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

SELLARO, Complainant, v. ELEKTRA RECORDS, Respondent.	))))))))	 8 U.S.C. §1324b Proceeding Case No. 92B00151

FINAL DECISION AND ORDER DISMISSING COMPLAINT
(March 9, 1993)

Appearances:

Vincent J. Sellaro,
Pro Se Complainant

David M. Mintzes, Esq.
For the Respondent

Before: E. MILTON FROSBURG
Administrative Law Judge

TABLE OF CONTENTS

I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. These antidis-crimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the United States, but who are discriminatorily treated in relation to either being hired, fired or recruitment or referring for a fee, because they are foreign citizens or of foreign descent. 8 U.S.C. 1324b. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) should it find reasonable cause to believe that such discrimination occurred. If, however, the OSC does not file such a charge within 120 days of receipt of the claim, the protected individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through Office of the Chief Administrative Hearing Officer OCAHO. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2).

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's busi-ness in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three, but fewer than fifteen employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three employees.

II. *Procedural History*

In my Orders issued on October 1, 1992, I detailed the procedural history of this case up to that time. As that information is relevant to this decision, I will repeat it here:

> Complainant, Mr. Vincent Sellaro a pro se litigant, filed an undated charge of discrimination in violation of 8 U.S.C. 1324b of the Immigration and Naturalization Act, against Respondent, Elektra Records, with the Office of Special Counsel for Immigration-Related Unfair Employment Practice (OSC). The basis of the charge was national origin discrimination.
>
> In a letter dated May 14, 1992, OSC notified Complainant that, based upon its investigation, it had found insufficient evidence of discrimination and would not be filing a complaint in this case. OSC informed Complainant that he could file a complaint on his own behalf with the Office of the Chief Administrative Hearing Officer, which he did on July 20, 1992. The Complaint, dated July 15, 1992, alleged national origin discrimination only.
>
> A Notice of Hearing on Complaint Regarding Unlawful Immigration-Related Employment Practices, dated July 21, 1992, was served on the parties notifying them of my assignment to the case, Respondent's right to file a timely Answer and the possibility of the issuance of a default judgment should one not be filed. Proper service of the Complaint upon Respondent is evidenced by a copy of a postal service return receipt for certified mail, signed and dated by Respondent, in the case file. I issued a Notice of Acknowledgment on July 29, 1992 which again cautioned Respondent to file a timely Answer.
>
> On August 11, 1992, Complainant contacted our Falls Church, VA office and indicated that Respondent had a "contract" out on him and that it involved cutting off his hand. Complainant contacted this Court on August 14, 1992 and informed my attorney-advisor that he had been attacked and had had his hand broken. Complainant was advised to contact the police with this information. Complainant then insisted that he wished to continue with his case and asked for procedural information. He was advised of his procedural rights and his burden in establishing a prima facie case.
>
> On August 25, 1992, Complainant contacted this Court to inquire as to whether Respondent had filed a timely Answer. As Respondent had not, Complainant was advised of his right to file a Motion for Default, its requirements and the procedural aspects of that filing. On August 26, 1992, prior to the filing of a Motion for Default, Respondent filed an Answer, affirmative defenses and a Motion To Dismiss. I accepted the filing of Respondent's Answer.
>
> Complainant telephonically contacted my attorney-advisor on August 28, 1992 to inquire about the status of the case. During the conversation, jurisdiction of this Court was explained to Complainant, i.e., that this Court has jurisdiction in cases of national origin discrimination where the employer, recruiter or referrer for a fee, employs more than three (3) but fewer than fifteen (15) individuals, and in cases of citizenship discrimination where there is no restriction on the number of employees. At that time, Complainant inquired into the procedure to amend his Complaint to include an allegation of citizenship status discrimination. The procedure, requirements and discretionary nature of this motion were explained to Complainant in detail by my attorney-advisor.

On September 8, 1992, Complainant filed several typed documents. These documents did not include captions, titles, signatures or dates and were accompanied by an undated, signed, Certificate of Service (COS) marked "SAMPLE" which had been previously provided to Complainant. The COS did not name the documents it accompanied or provide the name or address of the opposing party which would show that the documents had been served. After reviewing these documents, I inferred that they were intended to be a Motion to Amend Complaint, a Response to Respondent's Motion to Dismiss and a Motion for Default.

On September 14, 1992, Complainant filed several torn, untitled, uncaptioned, undated, and unsigned letters accompanied by a signed, dated copy of the Court-provided sample Certificate of Service. Again, there was no indication of the type of documents it accompanied. After a review of these papers, I inferred that these were Complainant's Reply to Respondent's Answer, Complainant's Motion to Submit Evidence, A Request Against Dismissal, a Partial Statement of Facts of the Case, a copy of a certified mail receipt which Complainant alleged corresponded to the mailing of the Complaint to OSC, and a copy of the alleged last page of the Complaint which contains a July 15, 1992 date and Complainant's signature.

On October 1, 1992, Complainant's Motion To Amend Complaint, Motion For Default and Motion To Submit Evidence were denied because they were not accompanied by certificates of service, and/or were moot or premature and/or were not supported by relevant argument. In that Order, as I did not grant Respondent's Motion To Dismiss, but did agree with its argument that Complainant was unclear as to what the alleged discriminatory act was or when it occurred, I directed Complainant to file a statement with a clear description of the events which were alleged to amount to national origin discrimination, a clear statement describing where each alleged discriminatory act occurred and the exact date of each alleged discriminatory act. In addition, I notified OSC of the Complainant's allegations of retaliation.

Apparently in response to my October 1, 1992, Order, on October 19, 1992, Complainant filed a document entitled "A Recordation Of Notice D escribeing(sic) My Musical Property To Secure My Protection And P o ssibillitys(sic) of any Unlawfull(sic) Unauthorized Musical Recordings (to Secure And To Protect Myself)". In that document, Complainant stated that he is the "owner original a o(sic) auther(sic) sole proprietor performing artist".

Accompanying this document was another document entitled "Complainants(sic) responce (sic) to responda nce(sic) motion to dismiss". In this document, Complainant stated, in relevant part:

"Quality contril I was w orking(sic) for them on the otherhand(sic).Ia m(sic) wa y(sic) more talented (emphasis added)

> I wouldnt(sic) had to listen to much of w hat(sic) they had to say unless they made sense Iam (sic) not gonna (sic) denie(sic) it was a recording contract....(emphasis added)
>
> I think you shouldnt(sic) dismiss the case because the News papers will be interested in the cassett a round election time....On the cassett he said he used his opinion If my name didnt(sic) have Italian 2nd name he would of (sic) rushed it threw(sic) the evaluation process (emphasis added).

Although Complainant had apparently attempted to comply with my Order, he still had not clearly set out facts which amounted to national origin employment discrimination. Arguably, Complainant had made what appeared to be an attempt to allege that he was not hired because he had an Italian surname. I noted that Complainant did not file, at that time, a Motion To Amend the Complaint to include a citizenship discrimination claim.

In the interest of justice and judicial economy, on November 30, 1992, I issued an Order Regarding Notification of Complainant's Availability For Prehearing. In that Order, I tentatively scheduled an in-person prehearing for December 14, 1992, in order to clear up the issues that I apparently could not clear up by way of written Order, i.e.,

1. whether Complainant had been, or was trying to become, an employee of Respondent's or whether Complainant was to remain an independent contractor;

2. whether Respondent employed more than fifteen (15) employees at the time of the alleged discriminatory act(s);

3. Complainant's clear statement of the Respondent's alleged discriminatory act(s) which Complainant believed constituted national origin and/or citizenship discrimination; and,

4. Complainant's statement as to his theory of the case, i.e., why he should recover under 8 U.S.C. 1324b.

As Complainant notified this Court on December 7, 1992 that he could not appear at this prehearing, it was canceled. On December 10, 1992, Complainant filed a request to reschedule the hearing. On December 11, 1992, Complainant notified my attorney-advisor that he would be filing, both, a statement alleging that he had applied for employment at Respondent's business and a copy of his employment application. He stated that he would include a statement setting out Respondent's acts which he alleged to be citizenship discrimination.

On December 17, 1992, Complainant filed several documents which he stated were:

1. "a request to resolve this matter";

2. "1st and 2nd packages sent to elektra";

3. "what was said dureing(sic) the negotiatid(sic) and an undescriminat(sic) ory opinion, Victor, giraldos(sic) riveras(sic) review of unlawfully runned(sic) companys(sic) are supervised by the mob called pirateers The reasons (sic) I Know(sic) Victor descriminated becaus(sic) of my citezenship (sic) status";

4. "an undiscriminatory sta tement(sic) of un heavy(sic) medal(sic) record label Giraldos(sic) review";

5. "methods of previous operations and Giraldos (sic) review this guy graphicly(sic) describes the word musician in his own image provideing(sic) chaos with loock(sic) a likes(sic)";

6. "Page Legislative Review GVT PUB Compitition US Policy";

7. "Illeagal(sic) performance appraisell(sic)";

8. "Post office reciepts(sic) sent to elektra(sic) & Warner in the first two stages of the negotiation";

9. "Tel(sic) bills reguarding(sic) employment negotiations";

10. "Illeagal(sic) performance appraisell(sic) based on opnion(sic) (and civil Fed Digest statas(sic) affilliated(sic) Inventors ass(sic) Foundation;"

11. "Tade(sic) secret status revealed threw(sic) Job enrollment prooved(sic) harm and ample time to cover up the charges(sic) gainst(sic). Victor Chirell Undescrimina-tory(sic) statement";

12. "Timely complaint evidance(sic) Po(sic) Reciepts(sic)"

13. "1 previous complants(sic) of unfairness"

14. "Collabative(sic) analysis"

No employment application or statement specifying that Complainant was seeking employment as an employee, and not as an independent contractor, were filed.

In these documents, the relevant information that Complainant supplied is quoted here, with emphasis added:

I applied for a musical e(sic) recording contract wiyh(sic) elektra records Victor Chirell

Ima(sic) I mailed him a ca ssett(sic) reguarding(sic) full functioning med(sic) of my product

He said it wasent(sic) good enough....I callem back in october....I request the basic rate of pay 250 000$(sic) a(sic) album I7(sic) albums half up front and the other half when the 2nd half or remaining albums are deliverd(sic)

he (Victor Chirell) agreed franticly(sic) in exctasy(sic) Ill(sic) tell you why his investments coverd(sic) the first day either way

I callem(sic) back in Feb he changes his mind what he said i(sic) dont(sic) now(sic) of any recording contract then he state s(sic) if his opinoin(sic) allowd(sic) hed(sic) sighn(sic) me I catch him in a Lie (his voice at this point sound clutterd(sic) so I cant(sic) put the same words I ll(sic) put it this way I told him it was unfair he though was funny fondeling(sic) his voice and his nationa lity(sic) well my my(sic) well I ascked(sic) what his nationality was he changes the subject that dont(sic) got nothing to do with it(me ascking(sic) the question has alot(sic) to do with it

I am sure this was sckeme(sic) of descrimination(sic) and unauthorized music recording me being the Victim of extreme prejiduce(sic) and descrimination(sic)

You asck(sic) for evidence Illp(sic) provide it this persons(sic) rummerd(sic) to be in the rock music mafia by Giraldo Rivera the most smallest forms of music in the world

In these documents, Complainant allegedly provided what he viewed as the "reasons he knew" that he had been discriminated against based on his citizenship status. For ease of understanding, I have paraphrased Complainant's words as follows:

1. Giraldo Rivera stated that there is a recording company being run by "gangsters". These "gangsters", acting under Respondent's orders, kept Complainant under surveillance;

2. Complainant's music was stolen by Respondent and given to other recording artists to play;

3. Respondent prolonged its negotiations with Complainant in an effort to extract information that only Complainant, as the owner of his music, would know;

4. Respondent hired the Mafia "to secure his (Respondent's) unlawfull employment practices and to publish unauthorized musical recordings";

5. Respondent did not run Complainant's product through any performace appraisal or other evaluative tests to determine its investment potential;

6. Respondent led Complainant to believe that if he delivered evidence that his music was a good investment, he would be "hired";

7. Respondent violated Federal Civil Practice "guidelines", comparable worth, and Complainant's 14th amendment civil right; and,

8. Respondent hired a less qualified individual in place of Complainant.

Complainant has provided this Court with a cassette which he alleges contains Complainant's musical product and a recording of an alleged telephone conversation between Complainant and Respondent. As Complainant has not submitted any documentation or release which would indicate that the alleged telephone conversation was recorded with Respondent's consent, the Court has not listened to it. 47 U.S.C. 605; 18 U.S.C. 2510, 2511; Katz v. U.S., 389 U.S. 347, 361(1967); U.S. v. Pratt, 913 F.2d 982, 986 (1st Cir. 1990).

III. *Discussion*

Based on the documents filed by Complainant since the previously canceled prehearing conference of December 14, 1992, I find that there is no longer a need for a prehearing in this case. Therefore, I deny Complainant's request to reschedule the prehearing.

A. National Origin Discrimination Claim

My jurisdiction to hear Complainant's national origin discrimination claim under 8 U.S.C. 1324b has been set by Congress and is limited to cases where the Respondent employs more than three (3) and fewer than fifteen (15) employees. 8 U.S.C. 1324b(a)(2),(b)(2). Thus, if the number of Respondent's employees does not fall within this narrow span, I must dismiss a claim of national origin discrimination. This threshold jurisdictional requirement has previously been explained to Complainant.

In this case, although Complainant indicated in his charge that he could not estimate the number of Respondent's employees and Respon-dent has not specifically brought this issue to the Court's attention, I may not proceed with this case until I make a determination on this issue. In proceeding, I have examined previous agency case law which indicates, as do the Rules of Practice and Procedure, that that it is within this Court's power to take judicial notice of adjudicative facts. 28 C.F.R. 68.1, 68.28; Fed. Rule Evid. 201; U.S. v. Nu Look Cleaners, 1 OCAHO 202 (7/20/90); U.S. v. O'Brien Oil Co., 1 OCAHO 166 (5/2/90); U.S. v. Marcel Watch Co., 1 OCAHO 143 (3/22/90), amended at 1 OCAHO 169 (5/10/90).

Therefore, based on the particular circumstances of this case, I have determined that it is in the interests of judicial economy and justice that I take judicial notice of the fact that Respondent is a music recording company known for its recordings of rock and roll and hard rock music and that it is a subsidiary of Warner Brothers with more

than fifteen (15) employees. I specifically note that my taking judicial notice of this fact does not prejudice Complainant as he telephonically stated to my attorney-advisor that Respondent did indeed employ more than fifteen (15) employees. Based on my finding, I am bound by law to dismiss Complainant's claim of national origin discrimination.

B. Citizenship Discrimination Claim

I am acutely aware that the Complainant in this case is pro se and unfamiliar with this Court, its legal precedents and procedures. Understandably, I have taken Complainant's telephonic and written allegations that Respondent has retaliated against him for filing his Complaint by "taking out a contract" on him and by having his hand broken very seriously. Due to the serious nature of these allegations and the totality of the circumstances, I have exercised my discretion several times and have allowed Complainant extra time so that he could present his claim properly. My goal was to allow Complainant to be heard in the proper forum, should he have a valid claim. However, even with this latitude, Complainant has not been able to set forth a claim of national origin discrimination which can be heard.

Now in prior cases, a dismissal of a national origin claim for lack of jurisdiction has not always meant that the Complainant is "out of court". In those cases, I followed the precedent set in Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/1991) and allowed a pro se Complainant the "widest ambit of administrative review" and have considered whether a case of citizenship discrimination exists. See e.g. Jasso v. Danbury Hilton, OCAHO Case No. 92B00036 (5/20/92). Therefore, despite the fact that I am at a loss to explain why Complainant did not refile his motion to amend his Complaint to include a claim of citizenship discrimination as directed in my Order of October 1, 1992, or why he did not do so after he told my attorney-advisor on December 11, 1992 that he would, I have determined that it would be unjust if I did not follow my prior line of reasoning and consider this pro se's Complaint as alleging a claim of citizenship discrimination under 8 U.S.C. 1324b.

In a claim of citizenship discrimination under 8 U.S.C. 1324b, a threshold requirement is that the Respondent employ more than three (3) employees. I so find.

Of at least equal importance is the requirement that Complainant be a "protected individual", as defined by 8 U.S.C. 1324b(a)(3). In this case, I find that Complainant satisfies this threshold requirement as it is undisputed that he is a citizen of the United States. 8 U.S.C. 1324b(a)(3)(A).

Another fundamental requirement that must be satisfied before a claim of citizenship discrimination may go forward is that Complainant must state a claim upon which relief can be granted. Should I find that one has not been made, I may dismiss the Complaint. 28 C.F.R. 68.28.

In other words, Complainant must set before the court a set of facts which allege that he was discriminated against with respect to his hiring on the basis of his citizenship status. In this case, Complainant has not raised facts that show that he was not hired because he was a U.S. citizen. In fact, despite numerous filings and allegations against Respondent, Complainant's factual allegations, quoted below, have related solely to the fact that he had an Italian last name.

1. "Descrimination(sic) of 2nd name national origin" Charge Form at p.3.

2. "On the cassett(sic), he said he used his opinion if my name didnt'(sic) have Italian 2nd name he would of rushed it threw(sic) the evaluation procecedure. Complainant's Response To Respondent's Motion To Dismiss at p. 1.

As I noted in my prior Order, Complainant's Complaint specifically omits a claim of citizenship discrimination. Complainant's reference in the record to a claim of citizenship discrimination is stated as follows:

Citezenship(sic) status a nd(sic) national origien are part of the same discrimination

Complainant's Response to Respondent's Motion To Dismiss filed October 19, 1992.

Complainant must also show that he was seeking employment as an employee. An examination of the record reveals that Complainant apparently was interested in being awarded a recording contract by Respondent, but Respondent was not interested in Complainant's product.

In resolving this issue this issue of employee status, I have reviewed the test used to determine whether an individual is an independent contractor. The relevant factors for this case are whether Complainant retained the supervisory control over himself or his work product, whether Complainant was to be considered in business for himself, whether there was evidence of monetary investment by Complainant, and whether Complainant was to be paid by piecework. U.S. V. Robles, 2 OCAHO 309 (3/29/91); see also U.S. v. ABC Waterproofing, 2 OCAHO 358 (8/26/91).

As applied to this case, Complainant stated in very strong terms that he was the sole owner of his work product and that he would not need to take or listen to Respondent's advice regarding his work product if he did not want to. Complainant's Response to Respondent's Motion To Dismiss. He stated further that he had spent his own money in producing and refining his work product and was interested in a recording contract for which he would be paid $250,000 for seven (7) recordings, with half upfront. Request To Resolve Matter and Statement of Discriminatory Acts. From these statements, I find that Complainant intended to be an independent contractor, should Respondent be interested in his work product, and not an employee. This finding alone requires a dismissal of this case.

However, in an abundance of caution, I examined the record further to determine whether Complainant has set forth a prima facie case of citizenship discrimination. The Supreme Court established the requirements for a prima facie case to be used in discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The claimant must first show that: (i) he belongs to a minority or suspect class; (ii) he applied and was qualified for employment by the em-ployer; (iii) he was rejected for employment despite his qualifications; and (iv) after being rejected, the position remained open and the employer continued to seek applications from similarly qualified applicants. If a claimant does not establish this prima facie case, the case cannot continue.

In the instant case, I find that Complainant has not fulfilled his burden; he did not show that Respondent had a position open for which he was applying or that he was applying for employment as an employee; he did not show that he was qualified for a position that was open; and, he did not show that the position remained open and that Respondent continued to seek similarly qualified applicants. I did note that in his last set of filed documents of December 17, 1992, Complainant stated that Respondent hired a person of similar citizenship status after Complainant filed his charges, apparently for the "position" that Complainant desired. Complainant's Table of Contents To Filed Documents at page 1. However, not only was there was no credible evidence supporting this bold allegation, but I find that the allegation that a person of similar citizenship status was "hired" would not help support Complainant's discrimination claim.

Therefore, based on the fact that Complainant has not alleged any facts which would amount to a citizenship discrimination claim, that he has not shown that he intended to obtain employment with Respondent as an employee, that I find that Complainant intended to

remain an independent contractor should Respondent wish to avail itself of his services, and that he has not set forth a prima facie case of citizenship discrimination, I find that Complainant has not stated a claim upon which relief can be granted. Therefore, I am dismissing this case.

I feel it is important at this point to make some comment on the credibility of the serious allegations made against Respondent by Com-plainant, specifically, the allegation that Respondent had its agents physically attack the Complainant and break his hand. I have considered the record as a whole, but have found the following to be most compelling in making a determination on the credibility of the allegation:

1. Complainant stated to my attorney-advisor that he had not filed a police report with regard to the alleged "attack" that resulted in his alleged broken hand, despite being advised to do so;

2. Complainant did not file a complaint with this agency regarding the alleged retaliation, although he stated to my attorney-advisor that OSC had advised him that he could do so; and,

3. Complainant did not supply any facts other than his bold allegation that he had been attacked; i.e., he did not provide a date, time, or place the alleged attack occurred; he did not provide the name or address of the hospital where he was allegedly treated; he did not file any doctor's report documenting his injury; and,

4. Complainant did not file a copy of his alleged employment application associated with the position he stated he was trying to be hired for despite advising my attorney advisor on December 11, 1992 that he would file it immediately.

After considering the above facts, and the total absence of proof of the attack, it is my opinion that the credibility of Complainant's allegations is suspect.

This Decision and Order is the final decision and order of the Attor-ney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 9th day of March, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge