

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

June 6, 2019

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

ORDER GRANTING MOTION TO DISMISS

This case arises under the anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. Complainant alleges Respondent refused to hire him based on his citizenship status in violation of § 1324b(a)(1)(B) and engaged in document abuse based on his citizenship status in violation of § 1324b(a)(6). Pending before the Court is Respondent's Motion to Dismiss.

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. His previous work 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." Compl. at 17.

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

Complainant did not file a response to Respondent's Motion to Dismiss. On February 5, 2019, the undersigned issued an Order for Prehearing Statements. On March 5, 2019, the undersigned issued a Notice and Order to Show Cause requiring Complainant to show cause why his Complaint should not be dismissed because he did not assert that he is a "protected individual" under § 1324b(a)(3). The undersigned also vacated the deadline for prehearing statements and instructed that the Court would reset the deadline pending the outcome of the motion to dismiss. On March 25, 2019, Complainant filed a response to the Order to Show Cause.

II. STANDARDS

A respondent "may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted." 28 C.F.R. § 68.10(a). If the respondent files a motion to dismiss, the Administrative Law Judge (ALJ) may dismiss a complaint if the ALJ "determines that the complainant has failed to state a claim upon which relief can be granted." 28 C.F.R. § 68.10(b). The Office of the Chief Administrative Hearing Officer (OCAHO) "rule for such motions is modeled after Federal Rule of Civil Procedure 12(b)(6)." *Sharma v. Discover Financial Services, LLC*, 12 OCAHO no. 1292, 7 (2016); see 28 C.F.R. § 68.1. On a motion to dismiss, generally, the Court's analysis is limited to the four corners of the complaint, but the Court may consider documents attached to or incorporated in the complaint. *Id.*; *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113–14 (1997).

III. DISCUSSION

In its motion, Respondent contends that the Court should dismiss the Complaint for failure to state a claim upon which relief can be granted because Complainant failed to allege he is a "protected individual" under § 1324b. Respondent further argues that Complainant does not allege a claim of discrimination based on national origin; thus, Complainant failed to state a claim for discriminatory hiring or document abuse under § 1324b.

In his response, Complainant argues that the Court should consider all iterations of § 1324b to interpret the meaning of “protected individual.” Complainant urges the Court to consider the 1986 version of § 1324b which permitted citizens and “intending citizens” to file citizenship status-based discrimination claims. Complainant argues the Court should consider the broad legislative intent behind the original version of § 1324b and the “intending citizen” requirement. When construing the “protected individual” requirement, Complainant asks the Court to apply his interpretation of Congress’s broad purpose for enacting § 1324b in 1986. He contends his immigration status is comparable “to the citizenship-intending immigrant protected classes outlined thirty years ago in [the] IRCA and the direct corollary of the congressional intent therein.” *Id.* at 5. Complainant asserts that Congress intended to extend the antidiscrimination provisions of the IRCA to citizens and non-citizens who made steps to obtain citizenship.

First, when Congress enacted the IRCA in 1986, under § 1324b, a citizen or “intending citizen” could assert a claim of discrimination based on citizenship status if the individual completed a declaration of intention to become a citizen *and* the individual was a lawful permanent resident, a temporary resident under § 245A(a)(1), a refugee, or an asylee. IRCA, Pub. L. No. 99-603, § 102(a), 100 Stat. 3359 (1986). Congress amended § 1324b in 1990, removed the “intending citizen” qualification, and replaced it with “protected individual.” § 1324b(a)(3); Immigration Act of 1990, Pub. L. No. 101-649, § 533, 104 Stat. 4978 (1990). Thus, to state a citizenship status-based discrimination claim, the complainant must be a “protected individual” under § 1324b(a)(3). § 1324b(a)(1)(B). Further, to state a citizenship status-based document abuse claim, the complainant must be a “protected individual.” *U.S. v. Mar-Jac Poultry*, 12 OCAHO no. 1298, 33 (2017); *Verdesi v. Ark Rustic Inn*, 13 OCAHO no. 1311, 6 (2018). Under § 1324b(a)(3), a “protected individual” is defined as a United States citizen or national, or a lawful permanent resident, a temporary resident under 8 U.S.C. §§ 1160(a) or 1255a(a)(1), a refugee, or an asylee.

While Complainant makes a creative argument regarding how the Court should interpret the “protected individual” requirement, Complainant does not assert that his immigration status falls into any of the categories enumerated in § 1324b(a)(3). In the Complaint, Complainant stated that at the time of discrimination, he was an alien authorized to work in the United States. Compl. at 5. On his IER charge form, when asked his citizenship, immigration status, or work authorization type, Complainant checked “None of the above, but is authorized to work.” Compl. at 17. As such, Complainant has not established that he is a “protected individual” under § 1324b(a)(3). Section 1324b(a)(3) provides a clear definition of “protected individual”; the Court lacks the authority to override the clear statutory text. *Mar-Jac Poultry*, 12 OCAHO no. 1298, at 31; see *M.S. v. Dave S.B. Hoon – John Wayne Cancer Institute*, 12 OCAHO no. 1305a, 9 n.11 (2018) (“Flexibility to ignore the statute is not within the [Administrative Law Judge’s] discretion.”). Since he is not a “protected individual,” Complainant cannot maintain a claim for discriminatory hiring or document abuse based on citizenship status under § 1324b. Complainant does not allege discrimination or document abuse based on national origin.

As such, the Court finds Complainant has failed to state a claim for discriminatory hiring or document abuse based on citizenship status under § 1324b. Complainant does not allege a national origin claim. The Complaint is DISMISSED.

SO ORDERED.

Dated June 6, 2019.

Priscilla M. Rae
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.