

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

July 10, 2020

JAYABEN PATEL,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00036
)	
USCIS BOSTON,)	
Respondent.)	
_____)	

ORDER OF DISMISSAL

I. Background

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Complainant, Jayaben Patel, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 21, 2020, alleging that Respondent, the United States Citizenship and Immigration Services (USCIS) office in Boston, discriminated against her based on her citizenship status and national origin, and retaliated against her in violation of § 1324b. Prior to filing her OCAHO complaint, Complainant filed a charge with the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER) on September 23, 2019. IER dismissed the charge because it lacked subject matter jurisdiction, but it referred Complainant’s submission to the Department of Homeland Security Office for Civil Rights and Civil Liberties and the USCIS Ombudsman. IER Letter of Determination.

On January 24, 2020, this office sent a Notice of Case Assignment For Complaint Alleging Unlawful Employment and a copy of the complaint, to Respondent, via certified U.S. mail. The Notice of Case Assignment directed that an answer was to be filed within thirty (30) days of receipt of the complaint, that failure to answer could lead to default, and that proceedings would be governed by Department of Justice regulations.¹ The U.S. Postal Service website indicates that service was completed on February 1, 2020, making Respondent's answer due no later than March 2, 2020. Respondent did not file an answer.

On March 17, 2020, the undersigned issued a Notice of Entry of Default (the Notice) which informed Respondent that it was in default and required Respondent, within twenty days of the order, to file an answer and show good cause for failing to file a timely answer. Respondent’s

¹ Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2020).

response to the Notice was due no later than April 6, 2020. Respondent did not file a response or an answer.

On April 24, 2020, the undersigned issued a Notice and Order to Show Cause to Complainant. The undersigned required Complainant to show cause why her claims for discrimination and retaliation should not be dismissed for lack of subject matter jurisdiction. Further, the undersigned requested that Complainant show cause why her complaint should not be dismissed for failure to state a claim upon which relief may be granted. On May 27, 2020, Complainant filed a response to the Notice and Order to Show Cause.

II. STANDARDS

OCAHO Administrative Law Judges (ALJs) have the authority to determine whether OCAHO has jurisdiction over a dispute. *Windsor v. Landeen*, 12 OCAHO no. 1294, 4–5 (2016); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO no. 919, 1172 (1997) (citing *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) (“when entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the court . . . has an affirmative duty to look into its jurisdiction over the subject matter[.]”).² Further, a court has “an obligation to inquire *sua sponte* into its own subject matter jurisdiction.” *McCulloch v. Velez*, 364 F.3d 1, 5 (1st Cir. 2004). OCAHO has held that “the issue of subject matter jurisdiction may be raised at any time, ‘even by the court, *sua sponte*.’” *Kim v. Getz*, 12 OCAHO no. 1279, 2 (2016) (quoting *Horne v. Town of Hampstead*, 6 OCAHO no. 906, 941, 945 (1997)). Additionally, “[w]hen a forum lacks subject matter jurisdiction, a default judgment must be vacated and the case dismissed.” *Wilson*, 6 OCAHO no. 919 at 1172.

The OCAHO rules do not contain a specific provision regarding dismissals for lack of subject matter jurisdiction. See 28 C.F.R. § 68; *Getz*, 12 OCAHO no. 1279 at 3. Under the OCAHO rules, the Federal Rules of Civil Procedure “may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.” 28 C.F.R. § 68.1. Thus, the Federal Rules and case law from the First Circuit, where this case arises, serve as “general guidance” when an OCAHO ALJ questions OCAHO’s subject matter jurisdiction. *Getz*, 12 OCAHO no. 1279 at 3. Under Federal Rule of Civil Procedure 12(h)(3), “[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” The party invoking jurisdiction bears the burden to establish that the court has jurisdiction. *Windsor*, 12 OCAHO no. 1294 at 4.

² Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

III. DISCUSSION

A. Discrimination

In her complaint, Complainant alleges that Respondent discriminated against her based on her national origin and citizenship status. Specifically, she alleges that she filed several I-130 Petitions along with I-485 Adjustment of Status applications, seeking to adjust her immigration status based on her marriage to a United States citizen, and Respondent's officers discriminated against her during the interviews. In the Order to Show Cause, the undersigned requested that Complainant show cause as to why her national origin and citizenship status discrimination claims should not be dismissed for lack of subject matter jurisdiction.

Similar to lower federal courts, OCAHO is a forum of limited jurisdiction "with only the jurisdiction which Congress has prescribed." *Wilson*, 6 OCAHO no. 919 at 1173. Section 1324b prohibits unfair immigration-related employment practices. *See* § 1324b. Specifically, under § 1324b, OCAHO has the authority to hear claims of discriminatory hiring and discharge based on citizenship status or national origin, retaliation under § 1324b(a)(5), and document abuse for the purpose of satisfying the employment eligibility requirements under 8 U.S.C. § 1324a. § 1324b(a); *Wilson*, 6 OCAHO no. 919 at 1175.

In support of her discrimination claims, Complainant alleges that while seeking to adjust her immigration status, USCIS officers discriminated against her during her interviews and the investigation related to her I-130 Petition. Complainant's Statement at 1–2; Letter to Director Riordan. Complainant does not allege that Respondent discriminated against her in hiring or discharge, and her discrimination claims are not related to her employment with Respondent. Finally, Complainant did not address her discrimination claims in her response to the Order to Show Cause, and, instead, framed her claims as only retaliation claims. *See* Resp. Order Show Cause at 5–8. As Complainant does not allege discriminatory hiring or discharge, the Court finds that OCAHO lacks subject matter jurisdiction to hear Complainant's national origin and citizenship status discrimination claims. As such, Complainant's discrimination claims based on national origin and citizenship status are **DISMISSED WITHOUT PREJUDICE**.

B. Retaliation

In the Order to Show Cause, the undersigned required Complainant to establish that OCAHO has subject matter jurisdiction to hear her retaliation claim. In response, Complainant argues that Respondent's officers retaliated against her for threatening to and for filing a complaint regarding their conduct during her adjustment of status interviews. Complainant alleges that in retaliation, Respondent's officers surveilled and continually searched her family business, resulting in an adverse employment action as her business lost customers and business.

"OCAHO case law has long held that in order to qualify as protected conduct under § 1324b(a)(5), a claim must implicate a right or privilege specifically secured under § 1324b or a proceeding under that section." *Cavazos v. Wanxiang America Corp.*, 10 OCAHO no. 1138, 2 (2011) (*citing to Harris v. Haw. Gov't Emps. Assoc.*, 7 OCAHO no. 937, 291, 295 (1997); *Yohan*

v. Cent. State Hosp., 4 OCAHO no. 593, 13, 21–22 (1994)). Relief under § 1324b is limited to “hiring, firing, recruitment or referral for a fee, retaliation [under § 1324b(a)(5)], and document abuse [under § 1324b(a)(6)].” *Wilson*, 6 OCAHO no. 919 at 1175 (quoting *Tal v M.L. Energia, Inc.*, 4 OCAHO no. 705, 1012, 1026 (1994)). Section 1324b does not prohibit all immigration-related discrimination or retaliation claims. *Id.*; see § 1324b; *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 814 (7th Cir. 2003) (explaining that § 1324b(a)(5) “does not cover all activities that implicate any provision of the immigration law”).

In *Cavazos*, the complainant alleged that his employer retaliated against him after he threatened to report his employer for hiring unauthorized workers in violation of 8 U.S.C. § 1324a. *Cavazos*, 10 OCAHO no. 1138 at 2–3. The ALJ found that although OCAHO has jurisdiction to hear complaints for violations of § 1324a, the clear language in § 1324b limits retaliation claims to actions taken to interfere with a complainant’s right or privilege under § 1324b or to interfere with a complainant’s participation in a proceeding under § 1324b. *Id.* at 3. Thus, the ALJ found that filing a complaint for violations of § 1324a is not a “proceeding” under § 1324b. *Id.*

Additionally, in *Yohan*, the complainant alleged that his employer retaliated against him when it fired him after he threatened to file a charge with multiple entities including “EEOC, NAACP, and [ACLU].” *Yohan*, 4 OCAHO no. 705 at 21. The ALJ explained that “[c]overage under 8 U.S.C. § 1324b(a)(5) requires a finding that the particular cause of action implicated rights and privileges secured under, or involves proceedings under, 8 U.S.C. § 1324b.” *Id.* (citing § 1324b(a)(5)). The ALJ found that OCAHO lacks jurisdiction “over a claim of retaliation...for filing or planning to file a charge with an entity other than [IER] or a complaint with an entity other than [OCAHO]” *Id.* at 21–22.

Here, Complainant’s allegations are related to her visa petition and adjustment application. Specifically, Complainant alleges that in January 2016, Respondent interviewed her and her husband regarding the I-130 Petition, and during the interview USCIS Officer Kristidhi “aggressively tried to trick [Complainant and her husband] into stating there was marriage fraud, and attempted to confuse and insult the couple.” Resp. to Order Show Cause at 3. Complainant’s counsel told the officer that he would file a complaint based on the officer’s conduct in the interview. *Id.* Complainant alleges that, thereafter, Respondent’s officers began surveilling her and her husband’s business and intimidated customers. *Id.* at 4. After filing another I-130 Petition, Complainant had an interview with Respondent in July 2017. *Id.* The morning of the interview, Complainant alleges that immigration officers raided her home, destroyed her personal property, and handcuffed her son. *Id.* During the interview, Complainant contends that the USCIS officer did not ask relevant questions and had already made up his mind that any petition Complainant filed would be denied. *Id.* Complainant’s counsel told the officer that he was going to file a complaint with Respondent “and other authorities” regarding the officer’s improper conduct during the interview. *Id.* On October 31, 2017, Complainant’s counsel sent a letter to Director Riordan of USCIS regarding the USCIS officer’s conduct during Complainant’s July 2017 I-130 Petition interview. Letter to Director Riordan.

After her counsel sent the letter, Complainant alleges that Respondent’s officers put additional pressure on her family’s business. Resp. Order Show Cause at 5. Complainant alleges that officers came to the business to search and/or question her husband several times a week, which

scared customers and resulted in lost business. *Id.* Thus, she alleges that after threatening to file a complaint and actually filing a complaint based on USCIS officers' conduct during I-130 Petition interviews, USCIS officers harassed her family business causing her to suffer an adverse employment action through the loss of customers and loss of thousands of dollars in business, as well as creating a hostile work environment.

While Complainant's allegations, if true, paint a troubling picture of her experiences during her USCIS interviews and investigations, Complainant's retaliation claims are not cognizable under § 1324b(a)(5). As discussed above, OCAHO only has jurisdiction over retaliation claims based on a complaint or charge that implicates a right or privilege, or a proceeding under § 1324b. *Cavazos*, 10 OCAHO no. 1138 at 2. Complainant does not allege any facts indicating a right or privilege, or proceeding under § 1324b, that is, discrimination in hiring, firing, referral for a fee or document abuse. She claims she was subject to retaliation because she complained about treatment she received during an interview as an applicant for adjustment of status, a situation that is not encompassed by § 1324b. Thus, the Court finds that retaliation under § 1324b does not protect threats to file or the filing of a complaint filed against USCIS for conduct that occurred by its officers during an interview for adjustment of status. *See* § 1324b(a)(5); *Yohan*, 4 OCAHO no. 705 at 21. The Court finds that OCAHO lacks subject matter jurisdiction to hear Complainant's retaliation claim. As such, Complainant's retaliation claim is **DISMISSED WITHOUT PREJUDICE**.

IV. CONCLUSION

The Court finds that OCAHO lacks subject matter jurisdiction to hear Complainant's national origin and citizenship status discrimination claims because Complainant did not allege that Respondent engaged in discriminatory hiring or discharge. The Court also finds that OCAHO lacks subject matter jurisdiction to hear Complainant's retaliation claim because Complainant did not allege that she engaged in protected conduct under § 1324b. Complainant's claims are **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED.

Dated and entered on July 10, 2020.

Jean C. King
Chief 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.