

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

March 25, 2014

SALIM J. HAJIANI,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 13B00032
)	
ESHA USA, INC. AND SAMEER RAMJEE,)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

Salim Hajiani filed a complaint against ESHA USA Inc. (ESHA) and Sameer Ramjee alleging that the respondents engaged in document abuse, fired him because of his citizenship status, and retaliated against him because he filed a complaint of religious discrimination against a previous employer. The case arises under the nondiscrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2012). After some preliminary delays, the respondents filed an answer denying the material allegations in the complaint, and prehearing procedures were undertaken. Neither Hajiani nor Ramjee, who appears on his own behalf as well as for ESHA, is represented by counsel.

In the course of discovery, Hajiani made sixty-eight pages of discovery requests to the respondents, consisting of 106 interrogatories (not including subparts) to Sameer Ramjee personally, 106 interrogatories (not including subparts) to ESHA, and thirty-four requests for production of documents made to each of them, together with nine pages of instructions and definitions. After reviewing these requests I issued an order staying discovery until further notice. The stay was issued because it was evident upon review of Hajiani’s discovery requests that many were voluminous, redundant, overbroad, not reasonably limited in time, scope, or location, not relevant to the subject matter of this proceeding, addressed to matters not covered by § 1324b, or so replete with legal jargon as to be unintelligible. Many requests assumed the very facts in issue.

Notwithstanding the stay of discovery, Ramjee responded to Hajiani's discovery requests and filed a copy of his responses with this office. Based on the record as a whole, including Ramjee's responses to Hajiani's discovery requests, I issued an order vacating the stay of discovery and giving Hajiani an opportunity to show cause why his complaint should not be dismissed. The order advised him that, because matters outside the pleadings would be considered, the matter would be treated as posing the question of whether his claim could survive a summary decision analysis. Hajiani was given until February 17, 2014 to file a response.

On January 30, 2014, Hajiani filed a motion to compel seeking an order compelling further answers to his discovery requests and granting sanctions and attorney's fees against the respondents. He complained that a witness statement and some answers to his discovery requests were handwritten, and that some interrogatories were answered incompletely. His motion also stated that it "is almost impossible for me to prove that there were undocumented workers at that business, because the defendant is holding all of this information."

On February 15, 2014, Hajiani faxed a response to the show cause order.¹ On February 24, 2014, Sameer Ramjee telephoned this office to inquire whether Hajiani responded to the order. When informed that a response had been filed, Ramjee stated that he had not received it and requested this office to fax a copy to him, which was done. This is at least the third time that this office has had to provide Ramjee with a copy of a document that Hajiani's certificate of service represented was served on Ramjee but that was not received by him. Ordinary mail sent from this office to Ramjee at the same address apparently arrives routinely without difficulty.

II. BACKGROUND INFORMATION

The record reflects that Salim Hajiani is a lawful permanent resident of the United States, and that ESHA is a Sonoco gas station and convenience store located in Philadelphia, Tennessee, that operates under the name One Stop Market.² Sameer Ramjee hired Hajiani on or about October 10, 2011 to work as a cashier at the Philadelphia facility. Hajiani thereafter worked the second shift, from noon until nine p.m. daily, until approximately January 10, 2012, when his employment ended for reasons that are disputed between the parties. Hajiani was not replaced, and after his departure Ramjee worked the second shift himself.

¹ The response is dated February 14, 2014 and the certificate of service states that a copy was served by mail to the respondents on that date. Applicable rules provide that facsimile filing is permissible only to toll the running of a time limit, and that originals must be forwarded simultaneously. 28 C.F.R. § 68.6(c). It also requires that a party filing by fax must include in the certificate of service a certification that service on the other party has been made by facsimile, by same-day hand delivery, or by overnight delivery, if fax or same-day is unavailable. These requirements were not complied with.

² The company also operates another facility in Red Knox, Tennessee.

Hajiani thereafter filed a charge with the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC) on June 26, 2012 and OSC sent him a letter dated November 8, 2012 advising him that OSC dismissed his charge because it did not state a claim under the governing statute. Hajiani then filed a complaint with the Office of the Chief Administrative Hearing Officer on February 8, 2013. He also filed a complaint of discrimination with the Tennessee Human Rights Commission, which sent him a letter dated July 1, 2013 authorizing him to file an action in state court. There is no indication in the record that Hajiani filed such an action.

Hajiani's OCAHO complaint was accompanied by a long narrative attachment he asked to be considered as part of his complaint. The narrative details a potpourri of confusing and disorganized assertions about requests for documentation, long hours with no overtime pay, the fact that the respondents checked Hajiani's references without his permission, double shifts, and other allegations respecting various terms and conditions of Hajiani's employment. Hajiani also said he previously filed a complaint of religious discrimination with EEOC, and that Ramjee learned of the complaint in the process of checking his references and then threatened to fire him if he did not withdraw it. Hajiani said he then told Ramjee he also filed with the Department of Justice, and Ramjee threatened to fire him if he did not withdraw all his complaints. Hajiani also described a number of other reasons for his discharge, including a conflict with Ramjee about selling cigarettes to a person Hajiani believed to be underage. Hajiani said when this individual entered the store on January 9, 2012, Hajiani and Ramjee had a discussion after which Ramjee paid him and then terminated him. Hajiani's narrative says further,

After a couple of hours I called Jim (father in law and part owner of the business), he told me that Mr. Ramjee had contacted some undocumented worker and the worker was ready to work for a cheap amount plus no overtime was demanded. He even told me that Mr. Ramjee told him that he was very upset about the threats that I made fir (sic) his business, like filing a complaint with the Department of Justice. Lastly, non withdrawal of the complaints on the former employer was also a ground for my termination.

Hajiani also concluded that among the other reasons he was fired were that the company wanted undocumented people so it would not have to pay overtime or benefits, that for the first shift the company was only interested in hiring U.S. citizens, that Hajiani was demanding meal breaks as Tennessee law requires, and that Hajiani refused to engage in illegal activity such as selling tobacco to minors or selling hot food on an EBT card because that is not legal. Hajiani said he also tried to help a lady by becoming a witness, and refused to withdraw a police complaint he made against the individual he believed to be underage.

Hajiani said he discussed all of those issues with Ramjee before his final notice. Hajiani also said Ramjee informed him that his other business locations employed undocumented workers, and that some of the employees "are partially undocumented, it means that they are not authorized to work at any job. They are only authorized to do somee (sic) of the jobs." An attachment explains this allegation by stating that "[a]ccording to the immigration laws they are only allowed to do certain jobs and not all the jobs."

Because it was unclear that Hajiani had actually stated a cognizable claim, an order of inquiry was addressed to him. He made a prompt response reiterating his previous allegations but also adding a number of new ones. Hajiani said Ramjee's father-in-law, Jim, called a female customer fat, and she became upset and "called the cops." He also said an employee named Jeni and another named "Stand" told the police that Jim was in the wrong and Jim terminated both of them. Hajiani said he was told "they even do tax frauds" at this and other stores, and that after some time he, Hajiani, would be a manager and would make more money committing tax frauds.

Hajiani also asserted that Carla, another employee, was upset because her hours were affected when he was hired. She told her boyfriend to fight Hajiani, and Hajiani had to call the police. Hajiani identified a number of other incidents he complained to Ramjee about, including cash register shortages, sexual harassment, allowing a seven-year-old to work in the cooler, and being touched by Jim. He complained about overtime, meal breaks, and rest breaks, and said that when he requested a day off to consult counsel, "they" told him they would terminate him "if I contacted a counsel." He said that there would be adverse consequences if he became a witness for "Cristy," who was involved in a fight outside the store, and also that they "would not hire" him if he moved out of the motel across the street from the store. Hajiani also asserts that "they would do a lot of following and spying on me," for example when he went to Walmart or other places. He said that in January he "informed them that I have to file my taxes and would need a W-2 and my overtime." After that, "I gave them an ultimatum. I told them I cannot work this way and now is the time for making a decision." Hajiani also said Sameer (Ramjee) told him he was too demanding and that undocumented immigrants would work for less. Then he was terminated.

Hajiani's recent response to the notice and order to show cause again stated that he was discharged on January 10, 2012 because of his citizenship, that he was not hired for the first shift because he was not a United States citizen, that he filed an EEOC complaint against a former employer and threatened to file a complaint with OSC after which he was retaliated against, and that "there were other reasons also for my termination, but the respondent is the best person to know his motives." Hajiani states that this forum is the only appropriate forum for the kind of violation he alleges, and concludes by saying, "I believe that I have established a claim and my complaint is timely filed."

III. DISCUSSION

As Hajiani was previously advised, much of the information in his initial narrative failed to bring his allegations within this forum's scope of authority. To the extent, for example, that Hajiani complained of document abuse at the time he was hired in October 2011, that claim was untimely made. Hajiani filed his OSC charge on June 26, 2012. Because 8 U.S.C. § 1324b(d)(3) directs that no complaint may be filed respecting any unfair immigration-related practice occurring more than 180 days prior to the filing of a charge with OSC, a timely claim would encompass only events occurring after December 29, 2011. Events occurring in the previous October do not provide a basis for a timely claim, so Hajiani may not pursue his allegations of document abuse that allegedly occurred at the time of hire.

To the extent, moreover, that Hajiani continues to contend he was retaliated against because he filed a complaint of religious discrimination with EEOC, that contention must be referred to EEOC itself because claims of retaliation that are cognizable in this forum do not include claims of retaliation for conduct other than that specifically protected under the governing statute. 8 U.S.C. § 1324b(a)(5). To qualify as protected conduct in this forum, an activity must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *Id.*; see also, e.g., *Harris v. Haw. Gov't Emps. Ass'n*, 7 OCAHO no. 937, 291, 295 (1997);³ *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no OCAHO jurisdiction over threats to report the employer to “EEOC, the Immigration Department (sic), the American Counsel General, the ALCU (sic), the NAACP, Georgia Legal Services,” or agencies other than OSC or this office). Complaints about retaliation for filing a complaint with EEOC do not come within the protection of § 1324b(a)(5).

Neither do Hajiani’s complaints about the terms and conditions of his employment, such as compensation, shift assignments, meal breaks, overtime, and other disputes having no discernable relation to the governing statute. OCAHO cases are legion for the proposition that the governing statute does not encompass terms, conditions, or privileges of employment; the language is unequivocal that only hiring, recruitment, and discharge are covered. Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., § 1324b does not speak to other employment issues, so no prima facie case can be established under § 1324b respecting the terms and conditions of employment. *Shortt v. Dick Clark’s AB Theatre, LLC*, 10 OCAHO no. 1130, 7 (2009).

Generalized complaints about the presence of undocumented workers, moreover, do not constitute protected conduct for purposes of this analysis either, because § 1324b(a)(5) is not a catch-all statute; it prohibits retaliation only when that retaliation is engaged in for the purpose of discouraging activity related to the filing of OSC charges, or interfering with rights or privileges secured specifically under § 1324b. See *Cavazos v. Wanxiang Am. Corp.*, 10 OCAHO no. 1138, 1-2 (2011); see also *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 813-14 (7th Cir. 2003) (observing that § 1324b(a)(5) does not provide a remedy for individuals who filed a charge or complaint about violations of immigration law rather than about discrimination). This is accordingly not the appropriate forum for complaints addressed generally to the employment of undocumented workers. See 8 U.S.C. § 1324a(e)(1)(A); 8 C.F.R. § 274a.9.

³ 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.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

Hajiani's responses to inquiries offer such a bewildering variety of shifting and inconsistent reasons for his termination that it is impossible to reconcile them. He said he was terminated in retaliation for not withdrawing previous complaints, for wanting to report his income for tax purposes, for complaining about the denial of meal breaks, for refusing to commit food stamp violations, for refusing to sell tobacco to a minor, for not withdrawing a police report about Tyler Hawk hitting him, for wanting to be a witness for "Cristy," for wanting to consult a lawyer, for moving out of the motel, and for other reasons known only to Sameer Ramjee. Hajiani also asserted as a reason for his termination that he is the one who issued an "ultimatum" when he told "them" he couldn't work this way.

When the same individual responsible for hiring an employee is also responsible for firing the employee within a short time thereafter, a strong inference arises that discrimination was not a determining factor. *See Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1442-43 (11th Cir. 1998) and cases cited therein. If Sameer Ramjee wanted to discriminate against Hajiani because of his citizenship status, Ramjee would not have hired him in the first place. Hajiani's subjective and conclusory allegations of citizenship status discrimination are insufficient to overcome the "same actor inference" of nondiscrimination, particularly where Hajiani simultaneously proffers a dozen other reasons for his termination that have nothing to do with his citizenship. Hajiani's response to the notice acknowledges that he has no personal knowledge as to anyone else's immigration status. He has not, moreover, proffered any actual evidence that leads to an inference of discrimination.

Hajiani's response to the notice correctly points out that this is the only appropriate forum for his claims of citizenship status discrimination. But that claim is sufficiently insubstantial that no rational fact finder could find in his favor because none of the reasons Hajiani offered for his discharge is supported by evidence. Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist. *See Goel v. Indotronix Int'l Corp.*, 9 OCAHO no. 1102, 14 (2003). However sincerely held, Hajiani's subjective assertions that his citizenship status was the reason for his discharge are wholly lacking in evidentiary support and are flatly contradicted by his other multiple, shifting, and inconsistent explanations. *Cf. Curuta v. N. Harris Montgomery Cmty. Coll. Dist.*, 9 OCAHO no. 1099, 15-16 (2003) (observing that discrimination suits require some evidence of discrimination, and subjective belief is not enough).

To state a colorable claim of retaliation within the meaning of 8 U.S.C. § 1324b, moreover, there must be some reason to believe that the adverse employment action would not have taken place but for the complainant's protected activity. *See Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 578 (1999); *cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). Hajiani himself put forth such a plethora of alternative explanations for his termination that it is impossible for him to show that his termination, assuming *arguendo* that it actually occurred, would not have happened in the absence of some protected conduct on his part.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 25th day of March, 2014.

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 (60) days after the entry of such Order.