

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

January 11, 2022

ROBERT PAUL HEATH,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	OCAHO Case No. 2021B00058
TRINGAPPS, INC.,	)	
Respondent.	)	
_____	)	

Appearances: Robert Heath, *pro se*  
Patrick Papalia, Esq., and Tanneika Minott, Esq., for Respondent

ORDER TO SHOW CAUSE AND ON MOTION TO DISMISS

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b, as amended by the Immigration Reform and Control Act (IRCA) of 1986. Complainant Robert Heath filed a *pro se* complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 20, 2021. Heath alleges that Respondent, Tringapps, Inc. (Tringapps), discriminated against him in violation of 8 U.S.C. § 1324b, based on his national origin and citizenship status. Compl. 6.<sup>1</sup> Complainant also alleges document abuse in violation of 8 U.S.C. § 1324b(a)(6). *Id.* at 10.

On September 27, 2021, OCAHO sent Tringapps a Notice of Case Assignment for Complaint Alleging Unlawful Employment (NOCA) and a copy of the complaint via U.S. certified mail. The NOCA informed Respondent of its right to file an answer to the complaint, due within 30 days of receipt of the complaint.<sup>2</sup> The notice stated that failure to submit an answer could lead to default.

<sup>1</sup> The Complaint, Respondent's Motion to Dismiss, and Complainant's Motion to Oppose Respondent's Motion to Dismiss do not have consecutively paginated pages. The Court will refer to page numbers for these filings according to the order in which the pages appear on Adobe PDF.

<sup>2</sup> Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2020).

Respondent's answer was due no later than December 6, 2021. Respondent has not filed an answer.

On November 5, 2021, Respondent, through counsel, filed a Motion to Dismiss. Respondent argues in the motion that Complainant has failed to state a claim upon which relief can be granted. Mot. Dismiss 1–5. According to Respondent, Complainant left at least two questions on the OCAHO complaint form blank, which prevents him from alleging “a *prima facie* case of citizenship status discrimination.” *See id.* On November 13, 2021, Complainant filed a Motion to Oppose Respondent's Motion to Dismiss (Motion to Dismiss Opposition). In the Motion to Dismiss Opposition, Complainant gives explanations on his “inability to provide an accurate answer to each question” at issue. Opp'n Mot. Dismiss 1–2.

## II. LEGAL STANDARDS

### A. Order to Show Cause

Per OCAHO regulations, a respondent must file an answer to contest a material fact alleged in the complaint. 28 C.F.R. § 68.9(c). A respondent's failure to timely file an answer “may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default.” *United States v. Quickstuff LLC*, 11 OCAHO no. 1265, 4 (2015) (citing 28 C.F.R. § 68.9(b)).<sup>3</sup>

“The filing of a motion to dismiss does not affect the time period for filing an answer.” 28 C.F.R. § 68.10. Thus, an order to show cause may be issued when a respondent files a motion to dismiss, but not a timely answer, to a complaint. *E.g., Ndzerre v. Wash. Metro. Area Transit Auth.*, 13 OCAHO no. 1306, 4–5 (2017) (requiring respondent to show good cause for failure to file answer despite filing motion to dismiss).

### B. Motion to Dismiss

---

<sup>3</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 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>.

“OCAHO’s rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]” *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citing 28 C.F.R. § 68.10, and then citing *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 639, 428, 436 (1994)). Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Id.*; see 28 C.F.R. § 68.1 (“[t]he Federal Rules of Civil Procedure may be used as a general guideline” in OCAHO proceedings).

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) (internal citations omitted). “The [C]ourt may, however, consider documents incorporated into the complaint by reference[.]” *Id.* at 113–14. The Court “must liberally construe the complaint and view ‘it in the light most favorable to the [complainant].’” *Heath v. Optnation & an Anonymous Empl’r*, 14 OCAHO no. 1374, 2 (2020) (citing *Spectrum Tech.*, 12 OCAHO no. 1291, at 8 (internal citation omitted)); see also *Montalvo v. Kering Americas, Inc.*, 14 OCAHO no. 1350, 3 (2020) (stating that complaints filed by pro se complainants “must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel”) (quoting *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 777 (1992)).

Further, 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). See *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). Rather, OCAHO 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.” *Split Rail Fence Co.*, 10 OCAHO no. 1181, at 5 (quoting 28 C.F.R. § 68.7(b)(3)); see *United States v. R&SL, Inc.*, 13 OCAHO no. 1333, 3 (2019) (the ‘task’ in deciding a motion to dismiss “is not to predict what [a complainant] will be able to prove” (quoting *Mar-Jac Poultry*, 10 OCAHO no. 1148, at 10)). Complainant therefore “is not required to plead a prima facie case to overcome a motion to dismiss for failure to state a claim upon which relief can be granted.” *Montalvo*, 14 OCAHO no. 1350, at 3 (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002), and then citing *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016)); 28 C.F.R. § 68.10.

### III. DISCUSSION

#### A. Order to Show Cause

Although Respondent filed a motion to dismiss in this matter, the Court has, to date, not received Respondent’s answer. The motion to dismiss filed by Tringapps did not excuse or toll the deadline for filing its answer. See 28 C.F.R. § 68.10.

Respondent is hereby ORDERED, within twenty (20) days of this order, to file a submission demonstrating good cause for its failure to timely file an answer, and to file an answer that comports with 28 C.F.R. § 68.9(c). Should Respondent fail to file an answer and show good cause regarding its untimely filing, the Court may enter a default judgment against Respondent, pursuant to 28 C.F.R. § 68.9(b).

## B. Motion to Dismiss

The Court need not wait for the Answer to be filed to decide Respondent's Motion to Dismiss. *See* 28 C.F.R. § 68.10.

### 1. Position of the Parties

Complainant asserts that Respondent discriminated against him on account of his citizenship and national origin status, and engaged in unlawful documentation practices. Respondent argues that Complainant "has failed to state a claim of discrimination based on Tringapps refusing to hire him," since Complainant "was required to allege that Tringapps was actually hiring." Mot. Dismiss 4 (citing *United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 602, 622 (2000)). Respondent contends that Complainant's 'blank' answers at Section 7, Questions 5 and 9 are a failure to allege it engaged in the claimed discrimination. *See id.* at 2–4. Concluding that Complainant cannot prove necessary facts to allege discrimination, Respondent moves the Court to dismiss the case. *See id.* at 4–5 (citing *Wong-Opasi v. Tenn. Bd. of Regents*, 8 OCAHO no. 1037, 585, 586 (1999)). Respondent's Motion to Dismiss does not address the alleged document abuse violation. The motion is also ambiguous on whether Respondent challenges Complainant's national origin discrimination claim.

In his opposition, Complainant argues that he has justifications for not answering Section 7, Questions 5 and 9, on the OCAHO complaint form. Opp'n Mot. Dismiss 1–2. Complainant states Section 7, Question 5 is ambiguous, and that he would have answered the question "yes" if it "[w]as the Business/Employer advertising for or taking applications from candidates." *Id.* at 1. For Section 7, Question 9, Complainant claims he does not have the information to answer whether "someone else was hired for the job[.]" *Id.* at 2.

### 2. Merits of the Motion

A decision on whether to dismiss the complaint rests on whether Complainant has stated a claim upon which relief can be granted by OCAHO. 28 C.F.R. § 68.10; *cf.* Fed. R. Civ. P. 12(b)(6). Under Section 1324b, an employer is prohibited from discriminating against an individual with respect to hiring or recruitment or referral for a fee, or termination based on the individual's national origin, or a protected individual's citizenship status. 8 U.S.C. § 1324b(a)(1). While there is no requirement 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*, 14 OCAHO no. 1350, at 3; *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016).

Respondent contends that OCAHO caselaw requires a complainant to allege a prima facie case of citizenship status discrimination. Mot. Dismiss 3 (citing *Winkler v. W. Capital Fin. Srvs.*, 7 OCAHO no. 928, 65, 73–75 (1997), and then citing *Patrol & Guard Enters.*, 8 OCAHO no. 1040, at 621–22). However, as noted above, OCAHO caselaw has more recently clarified that a Complainant is not required to plead a prima facie case. *Mar-Jac Poultry*, 10 OCAHO no. 1148, at 8–10; *Split Rail Fence Co.*, 10 OCAHO no. 1181, at 5. Further, these cases either arose in the context of summary decision, or were treated as summary decision motions where, in contrast to a motion to dismiss, the evidentiary standards set forth by *McDonnell Douglas Corp v. Greene*, 411 U.S. 492 (1972), apply. See, e.g., *Brown et al. v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379, 5–6 (2020) (rejecting a respondent's prima facie *McDonnell Douglas* argument in motion to dismiss context).

Complainant states that he was a U.S. citizen at the time of the alleged discrimination. Compl. 2. Complainant claims that on November 14, 2020, Respondent discriminated against him because of his national origin and citizenship status. *Id.* at 4, 6. Complainant then alleges Respondent refused to hire him after he applied to work for the employer on November 14, 2020, for a job for which he claims to be qualified. *Id.* at 6. He asserts that Respondent advertised for a “H1B Transfer.” *Id.* He also asserts that the job remained open and the Respondent continued to take applications from other people after he was not hired. *Id.*

While leaving Section 7, Question 5 blank, Complainant attaches the job advertisement at issue, such that it can be incorporated by reference. *Id.* at 6, 15–16; *Jarvis*, 7 OCAHO no. 930, at 113–14. The job advertisement appears to indicate that Respondent was looking for workers on November 14, 2020. *Id.* at 15–16. The job announcement provides a list of qualifications as well as a job announcement number, includes a statement, “Looking for Better Career Opportunities under H1B Transfer” and then solicits applications. *Id.* Taking the announcement in the light most favorable to Complainant, the Court finds that Complainant sufficiently alleges that Respondent was “hiring,” or “recruiting for a fee” within the meaning of § 1324b. Further, an answer to Section 7, Question 9 is not needed to allege a specific violation of law at 8 U.S.C. § 1324b(a)(1) here. Specifically, in Section 7, Question 8, Complainant alleges that Respondent continued to seek applications. Compl. 7.

Reading the complaint as a whole, Respondent has been put on notice of the nature of Complainant's claims, unlike in the OCAHO cases cited by Respondent. See *Curuta v. U.S. Water Conserv. Lab*, 3 OCAHO no. 459, 641 (1992) (finding complainant could not allege citizenship status discrimination because he only indicated national origin discrimination in the complaint); *Benz v. Dep't of Def.*, OCAHO Case No. 97B00115, 1997 WL 572135 (Sept. 8, 1997) (Order Granting Respondent's Motion for Leave to Plead and Motion to Dismiss) (finding citizenship

status discrimination allegation insufficient when complainant did not answer whether he faced discrimination in hiring, firing or recruitment).

For a claim to constitute discrimination under Section 1324b(a)(1), “[t]he employer [must] . . . treat some people less favorably than others” because of a protected characteristic. *See United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 19 (2014) (citing *Int’l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), and then citing *United States v. Townsend Culinary, Inc.*, 8 OCAHO no. 1032, 454, 510 (1999)). “Where citizenship status is the forbidden criterion, there must . . . be some claim . . . that the individual is being treated less favorably than others *because* of his citizenship status.” *Lee v. Airtouch Comm.*, 6 OCAHO no. 901, 891, 901–02 (1996) (emphasis in original). Complainant asserts that Respondent manipulated its hiring practices to disqualify him because of his citizenship status, preferring those with H-1B visa status. *See United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5, 9 (2021) (citing *Montalvo*, 14 OCAHO no. 1350, at 5).

Accordingly, Complainant has sufficiently alleged a discrimination claim in violation of 8 U.S.C. § 1324b(a)(1). Respondent has not moved the Court to take any action for the document abuse claim arising under 8 U.S.C. § 1324b(a)(6). Thus, Respondent’s Motion to Dismiss is DENIED.

#### IV. CONCLUSION

The Court ORDERS Respondent, within twenty (20) days of this order, to file an answer that comports with 28 C.F.R. § 68.9(c), and to show good cause for its failure to timely file an answer.

The Court DENIES Respondent’s Motion to Dismiss, as Complainant has not failed to state a claim upon which relief may be granted by the Court.

It is so ORDERED.

---

Jean C. King  
Chief Administrative Law Judge

Date: January 11, 2022