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

November 26, 2019

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| BRENT LESLIE REED,<br>Complainant,<br><br>v.<br><br>DUPONT PIONEER HI-BRED INTERNATIONAL, INC.,<br>Respondent. | ) | 8 U.S.C. § 1324b Proceeding<br>OCAHO Case No. 19B00010 |

ORDER GRANTING SUMMARY DECISION

This case arises under the anti-discrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. Pending before the Court is Respondent's Motion for Summary Decision. Complainant filed a response.

## I. BACKGROUND

Complainant, Brent Leslie Reed, is a U.S. citizen. From 2001 to 2017, Respondent, Dupont Pioneer Hi-Bred International, Inc., employed Complainant as a seasonal crew leader. As a crew leader, Complainant recruited and supervised crews of workers, who detasseled corn in the summer months at Respondent's facility in Constantine, Michigan. Complainant's crews were mostly minors between 14-17 years old. In February 2018, Complainant learned that Respondent was not going to hire him as a crew leader for the 2018 season and that Respondent was only going to hire crews of adult workers.

On June 28, 2018, Complainant filed a charge with the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER) alleging immigration-related employment discrimination. On February 1, 2019, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent replaced his crew with crews of non-U.S. citizens. Respondent filed a motion to dismiss and an amended motion to dismiss arguing that Complainant failed to state a claim upon which relief can be granted because the complaint did not allege citizenship status-based discrimination. On June 27, 2019, the undersigned denied Respondent's motion to dismiss for failure to state a claim, and granted the dismissal as it related to Complainant's claim under 8 U.S.C. § 1188. *Reed v.*

*Dupont Pioneer Hi-Bred Int'l, Inc.*, 13 OCAHO no. 1321 (2019). On August 22, 2019, Respondent filed a motion for summary decision and brief in support, and Complainant filed a response on September 18, 2019.

## II. POSITION OF THE PARTIES

Respondent contends that it is entitled to summary decision because Complainant failed to establish a prima facie case of discrimination based on citizenship status. Specifically, Respondent argues that Complainant did not establish that Respondent treated him differently than other similarly situated individuals outside of his protected class. Further, Respondent contends that it had a legitimate, non-discriminatory reason for not hiring Complainant in 2018. Respondent contends that crop production at its Constantine locations had decreased, so Respondent reduced the number of detasseling crews it hired. Further, Respondent argues that in 2018, it decided to only hire crews of adult workers at its Constantine facility due to a number of factors.

Complainant contends that Respondent discriminated against him because he is a U.S. citizen contractor "who recruited U.S. citizen workers, mostly kids age 14-17 and [Respondent] preferred to hire [ ] three American contractors who hired mostly[,] if not all[,] H-2A workers." Resp. Mot. Summ. Dec. at 32. Complainant argues that, in 2018, Respondent refused to hire any contractors who utilized crews of minors who were also U.S. citizens. Instead, Complainant argues that in 2018, after decades of using crews of minors to detassel at the Constantine facility, Respondent only hired crew leaders who utilized crews of non-U.S. citizen workers. Complainant also seems to contend that Respondent discriminated against him based on the citizenship status of his crew members. Additionally, Complainant seems to argue that Respondent discriminated against his crew members based on their citizenship status. He further alleges Respondent's hiring practices are in violation of 8 U.S.C. § 1188.

## III. STANDARDS

### A. Summary Decision

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[1] "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus.*

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

*Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[2]

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3679 Commerce Place, Inc. d/b/a Waterstone Grill*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Discriminatory Hiring

Complainant may use direct or circumstantial evidence to prove a § 1324b discrimination case. *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 n. 3 (1983)). Direct evidence is evidence that, on its face, establishes discriminatory intent. *Id.* "If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence." *Id.* However, only on rare occasions can the complainant present direct evidence. *Id.* at 14 (citing *Nguyen v. ADT Eng'g, Inc.*, 3 OCAHO no. 489, 915, 922 (1993) ("It is rare that the victim can prove that the employer conceded discrimination, e.g. 'I don't want any permanent resident aliens working here.'")).

A complainant may also rely on circumstantial evidence to establish an employment discrimination claim. *Id.* In a circumstantial evidence case, the Court applies the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993). *Id.* First, Complainant must establish a prima facie case of discrimination. *Id.* If Complainant establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for the challenged employment action. *Id.* If Respondent articulates such a reason, "the inference of discrimination raised by the prima facie case disappears, and [Complainant] then must prove, by a preponderance of the evidence, that [Respondent's] articulated reason is false and that [Respondent] intentionally discriminated against [Complainant]." *Id.*

[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 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.

To establish a prima facie claim for employment discrimination, Complainant must demonstrate that: "(1) he is a member of a protected class; (2) he was qualified for [the position]; (3) he suffered an adverse employment decision; and (4) he was [ ] treated differently than similarly situated [individuals who were not members of the protected class]." *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008).

## IV. DISCUSSION

Complainant states that he does not allege that Respondent discriminated against him based on *his* citizenship status. However, since Complainant is *pro se*, the Court will liberally construe his claims and analyze his allegations as an individual citizenship status-based discrimination claim under § 1324b. Complainant also claims that Respondent discriminated against him based on his crew members' citizenship status. Additionally, Complainant seems to allege that Respondent discriminated against his crew members based on their citizenship status. Finally, Complainant contends that Respondent violated 8 U.S.C. § 1188 when it hired crews of non-U.S. citizens.

### A. Discrimination against him

Under § 1324b, an employer is prohibited from discriminating against a protected individual with respect to hiring or termination based on the protected individual's citizenship status. § 1324b(a)(1). A U.S. citizen is a "protected individual" under § 1324b(a)(3)(A).

There is no dispute that Complainant is a United States citizen and is, therefore, a protected individual under § 1324b. The parties also do not dispute that Complainant was qualified for a position as a crew leader. From 2001 to 2017, Respondent employed Complainant as a seasonal crew leader at its Constantine, Michigan facility. Depo. at 78:6–10. Further, there is no dispute that Complainant suffered an adverse employment action when Respondent did not rehire him as a crew leader in 2018.

Respondent contends that Complainant does not identify any similarly-situated individual outside of Complainant's protected class. To establish a prima facie claim of discrimination based on citizenship status, Complainant must show that Respondent treated him differently than other similarly situated non-U.S. citizen crew leaders. *See Arendale*, 519 F.3d at 603. Therefore, Complainant "must prove that he was either replaced by a person outside of the protected class or show that similarly situated, non-protected individuals were treated more favorably." *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002).

Respondent contends that Complainant did not identify any non-U.S. citizen crew leaders hired in 2018. Instead, Respondent asserts that the crew leaders it hired in the 2018 season were all U.S. citizens. Complainant contends that Respondent only hired three contractors to provide detasseling crews in 2018, and he argues "[w]hile the contractors for those three detasseling crews may be U.S. citizens as I am, they hire people that are not American citizens." Resp. Mot. Summ. Dec. at 29.

Respondent contracted with three detasseling entities to provide crews for the 2018 season: T-Bell Detasseling, D and K Harvesting, and Manzana LLC. Mot. Summ. Dec. Ex. A, Ex. 1 at 4. All crew leaders for T-Bell Detasseling and D and K Harvesting are U.S. citizens. Mot. Summ. Dec. Exs. 3 & 4. Manzana's manager, Lawrence Williams, and another individual, Jesus Reyna, supervise and direct Manzana's detasseling workers and both are U.S. citizens. Mot. Summ. Dec. Ex. 5. Further, Complainant testified that it would not surprise him if he found out that the crew leaders for T-Bell Detasseling and D and K Harvesting were U.S. citizens. Depo. at 104:5-17.

Complainant only identified one other crew leader, Levi Bontrager. Complainant contends that Respondent approached Bontrager before the 2018 season and asked if he could assemble a crew of adults. Bontrager ultimately could not assemble an adult crew, so Respondent did not rehire him for the 2018 season. Complainant does not assert that Bontrager was treated more favorably. Instead, he asserts that Respondent also discriminated against Bontrager because Respondent did not hire Bontrager in 2018 and replaced his crew with "H-2A crews." Resp. Mot. Summ. Dec. at 28. Complainant has not provided any evidence that any crew leaders were outside his protected class. Therefore, Complainant has not provided any evidence to establish that Respondent treated a similarly situated non-U.S. citizen differently than Complainant. Complainant has not established a prima facie claim for discriminatory hiring based on his citizenship status.

Even if Complainant had established a prima facie claim, Respondent established a legitimate, non-discriminatory reason for not hiring Complainant in 2018. Respondent asserts that since 2014, it has reduced the number of detasseling crews at the Constantine facility due to a decrease in the acres of corn that needed to be detasseled. Mot. Summ. Dec. Ex. 1 at 1, 5. In 2016, Respondent hired eleven contractors to provide detasseling crews, in 2017, Respondent hired nine contractors, and, in 2018, Respondent hired three contractors. Mot. Summ. Dec. at Ex. 1 at 4; Ex. A. After the 2017 season, Respondent evaluated further crew reductions and decided to "work only with detasseling crews consisting of workers over age 18 at the Constantine facility." Mot. Summ. Dec. Ex. 1 at 2. Respondent determined that adult crews detasseled more quickly and more consistently than crews of minors. *Id.* Specifically, the evidence shows that in 2016 and 2017, at a minimum, Complainant's crew detasseled only half the acres per day compared to the adult crews. *Id.* at 3; Ex. B. Additionally, Respondent considered the operational effect of Michigan child labor laws and provided evidence showing that the adult crews' attendance was more reliable than crews of minors. *Id.*

As such, Complainant's claim that Respondent refused to hire him based on his citizenship status is DISMISSED.

B. Discrimination Based on Crew Members' Citizenship Status

Complainant appears to argue that Respondent discriminated against him based on the citizenship status of his crew members. Complainant claims that Respondent refused to hire him for the 2018 season because he employed crews of local, minor, U.S. citizens and Respondent only wanted to hire crews consisting of individuals with H-2A visas.

Section 1324b(a)(1)(B) states that an employer may not "discriminate against any individual . . . with respect to the hiring . . . of the individual for employment . . . because of such [protected] individual's citizenship status." The plain language of the statute prohibits an employer from refusing to hire an individual based on that individual's citizenship status. The language of the statute does not provide OCAHO with the authority to hear claims concerning refusal to hire an individual based on a third party's citizenship status, which is the crux of Complainant's claim. *Id.*

As such, to the extent that Complainant claims that Respondent refused to hire him in 2018 based on the citizenship status of his crew members, Complainant's claim is DISMISSED.

C. Discrimination Against Crew Members

Complainant also appears to bring a claim on behalf of his crew members as he argues that Respondent discriminated against his crew members based on their age and citizenship status. *See* Resp. Mot. Summ. Dec. at 30. Complainant seems to argue that federal law protects individuals based on their citizenship status, so it must also protect minors from discrimination based on their age. *Id.*

First, OCAHO's jurisdiction extends to claims of "(1) citizenship status discrimination against protected individuals and, in relevant part, (2) national origin discrimination not covered by Title VII [of the Civil Rights Act]." *Odina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 16; § 1324b(a). Thus, OCAHO does not have jurisdiction to hear age-related employment discrimination claims.

Additionally, "a person or organization filing on behalf of another must be authorized to act on the other's behalf." *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 8 (2003) (citing 28 C.F.R. § 44.300). Section 44.300 states that a charge may be filed by "[a]ny individual or entity authorized by an injured party to file a charge with [IER] alleging that the injured party is adversely affected directly by an unfair immigration-related employment practice[.]" § 44.300(a)(2). Complainant has not shown that he was authorized to file a charge on behalf of any other individual.

Further, Complainant appears *pro se* and he is not an attorney. The OCAHO rules provide that a non-attorney may represent a party in OCAHO proceedings only upon a written order from the ALJ granting approval of the representation. 28 C.F.R. § 68.33(c)(3). The non-attorney representative must file an application with the ALJ "demonstrating that the individual possesses the knowledge of administrative procedures, technical expertise, or other qualifications necessary to render valuable service in the proceedings and is otherwise competent to advise and assist in the presentation of matters in the proceedings." *Id.* Complainant did not file an application to represent his crew members and the ALJ has not issued an order granting approval of such representation. Thus, under the OCAHO rules, Complainant cannot represent his crew members in this proceeding.[3]

[3] Additionally, Complainant has not shown that he has met any of the requirements in the Federal Rules of Civil Procedure for bringing claims on behalf of minors. Federal Rule of Civil Procedure 17(c) only permits specific representatives to bring claims on behalf of minors, or if

As such, Complainant's discrimination claim on behalf of his crew members is DISMISSED.

D. 8 U.S.C. § 1188

Finally, Complainant contends that Respondent "clearly demonstrated a hiring preference for the 2018 and 2019 detasseling seasons by choosing to employ ONLY H-2A workers, who are employed by American contractors rather than keep on some of the American contractors . . . who hire via [Respondent] workers age 14-17 years old to do the same kind of work." Resp. Mot. Summ. Dec. at 30. The undersigned has already dismissed Complainant's claim alleging violations of 8 U.S.C. § 1188 because this Court "has no jurisdiction to enforce the requirements for approval of H-2A visa petitions under 8 U.S.C. § 1188." *Reed v. Dupont Pioneer Hi-Bred Int'l, Inc.*, 13 OCAHO no. 1321, 3 (2019).

## V. CONCLUSION

Complainant did not state a prima facie claim for discriminatory hiring based on his citizenship status under § 1324b(a)(2). OCAHO does not have jurisdiction to hear an individual's discrimination claim based on the citizenship status of others. Complainant may not bring a claim on behalf of his crew members because he did not provide any evidence that he was authorized to bring a claim on behalf of his crew members, nor did he submit an application to OCAHO to bring claims on behalf of his crew members. Finally, the Court previously dismissed Complainant's claim related to H-2A visa petitions under 8 U.S.C. § 1188. As such, the Complaint is DISMISSED.

## VI. FINDINGS OF FACT

1. Complainant, Brent Leslie Reed, is a United States citizen.

2. From 2001 to 2017, Respondent employed Complainant as a seasonal crew leader at its facility in Constantine, Michigan.

3. Complainant assembled and supervised crews to detassel corn at Respondent's Constantine, Michigan location and his crews consisted mostly of minors.

4. In 2018, Respondent informed Complainant that it was only going to hire crews of adults to detassel corn.

5. In 2018, Respondent did not rehire Complainant as a crew leader.

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the minor does not have a duly appointed representative, the Court must appoint a guardian ad litem or "issue another appropriate order" to protect the minor in the action. The Sixth Circuit, where this case arises, has not permitted a parent appearing *pro se* to bring a claim on behalf of her child, let alone a child's employer or prospective employer. *Shepherd v. Wellman*, 313 F.3d 963, 970–71 (6th Cir. 2002).

6. In 2018, Respondent hired three contractors to provide crews of adults to detassel corn.

7. The crew leaders of each of the three contractors who supervised and directed detasseling workers for Pioneer were U.S. citizens.

## VII. CONCLUSIONS OF LAW

1. An Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).

2. "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

3. "Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc*., 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

4. To establish a prima facie claim for employment discrimination, Complainant must demonstrate that: "(1) he is a member of a protected class; (2) he was qualified for [the position]; (3) he suffered an adverse employment decision; and (4) he was [ ] treated differently than similarly situated [individuals who were not members of the protected class]." *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008).

5. Complainant is a protected individual. 8 U.S.C. § 1324b(a)(3).

6. Complainant was qualified for a position as a crew leader.

7. Complainant suffered an adverse employment action when Respondent did not rehire him as a crew leader in 2018.

8. Complainant did not establish a prima facie claim for discriminatory hiring under § 1324b because Complainant did not provide evidence that Respondent treated him differently than similarly situated individual outside of his protected class.

9. Assuming arguendo that Complainant established a prima facie case of discrimination, Respondent provided a legitimate, nondiscriminatory reason for its refusal to hire Complainant and Complainant did not produce or point to any evidence to create a factual issue regarding the legitimacy of the explanation for the basis of its decision not to rehire Complainant.

10. OCAHO does not have the authority to hear claims concerning refusal to hire an individual based on a third party's citizenship status. § 1324b(a)(1)(B).

11. A charge may be filed by "[a]ny individual or entity authorized by an injured party to file a charge with [IER] alleging that the injured party is adversely affected directly by an unfair immigration-related employment practice[.]" § 44.300(a)(2).

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

SO ORDERED.

Dated and entered on November 26, 2019.

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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.