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

April 27, 2011

DANIEL CAVAZOS, JR., Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 11B00029
WANXIANG AMERICA CORPORATION, Respondent.	)	

FINAL ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act as amended (INA), 8 U.S.C. § 1324b. Daniel Cavazos, Jr. filed a complaint in which his sole assertion was that the respondent, Wanxiang America Corp. (Wanxiang), discriminated and retaliated against him in violation of 8 U.S.C. § 1324b(a)(1), (5) by firing him for notifying his supervisor that he intended to report Wanxiang to the Immigration and Naturalization Services (sic) for employing illegal aliens. Wanxiang filed a verified answer denying the material allegations of the complaint.

The unlawful employment of aliens is a violation of 8 U.S.C. § 1324a. The right of individuals to file written complaints respecting the hiring of unauthorized aliens or other potential violations of 8 U.S.C. § 1324a is expressly set out in § 1324a(e)(1)(A), and the procedures for so doing are set out in 8 C.F.R. § 274a.9(a)-(b). The right is specifically secured under those particular provisions. Section 1324b, on the other hand, is a provision that prohibits discrimination on the basis of citizenship status or national origin, and 8 U.S.C. § 1324b(a)(5) prohibits retaliation only for engaging in activity specifically protected by § 1324b. A complaint under 8 U.S.C. § 1324b(a)(5) thus requires an allegation of conduct that is specifically protected by § 1324b, and reports about the presence of undocumented workers or other violations of § 1324a do not constitute such conduct. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 10-

12 (2009).[1]

OCAHO case law has long held that in order to qualify as protected conduct for purposes of § 1324b(a)(5), a claim must implicate a right or privilege specifically secured under § 1324b, or a proceeding under that section. *Harris v. Haw. Gov't Emps. Assoc.*, 7 OCAHO no. 937, 291, 295 (1997); *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no OCAHO jurisdiction over threats to report employer to EEOC, the Immigration Department (sic), the American Counsel General, the ALCU (sic), the NAACP, Georgia Legal Services, or agencies other than OSC[2] or this office). Because Cavazos' complaint did not allege any conduct that is protected by § 1324b under OCAHO case law, I issued an order sua sponte pursuant to 28 C.F.R. § 68.10(b)[3] affording Cavazos an opportunity to show cause why I should not dismiss his complaint for failure to state a claim upon which relief can be granted.

Cavazos filed a timely response in which he acknowledged that his case was indistinguishable from *Shortt*. He expressed concerns about whether the Illinois courts might regard his state law claims as being preempted by the INA, and suggested further that were his case to be dismissed for failure to state a claim he might have a basis for filing in the Illinois courts.

II. DISCUSSION AND ANALYSIS

Cavazos' complaint alleges in pertinent part that he was terminated in retaliation for notifying Jesus Flores, the warehouse supervisor, of his intention to report Wanxiang to the Immigration and Naturalization Services for employing illegal aliens. It says further that upon hearing Cavazos' statements, and in his presence, Flores telephoned Wanxiang's CEO and told him about Cavazos' remarks, after which Flores fired Cavazos in accordance with what he said were

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[1] 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.

[2] The reference is to the Office of Special Counsel for Unfair Immigration-Related Employment Practices.

[3] Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2010).

the CEO's instructions. For purposes of this inquiry, I accept all Cavazos' factual allegations as true. I cannot, however, accept his legal conclusion that this conduct violates 8 U.S.C. § 1324b(a)(1) or (5), the latter of which provides that it is an unfair immigration-related employment practice,

> to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section (emphasis added).

The filing of a charge or complaint regarding violations of 8 U.S.C. § 1324a is not a proceeding "under this section." Apart from dictum in *Diarrassouba v. Medallion Financial Corp.*, 9 OCAHO no. 1076, 9 (2001), to the effect that § 1324(a)(5) should be broadly construed as a whistleblower statute, there is no precedent in OCAHO case law for reading the statute broadly enough to encompass Cavazos' claim, and such a reading would be implausible in light of the statutory language.

The Seventh Circuit, in which this case arises, has construed the statute the same way without reference to our case law, noting that § 1324b(a)(5) "does not cover all activities that implicate any provision of the immigration laws; it is limited to complaints and charges regarding discrimination based on national origin and citizenship . . . ." *Arres v. IMI Cornelius Remcor, Inc*., 333 F.3d 812, 814 (7th Cir. 2003), *aff'g* No. 00 C 6542, 2002 WL 1888489 (N.D. Ill. Aug. 15, 2002). The *Arres* court, while affirming the district court on other grounds, found it was error for the lower court to award summary judgment to the defendant Remcor based on the mistaken view that § 1324b(a)(5) provided a remedy for individuals who filed a charge or complaint about violations of immigration law. *Id.* at 813. The court observed that even had there been a federal remedy for Arres, such remedy would not automatically have precluded a state claim for retaliatory discharge. *Id.* at 813-14. *See also, Tiengkham v. Electronic Data Sys. Corp*., 551 F. Supp. 2d 861, 871 (S.D. Iowa 2008) (agreeing with *Arres* about the limited nature of the cause of action contained in § 1324b(a)(5), and finding that plaintiff's state action for retaliatory discharge for reporting the presence of illegal aliens at the plant was not preempted because it did "not come within 'the preemptive scope' of 8 U.S.C. § 1324b").

Notwithstanding some broad dicta in *Arres*, 333 F. 3d at 815, moreover, about the preemptive scope of federal immigration law generally, the circuit has subsequently recognized in *Hughes v. United Air Lines, Inc.*, 634 F.3d 391, 393-95 (7th Cir. 2011), that federal preemption may be less than "complete" in labor relations cases (finding that Railway Labor Act, 45 U.S.C. § 151 et seq. does not completely preempt retaliatory discharge claim under state law, overruling in part *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986)).

Whatever remedies may or may not be available to Cavazos in other fora however, none is available here. As was succinctly noted in *Arres*, 333 F.3d at 815, Congress provided an antiretaliatory provision in § 1324b and omitted one from § 1324a. I am not at liberty to alter this legislative choice.

ORDER

Cavazos' complaint is dismissed for failure to state a claim upon which relief can be granted in this forum.

SO ORDERED.

Dated and entered this 27th day of April, 2011.

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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.