

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

March 5, 2019

BENJAMIN STEPHEN MACKINNON,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 19B00006
THE FINANCIAL TIMES,)	
Respondent.)	
_____)	

NOTICE AND ORDER TO SHOW CAUSE

This action 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 (2012). On October 25, 2018, Complainant, Benjamin MacKinnon filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, The Financial Times.

I. BACKGROUND

Complainant is appearing pro se in these proceedings. According to the Complaint, Complainant is a citizen of Canada and an alien authorized to work in the United States, who was authorized to work from April 25, 2018 to April 24, 2019, while his previous authorization expired on March 3, 2018.

Complainant alleges Respondent hired him in February 2018, and Respondent terminated him in March 2018 when his work authorization expired. Complainant alleges he expected Respondent to rehire him when he obtained his new work authorization in April 2018. After he received his new work authorization, Complainant contends Respondent refused to hire him based on his citizenship status. Specifically, Complainant asserts Respondent refused to rehire him because of the length of his work authorization. Complainant also claims Respondent committed document abuse in violation of § 1324b(a)(6), by refusing to accept his April 2018 work authorization card based on the expiration date. Complainant does not allege national origin discrimination.

Attached to the Complaint is the charge Complainant filed with the Department of Justice's Immigrant and Employee Rights Section (IER), dated May 10, 2018. Where the IER charge asks Complainant to provide his "citizenship status or immigration status or work authorization type," Complainant checked "None of the above, but is authorized to work."

On December 3, 2018, Respondent filed an answer and a separate motion to dismiss the complaint pursuant to 28 C.F.R. § 68.8¹ for failure to state a claim upon which relief can be granted. Respondent argues Complainant failed to state any facts to support a claim for national origin discrimination. Further, Respondent argues Complainant fails to state a claim for citizenship status discrimination because he failed to allege his is a "protected individual" under 8 U.S.C. § 1324b(a)(3). Finally, Respondent contends Complainant failed to state a claim for document abuse because he failed to allege document abuse based on his national origin and failed to allege document abuse based on his citizenship status because he did not allege he is a "protected individual."

Complainant did not file a response to Respondent's Motion to Dismiss.

II. LEGAL STANDARDS AND DISCUSSION

OCAHO rules state if a respondent files a motion seeking to dismiss all claims, the Court must provide Complainant with an opportunity to show cause as to why his Complaint should not be dismissed. 28 C.F.R. § 68.10(b).

Title 8 U.S.C. § 1324b(a)(1)(B) prohibits a person or other entity from discriminating against a "protected individual" with respect to hiring for employment or discharge from employment based on the individual's citizenship status. According to § 1324b(a)(3), a "protected individual,"

- (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 under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee . . . or is granted asylum

¹ The title of the Motion to Dismiss cites 28 C.F.R. § 68.8 which provides the rules for time computations. The body of the motion refers to § 68.10, which provides the rules for dismissal for failure to state a claim. The Court assumes the reference to § 68.8 was a typographical error and considers it a motion to dismiss under § 68.10.

The current record does not reflect that Complainant is a protected individual, as he did not identify that he has an immigration or citizenship status that falls in any of abovementioned statutory categories. To maintain a citizenship status discrimination claim, Complainant has the burden of establishing he is a protected individual. *See, e.g., Omoyosi v. Lebanon Correctional Inst.*, 9 OCAHO no. 1119, 4 (2005); *Prado-Rosales v. Montgomery Donuts*, 3 OCAHO no. 438, 452, 456–57 (1992). Further, to maintain a document abuse claim based on citizenship status, Complainant must also establish that he is a protected individual. *U.S. v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 31 (2017).

III. COMPLAINANT IS ORDERED TO SHOW CAUSE WHY HIS CLAIMS SHOULD NOT BE DISMISSED

From the pleadings and attachments, it appears Complainant is not a “protected individual” under § 1324b(a)(3), which would prevent him from maintaining a claim for citizenship status discrimination under 8 U.S.C. § 1324b(a)(1)(B). Complainant is ordered to show cause that he is a “protected individual.” Complainant alleges Respondent refused to hire him based on his citizenship status. Thus, Complainant’s claim for discriminatory hiring will be dismissed if Complainant fails to demonstrate that he qualifies as a “protected individual” as defined under 8 U.S.C. § 1324b(a)(3). *See Mar-Jac Poultry*, 10 OCAHO no. 1148 at 7 (citing *Omoyoshi*, 9 OCAHO no. 1119, 4–5). If Complainant establishes he is a “protected individual,” the undersigned will proceed as appropriate.

Additionally, to plead a document abuse claim under § 1324b(a)(6), a complainant must allege the employer refused to accept or requested different documents based on the complainant’s national origin or citizenship status. Complainant’s complaint does not allege document abuse based on his national origin. Only “protected individuals” may maintain claims of document abuse based on citizenship status. *Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298 at 31. Therefore, Complainant is further ordered to show cause why his document abuse claim should not be dismissed. Specifically, Complainant is ordered to show cause that he is a “protected individual” under § 1324b(a)(3). If he fails to demonstrate that he qualifies as a “protected individual”, his complaint against Respondent for allegedly refusing to hire him and document abuse will also be dismissed.

Complainant’s response providing the above-requested information must be received by this office within twenty-one (21) days of this order.

Further, the deadlines for filing prehearing statements, as set forth in the February 5, 2019 Order for Prehearing Statements are vacated and will be reset pending the outcome of the motion to dismiss.

SO ORDERED.

Dated and entered on March 5, 2019.

Priscilla M. Rae
Administrative Law Judge