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

December 12, 2016

S.,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 16B00038
	)	
DISCOVER FINANCIAL SERVICES, LLC,	)	
Respondent.	)	
	)	

FINAL DISMISSAL AND ORDER

I. INTRODUCTION

This is an action arising under the antidiscrimination provisions the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Complainant S. alleges that Respondent Discover Financial Services, LLC (Discover) failed to hire Mr. S. on account of his citizenship status and retaliated against him for asserting his rights under 8 U.S.C. § 1324b.[1] For the reasons provided below, Mr. S.'s complaint will be dismissed.

II. PROCEDURAL HISTORY

On March 30, 2015, Mr. S. filed a charge of citizenship status discrimination and retaliation against Discover with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). In a letter dated March 30, 2016, OSC informed Mr. S. that based

[1] Mr. S.'s complaint contains conflicting information regarding his putative retaliation claim. He initially checked "No" in response to the question "Were you intimidated, threatened, coerced or retaliated against for exercising your rights under 8 U.S.C. § 1324b?" Complaint at 17. He later checked "Yes" in response to the question "Were you intimidated, threatened, coerced, or retaliated against because you filed or planned to file a complaint?" *Id*. at 20. For purposes of Respondent's Motion to Dismiss the Complaint discussed herein, the undersigned assumes that Mr. S. did raise an allegation of retaliation in his complaint.

on its investigation, OSC would not file a complaint on his behalf with the Office of the Chief Administrative Hearing Officer (OCAHO) due to "insufficient evidence of reasonable cause to believe that [he was] discriminated against as prohibited by 8 U.S.C. § 1324b." The OSC letter also advised Mr. S. that he could now file his own complaint with OCAHO, which he did on April 27, 2016.

Mr. S. attached the following proposed exhibits to his OCAHO complaint: Ex. C-1) Charge of Discrimination, filed with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission (EEOC) on February 17, 2015; Ex. C-2) Dawn Kawamoto, *Justice Department Hits IBM Over H-1B Hiring Practices*, Dice (Sept. 27, 2013), news.dice.com/2013/09/27/justice-department-hits-ibm-h-1b-hiring-practices-045/; Ex. C-3) email correspondences between Mr. S. and Discover personnel, January–April 2015; Ex. C-4) Mr. S.'s résumé; and Ex. C-5) Settlement Agreement, Waiver and Release of Claims, signed by Discover's Vice President and dated May 29, 2015.[2]

On June 8, 2016, Respondent filed an answer, in which it denied the material allegations of the complaint and raised several affirmative defenses, including Complainant's waiver and release of all claims against Respondent. The same day, Respondent also filed a Motion to Dismiss the Complaint (Motion to Dismiss), to which it attached the following proposed exhibits: Ex. R-1) Discover's responses to OSC's inquiries concerning Mr. S.'s discrimination charge, dated Oct. 16, 2015, (A) Discover's organizational chart, (B) description of Discover's Senior Hadoop Lead Engineer and Senior Consultant Database Security Analyst positions, (C) Email from Discover personnel, (D) Information about the Senior Hadoop Lead Engineer and Senior Consultant Database Security Analyst positions, (E) Rejection letter from Discover to Mr. S. with respect to his application for Senior Hadoop Lead Engineer, (F) Emails from Discover personnel discussing reasons Mr. S. was not selected for an interview, (G) Mr. S.'s personnel records at Discover, (H) Emails and relevant personnel records of two employees selected by Discover for Senior Consultant Database Security Analyst and Senior Hadoop Lead Engineer positions; and Ex. R-2) Settlement Agreement, Waiver and Release of Claims signed by Discover's Vice President and Mr. S., dated May 29, 2015 (Settlement Agreement, Waiver and Release).[3]

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[2] Mr. S. did not list or tab his attachments; however, the undersigned will enumerate the exhibits in this fashion for clarity.

[3] The copy of the settlement agreement that Mr. S. attached to his complaint was signed by Discover's Vice President but not by Mr. S.. *See* Complaint, Ex. C-5. The copy that Discover attached to its Motion to Dismiss reflects signatures from both Mr. S. and Discover's Vice President on May 29, 2015, as well as initials from each party on each page of the agreement. Motion to Dismiss, Ex. R-2. The two copies are otherwise identical, and neither party has challenged the authenticity of the Settlement Agreement, Waiver and Release or the signatures on it.

In response to the Motion to Dismiss, Mr. S. filed a Motion to Amend or Review Order/Motion to Reconsider (Motion to Amend) on September 6, 2016.[4] This motion includes proposed exhibits relating to a claim of unpaid wages that Mr. S. filed against Discover with the Illinois Department of Labor (IL DOL) on June 12, 2015.[5]

On August 23, 2016, Administrative Law Judge Robert Lesnick, who previously presided over this matter, issued an Order for Prehearing Statements instructing Mr. S. to file his prehearing statement by September 21, 2016, and Respondent to file its prehearing statement by October 11, 2016. On October 3, 2016, Respondent filed a Request for a Ruling on Respondent's Motion to Dismiss the Complaint reiterating that its Motion to Dismiss should be granted. Respondent filed its prehearing statement on October 11, 2016.

Mr. S. did not file a prehearing statement. On October 27, 2016, Judge Lesnick ordered Mr. S. to show cause why his complaint should not be deemed abandoned for failing to comply with the prior Order for Prehearing Statements and to file a prehearing statement by November 14, 2016.

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[4] In the Motion to Amend or Review Order/Motion to Reconsider, Mr. S. explained that he was out of the country between June 2 and July 18, 2016, which is why he did not timely respond to Discover's Motion to Dismiss. *See* 28 C.F.R. § 68.11(b) (providing a ten-day period in which to respond to a written motion). The undersigned finds good cause for the untimeliness of Mr. S.'s response and has fully considered it accordingly.

[5] That claim was dismissed by an IL DOL Administrative Law Judge on August 23, 2016, pursuant to Mr. S.'s withdrawal of his claim based on another settlement agreement he concluded with Discover on or about that same date. OCAHO does not have jurisdiction over state-law unpaid wage claims; thus, although many of Mr. S.'s filings in the instant case focus on his Illinois state wage claim and the settlement agreement he executed related specifically to that case, his arguments regarding issues in that case have no bearing on his instant case before OCAHO. Indeed, Mr. S.'s complaint with OCAHO was filed on April 27, 2016, approximately four months before he settled his IL DOL unpaid wage claim.

On November 11, 2016, Mr. S. filed a Motion to Response to Respondent's Motion to Dismiss the Complaint (Response), articulating several reasons why the complaint should not be dismissed.[6] He did not file a prehearing statement, but he included another copy of his Motion to Amend or Review Order with its attachments.[7]

III. POSITIONS OF THE PARTIES

A. Mr. S.'s Complaint

Mr. S. is a lawful permanent resident (LPR) who was employed by Discover in Riverwoods, Illinois, until June 12, 2015.[8] Mr. S. alleges that Discover has a policy of favoring its employees who are H-1B nonimmigrant visa holders over its United States citizen and LPR employees and of not providing "equal opportunities in training and development" to United States citizens and LPRs. Complaint at 3.

More specifically, Mr. S. states that on January 12, 2015, he applied for a technical training at Discover, titled "Advanced Hadoop for experienced Java developers." *Id.* at 1. His manager approved the training request, but it was then cancelled because senior management did not consider it necessary for the group in which Mr. S. worked. Mr. S. alleges that one of his colleagues, who is an employee utilizing an H-1B nonimmigrant visa, subsequently attended this training. Mr. S. reapplied for this training in April 2015 and his request was not approved. However, an H-1B employee was granted approval to attend. Mr. S. expressed his concerns about these training requests with the director of human resources and according to Mr. S., the human resources department did not respond. *Id.* at 2. Complainant also indicates that his

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[6] Mr. S.'s Response is dated October 16, 2016, but was not received by OCAHO until November 11, 2016.

[7] Because I find Mr. S.'s complaint is due to be dismissed for another reason as discussed herein, I do not address whether Mr. S.'s failure to comply with Judge Lesnick's Order for Prehearing Statements and Notice and Order to Show Cause also warrants dismissal of his complaint. *See* 28 C.F.R. § 68.37(b)(1) (a complaint may be dismissed due to abandonment, and a party who fails to respond to orders issued by an Administrative Law Judge shall be deemed to have abandoned a complaint).

[8] Mr. S.'s last day of active employment was in May 2015, but he remained employed by Discover on unpaid administrative leave until June 12, 2015. *See* Complaint, Ex. C-5 at 86.

manager reprimanded him for using the wrong exit but that other H-1B employees used it for several weeks without any objection.

In addition, the complaint provides that there was a six-month delay in Discover approving one of Mr. S.'s training requests, but that H-1B employees did not experience such delays. Complainant asserts that Discover's explanations for the six-month delay, which included prioritizing his work load and "budget constraints," were insincere. *Id.* at 3.

Between February and March 2015, Mr. S. applied to five job openings with Discover. Complaint at 4. Two of these positions closed and one was "cancelled." *Id.* He indicates that he was considered for two of the positions, Senior Hadoop Lead Engineer and Senior Consultant Database Security Analyst. *Id.* According to Mr. S., his manager wanted to set up an interview for him for the Senior Hadoop Lead Engineer position. However, Complainant was never interviewed. *Id.* at 5. Mr. S. learned that an H-1B employee was selected to be interviewed for the position and Mr. S. proffered several reasons why this H-1B employee was less qualified than him. *Id.* at 3. Complainant also alleges that Discover pays its H-1B employees less than United States citizens and LPRs.

Furthermore, Mr. S. contends that his performance appraisal of "meets some but not all expectations" was "biased and due to retaliation and discrimination." *Id.* at 5. He states that he has experienced retaliation since June 2014 and that he filed a retaliation charge with the Equal Employment Opportunity Commission (EEOC) against Discover in October 2014 and January 2015. *Id.* at 6.

Mr. S. also indicates that he hired an attorney to negotiate a settlement on his behalf with Discover. The provisions of the agreement—*i.e.* the Settlement Agreement, Waiver and Release executed on May 29, 2015—included that Mr. S. would withdraw the charges he had previously filed against Respondent with the EEOC and the IL DOL,[9] that he would resign from Discover's employ effective on June 12, 2015, and that he would receive a payment of $73,991.55 in exchange for, *inter alia*, withdrawing the EEOC and IL DOL claims and for waiving other claims and rights against Discover and releasing it from liability for such claims.

B. Discover's Motion

[9] This IL DOL claim (No. 15-000937) is separate from the claim (No. 15-001972) that was filed on or about June 12, 2015, and was dismissed on August 23, 2016, pursuant to the parties' settlement agreement. *See* Respondent's Motion to Amend or Review Order, Ex. A at 15, 48. The disposition of the earlier claim is not in the record, but it appears to have been dismissed as well.

Discover contends that Mr. S.'s complaint failed to state a claim upon which relief may be granted for several reasons. First, Discover states that the claims in the OCAHO complaint overlap with Mr. S.'s EEOC complaint against Discover. Second, the Settlement Agreement, Waiver and Release executed by the parties on May 29, 2015, released and waived the claims that Mr. S. has now brought before OCAHO. Third, Mr. S.'s claim of discriminatory hiring practices fails because the applicants that Respondent selected for the positions at issue were United States citizens, and not H-1B visa holders. Finally, according to Discover, training is not a protected activity under 8 U.S.C. § 1324b and, therefore, Mr. S.'s claim is not actionable in this forum.[10]

C. Settlement Agreement, Waiver and Release of Claims

Mr. S. submitted a copy of the May 29, 2015 Settlement Agreement, Waiver and Release with his complaint, and Discover submitted a copy with its Motion to Dismiss, which was filed concomitantly with its answer. As part of the termination of Mr. S.'s employment with Discover, the parties agreed to settle "any and all claims that have been or could have been asserted by Employee [Mr. S.] related to Employee's employment with Employer [Discover]" and to "end any and all employment relationships between them." *See* Complaint, Ex. C-5 at 85. Discover agreed to compensate Mr. S. in the amount of $73,991.55 for, *inter alia*, withdrawing his then-pending EEOC and IL DOL claims against the company and for waiving other claims and rights against Discover and releasing it from liability for such claims. The agreement's "Release" provision provides in relevant part:

> In exchange for the foregoing consideration, Employee further agrees to waive all claims and rights against Employer, and to release and forever discharge Employer from any and all liability for any claims or damages of any kind, whether known or unknown to Employee, that Employee may have against Employer as of the date of the execution of this Agreement including, but not limited to, any claim arising under any federal, state or local law or ordinance, any tort, any employment contract, express or implied, any public policy waivable by law, or arising under Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1866, as amended, the Equal Pay Act, as amended the Americans with Disabilities Act ("ADA"), as amended, the Family And Medical Leave Act ("FMLA"), as amended, the Employee Retirement Income Security Act ("ERISA"), as amended, the Civil Rights Act of 1991, as amended, the Rehabilitation Act of 1973, the Worker Adjustment Retraining and Notification Act ("WARN"), as amended, the Fair Labor Standards Act ("FLSA"), as amended, the Occupational Safety and Health Act of 1970 ("OSHA"), as amended, the Illinois WARN Act of 2005, as amended, the

[10] Because I find that Mr. S.'s complaint warrants dismissal based on the Settlement Agreement, Waiver and Release executed on May 29, 2015, I do not address the merits of Discover's other arguments.

> Illinois Human Rights Act, as amended, the Illinois Wage Payment and Collection Act, as amended, the Illinois Equal Pay Law, as amended, the Illinois Religious Freedom Restoration Act, as amended, and any other discrimination or fair housing law, all claims for invasion of privacy, defamation, intentional infliction of emotional distress, injury to reputation, pain and suffering, constructive and wrongful discharge, retaliation, wages, monetary or equitable relief, vacation pay, paid time off, award(s), grant(s), or awards under any unvested and/or cancelled equity and/or incentive compensation plan or program, and separation and/or severance pay under any separation or severance pay plan maintained by Employer, any other employee fringe benefits plans, medical plans, or attorneys' fees or any demand to seek Employer of any of the claims, rights or damages previously enumerated herein.

Id. at 87. In addition, the release provision states, "This Agreement is not intended to release rights or claims that may arise after the date of the parties' execution hereof, including without limitation any rights or claims that either Employer or Employee may have to secure enforcement of the terms and conditions of this agreement." *Id.* at 88. The agreement also indicates that "Employee further agrees, to the extent consistent with applicable laws, not to initiate any legal action, claim, charge, complaint or action against Employer, in any forum whatsoever in connection with Employee's employment with Employer, or the claims released by Employee in this Agreement." *Id.* In its concluding section, titled "Understanding of Full Waiver," the settlement agreement sets forth that Mr. S. consulted with an attorney, that he is "knowingly and voluntarily" signing the agreement, and that he "waives and releases any and all rights" he may have against Discover "up to the date of the execution of the agreement." *Id.* at 92.

IV. LEGAL STANDARDS & ANALYSIS

A. Motion to Dismiss

A respondent may move for dismissal of the complaint on the ground that it fails to state a claim upon which relief can be granted, and the Administrative Law Judge may dismiss a complaint based on such a motion. 28 C.F.R. § 68.10. OCAHO's rule for such motions is modeled after Federal Rule of Civil Procedure 12(b)(6). *United States v. Spectrum Technical Staffing Servs., Inc., and Personnel Plus, Inc.*, 12 OCAHO no. 1291, 8 (2016); [11] *see also* 28 C.F.R. § 68.1 (noting that the Federal Rules of Civil Procedure may be used as a general guideline in OCAHO

[11] 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

proceedings). Although consideration of a motion to dismiss is ordinarily limited to a consideration of the pleadings, documents attached to a motion to dismiss may be considered without converting the motion to one for summary decision if the documents are referred to in the complaint and are central to the claim. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002); *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113-14 (1997) (stating that although a court's analysis is generally limited to the four corners of the complaint when deciding a motion to dismiss, the court may consider documents incorporated in the complaint by reference). Moreover, Federal Rule of Civil Procedure 10(c) makes clear that a copy of a document attached to a pleading is a part of that pleading for all purposes. Fed. R. Civ. P. 10(c). In the instant case, the May 29, 2015 Settlement Agreement, Waiver and Release was attached to the complaint by Mr. S. and also attached to the Motion to Dismiss by Discover. It is also central to Mr. S.'s claim. Thus, the May 29, 2015 Settlement Agreement, Waiver and Release is properly considered in assessing Discover's Motion to Dismiss without converting that motion to one for summary decision.

B. Settlement and Release Agreements

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, and that an Administrative Law Judge has the authority to compel or bind a party to adhere to the terms to which it previously agreed. *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) (citing *Jeff D v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989)). There is some confusion in the case law, however, regarding whether federal law or the law of the forum state governs the validity of a release of federal rights in a settlement agreement. *Id.*; *see also Aityahia*, 9 OCAHO no. 1122 at 5. Nevertheless, as a general matter, a settlement agreement is a contract and is evaluated under the relevant state's contract law. *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002) (relying on *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380-81 (1994)).

In the instant case, Illinois contract law governs the May 29, 2015 Settlement Agreement, Waiver and Release, both by its express terms and as the law of the applicable forum state where the allegations arose. Illinois uses the "objective theory of intent," meaning a judge must first consider the written agreement and not the parties' subjective understandings. *Hampton v. Ford*

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.

Motor Co., 561 F.3d 709, 714 (7th Cir. 2009) (citing *Newkirk v. Vill. of Steger*, 536 F.3d 771, 774 (7th Cir. 2008)). "Where a contractual release is clear and explicit," a court "must enforce it as written." *Id.* (citations omitted). "A contract is ambiguous if its terms may reasonably be interpreted in more than one way…but it is not rendered ambiguous simply because the parties disagree upon its proper construction. *Id.* (internal citations omitted). Instead, an ambiguous contract is "'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.'" *Id.* at 251 (quoting *Whiting Stoker Co. v. Chi. Stoker Corp.*, 171 F.2d 248, 250-51 (7th Cir. 1948)). Under Illinois law, a general release of liability in a settlement agreement is effective against claims not otherwise specified in the release agreement if both parties were aware of the additional claims at the time the release was signed. *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667 (Ill. 1991). In other words, "[a] general release typically covers 'all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry.'" *Hampton*, 561 F.3d at 715 (quoting *Fair v. Int'l Flavors & Fragrances, Inc*., 905 F.2d 1114, 1116 (7th Cir. 1990), which also described the principles regarding a general release as "well-established").

The U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) has further indicated that although settlement agreements are generally governed by state contract law, "in the employment discrimination context, a requirement that the settlement be 'knowing and voluntary' has been added as a matter of federal law because of the important 'federal policy underpinnings' of employment discrimination law." *Dillard v. Starcon Int'l, Inc.*, 483 F.3d 502, 507 (7th Cir. 2007) (following and quoting *Pierce v. Atchison, Topeka and Santa Fey Ry. Co.*, 65 F.3d 562, 570-71 (7th Cir. 1995)).[12] To determine if a release was knowing and voluntary, the Seventh Circuit employs the federal "totality of the circumstances" approach, which goes beyond general principles of state contract law and "look[s] to a number of factors to assess the validity of a particular release." *Pierce*, 65 F.3d at 571. However, "[i]f an employee never disputes the knowing and voluntary nature of his release (and merely, perhaps, raises traditional state law defenses to the validity of the contract), a court is not required to consider the totality of the circumstances." *Id.* at 571-72.

Overall, for purposes of the instant case, a release agreement affecting a federal employment-related right is effective if it is valid under state law and is knowing and voluntary. *Hampton*, 561 F.3d at 716 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); *Pierce*, 65 F.3d at 570; *see also Cal. Mantel*, 10 OCAHO no. 1168 at 8.

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[12] Mr. S.'s allegations arose in the State of Illinois. Therefore, precedent from the Seventh Circuit provides guidance where appropriate. *See* 28 C.F.R. § 68.57. Additionally, Seventh Circuit decisions regarding Title VII claims—*e.g. Hampton*—are particularly instructive and have been considered for their persuasive value. *See generally United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1151 (1993) ("Title VII principles of law are generally applied to IRCA discrimination cases.") (citations omitted).

C. The May 29, 2015 Settlement Agreement, Waiver and Release

As an initial point, there is no indication that Mr. S.'s execution of the May 29, 2015 Settlement Agreement, Waiver and Release was anything but knowing and voluntary. Indeed, Mr. S. has not specifically challenged any aspect of that agreement.[13] He has not suggested that he was coerced into executing the agreement or that fraud or duress played a role in his signing of the agreement. Mr. S.'s résumé, which is attached to his complaint, reflects that he has a bachelor of engineering degree and a post-graduate diploma in advanced computing, and there is no indication that he did not understand the terms to which he assented. Ex. C-4. Furthermore, he initialed each page of the agreement indicating that he reviewed it page-by-page. A paragraph directly above Mr. S.'s signature line rendered in bold and all capital letters—in contrast to the remainder of the agreement—expressly states that by signing the agreement, Mr. S. is doing so knowingly and voluntarily and waiving and releasing accrued rights against Discover. The agreement is also clear and unambiguous, and Mr. S. received significant consideration, $ 73,991.55, in exchange for the release. He also hired an attorney to help him negotiate the settlement. Complaint at 3. The agreement itself indicates that he was provided an opportunity to consult with an attorney and did so; moreover, part of Mr. S.'s consideration from Discover included payment for attorneys' fees. Because Mr. S. has not challenged the knowing and voluntary nature of the release in the May 29, 2015 agreement, I need not consider the totality of the circumstances of that release. *Pierce*, 65 F.3d at 571-72. Nevertheless, even if the totality of the circumstances were considered, they would also point to a finding that Mr. S.'s release in the May 29, 2015 agreement was knowing and voluntary. *See Hampton*, 561 F.3d at 717 (affirming the knowing and voluntariness of a release of a Title VII claim where, *inter alia*, the employee had a high school education, the employee received significant consideration, the agreement was clear and unambiguous, and the agreement contained language just above the signature line to ensure it had been read carefully); *see also Dillard*, 483 F.3d at 507 (a superficial claim of involuntariness does not defeat enforcement of an otherwise valid settlement agreement).

Having found that Mr. S. voluntarily and knowingly executed the May 29, 2015 Settlement Agreement, Waiver and Release, the undersigned turns next to the language of the agreement itself. It is undisputed that both parties signed the May 29, 2015 agreement, and there has been no challenge to its authenticity. In exchange for payment in the amount of $73,991.55, Mr. S. agreed to waive claims against Discover and to release it from liability under at least sixteen specific federal and state laws, including Title VII. Additionally, he agreed to release Discover from "any and all liability for any claims or any damages of any kind" that he may have had

[13] Mr. S. contended in his Motion to Amend that Discover's attorney "tried to trick the complainant for the IL DOL Wage Claim" by "pressur[ing]" him to sign the August 22, 2016 wage claim settlement agreement. *See* Motion to Amend at 2. As discussed above, however, that agreement is not at issue in the instant proceeding, and any challenges to its validity are beyond the scope of the instant disposition of Mr. S.'s complaint. *See supra* n.5.

against Discover as of the date of the execution of the agreement including, but not limited to, "any claim arising under any federal . . . law or ordinance." *See* Complaint, Ex. C-5 at 85, 87. In addition, in exchange for the foregoing consideration, Mr. S. agreed not to institute any proceeding of any kind ("any legal action, claim, charge, complaint or action") against Discover relating in any way to his employment with Discover or to the claims released by him in the agreement. *Id.* at 88.

The undersigned finds that the release and waiver in the May 29, 2015 agreement precludes Mr. S. from initiating and maintaining a complaint against Discover before OCAHO. The language used in the release provision is clear and unambiguous. Mr. S. has not challenged the clarity of the release or alleged any ambiguity in it, and there is no question that he waived or released any claims he may have had under 8 U.S.C. § 1324b in exchange for the aforementioned consideration. *See Hampton*, 561 F.3d at 715 (noting that both the Seventh Circuit and Illinois courts have found language similar to "any and all claims" to be unambiguous and sufficient to release federal claims). Although the settlement agreement does not specifically list claims under 8 U.S.C. § 1324b, "a party need not enumerate the specific claims an employee is waiving in a general release." *Id.* at 716 (citing *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 533 (7th Cir. 1996)); *Constant v. Cont'l Tel. Co. of Ill.*, 745 F. Supp. 1374, 1380 (C.D. Ill. 1990); *Rakowski v. Lucente*, 104 Ill. 2d 317, 323 (1984)). Moreover, there is no indication that Mr. S. was not aware of the alleged unlawful acts prior to the date that he signed the settlement agreement. *See Hampton*, 561 F.3d at 715. Indeed, the alleged unlawful acts began as early as June 2014, according to Mr. S., and he signed the settlement agreement on May 29, 2015. Complaint at 6; Motion to Dismiss, Ex. R-2. The other alleged discriminatory acts, including the failures to provide Mr. S. with requested trainings and to interview him for new employment opportunities, also all predate the signing of the settlement agreement, and Mr. S. has not alleged a discriminatory act against Discover occurring after the settlement agreement. Complaint at 1-6, Exs. C-1 & C-3. Thus, although a general release does not cover claims that were unknown to the releasing party at the time the release was executed and also does not cover claims that arose after the execution of the release agreement, neither of those conditions is present in Mr. S.'s case. *See Hampton*, 561 F.3d at 715; *Whitlock*, 581 N.E.2d at 667; *Aityahia*, 9 OCAHO no. 1122 at 4-5. Thus, there is no reason not to give effect to the clear and unambiguous release and waiver language in the May 29, 2015 Settlement Agreement, Waiver and Release.

Mr. S. has not alleged that there was any fraud, duress, unconscionability, or other state law contract defenses to the consummation of the settlement agreement. *See generally Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 350 (Ill. 2012); *see also Aityahia*, 9 OCAHO no. 1122 at 7. Indeed, as discussed above, he has not directly disputed or otherwise challenged the validity

of the May 29, 2015 Settlement Agreement, Waiver and Release during these proceedings.[14] To the extent that Mr. S.'s complaint evinces a desire to rescind his waiver and release, he has also not alleged that he has returned or offered to return the consideration he received for that waiver and release, $73,991.55. Thus, any request for rescission would also necessarily fail. *Hampton*, 561 F.3d at 717.

In short, Mr. S.'s May 29, 2015 Settlement Agreement, Waiver and Release was executed knowingly and voluntarily and is valid under state law. Indeed, in the Title VII context, similar releases have been held binding, and there is no reason not to enforce the one in this case. *Hampton*, 561 F.3d at 714-17. Consequently, Mr. S. is bound by his waiver and release in his May 29, 2015 settlement agreement with Discover, and that waiver and release precludes his assertion of any putative claims under 8 U.S.C. § 1324b before OCAHO. Accordingly, Respondent's Motion to Dismiss is granted, and Mr. S.'s complaint is dismissed. All other pending motions are denied as moot.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. S. is lawful permanent resident who was employed by Discover Financial Services, LLC in Riverwoods, Illinois.

2. S. and Discover Financial Services, LLC signed a Settlement Agreement, Waiver and Release of Claims on May 29, 2015.

3. The May 29, 2015, Settlement Agreement, Waiver and Release of Claims terminated S.'s employment with Discover Financial Services, LLC.

[14] Mr. S. noted that his August 2016 settlement agreement related to his IL DOL wage claim was a "totally new" agreement which did not include the release and waiver in his May 29, 2015 settlement agreement. Response at 3. As discussed above, however, the August 2016 agreement was concluded solely to settle Mr. S.'s state law back wage claim pending before the IL DOL, as evidenced by both an extensive e-mail trail he submitted and his receipt of $ 1038.40 as compensation under the terms of that agreement. Although the August 2016 settlement agreement superseded any prior agreements "with respect to the subject matter hereof [*i.e*. the IL DOL wage claim (No. 15-001972)]," there is no indication that it superseded or modified the earlier May 29, 2015 Settlement Agreement, Waiver and Release which was concluded for the purpose of terminating his employment with Discover and under which he received $ 73,991.55 in consideration. Thus, as discussed, the August 2016 settlement agreement has no bearing on Mr. S.'s complaint before OCAHO.

4. S. waived and released Discover Financial Services, LLC from any and all liability for any claims or any damages of any kind that he may have had against the company as of the date of the execution of the agreement in exchange for payment in the amount of $73,991.55. S. also agreed not to institute any proceedings of any kind against Discover Financial Services, LLC relating in any way to his employment with the company or to the claims released by him in the agreement.

B. Conclusions of Law

1. This is an action arising under the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b.

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. 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, and that an Administrative Law Judge has the authority to compel or bind a party to adhere to the terms to which it previously agreed. *Aityahia v. Sabena Airline Training Ctr., Inc.*, 9 OCAHO no. 1122, 4-5 (2006).

4. "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).

5. As a general matter, a settlement agreement is a contract and is evaluated under the relevant state's contract law. *Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002) (relying on *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380-81 (1994)).

6. In the Seventh Circuit, a release agreement affecting a federal employment-related right is effective if it is valid under state law and is knowing and voluntary. *Hampton v. Ford Motor Co.*, 561 F.3d 709, 716 (7th Cir. 2009); *Pierce v. Atchison, Topeka and Santa Fey Ry. Co.*, 65 F.3d 562, 570 (7th Cir. 1995); *see also United States v. Cal. Mantel, Inc.*, 10 OCAHO no. 1168, 8 (2013).

7. The May 29, 2015 Settlement Agreement, Waiver and Release of Claims is binding on the parties.

8. S. is precluded from pursuing this matter based on the waiver and release in the May 29, 2015 Settlement Agreement, Waiver and Release of Claims, and the complaint must be dismissed.

ORDER

Discover's Motion to Dismiss is granted, and the complaint is dismissed. All other pending motions and requests are denied.

SO ORDERED.

Dated and entered on December 12, 2016.

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James R. McHenry III
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.