

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

September 9, 2016

RICARDO FARHARD GAMEZ CALTZONCIN,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 16B00018
)	
GSM INSURORS-GLASS, SORENSON &)	
McDAVID)	
Respondent.)	
_____)	

ORDER OF DISMISSAL WITH RESPECT TO CITIZENSHIP STATUS AND NATIONAL
ORIGIN DISCRIMINATION CLAIMS

I. PROCEDURAL HISTORY

This is an action arising under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2012). On February 1, 2016, Ricardo Farhard Gamez Caltzoncin (Mr. Caltzoncin or Complainant) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against GSM Insurors-Glass, Sorenson & McDavid (GSM Insurors or Respondent).¹ The complaint alleges unlawful firing on the basis of Mr. Caltzoncin’s citizenship status and national origin and document abuse. As far as the record shows, Mr. Caltzoncin is still unrepresented in these proceedings.

On June 28, 2016, the undersigned issued a Notice and Order to Show Cause to Mr. Caltzoncin. This filing, in part, ordered Complainant to show cause “within twenty-one (21) days” of the date of the order why his citizenship status and national origin discrimination claims should not be dismissed. Specifically, the undersigned discussed that based on the information Mr. Caltzoncin provided in his OCAHO complaint, he did not appear to be a “protected individual,”

¹ According to Respondent’s answer, its correct legal name is Glass, Sorenson & McDavid, Inc. d/b/a GSM Insurors. Either party should file a motion if needed to amend the case caption.

pursuant to the statutory definition at 8 U.S.C. § 1324b(a)(3), and therefore could not maintain a claim of citizenship status discrimination against Respondent. *See* 8 U.S.C. § 1324b(a)(1)(B); *see, e.g., Omoyosi v. Lebanon Correctional Inst.*, 9 OCAHO no. 1119, 4 (2005).²

Complainant was further ordered to show cause why his national origin discrimination claim should not be dismissed because he indicated in his discrimination charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), which is attached to his complaint, that GSM employs fifteen or more employees. As explained in my June 28, 2016, Notice and Order to Show Cause, section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012) (Title VII) covers most claims of national origin employment discrimination against employers who employ more than fourteen employees. Therefore, these claims are not within OCAHO's jurisdiction because they do not fall under the provisions of 8 U.S.C. § 1324b and must be directed to the Equal Employment Opportunity Commission (EEOC). *See Lima v. N.Y.C. Dep't of Ed.*, 10 OCAHO no. 1128, 8-9 (2009) (citing *Sodhi v. Maricopa Cnty. Special Health Care Dist.*, 9 OCAHO no. 1124, 6 n.2 (2007) (*Sodhi I*)).

Mr. Caltzoncin failed to respond to the Order to Show Cause, and the twenty-one (21) days provided for the filing of a response has expired.

I also granted in part GSM's Motion to Dismiss for Lack of Subject-Matter Jurisdiction with respect to the portions of the complaint that allege Respondent terminated Mr. Caltzoncin because of "breach of contract," "work hostility," "severance agreement," "manipulation," and "Fair Labor Standards Act and overtime." As I explained in the previous Order, complaints concerning the terms and conditions of employment do not fall within the scope of 8 U.S.C. § 1324b.

II. DISCUSSION

For the reasons provided below, I will dismiss Mr. Caltzoncin's citizenship status and national origin discrimination claims for two separate but related reasons. First, Complainant has

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

abandoned his complaint relating to these two claims by failing to respond to my order. Second, Complainant has failed to state a claim upon which relief may be granted with respect to his citizenship status discrimination claim and his national origin based discrimination claim.

A. Abandonment

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);³ *see e.g., Rodriguez v. Tyson Foods, Inc.*, 9 OCAHO no. 1109, 3-4 (2004).

Mr. Caltzoncin has abandoned his complaint with respect to the citizenship status and national origin claims as he has failed to respond to my Order to Show Cause. Moreover, Complainant did not respond to GSM's Motion to Dismiss, filed on March 15, 2016, nor has he submitted any kind of written communication with this office to indicate that he intends to comply with my Order, or that he intends to continue with his lawsuit. Therefore I conclude that Complainant has abandoned the portions of his complaint that are based on citizenship status discrimination and national origin discrimination.

B. Failure to State a Claim Upon Which Relief May Be Granted

The OCAHO Rules of Practice and Procedure allow an Administrative Law Judge to “dismiss the complaint, based on a motion by the respondent or without a motion from the respondent, if the Administrative Law Judge determines that the complainant has failed to state a claim upon which relief can be granted.” 28 C.F.R. § 68.10(b). However, during the prehearing phase, the Administrative Law Judge “shall not dismiss a complaint in its entirety for failure to state a claim upon which relief may be granted, upon his or her own motion, without affording the complainant an opportunity to show cause why the complaint should not be dismissed.” *Id.*

OCAHO's Rule 68.10 is similar to and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Bent v. Brotman Med. Ctr. Pulse Health Servs.*, 5 OCAHO no. 764, 362, 364 (1995) (citing *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)). In considering a motion to dismiss, a court should accept as true the well-pleaded factual allegations in the complaint. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004).⁴ The complaint should be liberally construed and viewed in the light most favorable to the complainant. *Bent*, 5 OCAHO no. 764 at 364 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

³ *See* OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

⁴ The Fifth Circuit is the reviewing United States Court of Appeals for this case, should it be appealed, as the alleged violation occurred in the State of Texas. 28 C.F.R. § 68.57.

As stated above, the undersigned provided Mr. Caltzoncin with written notice that his claims of employment discrimination based on his citizenship status and his national origin could be dismissed because of the deficiencies noted in his complaint. Although “some leeway in pleading is generally afforded to pro se parties, *see Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 3 (2016) (citing *United States v. Union Lakeville Corp.*, 8 OCAHO no. 1019, 277, 280 (1998)), his pleadings were overall articulate and reflected an understanding of the OCAHO process. For the reasons stated below, I find that Mr. Caltzoncin failed to plead sufficient facts to support a claim of either citizenship status discrimination or national origin discrimination. These portions of Mr. Caltzoncin’s complaint will therefore be dismissed.

1. Complainant is Not a Protected Individual

Title 8 U.S.C. § 1324b(a)(3) defines a protected individual as a citizen or national of the United States, an alien who is lawfully admitted for permanent residence, or for temporary residence under section 1160(a) or 1255a(a)(1) of title 8; or an alien who is admitted as a refugee under section 1157 of title 8, or granted asylum under section 1158 of title 8.⁵

Based on the information that Mr. Caltzoncin provided in his complaint, he does not fall within any of these categories. Where the OSC charge asks that the injured party indicate his or her “citizenship or immigration status or work authorization type,” Complainant checked, “None of the above, but is authorized to work” until May 12, 2017. He also indicated in his OSC charge that he had a work permit. Mr. Caltzoncin stated in his OCAHO complaint that he is an alien authorized to work in the United States and that he was authorized to work in the United States from March 22, 2013, to March 21, 2015, and from May 12, 2015, to May 11, 2017. I will therefore dismiss Mr. Caltzoncin’s individual complaint as it relates to his claim of citizenship status discrimination against GSM because he has failed to demonstrate in his pleadings an essential element of this kind of claim. *See United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 7 (2012) (citing *O moyosi*, 9 OCAHO no. 1119 at 4-5).

2. Complainant’s National Origin Claim Does Not Fall Within the Scope of 8 U.S.C. § 1324b

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). Claims of national origin discrimination against such employers are not within the scope of 8 U.S.C. § 1324b, and must be directed to the EEOC. *See Lima*, 10 OCAHO no. 1128 at 8; *see also* 8 U.S.C. § 1324b(a)(2)(B).

⁵ The definition excludes aliens who fail to apply for naturalization within a certain time period or who have not been naturalized within a certain time period. 8 U.S.C. § 1324b(a)(3)(B).

Mr. Caltzoncin admitted in his OSC charge that GSM employs fifteen or more employees and did not allege any facts or present any information, as directed, to show otherwise. I will accordingly dismiss Mr. Caltzoncin's national origin based discrimination claim. Because, "the number of a respondent's employees is an element of a claim for relief rather than a jurisdictional matter," *Lima*, 10 OCAHO no. 1128 at 9 (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-16 (2006)), the grounds for dismissal of this portion of the complaint is also Mr. Caltzoncin's failure to state a claim upon which relief may be granted.

C. Complainant's Allegation of Document Abuse

Mr. Caltzoncin also asserted a claim of document abuse under 8 U.S.C. § 1324b(a)(6) against GSM in his complaint. Although GSM denied in its answer the material allegations of the complaint in its entirety, Respondent did not address the document abuse claim in its Motion to Dismiss. Based on the facts alleged in the complaint and considering the early stage in which these proceedings are, Mr. Caltzoncin's claim of document abuse appears to remain viable. Accordingly, on August 23, 2016, the undersigned issued a separate Order for Prehearing Statements to facilitate these proceedings with respect to Mr. Caltzoncin's document abuse claim.

The undersigned encourages Mr. Caltzoncin to try to obtain legal representation should he wish to proceed with this lawsuit.

SO ORDERED.

Dated and entered on September 9, 2016.

Robert J. Lesnick
United States Administrative Law Judge