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

May 29, 2020

LEOLA BRANCH,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00033
	)	
DUONG SCHUMACHER,	)	
Respondent.	)	
	)	

ORDER DENYING MOTION TO DISMISS

I. BACKGROUND

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. On January 8, 2020, Complainant, Leola Branch, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Ms. Young.[1] Complainant alleges that Respondent discharged her based on her national origin, retaliated against her, and engaged in document abuse in violation of § 1324b. Complainant attached to her complaint the charge form she filed with the Immigrant and Employee Rights Section (IER) of the Civil Rights Division of the Department of Justice (IER Charge Form), two letters from IER, a typed statement (Typed Statement), and a handwritten page dated January 2, 2020. In her Complaint, Complainant states that she filed a charge with the Equal Employment Opportunity Commission (EEOC). On February 18, 2020, Respondent filed an answer, a motion to dismiss, and a motion to change caption. Respondent attached to its Motion to Dismiss two charges Complainant filed with the Texas Workforce Commission (TWC) alleging Respondent discriminated against her. On March 3, 2020, Complainant filed a response to the motion to dismiss and reply to Respondent's answer.

On March 27, 2020, the undersigned issued an Order of Inquiry and Changing Caption. In the Order, the undersigned noted that both parties acknowledge that Complainant filed a charge with the TWC and/or the EEOC alleging that Respondent discriminated against her based on her

[1] Complainant named Ms. Young as the respondent in her Complaint. Subsequently, the undersigned granted Respondent's motion to change the caption changing Respondent's name to Duong Schumacher.

national origin. Thus, the undersigned requested that the parties answer several questions, including, what was the status of the TWC and/or EEOC charge; whether the TWC and/or EEOC charges are based on the same facts as Complainant's OCAHO complaint; and to submit documents showing the current status of the TWC and/or EEOC charge.

On May 3, 2020, Complainant filed a response to the Order of Inquiry. Complainant attached two TWC charge forms, a Notice of Transfer from the TWC to the EEOC, a letter from the EEOC, and a copy of the status of her EEOC charge. Respondent did not respond to the Order of Inquiry.

II. STANDARDS

When considering a motion to dismiss, the Court accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990).[2] Additionally, complaints of pro se complainants "must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel." *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 777 (1992). "OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted." *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 2 (2020) (quoting *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016)). However, "[t]he OCAHO Rules of Practice and Procedure do not contain a specific provision regarding dismissal of actions for lack of subject matter jurisdiction but the Federal Rules of Civil Procedure 'may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.'" *Ugochi v. North Dakota Department of Human Servs.*, 12 OCAHO no. 1304, 4 (2017) (quoting 28 C.F.R. § 68.1).

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). However, to determine whether there is a factual basis to support a court's exercise of subject matter jurisdiction, a court is not limited to the allegations in the complaint and may consider other material in the record. *Ugochi*, 12 OCAHO no. 1304 at 4; *Davis ex. rel Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003) (when a party challenges the allegations supporting subject matter jurisdiction, the court may reference evidence outside the pleadings

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[2] 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.

without converting the motion to dismiss to a motion for summary judgment). Subject matter jurisdiction may be raised at any time, even by the Court sua sponte. *Kim v. Getz*, 12 OCAHO no. 1279, 2 (2016).

III. DISCUSSION

Respondent argues that the Complaint must be dismissed because Complainant filed a charge with the EEOC based on the same facts as her OCAHO complaint and Complainant failed to state a claim for national origin-based discrimination upon which relief can be granted.

A. No Overlap With EEOC Charges

OCAHO case law states that "[s]ection 1324b(b)(2) precludes [OCAHO] jurisdiction over alleged unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEOC charge." *Lareau v. USAIR, Inc.*, 7 OCAHO no. 932, 195, 206 (1997) (citing *Wockenfuss v. Bureau of Prisons*, 5 OCAHO no. 767, 373, 376 (1995); *Adame v. Dunkin Donuts*, 5 OCAHO no. 722, 1, 3–5 (1995)). Section 1324b(b)(2) states:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.], unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

8 U.S.C. § 1324b(b)(2).

"Section 1324b(b)(2) simply acknowledges that two agencies are empowered to enforce the statutory prohibition against national origin employment discrimination where the statutes confer jurisdiction differentiated by the size of the employer, a factor not always known by or clear to the protected individual at the outset." *United States v. Marcel Watch Corp.*, 1 OCAHO no. 143, 988, 1000 (1990)). Section 1324b(b)(2) states that when a complainant files a national origin discrimination claim both under Title VII and the INA, only one agency has subject matter jurisdiction over the claim. § 1324b(b)(2). The EEOC has jurisdiction over national origin discrimination claims against employers with more than fourteen employees. *Basua v. Walmart #1554*, 3 OCAHO no. 535, 1351, 1355 (1993). OCAHO has subject matter jurisdiction to hear claims of national origin discrimination against employers with between four and fourteen employees. *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 13 (2002).

OCAHO Administrative Law Judges (ALJs) have dismissed national origin discrimination claims because the complainant also filed a charge with the EEOC. However, in many cases, when the ALJ dismissed the claim, the complainant had already filed a Title VII claim in federal court and/or the EEOC had already dismissed the claim on the merits. *See Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO no. 892, 784, 799–800 (1996); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO no. 929, 85, 102 (1997); *Rainwater v. Doctor's Hospice of Georgia, Inc.*, 12 OCAHO no. 1300, 3 (2017). Other ALJs considering national origin claims pending both before OCAHO and the EEOC have dismissed the OCAHO claim when it was clear that the respondent employed more than fourteen employees. *See DeGuzman v. First American Bank*, 3 OCAHO no. 585, 1889, 1891 (1993); *Caspi v. Triglid Corp.*, 7 OCAHO no. 991, 1064, 1065 (1998); *Nickman v. Mesa Air Group*, 9 OCAHO no. 1113, 7 (2004).

Here, Complainant filed a charge with the TWC alleging discrimination based on national origin and age. Complainant states the TWC transferred her charge to the EEOC and the charge is still in the investigatory stage. Complainant states that Respondent has filed a position statement and she has filed a rebuttal. Complainant states that the TWC had difficulty determining Respondent's number of employees because Respondent was "evasive and uncooperative with TWC's inquiries." Resp. Order of Inquiry at 2. Complainant indicated in her IER charge form that she could not determine the number of employees in Respondent's business. In support of its position, Respondent provided the TWC charge and the Amended TWC charge where Complainant alleged that Respondent had fifteen plus employees. Respondent did not respond to the undersigned's Order of Inquiry and Respondent does not allege that it employs more than fourteen employees, or otherwise argue that OCAHO lacks jurisdiction based on its number of employees. While Complainant's Complaint and her EEOC charge both appear to allege national origin discrimination and be based upon the same set of facts, § 1324b(b)(2) states that OCAHO may hear a charge filed with both OCAHO and the EEOC if the EEOC lacks jurisdiction. Based on the record at this early stage of the case, Respondent has not shown that OCAHO lacks jurisdiction to hear Complainant's national origin claim pursuant to 8 U.S.C. § 1324b(b)(2). While the inconsistency regarding the Complainant's allegations as to the pivotal fact of the number of employees is troubling, and Court must construe the facts in the light most favorable to the pro se Complainant. Further, as noted above, the case may be dismissed at any time based upon lack of subject matter jurisdiction. Therefore, Respondent's motion to dismiss based on § 1324b(b)(2) is DENIED.

B. Failure to State a Claim

Respondent also argues that Complainant's national origin discrimination claim should be dismissed because she failed to state a prima facie case. Specifically, Respondent argues that Complainant failed to identify her national origin, Respondent's national origin, or the national origin of the comparators. Respondent also argues that it can hire any qualified employees over Complainant, Complainant failed to allege with particularity her qualifications for the position, and failed to allege how her qualifications compared to those nail technicians that Respondent hired. Respondent argues that under the *Twombly* pleading standard, Complainant failed to state enough facts to support her claim.

First, Respondent mistakenly relies on the federal pleading standard as set forth in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) as OCAHO has declined to adopt the federal pleading standard articulated in those cases. *United States v.*

Mar-Jac Poultry, 10 OCAHO no. 1148, 9 (2011); *United States v. Split Rail Fence Co.*, 10 OCAHO no. 1181, 5 (2013). The OCAHO rules explicitly address the pleading requirements in OCAHO cases and require that the complaint set out "[t]he alleged violations of law, with clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3). OCAHO ALJs have explained that "unlike complaints filed in district courts, complaints filed before OCAHO '[have] already been the subject of an underlying administrative process,' . . . and thus an OCAHO complaint 'will ordinarily come as no surprise to a respondent that has already participated in the underlying process.'" *Split Rail Fence*, 10 OCAHO no. 1181 at 5 (quoting *Mar-Jac Poultry*, 10 OCAHO no. 1148 at 9). Thus, the complaint only needs to provide the violations of law and a clear and concise statement of facts for each alleged violation.

As to Respondent's argument that Complainant did not plead enough facts to establish a prima facie claim for national origin discrimination, OCAHO case law explains that "[w]hile there is no requirement in a case pursuant to § 1324b that a complainant plead a prima facie case, a § 1324b complaint must nevertheless contain sufficient minimal factual allegations to satisfy 28 C.F.R. § 68.7(b)(3) and give rise to an inference of discrimination." *Montalvo v. Kering Americas, Inc.*, 14 OCAHO no. 1350, 3 (2020) (citing *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 5 (2016)).

Here, Complainant alleges that she applied for a position with Respondent as a nail technician. She contends that during her phone interview, Respondent asked, "what is your nationality?" Compl. at 10; Typed Statement. Complainant alleges that on her first day of work, Respondent asked for her driver's license and Social Security Card and took them to make copies. Complainant claims that Respondent then asked "what you got in you?" Typed Statement. Complainant alleges that she responded and shortly after Respondent fired her. Thus, Complainant has provided sufficient facts to support her claim of national origin discrimination.

Finally, Respondent appears to contend that under § 1324b(a)(4), it is not an unfair immigration-related employment practice to hire other qualified nail technicians over Complainant. Section 1324b(a)(4) states, "it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified." As an initial matter, Complainant indicated that she is a United States citizen, and therefore it is unclear how this provision applies. In any event, this argument requires factual findings which are not appropriate at this stage of the proceedings.

As such, Respondent's Motion to Dismiss for failure to state a claim for national origin discrimination is DENIED.[3]

[3] In her Complaint, Complainant also alleges that Respondent retaliated against her and engaged in document abuse. Respondent's Motion to Dismiss does not address the retaliation or document abuse claims.

IV. CONCLUSION

Respondent did not establish that OCAHO lacks subject matter jurisdiction over Complainant's national origin claim. Complainant has stated a claim for national origin-based discrimination. Respondent's Motion to Dismiss is DENIED.

SO ORDERED.

Dated and entered on May 29, 2020.

Jean C. King
Chief Administrative Law Judge