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

February 22, 2024

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2024A00015
ZARCO HOTELS INCORPORATED, Respondent.	)	

Appearances: Jodie Cohen, Esq., for Complainant
Kian Zarrinnam, pro se Respondent

ORDER DENYING RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. BACKGROUND

This matter arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Zarco Hotels Incorporated, on November 9, 2023.

On December 26, 2023, Respondent filed a document called Answer and Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (Motion to Dismiss).

On December 28, 2023, Complainant filed a response, titled "Reply to Respondent's Motion to Dismiss Complaint Regarding Unlawful Employment Practices" (Response). [1]

[1] The Court will use the terms "Response" and "Reply" consistent with OCAHO's Rules of Practice and Procedure for Administrative Hearings. *See* 28 C.F.R. § 68.11(b) (providing that parties may file a response in opposition to a motion, and that no reply to a response shall be filed unless the ALJ provides otherwise).

On January 4, 2024, Respondent filed a document titled "Response to Complainant Motion to Dismiss" (Reply); the Court construed this as a reply brief and exercised its discretion to accept Respondent's otherwise impermissibly filed submission. *United States v. Zarco Hotels Inc.*, 18 OCAHO no. 1518 (2024)[2]; *see* 28 C.F.R. § 68.11(b).[3]

On January 30, 2024, the Court held a prehearing conference pursuant to 28 C.F.R. § 68.13. *United States v. Zarco Hotels Inc.*, 18 OCAHO no. 1518a (2024). During the conference, the Court informed the parties that although Respondent attached extrinsic evidence to his Motion to Dismiss, the Court did not intend to convert it to a motion for summary decision. *Id.* at 2–3.

Respondent's Motion to Dismiss is now fully briefed. The Motion to Dismiss is denied.

II. ALLEGATIONS IN THE COMPLAINT[4]

Complainant alleges a Notice of Intent to Fine (NIF) was served on Respondent's President on June 29, 2023. Compl. 2; *id.* Ex. A. Respondent (timely) requested a hearing before OCAHO on July 10, 2023. *Id.* Ex. B.

The Complainant alleges two counts. Count I alleges Respondent "[f]ailed to timely prepare and/or present the Employment Eligibility Verification Form (Form I-9)" for two employees. Compl. 2; *id.* Ex. A. Specifically, Complainant alleges:

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[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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

[4] The facts are drawn from the Complaint and attachments thereto, and for the purposes of adjudicating the motion to dismiss, are accepted as true with all reasonable inference drawn in Complainant's favor. *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994); Fed. R. Civ. P. 10(c).

> "The Respondent hired the two individuals listed in Count 1 in [the NIF] after November 6, 1986 . . . The Respondent failed to prepare and/or present the [Forms I-9] for the two individuals listed in Count 1 in [the NIF] . . . Wherefore it is charged that the respondent is in violation of Section 274A(a)(1)(B) of the [INA], 8 U.S.C. Section 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b) of the [INA], 8 U.S.C. Section 1324a(b).

Compl. 2. For this Count, Complainant requests a fine of $2,270.10. *Id.* at 3.

Count II alleges Respondent "[f]ailed to ensure that employee properly completed Section 1 of the [Form I-9] (Substantive Paperwork Violations)" for ten employees. Compl. 3. Specifically, Complainant alleges:

> The Respondent hired the individuals listed in Count 2 in [the NIF] for employment in the United States . . . The Respondent hired the individuals listed in Count 2 in [the NIF] after November 6, 1986 . . . The Respondent was served with a Notification of Technical or Procedural Failures Letter [NTPF Letter] which included copies of the [Form I-9] that contain technical or procedural failures to meet the verification requirements of § 274A(b) of the [INA] . . . The Respondent was provided at least ten business days from the date of service of the [NTPF Letter] to correct the technical or procedural verification failures . . . ; and . . . The Respondent failed to properly correct the technical or procedural verification failures . . .

Compl. 3. Complainant alleges that this violated Section 274A(a)(1)(B) of the INA, which renders it unlawful after November 6, 1986 to hire an individual for employment without complying with the provisions of Section 274A(b) of the INA. For this Count, Complainant requests a fine of $10,864.05.

III. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

An OCAHO Administrative Law Judge (ALJ) may dismiss a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10. This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 7 (2016) (citing *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1).

"In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint." *Udala*, 4 OCAHO no. 633, at 394. The complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor. *Id.*

OCAHO's Rules of Practice and Procedure provide that complaints shall contain: (1) "A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated"; (2) "The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred"; and (3) "A short statement containing the remedies and/or sanctions sought to be imposed against the respondent." 28 C.F.R. § 68.7(a)–(b).

"Statements made in the complaint only need to be 'facially sufficient to permit the case to proceed further,' . . . as '[t]he bar for pleadings in this forum is low.'" *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 3 (2022) (citing *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012), and then citing *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021)).

"OCAHO's pleading standard does not require a complainant [to] proffer evidence at the pleadings stage . . . Rather, pleadings are sufficient if 'the allegations give adequate notice to the respondents of the charges made against them.'" *Id.* (quoting *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003)); *see also Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9 ("Unlike complaints filed in the district courts, every complaint filed in this forum, whether pursuant to § 1324a, § 1324b, or § 1324c, has already been the subject of an underlying administrative process as a condition precedent to the filing of the complaint . . . An OCAHO complaint thus will ordinarily come as no surprise to a respondent that has already participated in the underlying process.").

IV. CONVERSION OF A MOTION TO DISMISS TO SUMMARY DECISION

Because Respondent attached extrinsic materials to its Motion to Dismiss, the Court must consider whether it will convert Respondent's Motion to Dismiss to one for summary decision.

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113–14 (1997) (citations omitted). "When matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision." *Barone v. Superior Wash & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013); *see also Khoja v. Oregigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018) ("When 'matters outside the pleading are presented to and not excluded by the court,' [a] 12(b)(6) motion converts into a motion for summary judgment under Rule 56.") (citing Fed. R. Civ. P. 12(d)).[5]

[5] Since the allegations at issue in this case occurred in California, the Court may look to the case law of the relevant United States Court of Appeals, here the Ninth Circuit. *See* 28 C.F.R. § 68.57.

Here, the Court declines to convert Respondent's Motion to Dismiss to one for summary decision. In reaching this decision, the Court considered this Respondent is pro se, and neither party has engaged in meaningful discovery.[6] *See Sinha v. Infosys Ltd.*, 14 OCAHO no. 1373b, 4 n.2 (2022) (declining to convert motion to dismiss based on failure to state a claim where discovery had not yet occurred, and the parties had not been directed to provide information on this question). A declination to convert the motion does not preclude either side from filing a more complete submission for summary decision after having access to discovery.[7]

Because the Court will not convert the Motion to Dismiss, the extrinsic evidence attached to it will not be considered by the Court.

V. COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Positions of the Parties

In his Motion to Dismiss, Respondent states Complainant has failed to state a claim upon which relief may be granted; however none of Respondent's arguments explain why the pleadings are insufficient. Respondent does not explain why he moved the Court to conclude Complainant failed to meet the criteria of 28 C.F.R. § 68.7(a)–(b), and he does not explain why or how Complainant failed to provide him with adequate notice of the charges against him.[8] Instead, Respondent's arguments focus on factual issues which cause him to conclude he should not be held liable for violations of the statute.[9]

Moreover, the Federal Rules of Civil Procedure may be used as a general guideline in situations not provided for or controlled by OCAHO's Rules of Practice and Procedure, the Administrative Procedure Act, or other applicable law. 28 C.F.R. § 68.1.

[6] The Court asked each party about the status of discovery in the January 30, 2024 Prehearing Conference. Both confirmed they had not propounded discovery. *See Zarco Hotels Inc.*, 18 OCAHO no. 1518a, at 3.

[7] Again, and to ensure clarity, any evidence rejected at this stage may still be provided at a later stage (i.e. attached to a summary decision motion or a proposed hearing exhibit).

[8] If anything, his detailed and fact-specific arguments cause the Court to conclude the opposite – that he has adequate notice of why Complainant alleges he violated the law.

[9] For example, he states the responsible individual was absent during the inspection; that several employees had been terminated prior to receipt of the Notice of Suspect Documents; and that some Forms I-9 belong to a different employment entity. Mot. Dismiss 2–6.

For its part, Complainant argues it has stated a claim upon which relief may be granted. Complainant explains that by alleging two counts that are violations of Section 274A(a)(1)(B) of the INA with enough specificity that Respondent understands which I-9's are at issue and the alleged violation of the law.

B. Law & Analysis

The Complaint states a claim upon which relief can be granted. The Respondent is on notice of the claims against him, and the government has alleged the elements of a claim under § 1324a.

Complainant alleges that Respondent failed to timely prepare and/or present Forms I-9, and failed to ensure proper completion of Section 1 of Forms I-9, both in violation of 8 U.S.C. § 1324a(a)(1)(B); Complainant also provides the factual allegations supporting these claims. *See, e.g.*, *United States v. Lazy Days South, Inc.*, 13 OCAHO no. 1322a, 3 (2019) (finding allegation that the respondent "failed to prepare and/or present Form I-9s" sufficient to plead a violation of 8 U.S.C. § 1324a(a)(1)(B)) (citing *United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 5–6 (2013)). These are well-plead violations of § 1324a: Complainant alleged the basis for jurisdiction, "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred," and a "short statement containing the remedies and/or sanctions sought to be imposed against the respondent," as required by OCAHO Rules of Practice and Procedure. 28 C.F.R. § 68.7(a)–(b); *see Lazy Days South, Inc.*, 13 OCAHO no. 1322a, at 3.[10]

Indeed, Respondent's arguments center on potential factual disputes and affirmative defenses (employment history of its employees, the circumstances of the ICE inspection, and its opportunity to correct technical and procedural failures).[11] Because the Court declines to convert the motion

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[10] "The elements of a violation under 8 U.S.C. § 1324a(a)(1)(B) are that a person or other entity, after November 6, 1986, hires for employment in the United States, an individual, without complying with the employment verification requirements of § 1324a(b). The employment verification requirements include employer attestation after examination of documents, individual attestation of employment authorization, and retention of the verification form, which includes making the form available for inspection by ICE."

[11] "IRCA provides that an entity will not be penalized for a 'technical or procedural' failure of the employment verification system, unless the government first explained the basis for the failure and provided the employer a period of not less than ten business days after the explanation within which to correct the violations, and the employer did not correct the failure voluntarily within such

to dismiss to one of summary decision, it will not opine on the arguments made by Respondent. *See Lazy Days South, Inc.*, 13 OCAHO no. 1322a, at 3–4 (finding arguments that the company had: sent in the Forms I-9, demonstrated good faith compliance, and complied with retention period requirements were all factual issued which could not be resolved by looking within the four-corners of the complaint).

Respondent's Motion to Dismiss is DENIED.

SO ORDERED.

Dated and entered on February 22, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

period." *United States v. Cawoods Produce, Inc.,* 12 OCAHO no. 1280, 8 (2016) (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997)).