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

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| MABEL LILIANA RODRIGUEZ GARCIA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. § 1324b Proceeding<br>OCAHO Case No. 2021B00056 |
| FARM STORES,<br>Respondent. | ) | |

Appearances: Stephen Rollins, Esq., for Complainant
Alexandra C. Hayes, Esq. and J. Freddy Perera, Esq., for Respondent

ORDER ON MOTION TO DISMISS

## I. PROCEDURAL HISTORY

On September 7, 2021, Complainant Mabel Liliana Rodriguez Garcia filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent Farm Stores violated 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. Specifically, Complainant alleges that Respondent discriminated against her on the basis of her citizenship status by firing her, in violation of 8 U.S.C. § 1324b(a)(1). Compl. 8, 10. On October 27, 2021, Respondent, through counsel, filed an answer to the Complaint.

On October 27, 2021, Respondent filed a Motion to Dismiss Complainant's 8 U.S.C. § 1324b Complaint (Motion to Dismiss). Respondent argued that because Complainant stated in the Complaint that she did not timely apply for naturalization after becoming a lawful permanent resident (LPR), she is not entitled to the protection of the statute pursuant to 8 U.S.C. § 1324b(a)(3)(B). Mot. Dismiss 1–3. That section provides that a "protected individual" under § 1324b(a)(1)(B) "does not include . . . an 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 or, if later, within six months after November 6, 1986[.]"

On November 16, 2021 Complainant filed Complainant's Response to Respondent's Motion to Dismiss. Complainant claims that Respondent's arguments about protected individuals "would go against the very purpose of [the] statute." *See* Resp. Mot. Dismiss 1 (citations omitted). By "allowing the federal government to remove a protected class's rights

without any reason"—i.e., by only considering § 1324b(a)(1)(B) claims by legal permanent residents who applied for naturalization within six months of eligibility—other permanent residents would be left without a "remedial measure" under the statute. *See* id. at 1, 5–6. Complainant maintains that while she did not apply for naturalization within six months of her eligibility date, she was preparing to apply for naturalization. Id. at 2–3.

On August 11, 2022, the Court issued an order indefinitely staying these proceedings due to an "unresolved question as to the Court's ability to issue a final order with regard to §1324b cases that address non-administrative questions" following the Supreme Court's ruling in United States v. Arthrex, Inc., 594 U.S. 1 (2021) (holding that unreviewable authority by an Administrative Patent Judge is incompatible with that Judge's status as an inferior officer). Rodriguez Garcia v. Farm Stores, 17 OCAHO no. 1449, 1 (2022) (citation omitted).[1] On October 12, 2023, the Department of Justice issued an interim final rule providing that cases arising under 8 U.S.C. § 1324b are subject to administrative review by the Attorney General, resolving the concerns raised in Arthrex, Inc. *See* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68). As a result, this Court may make a final case disposition in this matter. Accordingly, the stay is lifted.

## II. LEGAL STANDARDS

### A. Motion to Dismiss

In resolving a motion to dismiss, the Court limits its analysis to the four corners of the Complaint and construes the Complaint in the light most favorable to the complainant. Heath v. Tringapps, Inc., 15 OCAHO no. 1410, 3 (2022) (citing Jarvis v. AK Steel, 7 OCAHO no. 930, 111, 113 (1997), and then citing Heath v. Optnation, 14 OCAHO no. 1374, 2 (2020)).

### B. Citizenship-Status Discrimination – "Protected Individual"

8 U.S.C. §1324b(a)(1) provides that it is an "unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . in the case of a protected individual . . . because of such individual's citizenship status." 8 U.S.C. § 1324b(a)(3) defines a "protected individual" as one who:

[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 ethe 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 https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

> (A) is a citizen or national of the United States, or
> (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence . . . is admitted as a refugee . . . or is granted asylum . . . but does not include (i) *an 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* or, if later, within six months after November 6, 1986, and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

(emphasis added). To succeed on a citizenship-status discrimination claim, the complainant bears the burden of establishing they were a protected individual at the time of the alleged discrimination. *See* Zu v. Avalon Valley Rehab. Ctr., 14 OCAHO no. 1376, 6 (2020) (citations omitted).

## III. DISCUSSION

### A. "Protected Individual"

Upon review of the allegations contained in the Complaint, Complainant has plead facts demonstrating that she was not a "protected individual" at the time of the alleged discrimination when she was fired on March 4, 2021. Compl. 10.

Complainant alleges that she was born in Cuba and became an LPR on April 11, 2012. Id. at 4–5. She became eligible to apply for naturalization on April 11, 2017, and at the time of the Complaint (filed on September 7, 2021) she had not yet applied for citizenship. Id. Therefore, even viewing the allegations in the Complaint in the light most favorable to Complainant, she was not a protected individual for purposes of 8 U.S.C. § 1324b(a)(1)(B) at the time of the alleged discrimination, as she had not applied for naturalization within six months of her eligibility date. *See* 8 U.S.C. § 1324b(a)(3).

Complainant argues that an interpretation of § 1324b(a)(3) which excludes from the definition of protected individuals "any legal resident who does not apply for naturalization within six months of eligibility" is "too harsh." Resp. Mot. Dismiss 3. First, Complainant asserts that the "legislative intent of the statute is not to punish residents who are discriminated against in favor of undocumented aliens," and not to allow employers to be "let off the hook." Id. at 4 (citing 8 U.S.C. § 1324b(a)(4)). Second, Complainant argues that the statute does not provide for a remedy for LPRs who did not apply for naturalization within six months of eligibility, citing to the Supreme Court's decision in Sessions v. Morales-Santana which noted that "[w]hen the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment," through "extension of benefits to the excluded class." Id. at 5 (quoting Sessions v. Morales-Santana, 582 U.S. 47, 72–73 (2017) (internal quotations and citations

omitted)). Complainant argues that, if the statute is read to exclude LPRs who did not apply for naturalization within six months of eligibility from the definition of protected individuals, "the statute would not provide for remedial measures for someone like Complainant and therefore [would] be considered unconstitutional because it arbitrarily excludes the rights of a protected class without providing any reason for the exclusion in the first place." Id. at 6.

As to Complainant's first argument regarding legislative intent, the statute is unambiguous as to the exclusion of LPRs who do not apply for naturalization within six months of eligibility from the "protected individual" classification. Because "[s]ection 1324b(a)(3) provides a clear definition of 'protected individual'; the Court lacks the authority to override the clear statutory text." Zu, 14 OCAHO no. 1376, at 6 (quoting MacKinnon v. Fin. Times, 13 OCAHO no. 1316a, 3 (2019)) (internal quotations omitted). Where no ambiguity exists, the plain meaning canon of construction applies. *See* United States v. Diversified Tech. & Servs. of Va., Inc., 9 OCAHO no. 1095, 18 (2003) (citation omitted) (declining to resort to outside sources when the statutory language has no apparent ambiguity). OCAHO precedent on § 1324b(a)(3) buttresses this view. *See* Sosa v. U.S. Postal Serv., 1 OCAHO no. 115, 752, 760 (1989) ("Nonetheless, Congress did insert a list of exceptions to the antidiscrimination protection in the statute, and by its plain meaning, Congress did intend to deny the protection of 1324(b)(1) to some people."); *e.g.*, Dhillon v. Regents of the Univ. of Cal., 3 OCAHO no. 497, 977, 992–94 (1993).

Moreover, the legislative here is instructive as to the purpose for this limitation. *See, e.g.*, Khatami v. Guardsmark, Inc., 3 OCAHO no. 572, 1714, 1724 (1993) ("A statute's legislative history provides an important key to statutory construction."). In 1986, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), which amended the Immigration and Nationality Act, including the employer sanctions provisions in INA § 274A, to discourage the employment of unauthorized workers. Section 101 of Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359; *see also* section 274A of the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1986) (codified as amended at 8 U.S.C. § 1324a). However, "[m]any feared that because of the sanctions imposed by IRCA, employers would become overly cautious and would refuse to hire foreign-looking or foreign-sounding individuals as a sure method of not violating 8 U.S.C. § 1324a(a)." Khatami, 3 OCAHO no. 572, at 1719 (citing Ryba v. Tempel Steel Co., 1 OCAHO no. 289 (1991)). Lawmakers were particularly, although not exclusively, concerned that Hispanic persons would be denied employment for fear of an employer running afoul of the requirements of IRCA. *See, e.g.* 131 Cong. Rec. S. 1200 (daily ed. Sept. 11, 1985) (Statement of Sen. Kennedy); 132 Cong. Rec. Conf. Report S. 1200 (daily ed. Oct. 15, 1986) (Statement of Rep. Rodino). "To address this fear, Congress included within IRCA an anti-discrimination provision, which made it an unfair immigration-related employment practice for a person or entity to discriminate with respect to the hiring, recruitment or referral for a fee, or the discharging of an individual." Khatami, 3 OCAHO no. 572, at 1719 (citing United States v. Lasa Mktg. Firms, 1 OCAHO no. 141 (1990)); *see* IRCA § 102; INA § 274B (1986) (codified as amended at 8 U.S.C. § 1324b). "This prohibited discrimination was limited to discrimination on the basis of an individual's national origin, and, for a limited category of individuals, to discrimination on the basis of their citizenship status." Khatami, 3 OCAHO no. 572, at 1719; *see also* United States v. Todd Corp., 900 F.2d 164, 165 (9th Cir. 1990) ("Congress was particularly concerned about documented

aliens and 'foreign looking and sounding' United States citizens.") (citing H.R. Rep. No. 99-1000, at 87–88 (1986) (Conf. Rep.)).

Two years prior to the enactment of IRCA, the House of Representatives passed a model for the eventual law which included amendments by Representatives Frank and Hawkins, outlawing discrimination on the basis of citizenship status. 130 Cong. Rec. H1510 (daily ed. June 12, 1984) (Amendments of Mr. Hawkins and Frank). Importantly, the prototype legislation prohibited discrimination "because of such individual's national origin or alienage" without regard to whether the person was a citizen, an intending citizen, or lawful permanent resident with no intention of ever becoming a citizen.[2] Id. The companion Senate bill, passed the following year, contained no provisions outlawing discrimination. 131 Cong. Rec. S1200 (daily ed. Sept. 19, 1985). During the second session of the 99th Congress, the House bill, authored by Representative Rodino and co-sponsored by Representative Mazzoli, contained the now familiar language prohibiting discrimination in employment against citizens or "intending citizens," defining that term to mean lawful permanent residents who seek naturalization within six months of eligibility. H.R. Rep. No. 99-682, pt. 1, at 7 (1986). Addressing the narrowed scope of the anti-discrimination provisions with regard to intending citizens, the House Judiciary Committee report notes that "[i]n the last Congress, the House recognized the need for including an anti-discrimination provision and adopted the so-called 'Frank amendment' by an overwhelming vote of 404-9. The version of the amendment that is included in H.R. 3810 reflects the lengthy discussions and compromises that were made on this provision during the conference deliberations in 1984." Id. at 69. Congressman Frank, in discussing the narrowed anti-discrimination provisions in the context of the final House vote, stated: "If the point comes at which they have lived in this country long enough to be citizens and choose not to apply for citizenship, then they do not get this protection. This protection only applies to those who have evinced an interest in being citizens, we hope." 132 Cong. Rec. HR 3810 (daily ed. Oct. 9, 1986). The House version of the bill, including the narrowed version of the Frank-Hawkins amendment, was passed on October 9, 1986. Id.

A discussion between Representative Mazzoli, Chairman of the House Subcommittee on Immigration, Refugees, and International Law and co-author of IRCA, and Pat Choate, a representative of the National Association of Manufacturers, during a joint congressional hearing related to the anti-discrimination provisions of IRCA is also informative with regard to the intent of the "intending citizens" language.

> Chair Mazzoli: And let me just begin, Mr. Choate with you, again, on the very profound but simple question: Should American citizens be preferred in the workplace, so to speak? Are you troubled by a bill which, on the one hand, would say to some people:
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> > You've been here a long time, you've worked hard, you've kept yourself out of legal trouble, other than the fact that you entered this country illegally, so we believe that you're the kind that ought

[2] Both Rep. Hawkins and Frank's amendments excluded from its protections undocumented persons, whom the draft legislation described as "unauthorized alien[s]."

> to be given a chance, first, to legalize your status and then maybe work towards citizenship?

> So are you troubled at all by the fact that an intending citizen, a person who has survived this individual scrutiny and has indicated that he or she wants to be a citizen, is then, when they go to get a job, maybe would suffer discrimination because a U.S. person would get in there first? Are you troubled at all by that? Does that bother you, really?
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> Mr. Choate: No; it doesn't, to be quite honest. I think that what that does is to put a premium on citizenship. It makes citizenship something desirable.
>
> Mr. Mazzoli: So the idea that that would put this intending citizen more quickly on the road to citizenship, that person would not delay in filing the papers, would move quickly, and so is that the idea?
>
> Mr. Choate: I think it will wonderfully concentrate people's minds about the objective. I think it also, to be quite honest about it, addresses the question of having people change their minds about whether or not they wish to become citizens.

Immigration Control and Reform Act of 1986: Anti-Discrimination Provision of H.R. 3080 Before Joint Hearing H. Comm. on the Judiciary, Subcomm. on Immigration, Refugees, and International Law and S. Comm. on the Judiciary, 99th Cong. 93 (1985) (Statement of Rep. Mazzoli, Chairman, H. Subcomm. on Immigration, Refugees, and International Law and Pat Choate, Director, Policy Analysis TRW Inc. on Behalf of the National Association of Manufacturers).

Congressman Garcia, in describing the compromise which resulted in the "intending citizens" language, stated: "While I understand that the language contained in H.R. 3080 was written in much the same spirit as Mr. Frank's amendment, it nonetheless does not offer protection to long-term legal permanent residents who do not apply or intend to apply to become citizens." Id. at 121 (Statement of Rep. Garcia).

The conference legislation adopted the House bill's provisions outlawing citizenship based discrimination. While the language in the summary conference report suggests adherence to Representative Frank and Hawkins' original and expansive prohibition against discrimination on the basis of alienage, the text of the compromise legislation hews to the House compromise legislation limiting the protections of the anti-discrimination provisions to citizens or intending citizens, and requiring an LPR seek citizenship within six months of eligibility. H.R. Rep. No. 99-1000, at 18 (1986). Congressman Rodino, one of the members of the conference committee who reintroduced the legislation to the House, briefly described the anti-discrimination provisions in the bill as a compromise, intended to complement Title VII and to "protect individual legal aliens who intend to become citizens from possible, although unlikely, discrimination resulting from the presence of employer sanctions." 132 Cong. Rec. H. Con. Res. 414 (daily ed. Oct. 16, 1986) (statement of Rep. Rodino).

Also of note, the conference legislation includes a provision asserting that it is "not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified." Id.; *see also* 8 U.S.C. §1324b(a)(4) (text of same in enacted IRCA).

In short, the drafters of IRCA offered little explanation for the inclusion of the "citizen and intending citizen" language, or the six-month timeframe for LPRs to take steps to become a citizen, besides a rejection of a broader protection against discrimination on the basis of alienage, a desire to reduce the scope and scale of the anti-discrimination provisions of the statute, and a desire to privilege U.S. citizenship. That compromise has been at the heart of the anti-discrimination provisions of IRCA since its inception, largely unchanged by the IRCA amendments in 1990.

Following reports by the United States General Accounting Office, and review by a task force, Congress enacted the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990). *See* In re Khatami, 3 OCAHO no. 572, at 1720. Among other things, the Immigration Act of 1990 further amended INA § 274B, replacing the term "citizen or intending citizen" with "protected individual," and removing the requirement of filing a declaration of intention to become a citizen to evidence such intention. *See* U.S. Gov't Accountability Off., GAO-T-GGD-92-21, IRCA-Related Discrimination: Actions Have Been Taken to Address IRCA-Related Discrimination, but More Is Needed 4 (1992) (noting that the Immigration Act of 1990 "eliminates the requirement that an alien file a declaration of intent to become a citizen in order to file an antidiscrimination complaint"); INA § 274B (1990) (codified as amended at 8 U.S.C. § 1324b). Both iterations of the INA indicate Congress' intent to provide an objective standard to an LPR's intention to naturalize, as least with regard to the protections offered through INA § 274B. Nothing in the legislative history suggests that Congress intended a more holistic or broad-ranging evaluation of the LPRs intentions outside of the six-month timeframe.

Complainant, understandably, urges this Court to rule that the statute's distinction between LPRs who have attempted to naturalize within six months of obtaining LPR status and those that have not should be disregarded, and that the Court may reach this conclusion without addressing any constitutional issues. Resp. Mot. Dismiss 6–7 (citing Ward v. State, 343 S.C. 14, 18 (S.C. 2000)). Whether this sought-after outcome turns on OCAHO's prior interpretation of the statute or the constitutionality of the provision is, to the Court's thinking, a distinction without a difference. OCAHO's interpretations have held to this distinction because the statute is unambiguous, and because Congress' intention in creating this distinction has been clear since the statute's inception.

Insofar as Complainant advances a policy-driven argument that the Court should adopt an interpretation of the statute which runs counter to its clear language, the Court declines to do so—as discussed above, because "[s]ection 1324b(a)(3) provides a clear definition of 'protected individual'; the Court lacks the authority to override the clear statutory text." Zu, 14 OCAHO no. 1376, at 5.

And insofar as Complainant argues that this provision creates an unconstitutional, arbitrary distinction between two classes of people, and asks the Court to extend coverage to those who do not apply for naturalization within six months of eligibility, to do so would require the Court to determine that this distinction is in fact unconstitutional. The Court declines to address the underlying constitutional question which Complainant's motion raises.

Supreme Court and federal circuit court case law do not provide a uniform answer as to when administrative courts can or should resolve constitutional questions. *Compare* Carr v. Saul, 593 U.S. 83, 92 (2021) ("[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise."), *and* Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."), *with* Elgin v. Dep't of Treasury, 567 U.S. 1, 23 (2012) (acknowledging that there may be "constitutional claims that [an agency] routinely considers, in addition to a constitutional challenge to a federal statute"). However, courts have looked to different considerations in determining whether an administrative court can or should consider a constitutional challenge: whether the constitutional question is within (or would benefit from) the agency's expertise, *see, e.g.*, Carr, 593 U.S. at 92; whether the constitutional question involves a challenge to the constitutionality of the statute as applied as opposed to the statute itself, Elgin, 567 U.S. at 16 n.5; whether the constitutional claim challenges agency actions mandated by Congress, Graceba Total Commc'ns, Inc. v. FCC, 115 F.3d 1038, 1042 (D.C. Cir. 1997); whether the federal courts provide a more appropriate forum to decide the claim, Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n, 838 F.2d 536, 544 (D.C. Cir. 1988); whether the challenge is "correctable" by the agency, Sola v. Holder, 720 F.3d 1134, 1135–36 (9th Cir. 2013); the potential impact of a ruling, Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1137 (9th Cir. 2021); and whether there is another basis on which to resolve a case, Bond v. United States, 572 U.S. 844, 855 (2014).

For its part, this court has often addressed constitutional questions, such as the application of the 11th amendment's immunity from suit clause with regard to a state government. *E.g.*, Ogochi v. N.D. Dep't of Human Servs., 12 OCAHO no. 1304, 4–6 (2017). Matters that involve the constitutionality of a statute itself, however, tend to be beyond the purview of this court, and many administrative agencies generally. *See, e.g.*, Mobility Workx, LLC v. Unified Patents, LLC, 15 F.4th 1146, 1150 (Fed. Cir. 2021) ("Under Supreme Court and circuit precedent, agencies generally do not have authority to declare a statute unconstitutional.") (citations omitted); United States v. Nev. Lifestyles, Inc., 3 OCAHO no. 463, 673, 679 (1992) ("Constitutional issues implicating statutory applicability are appropriate for consideration in administrative adjudications, i.e. by administrative law judges (ALJs), where those issues pertain to the constitutionality of the statutory application, as distinct from the constitutionality of the statute itself.") (citing Branch v. FCC, 824 F.2d 37, 47 (D.C. Cir. 1987)). Although this distinction is not absolute, *see* Elgin, 567 U.S. at 17 ("We need not, and do not, decide whether the [agency's] view of its power [i.e., that it cannot decide constitutional issues] is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction."), the Court finds this distinction prudent here. For the Court to decline to adopt Respondent's interpretation of the statute on the basis that such a reading is

unconstitutional, the Court would have to find that the statutory provision is in fact unconstitutional, a finding which would involve constitutional analysis which the Court is ill equipped to perform on the record presently before it. This appears to be a matter of first impression before this Court, which was been raised only in an opposition brief to a Motion to Dismiss. The Court does not have the benefit of Respondent's position by way of a reply brief or briefing from other interested parties. Further, Respondent cites to no legal authority, either in OCAHO or in any other court, which has previously held that the distinction between LPRs who intend to naturalize within six months and those that do not is an unconstitutional one.

The matter would have broad implications for litigants before this forum and before the Immigrant and Employee Rights Section. Further, practically, the posture of this case is not ideal for resolution of this issue: given that the Court is dismissing the Complaint on this ground, Complainant may promptly raise this issue on appeal.

Therefore, Complainant's citizenship discrimination claim facially fails, as she is not a protected individual as defined by 8 U.S.C. § 1324b(a)(3). As such, Respondent's Motion to Dismiss is GRANTED on this ground.

B. Respondent's Request for Attorney's Fees

In its Answer, Respondent contended that "the Complaint is without reasonable foundation and should therefore be dismissed and Respondent awarded its attorney's fees and costs pursuant to 8 U.S.C. § 1324b(h)." Ans. 3.

OCAHO generally follows the dual standard set out in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420–21 (1978). *See* Breda v. Kindred Braintree Hosp., LLC, 11 OCAHO no. 1225, 2 (2014) (further explaining the dual standard). OCAHO's rule on attorney's fees in § 1324b cases provides:

> The Administrative Law Judge in his or her discretion 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. Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative stating the actual time expended and the rate at which fees and other expenses were computed.

28 C.F.R. § 68.52(d)(6)[3]; *see also* De Leon v. Longoria Farms, 13 OCAHO no. 1320a, 6–7 (2019) (noting that an award of attorney's fees to a respondent is rare and "not appropriate simply because the complainant did not prevail or because the complaint was dismissed") (citations omitted).

As the Complainant is a resident of Florida, the Court looks to the Eleventh Circuit Court of Appeals for guidance. *See* 28 C.F.R. § 68.57. In Alansari v. Tropic Star Seafood, Inc., the court noted that an employer may not recover attorney's fees in an employment discrimination

[3] OCAHO Rules of Practice and Procedure, 28 C.F.R., part 68.

matter unless the underlying claim was "frivolous, unreasonable, or without foundation." Alansari v. Tropic Star Seafood Inc., 395 F. App'x 629, 631 (11th Cir. 2010) (quoting Christiansburg, 434 U.S. at 421); *see also* Bonner v. Mobile Energy Servs. Co., LLC, 246 F.3d 1303, 1304–05 (11th Cir. 2001) (applying Christiansburg standard and reversing an award of attorney's fees to defendant); Walker v. NationsBank of Fl. N.A., 53 F.3d 1548, 1559 (11th Cir. 1995) (applying Christiansburg and vacating an award of attorney's fees to defendant).

Christiansburg and its progeny make clear that the standard for an award of attorney's fees to a defendant in an employment discrimination case is a "stringent" one, and that the court should not engage in post hoc reasoning, awarding attorney's fees to the defendant solely because the plaintiff did not prevail on their claim. Hughes v. Rowe, 449 U.S. 5, 14 (1980); Christiansburg, 434 U.S. at 421–22.

In this case, the Court concludes that this matter is not so "patently devoid of merit" to hear arguments concerning the propriety of an award of attorney's fees to the defendant. Sullivan v. Sch. Bd. of Pinellas Cnty., 773 F.2d 1182, 1189 (11th Cir. 1985). The order granting the motion to dismiss turns on a relatively arcane provision of IRCA, one which, as discussed above, limits the scope of relief to legal residents who applied for naturalization within a six-month period following their eligibility for a change in their immigration status. Complainant otherwise meets the bare requirements of pleading a cause of action by alleging that her former employer terminated her because of her immigration status, favoring the undocumented workers at Respondent's company. The Court therefore finds that Complainant's belief that the Respondent had violated the IRCA to not be "unreasonable" under the circumstances, precluding an award of attorney's fees. *See* Bruce v. City of Gainsville, Ga., 177 F.3d 949, 952 (11th Cir. 1999).

## IV. ORDERS

The stay is LIFTED. The Respondent's motion to dismiss is GRANTED and the case is DISMISSED.

This is a Final Order.

SO ORDERED.

Dated and entered on June 27, 2024.

John A. Henderson
Administrative Law Judge

## Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review 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. See 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.