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

March 20, 2003

JUAN MANUEL ALAMPRESE,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00007
	)	
MNSH, INC. d/b/a DEL TACO, #171	)	
Respondent.	)	
___________________________________	)	

FINAL DECISION AND ORDER

Appearances: Daniel T. Keenan, Esquire
for complainant

Herbert A. Moss, Esquire
for respondent

Before: Honorable Ellen K. Thomas

I. PROCEDURAL HISTORY

Juan Manuel Alamprese, a naturalized citizen of the United States originally from Argentina, filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) alleging that Del Taco had refused to hire him for any job because of his United States citizenship. OSC investigated his charge, and subsequently informed him that it did not intend to file a complaint in his behalf with the Office of the Chief Administrative Hearing Officer, and that he was entitled to file his own private action within 90 days of his receipt of that notification. Alamprese thereafter filed a timely complaint in one count in which he alleged that he was intentionally not hired by Del Taco because of his United States citizenship. Del Taco filed an answer denying the allegations, and after a period devoted to discovery and preliminary matters, the parties convened for a hearing in Santa Ana, California, at 9:00 a.m. on December 17, 2002. At that time, the unopposed motion of Del

Taco to amend the pleadings to reflect its legal name of MNSH, Inc., dba Del Taco #171 was granted. Witnesses were sworn, evidence was heard, complainant's Exhibits 1-10 were offered into evidence, the record was closed, and a transcript was prepared consisting of 129 pages, exclusive of the exhibits. The parties were notified that the transcript was available, and given a period of time in which to file motions for correction of the transcript pursuant to 28 C.F.R. § 68.48(b),[1] if necessary. No such motions were made.

Each of the parties filed a posthearing brief. Alamprese also submitted a posthearing Motion for Admission of Exhibits 4 and 9 into Evidence, which had been denied admission at the hearing, together with a Declaration by his counsel in support of the motion. Alamprese's counsel also sent a letter dated January 3, 2003, in which he stated that he was obtaining certain documents from INS which he would forward when he received them, and would seek their admission as well. Del Taco's counsel responded by letter objecting to the admission of any additional evidentiary materials. The subject materials have not been received to date.

II. LEGAL CONTEXT IN WHICH THIS CASE ARISES

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986), amended the Immigration and Nationalities Act (INA), to establish for the first time in our history a national system designed to control the employment of unauthorized aliens by requiring employers to verify the eligibility of each new employee by examining documents to establish the person's identity and employment eligibility. The implementing regulations call for employers to complete INS Form I-9 to reflect the fact that they have complied with these requirements. 8 U.S.C. § 1324a, 8 C.F.R. § 274a.2(b)(1)(ii)(A) and (B). The statute authorizes the imposition of civil money penalties against an employer both for failure to comply with the requirements of the employment eligibility verification system, and for the knowing hire of workers not authorized for employment in the United States. 8 U.S.C. § 1324a(e)(4)(A).

Until March 1, 2003, the agency to which enforcement of the so-called "employer sanctions" provisions was committed was the Immigration and Naturalization Service (INS or the Service).[2] The

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[1] Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2002).

[2] The Homeland Security Act of 2002 (Pub. L. No. 107-296), November 25, 2002, 116 Stat. 2135, codified at 6 U.S.C. § 271, as amended (HSA), transferred the Service's functions to a new Department of Homeland Security (DHS) as of March 1, 2003. Pursuant to the authority granted in 6 U.S.C. § 542, a Presidential revision of the reorganization plan was announced on January 30,

(continued...)

procedures for complaints and investigations pursuant to 8 U.S.C. § 1324a(e)(1) are set out at 8 C.F.R. § 274a.9. The Service was authorized to conduct investigations and, upon finding a violation, to issue the offending employer a Notice of Intent to Fine (NIF). 8 C.F.R. § 274a.9(b) and (d). An employer so noticed may request a hearing before an Administrative Law Judge. 8 C.F.R. § 274a.9(e).

No private cause of action or third party enforcement mechanism was included either in the employer sanctions provision or in its implementing regulations, other than the right of an individual to submit a complaint to the Service for investigation. 8 C.F.R. § 274a.9(a). A private individual thus does not have standing to file a complaint with the Office of the Chief Administrative Hearing Officer seeking remedies for alleged violations of § 1324a. The question of third party standing under § 1324a has been addressed by the Ninth Circuit only in an unpublished opinion. *Effgen v. United States*, 31 Fed. Appx. 437, 2002 WL 460844 (9th Cir. 2002), attached as Appendix A. *Effgen* agreed that no express or implied private right of action is available to individuals under § 1324a.[3]

In order to ensure that the employment eligibility verification system did not itself have the unintended consequence of causing employers to avoid verification problems by not considering applicants who looked or sounded "foreign," Congress also enacted a complementary provision prohibiting discrimination with respect to the hiring, recruitment, or firing of protected individuals on the basis of their citizenship status or national origin. 8 U.S.C. § 1324b(a)(1). The agency to which investigations and enforcement under the nondiscrimination provisions is committed is the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). 8 U.S.C. § 1324b(d). Unlike § 1324a, § 1324b explicitly authorizes private actions respecting unfair immigration-related employment practices. § 1324b(d)(2). If, after receiving a charge and completing its investigation, OSC decides not to file a complaint, it notifies the party who filed the charge of his or her right to file a discrimination complaint before an administrative law judge.

Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2001), *Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251

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[2](...continued)
2003. With the exception of two minor amendments not pertinent here, the INA itself was not altered, so that references to the INS remain in place as of this date.

[3] In *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), the court held, however, that at least at the pleading stage, a suit based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968, should not be dismissed where the class of legally authorized workers contended that growers conspired to depress wages by employing undocumented alien agricultural workers.

(1990),[4] case law developed under that statute has long been held to be persuasive in interpreting § 1324b. *See, e.g., Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO no. 624, 308, 322 (1994), *aff'd*, 53 F.3d 328 (4th Cir. 1995) (Table). Thus the familiar burden shifting analysis in an OCAHO case usually follows that initially established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequently elaborated by its progeny. Once a case has been fully tried on the merits however, there is no need to focus on the elements of the *McDonnell Douglas* prima facie case, and the inquiry can proceed to the ultimate factual issue of whether the employer intentionally discriminated against the complainant. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983). The burden of proof on that ultimate question remains at all times on the complaining party. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

III. THE EVIDENCE PRESENTED

A. The Exhibits

Alamprese offered ten exhibits at the hearing, including: 1) Del Taco's Response to Alamprese's First Request for Production of Documents, consisting of four pages and 55 pages of attachments, which include a blank I-9 form with instructions, a blank employment application, a health insurance brochure, a sexual harassment policy statement, Del Taco's Hourly Crew Member New Hire package (a work opportunity tax credit notice, brochure, certification request and verification request form, and a sexual harassment notice in English and Spanish), and 17 I-9 forms with related materials; 2) Alamprese's First Request for Production of Documents, consisting of three pages; 3) a letter on plain paper with no letterhead or return address, dated February 7, 2001 and addressed to Del Taco, with an illegible signature; 4) six pages: the first two being a certification by the Office of the Regional Commissioner for the Social Security Administration with an attached list, the next two being a letter dated June 29, 2002, from Alamprese's counsel to the Social Security Administration with an attached list, and the last two being a fax transmission from the Social Security Administration dated August 1, 2002;
5) Employer and Third-Party Submitter Instructions for the Social Security Administration Employee Verification Service, consisting of 13 pages; 6) Answers to Alamprese's First Set of Special Interrogatories, consisting of six pages; 7) Alamprese's First Set of Special Interrogatories, consisting

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[4] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

of three pages; 8) reports on the attempted service of 17 subpoenas, with related documents, consisting in all of 130 pages; 9) the Declaration of Rosa Castelan dated December 16, 2002, consisting of two pages; and 10) the Deposition of Juan Alamprese dated March 27, 2002, consisting of 36 pages. Exhibits 3, 4, 8, and 9 were not admitted into evidence.[5]

B. The Testimony

1. Complainant's Testimony

Juan Manuel Alamprese testified that he was born in Argentina, and that he came to the United States in 1968 at the age of 17. He was naturalized as a United States citizen in 1986. Alamprese said that in the early part of 2001, he was working as a caseworker/legal assistant at Binder and Binder, a law firm, assisting the firm with social security disability claims work. He started there in June, 2000. The job involved dealing with clients on the telephone as well as paperwork and computer work. Alamprese said that because he was in need of extra money, he decided to apply for part-time work for evenings and weekends.

Del Taco #171 is located at the corner of South Bristol Avenue and Santa Ana in Costa Mesa, California, across the street from the John Wayne Airport Travelodge. Alamprese said that he was familiar with this particular store because his wife worked at the Travelodge and he had visited the store as a customer. Alamprese said that in February of 2001 he saw a sign in Del Taco's window saying "Now Hiring." He requested an application from the person at the counter, Jorge Valencia, which he filled out and returned to Valencia that same day, February 3, 2001, a Saturday. Alamprese said that he could understand the conversations going on among the employees there because he speaks Spanish, and after overhearing some of the conversations in the restaurant, he came to the conclusion that many of the employees there were unauthorized for employment, in the United States. He had a "gut feeling" about that. He said he was never called for employment, but other people were hired in and after March of 2001, subsequent to his application.

Alamprese said that about three weeks after he had applied at Del Taco, he found alternate part-time work as a telemarketer for Town & Country Credit, offering mortgage loans and refinancing over the telephone for $13.00 an hour. He said he thought Del Taco probably just paid the minimum wage,

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[5] The transcript reflects my statement that Exhibits 1, 2, 5, 7 and 10 were admitted. This appears to have been an oversight in the statement; my intention was, and the understanding appears to have been, that Exhibit 6 was accepted into evidence as well.

which he believes to have been $6.25 an hour at that time.[6] Alamprese testified that Town & Country is in the same building as Binder and Binder's office, but on a different floor. He said he only did that work for about 4 months however; then he quit because it was intolerable and he wanted something physical. Alamprese testified that he applied unsuccessfully for other part-time work after that, but on cross-examination he acknowledged that he had previously stated in his deposition that he did not apply for any other part-time jobs after he quit Town & Country. He said that he and his wife moved to Riverside in February of 2002 because the cost of living in Orange County was too high. He transferred to Binder and Binder's Riverside office.

2. Respondent's Testimony

Mike Kamali testified that he is the principal shareholder and officer of MNSH, a Del Taco franchisee, and that he bought the Bristol Avenue franchise in 1996. He said he is the only person authorized to hire new employees. The procedure was that if individuals came into the store to inquire about employment, they were given an application, and told they might be called back. Kamali said that Jorge Valencia was his assistant manager at the Bristol Avenue store until April, 2002, but that Valencia went back to Mexico because his father was dying. The procedure in 2001 was that if Valencia took an employment application, he would give it to Kamali the next day. Kamali said he never saw an application from Alamprese and was not looking for employees on February 3, 2001. He said he had no knowledge of Alamprese's citizenship status, and Del Taco's application form (Exh. 1) did not request this information, so he didn't think Valencia would know about Alamprese's citizenship either.

He also said that all the hiring for Del Taco was done by word of mouth, and that he would never put a Help Wanted or Now Hiring sign in the window because it tells customers that the store is short-handed. He said he has never been notified by the Social Security Administration, INS, OSC, or any other government agency of any problem with the social security numbers or status of his employees.

Kamali said there were 12 employees working at the store in February of 2001, half of whom were long-term employees who were already working there when he bought the franchise and just stayed on. It was a common practice for Del Taco employees to leave, go back to Mexico to see their families for a period of time, then return. If they were good employees, they got their jobs back. A new I-9 form would be completed when an employee was rehired. Kamali acknowledged on cross-examination that there were discrepancies between the I-9 Forms of his employees and some of the supporting documentation, but said he didn't think that necessarily meant the employees were unauthorized for employment.

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[6] The minimum wage has been $5.15 an hour since September 1, 1997. Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1) (1998), *amended by* the Minimum Wage Increase Act of 1996, Pub. L. No. 104-188, 110 Stat. 1928 (1996).

Kamali said he did hire new employees in and after March of 2001. He said he thought Christian Medina was the first hired,[7] probably for a lunch shift because that is most of their business. The first person they hired didn't last long, so he was replaced. Kamali said that he does not speak Spanish, so if he had to interview a Spanish-speaking applicant, he would need to get help from another employee who spoke both English and Spanish.

IV. ARGUMENTS OF THE PARTIES

Alamprese argues that the discrepancies between Del Taco's I-9 Forms (Exh. 1) and the supporting documents are sufficiently obvious to put a reasonable employer on notice that the majority of Del Taco's work force consists of aliens not authorized for employment in the United States. He contends that because the Supreme Court held in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275, 1281 (2002) that "employees must be deemed 'unavailable' for work . . . during any period when they were not lawfully entitled to be present and employed in the United States," Del Taco must be treated as having a vacancy for each position occupied by an unauthorized worker so that, as a matter of law, Del Taco had to be hiring on February 3, 2001. Alamprese says the company chose to employ illegal aliens and to pass over his application.

Del Taco argues that it was not hiring on February 3, 2001, that there is no record Alamprese ever applied, that Alamprese was never asked about his citizenship status, and that he admitted he had no idea why he wasn't hired. With respect to irregularities in the store's I-9 forms, Kamali said that those forms had been submitted to OSC, and he was never notified of any problem.

V. DISCUSSION AND ANALYSIS

Notably missing from the evidence presented in this case were any time sheets, work schedules, payroll records, or any other evidence which would establish what shift or hours any employee at Del Taco actually worked, whether hired before or after February 3, 2001. There was no evidence presented to show whether Del Taco's employees worked full-time or part-time, or whether any employee actually worked the particular schedule for which Alamprese said he was available. Similarly missing from the evidence, and fatal to Alamprese's allegation of intentional discrimination, was any suggestion that anyone at Del Taco knew or had reason to know what Alamprese's citizenship status was. Discrimination is an intentional act. An employer cannot, by definition, engage in intentional discrimination on the basis of a characteristic of which the employer is wholly unaware.

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[7] The earliest I-9 form after February 3, 2001 is dated March 1, 2001. Medina's is dated March 13, 2001. There are three more I-9 forms dated between March 17, 2001 and June 27, 2001.

Alamprese's native language is Spanish; he said he came to the United States from Argentina at the age of 17. His own testimony was that he spoke only Spanish, not English, while he was on the premises of Del Taco. Nothing on the application form refers to citizenship or national origin. Valencia did not ask Alamprese about his citizenship, Alamprese did not volunteer it, and there has been no suggestion that there is any way Del Taco could have known about it. Alamprese does not claim that they did; he acknowledged that Valencia would not have known. He cites no case law which supports the view that intentional discrimination can occur in the absence of a showing that the employer knew of an applicant's or employee's protected status. Indeed, he cannot cite such authority because there is none; the law is uniformly otherwise.

Alamprese appears to misunderstand the burden of proof in an employment discrimination case. The law in the Ninth Circuit has long held that the employer must know about the protected characteristic in order to discriminate on the basis of it. *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987), *cert. denied*, 490 U.S. 1105 (1989) ("An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race."). *Accord Martin v. Citibank, N.A.*, 762 F.2d 212, 217, 220 (2nd Cir. 1985). OCAHO jurisprudence is in accord. See *Wije v. Barton Springs/Edwards Aquifer Conservation Dist*., 5 OCAHO no. 785, 499, 523 (1995) (it is "patently self-evident" that complainant had to show that respondent knew of his citizenship status); *Suchta v. United States Postal Serv*., 2 OCAHO no. 327, 231, 242 (1991); *Martinez v. Lott Constructors, Inc*., 2 OCAHO no. 323, 178, 186-87 (1991).

Common sense dictates the result: an employer cannot be motivated by a factor which is unknown to him. Other circuits are in accord. Pointing to "the obvious logic of the argument," the Seventh Circuit held in *Hedburg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995), that an employer has to know about a fired employee's disability before any liability can be established under the Americans with Disabilities Act, 42 U.S.C. § 1201 et seq. (ADA). The Sixth Circuit reached a similar conclusion in *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181-82 (6th Cir. 1993), in a claim pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701 et sequitur.

While an applicant's race or sex will often be obvious to a prospective employer, the same cannot be said about less visible characteristics. Religious beliefs, for example, will not ordinarily be readily apparent to an employer, and for that reason courts have held that in order to establish a prima facie case of religious discrimination under the Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the employee must demonstrate that he told the employer of his religious beliefs. *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088-89 (7th Cir. 1991); *Redmond v. GAF Corp.*, 574 F.2d 897, 901-02 (7th Cir. 1978); *accord Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1305-07 (11th Cir. 2002) (finding no prima facie case where employer was unaware of applicant's religion.) A case of pregnancy discrimination cannot succeed either, where the employer does not know that the employee is pregnant. *Miller v. American Family Mut. Ins. Co.*, 203 F.3d

997, 1006 (7th Cir. 2000). *See also Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 443-44 (6th Cir. 2002) (imposing no Title VII liability where employer made decision to fire employee before learning of her pregnancy); *accord Geraci v. Moody-Tottrup Int'l., Inc.*, 82 F.3d 578, 581-82 (3d Cir. 1996).

An employer does not violate the National Labor Relations Act, 29 U.S.C. § 151 et seq., by discharging an employee whose protected conduct the employer doesn't know about, *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 418 (5th Cir. 1981), and for the same reason, an employer cannot retaliate against an employee for conduct or statements of which the employer has no knowledge. *Ambrose v. Township of Robinson*, 303 F.3d 488, 493-94 (3d Cir. 2002) (concluding that for protected conduct to be motivating factor in decision, decisionmakers must be aware of the protected conduct); *Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002) (stating that in order to retaliate for protected speech, employer must be aware of the speech, citing *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 750-51 (9th Cir. 2001)); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458-59 (7th Cir. 1994) (citing cases) (noting there is generally no causal link between protected activity and adverse employment action if employer remained unaware of protected activity). Similarly, an employee's termination the day before she began her scheduled leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq., was not unlawful where the decisionmaker was unaware of her leave when the decision was made. *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 799 (11th Cir. 2000) (citing cases).

Alamprese appears to misunderstand as well the statutory and regulatory provisions he cites. He has asked for back pay, attorney's fees, and civil money penalties as well as "sanctions/punitive damages payable to him for each unauthorized worker under Del Taco's employ for one year after he applied." But there are no such penalties or damages "payable to him" in this proceeding because the regulatory scheme plainly assigns the enforcement of the employment eligibility verification system to the INS, and now to its successor at DHS. Civil money penalties against an employer for hiring undocumented workers are payable only at the behest of INS or its successor, and only to the United States, not to third parties. No bounties or damages of any character are offered to private parties for the identification or reporting of undocumented workers. Other than the right contained in 8 U.S.C. § 1324a for an individual to notify INS or its successor of suspected violations, there is no authorization in the statute or the regulations for private enforcement of the employment eligibility verification system. Accordingly Alamprese has no remedy in this proceeding for the violations of § 1324a he alleges that Del Taco committed. His remedy, if any, would be for violations of § 1324b, but he has failed to show that there was any such violation.

VI. EVIDENTIARY DISPUTES

A. The Motion to Admit Exhibits 4 and 9

Alamprese's Exhibit 4 includes of six pages. The first two consist of a certification by the Office of the Regional Commissioner for the Social Security Administration, with a list attached identifying certain social security numbers as invalid or assigned to deceased persons, and indicating with respect to certain other numbers that information about the holders of those numbers cannot be released without their consent. The next two pages consist of a letter dated June 29, 2002, from Alamprese's counsel to the Social Security administration, with a list attached consisting of fifteen names with dates of birth and social security numbers entered for each, next to which is a handwritten column captioned "Good number?" containing the word "no" next to each name. The list is undated, has no letterhead and has no indication of who made the handwritten annotations. The next two pages consist of a fax from the Social Security Administration dated August 1, 2002, purporting to consist of three pages. Page 1 is a cover sheet, there is no page 2, and page 3 is a copy of the procedure the agency follows in responding to a request to determine whether a name and social security number match. Exhibit 9 is the Declaration of Rosa Castelan, one of Del Taco's employees. It relates only to the declarant's own immigration status.

Exhibits 4 and 9 were not admitted at the hearing. This was not, as Alamprese's brief suggests, because they are hearsay, or because they were unauthenticated or lacked foundation. The exhibits were excluded because the parties had been told more than once, and the prehearing order directed, that copies of any exhibits were to be provided to opposing counsel well in advance of the hearing, and this was not done. Alamprese argues that it was impossible for him to have tendered the exhibits earlier because he did not obtain the documents himself until shortly before the hearing.[8]

What counsel has not explained is why he waited until immediately before the hearing to develop his evidence in the first place, after representing to this office in writing on May 18, 2002, that his case was ready to be heard. The parties in this case were not rushed to hearing by any "rocket docket" system; they were provided with a generous period of time to conduct their discovery. The express purpose of the discovery period is to permit the parties enough time to gather their evidence and prepare their cases. At no time during the discovery period did Alamprese seek assistance in obtaining evidence, he requested no subpoenas during that period, and he filed no motions at all addressed to discovery issues. On the contrary, he represented in May, both in a letter and subsequently at a telephonic conference on May 29, that his discovery was complete and that he was ready for hearing. There was accordingly no reason to believe that he would wait until the eve of trial in December to gather his evidence.

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[8] Only the first two pages of Exhibit 4 appear to be of recent vintage: the letter to SSA is dated June 29, 2002; the fax from the agency is dated August 1, 2002.

Let me be clear: the admission of exhibits 4 and 9 would have no effect whatsoever on the outcome of this case. The question in this proceeding is whether Alamprese's citizenship was a factor in his failure to obtain the part-time job he said he wanted at Del Taco. Since he was unable to show that anyone at Del Taco had any way of knowing what his citizenship status was, and failed as well to establish that any employee worked the particular hours he said he was available, information about the immigration status of Del Taco's employees cannot alter the result in this case.

While Alamprese contends that "if Del Taco knowingly employed so much as one illegal alien at the time of his application, he possesses a valid claim for citizenship discrimination," this is a misstatement of the law: Alamprese has no valid claim of discrimination on the basis of his citizenship absent some evidence from which it could be inferred that anyone at Del Taco even knew what his citizenship status was. There is no such evidence.

This is not an enforcement action under § 1324a; it is a discrimination case pursuant to § 1324b. Thus even if Alamprese were to prove, as he contends, that 15 out of 17 (88%) of the employees who worked at Del Taco at some time in 2001 were unauthorized for employment in the United States, this fact, however deplorable, affords him no remedy in this proceeding because there is still no evidence that Alamprese personally was discriminated against on the basis of a characteristic of which Del Taco was wholly unaware. The motion to admit Exhibits 4 and 9 is denied.

B. The Letter of January 3, 2003

After the hearing, Alamprese's counsel sent a letter stating that prior to the hearing, he had served a subpoena on the INS office in Los Angeles requesting the presence at the hearing of the "Person Most Knowledgeable," but that no such person had appeared. The letter stated that after the hearing, he had gotten a phone call from someone at the INS stating that certified documents were being prepared in lieu of appearance, and that counsel's intent was to forward those documents and seek their admission. The documents have not been received. They evidently address the employment authorization status of Del Taco's employees.

For the reasons previously stated, the subject documents, even had they been timely obtained, could have no conceivable effect on the outcome of this case. The request to admit them is denied.

VII. CONCLUSION

Alamprese's pretrial brief urged many public policy reasons for finding liability in this case: the need to choke off the flow of illegal immigrants and control the border, the fact that illegal employees often work for depressed wages and in unsafe conditions, the fact that jobs are taken from United States citizens and dollars are sent out of the county, the fact that illegal immigration creates a black market in illegal identification documents, and that fact that illegal workers pay into a tax and social security system of which they cannot take advantage. These are sound reasons favoring vigorous enforcement of our nation's immigration laws. They are not, however, reasons which justify a finding of intentional discrimination in this case where the evidence does not support such a finding.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

l. Juan Manuel Alamprese is a naturalized citizen of the United States born in Argentina.

2. On or about April 22, 2001, Juan Manuel Alamprese filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) alleging that Del Taco refused to hire him because of his United States citizenship.

3. On or about September 20, 2001, the Office of Special Counsel for Immigration-Related Unfair Employment Practices sent Juan Manuel Alamprese a letter saying that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of receipt of the letter.

4. On or about December 19, 2001, Juan Manuel Alamprese filed a complaint with the Office of the Chief Administrative Hearing Officer.

5. MNSH, Inc., dba Del Taco #171 is a Del Taco franchise located at 280 South Bristol, Costa Mesa, California, 92626, where it engages in the business of serving Mexican fast food.

6. Mike Kamali is the principal shareholder and officer of MNSH, Inc., dba Del Taco #171.

7. Jorge Valencia was at all times pertinent until April, 2002, the assistant manager at Del Taco #171.

8. No one at Del Taco #171 knew or had reason to know what Juan Manuel Alamprese's citizenship status was.

9. No one at Del Taco #171 made an employment decision about Juan Manuel Alamprese on the basis of his United States citizenship.

10. No one at Del Taco #171 discriminated against Juan Manuel Alamprese on the basis of his United States citizenship.

B. Conclusions of Law

1. Juan Manuel Alamprese is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. Del Taco #171 is an entity within the meaning of 8 U.S.C. § 1324b(a).

3. All conditions precedent to the institution of this action have been satisfied.

4. Juan Manuel Alamprese did not carry his burden of proof or persuasion on the issue of intentional discrimination.

5. An employer cannot intentionally discriminate against a job applicant on the basis of his citizenship if the employer does not know or have reason to know the applicant's citizenship.

To the extent any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

The complaint must be, and it hereby is, dismissed.

SO ORDERED.

Dated and entered this 20th day of March, 2003.

Ellen K. Thomas
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 the Order seeks timely review of the 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 the Order.

APPENDIX A

This case was not selected for publication in the Federal Reporter

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This opinion was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. FI CTA9 Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

Christopher EFFGEN, Plaintiff-Appellant,
v.
UNITED STATES; et al., Defendants-Appellees.

No. 01-35441.
D.C. No. CV-00-00346-A-JKS.

Submitted Feb. 11, 2002. [FN*]

FN* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2). Accordingly, we deny Effgen's request for oral argument.

Decided Feb. 22, 2002.

Appeal from the United States District Court for the District of Alaska James K. Singleton, Chief Judge, Presiding.

Before B. FLETCHER, T.G. NELSON, and TALLMAN, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

****1** Christopher Effgen appeals pro se the district court's order dismissing his action ***438** for failure to state a claim and denying as moot Effgen's motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and, after de novo review, *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1295 (9th Cir.1998), we affirm.

Effgen alleged that he was unlawfully denied temporary employment with the Census Bureau because he refused to complete a Form I-9, the Employment Eligibility Verification Form, when he applied for the position. The district court correctly dismissed Effgen's Fourth Amendment claim because Effgen did not allege that he was subjected to either a "search" or a "seizure." *See United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). The district court properly dismissed Effgen's Fifth Amendment claim because none of the defendants violated his property or liberty interests when the Census Bureau declined to hire him. *See Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (property interest); *Roth v. Veteran's Admin.,* 856 F.2d 1401, 1410- 11 (9th Cir.1988) (liberty interest). Effgen's claim pursuant to 8 U.S.C.§ 1324a fails because the statute does not contain an express or implied private right of action. *See Burgert v. Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661, 664 (9th Cir.2000). His claims pursuant to 18 U.S.C. § § 241, 242 fail for the same reason. *See Aldabe v. Aldabe,* 616 F.2d 1089, 1092 (9th Cir.1980).

The district court did not abuse its discretion when it declined to hold a hearing on Effgen's request for a preliminary injunction. *See Stanley v. Univ. of So. Cal.,* 13 F.3d 1313, 1326 (9th Cir.1994).

Effgen's remaining contentions lack merit.

AFFIRMED.