

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

July 18, 2013

TRAVIS JOHN GUTH,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	OCAHO Case No. 12B00004
)	
KAISER PERMANENTE HAWAII,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (2006). Travis John Guth filed a complaint in which he alleged that Kaiser Permanente Hawaii¹ (Kaiser or KFHP) discriminated against him by firing him because of his citizenship status and national origin, and that KFHP engaged in document abuse. The company filed a timely answer denying the material allegations of the complaint and raising five affirmative defenses, after which prehearing procedures were undertaken.

Presently pending is Kaiser Foundation Health Plan, Inc.’s motion for summary decision or, alternatively, motion to dismiss. Guth made a timely response to the motion and it is ripe for adjudication.

¹ Kaiser says its correct name is Kaiser Foundation Health Plan, Inc., and that the name on the complaint is erroneous.

II. BACKGROUND INFORMATION

Travis John Guth is a lawful permanent resident of the United States. The Kaiser Foundation Health Plan, Inc. (KFHP or Kaiser) is a California nonprofit corporation doing business as a Health Maintenance Organization (HMO) in several states, including Hawaii, where it employs about 2300 people. KFHP hired Travis John Guth on or about January 12, 2010 to work as a Medical Assistant III at its Lahaina clinic. Guth presented a driver's license and social security card for purposes of satisfying the requirements of the employment eligibility verification system, 8 U.S.C. § 1324a(b), and completed section 1 of Form I-9 indicating that he was a U.S. citizen. Guth's employment at KFHP was subsequently terminated on December 3, 2010 for reasons that are disputed by the parties.

Guth filed a charge with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on March 23, 2011 in which he complained that Kaiser discriminated against him on the basis of his national origin and citizenship status, and also engaged in document abuse. Guth's OSC charge reflects that he also filed a charge with the Equal Employment Opportunity Commission (EEOC) on March 7, 2011. OSC subsequently sent Guth a letter dated August 3, 2011, advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter. Guth filed his complaint on October 20, 2011 and all conditions precedent to the institution of this proceeding have been satisfied.

III. SCOPE OF THIS PROCEEDING

As an initial matter, some of Guth's allegations are not properly within the scope of this proceeding and may not be considered.

A. Discrimination on the Basis of National Origin

Guth acknowledged in his OSC charge that Kaiser has more than fifteen employees. The governing statute provides that the INA's prohibition of national origin discrimination does not apply in cases covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (Title VII). *See* 8 U.S.C. § 1324b(a)(2)(B). Generally speaking, with limited exceptions, a person or entity is an employer covered by Title VII if it is engaged in an industry affecting commerce and has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b).

Title VII thus covers most claims of national origin discrimination against employers who employ fifteen or more employees. Claims of national origin discrimination against such

employers are not within the scope of § 1324b, and must be directed to EEOC. *See Lima v. N.Y.C. Dep't of Educ.*, 10 OCAHO no. 1128, 8 (2009).² The INA in addition specifically bars any overlap between charges filed under the two statutes, 8 U.S.C. § 1324b(b)(2); Guth stated at the time he filed the OSC charge that he had already filed a charge with EEOC. His claim of national origin-based discrimination therefore cannot be entertained in this forum.

B. Discrimination on the Basis of Citizenship Status

Case law makes clear that an action under § 1324b for citizenship status discrimination may be maintained only by a protected individual. *See Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO no. 1119, 3, (2005); *Mengarpuan v. Asbury Methodist Vill.*, 4 OCAHO no. 612, 236, 243 (1994). A person is a protected individual if the person is, inter alia, an alien lawfully admitted for permanent residence, but not an alien who fails to apply for naturalization within six months of becoming eligible, or who applied on a timely basis but did not naturalize within two years after the date of application (with exceptions). 8 U.S.C. § 1324b(a)(3)(B).

Guth's complaint asserts that he has been a lawful permanent resident of the United States since September 14, 1979 and that he became eligible to apply for naturalization on May 27, 1984. He applied on December 15, 1996 but has evidently never naturalized. Because he was not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) at the time of the alleged discrimination, Guth lacks standing to maintain an action for citizenship status discrimination. His allegations of citizenship status discrimination accordingly may not be considered in this proceeding, and the only claim considered will be limited to document abuse in connection with Guth's termination.

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 website at <http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

IV. GUTH'S CLAIM OF DOCUMENT ABUSE

A. Standards Applied

The relative burdens of proof and production in a document abuse case are allocated in the same manner as in any other discrimination case using the traditional burden shifting analysis originally set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). First, the complainant must establish a prima facie case; second, the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the prima facie case disappears.

Once the employer satisfies its burden of production by setting forth a facially valid reason for the employment decision, the burden reverts to the employee to show that the employer's reason is pretextual. *Id.* at 804-05; *cf. Simon v. Ingram Micro Inc.*, 9 OCAHO no. 1088, 16-17 (2003). The employer will ordinarily be entitled to summary resolution unless the complainant can demonstrate that there is a genuine issue of fact with respect to pretext. *Cf. Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 661 (9th Cir. 2002) (employee must "put forth *specific* and *substantial* evidence that [employer's] reasons are really a pretext for . . . discrimination").

B. The Instant Motion

KFHP's motion seeks summary decision, or alternatively, dismissal of Guth's complaint. Kaiser says that as a federal contractor, it was obligated pursuant to 48 C.F.R. parts 2, 22, and 52 to participate in E-verify, and that it started participating on May 3, 2010, at which time it elected to E-verify all its current employees as well as new hires. The motion was accompanied by the Declarations of Beverly A. Stuart, DarrylLynne Sims, and Roxanne Tejada.

DarrylLynne Sims's declaration states that she is an HR-Call Center Representative for KFHP in Honolulu, Hawaii, and that she has been trained to complete I-9 forms and inspect documents. Sims participated in and assisted with coordinating and implementing E-verify in Hawaii pursuant to the Federal Contractor FAR.³ The declaration states that Guth's information was first put through E-verify on May 31, 2010 as part of a bulk upload of I-9s and that KFHP received a tentative nonconfirmation the basis for which was a conflict about his citizenship status. Section 1 of his I-9 said that Guth was a U.S. citizen, but other records could not confirm that. Guth was subsequently advised that HR would visit the clinic and that he should bring his I-9 supporting documents with him. Sims met with Guth on November 15, 2010, at which time he continued to insist that he was a U.S. citizen, so his information was resubmitted to E-verify after which another tentative nonconfirmation was received. Guth was then referred to the

³ The reference is to the Federal Acquisition Regulation, 73 Fed. Reg. 67,651-91 (November 14, 2008).

Social Security Administration.

Sims says she inquired whether Guth had ever had a resident alien card or a Certificate of Naturalization but he indicated that he had not. Sims explained the options and Guth elected to contest the tentative nonconfirmation, but on November 22, 2010 Kaiser received a final nonconfirmation from the Social Security Administration. Sims so advised Guth, and also notified Roxanne Tejada in HR. Sims again asked Guth if he had an alien card or Certificate of Naturalization and this time he confirmed that he had an alien card, but not with him. Sims advised him to call DHS to see if it could help, and on November 23, 2010 Sims spoke with a representative in the DHS Case Resolution Department who told her Guth's final nonconfirmation resulted because he was presenting different documents from the ones submitted to SSA. The representative advised closing the case and starting a new E-verify request with new information. Guth then presented an alien card, a foreign birth certificate, and adoption papers to HR on November 29, 2010, but the alien card did not have Guth's name on it; it was in the name of "Ruiz Arevalo, Walter Orlando." Sims could not submit the case to E-verify for that reason.

The declaration of Roxanne M. Tejada, the Manager of Employee and Labor Relations for KFHP in Honolulu, Hawaii, states that she was informed of the final nonconfirmation of Guth's employment authorization and on or about December 3, 2010 she informed Guth that his employment was being terminated. The declaration states further that no employee who receives a final nonconfirmation from E-verify is retained by KFHP.

C. Guth's Response

Guth filed a response by letter in which he says that "The E-Verify error was the motivating factor which led my employer to fire me." He asserts that he presented valid documents at the time he was hired, and that he was later required to present more or different documents. Guth says that four other companies he worked for have used E-verify on him without encountering any problems, and that Kaiser has been inconsistent in its responses to his allegations. He also questions whether Kaiser had a prior government contract and says there were no posters in the office about E-verify when he was hired. He protests the fact that KFHP waited so long after he was hired to bring up the matter.

Attached to the response was Guth's exhibit G-15, a press release from OSC announcing a settlement with Milestone Management Company, a case Guth characterized as "similar to mine in every single way." The press release reflects that the settlement resolved a charge that the company reverified a lawful permanent resident's employment eligibility after three years of employment because his authorization document expired, but did not reverify the eligibility of citizens with expired documents.

Guth also filed an affidavit dated April 15, 2013 in which he asks for summary judgment in his favor. The affidavit says KFHP never posted fliers or informed him at the time of hire that it was involved with the E-verify system, and did not verify him within three business days after hiring him as is required.

D. Discussion and Analysis

Wholly missing from this scenario is any evidence that could support an inference that Kaiser intended to discriminate against Guth on any prohibited basis. For all that appears of record, KFHP wanted to keep him as an employee but was unable to do so. Assuming *arguendo* for purposes of the pending motion that Guth could present a *prima facie* case, Kaiser proffered a legitimate nondiscriminatory reason for terminating him: the company was required to do so after receiving a final nonconfirmation from E-verify, and had no choice in the matter.

While Guth refers to an “E-Verify error,” the error is not E-verify’s; it is instead his own. At the time he was hired by KFHP, Guth completed section 1 of Form I-9 and checked a box to indicate that he was a U.S. citizen. In fact he was not a citizen. E-verify could not reconcile Guth’s claim of U.S. citizenship with other records because Guth did not indicate his correct status as a lawful permanent resident.

While Guth is correct in stating that it is ordinarily improper to reverify the employment eligibility of a lawful permanent resident employee who presented valid documents at the time of hire, the prohibitions contained in 8 U.S.C. §1324b(1) are subject to certain exceptions, one of which is § 1324b(a)(2)(C). That section excludes from coverage,

discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

Id.; *see also* 28 C.F.R. § 44.200(b)(iii)(B). By virtue of becoming a federal contractor subject to Executive Order No. 12,989, 61 Fed. Reg. 6091 (Feb. 13, 1996), as amended by Executive Order No. 13,465, 73 Fed. Reg. 33,285 (June 6, 2008), Kaiser was required to comply with the Federal Acquisition Regulation (FAR) final rule. It chose, as it was permitted to do, to use E-verify for all its employees.

Guth asserts that “the fact is, had they noticed incomplete paperwork, it should’ve been handled professionally and in a timely manner.” But the fact is, rather, that the paperwork was not “incomplete,” it was just wrong and KFHP had no way of knowing it was wrong until the

company attempted to use E-verify to confirm Guth's employment eligibility. To the extent that Kaiser then requested Guth to show additional documents, that request was necessitated by the error Guth made himself in completing section 1 of his I-9, and not by any attempt on Kaiser's part to discriminate against him. To the extent that Kaiser subsequently rejected Guth's alien card, moreover, it did so because the card was in a name entirely different from Guth's, not because of an intent to discriminate against him.

Assuming *arguendo* that Guth could demonstrate a *prima facie* case of document abuse pursuant to 8 U.S.C. § 1324b(a)(6), KFHP proffered a legitimate nondiscriminatory reason for its document requests and for his termination, thereby shifting the burden back to Guth. An employee must point to specific and substantial evidence to create a genuine issue of material fact as to pretext, *Aragon*, 292 F.3d at 661, and Guth pointed to no evidence that would support an inference that The Kaiser Foundation Health Plan, Inc.'s reason for terminating him was a cover-up for a discriminatory motive or intent.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Travis John Guth is a lawful permanent resident of the United States.
2. The Kaiser Foundation Health Plan, Inc. is a California nonprofit corporation doing business as a Health Maintenance Organization (HMO) in several states.
3. The Kaiser Foundation Health Plan, Inc. employs about 2300 people in Hawaii.
4. The Kaiser Foundation Health Plan, Inc. hired Travis John Guth on or about January 12, 2010 to work as a Medical Assistant III at its Lahaina clinic.
5. Travis John Guth presented a driver's license and social security card to The Kaiser Foundation Health Plan, Inc. at the time he was hired to satisfy the requirements of the employment eligibility verification system, 8 U.S.C. § 1324a(b).
6. Travis John Guth completed section 1 of Form I-9 at the time he was hired by The Kaiser Foundation Health Plan, Inc., and checked a box on the form indicating that he was a U.S. citizen.
7. Travis John Guth has been a lawful permanent resident of the United States since September 14, 1979 and became eligible to apply for naturalization on May 27, 1984.

8. Travis John Guth applied for naturalization on December 15, 1996.
9. DarrylLynne Sims is an HR-Call Center Representative for The Kaiser Foundation Health Plan, Inc. in Honolulu.
10. DarrylLynne Sims participated in and assisted with coordinating and implementing E-verify for The Kaiser Foundation Health Plan Inc. in Hawaii pursuant to the Federal Acquisition Regulation, 73 Fed. Reg. 67,651-91 (Nov. 14, 2008).
11. Travis John Guth's information was first put through E-verify on May 31, 2010 as part of a bulk upload of I-9s for The Kaiser Foundation Health Plan, Inc. in Hawaii.
12. The Kaiser Foundation Health Plan, Inc. in Hawaii received a tentative nonconfirmation for Travis John Guth the basis for which was a conflict about his citizenship status.
13. The Kaiser Foundation Health Plan, Inc. in Hawaii received a final nonconfirmation for Travis John Guth on November 22, 2010.
14. Roxanne M. Tejada, Manager of Employee and Labor Relations for The Kaiser Foundation Health Plan, Inc. in Honolulu, Hawaii was informed of the final nonconfirmation of Travis John Guth's employment authorization and on or about December 3, 2010 she told him his employment was terminated.
15. Travis John Guth filed a charge with the Equal Employment Opportunity Commission (EEOC) on March 7, 2011.
16. Travis John Guth filed a charge with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices on March 23, 2011.
17. The Office of Special Counsel for Unfair Immigration-Related Employment Practices sent Travis John Guth a letter dated August 3, 2011, advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter.
18. Guth filed his complaint on October 20, 2011.

B. Conclusions of Law

1. Travis John Guth is not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).
2. The Kaiser Foundation Health Plan, Inc. is an entity within the meaning of 8 U.S.C. §

1324b(a)(1).

3. All conditions precedent to the institution of this proceeding have been satisfied.
4. INA's prohibition of national origin discrimination does not apply in cases covered under section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (Title VII). *See* 8 U.S.C. § 1324b(a)(2)(B).
5. With limited exceptions, a person or entity is an employer covered by Title VII if it is engaged in an industry affecting commerce and has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b).
6. The INA bars any overlap between charges filed under the two statutes. 8 U.S.C. § 1324b(b)(2).
7. Travis John Guth's claim of national origin-based discrimination cannot be entertained in this forum.
8. An action under § 1324b for citizenship status discrimination may be maintained only by a protected individual. *See Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO no. 1119, 3, (2005); *Mengarpuan v. Asbury Methodist Vill.*, 4 OCAHO no. 612, 236, 243 (1994).
9. A person is a protected individual within the meaning of § 1324b(a)(3) if the individual is, inter alia, an alien lawfully admitted for permanent residence, but not an alien who fails to apply for naturalization within six months of becoming eligible, or who applied on a timely basis but did not naturalize within two years after the date of application.
10. Because he was not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) at the time of the alleged discrimination, Travis John Guth lacks standing to maintain an action for citizenship status discrimination.
11. Travis John Guth failed to demonstrate a prima facie case of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).
12. Assuming arguendo that Travis John Guth demonstrated a prima facie case of document abuse pursuant to 8 U.S.C. § 1324b(a)(6), The Kaiser Foundation Health Plan, Inc. proffered a legitimate nondiscriminatory reason for his termination.
13. Travis John Guth pointed to no evidence raising a genuine issue of material fact as to whether The Kaiser Foundation Health Plan, Inc.'s reason for terminating him was a pretext for

discrimination.

14. The complaint must be dismissed.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 18th day of July, 2013.

Ellen K. Thomas
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 sixty days after the entry of such Order.