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

December 3, 2020

MARTINE MBITAZE, Complainant, v. CITY OF GREENBELT, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00005

ORDER ON PENALTIES

On October 11, 2019, Complainant, Martine Mbitaze, filed a complaint against Respondent, City of Greenbelt, with the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint alleges that Respondent refused to hire Complainant as a law enforcement officer based on her national origin and citizenship status and engaged in document abuse in violation of 8 U.S.C. § 1324b. On October 1, 2020, this Court issued an order granting summary judgment for the City of Greenbelt as to Complainant's claims based on national origin and citizenship discrimination, but denying the motion as to Complainant's document abuse violation, and found that the City engaged in document abuse. *Order on Mot. for Summ. Decision*. This Court sought briefing on the remedies for the document abuse claim. Complainant filed a Motion for Injunction and Monetary Remedy on October 13, 2020, and Respondent filed a Briefing on the Remedies on October 27, 2020, and a Response to Complainant's Motion for Injunction and Monetary Remedy on November 9, 2020 (Opposition).

I. Background

In the October 1, 2020 Order, this Court found that "[t]he position of law enforcement officer requires proof of United States citizenship." *Order on Mot. for Summ. Decision* 12. The Court found that Complainant provided a current United States passport as proof of citizenship, but that the City, through its training coordinator, asked for additional naturalization paperwork regarding Complainant's citizenship status. *Id.* The stated reasons for requesting the additional paperwork was because "passports expire" and Complainant gave conflicting information about her naturalization, reasons that were not reasonable. *Id.* This Court found that as Complainant had set forth a prima facie case, and Respondent's explanations for seeking additional documents

were not reasonable, the burden shifting analysis dissolved. *Id.* at 11. The Court found "that Respondent asked for, and insisted upon, more documents than required because the Complainant is a derivative citizen." *Id.*

The Court dismissed the national origin discrimination claim for lack of subject matter jurisdiction. *Id.* at 11. As regards the citizenship status discrimination claim, the Court found that, even assuming arguendo that Complainant established a prima facie claim, Respondent articulated legitimate, nondiscriminatory reasons for not hiring Complainant, and Complainant did not show that Respondent's articulated reasons were pretextual. *Id.* at 13–14.

II. Legal Standards

When a person or entity is found to have engaged in an unfair immigration-related employment practice, the law provides that a judge must issue an order requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A). Other remedies, however, are discretionary. 8 U.S.C. § 1324b(g)(2)(B). Discretionary remedies include ordering the following: compliance with § 1324b with respect to individuals hired for a period of up to three years; retention of the names and addresses of those who apply for employment for a period up to three years; hiring of the aggrieved party with or without back pay; payment of the applicable civil penalty; posting of notices informing employees about their rights and about the employer's obligations under § 1324b; and education of the hiring personnel. *Id.*

III. Parties' Positions

Complainant asserts that the City should be required to educate its workforce about immigration laws, it should pay a civil monetary penalty, a cease and desist order should be issued, and seeks $125,602.68 for negligent infliction of emotional distress. Mot. for Inj. and Monetary Remedy 2–5. As regards the latter, Complainant states that she experienced a loss of enjoyment in life as a result of Complainant's actions and the litigation she was compelled to bring. *Id.* at 3–5.

Respondent agrees with Complainant's contention that it can be required to educate its employees to avoid any future document abuse. Opp'n 1. It also argues that the civil penalty range is less than that set forth by Complainant. *Id.* Lastly, it argues that this Court does not have jurisdiction over common law tort claims. Further, even if this Court had jurisdiction over common law tort claims, the State of Maryland does not recognize claims for negligent infliction of emotional distress, nor has the matter been litigated. *Id.* (citing *Short v. Ramsey*, No. 002742, 2017 WL 1013211 (Md. Ct. Spec. App. Mar. 15, 2017)).

IV. Discussion

A court should tailor remedies "to the specific practices they are designed to address, and a complainant is entitled only to remedies commensurate with the deprivation he suffered." *Eze v. W. County Transp. Agency*, 10 OCAHO no. 1140, 7 (2011), (citing *Iron Workers Local 455 v. Lake Const. & Dev. Corp.*, 7 OCAHO no. 964, 632, 697–98 (1997)).[1]

As an initial matter, "request[s] for compensation for emotional distress, humiliation, and punitive damages exceed[] the forum's jurisdiction which is limited to awards of backpay and reinstatement." *Naginsky v. Dept. of Defense*, 4 OCAHO no. 710, 1062, 1064 (1994); *see also Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 2 n.5 (2017). Accordingly, this Court does not have authority to award Complainant for negligent infliction of emotional distress.

Complainant does not seek to be hired, nor is she seeking backpay. Compl. 10, 13. In any event, the statute provides that no order shall require the hiring of an individual or the payment to an individual of any back pay if the individual "was refused employment for any reason other than discrimination on account of national origin or citizenship status." 8 U.S.C. § 1324b(g)(2)(C); *see also Eze*, 10 OCAHO no. 1140 at 6 ; *Jackson v. Verizon Wireless*, 676 F. Supp. 2d 728, 738 (S.D. Ind. 2009). "[I]f the plaintiff had been screened out based on an impermissible characteristic, this would entitle her to an injunction to ensure full and fair consideration in the future regardless of her qualifications, but back pay or other forms of relief might be precluded if the defendant could show that the plaintiff would not have been hired in any event." *Eze*, 10 OCAHO no. 1140 at 6; *see also Patterson v. Greenwood Sch. Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982).

Respondent's stated reasons for not hiring Complainant provide preponderant evidence that Complainant would not have been hired even absent the discriminatory conduct. As noted above, Respondent continued moving Complainant through the hiring process even though it had not received the requested document; rather, it stopped the hiring process when it received negative information in the background investigation, as well as Complainant's email, the tone of which Respondent found offensive. *See* Order on Mot. for Summ. Judgment 7–8.

[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.

Accordingly, the Court finds that Complainant would not have been hired even in the absence of the document abuse, and back pay or reinstatement is therefore inappropriate.

Of the remaining potential remedies, the Court finds that 8 U.S.C. § 1324b(g)(2)(B)(vi) to be the most appropriate. Specifically, the Court orders the City of Greenbelt to educate all personnel involved in hiring about the requirements of the document abuse provisions of § 1324b(a)(6). While the statute includes civil monetary penalties, those penalties have been imposed only when the United States has brought the case. *Compare Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1255 (1990) (denying request of private party complainant for civil penalties, because the Office of Special Counsel failed "to vindicate interests of the Government" by not initiating the case), *with United States v. Estopy*, 11 OCAHO no. 1256, 3 (2015)(in discussing government's request for maximum civil monetary penalty, ALJ is to consider totality of the circumstances, specifically considering the nature of the violations, the circumstances surrounding the violations, and respondents' conduct during the proceedings). In this case, while Respondent asked for more documents than required, causing considerable difficulties for Complainant as she attempted to satisfy the request, Respondent did not disqualify her on that basis; there was no evidence that this practice is widespread within the City. Therefore a cease and desist order, along with increased education, should remedy the matter.

V. CONCLUSION

Accordingly Respondent is ordered to CEASE AND DESIST its unfair immigration related employment practices. Respondent is also ordered to educate all personnel involved in hiring about the requirements of the document abuse provisions of § 1324b(a)(6).

SO ORDERED.

Dated and entered on December 3, 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.