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

November 8, 2018

GARTH ANTON HAYDEN, Complainant, v. NEW YORK POLICE DEPARTMENT, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 18B00010

AMENDED FINAL ORDER OF DISMISSAL

A Final Order of Dismissal was initially issued in the above-captioned case on October 26, 2018. Pursuant to 28 C.F.R. § 68.52(f), this Amended Final Order of Dismissal amends the order issued on October 26, 2018, and corrects solely for clerical and typographical errors.

I. STATEMENT OF THE CASE

This case arises under the anti-discrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012).

Complainant, Garth Anton Hayden, alleges that Respondent, New York Police Department, refused to hire him for a school safety officer position based on Complainant's Jamaican national origin, in violation of 8 U.S.C. § 1324b(a)(1). OCAHO Compl. at 4, 8. Complainant also alleges that Respondent should have hired him based on his veteran status.

II. FACTUAL AND PROCEDURAL BACKGROUND

Complainant is of Jamaican national origin. OCAHO Compl. at 2. Complainant applied for a school safety officer position with Respondent. *Id.* at 8. Complainant alleges that Respondent interviewed him and refused to hire him on November 12, 2015. *Id.* at 8, 13.

Thereafter, Complainant filed a charge with the Equal Employment Opportunity Commission (EEOC). On July 28, 2016, the EEOC dismissed his charge and, based on the information

provided, determined that it was unlikely that a statutory violation occurred. *Id.* at 13–14. On October 24, 2017, Complainant filed a charge with the Department of Justice's Immigrant and Employee Rights Section (IER)[1] against Respondent. *Id.* at 15. IER dismissed the charge on November 2, 2017 because it was untimely filed. *Id.* On November 20, 2017, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Respondent violated 8 U.S.C. § 1324b when it discriminated against him on the basis of national origin. *Id.* at 1, 8–9.

On January 2, 2018, Respondent filed a motion to dismiss alleging that OCAHO does not have jurisdiction over Complainant's claims because Respondent employs more than fifteen employees. Mot. to Dismiss at 1, 4. On March 15, 2018, the undersigned issued an Order to Show Cause directing Complainant to explain why his complaint should not be dismissed for lack of subject matter jurisdiction. On March 20, 2018, Complainant responded to the motion and Order to Show Cause arguing that OCAHO has jurisdiction over this case because OCAHO has jurisdiction to hear employment discrimination claims. On August 16, 2018, the undersigned issued an Updated Order to Show Cause directing Complainant to explain why his complaint should not also be dismissed as untimely.

III. DISCUSSION AND ANALYSIS

A. Complainant's IER Charge is Untimely

On November 2, 2017, IER sent Mr. Hayden a letter stating he did not timely file his charge. Therefore, IER dismissed his charge as untimely filed. *See* IER, Letter of Determination (Nov. 2, 2017) (citing 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.301(d)(1)).[2] Under section 1324b(d)(3), "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge with the Special Counsel." Further, 28 C.F.R. § 44.301(g) requires IER to "dismiss a charge or inadequate submission that is filed more than 180 days after the alleged occurrence of an unfair immigration-related employment practice, unless Special Counsel determines that the principles of waiver, estoppel,

[1] On January 18, 2017, the Department's Office of Special Counsel for Immigration-related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section (IER). *See* standards and procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91768-01 (Dec. 19, 2016); *see* 28 C.F.R. § 0.53. This Order refers to IER, but citations to the regulation and statute in this order nonetheless retain the name "Special Counsel," which is equivalent to IER.

[2] IER's regulations at 28 C.F.R. pt. 44 were amended in January 2017. The regulation cited in IER's letter of determination is now found at 28 C.F.R. § 44.301(g).

or equitable tolling apply." IER also informed Complainant that despite the dismissal, he could still present his claims and file a complaint against Respondent in this matter.

Complainant alleges that Respondent refused to hire him on November 12, 2015 when he interviewed for a school safety officer position. OCAHO Compl. at 8, 13. He asserts that by refusing to hire him, Respondent discriminated against him based on his national origin in violation of 8 U.S.C. § 1324b(a)(1). Complainant's IER charge and OCAHO complaint both assert that the alleged discrimination occurred on November 12, 2015. Under OCAHO precedent, charge and complaint filing deadlines, such as the deadline § 1324(d)(3) imposes, are "subject to equitable remedies such as waiver, estoppel, and equitable tolling, under appropriate circumstances." *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 7 (2016) (citing *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071–73 (1998)); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112–14 (2002). These remedies, however, are applied sparingly. *Nat'l R.R. Passenger*, 536 U.S. at 113.[3]

Here, Complainant's complaint asserts that the discriminatory event occurred on November 12, 2015.[4] Complainant did not submit a charge with IER until October 24, 2017, well beyond the 180-day limitations period. Complainant, however, also submitted a charge with the Equal Employment Opportunity Commission (EEOC). IER and the EEOC have a memorandum of understanding which provides that if a complainant files a charge with the EEOC that falls under IER's jurisdiction, the statute of limitations for filing is tolled, despite filing in the wrong forum. 54 F.R. 32499-03. Further, OCAHO has found that timely filing in the wrong forum may be

[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 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 OCAHO website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders.

[4] Complainant attached a document to his complaint which alleges that Respondent sent Complainant a letter on May 7, 2016, in which Respondent set forth the reasons why Respondent did not hire Complainant for the school safety officer position. OCAHO Compl. at 17. Even if the undersigned determined that the alleged discrimination occurred on May 7, 2016, Complainant's complaint would still be untimely, as Complainant's charge was filed with IER more than 180 days after this date as well.

ground for equitable tolling of filing deadlines. *See Mikhailine v. Web Sci Technologies*, 8 OCAHO no. 1033, 519 (1999).

However, as discussed further later in this order, *see infra* Section III.B., due to the nature of Complainant's charge and the size of Respondent, the EEOC was the proper forum for Complainant's charge. Therefore, the memorandum of understanding between EEOC and IER does not operate to toll the deadline for filing a charge with IER. Complainant does not dispute the fact that he filed his charge with IER more than 180 days after the alleged discrimination occurred. Complainant also does not allege any other facts to establish that he timely filed his charge in this case or why he is entitled to equitable tolling of the statute of limitations period. Accordingly, because Complainant filed his IER charge more than 180 days after the alleged discrimination occurred, and equitable tolling does not apply, his complaint is time barred.

B. Subject-Matter Jurisdiction

On January 2, 2018, Respondent filed a motion to dismiss based on lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1) and 28 C.F.R. § 68.11. Respondent also filed a Declaration by Eileen Flaherty, which stated that Respondent has more than fifteen employees and Respondent employed 55,111 employees on December 22, 2017. Mot. to Dismiss at 4. The Declaration and the Motion to Dismiss allege that because Respondent has more than fifteen employees, OCAHO does not have jurisdiction to hear Complainant's claims.

Under 8 U.S.C. § 1324b, "[n]o charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [ ], unless the charge is dismissed as being outside the scope of such title." § 1324b(b)(2). Generally, national origin discrimination claims against an employer with fifteen or more employees "are not within the scope of § 1324b, and must be directed to [the Equal Employment Opportunity Commission]." *Paz-Martinez v. Securitas Sec. Serv. USA, Inc.*, 11 OCAHO no. 1260, 3 (2015). Accordingly, OCAHO may only hear national origin discrimination claims brought under § 1324b(a)(1) when the employer employs "between four and fourteen employees." *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 13 (2002). "Where a court lacks statutory or constitutional power to adjudicate a case, dismissal is more appropriately entered on jurisdictional grounds because, unlike a summary decision or dismissal for failure to state a claim, a jurisdictional dismissal has no res judicata or collateral estoppel effect." *Stubbs v. The Desoto Hilton Hotel*, 8 OCAHO no. 1005, 151 (1998).

Complainant alleges that he is of Jamaican national origin and that he was a United States citizen at the time of the alleged discrimination. OCAHO Compl. at 4. The complaint does not allege

discrimination or retaliation on the basis of citizenship or document abuse. *Id.* at 8. The complaint indicates that Complainant filed a charge against the Respondent with the EEOC. OCAHO Compl. at 13. The EEOC dismissed Complainant's charge on July 28, 2016. OCAHO Compl. at 13. Complainant does not dispute that Respondent employed more than fifteen employees. OCAHO has previously found, "[b]ecause it is undisputed that the number of employees exceeds OCAHO jurisdictional limits for claims of national origin discrimination, those allegations must be dismissed for lack of jurisdiction." *Stubbs v. The Desoto Hilton Hotel*, 8 OCAHO 1005, 152 (1998). Similarly, Respondent employs more than fifteen employees and Complainant only alleges national origin discrimination under § 1324b. Therefore, OCAHO does not have jurisdiction to hear Complainant's national origin discrimination claim.

C. Discrimination based on Veteran Status and/or Mental Disability

Finally, a liberal reading of Complainant's complaint appears to allege that Respondent discriminated against him based on his veteran status. Complainant's Response to Order to Show Cause at 2. OCAHO's jurisdiction only extends to claims of "(1) citizenship status discrimination against protected individuals and, in relevant part, (2) national origin discrimination not covered by Title VII [of the Civil Rights Act]." *Ondina-Mendez*, 9 OCAHO no. 1085, 16; § 1324b(a)(1). Accordingly, OCAHO does not have jurisdiction to hear claims of discrimination based on veteran status.

In sum, Complainant has failed to establish any viable bases for his complaint. Accordingly, his complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

Dated and entered on November 8, 2018.

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Thomas P. McCarthy
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. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure