view of the fact that this Complaint has been pending since October 16, 1989, and Complainant has not advised the Court of his current address or telephone number and has not responded to the Respondent's motion for summary decision, I am dismissing this case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Accordingly, the Complaint in this case is hereby dismissed without prejudice. Complainant should be advised that he may, upon a

showing of good cause, re-file a complaint if he can allege a reasonable basis in law and fact to support his claim.

SO ORDERED: This 27th day of August, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative law Judge