

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

November 29, 2012

BOUBOU BA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 12B00022
)	
WAL-MART STORE 1199,)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Naturalization Act (INA) as amended, 8 U.S.C. § 1324b (2006), in which Boubou Ba alleged that Wal-Mart Stores, Inc., through its Avon, Colorado store, discriminated against him by firing him from his job. Wal-Mart filed an answer denying the material allegations of the complaint and asserting two affirmative defenses; first, that this office lacks subject matter jurisdiction over the complaint; and second, that the complaint fails to state a claim upon which relief may be granted. Wal-Mart simultaneously filed a motion to dismiss in which it pointed out that its Avon store alone has more than 500 workers and that Ba had already filed his claim of national origin-based discrimination and retaliation with EEOC.

Ba filed a response in opposition to the motion to dismiss, together with a reply to Wal-Mart's affirmative defenses and a motion for leave to amend the complaint to add an allegation of citizenship status discrimination, the omission of which he said resulted from a clerical error. Wal-mart filed a memorandum in opposition to the motion for leave to amend, and in the alternative, a motion to dismiss the amended complaint. Wal-Mart contends that Ba's motion for leave to amend should be denied because the amendment proposed would be futile. The company asserts that Ba failed to exhaust his administrative remedies in not raising the citizenship issue previously, that this omission is substantive, not merely a matter of failing to check a particular box on the complaint form, and finally, that the proposed amended complaint fails to state a claim upon which relief may be granted.

Because the face of the proposed amended complaint did not appear to state a claim upon which relief could be granted, an order of inquiry was issued giving Ba the opportunity to identify any facts and circumstances that would support an inference of discrimination on the basis of his United States citizenship status or otherwise state a colorable claim based on citizenship status. Ba filed a timely response to the inquiry and Wal-Mart filed a response with a request for leave to respond.

Both parties are represented by counsel.

II. WAL-MART'S MOTION TO DISMISS THE ORIGINAL COMPLAINT

It is clear at the outset that Ba may not maintain an action in this forum for discrimination on the basis of national origin, and that this claim must be dismissed. The governing statute provides that the INA's prohibition of national origin discrimination does not apply in cases covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (Title VII). *See* 8 U.S.C. § 1324b(a)(2)(B). Generally speaking, with limited exceptions, a person or entity is an employer covered by Title VII if it is engaged in an industry affecting commerce and has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). Claims of national origin discrimination against such employers are not within the scope of § 1324b, and must be directed to EEOC. *See Lima v. N.Y.C. Dep't of Educ.*, 10 OCAHO no. 1128, 8 (2009).¹ Ba's remedy, if any, for his complaint of discrimination based on his national origin is with EEOC.

III. WHETHER BA SHOULD BE PERMITTED TO AMEND HIS COMPLAINT

Notwithstanding the liberality with which leave to amend is freely granted under 28 C.F.R. § 68.9(e), *United States v. Sunshine Building Maintenance, Inc.*, 6 OCAHO no. 913, 1067, 1071-72 (1997), such liberality does not extend to permit a proposed amendment that would not

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 in the LexisNexis database "OCAHO," or on the website at <http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

survive a motion to dismiss. This is the usual test for determining whether or not a proposed amendment is futile. *See Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 7 (2003) (*Santiglia I*) (citing *Jones v. Cmty. Redev. Agency of L.A.*, 733 F.2d 646, 650 (9th Cir. 1984)).

While I am not persuaded that Ba's failure to check a box on OSC's charge form is necessarily fatal to his claim, the amended complaint he proposed fails to state a claim upon which relief may be granted. Ba's response to the order of inquiry did not assert facts sufficient to state a claim either. Rather, the response reports the status of settlement discussions, and asserts only that discovery is necessary in order for Ba to determine how much of a role his citizenship status played in his termination. Ba acknowledged, however, that he had initiated no discovery after filing the instant complaint in January.

Examination of the proposed amended complaint reflects that Ba is a citizen of the United States who was born in Mauritania, and alleges that his citizenship status and national origin were the reasons for his firing. He reported additional reasons as being race, color, religion, and retaliation. The narrative explanation Ba provided says that in June, 2009,

all of us West Africans requested a meeting with our manager, Matt, to protest discriminatory conditions. Three representatives attended the meeting, but nothing was resolved. After the meeting, seven West Africans were fired, including me. I was fired on or about July 20, 2009. I believe these firings were retaliation for asserting our rights.

In assessing the adequacy of these assertions to state a claim cognizable in this forum, I view the factual allegations as true and construe them in the light most favorable to complainant. Even drawing all reasonable inferences in Ba's favor and reading the proposed amended complaint in the light most favorable to him, there is nothing in his proposed amended complaint that remotely connects his United States citizenship status to his termination, nor are there any facts at all to support an inference that he engaged in any conduct that is specifically protected under 8 U.S.C. § 1324b.

Ba nowhere identifies Matt or any other decisionmaker at Wal-Mart as having a citizenship status that is any different from his own United States citizenship. Ba does not assert that any person who was not a United States citizen was more favorably treated than he was in any way. Ba does not, moreover, suggest that he engaged in activity protected under 8 U.S.C. § 1324b or that he was retaliated against for the exercise of rights that arguably come within the ambit of the provision, such as filing an OSC charge or participating in an investigation or proceeding under that section. Rather, the only basis articulated for his claim of discrimination or retaliation sounds in national origin; Ba says he was adversely treated because he was a member of a group of individuals who were originally from Western African countries, in his case, Mauritania. The underlying charge Ba filed with EEOC similarly reflects no factual allegations that can remotely be construed as raising any issue respecting discrimination or retaliation related to Ba's status as

a citizen of the United States.

Absent some colorable claim that the events Ba complains of have some connection to his status as a United States citizen, the motion for leave to amend must be denied and the motion to dismiss must be granted. Even under the liberal pleading standards of this forum, a prospective litigant must at minimum state some colorable claim upon which relief may be granted before putting the other party through the burden and expense of discovery.

ORDER

The motion for leave to amend is denied. The complaint is dismissed for failure to state a claim upon which relief may be granted in this forum.

SO ORDERED.

Dated and entered this 29th day of November, 2012.

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 files a timely petition for 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.