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

October 2, 2015

BRIAN EMILIO GONZALEZ-HERNANDEZ, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 14D00085
ARIZONA FAMILY HEALTH PARTNERSHIP, Respondent.	)	

ORDER DENYING MOTION AND APPLICATION FOR ATTORNEY'S FEES

I. PROCEDURAL HISTORY

A final decision and order was entered in this matter on June 30, 2015 finding inter alia that Arizona Family Health Partnership (AFHP or AZ Family Health) proffered a legitimate nondiscriminatory reason for withdrawing a job offer it had previously made to Gonzalez-Hernandez, and that Gonzalez-Hernandez did not present specific and substantial evidence that AFHP's explanation was pretextual. The complaint was accordingly dismissed. *See Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 9 (2015).[1] The case arises under the nondiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2012).

AFHP, as the prevailing party, filed a motion and an application for an award of attorney's fees. Gonzalez-Hernandez filed a timely response in opposition, and the matter is ready for resolution.

[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 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 OCAHO website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

II. THE POSITIONS OF THE PARTIES

A. AFHP's Motion

AZ Family Health first argues that Gonzalez-Hernandez' position in this litigation was "not substantially justified." AFHP says in addition that it incurred significant and unnecessary legal fees through Gonzalez-Hernandez' abusive and unjustified actions and motion practice, and that his complaint was unreasonable and unjustified from the very beginning. The company says Gonzalez-Hernandez became increasingly difficult to work with over the course of the proceeding, and that he used the process to abuse and harass AFHP. AZ Family Health sets out a chronology of events in which it describes the difficulties it experienced in taking Gonzalez-Hernandez' deposition and what it characterizes as his unreasonable motion practice. In conclusion, AFHP says that because Gonzalez-Hernandez' position was baseless and not substantially justified, AFHP is entitled to attorney's fees in the amount of $59,262.

The motion is accompanied by exhibits consisting of the Declaration of Deanna Rader in Support of Respondent's Application for Attorneys' Fees (2 pp.), and an Itemized Statement of Attorneys' Fees (35 pp.).

B. Gonzalez-Hernandez' Response in Opposition

Gonzalez-Hernandez continues to argue that his status as a DACA recipient[2] was a factor in AZ Family Health's decision to revoke the job offer it initially made to him. Moreover, he contends that the reason AFHP gave him for revoking the offer, that its automobile insurance policy required its employees to have Arizona driver's licenses, was both factually untrue and a pretext for discrimination. He says in addition that he researched the case law and understood the Ninth Circuit decision regarding DACA[3] to mean that he was a protected individual. He emphasizes that he is a layman who had no resources to hire a lawyer, and that based on his understanding of

[2] Deferred Action for Childhood Arrivals (DACA) is a policy enacted on June 15, 2012 that permits certain undocumented youth an opportunity to obtain work authorization and remain in the United States lawfully for two years. *See* www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals.

[3] Gonzalez-Hernandez refers to *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (*ADAC*), which held that Arizona's policy of denying driver's licenses to DACA recipients had no rational relationship to any legitimate state interest and that the plaintiffs were likely to succeed on the merits of an equal protection claim. On remand, the district court enjoined the enforcement of the Arizona policy. *Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015).

the law he was discriminated against. Gonzalez-Hernandez states further that he thought his position was substantially justified, and that some of the unnecessary legal fees were in any event the result of actions of the company's attorneys. In conclusion he asserts that his complaint had a reasonable foundation in law and fact, and that he does not have the means to pay the attorney's fees requested.

III. THE STANDARDS FOR AWARDING ATTORNEY'S FEES IN THIS FORUM

The relevant statutory provision says that an award of reasonable attorney's fees may be made in such a case "if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h). While the text of the statute does not draw a distinction between awards to a successful complainant and awards to a successful respondent, OCAHO practice follows the dual standard for awarding attorney's fees in cases arising under Title VII as set out in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). *See, e.g., Trivedi v. Northrup Corp.*, 4 OCAHO no. 600, 105, 124-25 (1994). A prevailing plaintiff under that standard is ordinarily presumed to be entitled to an award of attorney's fees as a matter of course in order to "'make it easier for a plaintiff of limited means to bring a meritorious suit.'" *Christiansburg*, 434 U.S. at 420 (quoting remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964)).

An award to a prevailing defendant, in contrast, is rarely made. As explained in *Christiansburg*, an award of fees to a respondent is not appropriate simply because the complainant did not prevail or because a complaint was dismissed. *Id*. at 421-22. The case must be "unfounded, meritless, frivolous, or vexatiously brought" to justify such an award. *Id.* at 421 (citations omitted). It is important not to engage in post-hoc reasoning and conclude simply because a party did not prevail that the case was necessarily unreasonable. *Id.*at 421-22. As *Christiansburg* instructs, hindsight logic can "discourage all but the most airtight claims," and "the course of litigation is rarely predictable." *Id*. at 422.

As explained in *Banuelos v. Transportation Leasing Co.*, 1 OCAHO no. 255, 1636, 1652 (1990), moreover, in considering an award of fees to a prevailing respondent, the adjudicator must also take into account both a nonprevailing party's pro se status and the ability of the nonprevailing party to recognize the objective merit of the claim. The nonprevailing party's ability to pay is also a factor. *Id*. at 1660. The Ninth Circuit, in which this case arises, reversed an award of attorney's fees in *Miller v. Los Angeles County Board of Education*, 827 F.2d 617, 620 (9th Cir. 1987), where the district court did not indicate that the plaintiff's pro se status was taken into account, thus applying the wrong legal standard in considering the defendant's fee request. In making a determination of whether a claim is frivolous, the record must be viewed in the light most favorable to the nonprevailing party. *See Johnson v. Florida*, 348 F.3d 1334, 1354 (11th Cir. 2003).

IV. DISCUSSION AND ANALYSIS

AFHP's motion and application purport to be filed pursuant to 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(c)(9). But 28 C.F.R. § 68.52(c)(9) applies only to awards against a governmental entity pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C § 504 (2012). EAJA provides that certain defendants of a defined limited net worth may recover fees from a government agency in an unsuccessful enforcement action 1) unless the agency's enforcement action is substantially justified, or 2) unless special circumstances make the award unjust. 5 U.S.C § 504; *see generally Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (1990). Because enforcement actions in employer sanctions cases arising under 8 U.S.C. § 1324a are initiated by the Department of Homeland Security, Immigration and Customs Enforcement (the successor to legacy INS), EAJA applies to those cases.

But this is not an enforcement action by a government agency, and the "substantially justified" EAJA standard does not have any application to private cases arising under 8 U.S.C. §1324b. The appropriate regulatory standard for fee awards in the latter class of cases is found instead at 28 C.F.R. § 68.52(d)(6). That regulation, like the statute, directs that fees are recoverable by a prevailing party in a case under §1324b if the losing party's argument is without reasonable foundation in law and fact. This standard is in turn informed by a wealth of published case law. AFHP's legal argument is unencumbered by any citation to that case law, and is likewise devoid of citation to any case law from the circuit in which the events occurred.

OCAHO jurisprudence consistently holds that a fee award in favor of a prevailing respondent in a case arising under § 1324b is appropriate only under very limited circumstances. In *Wije v. Barton Springs*, 5 OCAHO no. 785, 499, 529-30 (1995), for example, the complainant was himself a lawyer and thus should have known from the outset that he could not possibly prevail on a claim of citizenship status discrimination when he knew that the respondent was unaware of his citizenship status. Similarly in *Kalil v. Utica City School District*, 9 OCAHO no. 1103, 11 (2003), although the complainant was not herself a lawyer, she was a schoolteacher who received advice from her father, who was a lawyer. The administrative law judge expressly noted that while Kalil's complaint had no reasonable basis in law or in fact, the attorney's fee award was not based on that standard. *Id.* at 8. Rather, fees were awarded as a sanction based on Kalil's willful misconduct, including abuse of the litigation process, repeated defiance of judicial orders, and repeated attempts to engage in ex parte communications. *Id.* at 11-14. The administrative law judge concluded that Kalil brought the case in bad faith for the sole purpose of vexing and harassing the respondent. *Id*. at 8-11.

Exceptions have also been made in a group of cases where the complainants repeatedly continued to press a frivolous, bizarre, and long-discredited claim that an employer is obligated to accept an individual's self-generated document purporting to exempt the individual from the

social security system. *See, e.g., Lee v. AirTouch Communications*, 7 OCAHO no. 926, 47, 56-58 (1997), and cases cited therein. Fees were denied, on the other hand, to a prevailing respondent as a matter of discretion in *Bozoghlanian v. Lockheed-Advanced Development Co.*, 4 OCAHO no. 711, 1067, 1079 (1994), notwithstanding the administrative law judge's conclusion that "[r]arely in the emerging jurisprudence under § 1324 has there been a complaint so lacking in evidentiary credibility as this one." Similarly, in *Chu v. Fujitsu Network Transmission System, Inc.*, 5 OCAHO no. 778, 433, 449 (1995), the administrative law judge in the exercise of discretion denied attorney's fees notwithstanding a record that was "devoid of any semblance of citizenship status discrimination."

A prevailing respondent bears the burden of proof to show entitlement to an award of attorney's fees. *Mid-Atlantic Reg'l Org. Coal., Laborer's Int'l Union of N. Am. v. Heritage Landscape Servs., LLC*, 10 OCAHO no. 1134, 15 (2010); *cf. Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (fee applicant has burden of showing entitlement to award). That burden is especially heavy in this forum when the nonprevailing party did not have the benefit of legal advice and proceeded in the litigation pro se. *Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO no. 892, 784, 809 (1996). The burden of showing entitlement to attorney's fees is not met here because AFHP's motion fails to identify the correct standard, ignores the particular solicitude necessary for an unrepresented litigant, ignores the necessity of considering the nonprevailing party's ability to pay, and ignores the wealth of case law both in this forum and in the relevant circuit bearing on the question.

As the court in *Miller* observed, pro se plaintiffs cannot be assumed to have the same ability as represented parties to recognize the merits vel non of a claim. 827 F.2d at 620. While AFHP faults Gonzalez-Hernandez for not knowing at the outset that he was not a protected individual within the meaning of § 1324b(a)(3), it is perfectly evident that AFHP did not know that either. DACA status did not even exist until June of 2012, and the question of whether § 1324b(a)(3) could be construed to include a DACA recipient had never been previously presented in this forum or elsewhere. Where there is very little case law directly on a point, and the claim raises a novel question, the claim is less likely to be considered frivolous. *See C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1245 (9th Cir. 2015) (citing *Karaum v. City of Burbank*, 352 F.3d 1188, 1195-96 (9th Cir. 2003)). It cannot necessarily be assumed, moreover, that it would be common knowledge among lay people that claims of national origin discrimination should be filed with EEOC when the employer has fifteen or more employees for twenty or more calendar weeks in a year. 42 U.S.C. § 2000e(b).

The record reflects that at the time of the events in question, Gonzalez-Hernandez was an unemployed recent college graduate whose status in the United States was legitimatized only when he became the beneficiary of an award of temporary lawful status under the new federal DACA policy. His present employment status is unknown. As a recent DACA recipient he was aware of the litigation challenging Governor Brewer's policy and of the indeterminate legal

position of DACA beneficiaries. That he may have misconstrued the reach of the federal litigation in the *ADAC* cases does not mean that his claim was frivolous. Just as the parents in an IDEA proceeding (Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq. (2010)) "are not usually in the position to assess whether a claim is frivolous," *C.W. v. Capistrano*, 784 F.3d at 1248, so too is the average unrepresented complainant in an employment discrimination case not usually in such a position. A firm command over technical issues such as standing or over formal pleading requirements cannot realistically be expected of most pro se litigants.

That said, AFHP correctly points out that some of Gonzalez-Hernandez' conduct in this litigation was unacceptable. But some of AFHP's conduct was unacceptable as well, and not all of the delay in resolving the matter was caused by Gonzalez-Hernandez' pro se status. AZ Family Health, for example, continued to insist throughout the proceeding that its automobile insurance policy required its employees to have Arizona driver's licenses, a proposition for which it never produced any evidentiary support, and which, when the policy was produced, turned out to be factually inaccurate. Time was wasted on both sides, and it was not until the end stage of the proceeding that AFHP actually identified the real reason it required its employees to have Arizona driver's licenses. Neither party in this action is without fault.

For the reasons more fully set out herein, Arizona Family Health's petition for attorney's fees will be denied as a matter of discretion.

ORDER

Arizona Family Health Partners' motion and accompanying application for an award of attorney's fees are hereby denied.

SO ORDERED.

Dated and entered this 2nd day of October, 2015.

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Ellen K. Thomas
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.