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

December 3, 2020

STEVEN BROWN, BERNARDO GARCIA, JOAQUIN HERNANDEZ, NICOLAS MARTINEZ AND MARSHALL PITTMAN, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00077
PILGRIM'S PRIDE CORPORATION, Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

I. BACKGROUND

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(1)(B) (2017).

On June 29, 2020, Complainants, Steven Brown, Bernardo Garcia, Joaquin Hernandez, Nicolas Martinez, and Marshall Pittman, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Pilgrim's Pride Corporation. Complainants allege that Respondent discharged Complainants based on their citizenship status in violation of 8 U.S.C. § 1324b. On August 27, 2020, Respondent filed an answer, after the undersigned granted Respondent an extension to file it, and a motion to dismiss. On September 8, 2020, Complainants filed a response in opposition to Respondent's motion to dismiss ("Opposition.") On September 28, Respondent filed a motion for leave to file a reply in support of its motion to dismiss and attached the Reply as an exhibit. On October 8, 2020, Complainants filed a response in opposition to Respondent's motion for leave to file a reply brief ("Sur-Reply.")

II. STANDARDS

"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) (citations omitted); 28 C.F.R. § 68.10. [1] Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.).

When considering a motion to dismiss, the Court accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990). Additionally, 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) (citations omitted). "The [C]ourt may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113–14.

"OCAHO's rules require only that the complainant set out facts 'for each violation alleged to have occurred.'" *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016) (quoting *United States v. Split Rail Fence Co.*, 10 OCAHO no. 14 OCAHO no. 1181, 5 (2013) (order by the CAHO)). Moreover, OCAHO's rules do not "require that a complainant plead a prima facie case to pursue a claim under 8 U.S.C. § 1324b." *Kelly Legal Servs.*, 12 OCAHO no. 1282 at 10 (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002)).

III. DISCUSSION

A. Motion Practice

i. Motion to Amend the Complaint

In Complainants' Opposition, Complainants cite to thirty-two "Proposed Additional/Amended Facts (PAFs)." Since the Court is limited to the four corners of the complaint when considering a motion to dismiss, these facts cannot be considered.

[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 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.

Complainants requested leave to amend should the Court deem it necessary. Opp'n 20–21. The Court will construe this as a motion to amend the complaint. The Court will also construe Respondent's Reply attached to its Motion for Leave to File a Reply as a response in objection to the Motion to Amend the Complaint. 28 C.F.R. § 68.9(e) permits amendments to complaints "[if] a determination of a controversy on the merits will be facilitated thereby" and "upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties[.]" Generally, in this forum, leave to amend is freely granted, except where amendment would be futile. *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 8 (2016). As discussed below, the Complaint pleads sufficient facts, but Complainants rely heavily upon these PAFs. Thus, the Court GRANTS Complainants leave to amend the Complaint to include the additional facts. Complainants are ordered to file their amended complaint incorporating the PAFs on or before December 14, 2020.

ii. Motion for Leave to File a Reply

Although Respondent filed its Motion for Leave to File a Reply more than ten days after Complainants filed their Opposition and Complainant is correct that this Court's regulations discourage replies and sur-replies,[2] the Court "maintains discretion to accept pleadings within a time period [it] may fix." *Villegas-Valenzuela v. INS*, 103 F.3d 805, 811 n.5 (9th Cir. 1996).[3] Given that Complainants essentially filed a motion to amend the complaint, Respondent's Reply is, in part, a response to the Motion to Amend. In any event, the Court GRANTS Respondent's Motion for Leave to File a Reply and deems the Reply filed. Complainant's Sur-Reply, however, falls within the "an endless volley of briefs" contemplated in *Byrom v. Delta Family Care-Disability & Survivorship Plan*, 343 F. Supp. 23 1163, 1188 (N.D. Ga. 2004), and therefore, the Court DENIES Complainants' request to file a sur-reply.

B. Motion to Dismiss

i. Subject Matter Jurisdiction

The first issue Respondent raised in its motion was whether this Court has subject matter jurisdiction to hear the case. Mot. to Dismiss 3. OCAHO's subject matter jurisdiction over §

[2] 28 CFR § 68.12(b), in its entirety, states that "[w]ithin ten (10) days after a written motion is served, or within such other period as the Administrative Law Judge may fix, any party to the proceeding may file a response in support of, or in opposition to, the motion, accompanied by such affidavits or other evidence upon which he/she desires to rely. Unless the Administrative Law Judge provides otherwise, no reply to a response, counterresponse to a reply, or any further responsive document shall be filed."

[3] Pleadings include replies to motions. 28 C.F.R. § 68.2.

1324(b) cases is "limited to discriminatory failure to hire and discharge, and does not include terms and conditions of employment." *Smiley v. City of Philadelphia,* 7 OCAHO no. 925, 15, 21 (1997). Complainants are pursuing two theories of discharge: actual and constructive. Opp'n 9–13.

a. Actual Discharge

Complainants were employed by Respondent as chicken catchers. Compl. 4. Complainants allege that they "were discharged from their role as Catchers" on July 9, 2020, when "HR informed them that they were no longer Catchers . . . ." Compl. 6–7. Complainants allege that they were offered different positions at the plant, positions that paid less than their positions as catchers. *Id.* Two Complainants took the offered positions, three resigned instead. Compl. 6. Respondent asserts that since Complainants were offered alternative positions, they were not discriminatorily fired; and thus, this Court lacks jurisdiction to hear this case. Mot. to Dismiss 3–6.

An employee is actually discharged "when the employer uses language or engages in conduct that 'would logically lead a prudent person to believe his tenure has been terminated.'" *Thomas v. Dillard Dep't Stores*, 116 F.3d 1432, 1434 (11th Cir. 1997) (quoting *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 88 (2d Cir.1996)). While it is true that § 1324(b) does not confer jurisdiction over "terms and conditions of employment," this case does not involve a change in the terms and conditions of employment. Complainants were not simply relocated or denied a work assignment, "their positions were eliminated." Mot. to Dismiss 1.

Although Respondent provided Complainants with a list of new positions that they could choose from, these offers do "not automatically preclude an inquiry as to whether [Complainants were] actually terminated." *Thomas,* 116 F.3d at 1435. An actual termination can occur even when the employer has offered alternative positions to the employee. *See id.* at 1435 n.6 ("[A]n offer of alternative employment does not foreclose as a matter of law the fact-intensive inquiry as to whether plaintiff was actually terminated."). Therefore, Respondent's argument that the offers of alternate employment prevents a finding that Complainants were discharged is unsuccessful.

b. Constructive Discharge

Complainants argue, in the alternative, that Garcia, Hernandez, and Martinez were constructively discharged. Opp'n 13. "A constructive discharge occurs when an employer makes working conditions so intolerable that a reasonable person would be forced to resign." *Paz-Martinez v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1260, 7 (citing *Banuelos v. Transp. Leasing Co.*, 1 OCAHO no. 255, 1636, 1648 n.5 (1990)). Whether an employee was constructively discharged is a fact-intensive inquiry. *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002) (citation omitted). A pay cut or demotion may be indicative of constructive discharge. *See Freeman v. Koch Foods of Ala.*, 777 F. Supp. 2d 1264, 1287 (M.D. Ala. 2011).

Complainants do not need to specify the legal theory for which relief is being sought in their complaint. *See United States v. Tinoco-Medina*, 6 OCAHO no. 890, 720, 728 (1996); *cf. Johnson v. City of Shelby*, 574 U.S. 10, 12 (per curiam) (citation omitted) ("making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief"). But "a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Lee v. Airtouch Commc'ns.*, 6 OCAHO no. 901, 891, 901 (1996) (citation omitted).

Here, although Complainants do not explicitly allege constructive discharge in their Complaint, the alleged facts indicate a plausible theory of constructive discharge. "Complainants Garcia, Hernandez, and Martinez resigned their employment rather than take lesser-paying jobs." Compl. 6. They had been making about $1,300 per week, Compl. 4, and all of the alternative positions "paid far less than what Complainants were paid as Catchers." Compl. 6. For reference, the alternative positions that Brown and Pittman accepted paid about $700 per week. Compl. 6. Thus, Complainants have alleged sufficient facts to plead a claim of constructive discharge.

Therefore, this Court has subject matter jurisdiction to hear this case based on theories of actual and constructive discharge.

ii. Failure to State a Claim

The second argument that Respondent raises is that the Complaint fails to state a viable § 1324b claim. Mot. to Dismiss 6. Respondent asserts that Complainants are unable to satisfy their initial burden of establishing a prima facie case of discrimination established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1792) because Complainants were not discharged nor were they replaced by employees. *Id.* at 7–8. However, as mentioned above, Complainants are not required to plead a prima facie case to pursue a § 1324b claim. *Kelly Legal Servs.*, 12 OCAHO no. 1282 at 10 (citations omitted). They just need to plead "sufficient minimal allegations to satisfy [28 C.F.R.] § 68.7(b)(3) and give rise to an inference of discrimination." *Robert Half Legal* 12 OCAHO no. 1272 at 6.

Here, Complainants claim that their assertion that Respondent had "a desire to switch to 'contract' workers," gives rise to an inference of discrimination, Opp'n 18–19; *see also* Compl. 6 ("For years, [Respondent] had wanted to switch its catching operation to 100% catchers . . . [.]"). Further, Pizano, the individual Respondent contracted catching work to, "had a widespread reputation in the poultry industry for using 'contract' catchers that were undocumented." Compl. 4–5. Moreover, Pizano subcontracted to a couple of crews of "undocumented workers who began performing catching work for Pilgrim." Compl. 5. The Court finds these facts, taken as true, are sufficient to meet the pleading standard. Notwithstanding this determination, the Court will still address Respondent's prima facie discrimination arguments.

a. Prima Facie Case

To establish a prima facie case of discrimination, complainants need to establish that complainants are members of a protected class, were qualified for the positions held, were discharged, and were replaced by people not in complainants' protected class. *Martinez v. Superior Linen*, 10 OCAHO no. 1180, 6 (2013). The first two elements are not disputed in this case. Mot. to Dismiss 7. But Respondent argues that Complainants are unable to establish a prima facie case of discrimination because Complainants fail to plead the last two elements, "that they were fired or replaced by individuals who were not in their protected class." Mot. to Dismiss 7–8.

As explained above, Complainants sufficiently plead that they were discharged. Thus, Complainants have stated a claim regarding the third element.

However, Complainants are on shakier ground in pleading the fourth element, that they were replaced by people not in their protected class. As Respondent notes, "an employer who terminates an employee and contracts out that employee's duties to another company has not 'replaced' that worker within the meaning of *McDonnell Douglas*." *Humphries v. Palm, Inc.*, 9 OCAHO no. 1112, 8 (2004); *see also Mitchell v. Worldwide Underwriters Ins. Co.*, 967 F.2d 565 (11th Cir. 1992) (holding that plaintiff's failure to establish that he was replaced by an employee outside of his protected class prevented him from establishing that requirement of *McDonnell Douglas*). Here, Complainants, implicitly, admit that they were replaced by contractors. *See* Compl. 4–5 (stating that "Pilgrim began contracting out 'catching' work to a man named Raul Pizano[,]" and that Pizano subcontracted the catching work). As such, without more, Complainants cannot prove that they were replaced by employees not in their protected class.

To counter, Complainants assert that Respondent jointly employed Pizano's Catchers and list several factors pertinent to determining joint employment. Opp'n 14–15. Complainants rely upon PAFs, which also do not include any facts that would support such a claim of joint employment. Therefore, the Complaint has not set forth sufficient facts to adequately plead the fourth element of the prima facie analysis.[4] However, as noted above, the OCAHO pleading standards are much lower and Complainants just need to plead enough to raise an inference of discrimination. Notwithstanding Respondent's citation to *Robert Half Legal*, 12 OCAHO no. 1272 at 7, the Court will permit Complainants to develop the claim.

b. Back Pay

[4] As such, the Court will not address the parties' arguments regarding the rest of the *McDonnell Douglas* burden-shifting analysis.

Respondent argues that Complainants do not have injury because they were offered continued employment, and thus are not entitled to back pay. Mot. to Dismiss 12–13. However, back pay "is typically ordered to compensate a discriminatee for earnings lost as a result of an unlawful discrimination[,]" which includes discriminatory discharge. *Jones v. De Witt Nursing Home*, 1 OCAHO no. 189, 1235, 1256 (1990) (citing *NLRB. v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965)). As explained above, Complainants have sufficiently plead their discharges. Therefore, Complainants' claim for back pay will not be dismissed.

IV. CONCLUSION

Complainants' Motion to File an Amended Complaint is GRANTED. Complainants are ordered to file their amended complaint on or before December 14, 2020. Respondent's Motion for Leave to File a Reply is GRANTED and its Reply is deemed filed. Complainants' request to file a sur-reply is DENIED. Respondent's Motion to Dismiss is DENIED, and thus Respondent's request for attorney fees is DENIED.

SO ORDERED.

Dated and entered on December 3, 2020.

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Jean C. King
Chief Administrative Law Judge