

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

August 18, 2020

AURELIO GALINDO,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00039
)	
SMITHFIELD FOODS & YUMA COUNTY,)	
Respondent.)	
_____)	

AMENDED ORDER GRANTING MOTIONS TO DISMISS

An Order Granting Motions to Dismiss was initially issued in the above-captioned case on August 12, 2020. Pursuant to 28 C.F.R. § 68.52(f), this Amended Order Granting Motions to Dismiss amended the order issued on August 12, 2020, and corrects solely for typographical errors.

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 (IRCA), 8 U.S.C. § 1324b. Aurelio Galindo (Complainant) filed a complaint, *pro se*, with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 24, 2019, alleging that Respondents, Smithfield Foods¹ (Smithfield) and Yuma County, discriminated against him based on his citizenship status and national origin in violation of 8 U.S.C. § 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 8. Respondents denied the allegations and filed motions to dismiss the complaint. For the reasons set forth herein, both of the motions are GRANTED, and the complaint is dismissed in its entirety.

II. BACKGROUND AND PROCEDURAL HISTORY

¹ Smithfield noted in its answer that it is incorrectly identified in the caption of the case as Smithfield Foods. Its correct name is Murphy-Brown LLC, d/b/a Smithfield Hog Production.

Complainant is a foreign national from Mexico who is authorized to work in the United States pursuant to a TN visa. Compl. at 4.

On May 10, 2019, Complainant filed a charge with the Department of Justice’s Immigrant and Employee Rights Section (IER) against Smithfield and Yuma County alleging discrimination based on his citizenship status and national origin, retaliation, and document abuse. *Id.* at 8-12. On October 15, 2019, IER sent Complainant a letter of determination informing him that IER is dismissing his charge. IER Letter of Determination at 1. The letter explained that IER does not have jurisdiction over the charge for several reasons. *Id.* First, IER concluded that Complainant is an “Alien Authorized to Work” and, thus, not a protected individual for citizenship status discrimination. *Id.* Second, IER determined that it lacks jurisdiction over the national origin claim because Respondent employs fifteen or more employees. *Id.* Third, IER explained that Complainant’s charge does not provide facts supporting his claim for unfair documentary practices or retaliation. *Id.* Lastly, IER stated that the charge does not provide any details about how Yuma County was involved in the alleged discriminatory or retaliatory acts. *Id.*

On January 24, 2020, Complainant filed his complaint with OCAHO.² Complainant alleged that a manager from Smithfield, on October 2, 2013, “fire[d] [him] without reason (gay person).” Compl. at 10. He also stated, at the time he was fired, that Smithfield refused to accept the documents he presented to prove that he was authorized to work in the United States. *Id.* at 12. Complainant explained in an addendum to the complaint that he was fired because he had an accident at Smithfield. Handwritten Addendum to Compl. Moreover, Complainant asserted that Smithfield asked him for more or different documents than required for the employment eligibility verification process on July 2, 2013. *Id.* Complainant also asserted that he was retaliated against regarding a dispute with a board. *Id.* at 11. Additionally, Complainant alleged that Smithfield refused to re-hire him as a Product Resource Specialist after he applied for the position on March 5, 2018. *Id.* at 8. In an addendum to the complaint, Complainant explained that “the police of Yuma, IC3 of FBI and other lawyers & agencies” have been intimidating and harassing him for two years. *See* Handwritten Addendum to Compl.

Smithfield timely filed an answer and a Motion to Dismiss (“Smithfield’s Motion”) on March 3, 2020. The answer denies the material allegations of the complaint and raises the following affirmative defenses: (1) the complaint fails to state a claim upon which relief can be granted; (2) Complainant did not file a timely charge of discrimination with IER; (3) OCAHO lacks jurisdiction over Complainant’s national origin discrimination claims because Smithfield employs more than fifteen employees; (4) OCAHO lacks jurisdiction over Complainant’s citizenship discrimination claims because Complainant is an Alien Authorized to Work, and thus, not a protected individual; (5) the complaint fails to state a claim against Smithfield

² The complaint provided contact information for Smithfield, but did not provide any contact information regarding Yuma County. Initially, OCAHO served the complaint and Notice of Case Assignment for Complaint Alleging Unlawful Employment only on Smithfield. On February 24, 2020, Complainant filed a Notice of Appearance and included Ron Swehla, Yuma County, on the Certificate of Service. At the time, this was the only document in the case that was served on Yuma County. Attorneys for Yuma County entered their appearance on March 10, 2020. OCAHO mailed the Complaint to Yuma County on March 18, 2020.

because Smithfield's treatment of Complainant was based solely upon reasonable, legitimate, non-discriminatory factors; (6) Complainant was not treated less favorably than any similarly situated individual; and several other defenses.

The Motion similarly argues that (1) Complainant did not file a timely charge of discrimination with IER; (2) OCAHO lacks jurisdiction over the national origin claim because Respondent employs more than fifteen employees; (3) OCAHO lacks jurisdiction over Complainant's citizenship discrimination claims because Complainant is an Alien Authorized to Work, and thus, not a protected individual.

On April 20, 2020, Yuma County timely filed an answer and a Motion to Dismiss ("Yuma's Motion"). The answer either denies the material allegations of the complaint or states Yuma lacks sufficient information to admit or deny the allegations. The answer also raises the following affirmative defenses: (1) OCAHO lacks jurisdiction over any and all of Complainant's claims against Yuma County because it never created an employment or perspective employment relationship with Complainant; (2) Complainant failed to establish OCAHO's subject matter jurisdiction over any and all alleged claims against the County; and (3) Complainant failed to establish a claim upon which relief can be granted. The Motion similarly argues Complainant did not establish subject-matter jurisdiction for OCAHO to review his claims because Complainant did not allege either discriminatory refusal to hire or discriminatory discharge. Yuma's Mot. at 3-4.

On March 13 and April 24, 2020, Complainant filed a number of documents, including responses to the motions to dismiss. Complainant resubmits his complaint, and asserts a number of new facts. As it relates to the retaliation charge, Complainant appears to indicate that he began to suffer retaliation by the County after he purchased a home in 2017.

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)³ (citations omitted). Rule 12(b)(1) of the

³ 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

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.

IV. DISCUSSION

A. Claims Against Smithfield Are Time-Barred

The claims against Smithfield are time-barred because the charge was filed more than 180 days after the alleged discriminatory practice. Under § 1324b, “[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge with [IER].” 8 U.S.C. § 1324b(d)(3); *see also Ndzerre v. Wash. Metro. Area Transit Auth.*, 13 OCAHO no. 1306, 8 (2017). Filing a timely IER charge is thus a condition precedent to the filing of a private action with OCAHO. *See Ndzerre*, 13 OCAHO no. 1306 at 8. Claims, under § 1324b, based on events occurring more than 180 days prior to the filing of an IER charge are ordinarily barred by operation of the law. *Id.* Here, Complainant filed a charge with IER on May 10, 2019. Compl. at 1. In the complaint, Complainant asserted that Smithfield refused to hire him after he applied for the job of Product Resource Specialist on March 5, 2018. Compl. at 6. Complainant also asserted that he was fired by Smithfield on October 2, 2013. Compl. at 8. He stated that, on October 2, 2013, Smithfield refused to accept the documents he presented to prove his identity and/or show that he was authorized to work in the United States. Compl. at 10. Complainant also alleged that, on July 2, 2013, Smithfield asked him for more or different documents than required for the employment eligibility verification process to show that he was eligible to work in the United States. *Id.* Furthermore, Complainant asserted that he was retaliated against by Smithfield in July of 2013. Compl. at 9. Each of these events occurred more than 180 days prior to May 10, 2019, when Complainant filed the charge with IER.

While there are exceptions to the normal timing requirements imposed by the statute of limitations, none of the exceptions apply in this case. First, the Court may use equitable tolling to set aside an untimely filing with IER when the complainant shows “(1) that he has been pursuing [his] rights diligently, and (2) that some extraordinary circumstance stood in [his] way and prevented timely filing.” *Ndzerre*, 13 OCAHO no. 1306, 8-9 (citing *Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013)). Complainant has not asserted, nor do the facts show, that he was diligently pursuing his rights and that some extraordinary circumstance prevented timely filing. Second, when a petitioner has filed a charge with the Equal Employment Opportunity Commission (EEOC) under 8 U.S.C. § 1324b, and it is determined to be the wrong forum or if the complaint is properly before the EEOC and involves a subsidiary question under OCAHO’s jurisdiction, this court may toll the statute of limitations. *Id.* (citing *Caspi v. Trigild Corp.*, 6 OCAHO no. 907, 957, 964 (1997)). This exception does not apply in this case because the record does not show that Complainant filed a charge with EEOC. Accordingly, neither exception to the normal timing requirements applies in this case. Therefore, the Court finds that the claims against Smithfield are time-barred because all of the unfair immigration-related employment practices alleged in the complaint occurred more than

database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the OCAHO website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

180 days prior to the filing of the charge with IER. Smithfield's Motion is GRANTED and the complaint is DISMISSED with respect to Smithfield.

B. No Jurisdiction Over Claims Against Yuma County

With respect to Yuma County, Complainant alleged in an addendum to the complaint that "the police of Yuma, IC3 of FBI and other lawyers & agencies" have been intimidating him for two years. *See* Handwritten Addendum to Compl. It appears that Complainant alleged that the police of Yuma were stealing mail from his residence, listening to his phone calls, blocked his communications, and engaged in terrorism and human trafficking. *Id.* It does not appear from the complaint that any of this alleged conduct was linked to a protected act from Complainant.

This forum does not have jurisdiction to hear Complainant's claims against Yuma County because Complainant does not allege an unfair immigration-related employment practice under 8 U.S.C. § 1324b. OCAHO's jurisdiction under 8 U.S.C. § 1324b "is limited to claims that involve the hiring, recruitment, or discharge of employees, 8 U.S.C. § 1324b(a)(1), retaliation for engaging in protected conduct, 8 U.S.C. § 1324b(a)(5), and document abuse, 8 U.S.C. § 1324b(a)(6)." *Thompson v. Sanchez Auto Services, LLC*, 12 OCAHO no. 1302, 4 (2017). Nothing in the language of § 1324b suggests that it could encompass claims regarding police harassment that are unrelated to employment.

Moreover, the complaint does not allege that Yuma County retaliated against Complainant for engaging in a protected act. Section 1324b is "not a catch-all statute . . . it prohibits retaliation only when that retaliation is engaged in for the purpose of discouraging activity related to the filing of [IER] charges or interfering with rights or privileges secured specifically secured under § 1324b." *Torres v. Pacific Continental Textiles, Inc.*, 10 OCAHO no. 1203, 4 (2013). Given that Complainant did not allege an existing or prospective employment relationship with Yuma County, it is unclear how Yuma County could have retaliated against Complainant for any conduct that would be protected under § 1324b. Furthermore, to the extent that Complainant specifies conduct he engaged in that resulted in an act of retaliation by Yuma County, it appears to stem from his purchase of property. "Reply Affirmative Defense by Aurelio Galindo" at 5.

Accordingly, this forum does not have jurisdiction over Complainant's claims against Yuma County. Yuma County's Motion is GRANTED and the complaint is DISMISSED in its entirety.

V. CONCLUSION

Complainant's claims against Smithfield are time-barred because the charge was filed more than 180 days after the alleged discriminatory practices. Complainant's claims against Yuma County are not within the jurisdiction of this forum because Complainant does not allege an unfair immigration-related employment practice under 8 U.S.C. § 1324b.

Therefore, both of Respondents' motions to dismiss are GRANTED and the complaint is DISMISSED in its entirety.

SO ORDERED.

Dated and entered on August 18, 2020.

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.