

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

November 14, 2012

KR,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 12B00051
)	
WESTERN DIGITAL,)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL WITH PREJUDICE

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b (2006), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which KR is the complainant and Western Digital Corporation is the respondent. KR filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that respondent discriminated against him by firing him because of his citizenship status and national origin and retaliated against him, all of which he said was done in violation of 8 U.S.C. § 1324b. The respondent filed an answer denying the material allegations and raising various affirmative defenses, and KR filed a reply to the answer.

On May 16, 2012, an Order for Prehearing Statements was issued directing KR to file his prehearing statement no later than June 26, 2012 and Western Digital to file its prehearing statement no later than August 7, 2012. After KR failed to file his prehearing statement as directed, Western Digital filed a Motion to Dismiss Complaint on July 23, 2012, together with a Declaration and attachments. KR did not file a response to the motion to dismiss, and after

the time for doing so elapsed,¹ a Notice and Order to Show Cause was issued to KR advising him that OCAHO rules provide that a complaint may be dismissed upon its abandonment by the party who filed it, and that a party shall be deemed to have abandoned his complaint where the party or his representative fails to respond to orders issued by the Administrative Law Judge. 28 C.F.R. § 68.37(b)(1); *see, e.g., Rodriguez v. Tyson Foods, Inc.*, 9 OCAHO no. 1109, 3-4 (2004).² KR was ordered to show cause within fifteen days why his complaint should not be deemed abandoned, or, in the alternative, show good cause for his prior failure to file his prehearing statement, and to file a prehearing statement which comports with 28 C.F.R. § 68.12.

On August 1, 2012, KR filed Complainant's Response to Notice and Order to Show Cause stating that he did not file his prehearing statement because he had not yet completed his discovery and needed additional time to prepare a prehearing statement. As explained in a subsequent order resolving various motions,¹ KR offered no good cause or adequate ground for his failure to file a prehearing statement as directed. While he said he preferred to conduct discovery first, prehearing statements are routinely filed before, not after, the completion of discovery; indeed one of the matters expressly directed to be addressed in such statements is the scope of a party's contemplated discovery.

¹ *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011). A party has ten days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). The motion was served on July 19, 2012 so KR's response was due by August 3, 2012.

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>.

³ KR's response was accompanied by a Motion for Order to Preserve Evidence. On August 7, 2012, KR filed a Motion for Protective Order Preventing the Deposition of KR, and on August 13, 2012 he filed a Motion to Strike Scandalous Material. Western Digital made timely responses to all the motions, and all were resolved in an order issued on August 23, 2012

KR was accordingly advised that parties are not free to rewrite orders issued to them in order to unilaterally change the terms of such orders, nor are they at liberty to simply decline to follow such orders. He was given yet another opportunity to file his belated prehearing statement if he did so on or before September 7, 2012. The order also directed KR, inter alia, to provide a more definite statement on or before September 7, 2012 and clarify certain of his claims in order to facilitate a determination as to whether he could state a claim upon which relief may be granted.

II. KR'S RESPONSE TO THE ORDER

Once again KR failed to file a prehearing statement as directed. Neither did he provide a more definite statement as directed. Instead, an attorney entered an appearance on KR's behalf and filed a Motion to Dismiss Complaint without Prejudice pursuant to Federal Rule of Civil Procedure Rule 41(a)(2). In support of the motion, KR acknowledged, inter alia, that he would "likely need to adjudicate his claims for retaliation in front of the EEOC or in front of the California Superior Court." He acknowledged as well that voluntary dismissal without prejudice is not a matter of right. Although KR observed that "no depositions are currently noticed," he failed to acknowledge that his deposition had previously been noticed, that he had failed to appear, and that one of the motions denied in the most recent order was his motion for a protective order to prevent the taking of his deposition.

Western Digital filed a response in opposition to KR's Motion to Dismiss without Prejudice, observing that no OCAHO decision has ever granted voluntary dismissal without prejudice over the objections of the other party, and that research reflected only two instances in which dismissal without prejudice was granted at all: *Kadir v. Regal Dental Ceramics, Inc.*, 4 OCAHO no. 598, 93, 99 (1994) (unrepresented complainant became temporarily disabled), and *LeEdwards v. Kumagai Int'l USA Corp.*, 4 OCAHO no. 609, 197, 200 (1994) (by stipulation of the parties).

III. DISCUSSION AND ANALYSIS

KR's complaint will be deemed abandoned for his having failed, for the third time, to file his prehearing statement and respond to other orders issued as well. Western Digital's previous Motion to Dismiss will accordingly be granted.

ORDER

The complaint is dismissed with prejudice.

SO ORDERED.

Dated and entered this 14th day of November, 2012.

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 60 days after the entry of such Order.