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

January 31, 2020

DAVE O'BRIAN TINGLING, Complainant, v. CITY OF RICHMOND, VA, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00009

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This case arises 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 (2017). Dave O'Brian Tingling (Complainant) filed a complaint, pro se, with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 15, 2019, alleging that the City of Richmond (Respondent) discriminated against him based on his citizenship status and retaliated against him for filing a complaint under § 1324b. Respondent's Motion for Partial Summary Decision is now pending. Respondent argues that portions of the complaint should be dismissed because, in a prior action, Complainant and Respondent executed a settlement agreement waiving and releasing these claims against Respondent. For reasons set forth herein, Respondent's Motion for Partial Summary Decision is GRANTED

II. BACKGROUND AND PROCEDURAL HISTORY

Complainant is a United States citizen who worked for Respondent beginning on May 6, 2013. Respondent terminated him on April 6, 2016. Complainant filed a complaint with OCAHO on November 4, 2016, against the City of Richmond. In January 2018, Complainant and Respondent executed a Settlement Agreement and Release (Agreement or Release). Mot. Summ. Dec. Ex. A. On February 8, 2018, Administrative Law Judge (ALJ) Thomas McCarthy issued an Order Granting Joint Motion to Dismiss, finding that the settlement agreement substantially complied with 28 C.F.R. § 68.14(a)(2), and dismissed the complaint with prejudice.

Mot. Summ. Dec. Ex. B. On January 22, 2018, Respondent was reinstated as an employee with the City of Richmond.

In June 2018, Complainant filed a charge against Respondent with the United States Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER). Compl. at 3. On October 11, 2018, IER sent Complainant a letter informing him that IER had not completed its investigation, but that Complainant could file a complaint with OCAHO. *Id.*

On January 15, 2019, Complainant filed a complaint with OCAHO. Subsequently, on September 26, 2019, Complainant retained counsel, who filed a Motion for Leave to File an Amended Complaint with OCAHO. Respondent objected to the motion, but also filed an Answer to the First Amended Complaint on October 10, 2019. The undersigned granted the Motion to Amend the Complaint on October 22, 2019. On October 31, 2019, Respondent filed a Motion for Partial Summary Decision. On January 3, 2020, Complainant timely filed a response to the motion.

III. POSITIONS OF THE PARTIES

Respondent argues that the Court should grant partial summary decision for any claim based upon conduct that occurred prior to January 19, 2018, the date the Complainant signed the Release, as any claim is barred by the Settlement Agreement and Release. Mot. Summ. Dec. at 2. Furthermore, Respondent argues that this Court lacks jurisdiction to enforce the Agreement pursuant to 28 C.F.R. § 68.57, which vests enforcement exclusively in the United States District Court for the Eastern District of Virginia. Respondent does not seek summary decision as regards those aspects of the complaint that accrued after the Release.

Complainant argues that Respondent misrepresented several material facts with respect to the Release, facts that Complainant relied upon in entering the agreement. Complainant's Opposition to the Motion for Summary Decision (Opp.) at 1. Complainant argues that, as a result of the misrepresentations, Complainant has grounds for a hearing on whether the Agreement should be vacated due to fraud and misrepresentation, and to address any and all claims that accrued prior to January 19, 2018. Opp. at 1.

The Amended Complaint asserts that in 2016, Respondent employed Complainant in the Department of Information and Technology as an Infrastructure Architect. Am. Compl. ¶ 3. Complainant alleges that Respondent demanded employment reverification documents from him, despite the fact that Complainant presented a U.S. Passport and a Certificate of Naturalization. *Id.* at ¶¶ 5–11, 15. Respondent terminated Complainant on April 7, 2016, two days after he filed a charge with the Office of Special Counsel. *Id.* at ¶¶ 16–18.

The Release provides that,

> Effective January 22, 2018, the City will reinstate Tingling to the position of Network Engineer at the salary of $84,150 . . . per year. The position is classified with no adjustment period and with a current salary range of $39,651.00-$107,123.00. The City will also restore 58.9 hours of sick leave to Tingling. Tingling will work in the City's Department of Fire and Emergency Services. This agreement is not a guarantee of future employment and all employment with the City is subject to the Administrative Regulations, Policies and Personnel Rules where applicable.

Mot. Summ. Dec. Ex. A at 1.

In a footnote, the Release notes that "this title may change as a result of the City's ongoing class and compensation study, which began prior to and independently of the facts and circumstances that gave rise to this case. Tingling's current salary amount will not be lowered as a result of the study. The City does not know at this time when the class and compensation study will be complete, or what, if any, impact it will have on Tingling's position." *Id.* The Release also contained a lump sum amount for attorney's fees.

Finally, the Release provides that Complainant releases Respondent from all causes of action that he may have against Respondent up to the time of executing the Agreement, and also waives all other causes of actions, including those arising under § 1324b. *Id.* at 1–2. Additionally, Complainant agreed to dismiss and not institute any other lawsuits against the City "with respect to the matters encompassed within or released by this Agreement[.]" *Id.* at 2.

Complainant asserts that, unknown to him, the class and compensation study had completed the classification portion relevant to his position in Fall 2017, that in January 2018, the classification outcomes of the study were know to Respondent, and indeed, in April 2019, as a result of the classification study, Complainant was reclassified and demoted to the position of Technology Coordinator. Am. Compl. at ⁋⁋ 25, 28, 31. Complainant further states that he would not have signed the Release had he known that his position was going to be reclassified and demoted.

IV. STANDARDS

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[1] Section 68.38(c) is similar to and based on Rule 56(c) of the Federal Rules of Civil

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2019).

Procedure, which provides for the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994). [2]

"An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, in the absence of any proof, the Court will not assume that the nonmoving party could or would prove the necessary facts. *Martinez v. Superior Linen*, 10 OCAHO no. 1180, 5–6 (2013). A party opposing a motion for summary decision may not demand a trial simply based on a speculative possibility that a material issue might turn up at trial. *See generally United States v. Manos & Assocs., Inc*., 1 OCAHO no. 130, 877, 884 (1989).

"While the nonmoving party is entitled to all the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation." *Angulo v. Securitas Sec. Servs. USA, Inc*., 11 OCAHO no. 1259, 8 (2015). Furthermore, "[w]hen a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary [decision] against that party will ensue." *Id.* at 9 (citing *Catrett*, 477 U.S. 317 at 322–23).

V. DISCUSSION

Respondent contends that the Court does not have jurisdiction to hear Complainant's claims regarding the validity of the Agreement. Complainant has the burden to prove that OCAHO has subject matter jurisdiction. *Smiley v. City of Philadelphia*, 7 OCAHO no. 925, 15, 31 (1997); *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). There appears to be a paucity of caselaw addressing the question of whether an ALJ has jurisdiction to determine whether a prior settlement agreement that resulted in a dismissal with prejudice is void/voidable due to fraud or misrepresentation.

[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 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.

First, OCAHO case law is clear that "[a]n accrued cause of action under 8 U.S.C. § 1324b may be waived as part of a settlement agreement," that a party who knowingly and voluntarily agrees to the terms of such an agreement is bound thereby. *S. v. Neiman Marcus Group*, 13 OCAHO no. 1323, 4 (2019) (quoting *Aityahia v. Sabena Airline Training Ctr., Inc*., 9 OCAHO no. 1122, 4–5 (2006)). "Public policy favors the enforceability of settlement agreements and the concomitant avoidance of litigation." *United States v. Cal. Mantel, Inc*., 10 OCAHO no. 1168, 8 (2013). These prior cases, however, primarily dealt with the situation where the parties have engaged in settlement discussions, but subsequently one of the parties refuses to sign the agreement. In that situation, the case is still pending before the agency, and OCAHO ALJs have determined whether the parties entered into a settlement agreement, and enforced the agreements when they find a settlement agreement was reached. *See Cal. Mantel. Inc.*, 10 OCAHO no. 1168 at 5. In addition, OCAHO has determined whether a settlement agreement executed independently of any OCAHO proceedings served to bar a subsequent action. *See S. v. Neiman Marcus Group,* 13 OCAHO no. 1323 (2019). Those cases by necessity require the OCAHO ALJ to review the settlement agreement and discern its terms.

This case is distinguishable from *Neiman Marcus* and *Cal. Mantel* because the Agreement was the result of a previous OCAHO case, and the claims were dismissed with prejudice. In reviewing the Agreement at issue, it bars those aspects of the Complaint that accrued before the Agreement, including "claims based on contract, fraud, equity, tort, discrimination, harassment, retaliation . . . and any and all claims arising under 8 U.S.C. § 1324b[.]" *Id.* at 1–2. Complainant frames his argument as fraudulent inducement of a contract and he seeks to remedy a material misrepresentation. Opp. at 9. In a Notice of Correction, Complainant asserts that he is alleging the Respondent breached a material term of the Settlement Agreement, which he appears to wrap into the fraudulent inducement argument.

Complainant executed the Agreement on January 19, 2018. Mot. Summ. Dec. Ex. A at 5. Complainant was reinstated as a Network Engineer at his prior salary, and the Respondent paid the lump sum attorneys fees (albeit, allegedly, late), therefore there was compliance with the letter of the agreement. Opp. Ex. 10. Complainant clarifies that he does not assert a separate claim based on conduct that arose prior to January 19, 2018. Instead, he contends that if the Court granted his fraud or misrepresentation claim, the remedy would be to reopen his previous case. Nonetheless, the Agreement bars any separate claim of discrimination or retaliation that occurred prior to January 19, 2018. As such, to the extent that he alleges a separate claim based on events that occurred prior to January 19, 2018, that claim is DISMISSED WITH PREJUDICE. This does not resolve the matter, however, as Complainant is seeking a declaration that the agreement is void/voidable. *Id.*

Respondent asserts that the Court does not have jurisdiction to hear Complainant's fraud or misrepresentation claims. Complainant argues that the Court has jurisdiction to hear his misrepresentation and fraud claims regarding the settlement agreement because the Court

approved the settlement agreement at issue. First, similar to Article III courts, OCAHO is a court of limited jurisdiction. *Austin v. Jitney-Jungle Stores of America*, 6 OCAHO no. 923, 1222, 1227 (1997) (citing *Winkler v. Timlin*, 6 OCAHO no. 912, 1049, 1053 (1997); *Horne v. Town of Hampstead*, 6 OCAHO no. 906 941, 945 (1997)). "The forum cannot expand or constrict the jurisdiction conferred on it by statute" *Horne*, 6 OCAHO no. 906 at 946 (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992)). Generally, fraud and misrepresentation claims based on a contract are grounded in state law. *See Saunders v. General Services Corp.*, 659 F.Supp. 1042, 1055 (E.D. Va. 1987) (finding "Virginia law provides a cause of action for fraud acting as an inducement to entering a contract, such as [a] conciliation agreement"). Complainant cites *California Mantel* in support of his position that this Court has jurisdiction to hear his fraud claim. However, *California Mantel* clarifies that "once a final decision and order is entered disposing of a case, this forum has no authority to provide continuing oversight or monitoring of a settlement[.]" *Cal. Mantel, Inc.*, 10 OCAHO no. 1168 at 12 (citing *United States v. IBP, Inc.*, 5 OCAHO no. 766, 371, 372 (1995); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994) (holding that after a federal court dismisses a case based on a settlement agreement, the court lacks jurisdiction to hear enforcement claims unless the court retained jurisdiction in the dismissal order). Thus, contrary to Complainant's argument, courts of limited jurisdiction do not retain jurisdiction over a settlement agreement after the case has been dismissed simply because the court approved the settlement agreement.

Additionally, Respondent argues that based on OCAHO's rules, after the ALJ issues a final agency order in a § 1324b case, the forum no longer has jurisdiction over the case. Complainant contends that the order of dismissal was not a final agency order under § 68.52(d) because it was issued pursuant to § 68.14(a)(2). Section 1324b does not make this distinction. 8 U.S.C. § 1324b(j). Rather, an ALJ's decision in a case arising under § 1324b becomes the final agency decision on the date the order is issued. 28 C.F.R. § 68.52(g); § 1324b(g)(1). An ALJ's final order constitutes the final agency order in cases arising under § 1324b. § 68.2. The regulations define a final order as one that "disposes of a particular proceeding or a distinct portion of a proceeding, thereby concluding the jurisdiction of the Administrative Law Judge over that proceeding or portion thereof." 28 C.F.R. § 68.2. An action for enforcement of a final order of this forum in a case arising under § 1324b is committed to the United States District Court in the district where the events underlying the case occurred, or where the respondent resides or transacts business, unless the order is appealed as provided in § 1324b(g)(1). *See* § 1324b(j); § 68.57.

Respondent also asserts that Complainant's relief sought is better suited for a Rule 60 motion for reconsideration, but Complainant did not file such a motion in his previous case. Federal Rule of Civil Procedure 60(b)(3) provides that a court may set aside a final judgment or order based on "fraud . . . misrepresentation, or misconduct by an opposing party." FED. R. CIV. P. 60(b)(3)). Under Rule 60(c), a party must file a Rule 60 motion based on fraud no more than one year after

the entry of the final order.[3] *See also Fox ex rel. Fox v. Elk Run Coal Co., Inc.*, 739 F.3d 131, 135 (4th Cir. 2014). Complainant did not file a Rule 60 motion in his previous case.

For the foregoing reasons, the Court finds that it lacks jurisdiction over Complainant's fraud and misrepresentation claim, as well as any claim to breach of the settlement agreement. Thus, Complainant's fraud or misrepresentation claim is DISMISSED WITHOUT PREJUDICE.

VI. CONCLUSION

The Court lacks jurisdiction over Complainant's fraud and misrepresentation claim. Respondent's Motion for Partial Summary Decision is GRANTED. Complainant's fraud and misrepresentation claim is DISMISSED WITHOUT PREJUDICE. To the extent that Complainant asserts a claim based on conduct that occurred prior to January 19, 2018, that claim is DISMISSED WITH PREJUDICE. A hearing on Complainant's retaliation claim is set to begin on March 24, 2020 in Richmond, Virginia. The Court will issue a separate Notice of Hearing.

SO ORDERED.

Dated and entered on January 31, 2020.

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Jean C. King
Chief Administrative Law Judge

[3] "The weight of authority in this forum is that there is no ability to accept or act upon a party's filings received subsequent to the issuance of a final decision." *United States of Am. v. Diversified Technology and Services of Virginia*, 9 OCAHO 1098, 2 (2003) (citing *Lewis v. Ogden Servs.*, 2 OCAHO no. 384, 704 (1991) (finding that the filing of documents by a party after issuance of final decision is not contemplated by the rules); *United States v. Mojave, Inc.*, 3 OCAHO no. 502, 1024, 1025 (1993) (declining on the authority of *Lewis* to reopen default judgment and receive a late answer with affirmative defenses); *Trivedi v. Northrop Corp.*, 4 OCAHO no. 603, 135, 136 (1994) (rejecting an unsolicited brief filed after the issuance of a final decision); *Horne v. Town of Hampstead*, 7 OCAHO no. 959, 546, 547 n.1 (1997) (deciding that reconsideration is not authorized by statute or regulation; review is available only in the Court of Appeals). *See also Basua v. Wal-Mart*, 3 OCAHO no. 549, 1452, 1453 (1993) (denying complainant's motion to reopen); *United States v. Marcel Watch Corp.*, 1 OCAHO no. 169, 1155, 1156 (1990) (noting "mischief" inherent in reopening final decision other than for clerical error because "final decision ordinarily ends the litigation").