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

October 2, 2020

TEMITOPE OGUNRINU, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 19B00032
LAW RESOURCES & ARNOLD & PORTER KAYE SCHOLER LLP, Respondent.	)	

ORDER ON DISCRIMINATION CLAIMS, DENYING ARNOLD & PORTER'S REQUEST TO DISMISS RETALIATION CLAIM, AND PERMITTING FURTHER BRIEFING ON DOCUMENT ABUSE CLAIMS

I. BACKGROUND

Temitope Ogunrinu (Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on June 5, 2019. Complainant asserts claims of citizenship status discrimination, document abuse, and retaliation in violation of 8 U.S.C. § 1324b, when she was offered a position on a two-week discovery project (the Project) through a legal staffing service, Law Resources, Inc., with the law firm of Arnold & Porter Kay Scholer, LLP (Arnold & Porter). The offer was conditional: she had to reconfirm that she is a U.S. citizen and does not have dual citizenship with any other country because of a mistaken belief that the legal requirements of the litigation required it. Am. Compl. at 5. Complainant asserts that when she did not respond to the question, she was not hired for the job. Complainant further asserts she was retaliated against because she has not been contacted for future opportunities. Am. Compl. at 7.

After discovery began, proceedings were stayed for approximately five months while the parties unsuccessfully attempted to settle. The case was placed back before this Court in July 2020. On August 8, 2020, this Court issued an order that, among other things, bifurcated the discrimination claims under § 1324b(a)(1)(B) from the retaliation and document abuse claims and the damages portion of the proceedings. *See Ogunrinu v. Law Resources and Arnold & Porter Kaye Scholer*,

13 OCAHO no. 1332d (2020). [1] The Court also ordered the parties to show cause why the Court should not enter an order of liability as to Complainant's discrimination claims under § 1324b(a)(1)(B), based upon the admissions in Respondents' respective briefs (the Order). *See. e.g. United States v. Davila*, 7 OCAHO no. 936, 8 (1997); *United States v. Tri Component*, 5 OCAHO no. 821, 765, 768 (1995) ("Summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted."); *see also* FED. R. CIV. P. 56(c). In addition, the Court asked the parties for briefing as to whether, based upon the facts as admitted by Respondents, Complainant set forth a separate claim for improper documentary practices under § 1324b(a)(6), and whether the claim, if cognizable, can be resolved at this point in the litigation. The parties timely filed responses to the Order to Show Cause. On September 4, 2020, Complainant filed a motion requesting judicial notice of a settlement agreement between Respondents and the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER). On September 22, 2020, Complainant filed a motion seeking voluntary dismissal of her national origin discrimination claim.

II. DISCUSSION

A. Citizenship Status Discrimination under § 1324b(a)(1)(B)

Law Resources, Inc. stated as follows: "Law Resources agrees with this Court that an Order of Judgment as to liability only may be entered against Respondents concerning Ms. Ogunrinu's claims for discrimination based upon citizenship under 8 U.S.C. § 1324b(a)(1)(B) relating to the Project." Law Resource's Resp. at 3. Arnold & Porter states: "Arnold & Porter admits liability on the citizenship discrimination claim under 8 U.S.C. § 1324b(a)(1)(B) in relation solely to the single, limited-duration document review project that took place from October 3–12, 2018 (the 'Project')." Arnold & Porter Resp. at 2. Complainant also agrees that, based upon the facts as admitted by the parties, the Court may enter an order regarding liability for citizenship discrimination.

The briefs provide that Law Resources, Inc. advertised for attorneys to work on a document review project (the Project). Law Resource's Resp. at 2. The document review project was for Arnold & Porter, and involved the review of materials protected under the International Traffic

[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 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.

in Arms Regulations ("ITAR") and, as a result, Arnold & Porter imposed a citizenship restriction based on a mistaken belief that such a requirement was mandated under ITAR. Arnold & Porter Resp. at 2. On September 20, 2018, Complainant contacted Law Resources and stated that she was available for work. Law Resources Resp. at 2. Law Resources asked Complainant if she would be interested in working on a new document review project for Arnold & Porter and when she indicated that she was, Law Resources directed Complainant to submit her resume and fill out Arnold & Porter's conflict screening form. *Id*. Complainant submitted this information, and Law Resources submitted her packet to Arnold & Porter as a potential candidate for the Project. *Id.* On September 26, 2018, Arnold & Porter contacted Law Resources and asked that Law Resources "double check and confirm that all candidates [for the Project] have exclusive U.S. citizenship[.]" *Id.* Arnold and Porter told Law Resources that "[n]o other citizenship [was] acceptable[,]" including dual citizenship. *Id*. On September 27, 2020, Law Resources emailed Ms. Ogunrinu and asked her to re-confirm that she is a U.S. citizen and did not have any dual citizenships in any other countries. When Ms. Ogunrinu would not provide the information requested by Arnold & Porter, Law Resources told her that it was unable to staff her to the Project, which ultimately lasted from October 3–12, 2018. *Id.* at 3.

Accordingly, the Court finds Respondents Law Resources, Inc. and Arnold & Porter liable for citizenship status discrimination under 8 U.S.C. 1324b(a)(1)(B). As this finding is based upon the concessions and admissions of the parties in briefing to this Court, the Court need not and does not take judicial notice of any settlement agreements as requested by Complainant.

B. National Origin Discrimination under § 1324b(a)(1)(A)

Respondents also request that the case be dismissed as to Complainant's national origin discrimination based upon lack of subject matter jurisdiction because both Respondents employ more than fourteen employees. Complainant filed a motion seeking voluntary dismissal of the national origin-based claim because, although she believes the claim is meritorious, she faces limitations on time, resources, and challenges with discovery. Mot. Voluntary Dismissal.

First, the OCAHO rules do not specifically cover a voluntary dismissal by the complainant, but the Federal Rules of Civil Procedure may be used as a general guideline for any situation not covered by the OCAHO rules, the Administrative Procedure Act, any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1. Under Federal Rule of Civil Procedure 41(a)(2), the Court may, in certain circumstances, order dismissal of an action at the plaintiff's request. "Such an order is proper only if a plaintiff has made a motion for dismissal." *LeEdwards v. Kumagai Int'l USA Corp.*, 4 OCAHO no. 609, 197, 200 (1994). Rule 41(a)(2) allows the Court to dismiss with or without prejudice, with the most important consideration being the interests of the defendant. *Huesca v. Rojas Bakery*, 4 OCAHO No. 654, 550 (1994) (citing *Schwarz v. Folloder*, 767 F.2d 125, 129 (5th Cir.1985)). If the plaintiff moves for dismissal under Rule 41(a)(2) and does not specify whether the dismissal be with or without prejudice, the matter is left to the sound discretion of the court. *Id.* at 555 (citing *Kapowas v.*

Williams Ins. Agency, Inc., 11 F.2d 1380, 1385 (7th Cir.1993)). Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and, the adequacy of plaintiff's explanation for the need to dismiss. *Id.* at 556 (citing *Bosteve Ltd. v. Marauszwki*, 110 F.R.D. 257, 259 (E.D.N.Y.1986); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir.1969) (dismissal without prejudice properly denied where discovery considerably advanced and defendant's motion for summary judgment pending)).

In the instant case, Complainant has moved to dismiss her nationality claim, but does not indicate in her motion whether she seeks a dismissal with or without prejudice. The Court considers that this case has been pending since June 2019, the case is at an advanced stage, Respondents have spent considerable time and expense on discovery, Complainant's reasons relate in part to her time constraints, and, as discussed below this Court does not have jurisdiction over the nationality claim. Thus, Complainant's motion to voluntarily dismiss her nationality discrimination claim is GRANTED and Complainant's nationality discrimination claim is DISMISSED WITH PREJUDICE.

In the alternative, 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). 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)). 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.

Similar to lower federal courts, OCAHO is a forum of limited jurisdiction "with only the jurisdiction which Congress has prescribed." *Wilson v. Harrisburg School Dist.*, 6 OCAHO no. 919, 1167, 1173 (1997). OCAHO only has jurisdiction to hear national origin discrimination claims against employers with between four and fourteen employees. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020). In the complaint, Complainant did not state how many employees Law Resources Inc. or Arnold & Porter employs. In the charge form filed with IER, and attached to the original complaint, Complainant stated that Law Resources employed more than 14 employees. In her amended complaint, Complainant alleged that OCAHO has jurisdiction over Arnold & Porter because it employs more than three employees. Am. Compl. at 4. Complainant has not alleged sufficient facts to show that OCAHO has jurisdiction to hear national origin discrimination claims against Respondents.

As Complainant has moved to dismiss her nationality claim, this case has been pending since June 2019, the case is at an advanced stage, Respondents have spent considerable time and expense on discovery, this Court does not have jurisdiction over the nationality claim, and Respondent's reasons relate in part to her time constraints, Complainant's nationality discrimination claim is DISMISSED WITH PREJUDICE.

C. Document Abuse Claim under § 1324b(a)(6)

This Court's Order sought briefing from the parties as to whether, based upon the facts as admitted by Respondents, Complainant has set forth a separate claim for improper documentary practices under § 1324b(a)(6), and whether the claim, if cognizable, can be resolved at this point in the litigation.

To establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017). These two elements, an act and an intent, are essential to a claim of document abuse. *Id.* For individual claims of document abuse, the relative burdens of proof and production are typically allocated using the traditional burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* at 5; *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015).

The amended complaint states that Respondent refused to accept documents Complainant presented to prove her identity and/or show that she was authorized to work, and that this happened on September 27, 2018, and September 26, 2019. Am. Compl. at 7. Complainant also alleges that she does not recall Respondents requesting any specific document, she was "told to simply confirm that she does not hold dual-citizenship, because the client wanted to know." Am. Compl. at 8. In her response to the Order, Complainant cites to the same set of facts as the citizenship claim, and includes excerpts from emails and job postings in her brief, concluding that the requests to demonstrate that she was not a dual citizenship was for the purpose of the employment verification process.

Respondents deny liability for a document abuse violation. Law Resources, Inc. states that Complainant has not stated a prima facie claim of document abuse, arguing that the I-9 process occurred in 2010 when Complainant first completed an application for temporary placement, eight years before the project at issue here. Law Resources Resp. at 6. Law Resources argues that there is no evidence (or allegations) that Ms. Ogunrinu was asked to provide additional or

different documentation, or that Law Resources refused to accept and/or rejected any documentation in connection with the employment verification process that occurred in 2010. Law Resources includes a number of exhibits, including the Form I-9 Complainant completed in 2010.

Arnold & Porter argues that it contracts with Law Resources for document review attorneys on an as-needed basis. Arnold & Porter Resp. at 3. Arnold & Porter argues that it has no role in the employment eligibility verification process, as pursuant to its Master Services Agreement, this is the responsibility of Law Resources. Arnold & Porter also argues that it cannot be held liable under a joint employer theory because the relationship between Arnold & Porter and Law Resources does not meet the elements to satisfy the joint employment doctrine, citing to *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 408–09 (4th Cir. 2015) (quoting *Bristol v. Bd. of Cnty. Comm'rs*, 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc)).

While it appears that the factual predicate arises from the same nucleus of facts as the citizenship discrimination claim, Complainant and Respondents submitted evidence outside of the pleadings in response to the Court's inquiry. To provide an orderly means of resolving the issue, the Court will construe the parties' filings as motions for summary decision. *See, e.g. Barone v. Superior Wash & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013) ("When matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision."). If the Court converts a motion to dismiss to a motion for summary decision, "the parties must be given appropriate notice so that they have a reasonable opportunity to present relevant materials." *Id.*

Accordingly, the Court will treat the filings related to document abuse claims as motions for summary decision, and will defer resolution of the issue until the summary decision briefing period has been exhausted. The parties may supplement the arguments and evidence regarding the document abuse claim at any time before the summary decision deadline, and may respond pursuant to the summary decision timeframe set by this Court.

D. Retaliation claim under §1324(b)(a)(5)

Arnold & Porter seeks dismissal of the retaliation claim, arguing that Complainant did not allege sufficient facts to state a claim for retaliation. Arnold & Porter Resp. at 6. Complainant asserts that she can establish a claim against Arnold & Porter for retaliation and that Arnold & Porter is vicariously liable for Law Resources' discrimination. Complainant's Resp. at 18-19. Complainant's amended complaint states that she "has not been contacted for future opportunities, as was promised after she raised the issue concerning Respondent's dual citizenship inquiry." Am. Compl. at ¶ 27.

OCAHO does not demand the "plausibility" standard required in federal courts as outlined by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 8-10 (2012); *United States v. Split*

Rail Fence Co., Inc., 10 OCAHO no. 1181, 5 (2013) (CAHO declined to modify or vacate interlocutory order). OCAHO's rules merely require the complaint to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3); *Split Rail Fence*, 10 OCAHO no. 1181 at 5. Motions to dismiss for failure to state a claim are generally disfavored, and will only be granted in extraordinary circumstances. *Id.* (citing *Lone Star Indus., Inc. v. Horman Family Trust*, 960 F.2d 917, 920 (10th Cir. 1992); *United States v. AztecaRest, Northgate*, 1 OCAHO no. 33, 175 (1988)).

The Court finds that Complainant pled sufficient facts to allege a retaliation claim against Arnold & Porter as Complainant's brief allegations identified the facts supporting a claim for retaliation and the allegations are not limited to Law Resources. Given the advanced stage of this case, and the lower pleading standard in OCAHO proceedings, the Court denies Arnold & Porter's request to dismiss the retaliation claim at this point in the proceedings.

III. CONCLUSION

The Court finds Respondents Law Resources, Inc. and Arnold & Porter liable for citizenship status discrimination under 8 U.S.C. 1324b(a)(1)(B). Complainant's motion for judicial notice is MOOT. The Court finds that Complainant's national origin discrimination claim against both Respondents is DISMISSED WITH PREJUDICE. Arnold & Porter's request to dismiss Complainant's retaliation against it is DENIED because Complainant has alleged facts to support a retaliation claim against Arnold & Porter. Finally, the Court will treat Respondents' filings related to the document abuse claims as motions for summary decision, and will defer resolution of the issue until the summary decision briefing period has been exhausted. The parties may supplement the arguments and evidence regarding the document abuse claim at any time before the summary decision deadline, and may respond pursuant to the summary decision timeframe set by this Court.

SO ORDERED.

Dated and entered on October 2, 2020

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Jean C. King
Chief Administrative Law Judge