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

June 12, 2024

ZAJI OBATALA ZAJRADHARA, Complainant, v. AMERICAN SINOPAN, LLC, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00079

Appearances: Zaji Obatala Zajradhara, pro se Complainant
Jordan Sundell, Esq., for Respondent

FINAL ORDER - ORDER DISMISSING COMPLAINT

I. PROCEDURAL HISTORY

On August 5, 2020, Complainant, Zaji Obatala Zajradhara, filed a *pro se* complaint against Respondent with the Office of the Chief Administrative Hearing Officer (OCAHO).[1] Complainant alleges that Respondent refused to hire him based on his national origin and citizenship status and retaliated against him in violation of 8 U.S.C. § 1324b.

On October 22, 2020, Respondent filed an Answer, Motion to Dismiss and Motion for Summary Decision.

On November 3, 2020, Complainant filed a "Laymans' Affidavit of Zaji O. Zajradhara in Reply Opposition to Respondent's Declaration in Support of Motion for Summary Judgment" (Opposition).

[1] The Complaint is not paginated in its entirety. Pinpoint citations to the Complaint refer to the internal pagination of the PDF copy of the complaint as reflected in the official record.

On November 9, 2020, Respondent filed a Reply, which was not considered as it was filed in contravention of 28 C.F.R. § 68.11(b).[2]

On February 5, 2021, the Court issued an Order of Inquiry to Complainant as it was unclear whether he intended to still pursue his case (based on e-mail correspondence he previously submitted). On February 15, 2021, Complaint confirmed he would continue to pursue the matter in the forum.

Some time elapsed between the last filing and this decision;[3] no further filings[4] were provided by the parties. The matter is ripe for resolution.

II. CONTENTS OF THE COMPLAINT

Complaint alleges he is a U.S. citizen or national and lists the Respondent as "American Sinopan, LLC." Compl. 2, 4. He states he "do[es] not know how many employees the employer has." *Id*. at at 4. Under the section of the Complaint pertaining to Respondent Employer Representation, Complainant lists "Imperial Pacific International, LLC DBA Imperial Pacific Resort Hotel – Saipan" with an address different from that he provides for Respondent. *Id*.. at 5.

Complainant alleges he was discriminated against because of his national origin and citizenship status. He separately alleges he was intimidated, threatened, coerced, or retaliated against for exercising his rights under 8 U.S.C. Section 1324b. *Id*. at 6.

As to his discrimination allegation, he states he was qualified for and applied to a "Manager" position[5] with Respondent on December 7, 2019. He provides the Commonwealth of the

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[2] Under 28 C.F.R. § 68.11(b), parties may not file a reply to a response, counter-response or further responsive filing without the permission of the presiding Administrative Law Judge.

[3] "On October 12, 2023, the Department of Justice published an interim final rule providing for review by the Attorney General of OCAHO Administrative Law Judge (ALJ) final orders in cases arising under 8 U.S.C. § 1324b." *Zajradhara v. HDH Co., Ltd*., 16 OCAHO no. 1417D, 2 (2023) (citing Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68)).[3] The change regulation resolved the potential tension between the Supreme Court's holding in *United States v. Arthrex, Inc.,* 141 S. Ct. 1970 (2021) and OCAHO's review provisions for final orders in § 1324b cases. *Sinha v. Infosys Ltd*., 14 OCAHO no. 1373d, 2 (2024) (citing A.S. v. Amazon Web Servs., 14 OCAHO no. 1381h, 2 n. 4 (2021)).

[4] Complainant submitted some filings pertaining to discovery; however it is unclear whether he intended to move the Court to take (or not take) a particular action. In light of the Court's Order here, to the extent those matters were motions, they are denied as moot.

[5] The job duties include:

Northern Marianas Islands Department of Labor (CNMI DOL) Job Vacancy Announcement (JVA) – JVA 19-11-81504. *Id*. at 6, 18. According to the JVA, the position had an anticipated starting date of November 2019 (i.e. as soon as possible). Compl. at. 20. Complainant filed a complaint with IER on January 28, 2020 related to his non-selection for this position (noting he had attempted to contact the company throughout the month of January 2020 with no success). *Id*. at 14.[6] When prompted to explain the nexus between his non-selection for the 2019 manager position and his protected status on the Complaint Form, Complainant writes, "They have a history of ignoring American qualified citizens and renewing the foreign workers." *Id*. at 7.

As to retaliation, he states he was not selected for the same "manager" position "because he has filed previous claims against IPI/Best Sunshine Casino with the EEOC and IER." *Id*.

III. RESPONDENT'S DISPOSITIVE MOTIONS & COMPLAINANT'S RESPONSE

A. Respondent's Dispositive Motions

> Identify and analyse [sic] current operations of the company and the department; Create, implement and measure the success of a comprehensive administrative communications program within the company; Build and enhance company brand awareness among target market sectors; Ensure articulation of the company desired image and position and check for accuracy and consistency; Collaborate with relevant parties to respond to business documentations; Provide leadership and advice across the department; Develop accurate financial budgets and forecasting; Develop better strategies to train employees and promote department development and coordination; Facilitate both internal and external communications; Delegate responsibilities and liaise with other related departments; Perform other ad hoc and/or related duties as assigned; Remain well-mannered and well-groomed as per department and company standards at all times. Compl. at 19.

[6] Absent Complainant identifying a different day, the Court will find January 28, 2020 as the date of alleged discrimination as this is the earliest discernable date of non-selection (i.e. he presumably believes he was non-selected for this position, because he contacted IER on that date about his non-selection after the business became non-responsive to his requests for updates.)

For failure to hire, the date of discrimination is when the complainant received notice he would not be hired, or when he should have realized that he had not been hired for the position. *See Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008) (first citing *Grimes v. City and County of San Francisco*, 951 F.2d 236, 239 (9th Cir. 1991); and then citing *AMTRAK v. Morgan*, 536 U.S. 101, 114 (2002)); accord *Weaver v. Dep't of Agric.*, No. 89-4150-S, 1990 U.S. Dist. LEXIS 15877, at *9 (D. Kan. Sep. 28, 1990) (citing *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 411 (7th Cir. 1984)).

Respondent's omnibus submission on October 22, 2020 moved the Court to dismiss the Complaint by way of several legal theories.[7] Respondent submitted several exhibits alongside the motions: a quarterly withholding tax return from first quarter 2020 (showing 7 employees), second quarter 2020 (showing 2 employees), and third quarter 2020 (showing zero employees), Complainant's resume, a House Resolution from the Legislature of the Commonwealth of the Northern Mariana Islands (CNMI), and an affidavit.[8]

Respondent advances jurisdictional arguments based on employee numerosity in quarters two and three of 2020. Ultimately, this data is irrelevant – it is quarter one that matters. Indeed, the Court will look only to Respondent's first quarter 2020 tax and employment data because the date of discrimination and date of retaliation[9] are both in the first quarter 2020. Respondent's evidence shows seven employees.[10] For reasons outlined below, Respondent advances but cannot successfully move the Court to dismiss the Complaint on this theory.

Next, Respondent argues something akin to a failure to state a claim upon which relief can be granted or failure to meet OCAHO's pleading standards. Mem. Support at 7-8. On Complainant's non-selection allegation, Respondent notes Complainant alleges he applied for a

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[7] Respondent argues the Complaint should be dismissed because it does not list the number of employees. Mem. Support 6. Alternatively, Respondent argues Complainant cannot demonstrate a prima facie case of discrimination or retaliation, and the Respondent had a legitimate, non-discriminatory reason for its decision not to select Complainant for the Manager position. *Id*. at. 7–9.

[8] The affidavit is from a "representative of [Respondent who is] authorized to speak on behalf of Respondent." Decl. Support Mot. Summ. Decision 1. It is dated, signed, and sworn to under penalty of perjury. As to Complainant's discrimination allegation, the individual states she personally interviewed Complainant for the manager position. *Id*. at 2. She reviewed Complainant's resume and considered it in tandem with his interview performance to determine he did not have the requisite experience or qualifications. *Id*. She also stated Respondent did not fill the position and, as of October 2020, did not intend to because of the adverse impact of COVID-19 on local tourism – the industry in which American Sinopan is engaged. *Id.*

The affidavit states Respondent is not "owned, controlled, or related to Imperial Pacific International d/b/a/ Best Sunshine Casino… [and] Respondent is not aware of Complainant's history with IPI." *Id*. at 1.

[9] Or as is further explored below, Complainant advances an additional theory related to other protected IER activity, but does not reference a date at all for that protected activity.

[10] "[T]he count of employees is to be made as of the date the alleged discrimination occurred and that all who are employed on that date, whether full-time or part-time, and whether permanent or seasonal, are to be counted." *Sanchez v. Leobardo and Carmen Ocanas*, 9 OCAHO no. 1115, 3 (2005); *Cormia v. Home Care Givers Servs., Inc.*, 10 OCAHO no. 1160, 4 (2012).

particular job, claims he was qualified, and claims he was not selected. Mem. Support at 7. Complainant does not allege (according to Respondent) any nexus between his protected class and his non-selection, and thus fails to meet the pleading standard for the forum. *Id*. at 7-8. As to retaliation, Respondent argues Complainant does not allege Respondent knew of any protected activity; and Complainant does not allege Respondent took a particular action because of that protected activity. *Id*. at 8-9.

Respondent also advances arguments related to summary decision; however, these need not be addressed because the Complaint will be dismissed for other reasons.

B. Complainant's Response[11]

Complainant's submission does not appear to squarely address Respondent's arguments (and in particular Respondent's arguments pertaining to the sufficiency of his pleadings) or assertions of fact made by Respondent through its motion and supporting evidence.[12]

IV. LAW & ANALYSIS

Respondent's jurisdictional arguments have no merit (Respondent itself provided evidence it had the requisite number of employees[13] when the discrimination occurred), so the Court will turn to

[11] Respondent filed a reply to Complainant's opposition on November 9, 2020. However, replies are generally not permitted. 28 C.F.R. § 68.11(b) ("Unless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive document shall be filed."). Here, Respondent failed to seek leave to file such a reply. As such, it was filed in derogation of OCAHO's rules and will not be considered. *See Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 1–2 (2019) (citing *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 1–2 (2012)).

[12] Rather Complainant provides his views and concerns related to unrelated litigation involving Complainant or involving Respondent, concerns about local CNMI government policy and practice, visa issuance, and the labor market landscape in the CNMI. Opp'n 2-3.

[13] For reference, 8 U.S.C. § 1324b(a)(2)(A) makes clear that its coverage of citizenship status and national origin discrimination excludes employers with three or fewer employees. The statute is also clear that employers with over fifteen employees are likewise excluded from coverage. 8 U.S.C. § 1324b(a)(2)(B) (excepting national origin claims that fall under the coverage of 42 U.S.C. 200e-2, which cover employers with fifteen or more employees). Therefore, "OCAHO has . . . jurisdiction for claims based upon citizenship status if the employer employs more than three employees . . . . For claims based upon

whether Respondent's arguments related to dismissal other Federal Rule of Civil Procedure 12 theories are grantable. *See United States v. Facebook, Inc*., 14 OCAHO no. 1386b, 8-9 (first concluding that OCAHO has jurisdiction over the citizenship status discrimination claim, then considering respondent's argument that complainant had failed to state a claim upon which relief could be granted); *Lardy v. United Airlines, Inc*., 4 OCAHO no. 595 (1994) (first denying respondent's motion to dismiss for lack of subject-matter jurisdiction, then granting in part and denying in part respondent's motion to dismiss based on failure to state a claim). Finding they are, the Court concludes it need not address Respondent's motion for summary decision.

A. Law - Failure to State A Claim Upon Which Relief Can 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). *Wangerperawong v. Meta Platforms, Inc*., 18 OCAHO no. 1510c, 6 (2024). (internal citations omitted).

"In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint." *Udala v. New York State Dept. of Educ.*, 4 OCAHO no. 633, 390, 394 (1994). The complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor. *Id.*

OCAHO's Rules of Practice and Procedure provide that complaints shall contain, among other requirements, "alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b). At the pleading stage, "[s]tatements made in the complaint only need to be 'facially sufficient to permit the case to proceed further,' . . . as '[t]he bar for pleadings in this forum is low.'" *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 3 (2022) (citing *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012), and then citing *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021)).

"[P]leadings are sufficient if 'the allegations give adequate notice to the respondents of the charges made against them.'" *Id.* (quoting *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003)); *see also Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9 ("Unlike complaints filed in the district courts, every complaint filed in this forum, whether pursuant to § 1324a, § 1324b, or § 1324c, has already been the subject of an underlying administrative process as a condition precedent to the filing of the complaint . . . An OCAHO complaint thus will ordinarily come as no surprise to a respondent that has already participated in the underlying process.").

"A § 1324b complaint must contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination." *Wangperawong v. Meta Platforms, Inc*., 18

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national origin, OCAHO has . . . jurisdiction if the employer employs between four and fourteen workers." *Zajradhara v. HDH Co*., 16 OCAHO no. 1417, 2 (2022).

OCAHO no. 1510c, 7 (2024) (citing *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016)). To give rise to an inference of discrimination, complaints must include information that links the complainant's protected class and the employment action in question. *Id.*; *Sharma*, 17 OCAHO no. 1450, at 5.

B. Analysis – Failure to Hire Based on Citizenship or National Origin Allegation

Based on the Complaint as filed, this Complainant cannot meet the pleading standard because he does not adequately place Respondent on notice of his "theory" for causation. (i.e. what transpired that led Complainant to believe Respondent's non-selection decision was caused by Complainant's citizenship or national origin.) *See Wangperawong*, 18 OCAHO no. 1510c at. 7. Complainant' proposed nexus[14] as taken from within the four corners of the Complaint is vague and fails to explain why he, specifically, was not selected for the specific position to which he applied. His pleadings are distinguishable from other instances where the Complainant was able to meet the notice pleading standard,[15] and his pleadings are analogous to other instances where Complaints have been unsuccessful after falling below the standard.[16]

When an allegation in a Complaint fails to meet the forum's pleading standard, the deficient allegation should be dismissed from the Complaint. 28 C.F.R. § 68.10(b); 28 C.F.R. § 68.7(b); *Jablonski*, 12 OCAHO no. 1282, 10 ("[T]he complaint must set forth minimal factual allegations to satisfy 28 C.F.R. § 68.7(b)(3) and to give rise to an inference of discrimination," to survive a motion to dismiss for failure to state a claim upon which relief can be granted.).

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[14] "They have a history of ignoring American qualified citizens and renewing the foreign workers." Compl. 7.

[15] For example, in *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 7 (2022), the Court found the complainant met the pleading standard "because he [] identified a theory by which [the] [r]espondent allegedly violated 8 U.S.C. § 1324b" when he alleged "the [r]espondent sought applicants for a particular position, he applied to this position, he was qualified for this position, he was not selected for the position" and [r]espondent "may have alternatively hired a non-citizen into the specific position because of that candidate's citizenship status." These allegations "succinctly yet clearly" informed respondent why the complainant was brought *Id*.

[16] "While Complainant may not possess information regarding whether Respondent filled the position, and with whom, Complainant must at least identify why he believes the decision was discriminatory." *Wangperawong*, 18 OCAHO no. 1510c at8; *see also.*, *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381d, 16 (2021) (dismissing a discrimination claim when the complainant merely asserted "in a general and conclusory fashion that Respondent discriminated against him based on his citizenship status, without citing to specific facts giving an inference to causation") (citing, inter alia, *Thompson v. Sanchez Auto Servs., LLC*, 12 OCAHO no. 1302, 7–8 (2017) (dismissing discrimination claim where the complaint was "bereft of any allegations related to [] national origin apart from cursory assertions.")).

C. Analysis – Retaliation Based on Prior Protected Activity Allegation

Based on the Complaint as filed, this Complainant cannot meet the forum's pleading standard for this allegation because his Complaint is either insufficiently vague, or alternatively, he cannot state a claim upon which relief can be granted because his identified protected activity post-dates the adverse action by Respondent.

In relying only upon proposed facts identified within the four corners of the Complaint, the Court can glean that Complainant has two potential instances of protected activity. The first potential protected activity is the one he identifies in his Complaint when prompted to do so on the Complaint form ("previous claims against IPI/Best Sunshine Casino [with] … IER."), and the second proposed protected activity is his contact with IER in late January 2020 where he informed them of his discrimination allegation. Compl. 7, 14.

Contact with IER, as alleged, is a protected activity. *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 18 (2024) (holding that "contacting IER[] . . . to inquire about one's rights under § 1324b constitutes a right or privilege under § 1324b(a)(5).").. Non-selection for a vacant position is an adverse employment action. *Ruggles v. Cal. Polytechnic State Univ*., 797 F.2d 782, 786 (9th Cir. 1986) (holding that for failure-to-hire retaliation cases, the "'adverse employment decision' is the closing of the job opening to [the complainant] and the loss of the opportunity even to compete for the position."); *Rowell v. Sony Pictures Television, Inc*., 743 Fed. Appx. 852, 854 (9th Cir. 2018) ("Inherent in the standard for retaliatory failure-to-hire is the existence of an open 'position' to which the [complainant] applied."); . At issue here is whether Complainant's allegation meets the pleading standard for the knowledge[17] and causation elements.[18]

As to the first theory ("previous claims against IPI/Best Sunshine Casino [with] … IER"), the allegation fails because it is not sufficiently specific to place Respondent on notice (what claim, what IER case or file number, month or year of claim with IER etc.). Further, it is unclear within the four corners of the Complaint that this Respondent, American Sinopan, would be aware of claims made against a different company. Again, the Complainant must show or allege facts to place Respondent on notice of his theory related to retaliation, and here he has not done so.

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[17] "To establish causation, the complainant must show that the decision-maker *knew* of the employee's protected activity." *Sivasankar v. Strategic Staffing Sols.*, 14 OCAHO no. 1354, 5 (2020) (citing *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007)) (emphasis added).

[18] "The causal link between the protected activity and the respondent's employment decision or intimidating, threatening, or coercive behavior must rise to the level of *'but for' causation* . . . in order to find that retaliation occurred, there must be some reason to believe that *but for the protected activity, the adverse employment decision would not have taken place.*" *Zajradhara v. Gig Partners*, 14 OCAHO no. 1363c, 8 (2021) (internal citations and quotations omitted, with emphasis added).

In the alternative, Complainant engages in protected activity with IER in late January 2020 when he contacted them and initiated an investigation pertaining to his non-selection for the 2019 manager position. While this theory could survive the notice pleading analysis in that it sufficiently identifies the protected activity, and at the pleading stage knowledge could be inferred,[19] it is not a claim upon which relief can be granted because causation is temporally impossible (i.e. the protected activity post-dates the adverse employment action).

V. CONCLUSION

When an allegation in a Complaint fails to meet the forum's pleading standard or fails to state a claim upon which relief can be granted, the deficient allegation should be dismissed from the Complaint. The Complaint is DISMISSED without prejudice.

This is a Final Order. 28 C.F.R. § 68.2 ("Final order is an order by an Administrative law Judge that disposes of a particular proceeding . . . thereby concluding the jurisdiction of the Administrative Law Judge."). .

SO ORDERED.

Dated and entered on June 12, 2024.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

[19] *Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9 ("Unlike complaints filed in the district courts, every complaint filed in this forum, whether pursuant to § 1324a, § 1324b, or § 1324c, has already been the subject of an underlying administrative process as a condition precedent to the filing of the complaint . . . An OCAHO complaint thus will ordinarily come as no surprise to a respondent that has already participated in the underlying process.").

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.