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

PORFIRIO SPERANDIO, Complainant, v. UNITED PARCEL SERVICE, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2021B00025

Appearances: Porfirio Sperandio, pro se, Complainant
Patrick Shen, Esq., Daniel Brown, Esq., and K. Edward Raleigh, Esq., for Respondent

ORDER DENYING COMPLAINANT'S MOTION FOR REINSTATEMENT

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Complainant Porfirio Sperandio filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 22, 2021 alleging that Respondent United Parcel Service, Inc. engaged in unfair documentary practices related to verifying the employment eligibility of employees and retaliating against him in violation of § 1324b.

On December 7, 2021, the Court issued an Order Setting Prehearing Conference and General Litigation Order (General Litigation Order) in which it described the rules for motion practice. Of note, the Court instructed that "[b]efore seeking a hearing on any motion, it shall be incumbent on the party desiring the hearing on the motion to meet and confer with the opposing party in a good faith effort to narrow the areas of disagreement." General Litigation Order 4.

On January 20, 2022, Complainant filed its Corrected Complainant's Motion for Employment Reinstatement (Motion for Reinstatement). On January 27, 2022, Respondent filed its Opposition to Complainant's Motion for Employment Reinstatement (Opposition). The next day, Complainant filed Complainant's Answer to Respondent Opposition to Complainant Motion for Employment Reinstatement (Reply).

II. LEGAL STANDARDS

A. Preliminary Injunction

In Banuelos v. Transportation Leasing Co., 1 OCAHO no. 148, 1043, 1045, the administrative law judge (ALJ) ruled on the complainants' motion for a preliminary injunction seeking reinstatement.[1] First, the ALJ addressed whether OCAHO ALJs have the power to issue preliminary injunctions. Id. at 1045–48. The court reasoned that "since the role of an ALJ, in section 1324b IRCA proceedings, is functionally comparable to a district court judge, he or she, consistent with the general powers outlined in the statute, governing regulations, and the APA, has the requisite legal and equitable authority to consider and rule on requests for preliminary relief." Id. at 1048. The court concluded that it "can and should consider motions for preliminary inunction in section 1324b cases" using Federal Rule of Civil Procedure 65 as guidance. Id. at 1049 (citing 28 C.F.R. § 68.1).

To obtain a preliminary injunction, the movant must demonstrate the following elements: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest." Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002) (citation omitted); *see* Banuelos, 1 OCAHO no. 148, at 1049 (citing Hunt v. Nat'l Broad. Co., Inc., 872 F.2d 289, 293 (9th Cir. 1989)). "Because a preliminary injunction is 'an extraordinary and drastic remedy,' its grant is the exception rather than the rule, and plaintiff must clearly carry the burden of persuasion." United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983) (citation omitted). The burden on the moving party increases when seeking a mandatory or affirmative injunction as it "force[s] another party to act, rather than simply to maintain the status quo[.]" Haddad v. Arnold, 784 F. Supp. 2d 1284, 1295 (M.D. Fla. 2010) (quoting Exhibitors Poster Exch. v. Nat'l Screen Serv. Corp., 441 F.2d 560, 561 (5th Cir.1971)).[2]

The court in Banuelos denied the complainants' motion for a preliminary injunction seeking reinstatement because the complainants neither established irreparable injury nor success on the merits. 1 OCAHO no. 148, 1049–50.

---

[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.

[2] "A typical preliminary injunction is prohibitive in nature and seeks simply to maintain the status quo pending a resolution of the merits of the case." Haddad, 784 F. Supp. 2d at 1295 (citation omitted).

Rule 65(c) provides that a preliminary injunction may only be issued "if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

B. Unfair Documentary Practices

8 U.S.C. § 1324b(a)(6) proscribes unfair documentary practices. Generally, section 1324b(a)(6) prohibits an employer from "specify[ing] the type of documents it will accept to complete the Form I-9" to comply with the requirements of 8 U.S.C. § 1324a(b). United States v. Mar-Jac Poultry, Inc., 12 OCAHO no. 1298, 25 (2017) (citations omitted); *see also* United States v. Townsend Culinary, Inc., 8 OCAHO no. 1032, 454, 507 (1999) (collecting cases) ("the vast majority of OCAHO rulings have held that requests for specific documents, such as INS documents, constitute document abuse violations."). Specifying which documents will be accepted to complete a Form I-9 "with the intent to discriminate against an individual in violation of 8 U.S.C. § 1324b(a)(1) — i.e. based on that individual's national origin or citizenship status — is a prohibited unfair immigration-related employment practice." Mar-Jac Poultry, Inc., 12 OCAHO no. 1298, at 25–26 (citing 8 U.S.C. § 1324b(a)(6)). The complainant has the burden to establish a prima facie case of unfair documentary practices, which includes two elements: the act and intent. Trazell Onoja v. Arlington Cnty. Sheriff's Off., 13 OCAHO no. 1317, 3–4 (2019) (quoting Johnson v. Progressive Roofing, 12 OCAHO no. 1295, 5 (2017)).

To establish intent to discriminate, "there must be a showing that an employer acted based on an individual's national origin or citizenship status and that its action would not have occurred but for one or both of those characteristics." Mar-Jac Poultry, Inc., 12 OCAHO no. 1298, at 28 (citing 8 U.S.C. § 1324b(a)(6)). The complainant may establish discriminatory intent by direct or circumstantial evidence. Id. at 22 n.16; *accord* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000).

If the complainant uses direct evidence to establish discriminatory intent unfair documentary practices, "a respondent can prevail only by showing, by a preponderance of the evidence and bearing the burden of persuasion, that the same action would have been taken in the absence of the pertinent discriminatory factor." Mar-Jac Poultry, Inc., 12 OCAHO no. 1298, at 23.

Conversely, if complaint uses circumstantial evidence to establish a prima facie case of unfair documentary practices, the traditional burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1993) applies. *See* id. at 23, 37. After establishing a prima facie case, "the burden shifts to [the r]espondent to articulate a legitimate, non-discriminatory reason for the challenged employment action." Trazell Onoja, 13 OCAHO no. 1317, at 4 (citing United States v. Diversified Tech. & Servs. of Va., Inc., 9 OCAHO no. 1095, 14 (2003)). If the respondent provides a legitimate non-discriminatory reason, "the inference of discrimination

raised by the prima facie case disappears, and [the complainant] then must prove, by a preponderance of the evidence, that [the respondent's] articulated reason is false and that [the respondent] intentionally discriminated against [the complainant]." Id. (citation omitted).

C. Retaliation

> Section 1324b's antiretaliation provision prohibits a person or other entity from
>
> intimidate[ing], threaten[ing], coerc[ing], or retaliate[ing] against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

8 U.S.C. § 1324b(a)(5). A complainant may establish a prima facie case of retaliation "by either direct or circumstantial evidence." Masso v. Miami-Dade Cty., 465 F. Supp. 2d 1260, 1264 (S.D. Fla. 2006) (citing Schoenfeld v. Babbitt,168 F.3d 1257, 1263 (11th Cir. 1998)). A prima facie case of retaliation using circumstantial evidence requires the complainant establish that: "1) an individual engaged in conduct protected by 8 U.S.C. § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action." Ogunrinu, 13 OCAHO no. 1332j, at 10 (quoting R.O. v. Crossmark, Inc., 11 OCAHO no. 1236, 6 (2014)).

III. ANALYSIS

Per the General Litigation Order, Complainant was required to meet and confer with Respondent regarding his request for reinstatement prior to filing his motion. However, Complainant did not indicate in his motion whether he met and conferred.

Respondent states that Complainant did not fulfill its obligation to meet and confer prior to filing the motion. Opp'n 1 n.2. Complainant did not rebut this allegation in his reply. The Court considers Complainant's nonresponse as an admission. Complainant's failure to comply with the meet and confer requirement provides independent grounds for denial. *See* Reese v. Herbert, 527 F.3d 1253, 1264 n.17 (11th Cir. 2008) (citation omitted). The Court therefore DENIES Complainant's Motion for Reinstatement. The meet and confer requirement is a mandatory obligation imposed on both parties directing them to attempt to reach an agreement among themselves before presenting the matter to the Court. Notwithstanding the failure to meet and confer, the Court will still address the merits of Complainant's motion.

Complainant requests a preliminary injunction reinstating him to his employment with Respondent. Mot. Reinstatement 3. He states that he "is in dare [sic] health care situation and if he could have the job, he could also have health case insurance in order to treat the root canals." Id. Further, Complainant asserts that while he "is diligently looking for work[,] [a]ll his economies are gone [and] [u]nemployment helps but he cant [sic] live on this for this much of time." Id. Respondent argues that "Complainant has not produced competent evidence and cannot meet the burden for injunctive relief" as he has not met the four elements for a preliminary injunction. Opp'n 5–6. Although Complainant did not directly provide argument and evidence in support of the four elements, the Court will nonetheless liberally construe his motion since he is pro se. *See* Heath v. Optnation, 14 OCAHO no. 1374a, 2 (2021) (citations omitted) ("Pleadings filed by pro se litigants must be liberally construed.").

A. Substantial Likelihood of Success on the Merits - Unfair Documentary Practice

As to the first element of a substantial likelihood of success on the merits, Complainant asserts that he received a letter from the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) in which IER determined that Respondent discriminated against Complainant. Mot. 1. Complainant attaches a copy of IER's letter in his Motion for Sanction for Spoliation of Evidence. Insofar as Complainant asserts that IER's determination is evidence of a substantial likelihood of success, neither 8 U.S.C. § 1324b nor OCAHO's regulations require the Court "to give any deference to IER's determination." Montalvo v. Kering Ams., Inc., 14 OCAHO no. 1350, 6 (2020) (citation omitted); *see also* Lardy v. United Airlines, 4 OCAHO no. 595, 31, 70 (1994) ("To give any deference to [IER's] determination would, in fact, take away from [the Court's] own independent fact-finding and legal conclusions, which are required by statute.").

In Complainant's Reply, he attaches a copy of an email from one of Respondent's employees dated August 18, 2020 in which she stated "[a]lso you need to have 3 forms of ID: 1. Valid Driver's License 2. Original Social Security card (Cannot be laminated) 3. Passport, or Birth Certificate, or citizenship certificate or residence card." Reply 23.[3] This practice potentially constitutes the act element of unfair documentary practice prima facie case.[4] However, Complainant has not provided or referenced evidence in his motion or reply that establishes the intent requirement.[5] Complainant has therefore failed to demonstrate a substantial likelihood of success on the merits on his claim of unfair documentary practice.

[3] Complainant does not label his exhibits. As such, pinpoint citations to his Reply and the corresponding exhibits are to the internal pagination of the portable document file (PDF).

[4] Although Complainant alleges retaliation in addition to unfair documentary practice in his Complaint, he did not provide argument or evidence in support of this allegation in his motion or reply. Accordingly, Complainant has not met his burden and examination of the substantial likelihood of success on the merits as to retaliation is unnecessary.

[5] In the Complaint, Complainant makes several allegations regarding discriminatory intent, *see* Compl. 14, 18, that arguably relate to the intent element of unfair documentary practice prima facie case. However, Complainant bears

B. Substantial Threat of Irreparable Injury

Regarding the substantial threat of irreparable injury, Complainant argues that if he is reinstated, he could obtain health insurance. Respondent retorts that health insurance was not a benefit provided with the position. Opp'n, Ex. C, at 1–2. Complainant continues that with the income he would obtain from employment with Respondent he could obtain insurance, and that without reinstatement, "the damages in his already fragile health might be irreversible." Mot. Reinstatement 3.

The Supreme Court has held that "mere loss of income . . . would 'fall far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction[.]'" Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975) (quoting Sampson v. Murray, 415 U.S. 61, 91–92 (1974)).

In Cabral v. Olsten Corp., the district court relied upon the employee's uninsurability because of a preexisting condition to make the finding that "the *threat of termination of medical benefits* constitutes irreparable harm[.]" 843 F. Supp. 701, 704 (M.D. Fla. 1994) (emphasis added). The court relied upon other circuits' case law that held that "uninsurability rises to the level to establish irreparable harm." Id. at 703. Here, unlike the plaintiff in Cabral that sought a prohibitory injunction, Complainant is seeking a mandatory injunction, which carries a higher burden. Complainant is not at risk of termination of medical benefits; rather, he currently does not have health insurance. Moreover, there is no indication that Complainant is uninsurable like the plaintiff in Cabral. Instead, it appears that Complainant does not have the funds to purchase health insurance, which is more akin to mere loss of income that does not rise to the level of irreparable injury. *See* United States v. Jefferson Cty., 720 F.2d 1511, 1520 (11th Cir. 1983) (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available [later], in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

Complainant has not demonstrated substantial threat of irreparable injury, which precludes an issuance of the requested preliminary injunction.

C. Balance of Threatened Injury to Complainant and Potential Harm to Respondent

Complainant argues that without reinstatement, which would give Complainant access to health insurance, the damage to his health may be irreversible. Mot. Reinstatement 3. Respondent rebuts that the balance of equities tips in its favor because it "should not be forced to

---

the burden in a preliminary injunction and his failure to mention these allegations in his motion or reply precludes the Court from considering them.

employ someone who skipped a day of training because it was inconvenient for him to show-up." Opp'n 6 n.4.

This inquiry balances the hardship the complainant would suffer without the preliminary injunction against the impact the preliminary injunction would have on the respondent. Without the injunction, Complainant speculates he would incur damage to his health. Conversely, Respondent would be forced to employ and compensate Complainant until the adjudication of this case. Although a balance of the equities may tip in Complainant's favor, Complainant has not established the first two elements of a preliminary injunction.[6]

D. Public Interest

Complainant does not provide argument or evidence to establish that public interest weighs in favor of reinstatement. Conversely, Respondent argues that "no compelling interest of the public nor of the government would warrant sending Complainant back to work where he refused mandatory training." Opp'n 6 n.4. Based on to the heightened standard for affirmative preliminary injunctions, the Court finds that Complainant has not met his burden to establish that the public interest warrants a grant of his request.

IV. CONCLUSION

Because Complainant has failed to meet and confer per the Court's prior Order, and Complainant has not met his heightened burden for a mandatory preliminary injunction, the Court DENIES Complainant's Motion for Reinstatement.

SO ORDERED.

ENTERED:

_____

Honorable John A. Henderson
Administrative Law Judge

[6] The Court is also mindful of the security requirement under Rule 65(c). Assuming *arguendo* that Complainant met his heightened burden of proving the elements for an affirmative preliminary injunction, he would have to provide a bond in an amount "proper to pay the costs and damages sustained" by Respondent if found to have been wrongfully enjoined. It would be counterintuitive to require Complainant pay a bond (that would be directly related to the amount Respondent would pay Complainant) in order to be paid a salary from Respondent.