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

JENLIH JOHN HSIEH, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00005
PMC - SIERRA, INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER PARTIALLY GRANTING
RESPONDENT'S MOTION TO DISMISS
(*October 16, 2002*)

I. BACKGROUND

As previously arranged with the parties, a telephone prehearing conference in the above case was conducted on October 9, 2002, at 1 p.m. Eastern Time. The parties were notified of the conference by telephone and by the written Notice of Prehearing Conference issued on October 1, 2002. The purpose of the conference was to discuss with the parties Respondent's Motion to Dismiss the Complaint, along with six other motions which are discussed in a Prehearing Conference Report that will be issued subsequently.

Phillip J. Griego, Esq., appeared for Jenlih John Hsieh (Complainant), and Jennifer K. Mathe, Esq., appeared for PMC-Sierra, Inc. (Respondent). The conference was recorded by a court reporter, and a transcript of the same may be obtained by the parties.

Respondent filed a Motion to Dismiss the Complainant's Complaint on September 20, 2002. In that motion, Respondent argues the Complaint should be dismissed because Complainant filed the same case in the Superior Court of the State of California. Additionally, Respondent argues that this Court does not have jurisdiction over Complainant's national origin discrimination claim, pursuant to 8 U.S.C. § 1324(b)(a)(2). I grant the motion to dismiss the discrimination claim based on national origin, but otherwise the motion to dismiss is denied.

II. DISMISSAL BASED ON CONCURRENT CLAIM IN SUPERIOR COURT OF THE STATE OF CALIFORNIA

A. *Relevant Procedural History*

Complainant filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on April 3, 2001. After OSC declined to prosecute Complainant's case, a Complaint was filed with the Office of the Chief Administrative Hearing Officer (OCAHO) on October 23, 2001.

On August 14, 2002, Complainant filed a complaint in the Superior Court of the State of California alleging age, race, and national origin discrimination in Violation of the California Fair Employment and Housing Act; Fraud and Deceit, Suppression of Fact; and Wrongful Termination in Violation of Public Policy. In support of the claim of Wrongful Termination in Violation of Public Policy, Complainant alleged, among other things, a violation of 8 U.S.C. § 1324b. Brief for Respondent Ex. A at 7.

On September 16, 2002, Respondent filed a Motion to Dismiss the Complainant's Complaint.

On September 27, 2002, Respondent removed Complainant's proceeding from the Superior Court of California to the Federal District Court for the Northern District of California.

B. *Discussion and Ruling*

In Respondent's brief in support of its Motion to Dismiss, Respondent relied on the Colorado River abstention doctrine. The Colorado River doctrine applies to federal courts when a concurrent state action is pending and only permits abstention in extraordinary and narrow circumstances. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Because Respondent removed the concurrent state court case to federal court, the Colorado River abstention doctrine is consequently inapplicable to the present posture of this case.

During the prehearing conference, Respondent argued for dismissal because Respondent would prefer to litigate Complainant's claims in one federal forum, instead of two. Respondent argued that the Federal District Court for the Northern District of California has jurisdiction to hear Complainant's citizenship status discrimination claim and thus two identical claims were pending in two different federal forums. Respondent contended that this duplicative litigation wastes federal judicial resources. Respondent requested that this Court abstain from adjudication to allow the aforementioned claims and the citizenship status discrimination claim to be litigated in the Northern District of California.

First, and foremost, dismissal is improper because the issues litigated in this Court and those litigated in the Northern District of California are not the same. Complainant did not independently allege citizenship status discrimination under 8 U.S.C. § 1324b in the complaint filed with the Superior Court of the State of California. Complainant pointed to a violation of section 1324b to help support and bolster his allegation of Wrongful Termination in Violation of Public Policy. Therefore, although there are two pending lawsuits, duplicative litigation does not exist because the Northern District of California is not adjudicating whether section 1324b was violated, but whether there is enough cumulative evidence to support a finding of wrongful termination in violation of public policy. In this determination, the Northern District of California may examine Complainant's allegations of Respondent's violation of section 1324b, but is not called upon to definitively adjudicate whether Respondent violated section 1324b. Moreover, at the prehearing conference Complainant agreed to amend his pending complaint in the Northern District of California to exclude any citizenship status discrimination claim under 8 U.S.C. § 1324b, thereby ensuring no duplicative federal litigation. Federal judicial resources are not wasted because there are not two identical causes of action pending in two different federal forums.

Second, under the well-established first-to-file rule, the Northern District of California is the proper court to determine whether to stay or dismiss any part of Complainant's case because of its similarity to this case. The first-to-file rule promotes judicial efficiency by allowing a federal court to stay or dismiss a cause of action when a complaint containing the same parties and same issues has previously been filed in another federal court. Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 625 (9th Cir. 1991). Under the first-to-file doctrine, the Northern District of California is the appropriate court to decide whether to stay or dismiss Complainant's complaint based on the similarities with this proceeding, especially because the case was recently filed with the Northern District of California, whereas this proceeding has been pending at OCAHO for almost a year and discovery is nearly completed.

Finally, OCAHO has exclusive, original jurisdiction to adjudicate allegations of section 1324b violations. Under the Immigration and Nationality Act (INA), Congress neither created nor implied a private right of action in any forum other than OCAHO, and the statute requires that Complainant exhaust all administrative remedies before a federal court may review the case. 8 U.S.C. § 1324b(b-d).

For a statute to imply a private right of action in a federal district court, Congressional intent to create such right must be demonstrated. Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 532 (1989) (holding no private cause of action under Title VII to enforce federal employees unions' duty of fair representation). A private right of action should not be inferred unless there is strong evidence of congressional intent to imply such a right. Id. Congressional intent may be inferred from a broad variety of sources such as statutory language, statutory structure, and legislative history. Id. at 533.

Through a reading of the statutory language, it is clear that Congress specifically vested the power

to adjudicate complaints brought under section 1324b in administrative law judges: "[h]earings on complaints under this subsection shall be considered by administrative law judges who are specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, before such judges who only consider cases under this section." 8 U.S.C. § 1324b(e)(2) (emphasis added). Congress granted administrative law judges the power to hear section 1324b claims in mandatory and unequivocal language. Federal district court judges do not meet any of the aforementioned criteria that would enable them to adjudicate section 1324b violations, as they are not administrative law judges selected by the Attorney General, they do not have special training in employment discrimination, and they do not hear almost exclusively section 1324b claims. Thus, the statutory language does not evidence Congressional intent to create a private right of action under section 1324b. Accord Shah v. Wilco Sys. Inc., 126 F. Supp.2d 641, 649 (S.D.N.Y. 2000) (holding that section 1324b's statutory provisions do not indicate that Congress intended to create a private right of action).

Section 1324b's statutory structure contains extensive administrative mechanisms for resolving employment-related citizenship status discrimination claims. Accord Biran v. JP Morgan Chase & Co., No. 02 CIV. 5506(SHS), 2002 WL 3104035, at *2 (S.D.N.Y. Sept. 12, 2002) (unpublished opinion) (holding no private right of action under 8 U.S.C. § 1324b). In section 1324b, Congress specifically requires that cases under that subsection be brought to OSC and, if OSC declines the case or does not file a charge within 120 days, the individual may file a complaint with an administrative law judge. 8 U.S.C. § 1324b(b-d). Only after an administrative law judge issues a final order may a party seek review in a United States court of appeals. 8 U.S.C. § 1324b(e). A complainant must first exhaust specific administrative remedies under section 1324b before seeking review in the federal judicial system. Accord Biran, 2002 WL 3104035, at *1; Shah, 126 F. Supp.2d at 649-50. Accordingly, section 1324b's comprehensive statutory structure "strongly suggests that Congress did not intend to furnish a remedy in the district courts parallel to that available in administrative proceedings." Murtaza v. New York City Health & Hosp. Corp., No. 97-CV-4554, 1998 WL 229253, at*4 (E.D.N.Y. Mar. 31, 1998) (unpublished opinion) (holding that there is no private right of action under 8 U.S.C. § 1324b). Moreover, nothing in section 1324b's sparse legislative history evidences Congressional intent to create a private right of action. Accord Biran, 2002 WL 3104035, at *3.

After examining section 1324b's statutory language, statutory structure, and legislative history, I conclude that OCAHO has exclusive, original jurisdiction to adjudicate claims of section 1324b violations. Therefore, dismissing the entire case would unjustly leave Complainant without a forum to bring its section 1324b action.

III. DISMISSAL OF CLAIM OF DISCRIMINATION BASED ON NATIONAL ORIGIN

This Court does not have jurisdiction over national origin claims that are covered under section 703 of the Civil Rights Act of 1964. 8 U.S.C. § 1324b(a)(2)(B). During the relevant time period, Respondent

had more than fourteen full-time employees and consequently any acts by Respondent constituting national origin discrimination would be covered by section 703 of the Civil Rights Act of 1964. At the start of the conference, Complainant conceded that this Court was without jurisdiction to adjudicate Complainant's national origin discrimination claim. Accordingly, Respondent's Motion to Dismiss Complainant's claim of national origin discrimination is granted.

IV. CONCLUSION

Respondent's Motion to Dismiss Complainant's Complaint on the basis that duplicative federal litigation is pending in the Northern District of California is denied. Respondent's Motion to Dismiss Complainant's national origin discrimination claim under section 1324b is granted.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE