

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

November 17, 2005

AKINTUNDE ADEDAPO OMOYOSI,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 05B00042
)	
LEBANON CORRECTIONAL INSTITUTION,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Akintunde Adedapo Omoyosi filed a complaint in which he alleged that the Lebanon Correctional Institution discriminated against him on the basis of his citizenship and national origin and retaliated against him by firing him on September 7, 2004. The complaint was answered by the Ohio Department of Rehabilitation and Correction, of which the Lebanon facility is a component. The answer denied the material allegations of the complaint and raised several affirmative defenses, principally lack of jurisdiction based on state sovereign immunity.

In the meantime, Omoyosi filed a motion seeking leave to amend his complaint to add Ernie Moore, the Warden, and Ron Hart, the Deputy Warden for Administration, as respondents in their official capacities. The Ohio Department of Rehabilitation and Correction filed a timely Response to Complainant’s Motion to Amend. I issued an Order of Inquiry on October 24, 2005 giving Omoyosi until November 10, 2005 to file evidence of his status as a protected individual on the date of the alleged discrimination, in the absence of which it would not appear that he had standing to file the motion to amend.

Omoyosi made a timely response and submitted documents relevant to his immigration status. Both motions are currently pending and ripe for resolution: respondent’s motion to dismiss and complainant’s motion for leave to amend.

II. THE MOTIONS AND RESPONSES

A. Respondent's Motion to Dismiss

The Ohio Department of Rehabilitation and Correction status that as a component of an agency of the State of Ohio, the Lebanon Correctional Institute is entitled to sovereign immunity from Omoyosi's claims. It argues further that OCAHO lacks jurisdiction over Omoyosi's allegations of national origin discrimination because he previously dual-filed a charge based on the same facts with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC). The motion was accompanied by Respondent's Exhibits: A) a letter from United States Immigration and Customs Enforcement to Warden Ernie Moore dated September 9, 2004; B) a dual-filed charge filed with the OCRC and EEOC by Akin A. Omoyosi on December 29, 2004; C) a letter from OCRC dated March 17, 2005; D) a letter from OCRC dated May 5, 2005; E) a dismissal and notice of rights from EEOC dated July 20, 2005.

Omoyosi's response does not address the issue of sovereign immunity at all. Rather, it argues that this forum has no authority to determine his work authorization status which he says can only be determined by an employer through the I-9 process. He states in addition that the Office of Immigration and Customs Enforcement will be taking his case to Immigration Court and asks in the meantime that Respondent's Exhibit A be stricken from the record. Omoyosi also makes various arguments related to the merits of his case. The response was accompanied by Complainant's Exhibits: 1) an INS Notice of Action (Form I-797) dated September 15, 1995; 2) INS Form I-862 Notice to Appear (NTA) dated September 30, 2004; 3) a letter dated July 28, 2005 from The Hammond Law Group to the Department of Homeland Security; 4) a Freedom of Information Act (FOIA) request to the Department of Homeland Security dated September 8, 2004; 5) a Notice from the Ohio Department of Rehabilitation and Correction, Lebanon Correctional Institute dated September 7, 2004; 6) a letter to Omoyosi from the Ohio Department of Rehabilitation and Correction dated September 8, 2004; 7) a form captioned Procedures for Charge Handling and an acknowledgment signed and dated December 29, 2004; and 8) a Memorandum from Omoyosi to Ernie L. Moore, Warden dated August 31, 2004, with attachments.

B. Complainant's Motion for Leave to Amend

Omoyosi's motion seeks to add Ernie Moore, Warden, and Ron Hart, Deputy Warden for Administration, as Respondents in their official capacities. Omoyosi alleges that each was aware of the hostile environment in which he worked and that both were involved in his termination.

The Ohio Department of Rehabilitation and Correction opposes the motion on the grounds that it was not properly served, that Omoyosi did not file a charge with OSC naming Moore or Hart nor did OSC authorize him to file a complaint against them, that they did not act as Omoyosi's employer with respect to his allegations, that they are entitled to immunity in their official capacities, and that the complaint should, in any event, be dismissed.

III. APPLICABLE LAW

Nonconsenting states are generally not amenable to private suits unless their immunity is validly abrogated. *Alden v. Maine*, 527 U.S. 706, 759 (1999). The state of Ohio ordinarily allows waiver of its immunity only by its legislature or its courts. *Mixon v. State of Ohio*, 193 F.3d 389, 397 (6th Cir. 1999). While Congress may abrogate a state's immunity under limited circumstances by appropriate legislation, OCAHO jurisprudence acknowledges that it did not do so in 8 U.S.C. § 1324b. *See, e.g., Reffell v. Prairie View A&M Univ.*, 9 OCAHO no. 1057, 4 (2000) (citing cases).¹

A limited exception to state sovereign immunity is sometimes available under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) under narrow circumstances where violations of federal statutory rights are implicated. *Ex Parte Young* permits an individual to maintain an action for prospective injunctive (nonmonetary) relief against state officials in their official capacities under proper circumstances. *See McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 446 (1999) (granting leave to amend), *Mixon*, 193 F.3d at 397-98, *Lupo v. Voinovich*, 235 F.Supp.2d 782, 789-90 (S.D. Ohio 2002).

As a general matter, leave to amend a complaint is freely given in this forum whenever a determination on the merits will be facilitated thereby. *See* 28 C.F.R. § 68.9(e). While a liberal approach is taken, leave to amend is routinely denied under circumstances where the proposed amendment would be futile. *McCaffrey v. LSI Logic Corp.*, 6 OCAHO no. 867, 481, 485 (1996). The test for futility is whether or not the proposed amendment would survive a motion to dismiss. *Id.*

The protections of § 1324b are not available to unauthorized aliens. 8 U.S.C. § 1324b(a)(1). Generally speaking, a protected individual within the meaning of the statute is a citizen or national of the United States, an alien lawfully admitted for permanent residence, lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of title 8, admitted as a refugee under section 1157 of title 8, or granted asylum under section 1158 of title 8. 8 U.S.C. § 1324b(a)(3).

¹ 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 accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (<http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published>).

IV. DISCUSSION

There is no suggestion that Ohio has waived its state sovereign immunity; indeed the state of Ohio appears here and claims that immunity by way of defense. As an initial matter then, it would appear that the doctrine of state sovereign immunity insulates the Lebanon Correctional Institution, as an agency of state of Ohio, from complaints in this forum and that accordingly the complaint in this matter should be dismissed.

Because Omoyosi furnished no evidence that he was a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) at the time of the alleged discrimination, I conclude that he lacks standing to file a motion for leave to amend his complaint. The respondent also made a number of other arguments as to why that motion for leave to amend should be denied. I do not reach those issues.

The Ohio Department of Correction stated that the Lebanon facility was informed by the Office of Immigration and Customs Enforcement in September of 2004 that Omoyosi was not at that time legally authorized to work in the United States. While Omoyosi seeks to strike the letter stating this (RXA), his own evidence simply confirms it. While Omoyosi's brief says he was a lawful permanent resident on September 7, 2004, his evidence does not support this claim. His Exhibit 1 does indicate that an Immigrant Petition had been approved for him in 1995 but the Approval Notice also recites that the information submitted reflected that Omoyosi was not eligible at that time to apply for adjustment of status. There is no evidence that he applied for adjustment of status at any time prior to September 2004. His Exhibit 2 reflects that as of September 30, 2004 Omoyosi was charged with having been admitted as a nonimmigrant F-1 Student in 1978 with authorization to remain in the United States during the duration of his student status, but that he had been found on September 7, 2004 to be employed without authorization from the Service. His Exhibit 3 reflects that Omoyosi and his wife had appeared at an INS interview on September 13, 2001 but that no green card had ever been issued for him. His counsel requested on July 28, 2005 that he be placed in proceedings in Immigration Court in order to facilitate adjudication of his then pending application for adjustment of status. There is no evidence as to when the application was filed. In any event, "an alien with 'adjustment of Status Pending'" as Omoyosi describes himself, is not a protected individual under § 1324b(a)(3). Unauthorized aliens are expressly excluded from the protections of § 1324b(a)(1). The term "unauthorized alien" means with respect to employment that the alien is not either A) lawfully admitted for permanent residence, or B) authorized to be so employed by the Attorney General. 8 U.S.C. § 1324a(h)(3). Omoyosi's contention that I lack authority to determine whether he is such an individual is frivolous.

Omoyosi contends that the charges against him are simply allegations and they have yet to be proved. That well may be. But it is his own burden in this forum to establish that he is a protected individual within the meaning of 8 U.S.C. § 1324b, and he has failed to do so. I

conclude therefore that he is unable to make the requisite showing of standing to file a motion to amend the complaint. The amendment he proposed would be futile because the amended complaint would be subject to immediate dismissal on the ground that Omoyosi is not a protected individual within the meaning of § 1324b(a)(3).

ORDER

Omoyosi's motion for leave to amend is denied. The motion of the Ohio Department of Rehabilitation and Correction to dismiss is granted. The complaint is dismissed.

SO ORDERED.

Dated and entered this 17th day of November, 2005.

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 such Order seeks timely review of that 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 such Order.