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

April 10, 2020

MD SHAKHAWAT HOSSAIN, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00035
JOB SERVICE NORTH DAKOTA, Respondent.	)	

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

This matter arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. Complainant Md Shakhawat Hossain alleges that Respondent Job Service North Dakota discriminated against him because of his citizenship status and national origin in violation of § 1324b(a)(1), retaliated against him in violation of 8 U.S.C. § 1324b(a)(5), and committed document abuse in violation of 8 U.S.C. § 1324b(a)(6). Compl. at 10-12. Respondent denied the allegations and filed a Motion to Dismiss, predicated, in part, on its Eleventh Amendment sovereign immunity. Mot. Dismiss at 1. For the reasons set forth herein, the Motion to Dismiss is GRANTED, and the complaint is dismissed in its entirety.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainant is a foreign national from Bangladesh who stated that he is currently authorized to work in the United States. Compl. at 5.

On October 28, 2019, Complainant filed a charge with the Department of Justice's Immigrant and Employee Rights Section (IER) against Job Service North Dakota (JSND) alleging discrimination based on his citizenship status and national origin, retaliation, and document abuse. *Id*. at 10-12. On November 8, 2019, IER sent Complainant a letter of determination informing him that his submission was untimely filed and, thus, IER could not open an investigation into his claims. IER Letter of Determination at 1.

On January 17, 2020, Complainant filed his complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant asserts that Respondent hired him as a Programmer Analyst in 2017. EEOC Form 5 at 1. On June 20, 2018, Respondent terminated Complainant from his employment. Compl. at 10. Complainant stated that Respondent's Human Resources (HR) personnel "filled out the STEM Extension Training Plan Form or I-983 and provided [him an] e-verify MOU [memorandum of understanding] to give it to [the] school DSO [designated school official]." *Id*. On June 14, 2018, the school DSO, Carly Gunnerson, issued two copies of Form I-20 (Certificate of Nonimmigrant Student Status) so that Complainant could get an extension of his work eligibility. *Id*. According to Complainant, he presented these forms to an HR employee, Jason Sutheimer, but Sutheimer informed Complainant that his E-verify number did not work and that he cancelled Complainant's I-20 forms. *Id*. On June 20, 2018, Respondent presented Complainant with a termination letter, which Complainant refused to sign initially. *Id*. Complainant alleges that Jason Sutheimer threatened to jeopardize Complainant's immigration status. *Id*. According to Complainant, he then felt pressured to sign the termination letter, which he proceeded to sign. *Id*. The next day, Complainant alleges that he gave Respondent a resignation letter because he was told that, if he did so, he could potentially be rehired in the future. *Id*. When Complainant later reapplied for the position, Respondent did not rehire him. *Id*. Complainant also alleges that on or around December 17-21, 2018, he started to notice that some of his co-workers were following him and some people would block his driveway at night. Compl. at 15.

Respondent timely filed an answer and a Motion to Dismiss (Motion), on February 27, 2020. The answer denies the material allegations of the complaint and raises the following affirmative defenses: (1) Complainant failed to state a claim upon which relief may be granted; (2) as a state agency, Respondent is entitled to state sovereign immunity under the Eleventh Amendment to the United States Constitution; (3) Respondent employs more than fourteen employees; and (4) Respondent had legitimate, non-discriminatory reasons for terminating Complainant's employment. Answer at 2.

The Motion similarly argues that, as a state agency, Respondent is entitled to state sovereign immunity under the Eleventh Amendment to the United States Constitution. Mot. at 2. Alternatively, Respondent argues that (1) with respect to the national origin claims, this Court lacks jurisdiction over Respondent because it employs more than fourteen people and, thus, is covered by Title VII of the Civil Rights Act, and (2) Complainant's filing with the IER is untimely. *Id*.

On March 6, 2020, Complainant filed a response in opposition of the motion, along with a brief in support of the response. Complainant asserts in his brief that the last date of discriminatory conduct occurred either December 17-22, 2018, or March 24, 2019. Complainant also argues that Respondent is not entitled to sovereign immunity under the Eleventh Amendment. Brief in Opp. of Mot. at 5. Complainant argues that Respondent waived its sovereign immunity, on a case-by-case basis, "by accepting federal funds for its Unemployment Insurance Division, [Workforce Innovation and Opportunity Act (WIOA)], and other federal funds." *Id*. at 4, 6. Furthermore, Complainant asserts that his complaint was "timely filed with EEOC, according to [the] discovery rule[,] . . . equitable tolling, [and] estopp[el] under [T]itle VII interpretation." *Id*.

at 8. According to Complainant, he only discovered his injury in February of 2019, which was within 180 days of filing his charge with EEOC. *Id.*

Complainant also filed a response to Respondent's Answer on the same day. This document restates the factual allegations set forth in the complaint.

III. STANDARDS

The Administrative Law Judge (ALJ) may dismiss the complaint, based on a motion by the respondent, if the ALJ determines that the complainant has failed to state a claim upon which relief can be granted. 28 CFR § 68.10(b). While the OCAHO rules of practice do not specifically provide for motions to dismiss for lack of subject-matter jurisdiction, respondents may assert, on a motion to dismiss, that the Court lacks subject-matter jurisdiction on a claim. *See* 28 C.F.R. § 68.1 (providing that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules . . . ."); *see also Seaver v. Bae Systems*, 9 OCAHO no. 1111, 2 (2004)[1] (citations omitted). Rule 12(b)(1) of the Federal Rules of Civil Procedure may be used as a general guideline in assessing whether OCAHO has subject-matter jurisdiction over a particular claim. 28 C.F.R. § 68.1.

Since this decision ultimately rests upon sovereign immunity grounds, it will be treated as a motion to dismiss for lack of subject-matter jurisdiction. *See Ugochi v. North Dakota Dept. of Human Services*, 12 OCAHO no. 1304, 2 (2017) (citing *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1042-43 (8th Cir. 2000)). In determining whether there is a factual basis to support the Court's exercise of subject-matter jurisdiction, the Court is not limited to the allegations in the complaint and may consider other material in the record. *Ugochi*, 12 OCAHO no. 1304 at 2 (citing *Osborn v. United States*, 918 F.2d 724, 728-30 (8th Cir. 1990)).

IV. DISCUSSION

The Eleventh Amendment to the U.S. Constitution states, "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has interpreted this amendment to mean that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *see also Alden v.*

[1] 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.

Maine, 527 U.S. 706, 745-46 (1999). The party seeking immunity from suit has the burden of establishing that the Eleventh Amendment applies to it. *Ugochi*, 12 OCAHO no. 1304 at 3 (citing *Reffell v. Prairie View A&M University*, 8 OCAHO no. 1057, 4 (2000).

Under OCAHO case law, it is well-established that "complaints against state agencies are routinely dismissed in this forum when the immunity defense is timely asserted." *Ugochi*, 12 OCAHO no. 1304 at 4 (quoting *Guerrero v. Cal. Dep't of Corr. and Rehab.*, 11 OCAHO no. 1264, 2-3 (2015)). Respondent timely asserted this defense in both its answer and Motion. In light of the above mentioned principles, Respondent has demonstrated immunity from suit under 8 U.S.C. § 1324b.

JSND is a "state entity." A respondent seeking immunity under the Eleventh Amendment "must submit proof that it is, in fact, a 'state entity.'" *Wong-Opasi v. Tennessee*, 8 OCAHO no. 1042, 652 (2000). North Dakota expansively defines the "State" as including "an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the state." N.D. Cent. Code § 32-12.2-01(7). JSND is "charged with administering the provisions of the North Dakota unemployment compensation law and the provisions of the North Dakota state employment service . . . which must be administered by a full-time salaried executive director, who is subject to the supervision and direction of the governor." N.D. Cent. Code § 52-02-01. Given that Job Service North Dakota is an entity created by the State of North Dakota in order to "administer[] the provisions of the North Dakota unemployment compensation law," the Court finds that it is, in fact, a "state entity."

There are two exceptions to state sovereign immunity under the Eleventh Amendment. First, Congress may statutorily abrogate an unconsenting state's sovereign immunity by clear and unmistakable language, pursuant to its power to enforce the substantive provisions of the Fourteenth Amendment to the U.S. Constitution. *See Welch v. Tex. Dept. of Highways and Public Transp.*, 483 U.S. 468, 474 (1987); *see also Ugochi*, 12 OCAHO no. 1304 at 4. Second, a State may waive its sovereign immunity and consent to suit in federal court. *Welch*, 483 U.S. at 473. The Court may only find a waiver where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673.

As to the first exception to Eleventh Amendment immunity, "it is well-established OCAHO precedent that Congress did not express any intent to abrogate the states' sovereign immunity when it enacted 8 U.S.C. § 1324b." *Ugochi*, 12 OCAHO no. 1304 at 5; *Reffell*, 9 OCAHO no. 1057 at 4 (collecting cases). In *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 508-09 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held that § 1324b did not abrogate either federal or state sovereign immunity, and no OCAHO decision since then has held otherwise. *Ugochi*, 12 OCAHO no. 1304 at 5; *Reffell*, 9 OCAHO no. 1057 at 4. Since Complainant is asserting a claim under § 1324b, and Congress did not abrogate the states' sovereign immunity when it enacted § 1324b, the first exception to Eleventh Amendment immunity does not apply in this case.

Further, Congress may indirectly abrogate a state's sovereign immunity by conditioning the receipt of federal funds on a state's waiving immunity under the program for which the federal funds are provided. *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1995)). "A waiver of Eleventh Amendment immunity as a condition of the receipt of federal funds should be found 'only where stated by the most expressive language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Doe v. Nebraska*, 345 F.3d 593, 597-98 (8th Cir. 2003) (quoting *Edelman*, 415 U.S. at 673). Complainant argues that North Dakota has waived its sovereign immunity by accepting federal funds under the "Unemployment Insurance Trust Fund, the Workforce Innovation Opportunity Act, and many other federal funds" received for "any purpose." Resp. in Opp. Mot. at 1.

Section 1324b does not contain any provision allocating federal funds conditioned on a state's waiver of sovereign immunity. *See* § 1324b. Further, there is nothing in the Unemployment Trust Fund statutory provisions that condition the receipt of federal funds on a state's waiver of sovereign immunity. *See* 42 U.S.C. § 1104. Similarly, the Workforce Innovation Opportunity Act does not contain any provision that conditions the receipt of federal funds on a state's waiver of sovereign immunity for suits brought under 8 U.S.C. § 1324b. *See* 29 U.S.C. § 3101 *et seq*. Complainant does not identify any other federal statute that conditions the receipt of federal funding on the waiver of sovereign immunity in cases under 8 U.S.C. § 1324b. Complainant only argues that North Dakota waived its sovereign immunity based on its receipt of "other federal funds" for "any purpose." [2] Even when a state has accepted federal funds and waived sovereign immunity, the Eighth Circuit has narrowly interpreted such waiver as applying only to the particular department or agency that receives or distributes the federal funds. *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000). Thus, a state does not waive sovereign immunity in all cases when it accepts federal funds. *Id.* As such, the Court finds that North Dakota has not waived sovereign immunity in cases brought under § 1324b by accepting federal funds.

With regard to the second exception, North Dakota has not consented to suit under 8 U.S.C. § 1324b, as it has asserted Eleventh Amendment immunity as a ground for dismissal. Moreover, as the Court in *Ugochi* noted, while North Dakota has abrogated its state sovereign immunity

[2] While Complainant does not cite another federal statute under which Respondent accepted federal funds on the condition that it waive sovereign immunity, courts in the Eighth Circuit have considered whether a state waived sovereign immunity for cases arising under federal nondiscrimination statutes by accepting funds under § 504 of the Rehabilitation Act. *Jim C. v United States*, 235 F.3d 1079, 1081 (8th Cir. 2000); *Fiske v. Iowa*, 633 F.Supp.2d 682, 690 (N.D. Iowa 2009). Section 504 conditions the acceptance of funds on the waiver of immunity under specifically enumerated federal nondiscrimination statutes and "any other federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). Section 1324b is not enumerated in § 504. *See id.* Section 504 only applies to non-enumerated federal statutes "prohibiting discrimination by recipients of federal financial assistance." *Fiske*, 633 F.Supp.2d at 690. Section 1324b is not a statute "prohibiting discrimination by recipients of federal financial assistance." *Compare* § 1324b(b)(1) ("It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or discharging the individual from employment . . . because of such individual's national origin, or . . . citizenship status"), *with* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin[ ] . . . be subjected to discrimination under any program or activity receiving Federal financial assistance"); *see also Fiske*, 633 F.Supp.2d at 689, 690.

from certain claims, *see, e.g.*, N.D. Cent. Code § 32-12.2-02; *Bulman v. Hulstrand Constr. Co.*, 521 N.W.2d 632, 637, 639 (N.D. 1994) (abolishing the State's common-law sovereign immunity from tort liability) (relying on N.D. Const., art. I, § 9), North Dakota has specifically preserved its Eleventh Amendment sovereign immunity by statute. *See* N.D. Cent. Code § 32-12.2-10 ("This chapter does not waive the state's immunity under the Eleventh Amendment to the United States Constitution in any manner, and this chapter may not be construed to abrogate that immunity."); *Ugochi*, 12 OCAHO no. 1304 at 5.

Additionally, the doctrine of *Ex parte Young*, 209 U.S. 123, 158-59 (1908), which holds that individual state officials or employees may be sued in federal court for prospective injunctive relief when the plaintiff alleges that the officials or employees are violating federal constitutional rights and laws, is inapplicable. Complainant did not file his complaint against any individual JSND employees or officials. The Young doctrine "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Accordingly, because Complainant's complaint is only against the State of North Dakota and no exception to North Dakota's Eleventh Amendment sovereign immunity applies, JSND cannot be sued in this forum and Complainant's complaint must be dismissed.

V. CONCLUSION

Respondent is a state agency that is entitled to sovereign immunity from these proceedings pursuant to the Eleventh Amendment to the U.S. Constitution. Neither of the exceptions to sovereign immunity apply to this case. Congress has not abrogated North Dakota's Eleventh Amendment immunity to lawsuits brought under 8 U.S.C. § 1324b, nor has North Dakota expressly or impliedly waived its Eleventh Amendment immunity for the instant case. As such, the Complaint is DISMISSED.

SO ORDERED.

Dated and entered on April 10, 2020.

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Jean C. King
Chief 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.