

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

CRECENCIO CABRERA MENDEZ,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) CASE NO. 91200049
JIM DANIELS,)
Respondent,)
_____)

ORDER DIRECTING COMPLAINANT TO FILE APPROPRIATE
STATEMENTS AND/OR AFFIDAVITS, DOCUMENTS

As will be detailed herein, the record in this case has not been sufficiently developed for the court to determine whether or not an evidentiary hearing is needed.

The procedural history in this case shows that on September 26, 1990, Crecencio Cabrera Mendez, Complainant herein, acting pro se, filed a charge of national origin discrimination against Jim Daniels with the Office of Special Counsel (OSC). In his Complaint, Mr. Mendez alleged that he was an alien authorized to work in the United States who had applied for naturalization. He further alleged that the discrimination was as follows:

Jim always told me that he was gonna pay me and he never did. He said as soon as he sold some land he was gonna pay me and he never did. He owes \$27,250.00 (sic). All that time I was there he only gave me \$5,200.00 just enough to by (sic) my grocery (sic)."¹

Although the OSC declined to prosecute this case, the record is not clear as to when and for what reason(s), OSC declined prosecution.

¹ Although this allegation appears to be a dispute over wages or for breach of contract, Complainant may be trying to show evidence of Respondent's anti-Mexican attitude.

On April 1, 1991, Complainant, again acting pro se, filed a Complaint with the Chief Administrative Hearing Officer (OCAHO) against Jim Daniels, the Respondent, alleging discrimination based upon national origin status in violation of Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. Section 1324b.

More specifically, the Complaint alleges that Complainant, a U.S. citizen, was hired by Respondent on or about December 26, 1983, to take care of horses for Jim Daniels in Brenham, Texas.² It is further alleged in the Complaint that Complainant was qualified for this position, but on or about June 12, 1988, was "knowingly and intentionally" fired from this job because of his Mexican national origin. The factual details supporting the allegation of discrimination were not set out in the Complaint.

I was assigned to hear the case on April 5, 1991.

On June 14, 1991, I issued a "Show Cause Order" and ordered Respondent to file, on or before July 1, 1991, an explanation as to why he had not filed a timely answer.

On June 31, 1991, Respondent filed his response to my order. Instead of detailing his reasons for filing a late Answer, Respondent filed a detailed Answer. In light of the fact that Respondent is also acting pro se and is apparently in poor health and having significant financial problems, I find reasonable and just cause for his filing a late Answer and I will construe his letter/Answer as in compliance with 28 C.F.R. § 68.8. Moreover, I specifically deny granting a default judgment against Respondent.

Under ordinary circumstances, I would direct both parties to begin the discovery process to determine whether or not there are any material facts in dispute and a summary decision is appropriate. Because both parties are not represented by counsel, I shall identify the legal issues and initially direct the Complainant to submit to me the appropriate pleadings, affidavits, or other documents necessary for me to determine whether or not there needs to be an evidentiary hearing in this case.

Jurisdiction of OCAHO over claims of national origin discrimination in violation of 8 USC § 1324b(a)(2)(B) is necessarily limited to claims against employers employing between four (4) and fourteen (14) employees. The record is not clear how many employees were employed by Respondent on the date Complainant was terminated.

² Actually, it appears from a "Declaration of Intending Citizen" form in the file that Complainant is an alien lawfully admitted for permanent residence.

The law requires Complainant to file a charge with Special Counsel within 180 days after the unfair immigration-related employment practice. See 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b). A charge filed after that time will be dismissed with prejudice by the Special Counsel. See 28 C.F.R. § 44.301 (d)(1). I assume that is what has happened in this case because Complainant was terminated from his employment on June 12, 1988, but did not file his complaint with the OSC until September 26, 1990, more than 180 days after the alleged occurrence of the unfair immigration-related employment practice.

However, I agree with the ALJ decision in Lundy v. OOCL (USA), Inc., 1 OCAHO 215 (1990), that time limits on agency filings under IRCA's antidiscrimination provisions are subject to waiver, estoppel and equitable tolling. I, therefore, will have to obtain additional facts from Complainant as to why he took so long to file his complaint with the Office of Special Counsel, before I can make a finding on whether or not equitable tolling applies to this case.

The law requires that the Special Counsel's Office investigate each charge within 120 days of filing. See 8 USC § 1324(c) (2) and 8 USC § 1324b(d)(1); 28 C.F.R. § 44.33(a). It is also important for Complainant to note that although there is no statutory time period in which a party must exercise the right to file a private complaint, the regulation requires that such a complaint be filed within 90 days of the end of the 120-day investigative period. In this case, Complainant had until April 24, 1991, to file his complaint with OCAHO. Since Complainant filed his complaint with OCAHO on April 1, 1991, he has complied with the 90 day rule.

In order to determine whether or not I need to hold an evidentiary hearing, assuming, arguendo, that Complainant has either filed a timely charge with OSC or equitable tolling applies, the first finding I will have to make is whether or not Complainant can prove a prima facie case of discrimination under IRCA. Since this is a termination case, Complainant must show this court that: (1) he was a member of the group of individuals protected by IRCA; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements of his work; (4) that he was discharged; and (5) that, after his discharge, he was replaced by an employee whose national origin was not Mexican.

ACCORDINGLY, the Complainant is hereby ORDERED to file with this court³, on or before Monday, September 30, 1991, his affidavit or written statement and/or those of others to show (1) why he did not file a complaint with the Office of Special Counsel within 180 days after he was terminated from employment; (2) whether or not he was represented by counsel at anytime in connection with these proceedings; (3) state what was his specific "protected" legal status in this country on the date he was terminated from employment by the Respondent and submit copies of any INS documents in support of that status⁴; (4) state what his prior working experience had been prior to his employment with Respondent; (5) state what his specific job duties had been on the date of his termination, what specific reasons were given to him by the Respondent for his termination, and whether or not he was replaced by someone else and, if so, by whom; (6) state specifically what evidence or what proof he has that the reason he was terminated was because he was a Mexican or Hispanic (detail any statements made by Respondent or acts of Respondent that support your conclusion that you were discriminated against); (7) state when and where you were born and when and how you entered the United States; (8) submit any written agreements between you and Respondent that prove any of your allegations; (9) state how many persons, including yourself, were employed by Respondent on the date you were terminated from employment; and (10) submit the affidavits or statements of any other persons who will support your allegations.

It is further ORDERED that Respondent shall send a copy of his response to this Order, to Respondent on or before September 30, 1991.
SO ORDERED this 19th day of September, 1991, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

³ It appears from the file in this case that Complainant may not be able to read or write in English but is being assisted by someone fluent in the English language. Complainant is reminded that the regulations require that all pleadings filed with the court must be in English or, if in a foreign language, accompanied by a certified translation. See 28 CFR § 68.6(d).

⁴ Protected individuals include citizens and nationals of the United States; lawful permanent residents; certain temporary residents; refugees and asylees.