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

September 5, 2019

MIKE DE LEON, et al.,	)	
Complainants,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 18B00056
	)	
LONGORIA FARMS, et al.,	)	
Respondents.	)	
	)	

ORDER DISMISSING CLAIMS OF COMPLAINANTS GUZMAN, DE LEON, AND HERNANDEZ, AND DENYING REQUEST FOR ATTORNEYS' FEES

This case arises under the anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. Complainant Guzman's Motion to Dismiss and Respondents' Motion to Dismiss the claims of de Leon and Hernandez are pending before the Court.

I. BACKGROUND

On May 9, 2018, Mike de Leon, Oscar Hernandez Jr., Tomas Guzman, Raul Rodriguez Jr., Tomas Hinojosa, and Marco Martinez filed separate complaints against Respondents Longoria Farms and Martin Longoria with the Office of the Chief Administrative Hearing Officer (OCAHO). The cases were consolidated on June 6, 2018. On July 13, 2018, Complainants filed their First Amended Complaint alleging that Respondents discriminated against them based on their citizenship status and national origin in violation of 8 U.S.C. § 1324b. Respondents filed an answer to the First Amended Complaint on August 16, 2018.

On March 15, 2019, Respondents filed an Emergency Motion for Order Compelling the Depositions of Mike de Leon and Oscar Hernandez Jr. Respondents alleged that de Leon and Hernandez did not appear for their first scheduled depositions on February 4, 2019. That same day, Complainants' counsel filed motions to withdraw from representation of de Leon and Hernandez. On April 4, 2019, the undersigned granted the motions to withdraw as Complainants' counsel for de Leon and Hernandez. Since then, de Leon and Hernandez have proceeded pro se.

On April 24, 2019, the undersigned granted Respondents' motion to compel the depositions of de Leon and Hernandez and ordered them to appear for their subsequently scheduled depositions at Respondents' counsel's office. The following day, Respondents' counsel sent notices of deposition to Hernandez and de Leon at their last known addresses and set the depositions for May 6, 2019. Hernandez and de Leon did not appear for their May 6, 2019 depositions. On June 5, 2019, Respondents filed a motion to dismiss seeking to dismiss the claims of Hernandez and de Leon and requested attorneys' fees. No response to the motion was filed.

Additionally, on June 7, 2019, Complainant Guzman filed a motion to dismiss his claims with prejudice pursuant to Fed. R. Civ. P. 41(a). Respondents did not file a response to the motion.

II. DISCUSSION

A. Complaint Guzman's Motion to Dismiss

On June 7, 2019, Complainant Tomas Guzman filed a Motion to Dismiss under Federal Rule of Civil Procedure 41(a)(2) seeking to withdraw all of this claims with prejudice. Guzman stated that he no longer wishes to pursue his claims.

The OCAHO rules "explicitly provide for dismissal of complaints under three circumstances: (1) '[w]here the parties or their authorized representatives or their counsel have entered into a settlement agreement' (28 C.F.R. § 68.14); (2) when a complaint or a request for hearing is abandoned by the party or parties who filed it (28 C.F.R. § 68.37(b)); or (3) by default (28 C.F.R. § 68.37(c))." *LeEdwards v. Kumagai Int'l USA Corp.*, 4 OCAHO no. 609, 197, 200 (1994).[1]

The OCAHO rules do not specifically cover a voluntary dismissal by the complainant, but the Federal Rules of Civil Procedure may be used as a general guideline for any situation not covered by the OCAHO rules, the Administrative Procedure Act, any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1.[2]

Under Federal Rule of Civil Procedure 41(a)(2), the Court may, in certain circumstances, order dismissal of an action at the plaintiff's request. "Rule 41(a)(2) allows the Court to dismiss with or without prejudice[.]" *Mangir v. TRW, Inc.*, 4 OCAHO no. 672, 722, 725 (1994). "Such an order is proper only if a plaintiff has made a motion for dismissal." *LeEdwards*, 4 OCAHO no.

[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 OCAHO website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders.

[2] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

609 at 200. Further, "motions for voluntary dismissal should be freely granted unless the non-moving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Elabor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002). "If the plaintiff moves under Rule 41(a)(2) for voluntary dismissal and specifies that he or she wishes dismissal with prejudice, it has been held that the court must grant that wish." *Mangir*, 4 OCAHO no. 672 at 725 (citing *Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964); *Shepard v. Egan*, 767 F.Supp. 1158, 1165 (D. Mass. 1990)). "A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars suits brought by plaintiff upon the same cause of action." *Id.* at 726 (quoting *Nemaizer v. Baker*, 793 F.2d 58, 60 (2d. Cir. 1986)).

Respondents did not file a response to the Motion to Dismiss or that they would suffer legal prejudice if the undersigned grants Guzman's motion. Further, Guzman seeks to dismiss his claims *with* prejudice. As such, Guzman's Motion to Dismiss is GRANTED. The Amended Complaint as it relates to Complainant Guzman's claims is DISMISSED WITH PREJUDICE.[3]

B. Motion to Dismiss Complainants de Leon and Hernandez

Respondents filed a motion to dismiss Complainants' First Amended Complaint as it relates to the claims of de Leon and Hernandez. Respondents request that under § 68.23(c)(5) the undersigned strike the portions of the Complaint that relate to de Leon's and Hernandez's claims and dismiss their claims with prejudice because they failed to comply with the undersigned's order compelling their depositions. Complainants de Leon and Hernandez did not file a response to the motion.

The OCAHO rules provide that if a party fails to comply with an order compelling discovery, the ALJ may take any of the following actions:

> (1) Infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;
>
> (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;
>
> (3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer, or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;
>
> (4) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

[3] On May 24, 2019, Respondents filed a Second Amended and Restated Motion for Summary Decision on Tomas Guzman's Causes of Action. Given the undersigned's dismissal of Guzman's claims, this second motion is considered moot.

> (5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the noncomplying party, or both.

28 C.F.R. § 68.23(c)(1–5).

Additionally, the 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 the complaint where the party or his representative fails to respond to orders issued by the Administrative Law Judge." *Calzoncin v. GSM Insurors-Glass*, 12 OCAHO no. 1287a, 3 (2016); 28 C.F.R. § 68.37(b)(1).

On January 25, 2019, Respondents noticed the depositions of de Leon and Hernandez. Hernandez's deposition was scheduled for February 4, 2019. Mike de Leon's deposition was originally scheduled for February 4, 2019, but the parties rescheduled it for February 5, 2019. The day before the depositions, Complainants' counsel informed Respondents that Hernandez would not appear at his scheduled deposition, and Hernandez did not appear. Order Granting Resp't Mot. Compel at 1. Additionally, de Leon did not appear for his deposition on February 5, 2019. *Id.* On March 15, 2019, Complainants' counsel filed motions to withdraw as counsel for de Leon and Hernandez and informed the undersigned that de Leon and Hernandez were no longer communicating with counsel. That same day, Respondents filed a motion to compel the depositions of de Leon and Hernandez. On April 4, 2019, the undersigned granted Complainants' counsel's the motion to withdraw as counsel and de Leon and Hernandez did not obtain other counsel. On April 25, 2019, the undersigned issued an Order Granting Respondents' Motion to Compel and ordered de Leon and Hernandez to appear for any subsequently-noticed deposition at the office of Respondents' counsel.

On April 26, 2019, Respondents sent Amended Notices of Deposition to de Leon and Hernandez at their last known addresses and set their depositions for May 6, 2019. Ex. G & H. Hernandez and de Leon failed to appear for their scheduled depositions, and did not notify Respondents' counsel that they would be unable to attend the depositions, or request to re-schedule their depositions. Ex. I. Further, since the withdrawal of their counsel, Hernandez and de Leon have not responded to any motions, have not participated in any telephonic conferences, and have not further communicated with the undersigned indicating that they intend to continue pursuing their claims. Their lack of participation in these proceedings also indicates an abandonment of their claims. § 68.37(b)(1).

Therefore, the undersigned finds that Complainants de Leon and Hernandez failed to comply with the Court's Order Granting Respondents' Motion to Compel, which required de Leon and Hernandez to appear for their depositions. Furthermore, they have not participated in these proceedings since their counsel withdrew. Accordingly, pursuant to § 68.23(c)(5), the Amended

Complaint as it relates to the claims of de Leon and Hernandez is DISMISSED WITH PREJUDICE.[4]

C. Attorneys' Fees

Respondents argue that the undersigned should award attorneys' fees against de Leon and Hernandez because they "have shown a flagrant disregard for the rules of discovery as well as this Court's orders and have failed to prosecute their claims." Accordingly, "Respondents have been forced to incur additional attorneys' fees and expenses due to Complainant de Leon and Hernandez's claims and their failures to appear at their noticed depositions." Mot. Dismiss de Leon and Hernandez at 4. Further, Respondents argue they are entitled to attorneys' fees because "if this Motion is granted, Respondents will be the prevailing party as to the claims made by Complainants de Leon and Hernandez and the position of the Complainants de Leon and Hernandez was not substantially justified." *Id.* at 4–5. Respondents seek $21,569.69 each from Complainants de Leon and Hernandez, plus any additional fees incurred after May 1, 2019.

Section 68.23(c) sets out sanctions for a party's failure to comply with discovery orders and "attorney's fees are not among those sanctions." *Palma v. Alufase USA, LLC*, 10 OCAHO no. 1213, 1 (2014) (citing § 68.23(c)); *see supra* II.B. "[T]he weight of authority is that the [OCAHO] rules do not permit the imposition of monetary sanctions for failure to comply with discovery orders." *Id.* (citing *United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 274, 1771, 1780 (1990) (action by CAHO vacating ALJ's decision and order)). The OCAHO rules provide that the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by the OCAHO rules. 28 C.F.R. § 68.1. Federal Rule of Civil Procedure 37(d)(3) provides that courts may impose monetary sanctions for a party's failure to comply with discovery. OCAHO case law, however, explains that since "the OCAHO rules provide for discovery sanctions, and the authority to award attorney's fees . . . is not listed as a discovery sanction, there is no need to turn to the Federal Rules of Civil Procedure as a general guideline because discovery sanctions are provided for and controlled by the OCAHO rules of practice." *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1091, 5 (2003); *see also United States v. Weldco, Inc.*, 3 OCAHO no. 483, 869, 874–75 (1993). Accordingly, to the extent that Respondents seek attorneys' fees for de Leon's and Hernandez's failure to comply with the order compelling their depositions, the request for attorneys' fees is DENIED.

Respondents also cite 5 U.S.C. § 504, the Equal Access to Justice Act (EAJA), in support of their request for attorneys' fees. OCAHO has explained that "EAJA provides that certain defendants of a defined, limited net worth may recover fees from a government agency in an unsuccessful enforcement action 1) unless the agency's enforcement action is substantially justified, or 2) unless special circumstances make the award unjust." *Gonzalez-Hernandez v. Ariz. Family Health Partnership*, 11 OCAHO no. 1254a, 4 (2015) (citing § 504; *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203–04 (1990)).

[4] On May 24, 2019, Respondents filed separate Second Amended and Restated Motions for Summary Decision on Mike de Leon's and Oscar Hernandez Jr.'s causes of action. Since the Court is dismissing Hernandez and de Leon's claims, the Motions for Summary Decision regarding de Leon and Hernandez are considered moot.

Respondents rely on the "substantially justified" standard in § 504 to argue that that are entitled to attorneys' fees. This case, however, is not an enforcement action by a government agency, "and the 'substantially justified' EAJA standard does not have any application to private cases arising under 8 U.S.C. § 1324b." *Gonzalez-Hernandez*, 11 OCAHO no. 1254a at 4. Rather, § 1324b(h) explicitly addresses attorney's fees awards and provides the standard for such an award in cases arising under § 1324b. *See also* § 68.52(d)(6). Section 1324b(h) provides that the ALJ may "allow a prevailing party, other than the United States, a reasonable attorney's fee if the losing party's argument is without reasonable foundation in law and fact." *See also* § 68.52(d)(6).

OCAHO ALJs have consistently held "that a fee award in favor of a prevailing respondent in a case arising under § 1324b is appropriate only under very limited circumstances." *Gonzalez-Hernandez*, 11 OCAHO no. 1254a at 4. To justify an attorneys' fees award to a prevailing respondent, "[t]he case must be 'unfounded, meritless, frivolous, or vexatiously brought[.]'" *Id.* at 3 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978)). In *Wije v. Barton Springs*, 5 OCAHO no. 785, 499, 529–30 (1995), the ALJ awarded attorney's fees to the respondent after dismissing the complaint because the complainant was a lawyer and was aware at the outset that he could not prevail on a citizenship status discrimination claim since he knew the respondent was unaware of his citizenship status. In *Kalil v. Utica County Sch. Dist.*, 9 OCAHO no. 1103, 11 (2003), the ALJ found that the complaint had no reasonable basis in law or fact, but did not award fees on that basis. Instead, the ALJ found that the complainant brought the case in bad faith for the sole purpose to vex and harass the respondent and awarded attorney's fees to the respondent as a sanction for complainant's abuse of the litigation and discovery process, repeated defiance of judicial orders, and repeated attempts to engage in ex parte communications. *Id.* Additionally, in *Lee v. AirTouch Communications*, 7 OCAHO no. 926, 47, 56–58 (1997), the ALJ awarded attorney's fees to the prevailing respondent when the complainants repeatedly continued to press a frivolous, bizarre, and long-discredited claim that an employer is obligated to accept an individual's self-generated document purporting to exempt the individual from the social security system.

Further, OCAHO ALJs have declined to award attorney's fees even when the ALJ found that the complainant lacked any evidence of discrimination. In *Bozoghlanian v. Lockheed-Advanced Development Co.*, 4 OCAHO no. 711, 1067, 1079 (1994), the ALJ exercised discretion and declined to award attorney's fees because there was "no generalized public intent favoring fee shifting," despite finding that rarely had "there been a complaint so lacking in evidentiary credibility as this one" and that the complainant's allegations were without reasonable foundation in law and fact. *Id.* In *Chu v. Fujitsu Network Transmission System, Inc.*, 5 OCAHO no. 778, 433, 449 (1995), the ALJ found that the record was "devoid of any semblance of citizenship status discrimination[,]" but the ALJ denied the respondent's request for attorney's fees because, at the outset of the case, the complainant's claims did not lack factual and legal foundation.

"A prevailing respondent bears the burden of proof to show entitlement to an award of attorney's fees." *Gonzalez-Hernandez*, 11 OCAHO no. 1254a at 5 (citing *Mid-Atlantic Reg'l Org. Coal., Laborer's Int'l Union of N. Am. v. Heritage Landscape Servs., LLC*, 10 OCAHO no. 1134, 15

(2010)). OCAHO case law explains that in cases arising under § 1324b, an award of fees to a respondent is rare "[b]ecause such an award is designed to deter potential complainants from bringing lawsuits that are totally without foundation, an award of fees to a respondent is not appropriate simply because the complainant did not prevail or because the complaint was dismissed." *Ojeda-Ojeda v. Booth Farms, L.P.*, 9 OCAHO no. 1121, 4 (2006) (citing *Christiansberg*, 434 U.S. at 421–22). The burden to show entitlement to attorneys' fees is "especially heavy in this forum when the non-prevailing party did not have the benefit of legal advice and proceeded in the litigation pro se." *Id.*

Respondents failed to identify the correct standard applicable to an award of attorneys' fees in a case arising under § 1324b, failed to cite any OCAHO or Fifth Circuit case law regarding attorneys' fees awards, and failed to show that de Leon's and Hernandez's claims lacked foundation in law or fact. *See Gonzalez-Hernandez*, 11 OCAHO no. 1254a at 4. Further, Respondents failed to take into account the pro se status of de Leon and Hernandez. When de Leon and Hernandez filed their complaints, they were represented by counsel, and they were represented during their first scheduled depositions. Counsel sought to withdraw after de Leon and Hernandez did not appear for their scheduled depositions and stopped communicating with their counsel. The undersigned granted the Motion to Withdraw as counsel for both de Leon and Hernandez on April 4, 2019. Neither Hernandez nor de Leon obtained other counsel and neither has participated in the proceedings since their counsel's withdrawal. Hernandez and de Leon were not represented when the undersigned issued the order compelling their depositions and they were not represented when Respondents noticed their May 2019 depositions. The undersigned does not condone the conduct of de Leon and Hernandez, but since Respondents did not show that they are entitled to attorneys' fees, the undersigned declines to grant the request. In sum, the undersigned concludes that Respondents failed to establish that they are entitled to an award of attorneys' fees under § 1324b(h).

As such, Respondents' request for attorneys' fees relating to Complainants Hernandez and de Leon is DENIED.

III. CONCLUSION

For the foregoing reasons Complainant Guzman's Motion to Dismiss is GRANTED and the Complaint as it relates to Guzman's claims is DISMISSED WITH PREJUDICE. Respondents'

Motion to Dismiss Complainants de Leon and Hernandez is GRANTED IN PART and the Complaint as it relates to the claims of de Leon and Hernandez is DISMISSED WITH PREJUDICE. Respondents' request for attorneys' fees from de Leon and Hernandez is DENIED.

SO ORDERED.

Dated and entered on September 5, 2019.

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Thomas P. McCarthy
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. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.