

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

ROBERT HEATH,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	OCAHO Case No. 2020B00089
CONSULTADD AND AN ANONYMOUS	)	
EMPLOYER,	)	
Respondent.	)	
	)	

ORDER TO SHOW CAUSE REGARDING SUBPOENAS

I. PROCEDURAL HISTORY

On June 30, 2021, Complainant Robert Heath filed five motions to approve subpoenas to five different entities, Capitol One, Comcast, Equifax, Fannie Mae, and Lululemon, that he asserts are clients of Respondent, ConsultAdd. On July 1, 2021, Complainant filed a motion to approve a sixth subpoena, to Pfizer, which he also asserts is a client of Respondent. Within each of his motions, Complainant seeks responses to interrogatories and requests for production of documents that he propounds within the subpoenas.

II. ANALYSIS

A. Interrogatories

Complainant includes five interrogatories for each subpoena to the six businesses. Pursuant to Section 1324b of the Immigration and Nationality Act, administrative law judges “by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing.” 8 U.S.C. § 1324b(f)(2); *accord* 28 C.F.R. § 68.25(a). Neither § 1324b nor OCAHO’s regulations permit a party to propound interrogatories upon non-parties. *See* § 1324b(f)(2); § 68.25(a). The provision that permits written interrogatories within OCAHO cases also limits the issuance of these interrogatories to the parties to the litigation. 28 C.F.R. § 69.19. As such, Complainant’s motions seeking to subpoena interrogatories from the non-parties are improper and his motions are DENIED in that respect.¹

¹ Although subpoenas cannot compel responses to interrogatories, subpoenas may require witnesses to attend and provide testimony at a deposition. § 68.25(a). Additionally, depositions may be taken by written questions. 28 C.F.R. § 68.22(b)(1) (“deposition by written interrogatories”); Fed. R. Civ. P. 31 (“deposition by written question”).

B. Requests for Production of Documents

Complainant lists three requests for documents within each subpoena. The three requests appear to be identical among the six entities.

“[S]ince granting the issuance of a requested subpoena is discretionary, [the administrative law judge should] make an appropriate decision after reviewing the requesting party's showing of general relevance and reasonable scope of the evidence sought.” United States v. Creation and Innovation, Inc., 3 OCAHO no. 491, 941, 941 (1993) (citation omitted); *see also* § 68.25(a).² In order for an administrative subpoena to be enforceable, the following three elements must be met: “the investigation is within the statutory authority of the agency; the subpoena is not too indefinite; and the information sought is reasonably relevant to the charge under investigation.” In re Investigation of Space Exploration Tehcs. Corp., 14 OCAHO no. 1378, 2 (2020) (citations omitted). In the context of an administratively issued subpoena, relevance means “virtually any material that might cast light on the allegations against the employer.” In re Investigation of Hyatt Regency Lake Tahoe, 5 OCAHO no. 751, 238, 243 (1995) (citations omitted); *e.g.*, Equal Emp. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54, 68–69 (1984). Discovery, including the subpoena process, “must be relevant to the claim of discrimination, and cannot be a fishing expedition for any other potential wrongdoing.” Ogunrinu v. Law Resources, 13 OCAHO no. 1332a, 2 (2019) (citing United States v. Kellogg Brown & Root Servs., Inc., 284 F.R.D. 22, 34–35 (D.D.C. 2012)).

Relevance is specific to the facts of each case; accordingly, determining the scope of relevance requires consideration of Complainant's specific allegations in his complaint. Complainant alleges that he was not hired for the position of “Python and Ruby on Rails Developer.” Complaint 12. Both “Python” and “Ruby on Rails” appear to refer to computer programming languages or computer applications. Complainant asserts that he was not hired because Respondent is “overtly not accepting applications from American workers.” *Id.* at 12. Complainant included a copy of the job advertisement as an exhibit to his complaint. *Id.* at 21–22.

Complainant may obtain responses to interrogatories from a subpoena *ad testificandum*, but he cannot do so by directly subpoenaing interrogatory responses.

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 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>.

In the subpoena requests, Complainant identifies labor condition applications (LCAs) with the companies (which he claims are Respondent's clients) that had start dates after the date he filed his job application with Respondent.

As a foundational matter, it is unclear whether the third parties named in the subpoenas have any relation to the job vacancy at issue in this litigation. Complainant predicates his subpoenas on labor conditions applications filed by Respondent identifying third parties, but he fails to offer any evidence that any of the third parties ever contracted with the Respondent for the job vacancy.³

Moreover, Complainant's subpoenas appear to demand information well beyond the scope of the complaint. Complainant's demand for documents pertaining to "the technical requirements for [Respondent's] consultants that will work at any [of the subpoenaed entity's] facility for the years 2019, 2020, and 2021" appears to not only covers positions that predated Complainant's application, but also positions that arose after his application.

The subpoenas also appears to be facially overbroad in terms of the number of LCAs targeted. Complainant seeks information related to nine LCAs between Respondent and Lululemon, two for Comcast, seven for CapitalOne, four for Equifax, four for FannieMae, and three for Pfizer — all purportedly stemming from one job vacancy posted through Dice.com, with no showing as to whether the LCAs were either for the position at issue or for positions that were substantially similar (i.e. having similar minimum qualifications in a similar geographic region). It is therefore generally unclear how the LCAs relate to Complainant's allegations of non-selection due to his national origin and citizenship status.

III. ORDERS

Complainant is therefore ORDERED to show cause as to why the requested subpoenas are relevant and not overbroad. The Court will not issue the subpoenas absent a showing of relevance to the matter pending before this Court.

Complainant is ORDERED to respond to this Order within 14 calendar days of issuance of this Order. Failure to timely comply shall result in a denial of the motions to approve the

³ The Court assumes for the purpose of the motion that the LCAs are as Complainant describes, however Complainant is obliged to, at a minimum in response to the show cause order, provide evidence demonstrating that Respondent indeed filed LCAs that identified the third parties named in the subpoena. Complainant's citation to the U.S. Department of Labor's LCA database, which lists thousands of LCAs in the first quarter of FY 2020 alone, is insufficient.

subpoenas. Respondent shall have 14 calendar days from the date of service of Complainant's response to this order to file its response.

IT IS SO ORDERED.

ENTERED:

John A. Henderson
Administrative Law Judge

DATE: August 6, 2021