4. *Pro Se* Antidiscrimination Plaintiff Loses, But Avoids Attorney's Fees

An administrative law judge (ALJ) recently refused to award attorney's fees in favor of an employer against a *pro se* former employee who failed to make a prima facie case under the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA). ALJ Marvin H. Morse of the Executive Office for Immigration Review's Office of the Chief Administrative Hearing Officer (OCAHO) declined to award attorney's fees because of the "untested" standard for recovery of fees. He also suggested that the Justice Department's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) caution persons regarding the potential liability for attorney's fees if they unsuccessfully pursue a private action. *Bethishou v. Ohmite Manufacturing Co.*, No. 8900175 (OCAHO August 2, 1989).

Sargon Bethishou filed a charge with the OSC in October 1988, alleging that Ohmite Manufacturing Co., his former employer, discharged him on the basis of his national origin and/or citizenship status. In January 1989 the OSC notified Mr. Bethishou that it would not file a complaint on his behalf but that he could do so directly with OCAHO. In April 1989, Mr. Bethishou filed such a complaint.

Ohmite responded that Mr. Bethishou was without a cause of action partly because his claim was premised on national origin, not citizenship, discrimination grounds. The company filed a motion for summary decision as well as a request for attorney's fees. Mr. Bethishou, who was not represented by counsel, filed a handwritten letter with OCAHO, although it was not clear whether it was intended to be a response to Ohmite's motion for summary decision. Despite requests by OCAHO for more information, Mr. Bethishou failed to respond.

In his opinion, ALJ Morse refused to rule on the national origin claim, noting that OCAHO's jurisdiction over national origin cases is limited by IRCA to claims against employers employing between four and 14 employees. Ohmite has more than 15 employees. OCAHO does, however, have jurisdiction over the citizenship status claim, ALJ Morse said.

In deciding the merits of the claim, ALJ Morse relied on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a case decided pursuant to Title VII of the Civil Rights Act of 1964. Adopting the three-prong test in that case to Mr. Bethishou's complaint, ALJ Morse found that although Mr. Bethishou proved that he was a member of the group protected by IRCA and that he was discharged, Mr. Bethishou failed to show any disparate treatment to infer a causal connection between his protected status and the discharge. ALJ Morse thus found that Mr. Bethishou failed to make a prima facie case showing unlawful citizenship status discrimination.

ALJ Morse then considered Ohmite's request for attorney's fees. He noted that IRCA allows an ALJ to grant attorney's fees if the losing party's argument is without a reasonable foundation in law or fact. Although he found Mr. Bethishou's claim to lack such a reasonable foundation, ALJ Morse refused to award Ohmite attorney's fees, saying that "the statutory standard for recovery of fees is innovative and untested." In addition, he noted that this was only his second disposition on the merits of an IRCA discrimination case involving a *pro se* complainant. ALJ Morse concluded:

> [A]t this early juncture in the administration of [INA §274B], potential complainants may not have been made adequately aware of exposure to liability for attorney's fees of the prevailing party. It might be helpful in this context for the Special Counsel, upon informing charging parties of their opportunity to initiate private actions where the Special Counsel declines to file a complaint, to caution that there is such potential liability. Of course, there is a need for sensitivity to the balance between advising complainants of that exposure and frightening them off from prosecuting credible claims of discrimination in violation of IRCA.

5. Justice Dept. Finalizes Japanese Restitution Rule

The Justice Department has published a final rule establishing procedures to identify, locate and make payments to eligible individuals of Japanese ancestry who were interned during World War II. The final rule appeared in the *Federal Register*, Vol. 54, No. 159, August 18, 1989, pp. 34157–34168. It took effect immediately upon publication.

The new regulations implement §105 of the Civil Liberties Act of 1988.[1] The Act offers $20,000 and an official apology to each of the estimated 60,000 surviving Japanese-Americans who were evacuated, relocated or interned during World War II. The Act authorizes $1.25 billion to be paid over a 10–year period. So far, however, no money has actually been appropriated.

Pursuant to §105, the Justice Department established the Office of Redress Administration (ORA) to identify and locate the persons eligible for restitution under the Act. The ORA's regulations, contained in 28 CFR Part 74, establish eligibility criteria for redress payments and the procedures for verifying eligibility.

The final rule differs in some respects from the proposed rule, published in June.[2] In response to the 157 comments, the ORA liberalized its proposed documentation requirements. The ORA will accept certified copies as well as original records to prove a person's birthdate or current legal name and address.

In response to other comments, the final rule also clarifies that minors who were relocated to Japan during the war are not eligible to receive restitution payments. Also ineligible are most persons of Japanese ancestry sent to U.S. internment camps from other countries. According to the rule, they cannot receive redress payments because they were not U.S. citizens or permanent residents.

Finally, the rule notes the plight of about 40 surviving non-Japanese who were interned with their Japanese American spouses or children. Because they are not of Japanese ancestry, such persons are ineligible for redress payments. The Justice Department plans to submit legislation to Congress to amend the Act to correct this problem.

Also on the legislative front, the House of Representatives has passed a fiscal year 1990 appropriations bill for the Justice Department that includes $50 million to begin making redress payments. That amount, while $30 million more than requested by the administration, is enough to pay only the oldest of the surviving internees—those in their late 80s. The Senate Appropriations Committee has not marked up its version of the bill yet.

6. INS Restricts Consulates' Ability to Accept Familial Visa Petitions

The INS has finalized a rule restricting the ability of consular officers overseas to approve familial immigrant visa petitions on Form I–130. Under the new rule, consular officers may accept such petitions only if the petitioner is residing in the consular office's jurisdiction. No longer will mere physical presence in the jurisdiction suffice.

Until 1987, petitioners physically present in a consular district overseas where there was no INS office could have the consulate decide their I–130 immigrant visa petition. By contrast, aliens located near an overseas INS office had to reside in that office's jurisdiction before the Service would accept the petition. According to the INS, these differing requirements caused confusion. To clarify the matter, the Service published a proposed rule in February 1989 to impose the same, more restrictive residence requirement in both situations.[3]

In response to comments, the final rule, while adopting the essence of the proposed rule, clarifies that only the petitioner must reside in the area over which a consulate or INS office has jurisdiction. Where the beneficiary resides is irrelevant.

The final rule also grants overseas INS and consular offices discretion to accept I–130 petitions filed by non-residing petitioners if emergent or humanitarian reasons exist or if it is in the national interest. The supplementary information part of the rule lists two examples of such humanitarian reasons: (1) where the beneficiary is a very young child or very old parent who needs the petitioner to care for them; and (2) where the qualifying marriage takes place abroad, so that it makes no sense to return to the U.S. to file the I–130 petition.

The final rule, published in the *Federal Register*, Vol. 54, No. 159, August 18, 1989, pp. 34141–34142, amends 8 CFR 204.1(a)(3). It took effect

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1 See *Interpreter Releases*, Vol. 65, No. 31 August 15, 1988, p. 821.

2 See *Interpreter Releases*, Vol. 66, No. 23, June 19, 1989, p. 659.

3 See *Interpreter Releases*, Vol. 66, No. 8, February 27, 1989, pp. 227–228, 243. A correction to the proposed rule appeared in No. 10, March 13, 1989, pp. 299–300, 311