

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

TALHA CIHAD GULCU,)	
Complainant,)	
)	
)	8 U.S.C. § 1324b Proceeding
v.)	OCAHO Case No. 2024B00053
)	
FRAUNHOFER USA,)	
Respondent.)	
)	

Appearances: Talha Gulcu, pro se Complainant
Amy L. Peck, Esq., Sarah J. Millsap, Esq., and David A. Calles Smith, Esq., for
Respondent

ORDER GRANTING IN PART AND DENYING
IN PART RESPONDENT’S MOTION TO DISMISS

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. Complainant Talha Cihad Gulcu filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on February 22, 2024, alleging that Respondent Fraunhofer USA discriminated against him on the basis of his citizenship status and national origin and retaliated against him in violation of 8 U.S.C. §§ 1324b(a)(1) and (a)(5).

On April 3, 2024, Respondent filed a motion to dismiss. Complainant filed its opposition on May 21, 2024. For the reasons that follow, Respondent’s motion is granted in part and denied in part.

II. ALLEGATIONS IN THE COMPLAINT

Complainant is a native and citizen of Turkey. In November 2022, he began working as a Project Scientist for Respondent, engaged in computer engineering. *See* Compl. 10; Mot.

Dismiss, Ex. A at 4.¹ Complainant held an H-1B visa, sponsored by his employer, through which he was authorized to work in the United States. Compl. 2–3; Mot. Dismiss, Ex. A at 4.

On February 13, 2023, Complainant filed a complaint of discrimination based on citizenship status with the Department of Justice’s Civil Rights Division. Compl. 10, 66–67. He asserts that he was the only non-U.S. Citizen working in his office, and that he felt stuck because he was reliant on his H-1B sponsorship to remain in the country. Compl. 67. He further contends that Respondent discriminated against him concerning his work hours, his work assignments, and through harassment by his co-workers. Compl. 10–12, 24–35. On May 4, 2023, Complainant forwarded his complaint to the EEOC. Compl. 10.

Complainant was previously diagnosed with major depression. Compl. 58. On May 23, 2023, Complainant felt ill and could not go to work. Compl. 10. On August 10, 2023, Complainant again felt ill, sending an email to HR Director Kathleen Schuelke and HR Manager Veronica Hensler at 3:30 am that stated that he “could not sleep today after 2am” and that he felt “mistreated and manipulated.” Compl. 10.

The next day, Complainant sent another email to both Schuelke and Hensler in which he stated that he “imagined [himself] being brought to [a co-worker’s] room for the second time, and I imagined myself shouting and punching, I got up from the couch with an immense anger. I was awake during all this.” Compl. 10, 37. Complainant also stated that he had been unable to sleep or to eat. Compl. 37.

Schuelke responded with a list of psychiatric Urgent Care resources in Cambridge, MA, and encouraged Complainant to seek help from a medical professional. Compl. 10, 38. Complainant responded that he completed an assessment at an Urgent Care and that Respondent could talk to the doctor who examined him. Compl. 38.

On August 14, 2023, Complainant’s supervisor Michael Zeifman emailed Complainant asking whether he was well given that he had not been to work for the last two days. Compl. 46. Complainant responded that this was “not an innocent question, given the fact that how I have been deliberately treated for months . . . I retain(restrained?) myself so hard in order not to do anything bad to anyone of you.” Compl. 47.

The next day, HR Director Schuelke emailed Complainant and asked him to set up an appointment with a mental health provider to continue his evaluation and recommend any next steps, including treatment options. Compl. 49. Schuelke stated that the company required a note from his doctor giving an estimate of when he would be able to return to work in light of his mental and physical health challenges. She inquired about whether Complainant had thoughts or feelings of harming himself or others, due to the “anger and frustration he expressed.” *Id.* at 44.

¹ Citations to specific page numbers in the Complaint refer to the pagination of the PDF document containing all materials submitted by Complainant as part of the Complaint.

Schuelke stated that Respondent required a doctor's note before he would be permitted to return to the office. Compl. 49.

On August 16, 2023, in response to an email about his unhappiness at work, Schuelke asked Complainant to send a list of his grievances with Respondent. Compl. 42. Complainant responded with a 12-page document, detailing how he felt he was treated differently than some co-workers in terms of the rigor of his hiring process and the review of his work product. He contended that his supervisors failed to acknowledge his superior work. *See generally* Compl. 24–35. On page 3 of the document, Complainant asserted that he had filed a discrimination complaint with the Department of Justice. *Id.* at 26.

The next day, Schuelke asked Complainant not to return to the office until they had agreed on an “appropriate plan to return to work.” Compl. 43. She wrote that they had concerns about his anger, frustration, and that they had concerns from his emails that he might pose a danger to himself or others. Compl. 43. She asked Complainant to let her know if he had feelings or fantasies of harming himself or others at Respondent. Compl. 43–44.

Complainant did not send Respondent a doctor's note attesting to his ability to return to work. *See* Compl. 49. On August 22, 2023, Respondent informed Complainant that he must send a note as soon as possible to return to work, given that he had used all his sick leave and was not eligible for paid leave. Compl. 49.

Complainant filed a charge of discrimination with the DOJ Civil Rights Division's Immigrant and Employee Rights Section (IER) on August 23, 2023. Compl. 16–19.

On August 28, 2023, Respondent terminated Complainant. Compl. 8, 10. Complainant's termination letter said that Respondent had not received “any indication that [Complainant] will be fit to return to work and do not pose a safety threat to yourself or others.” Compl. 22–23.

Due to his termination, Complainant's H-1B visa petition was revoked, and Complainant returned to Turkey on December 26, 2023. Compl. 11.

III. STANDARD OF LAW

“While the OCAHO rules of practice do not specifically provide for motions to dismiss for lack of subject-matter jurisdiction, respondents may assert, on a motion to dismiss, that the Court lacks subject-matter jurisdiction on a claim . . . Rule 12(b)(1) of the Federal Rules of Civil Procedure may be used as a general guideline in assessing whether OCAHO has subject-matter jurisdiction over a particular claim.” *Hossain v. Job Serv. N.D.*, 14 OCAHO no. 1352, 3 (2020)

(citing 28 C.F.R. § 68.1²).³ OCAHO does not have jurisdiction to hear citizenship status discrimination claims if the employer employs three or less individuals. 8 U.S.C. § 1324b(a)(2)(A). Moreover, OCAHO only has jurisdiction to hear national origin discrimination claims against employers with between four and fourteen employees. Sivasankar v. Strategic Staffing Sols., 13 OCAHO no. 1343, 3 (2020); 8 U.S.C. § 1324b(a)(2). In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the Court's review is not limited to materials inside the Complaint. *See Windsor v. Captain Glen Landeen*, 12 OCAHO no. 1294, 5 (2016).

The court may dismiss a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10. This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 7 (2016) (citing United States v. Spectrum Tech. Staffing Servs., Inc., 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1).

“In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint.” Udala v. N.Y. State Dep’t of Educ., 4 OCAHO no. 633, 390, 394 (1994). The complainant’s allegations of fact are accepted as true, and all reasonable inferences derived therefrom are drawn in the complainant’s favor. *Id.*

To meet OCAHO pleading standards, a complaint must contain “[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred.” 28 C.F.R. § 68.7(b)(3). Statements made in the complaint only need to be “facially sufficient to permit the case to proceed further,” United States v. Mar-Jac Poultry, Inc., 10 OCAHO no. 1148, 10 (2012) (citations omitted), as “[t]he bar for pleadings in this forum is low,” United States v. Facebook, Inc., 14 OCAHO no. 1386b, 5 (2021). Section 1324b complainants must provide more than legal conclusions, but need not plead a prima facie claim of discrimination, to overcome a motion to dismiss. *See Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016) (“[A] § 1324b complaint must nevertheless contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination.”). To give rise to an inference of discrimination, complaints must include information that links the complainant’s protected class and the employment action in question. *See id.*; Sharma v. NVIDIA Corp., 17 OCAHO no. 1450, 5 (2022). Moreover, the evidentiary standards set forth in McDonnell

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2025).

³ 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 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 “FIMOCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

Douglas Corp. v. Greene, 411 U.S. 792 (1973) do not apply in the motion to dismiss context. Heath v. Tringapps, Inc., 15 OCAHO no. 1410, 5 (2022).

Since the allegations at issue in this case occurred in Massachusetts, the Court will look to the case law of the relevant United States Court of Appeals, here the First Circuit.⁴ *See* 28 C.F.R. § 68.57. Moreover, 28 C.F.R. § 68.1 directs that the Federal Rules of Civil Procedure may be used as a general guideline when the regulations or statute provide no direct guidance.

IV. ANALYSIS

A. Discrimination – National Origin

Respondent first argues that the Court does not have jurisdiction over Complainant’s national origin discrimination claim because Respondent employs 15 or more persons. Mot. Dismiss 5. Complainant does not address this argument in his response.

This Court only has subject matter jurisdiction over national origin discrimination claims against employers with between four and 14 employees. 8 U.S.C. § 1324b(a)(2)(B); Wangperawong v. Meta Platforms, Inc., 18 OCAHO no. 1510d, 3 (2024). The Complaint asserts that Respondent employs 15 or more employees. Compl. 6. Based on Complainant’s representations, as well as Respondent’s uncontroverted statements related to the number of persons it employs, Complainant has not met his burden of establishing this Court’s jurisdiction over his national origin claim. Accordingly, Respondent’s motion to dismiss the 8 U.S.C. § 1324b(a)(1)(A) national origin discrimination claim is GRANTED, and the claim is DISMISSED.

B. Discrimination – Citizenship Status

Next, Respondent argues that Complainant’s citizenship status discrimination claim must be dismissed because Complainant does not allege that he was a protected individual as defined by 8 U.S.C. § 1324b(a)(3) at the time of the alleged discrimination. Mot. Dismiss 5–6. Complainant responds that that the definition of a “protected class” differs depending on the forum and interpretation. Opp’n Mot. Dismiss 2.

8 U.S.C. § 1324b(a)(1) provides that it is an “unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . in the case of a protected individual . . . because of such

⁴ *See* United States v. A&D Maint. Leasing & Repairs, Inc., 19 OCAHO no. 1568, 2 n.2 (2024) (CAHO Order) (citing 28 C.F.R. § 68.56 and holding that OCAHO ALJs are bound by the decisions from the federal circuit court of appeals in which a case arises).

individual’s citizenship status.” 8 U.S.C. § 1324b(a)(3) defines a “protected individual” as one who:

- (A) is a citizen or national of the United States, or
- (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence . . . is admitted as a refugee . . . or is granted asylum . . . but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986, and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service’s processing the application shall not be counted toward the 2-year period.

To succeed on a citizenship-status discrimination claim, the complainant bears the burden of establishing that they were a protected individual at the time of the alleged discrimination. *See Zu v. Avalon Valley Rehab. Ctr.*, 14 OCAHO no. 1376, 6 (2020) (citations omitted).

Complainant alleges that, at the time of the incident giving rise to this claim (his termination), he was working in the United States on an H-1B visa. Compl. 2–3. An H-1B visa is not one of the protected categories enumerated in 8 U.S.C. § 1324b(a)(3). Accordingly, Complainant has not alleged that he was a protected individual at the time of the alleged discrimination. Accordingly, Respondent’s motion to dismiss Complainant’s discrimination claim based on national origin is GRANTED, and the claim is DISMISSED.

C. Retaliation⁵

Respondent argues that the retaliation component of the complaint should be dismissed because Complainant has not alleged that any person at Respondent was ever aware of his complaints of discrimination prior to his termination. Mot. Dismiss 7. Respondent further argues that Complainant’s alleged protected activity was generalized complaints of mistreatment which were unconnected to his citizenship status. *Id.*

⁵ “Although Complainant is not a ‘protected individual’ as defined by § 1324b(a)(3), he still may maintain a claim for retaliation ‘because . . . § 1324b(a)(5) protects ‘any individual.’” *Roseman v. Walmart, Inc.*, 21 OCAHO no. 1618, 5 (2024) (citing *R.O. v. Crossmark, Inc.*, 11 OCAHO no. 1236, 12 (2014)).

Title 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice “to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.” Although a complainant before OCAHO does not have to plead a prima facie case at the motion to dismiss stage, the elements of a prima facie case are “instructive.” Ackermann v. Mindlance, Inc., 17 OCAHO no. 1462b, 11 (2023). “A prima facie case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual’s protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action.” Id. (citing Rainwater v. Doctor’s Hospice of Ga., Inc., 12 OCAHO no. 1300, 17 (2017)).

Here, Complainant has alleged that he engaged in protected activity by filing a charge of discrimination with the Immigrant and Employee Rights Section prior to his termination, and that he suffered an adverse employment action when he was terminated. Although the allegations in the complaint are not clearly organized, Complainant does appear to allege that Respondent was aware of his protected activity prior to terminating him. In his “Response to Section 9, Question 7” of the complaint, Complainant states that he has a “document of 12 pages in which [he] summarize[s] all the adverse actions.” Compl. 10. Later in the same response, Complainant states that this document was created at the suggestion of Respondent’s HR Director and that he sent it to her on August 16, 2023. Compl. 10. This document, which Complainant attaches to the Complaint, indicates that in February 2023, “[Complainant] filed a discrimination complaint from the website of Department of Justice.” Compl. 26. These statements are sufficient for the Court to infer both that Complainant engaged in protected activity⁶ and that Respondent was aware of it prior to terminating him on August 28, 2023.

⁶ As stated above, Complainant’s 12 page document is not a model of clarity, however as the Court noted above, it does state unequivocally that Complainant filed a charge with the Department of Justice alleging that Respondent discriminated against him. To the extent Respondent argues that the “participation clause” of 8 U.S.C. § 1324b(a)(5) can only be triggered by the employer having the specific knowledge that the employment discrimination charge filed with the Department of Justice alleges citizenship or national origin based discrimination, the Court notes that the language of 8 U.S.C. § 1324b(a)(5) is broad, and that an inference may be made from the documents Complainant submitted to Respondent that he believed he was being targeted due to his national origin or citizenship status. Complainant’s document references his own national origin, his feelings of persecution, the different national origins of many of his coworkers (e.g. an “Indian intern,” and “a woman having an Italian surname,”) and his feeling of victimization in the workplace related to his travel to Turkey to see family. Complaint 24, 28, 31-32. On a motion to dismiss, where the Court must presume that the purely factual statements are true and evaluate whether the litigant has staked out a “plausible” claim for relief, Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 10-11 (1st Cir. 2011), the Court finds that Complainant’s allegations have crossed the line to alleging a claim of retaliation. “The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint.” Id. Setting aside the likelihood of its occurrence, or this Court’s assessment of the probable success at hearing, Complainant has alleged a plausible claim that Respondent, aware of Complainant’s discrimination complaint and also aware of his feelings of victimization related to his national origin or citizenship status, decided to terminate him. The law require no more.

As to a causal connection, this Court has held that a causal connection between a protected activity and adverse action may be inferred if the events take place very close in time. Ackermann, 17 OCAHO no. 1462b, at 12 (“[T]emporal proximity between an employer’s knowledge of a protected activity and the adverse employment action may alone establish causality.”); *see also* DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008) (“[O]ur law is that temporal proximity alone can suffice to meet the relatively light burden of establishing a prima facie case of retaliation.” (internal quotations omitted)). Here, the termination took place only days after Complainant’s IER charge, and less than two weeks after Complainant sent Respondent’s HR Director a document outlining his perceived grievances, which included mention of a discrimination complaint previously filed with the Department of Justice. As a result, the Court finds Complainant has sufficiently pled the element of causation, and in turn that he has pled facts which may establish the claim of retaliation under 8 U.S.C. § 1324b(a)(5).

Accordingly, Respondent’s motion is DENIED with respect to Complainant’s retaliation claim.

V. ORDERS

It is SO ORDERED that Respondent’s Motion to Dismiss is GRANTED IN PART with respect to Complainant’s national origin and citizenship status discrimination claims, and DENIED IN PART with respect to his retaliation claim;

IT IS FURTHER ORDERED that the discrimination claims are DISMISSED WITHOUT PREJUDICE; and

IT IS FURTHER ORDERED that the parties attend a prehearing conference on March 31, 2025, at 2:00 pm EST for the Court to set a case schedule regarding the remaining retaliation claim.

SO ORDERED.

Dated and entered March 12, 2025.

Honorable John A. Henderson
Administrative Law Judge