

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

May 22, 2017

BIENVENIDO ANTONIO THOMPSON,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 17B00033
)	
SANCHEZ AUTO SERVICES, LLC,)	
Respondent.)	
_____)	

FINAL ORDER OF DISMISSAL

I. INTRODUCTION

This matter arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Complainant Bienvenido Antonio Thompson (Mr. Thompson) alleges that Respondent Sanchez Auto Services, LLC (Sanchez Auto) discriminated against him because of his citizenship status and national origin, retaliated against him for asserting his rights under 8 U.S.C. § 1324b, and rejected the documents he presented to establish his identity and/or work authorization. Mr. Thompson is *pro se*. For the reasons discussed below, Mr. Thompson’s complaint will be dismissed in its entirety for failure to state a claim upon which relief may be granted.

II. PROCEDURAL HISTORY AND BACKGROUND

On August 3, 2016, Mr. Thompson filed a charge with the Immigrant and Employee Rights Section (IER) alleging that Sanchez Auto, located in Paterson, New Jersey, discriminated against him because of his national origin in January 2013. In a letter dated October 17, 2016, IER informed Mr. Thompson that IER was dismissing his charge because it was not timely filed. *See* IER Letter of Determination (Oct. 17, 2016) (citing 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.301(d)(1)¹). IER also stated that Mr. Thompson could nevertheless present his claims in

¹ IER’s regulations at 28 C.F.R. pt. 44 were amended in January 2017, so the regulation cited to in IER’s letter of determination is now found at 28 C.F.R. § 44.301(g).

court by filing a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), which he did on December 19, 2016.

According to the complaint, Mr. Thompson is a citizen of the Dominican Republic and a lawful permanent resident (LPR) of the United States. The complaint states that he became an LPR on September 25, 1994, and that he applied for naturalization on February 4, 2015. *See* OCAHO Complaint at 4. Mr. Thompson contends that he applied for employment with Sanchez Auto on June 11, 2012, and that Sanchez Auto refused to hire him because of his citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1). *Id.* at 8. However, the attachments to his complaint reveal that he was employed by Sanchez Auto until January 17, 2013. He also claims that Sanchez Auto terminated him because of his citizenship status and national origin, which was the basis of his IER charge.² The complaint further contends that Sanchez Auto intimidated, threatened, coerced, or retaliated against him in violation of 8 U.S.C. § 1324b(a)(5). *Id.* at 11. In addition, Complainant alleges that Sanchez Auto refused to accept his Social Security card as proof of his identity and/or authorization to work in the United States in violation of 8 U.S.C. § 1324b(a)(6). *Id.* at 12. He seeks back pay from June 11, 2012.

Mr. Thompson attached numerous documents to his complaint that reflect he filed a wage claim against Sanchez Auto in January 2013 with the New Jersey Department of Labor and Workforce Development. He also filed a discrimination charge against Sanchez Auto in 2014 with the Equal Employment Opportunity Commission (EEOC), contending that he was discriminated against because Sanchez Auto denied him due wages and pay. Mr. Thompson submitted copies of numerous other documents as well, almost all of which reflect his assertion that Sanchez Auto discriminated against him by not paying him certain wages.

Sanchez Auto did not file an answer to the complaint and on March 7, 2017, I issued a Notice and Order to Show Cause, directing Sanchez Auto to show cause why a default judgment should not be entered in favor of Mr. Thompson and to file an answer which comports with 28 C.F.R. § 68.9.³ Respondent has neither responded to the Order to Show Cause nor filed an answer.⁴

² Mr. Sanchez checked “no” when asked if the business/employer refused to hire him or fired him. *See* OCAHO Complaint at 8, 10. However, he also identified citizenship status and national origin as the reasons he was not hired and fired. *Id.* at 8, 10. Because “some leeway in pleading is generally afforded to *pro se* parties,” *see Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 3 (2016) (citing *United States v. Union Lakeville Corp.*, 8 OCAHO no. 1019, 277, 280 (1998)), I will consider Mr. Thompson’s complaint to allege both discriminatory hiring and firing.

³ *See* OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2017).

⁴ The undersigned does not condone Sanchez Auto’s overall failure to engage this case and its contumacious ignorance of the pleadings and orders entered in the case. Nevertheless, because I

As Sanchez Auto failed to comply with the Order to Show Cause, I assessed Mr. Thompson's complaint to determine whether a default judgment in his favor was warranted. Upon review of the complaint, on April 17, 2017, I issued an Order to Show Cause to Mr. Thompson because it appeared that his complaint was subject to dismissal for failure to state a claim upon which relief may be granted, pursuant to 28 C.F.R. § 68.10(b). Specifically, I instructed Mr. Thompson to: (1) clarify the nature of the alleged employment discrimination because of 8 U.S.C. § 1324b's limited scope; (2) demonstrate that he is a protected individual as defined under 8 U.S.C. § 1324b(a)(3); (3) show why his national origin-based discrimination and document abuse claims should not be dismissed because of his failure to allege any supporting facts; and (4) show why his retaliation claim should not be dismissed for also failing to allege any supporting facts. Mr. Thompson's response to the Order to Show Cause was due May 8, 2017. To date, Complainant has failed to file a response.⁵

III. DISCUSSION

A. Failure to State a Claim Upon Which Relief May be Granted

An OCAHO Administrative Law Judge (ALJ) may dismiss a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10. This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). *Sharma v. Discover Financial Servs.*, 12 OCAHO no. 1292, 7 (2016) (citing *United States v. Spectrum Technical Staffing Servs., Inc.*, and *Personnel Plus, Inc.*, 12 OCAHO no. 1291, 8 (2016); 28 C.F.R. § 68.1).⁶ During the prehearing phase,

have determined that Mr. Thompson's complaint should be dismissed, I find that a default judgment against Sanchez Auto is not warranted. Accordingly, the Order to Show Cause against Sanchez Auto is also discharged.

⁵ Because I am dismissing Mr. Thompson's complaint pursuant to 28 C.F.R. § 68.10(b) for failure to state a claim upon which relief can be granted, I need not address whether dismissal of his complaint due to abandonment is also warranted under 28 C.F.R. § 68.37(b) based on his failure to respond to the Order to Show Cause.

⁶ 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

however, the ALJ “shall not dismiss a complaint in its entirety for failure to state a claim upon which relief may be granted, upon his or her own motion, without affording the complainant an opportunity to show cause why the complaint should not be dismissed.” 28 C.F.R. § 68.10(b). Sanchez Auto did not file a motion to dismiss. Mr. Thompson was notified that his complaint was potentially subject to dismissal for failure to state a claim, and he was afforded an opportunity to show cause why his complaint should not be dismissed. Mr. Thompson did not avail himself of the opportunity to show cause, however.

An ALJ’s analysis in deciding whether to dismiss a complaint for failure to state a claim is limited to the four corners of the complaint; however, a copy of a document attached to a pleading is a part of that pleading for all purposes. *See* Fed. R. Civ. P. 10(c). Further, “[a]lthough 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.” *Sharma*, 12 OCAHO no. 1292 at 8 (citing *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)); *see also* *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002).⁷ The complainant’s allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant’s favor. *Udala v. N.Y. State Dep’t of Educ.*, 4 OCAHO no. 633, 390, 394 (1994).

Thus, for purposes of assessing whether Mr. Thompson has stated a claim or claims upon which relief can be granted, I accept as true his factual assertions that he applied for employment with Sanchez Auto on June 11, 2012, and that he was also terminated by Sanchez Auto on January 17, 2013. I also accept as true that Mr. Thompson tendered his Social Security card as proof of his identity and/or eligibility to work in the United States, which Sanchez Auto rejected. Notwithstanding these factual assertions, for the reasons described below, Mr. Thompson has failed to sufficiently allege that he was discriminated against, subjected to document abuse, or retaliated against under the relevant provisions of 8 U.S.C. § 1324b. Although some leeway has been afforded to Mr. Thompson as a *pro se* party in assessing his pleadings, *see Jablonski*, 12 OCAHO no. 1272 at 3, his claims—some of which are foreclosed by well-established law—are insufficient to establish that Sanchez Auto subjected him to an unfair immigration-related

database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

⁷ The alleged unfair immigration-related employment practices occurred in the State of New Jersey; therefore, the U.S. Court of Appeals for the Third Circuit is the appropriate reviewing court, should this Order be appealed. *See* 8 U.S.C. § 1324b(i)(1).

employment practice for which he could obtain relief.⁸ Mr. Thompson has been afforded a full and fair opportunity to address the issue of dismissal for failure to state a claim upon which relief may be granted, and his due process rights have been preserved. Nevertheless, for the reasons set forth below, his complaint must be dismissed.

1. OCAHO Does Not have Jurisdiction Over Mr. Thompson's Claim of Unpaid Wages

Title 8 U.S.C. § 1324b is limited to claims that involve the hiring, recruitment, or discharge of employees, 8 U.S.C. § 1324b(a)(1), retaliation for engaging in protected conduct, 8 U.S.C. § 1324b(a)(5), and document abuse, 8 U.S.C. § 1324b(a)(6). By its unequivocal language, § 1324b does not encompass complaints that relate to the terms and conditions of employment such as compensation, promotions, and hostile work environments. *Molina v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1261, 3 (2015) (referencing *Smiley v. City of Philadelphia*, 7 OCAHO no. 925, 15, 35 (1997)); *see also Huang v. Queens Motel*, 2 OCAHO no. 364, 504, 516 n.9 (1991) (stating that claims for failure to pay proper wages under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2012), are not cognizable under IRCA's antidiscrimination provisions).

The overall crux of Mr. Thompson's complaint is that Sanchez Auto failed to pay him owed wages, including overtime, and he references the contested wages repeatedly as a basis for his claims.⁹ *See* OCAHO Complaint at 11-14, 25-34, 57-63, 71-84. His EEOC national origin charge was also predicated on Sanchez Auto's alleged failure to pay him wages. It is well-established, however, that issues relating to the terms of employment, such as compensation, fall outside the scope of 8 U.S.C. § 1324b and that OCAHO is not the proper forum for a compensation-related grievance. *See Monda v. Staryhab, Inc.*, 8 OCAHO no. 1002, 86, 94 (1998); *see also Horne v. Town of Hampstead*, 6 OCAHO no. 906, 941, 946-47 (1997). Accordingly, Mr. Thompson's claims related to his allegations that Sanchez Auto did not pay him owed wages must be dismissed.

⁸ The undersigned notes that Mr. Thompson indicated that he was disabled in some documents in his complaint. OCAHO Complaint at 34, 44, 46, 50, 51. There is no indication or allegation, however, that any disability experienced by Mr. Thompson precluded him from responding to the Order to Show Cause or otherwise pleading sufficient facts to state a viable claim in this forum.

⁹ On July 8, 2013, the New Jersey Department of Labor and Workforce Development entered an award in the amount of \$16,844.16 in favor of Mr. Thompson. *See* OCAHO Complaint at 31. The record reveals that Sanchez Auto appealed this judgment. *Id.* at 30. On March 7, 2014, the Superior Court of New Jersey, Passaic County, entered a judgment in favor of Sanchez Auto. *Id.* at 59.

2. Mr. Thompson is Not a Protected Individual

Title 8 U.S.C. § 1324b(a)(1)(B) prohibits an employer from discriminating against an individual with respect to hiring, recruitment or referral for a fee, or termination on account of the individual’s citizenship status if he is a “protected individual.” In addition, a viable claim of citizenship status-based document abuse under 8 U.S.C. §1324b(a)(6), which references § 1324b(a)(1), can be maintained only when the allegations reflect document abuse against a statutorily-defined protected individual. *See United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 30 (2017); *see also Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 5-6 (2015) (“Document abuse . . . occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin.”) (citing *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014)).

Title 8 U.S.C. § 1324b(a)(3) defines a protected individual, in part, as an alien lawfully admitted for permanent residence, but not an LPR alien “who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization.” Section 316(a) of the INA sets forth the requirements for naturalization and in relevant part states:

No person, except as otherwise provided in this title, shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application

8 U.S.C. §1427(a).¹⁰

Mr. Thompson’s admissions in the complaint reflect that he was not a protected individual in June 2012 or January 2013, when Sanchez Auto allegedly discriminated against him. The earliest date Mr. Thompson could have applied for naturalization was on or about September 25,

¹⁰ There are certain provisions that *reduce* the required period of continuous residence after becoming an LPR in order to become eligible for naturalization. *See* 8 U.S.C. § 1430. Complainant has not alleged that he falls within any category that decreased his required period of residence prior to becoming eligible to naturalize, and based on the standard period of five years of residency as an LPR, his admissions in the complaint establish that he was not a protected individual at the time of the alleged discriminatory actions.

1999, as he became an LPR on September 25, 1994.¹¹ However, according to the complaint, he applied for naturalization on February 4, 2015, and thereby failed to apply within the statutorily required first six months of becoming eligible. Accordingly, he lost his status as a protected individual when he failed to apply for naturalization within six months of the date that he first became eligible to apply. *See Santos v. USPS*, 9 OCAHO no. 1105, 5 (2004) (citing 8 U.S.C. § 1324b(a)(3)(B)(i)). Mr. Thompson has failed to establish that he is a protected individual to maintain claims of either citizenship status-based discrimination in hiring and firing or of citizenship status-based document abuse. These claims will, therefore, be dismissed. *See, e.g., Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO no. 1119, 4-5 (2005).

3. Mr. Thompson Did Not Present Any Facts Supporting a Claim of National Origin-Based Discrimination or Document Abuse

Title 8 U.S.C. § 1324b(a)(1)(A) prohibits an employer from discriminating against an individual with respect to hiring, recruiting or referring for a fee, or terminating an individual because of the individual's national origin. A claim of § 1324b(a)(6) document abuse may also be predicated on national origin. In the instant matter, neither the facts asserted in the complaint nor its attachments support any conclusion that Sanchez Auto treated Mr. Thompson differently or committed an unfair immigration-related employment practice against him on account of his national origin from the Dominican Republic. *See Jablonski*, 12 OCAHO no. 1272 at 6 (“[A] § 1324b complaint must nevertheless contain sufficient minimal factual allegations to satisfy [28 C.F.R.] § 68.7(b)(3) and give rise to an inference of discrimination.”). Indeed, his complaint is bereft of any allegations related to his national origin apart from cursory assertions that he was not paid wages because he is from the Dominican Republic; however, those passing allegations are insufficient to support a claim of national origin discrimination under any theory encompassed by 8 U.S.C. § 1324b. “Where a complainant alleges no facts from which an adjudicator could reasonably conclude that the opposing party violated the law, dismissal is the appropriate result.” *Id.* at 7. Accordingly, Mr. Thompson's claims of discriminatory hiring and firing and of document abuse on account of his national origin will be dismissed.

4. Mr. Thompson Did Not Present Any Facts Supporting a Claim of Retaliation

Title 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice “to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.” Although Mr. Thompson checked the box in his complaint alleging that Sanchez Auto violated 8 U.S.C. § 1324b(a)(5), *see* OCAHO

¹¹ Mr. Thompson identifies September 25, 1994, as the date he also became eligible to apply for naturalization, *see* Complaint at 4, which is, as a matter of law, incorrect.

Complaint at 11, the complaint and attachments are otherwise devoid of any facts that suggest he was retaliated against by Sanchez Auto based on behavior protected by 8 U.S.C. § 1324b. As Mr. Thompson did not plead the minimum factual allegations required under 28 C.F.R. § 68.7(b)(3) to support this allegation, the retaliation claim will also be dismissed. *See Jablonski*, 12 OCAHO no. 1272 at 7.

IV. CONCLUSION

Mr. Thompson failed to establish that he is a statutorily-defined protected individual and failed to plead sufficient factual allegations to raise even an inference of discrimination under any theory cognizable by 8 U.S.C. § 1324b. Indeed, the gist of his overall complaint is a wage dispute with Sanchez Auto, and a fair reading of his complaint indicates that his work with Sanchez Auto ceased because of that dispute; however, a dispute over owed wages and compensation rates is simply not justiciable in this forum. Accordingly, because Mr. Thompson failed to state a claim upon which relief can be granted, his complaint is hereby dismissed with prejudice.¹²

SO ORDERED.

Dated and entered on May 22, 2017.

James R. McHenry III
Administrative Law Judge

¹² Ordinarily, the dismissal of a complaint at the pleading stage would be accompanied by leave to amend the complaint; however, if there is no reasonable possibility that amendment will cure a pleading defect, leave to amend need not be granted. *Jablonski*, 12 OCAHO no. 1272 at 7-8. Providing Mr. Thompson leave to amend would be futile, as there is no evidence that the facts he presented could be developed or altered in a reasonable manner to cure the deficiencies with his claims. *Id.* at 8.