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

February 12, 2020

MANIKANDAN SIVASANKAR, Complainant, v. STRATEGIC STAFFING SOLUTIONS, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00016

NOTICE OF INTENT TO CONVERT MOTION

I. INTRODUCTION

This case arises under the antidiscrimination 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(a) (2018). Manikandan Sivasankar (Complainant) filed a complaint, pro se, with the Office of the Chief Administrative Hearing Officer (OCAHO) on November 12, 2019, alleging that Strategic Staffing Solutions (Respondent) violated § 1324b by discriminating against him based on his citizenship and nationality, and retaliated against him. Respondent filed a timely Answer. On December 11, 2019, Respondent filed a Motion to Dismiss. Complainant did not file a response.

II. BACKGROUND AND RESPONDENT'S POSITION

Complainant alleges in the Complaint that Respondent discriminated against him because of his citizenship status, retaliated against him for exercising his rights under §1324b, and asked for more or different documents than required for the employment eligibility verification process. Compl. at 8–12. He indicated that Respondent refused to hire him on January 10, 2019, as a Project Manager and business analyst for its client, USAA Company, because of his "visa status." *Id*. at 8. He also asserted that he was fired a month later because of his national origin. *Id.* at 10. In his charge with the Immigrant and Employee Rights (IER) Section, Complainant asserted that Respondent hired him for two weeks and then fired him without giving any reason, and the managers threatened him for reporting. Charge Form at 2; Compl. at 11. Complainant

asserts that Respondent refused to accept his employment authorization card (EAD) and H-1B Notice, indicating that it asked for a "green card or EAD copy." Compl. at 12. Complainant stated in his Complaint that he is an alien authorized to work in the United States based upon an H-1B visa and is also a pending asylee. *Id.* at 5.

Respondent argues in its Motion to Dismiss that Complainant is not a protected individual within the meaning of § 1324b, that OCAHO lacks subject matter jurisdiction over any national origin discrimination claims because the company employs more than fifteen employees, and Complainant failed to state a claim upon which relief can be granted. Respondent further argues that Complainant submitted an expired EAD.

III. STANDARDS FOR RULING ON A MOTION TO DISMISS

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10. Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court must "liberally construe the complaint and view it 'in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)).

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). Generally, "[w]hen matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision." *Barone v. Superior Wash & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013). If the Court converts a motion to dismiss, "the parties must be given appropriate notice so that they have a reasonable opportunity to present relevant materials." *Id.* "The court may, however, consider documents incorporated into the complaint by reference[.]" *Jarvis*, 7 OCAHO no. 930 at 113–14. Therefore, "documents attached to a motion to dismiss may be considered without converting the motion to one for summary decision if the documents are referred to in the complaint and are central to the claim." *Sharma v. Discover Fin. Servs*., 12 OCAHO no. 1292, 8 (2016) (citing *Rosenblum v. Travelbyus.com Ltd*., 299 F.3d 657, 661 (7th Cir. 2002); *Jarvis*, 8 OCAHO no. 930 at 113-14). Additionally, "a copy of a document attached to a pleading is a part of the pleading for all purposes." *Id.* (citing FED. R. CIV. P. 10(c)).

IV. DISCUSSION

Section 1324b(a) prohibits discrimination against any individual with respect to hiring or firing because of such individual's national origin (§ 1324b(a)(1)(A)) or, in the case of a "protected individual", because of such individual's citizenship status (§ 1324b(a)(1)(B)). In the case of discrimination based upon national origin, § 1324b indicates that it does not apply to persons covered under § 703 of the Civil Rights Act (Title VII) – in other words – to employers who employ more than fifteen persons. § 1324b(a)(2)(B); *see Hayden v. New York Police Dept.,* 13 OCAHO no. 1313, 4 (2018). "OCAHO may only hear national origin discrimination claims brought under § 1324b(a)(1) when the employer employs 'between four and fourteen employees.'" *Hayden*, 13 OCAHO no. 1313 at 4 (quoting *Ondina-Mendez v. Sugar Creek Packing Co*., 9 OCAHO no. 1085, 13 (2002)). Complainant asserted in his Complaint that he did not know how big the company was, but he indicated in the IER charge form that Respondent employs more than fifteen individuals. Charge Form at 2. Complainant has the burden to prove that OCAHO has subject matter jurisdiction. *Smiley v. City of Philadelphia*, 7 OCAHO no. 925, 15, 31 (1997). Accordingly, Complainant has not pled sufficient facts to state a claim as to discrimination based upon nationality. Respondent's motion is GRANTED as to Complainant's national origin discrimination claims.

Section 1324b(a)(1) permits citizenship-status discrimination claims if the individual is a statutorily-defined "protected individual." *United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 30 (2017); *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1261, 7 (2014); *see also Rainwater v. Doctor's Hospice of Georgia, Inc.,* 12 OCAHO no. 1300, 20 (2017). A "protected individual" is, in relevant part, a citizen or national of the United States, or an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under 8 U.S.C. §§ 1160(a) or 1255a(a)(1), is admitted as a refugee under 8 U.S.C. § 1157, or is granted asylum under 8 U.S.C. § 1158. § 1324b(a)(3). In the Complaint, Complainant alleges that he is an alien authorized to work in the United States from June 29, 2016 to October 5, 2020. Compl. at 5. He further alleges that he has an H1-B visa and is a "pending asylee." *Id.* Based upon the Complaint, Complainant has not stated a claim upon which relief can be granted as he has not pled that he is a protected individual under § 1324b(a)(3), and therefore, cannot assert a citizenship status discrimination claim. According, Respondent's motion is GRANTED as to Complainant's claims that Respondent refused to hire him and discharged him based upon his citizenship status.

Additionally, in *Mar-Jac*, the Administrative Law Judge held that only a "protected individual" can bring a document abuse claim under § 1324b(a)(6). *Mar-Jac Poultry*, 12 OCAHO no. 1298 at 33. Prior cases had found that any work authorized individual, not just a protected individual, could bring a document abuse claim. *See United States v. Mar-Jac Poultry*, 10 OCAHO 1148, 3 (2012). Further, OCAHO cases hold that a retaliation claim pursuant to § 1324b(a)(5) may be maintained by any work authorized individual, not just a protected individual as defined in § 1324b(a)(3). *See Fakunmoju v. Claims Adm. Corp*., 4 OCAHO no. 624, 308, 321 (1994), *aff'd*

53 F.3d 328 (4th Cir. 1995) (citing *Yohan v. Central State Hosp.*, 4 OCAHO no. 593, 13, 22 (1994)). As this case law is not settled, and the parties have not adequately briefed the issue, the Court will consider the alternative arguments.

Respondent argues that Complainant has not stated a claim of document abuse because Respondent presented an expired EAD card and, additionally, an H-1B visa is not an acceptable document to prove identity or verify work authorization. Therefore, Respondent had to ask for additional documentation. *See* 8 C.F.R. § 274a.2(b)(1)(v). With its Motion to Dismiss, Respondent attached a copy of an EAD with Complainant's name on it, but with the bottom cut off. Mot. Dismiss Ex. A. The EAD shows an expiration date of December 11, 2018. *Id.* While Complainant indicated in his Complaint that he submitted his EAD, he did not provide that document with his Complaint and has not responded to the motion. Complainant averred in the Complaint that he was authorized to work in the United States through 2020. Thus, Complainant's EAD is crucial to determining if OCAHO has subject matter jurisdiction. Because Complainant is pro se and has included a contradictory statement in his Complaint, in an abundance of caution the Court will convert the motion to a motion for summary decision.

As to the retaliation claim, Respondent argues in the alternative that Complainant did not state a claim for retaliation because he did not allege any facts in support of the claim. However, Complainant indicated in the Complaint that he was "not given any reason and threatened by the managers for reporting and told [he] will not be allowed to work for client anymore by any other agencies as well." Compl. at 11. The first section appears to refer to his termination. While the claim is sparse, construing the claim in the light most favorable to the non-movant, as we must, the Complaint meets the very minimal standards for notice pleading. However, as the Court will convert the motion to dismiss to a motion for summary decision, either party may submit materials of evidentiary value as to this claim.

The Fifth Circuit, the circuit in which the events in this case arose, has held that when a court *sua sponte* converts a Federal Rules of Civil Procedure Rule 12(b) motion into a summary judgment motion by considering matters outside the pleadings, the notice provisions must be observed. *Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979). Proper notice affords each party the opportunity to bring forth all of its evidence on the essential elements before suffering an adverse decision. *Jardines Bacata, Ltd. v. Diaz-Marquez*, 878 F.2d 1555, 1561 (1st Cir. 1989); *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 9.

Accordingly, by this notice, each party will have an opportunity to submit evidentiary materials, after which the subject motion will be treated as one for summary decision. If the motion does not dispose of the entire case, the parties are not precluded from filing another motion for summary disposition at the close of discovery.

V. CONCLUSION

Respondent's Motion to Dismiss is GRANTED as to any discrimination claims based on national origin. Complainant's national origin-based discrimination claims are DISMISSED. Respondent's Motion to Dismiss is GRANTED as to the claims for discriminatory hiring and discharge based on citizenship status. Complainant's citizenship status-based discrimination claims are DISMISSED. The Motion to Dismiss is CONVERTED TO A MOTION FOR SUMMARY DECISION as to the retaliation and unfair documentary practices claims.

The parties are further advised as follows:

Within twenty-one (21) days of this order, Strategic Staffing Solutions may file materials of evidentiary quality in support of summary decision on Complainant's unfair documentary practices and retaliation claims, after which Manikandan Sivasankar will have an additional twenty-one (21) days in which to file materials in opposition.

SO ORDERED.

Dated and entered on February 12, 2020.

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Jean C. King
Chief Administrative Law Judge