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

March 15, 2012

UNITED STATES OF AMERICA, Complainant, v. MAR-JAC POULTRY, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 11B00111

ORDER DENYING MOTION TO DISMISS AND FOR SCHEDULING ORDER, DENYING MOTION TO STAY DISCOVERY AND OTHER PROCEEDINGS, AND DENYING MOTION FOR CASE MANAGEMENT CONFERENCE

I. PROCEDURAL HISTORY

This is an action pursuant to the nondiscrimination provisions of the INA as amended, 8 U.S.C. § 1324b, in which the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is the complainant and Mar-Jac Poultry, Inc. (Mar-Jac or the company) is the respondent. OSC filed a complaint alleging in Count I that Mar-Jac engaged in document abuse against Edwin Morales and other similarly situated parties and in Count II that Mar-Jac engaged in a pattern or practice of discrimination in the hiring and employment eligibility verification process by imposing greater burdens on noncitizens than on citizens of the United States.

Mar-Jac filed an answer denying the material allegations of the complaint and raising thirteen defenses, together with a simultaneous Motion to Dismiss Complaint and for Scheduling Order. OSC filed a response to the motion, after which, with permission, Mar-Jac filed a reply and OSC filed a sur-reply. Mar-Jac subsequently filed a Motion to Stay Discovery and Other Proceedings, to which OSC filed a response in opposition. OSC filed a Motion for Case Management Conference to which Mar-Jac filed a Response in Opposition. All three motions are ripe for adjudication.

II. FACTUAL ALLEGATIONS MADE IN OSC'S COMPLAINT

The complaint alleges that Mar-Jac is a fully integrated poultry processor having its principal place of business at 1020 Aviation Boulevard, Gainesville, Georgia, 30501, and that Edwin Morales is a recipient of Temporary Protected Status (TPS)[1] who filed a charge that OSC deemed complete on December 13, 2010, 166 days after Mar-Jac hired Morales. It states further that on February 16, 2011 OSC notified Mar-Jac that it was expanding its investigation of the Morales charge to include a pattern and practice of document abuse. On April 16, 2011 OSC advised Morales that it was continuing its investigation of his charge and that he had the right to file an individual complaint with OCAHO within 90 days of his receipt of the letter. Morales did not file his own complaint but is nevertheless considered a party to this action pursuant to 8 U.S.C. § 1324b(e)(3).

OSC states further that when Morales initially went to Mar-Jac's human resources office on June 23, 2010 to seek employment, the human resources officer requested him to show a photo ID and social security card before he could even obtain an employment application. Morales showed an Employment Authorization Document (EAD) bearing an expiration date of July 5, 2010 and a restricted social security card, and was advised that his employment would be conditioned upon his production of a receipt from USCIS[2] showing that he had reapplied for TPS. On or about June 29, 2010 Morales returned to Mar-Jac bearing such a receipt, whereupon he met with Marta Guzman of Human Resources who completed an I-9 on his behalf for which she acted as both preparer and translator. Upon learning that Morales was an alien authorized to work in the United States, Guzman requested that Morales produce a List A document issued by the Department of Homeland Security. She required him to present his USCIS receipt, EAD, and social security card so that she could make copies of them. After an orientation, Morales began work as a forklift operator on July 29, 2010.

OSC further alleged that on February 10, 2011 it conducted a taped interview of Marta Guzman during which she stated that since at least 2008 she required all noncitizen applicants to provide DHS issued List A documents for the I-9 and E-Verify processes, and that she requires all TPS recipients with expired EADs to show that they reapplied for TPS. The complaint alleges that between July 1, 2009 and January 27, 2011, 571 of Mar-Jac's 572 noncitizen hires were required to show DHS issued List A documents for the Form I-9 and E-verify processes.

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[1] TPS is, as its name suggests, a status that permits an otherwise unauthorized alien from one of certain designated countries to remain temporarily exempt from removal from the United States while conditions of armed conflict, environmental disaster, or other temporary conditions prevent a safe return to the alien's home country. 8 U.S.C. § 1254a. Aliens having been granted TPS are authorized for employment throughout the period during which they retain such status.

[2] U.S. Citizenship and Immigration Services

For purposes of this motion, factual allegations made in the complaint are taken as true and construed in the light most favorable to OSC as the nonmoving party. *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 146 (1996);[3] *Speaker v. U.S. Dep't of Health and Human Services*, 623 F.3d 1371, 1379 (11th Cir. 2010).

III. STATUTORY PROVISIONS INVOLVED

The Immigration Reform and Control Act of 1986 enacted the general rule that prohibits employers from discriminating against any protected individual "with respect to the hiring, or recruitment or referral for a fee, of the individual for employment . . . because of such individual's citizenship status." 8 U.S.C. § 1324b(a)(1). The term protected individual is defined in § 1324b(a)(3) as including citizens of the United States, lawful permanent residents, refugees, asylees, and certain lawful temporary residents not including persons having TPS.

The Immigration Act of 1990 (IMMACT 90), Pub. L. No. 101-649, § 535, 104 Stat. 4978 (1990), added a new provision prohibiting certain documentary practices as well, an offense colloquially known as "document abuse," codified at 8 U.S.C. § 1324b(a)(6). The document abuse amendment provided that when satisfying the requirements of the employment eligibility verification system, if an employer requested more or different documents than required or refused to honor apparently genuine documents, that would be treated as an unfair immigration-related employment practice relating to hiring. Because no element of intent to discriminate was explicitly spelled out in the amendment, case law following its enactment typically treated document abuse as a strict liability offense without inquiry into the reason for the employer's conduct. *See, e.g.*, *United States v. A.J. Bart, Inc.*, 3 OCAHO no. 538, 1374, 1387 (1993); *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO no. 414, 181, 187-89 (1992).

A new clause inserting an element of intent was subsequently added to § 1324b(a)(6) by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 421, 110 Stat. 3009-67, so that effective September 30, 1996 the law now says explicitly that such a refusal or request violates the section only "if made for the purpose or with

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[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.

the intent of discriminating against an individual in violation of paragraph (1)." Case law following the amendment recognized that document abuse could no longer be treated as a per se offense. In *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798, 801 (9th Cir. 1998), *reviewing* 6 OCAHO no. 855, 285 (1996), it was held that the amendment simply clarified what the law had meant since its inception: "We hold that Congress intended a discrimination requirement in the 1990 statute and merely clarified the statute to state that intent in its 1996 amendment." *See also United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 18 (2003) (finding no need to consult legislative history because statutory language made "crystal clear" that document abuse could no longer be treated as a strict liability offense).

Until *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085 (2002), OCAHO case law had uniformly held that any work-authorized individual, not just a protected individual as defined in § 1324b(a)(3), was entitled to protection against document abuse. *See United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO no. 879, 604, 615 (1996); *United States v. Zabala Vineyards*, 6 OCAHO no. 830, 72, 86 (1995); *United States v. Strano Farms*, 4 OCAHO no. 601, 127, 130 (1994); *United States v. Guardsmark, Inc.*, 3 OCAHO no. 572, 1714, 1724-28 (1993).[4] *Ondina-Mendez* found that the 1996 amendment "compels a contrary conclusion," 9 OCAHO no. 1085 at 16, and that the effect of the 1996 amendment was not only to add the element of discriminatory intent, but also to convert document abuse into a subset of discrimination under §1324b(a)(1) and sub silentio restrict its application to protected individuals as defined in 8 U.S.C. § 1324b(a)(3). No subsequent case has followed *Ondina-Mendez* and the conflict in OCAHO case law has not been resolved.

IV. THE POSITIONS OF THE PARTIES

A. Mar-Jac's Motion

Mar-Jac's motion to dismiss rests principally upon two assertions. First, the company says that OCAHO lacks subject matter jurisdiction over Count I because Morales is not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3), citing *Ondina-Mendez*, and because any persons "similarly situated" to Morales would also be limited to individuals with TPS, so that no individual included in this pattern and practice action would be a protected individual either.

[4] OCAHO cases similarly hold that a retaliation claim pursuant to § 1324b(a)(5) may be maintained by any work authorized individual, not just a protected individual as defined in § 1324b(a)(3). *See Fakunmoju v. Claims Adm. Corp.*, 4 OCAHO no. 624, 308, 321 (1994), *aff'd* 53 F. 3d 328 (4th Cir. 1995) (citing *Yohan v. Central State Hosp.*, 4 OCAHO no. 593, 13, 22 (1994)).

Second, the company says that the complaint fails to state a claim upon which relief may be granted because its allegations are conclusory and do not meet the pleading standards set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Mar-Jac says the complaint lacks factual allegations that are sufficiently specific to identify any protected individual who was denied employment or suffered any other adverse employment action because of citizenship.

Mar-Jac asserts that the elements required to make a prima facie case of employment discrimination are those set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) which requires a complainant to show both protected status and denial of employment, and that OCAHO case law also requires evidence of an adverse employment action. Mar-Jac also says that because Morales was hired, as were the 571 noncitizens OSC alleges were subject to document abuse, there was no adverse employment action affecting any of them.

Finally, the company requests a scheduling order providing it an opportunity to file a motion for attorneys fees.

B. OSC's Response

OSC's response asserts that OCAHO has subject matter jurisdiction over this action because, while Morales is not a protected individual for purposes of an action pursuant to § 1324b(a)(1), he is, and similarly situated individuals are, nevertheless protected by § 1324b(a)(6) from document abuse by virtue of their status as work authorized aliens. OSC points to the weight of authority in OCAHO case law that all work authorized aliens are protected from document abuse and argues that §§ 1324b(a)(1) and 1324b(a)(6) are not coterminous. In OSC's view *Ondina-Mendez* not only misreads the statutory text, but also ignores the entire statutory scheme, and is at odds with the statute's remedial purpose and legislative history. OSC argues that jurisdiction is proper in any event because at least some of the individuals subjected to Mar-Jac's discriminatory policy were protected individuals because all noncitizens, not just those having TPS, were required to show List A documents to demonstrate their employment eligibility.

With respect to the allegation of failure to state a claim, OSC asserts that a tangible injury is not an element of a document abuse claim because economic harm is not required in order to state a cause of action under the statute. OSC questions what it characterizes as Mar-Jac's attempt to shoehorn Title VII[5] analysis into § 1324b(a)(6), and points out that the court in *Robison* noted that an employer could engage in discrimination "by creating unnecessary and discriminatory obstacles to hiring, regardless of whether applicants are able to surmount them." 147 F.3d at 802.

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et sequitur.

OSC concludes that a pattern and practice case for noncitizens has been pleaded sufficiently citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360 (1977), and says that at the liability stage of a pattern and practice action, it need only establish that a discriminatory policy existed. In OSC's view individual adverse employment actions are relevant, if at all, only for the purpose of determining damages.

Finally, OSC says that a scheduling order for filing a petition for attorneys' fees is premature because there is not yet any prevailing party.

C. Mar-Jac's Reply

Mar-Jac's reply reiterates its assertion that the *Iqbal/Twombly* standard has not been satisfied. It argues in addition that there can be no liability based on document requests made outside of the Form I-9 completion process, for example when an employer requests identification documents at the application or interview stage, or for purposes of drug testing, or to complete tax forms, or to satisfy the E-Verify process, or for other reasons. The company says there is no liability merely for asking for specific documents. It takes issue with OSC's reliance on legislative history and contends that because the clear and unambiguous language of the amendment supports its view that the limitations in § 1324b(a)(1) apply to § 1324b(a)(6) as well, no resort to legislative history is warranted. The company says in addition that *Ondina-Mendez* overruled prior OCAHO case law, and concludes by stating that no liability can result from requests made without the requisite discriminatory intent, or where there is neither a failure to hire the individual nor a termination of employment.

D. OSC's Sur-Reply

OSC's sur-reply reiterates that its pleading is sufficient under *Iqbal/Twombly* and says that Mar-Jac is simply wrong in contending that § 1324(a)(6) is triggered only when a violation of § 1324b(a)(1) occurs. It vigorously disputes Mar-Jac's assertions that document abuse in the application or E-Verify process is not within the reach of § 1324b(a)(6) and continues to contend that requiring specific documents is a violation of the statute.

V. DISCUSSION AND ANALYSIS

A. Whether OCAHO Lacks Subject Matter Jurisdiction

As explained in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006), a threshold limitation on a statute's scope should be treated as jurisdictional only when the legislature clearly says that it is jurisdictional. When Congress does not rank a statutory limitation as jurisdictional, it should be

treated as nonjurisdictional. *Id.* at 516. This so-called "clear-statement" principle was most recently reiterated in *Gonzalez v. Thaler*, 132 S. Ct. 641, 648-49 (2012), in which the Court expressly noted that just because a rule is nonjurisdictional does not mean it is not mandatory or that a timely objection to a failure to satisfy it can be ignored. *Id.* at 651.

Definitional or procedural limitations on the scope of a statute, such as employee numerosity or satisfaction of conditions precedent, should accordingly not be treated as jurisdictional in nature absent a clear statement to the contrary. *See, e.g.*, *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203-04 (2011) (noting that "claim-processing rules" should not be characterized as jurisdictional); *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2876-77 (2010) (finding that question of extraterritorial reach of statute is not a jurisdictional issue; what conduct the statute reaches or prohibits is a merits question); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245-48 (2010) (finding condition precedent to be nonjurisdictional and noting that statutory limitations are jurisdictional only when Congress says they are); *Union Pacific R.R. Co. v. B'hd of Locomotive Eng'rs & Trainmen*, 130 S. Ct. 584, 596 (2009) (cautioning against profligate use of the term "jurisdictional"). The absence of a valid cause of action does not implicate subject matter jurisdiction, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), and "drive-by jurisdictional rulings" to the contrary should not to be accorded any precedential effect. *Id.* at 91.

Thus even if Morales does not satisfy the definition of a protected individual, that threshold fact does not deprive this forum of jurisdiction any more than the company's failure in *Arbaugh* to qualify as an employer under the definition section of Title VII deprived the district court of jurisdiction in that case. 546 U.S. at 503-04. Notwithstanding dicta in *Ondina-Mendez*, it is not necessary to find that every failure of a litigant to establish some threshold fact equates to an ouster of jurisdiction. Were this a case in which Morales filed an individual complaint pursuant to § 1324b(a)(1) alleging discrimination based on his citizenship status, that complaint would doubtless be dismissed; not because of any jurisdictional defect but because Morales would be unable to establish an essential element necessary to his case. *See Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO no. 1119, 4-5 (2005) (finding that because complainant was not a protected individual he lacked standing to proceed in citizenship status discrimination case).

But Morales did not file an individual complaint, and while Mar-Jac's brief sets out what it believes OSC must do "in order to bring a case on behalf of Morales," OSC did not bring a case on behalf of Morales either.[6] It filed a pattern and practice action asserting that Mar-Jac maintained and implemented discriminatory employment policies. Whether or not Morales will be entitled to any relief in this action is yet to be determined, but resolution of that question either

[6] As explained in *United States v. McDonnell Douglas Corp.*, 3 OCAHO no. 507, 1053, 1061-62 (1993), OSC represents the public interest in an OCAHO case, not the charging party or other individuals.

way has no jurisdictional consequences.

That OSC's expanded investigation was initially triggered by Morales' charge does not operate to deprive this forum of jurisdiction either; OSC would have standing to maintain this action even had its investigation been triggered by an anonymous tip or by random selection because the statute confers upon the agency the absolute right to conduct an investigation *on its own initiative*, that is, with or without an underlying charge. 8 U.S.C. § 1324b(d). That independent authority has been cited in our case law as the source of OSC's authority to broaden the scope of an existing investigation beyond the allegations made in a particular charge. *In re Investigation of Wal-Mart Distribution Ctr. #6036*, 5 OCAHO no. 788, 551, 553-54 (1995) (noting that OSC may broaden an investigation on its own initiative where it believes a pattern and practice of discrimination exists) (citing *In re Investigation of Carolina Emp'rs Ass'n, Inc*. 3 OCAHO no. 455, 605, 611 (1992)).

That is precisely what happened in this case; OSC notified Mar-Jac on February 16, 2011 that it was expanding its investigation beyond the scope of the Morales charge, as it specifically had the authority to do. OSC's authority is not limited to the allegation raised in a particular charge even where the underlying charge itself turns out to lack merit; for example in *United States v. Robison Fruit Ranch, Inc.*, 4 OCAHO no. 594, 23, 25-26 (1994), where OSC's investigation revealed that the charging party's allegation of discriminatory termination was unfounded but the investigation nevertheless led the agency to discover document abuse against others, the agency was allowed to proceed with the document abuse claim.

Because Morales' protected status vel non has no bearing on the question of jurisdiction, the motion to dismiss for lack of subject matter jurisdiction will be denied.

B. Whether the Complaint States a Claim upon Which Relief May Be Granted

1. Threshold Issue - What Pleading Standard Is to Be Applied

The parties appear to assume without discussion that the new and heightened pleading standards articulated in *Iqbal* and *Twombly* for assessing the sufficiency of complaints filed in the district courts should be used in assessing the motion to dismiss this case. But the question of whether these standards have any application to OCAHO complaints has not yet been addressed in this forum and it cannot be assumed without more that these cases necessarily govern our proceedings. Neither party addressed the question of why any administrative agency should be required to adopt such a controversial pleading standard, and neither party cited any authority or offered any argument as to why it is even desirable, much less necessary, to adopt such a standard in a forum where complaint filings are frequently made by pro se parties who already struggle with the formalities involved. As explained in *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1084, 4 (2002), this forum may look to the federal rules as a guideline where appropriate, but

it is not bound by those rules. 28 C.F.R. § 68.1.[7] Neither is it bound by case law construing them.

While it has been suggested that *Iqbal/Twombly* clarified, rather than altered, federal pleading standards, enough commentators have thought otherwise as to generate law review articles sufficient in number, as Judge Trott remarked in a different context, to "menace the endangered species of the world who live in trees." *Butros v. INS*, 990 F.2d 1142, 1148 (9th Cir. 1993) (Trott, J., dissenting). *See, e.g.*, Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting that They Did So*, 33 Hamline L. Rev. 205 (2010); Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal: *A New Phase in American Legal History Begins*, 58 Drake L. Rev. 401 (2010); Douglas G. Smith, *The Evolution of a New Pleading Standard*: Ashcroft v. Iqbal, 88 Or. L. Rev. 1053 (2009), to cite just a small sampling.

What the term "facially plausible" can mean at the pleading stage is, moreover, still lacking in substantive meaning. *See generally*, Nicholas Tymoczko, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 Minn. L. Rev. 505 (2009); Anthony Martinez, Note, *Plausibility Among the Circuits: An Empirical Survey of* Bell Atlantic Corp. v. Twombly, 61 Ark. L. Rev. 763 (2009). Absent some compelling reason for adopting a standard that all but guarantees dilatory and protracted ancillary litigation at the threshold of every case, I decline to adopt such a pleading standard in an administrative forum where the case load differs sharply from that in a federal district court.

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, either in the form of an OSC investigation or an ICE inspection. An OCAHO complaint thus will ordinarily come as no surprise to a respondent that has already participated in the underlying process. OCAHO has adopted a standardized and simplified complaint form that is frequently used by pro se litigants in § 1324b cases; the form is designed to focus on the basic minimal elements of a claim while at the same time discouraging the pleading of extraneous, redundant, or overly detailed narratives. *See United States v. Capitol Arts and Frames, Inc.*, 1 OCAHO no. 229, 1514, 1516 (1990) (noting that a complaint need not relate every factual detail or its evidentiary foundation, matters properly reserved for the discovery stage).

The requirements for complaints filed pursuant to 8 U.S.C. §§ 1324a, 1324b, and 1324c are set out in 28 C.F.R. § 68.7(b) (2011). The rule calls in each type of case for a clear and concise statement of the facts upon which jurisdiction is predicated, the names and addresses of the respondents, the alleged violations of law with a clear and concise statement of facts for each

[7] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011).

violation, and a short statement containing the remedies and/or sanctions sought to be imposed. 28 C.F.R. § 68.7(b). This is the standard by which the instant complaint will be measured. I therefore do not purport to address questions about the "plausibility" of OSC's allegations or the adequacy of its evidence, nor do I venture to predict the outcome.

2. The Sufficiency of the Complaint

Mar-Jac's motion contends that the complaint fails to state a claim upon which relief may be granted because in order to establish a claim of document abuse under § 1324b(a)(6), there must be evidence of an individual's protected status as well as a tangible employment action. But a complainant in this forum has never been required to present evidence at the pleading stage; the task here is not to assess evidence and predict at the outset what OSC will be able to prove. The only question to be addressed in considering a motion to dismiss for failure to state a claim is whether the complaint is facially sufficient to permit the case to proceed further. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984). *Cf. United States v. Azteca Rest., Northgate*, 1 OCAHO no. 33, 175 (1988) (observing also that motions to dismiss for failure to state a claim are disfavored).

Mar-Jac's reliance on the *McDonnell Douglas* burden of proof formulation as the test for this complaint is misplaced for two reasons. First, we know on the highest authority that the *McDonnell Douglas* elements provide an evidentiary standard, not a pleading requirement. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510-11 (2002). There is no necessity that those elements be pleaded at the outset in a complaint. *Id.* at 511. Second, *McDonnell Douglas* in any event sets out the evidentiary standard for a traditional individual hiring discrimination case under Title VII, not for a pattern and practice document abuse case pursuant to § 1324b. Mar-Jac's citations to a variety of cases decided at the summary judgment stage, are moreover, inapposite at this stage; those cases were resolved based on the actual evidence presented, not on the basis of the initial pleadings. I am required for purposes of this motion to take the facts set out in the complaint as true, not to demand identification of the evidence that will be offered to support them.

The parties vigorously dispute the question of who is protected by § 1324b(a)(6). Mar-Jac cites *Ondina-Mendez* and what it characterizes as the plain language of the amendment for the proposition that the reach of § 1324b(a)(6) extends only to protected individuals as defined in § 1324b(a)(3), while OSC relies on previous OCAHO case law and the legislative history to support the proposition that protection against document abuse extends to all work authorized individuals. Except for *Ondina-Mendez*, the weight of authority in OCAHO case law is that all work authorized individuals are included within the scope of § 1324b(a)(6). Resolution of this conflict in our case law is, however, unnecessary to this decision because the class of persons similarly situated to Morales is not limited to those having TPS but extends potentially to all noncitizen applicants for employment. Drawing, as I must, all reasonable inferences in favor of the nonmoving party, at least some of the individuals encompassed in the class are more likely

than not to be protected individuals, whether or not relief is available to TPS holders.

The parties also dispute the extent to which a tangible adverse employment action must be pleaded or established. Mar-Jac's argument implies that the existence of a discriminatory employment policy is not in itself an injury or an adverse employment action; it characterizes the requirement instead as being some action constituting "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[8] OSC contends on the other hand that at the liability stage in a pattern and practice action it need only establish the existence of the discriminatory policy, and that questions about who is entitled to what relief are determined at the remedy stage.

Our case law has not required for purposes of a document abuse case that the prohibited conduct have immediate adverse consequences. As Judge Morse explained in *United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 625-26 (2000) an "injury" is not necessary to establish liability for document abuse. In finding summary decision inappropriate in that case, he quoted approvingly from *Teamsters* in observing that in a pattern and practice case, the government was not required at the liability stage to offer evidence for each person for whom relief would be sought. The initial burden, rather is to show that the policy existed. *Id.* at 625-26 (citing *Teamsters*, 431 U.S. at 360).

While Mar-Jac's reply is correct in pointing out that document requests made for the purposes of drug testing or tax form completion are not within the purview of the statute, it is mistaken in its assertion that document requests made at the interview stage or for purposes of E-Verify can escape scrutiny in OCAHO proceedings. *See* Memorandum of Agreement between Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec. and Civil Rights Div., U.S. Dep't of Justice (Mar. 17, 2010), http://www.uscis.gov (type "osc moa" in the search box at the upper right, then click on pdf titled "Memorandum of Agreement.") As explained in *Eze v. West County Transportation Agency*, our cases have long held that it is the entire selection process, not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment. 10 OCAHO no. 1140, 5-6 (2011) (citing *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999); *United States v. Lasa Marketing Firms*, 1 OCAHO no. 141, 950, 971 n.21 (1990)). Discrimination can thus occur at any point in the hiring process. If it were otherwise, an employer would be free to use preliminary document requests as an impermissible screening device. Among the allegations in the instant complaint is that Mar-Jac required potential applicants to show certain documents as a condition of even obtaining an application form; under appropriate circumstances, liability could ensue for such a practice. *See Williams v. Lucas & Assocs.*, 2 OCAHO no. 357, 423, 429-430, 432 (1991) (discussing the practice of "prescreening" job applicants).

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[8] The quotation is from *Burlington Inds., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

The choice of what documents to present to establish identity and employment eligibility is supposed to be the employee's choice, not the employer's. *United States v. Townsend Culinary, Inc*., 8 OCAHO no. 1032, 454, 507-08 (1999). An individual therefore should be able to present any combination of legally acceptable documents. Crediting the factual allegations of the complaint, as I must for purposes of this motion, Mar-Jac's policy was to allow citizens the freedom to choose among documents, but to impose a different and stricter standard for noncitizens. Just as Title VII forbids an employer to limit, segregate, or classify employees or employment applicants on a prohibited basis, so too does § 1324b prohibit adopting one rule for citizen applicants and another, harsher rule for noncitizen applicants. While I recognize that Mar-Jac denies that it has such a policy, a respondent's denials are not a sufficient basis upon which to dismiss a complaint.

Finally, Mar-Jac points out that discrimination cases require evidence of discrimination. The proposition is unexceptional. We have never required, however, that the evidence has to be presented at the pleading stage just to get a foot in the door. Examining the government's complaint, it appears that the allegations of paragraphs 7-14 state the facts upon which OCAHO's jurisdiction is predicated. The names and addresses of the respondents are provided. Paragraphs 15-27 set out the facts for each violation and paragraphs 31-34 summarize the pattern and practice allegations. A short statement identifying the remedies and/or sanctions sought to be imposed concludes the complaint. The requirements stated in 28 C.F.R. § 68.7(b) are accordingly satisfied. The case is within the jurisdiction of this forum, and the complaint states a cause of action upon which relief may be granted.

ORDER

Mar-Jac's Motion to Dismiss is denied. Its request for a schedule to file a petition for attorneys' fees is denied as well. Mar-Jac's Motion to Stay Discovery and Other Proceedings is denied as moot. Because OSC's Motion for Case Management Conference is addressed to discovery, it is similarly denied as moot.

SO ORDERED.

Dated and entered this 15th of March, 2012

Ellen K. Thomas
Administrative Law Judge