

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

April 24, 2020

JAYABEN PATEL,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 2020B00036
	)	
USCIS BOSTON,	)	
Respondent.	)	
_____	)	

NOTICE AND ORDER TO SHOW CAUSE

I. BACKGROUND

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Complainant, Jayaben Patel, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 21, 2020, alleging that Respondent, the United States Citizenship and Immigration Services (USCIS) office in Boston, discriminated against her based on her citizenship status and national origin, and retaliated against her in violation of § 1324b.

On January 24, 2020, this office sent a Notice of Case Assignment For Complaint Alleging Unlawful Employment and a copy of the complaint, to Respondent, via certified U.S. mail. The Notice of Case Assignment directed that an answer was to be filed within thirty (30) days of receipt of the complaint, that failure to answer could lead to default, and that proceedings would be governed by Department of Justice regulations.<sup>1</sup> The U.S. Postal Service website indicates that service was completed on February 1, 2020, making Respondent’s answer due no later than March 2, 2020. Respondent did not file an answer.

On March 17, 2020, the undersigned issued a Notice of Entry of Default (the Notice) requiring Respondent, within twenty days of the order, to file an answer and show good cause for failing to file a timely answer. Respondent’s response to the Notice was due no later than April 6, 2020. Respondent did not file a response or an answer.

<sup>1</sup> Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2020).

## II. STANDARDS

### A. OCAHO's Authority to *Sua Sponte* Raise Issues of Subject Matter Jurisdiction

Although Respondent has not filed a responsive pleading in this matter, the Court may not issue a default judgment if the Court lacks subject matter jurisdiction over a complainant's claims. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO no. 919, 1167, 1170 (1997).<sup>2</sup> OCAHO Administrative Law Judges (ALJs) have the authority to determine whether OCAHO has jurisdiction over a dispute. *Windsor v. Landeen*, 12 OCAHO no. 1294, 4–5 (2016); *Wilson*, 6 OCAHO no. 919 at 1172 (citing *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) (“when entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the court . . . has an affirmative duty to look into its jurisdiction over the subject matter[.]”)).

Further, a court has “an obligation to inquire *sua sponte* into its own subject matter jurisdiction.” *McCulloch v. Velez*, 364 F.3d 1, 5 (1st Cir. 2004). OCAHO has held that “the issue of subject matter jurisdiction may be raised at any time, ‘even by the court, *sua sponte*.’” *Kim v. Getz*, 12 OCAHO no. 1279, 2 (2016) (quoting *Horne v. Town of Hampstead*, 6 OCAHO no. 906, 941, 945 (1997)). Additionally, “[w]hen a forum lacks subject matter jurisdiction, a default judgment must be vacated and the case dismissed.” *Wilson*, 6 OCAHO no. 919 at 1172.

The OCAHO rules do not contain a specific provision regarding dismissals for lack of subject matter jurisdiction. See 28 C.F.R. § 68; *Getz*, 12 OCAHO no. 1279 at 3. Under the OCAHO rules, the Federal Rules of Civil Procedure “may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.” 28 C.F.R. § 68.1. Thus, the Federal Rules and case law from the United States Court of Appeals for the First Circuit, where this case arises, serve as “general guidance” when an OCAHO ALJ questions OCAHO's subject matter jurisdiction. *Getz*, 12 OCAHO no. 1279 at 3. Under Federal Rule of Civil Procedure 12(h)(3), “[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” The party invoking jurisdiction bears the burden to establish that the court has jurisdiction. *Windsor*, 12 OCAHO no. 1294 at 4.

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<sup>2</sup> 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 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 website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

## B. Failure to State a Claim

Additionally, the OCAHO rules provide that the ALJ may dismiss the complaint *sua sponte*, 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). However, in the prehearing phase of a proceeding, the ALJ shall not *sua sponte* dismiss the complaint in its entirety for failure to state a claim upon which relief may be granted, “without affording the complainant an opportunity to show cause why the complaint should not be dismissed.” *Id.*

## II. COMPLAINANT IS ORDERED TO SHOW CAUSE WHY HER CLAIMS SHOULD NOT BE DISMISSED

### A. Lack of Subject Matter Jurisdiction

Similar to lower federal courts, OCAHO is a forum of limited jurisdiction “with only the jurisdiction which Congress has prescribed.” *Wilson*, 6 OCAHO no. 919 at 1173. Section 1324b prohibits unfair immigration-related employment practices. *See* § 1324b. Specifically, under § 1324b, OCAHO has the authority to hear claims of discriminatory hiring and discharge based on citizenship status or national origin, retaliation under § 1324b(a)(5), and document abuse for the purpose of satisfying the employment eligibility requirements under 8 U.S.C. § 1324a. § 1324b(a); *Wilson*, 6 OCAHO no. 919 at 1175.

There is a substantial question as to whether OCAHO has subject matter jurisdiction to hear Complainant’s discrimination and retaliation claims. Complainant alleges that Respondent discriminated against her based on her national origin and citizenship status and retaliated against her while she sought an adjustment of her immigration status through an I-130 Petition. Complainant’s Statement at 1–2; Letter to Director Riordan.

In support of her discrimination claims, Complainant does not allege any facts indicating that Respondent discriminated against her in relation to her employment with Respondent. Instead, Complainant alleges that while seeking to adjust her status, USCIS officers discriminated against her during her interview and the investigation related to her I-130 Petition. Complainant’s Statement at 1–2; Letter to Director Riordan.

Further, Complainant’s allegations in support of her retaliation claim do not indicate that Respondent interfered with Complainant’s exercise of her rights under § 1324b or retaliated against Complainant for participating in an investigation or proceeding under § 1324b. Instead, she alleges that her attorney wrote a letter to Director Riordan at USCIS detailing the USCIS officers’ alleged discriminatory conduct during Complainant’s interview related to her I-130 Petition. She alleges that after her attorney wrote the letter, USCIS officers retaliated against her when they harassed and threatened her during visits to her home and family business, and arrested her son. Complainant’s Statement at 2

Complainant must establish that OCAHO has subject matter jurisdiction over her discrimination and retaliation claims. *Wilson*, 6 OCAHO no. 919 at 1172. As such, Complainant is ordered to show cause as to why the Court should not dismiss her Complaint for lack of subject matter jurisdiction.

#### B. Failure to State a Claim Upon Which Relief Can be Granted

Even if Complainant establishes that OCAHO has subject matter jurisdiction, the undersigned may dismiss her claims for failure to state a claim upon which relief can be granted. The Complaint and attached documents indicate that Complainant may have failed to state a claim upon which relief can be granted. Relief under § 1324b is limited to “hiring, firing, recruitment or referral for a fee, retaliation [under § 1324b(a)(5)], and document abuse [under § 1324b(a)(6)].” *Wilson*, 6 OCAHO no. 919 at 1175 (quoting *Tal v M.L. Energia, Inc.*, 4 OCAHO no. 705, 1012, 1026 (1994)). Section 1324b does not prohibit all immigration-related discrimination or retaliation claims. *Id.*; see § 1324b; *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 814 (7th Cir. 2003) (explaining that § 1324b(a)(5) “does not cover all activities that implicate any provision of the immigration law”).

To state a discrimination claim under § 1324b, Complainant must allege that she suffered an adverse employment action. *Barone v. Superior Washer & Gasket Corp.*, 10 OCAHO no. 1176, 6 (2013). Complainant does not allege any facts indicating that she suffered an adverse employment action as she does not allege that Respondent refused to hire her or discriminatorily discharged her.

Additionally, while a complainant does not always need to show that she suffered an adverse employment action when asserting a claim based on retaliation, she must show that the respondent took an adverse action to discourage a complainant from activity related to the filing of an IER charge or an OCAHO proceeding, or to interfere with her rights or privileges secured specifically under § 1324b. *Martinez v. Superior Linen*, 10 OCAHO no. 1180, 7 (2013); *Breda v. Braintree Hosp., LLC*, 10 OCAHO no. 1202, 9 (2013). Complainant alleges that Respondent retaliated against her after her attorney wrote a letter to Director Riordan of USCIS detailing Respondent’s alleged discriminatory conduct during Complainant’s interview related to her I-130 Petition. Complainant does not appear to have alleged any facts to show that Respondent took the alleged retaliatory actions to interfere with Complainant’s rights under § 1324b or to discourage her from filing an IER charge or from participating in an OCAHO proceeding.

As such, Complainant must also show cause why her claims for national origin and citizenship status discrimination, and retaliation under § 1324b(a)(5) should not be dismissed for failure to state a claim upon which relief can be granted.

#### IV. CONCLUSION

Complainant must show cause why her discrimination and retaliation claims should not be dismissed for lack of subject matter jurisdiction.

Complainant must also show cause as to why her discrimination and retaliation claims should not be dismissed for failure to state a claim upon which relief can be granted. Complainant's response is due on or before May 15, 2020.

SO ORDERED.

Dated and entered on April 24, 2020.

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Jean C. King  
Chief Administrative Law Judge