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

FRANK FARZIN NICKMAN, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00005
MESA AIR GROUP, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS/MOTION FOR SUMMARY DECISION

December 20, 2004

I. SUMMARY

Mesa Air Group (Respondent or Mesa) moves for summary decision or dismissal of Frank Farzin Nickman's (Complainant or Nickman) claims of national origin discrimination, citizenship status discrimination, and retaliation under 8 U.S.C. § 1324b. I GRANT Respondent's motion because I lack jurisdiction over Complainant's national origin discrimination claim, Complainant has not alleged a prima facie case of citizenship status discrimination or retaliation, and Respondent has adduced un-refuted evidence of legitimate non-discriminatory reasons for not hiring Complainant.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On November 13, 2003, Nickman filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Mesa had committed immigration-related unfair employment practices by knowingly and intentionally failing to hire him as an airline pilot. Complainant, who is of Iranian descent, alleges that Respondent violated 8 U.S.C. § 1324b(a)(1) by discriminating against him based on his national origin. Complaint at 4; attachments to Complaint. Complainant, who is a naturalized U.S. citizen, further alleges citizenship status discrimination

under § 1324b(a)(1). Id. Nickman later explained that he is alleging citizenship status discrimination by Mesa in preferring native-born U.S. citizens over himself during the hiring process. See Prehearing Conference Transcript of November 16, 2004 (PHC Tr.) at 71-75; Complainant's Motion for Stay, filed on December 7, 2004, at 4-5, 8. Complainant also alleges that Respondent violated 8 U.S.C. § 1324b(a)(5) by intimidating, threatening, coercing, or retaliating against him because he filed or planned to file a complaint with OCAHO. Complaint at 6.

On January 27, 2004, Respondent filed an Answer in which it denied the central allegations of the Complaint. Respondent also raised the affirmative defenses of lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, lack of control over the parties responsible for the allegations in the Complaint, and failure to mitigate damages. Answer at 5.

On September 7, 2004, Respondent filed the Motion to Dismiss/Motion for Summary Judgment (Motion) currently sub judice. In opposition to the Motion, Complainant filed three separate pleadings. First, Complainant filed a Response to Defendant's Motion to Dismiss/Motion for Summary Judgment on September 9, 2004. Complainant then filed, on September 11, 2004, a pleading entitled Complainant's Response to Defendant's Statement Regarding Alleged Improper Filing of Charges by Complainant. Finally, on September 14, 2004, Complainant filed a pleading entitled "Federal Case Reference in Support of Continuance and Opposition to Dismissal and Summary Judgment", which attached a copy of the decision in United States of America v. Mesa Airlines, 1 OCAHO 461, 1989 WL 433896.

I granted Respondent leave to file an addendum to its Motion showing that I lack jurisdiction over Complainant's national origin claim because Mesa employed, for at least twenty full weeks during the relevant time frame, more than fourteen full-time, non-supervisory employees who were not independent contractors. Order Regarding Respondent's Motion to Dismiss/Motion for Summary Decision at 3 (September 10, 2004). Respondent filed an Addendum (First Addendum) on October 5, 2004. The First Addendum includes an Affidavit of Respondent's Vice President of Human Resources Ms. Rodena Turner-Bojorquez (Turner Affidavit), and Respondent's Form 10-K/A filed with the United State Securities and Exchange Commission for the fiscal year ended which ended on September 30, 2003.

On October 18, 2004, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed a brief as Amicus Curiae, pursuant to leave of this Court. See Order Granting United States' Motion for Leave to file Brief as Amicus Curiae (September 29, 2004). Respondent had filed an untimely Notice of Objection to Amicus Curiae Brief on October 8, 2004, which I rejected during the November 16 prehearing conference. PHC Tr. 28-29. In its Amicus brief, OSC opposes Respondent's arguments with respect to the citizenship status discrimination claim. Specifically, OSC argues that naturalized United States citizens may bring citizenship status discrimination claims based on alleged employer preference for native-born citizens. Moreover, OSC contends that a complainant's failure to assert citizenship status in his charge filed with OSC does not necessarily preclude its inclusion in a later filed complaint.

I noticed the telephonic prehearing conference of November 16 for the purpose of discussing pending motions in the case. I made several rulings during the conference, the most pertinent of which are summarized below. I granted Respondent until November 29, 2004, to serve and file a supplemental pleading, supported by affidavits, showing the names and citizenship status of individuals hired and not hired by Respondent during the period in which Complainant alleges that Respondent discriminated against him based on his citizenship status. I further provided that the supplemental pleading could include a motion for summary decision with respect to Complainant's retaliation claim. I also ordered Complainant to serve on Respondent and file with my office, not later than December 6, 2004, either a motion to stay this case or a settlement offer. I ruled that if Complainant elected the latter option, Respondent must serve and file a response to the settlement offer within 10 days after service.

In accordance with my orders, on November 30, 2004, Respondent filed an Addendum to Motion to Dismiss/Motion for Summary Judgment (Second Addendum). In the accompanying legal memorandum, Respondent incorporates the arguments of its original Motion and advances additional arguments for summary decision or dismissal of Complainant's citizenship status and retaliation claims. Respondent also attaches six affidavits of Mesa employees.

Complainant then filed a Motion for a Stay of the Proceedings (Motion for Stay) on December 7, 2004. The OCAHO rules of practice provide that pleadings are not deemed filed until received by OCAHO. 28 C.F.R. § 68.8(b) (2004). According to the Certificate of Service, Complainant submitted his Motion for Stay by first class mail on December 3, 2003, but it was not technically filed until received by my office on December 7. Although Complainant's Motion for Stay was late-filed, I am mindful that he is pro se and the Motion for Stay was only overdue by one day. Accordingly, I have exercised my discretion to waive the deadline and accept the Motion for Stay for filing. In his Motion for Stay, Complainant asserts that he can establish a prima facie case of discrimination, but attaches no supporting evidence such as affidavits.

On December 14, 2004, Respondent filed a Motion for Leave to File Reply in Support of Motion for Summary Disposition, and Motion and Memorandum in Opposition to Complainant's Motion for a Stay of Proceedings. In light of my rulings in this Order, a reply is unnecessary. Likewise, Complainant's Motion for Stay is moot and it is unnecessary to consider Respondent's Motion in Opposition.

III. STANDARDS GOVERNING A MOTION TO DISMISS/MOTION FOR SUMMARY DECISION

A. Motion to Dismiss: Subject-Matter Jurisdiction

Respondent asserts grounds for dismissal based on OCAHO's lack of subject-matter

jurisdiction and Complainant's alleged failure to state a claim upon which relief can be granted. I am bound to consider the motion regarding subject-matter jurisdiction first, since Respondent's motion to dismiss for failure to state a claim becomes moot if this court lacks subject-matter jurisdiction. See Ruan v. United States Navy, 8 OCAHO 714, 716, 2000 WL 773075, at *2 (citing Bell v. Hood, 327 U.S. 678, 682 (1946); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § 1350, 209-210 (1990)).

The OCAHO rules of practice do not provide for motions to dismiss for lack of subject-matter jurisdiction. The OCAHO rules, however, state that the Federal Rules of Civil Procedure (FRCP) "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 (2004). Thus, Rule 12(b)(1), providing for motions to dismiss for lack of subject-matter jurisdiction, and Rule 12(h)(3), compelling dismissal of actions "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter," may be employed as a general guideline when an OCAHO Administrative Law Judge has reason to question OCAHO's subject-matter jurisdiction. See, e.g., Ruan, supra, at 716-717, at *2 (citing Hammoudah v. Rush-Presbyterian-St. Luke's Med. Center, 8 OCAHO 254, 256-257, 1998 WL 1085948, at *2; Artioukhine v. Kurani, Inc. d/b/a Pizza Hut, 1998 WL 356926, at *3-4 (OCAHO) (unpublished); Boyd v. Sherling, 6 OCAHO 1113, 1119, 1997 WL 176910, at *5; Caspi v. Trigild Corp., 6 OCAHO 957, 960, 1997 WL 131354, at *2-3).

In addition, 28 C.F.R. § 68.57 (2004) provides that any person aggrieved by a final agency order issued with respect to unfair immigration-related employment practice cases may seek review in the United States court of appeals in which the violation is alleged to have occurred or in which the employer resides or transacts business. Since the relevant events in this case took place in Arizona, and the employer transacts business in that state, case law precedent from the United States Court of Appeals for the Ninth Circuit is pertinent.

Respondent's attack on OCAHO's subject-matter jurisdiction can be considered a "speaking motion;" that is, it challenges this Court's subject-matter jurisdiction in fact, without regard to the formal sufficiency of the allegations made in the Complaint. See Thornhill Publishing Co. v. General Telephone and Electronics Corp., 594 F.2d 730, 733 (9th Cir 1979). In the case of a speaking motion, the plaintiff bears the burden of proof that jurisdiction does in fact exist. Id. Moreover, "no presumptive truthfulness attaches to plaintiff's allegations, and the presence of disputed material facts will not prevent the trial court from evaluating for itself the merits of jurisdictional claims." Id. (quoting Mortensen v. First Federal Savings & Loan Association, 549 F.2d 884, 891 (3d Cir. 1977)).

B. Motion to Dismiss: Failure to State a Claim Upon Which Relief May be Granted

The OCAHO rules expressly provide for motions to dismiss for failure to state a claim upon which relief may be granted at 28 C.F.R. § 68.10 (2004). A motion to dismiss under 28 C.F.R. § 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See, e.g., Reyes-Martinon v. Swift and Company, 9 OCAHO Ref. No. 1068, 9, 2001 WL 909276, at *7 (citing Bunn v. USX/US Steel, 7 OCAHO 996, 999-1000, 1998 WL 745990, at *3; United States v. Tinoco-Medina, 6 OCAHO 720, 728, 1996 WL 670175, at *6). In considering such a motion, the court must assume the truth of all facts alleged in the complaint and must allow the nonmoving party the benefit of all inferences that can be derived from the alleged facts. Reyes-Martinon, supra, at 9, at *7 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). A respondent's motion to dismiss should be granted only if it appears that under any reasonable reading of the complaint, the complainant will be unable to prove any set of facts that would justify relief. Id. (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

C. Summary Decision

As an alternative to dismissal, Respondent requests the entry of summary judgment against Complainant. I adjudicate Respondent's "motion for summary judgment" as a "motion for summary decision," which is the proper terminology under the OCAHO rules of practice. See 28 C.F.R. § 68.38 (2004). Moreover, OCAHO judges analyze motions to dismiss as motions for summary decision when the proponent relies upon matters outside the pleadings. See, e.g., Santos v. United States Postal Service, 9 OCAHO Ref. No. 1105, 3, 2004 WL 1539490, at *3 (citing United States v. Italy Department Store, Inc., 6 OCAHO 229, 231, 1996 WL 312113, at *2; Flores v. Logan Foods Co., 6 OCAHO 545, 549, 1996 WL 525690, at *3). Here, Respondent relies on documents outside of the Complaint in arguing that this Court lacks jurisdiction over Complainant's national origin claim, that Complainant cannot establish a prima facie case of citizenship status discrimination, and that Mesa had legitimate non-discriminatory reasons for not hiring Nickman.

A motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to decision as a matter of law. Aguirre v. KDI American Products, Inc., 6 OCAHO 632, 640, 1996 WL 637474, at *7 (citing Curuta v. U.S. Water Conservation Lab., 19 F.3d 26 (9th Cir.1994); New Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1477 (7th Cir.1990)). In determining whether a fact is material, any uncertainty must be considered in the light most favorable to the non-moving party. Id. (citing Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986)). The burden of proving that there is no genuine issue of material fact rests on the moving party, but once the movant meets its initial burden the non-moving party must show that there is a genuine issue of material fact for trial. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). An issue of material fact is genuine only if it has a real basis in the record and is material only if it might affect the outcome of the case. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). When a motion for summary decision or summary judgment is made and supported by affidavits, an adverse party may not rest on the mere allegation or denials of his pleadings, but must set forth specific facts, by affidavits or as otherwise provided

in the procedural rules, showing there is a genuine issue for trial. 28 C.F.R. § 68.38(b) (2004); Rule 56(e), FRCP; see Anderson at 256; Rivera v. National Railroad Passenger Corp., 331 F.3d 1074, 1078 (9th Cir. 2003).

IV. JURISDICTION

A. National Origin Discrimination

Respondent argues that I should dismiss Complainant's national origin discrimination claim for lack of jurisdiction under 8 U.S.C. § 1324b(a)(2)(B). See Motion at 2-3. OCAHO jurisdiction to adjudicate claims of national origin discrimination under 8 U.S.C. § 1324b(a)(1) does not encompass employers covered by § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. 28 U.S.C. § 1324b(a)(2)(b); see, e.g., Ondina-Mendez v. Sugar Creek Packing Co., 9 OCAHO Ref. No. 1085, 12-13, 16-17, 2002 WL 31663164, at *10, at *13-14; Lareau v. USAir, Inc., 7 OCAHO 194, 205-206, 1997 WL 1051433, at *7; Bunn v. USX/US Steel, 7 OCAHO 996, 998, 1998 WL 745990, at *2; Lee v. Airtouch Communications, 6 OCAHO 891, 901, 1996 WL 780148, at *8, appeal dismissed, no. 97-70124 (9th Cir. 1997). The Civil Rights Act defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ." 42 U.S.C. § 2000e(b). Thus, jurisdiction under the 1964 Civil Rights Act over national origin discrimination claims not involving document abuse exists when an employer has fifteen or more employees work each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Ondina-Mendez, supra, at 12-13, 16-17, at *10, at *13–14; Touissaint v. Tekwood Associates, Inc., 6 OCAHO 784, 798, 1996 WL 670179, at *10, aff'd, 127 F.3d 1097 (3d Cir. 1997) (citing 42 U.S.C. § 2000e(b)); see also Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 212 (1997); General Dynamics Corp. v. U.S., 49 F.3d 1384, 1385 (9th Cir. 1995).

In determining the number of employees for each working day, courts generally do not count part-time employees who did not work each day of the working week. Touissaint, supra, at 798, at *10 (citing EEOC v. Garden & Associates, 956 F 2d. 842 (8th Cir. 1992); Zimmerman v. North American Signal Company, 704 F.2d 347, 354 (7th Cir. 1983)); Flores v. Logan Foods Co., 6 OCAHO 545, 551, 1996 WL 525690, at *5 (citing same). The case law also distinguishes between "employers" and "employees," such that a company president and supervisory personnel are not considered employees for jurisdictional purposes. Touissaint, supra, at 798, at *10 (citing Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989); Flores, supra, at 551, at *5 (citing same). Finally, courts generally do not count independent contractors as employees for jurisdictional purposes. Flores at 551, at *5 (citing Garrett v. Phillips Mills, Inc., 721 F.2d 979, 982 (4th Cir. 1983); United States v. Robles, 2 OCAHO 62, 69-70, 1991 WL 531738, at *5-6).

In the instant matter, Ms. Turner states that Mesa has employed fifteen or more full-time employees during the years 2000 to the present. Turner Affidavit at ¶ 3. In fact, she asserts that

Respondent has had well over 3,000 full-time employees during those years. Id. Complainant also stated in documents attached to his OSC Charge that Respondent has approximately 4,000 employees and that Mesa has employed more than fifteen employees at all relevant times. Nickman reaffirmed these figures during the November 16 prehearing conference and conceded that I would lack jurisdiction over his national origin claim if I concluded that Mesa had that many employees. PHC Tr. 66-67.

Respondent has not satisfied the standards articulated in Touissaint and Flores, because neither the Turner Affidavit nor Respondent's Form 10-K/A show whether Mesa's employees were supervisory personnel or independent contractors. Nonetheless, 3,000 employees is such a large number that it is inconceivable that Mesa did not employ more than fourteen non-supervisory employees who were not independent contractors during the relevant time period. This conclusion is bolstered by Complainant's own statements that Mesa employed in excess of 4,000 employees during the relevant time frame and the fact that Complainant has brought a parallel Title VII action in federal district court alleging national origin discrimination. See Attachments to Complainant's OSC Charge; PHC Tr. 66-67; Motion RX-A (Complainant's Complaint filed in the United States District Court for the District of Arizona on November 17, 2003). I conclude that Respondent employed fifteen or more individuals full-time over the relevant time period. Therefore, no genuine issue of material fact remains that I lack subject-matter jurisdiction over Complainant's national origin claim and Respondent is entitled to decision as a matter of law. See Aguirre, supra, at 640, at *7 (internal citations omitted).

In light of this holding, Respondent's argument that I should dismiss Complainant's national origin claim under 8 U.S.C. § 1324b(b)(2) because Nickman filed a complaint with the Equal Employment Opportunity Commission (EEOC) based on the same set of facts is moot. Moreover, § 1324b(b)(2) applies only to Complainant's national origin claim and has no bearing on his allegations of citizenship status discrimination or retaliation.

B. Citizenship Status

Respondent also argues that this Court lacks jurisdiction over Complainant's citizenship status claim. Specifically, Respondent claims that because Nickman did not check the citizenship status box in his OSC Charge, he may not assert citizenship status discrimination in his OCAHO Complaint. Motion at 5-6. Respondent also claims that OCAHO has jurisdiction over a claim of citizenship discrimination by a naturalized citizen such as Nickman only in cases of over-documentation under 8 U.S.C. § 1324b(a)(6), or where a complainant alleges discrimination in favor of non-citizens. Id. at 6-9. I address these arguments seriatim.

1. Claims of Citizenship Status Discrimination Brought by Naturalized U.S. Citizens

OSC contends that based on a plain reading of 8 U.S.C. § 1324b(a)(3), the purpose of this anti-discrimination provision, and legislative history, naturalized U.S. citizens may bring citizenship status discrimination claims. Amicus Brief at 2-3. OSC further cites OCAHO case law supporting full coverage of naturalized citizens under § 1324b. Id. at 4-7.

8 U.S.C. § 1324b(a)(1)(B) prohibits a person or other entity from discriminating against a "protected individual" because of such individual's citizenship status. Section 1324b(a)(3)(A) defines "protected individual" as an individual who "is a citizen or national of the United States," and § 1324b(a)(3)(B) excludes from the definition of "protected individual" lawful permanent residents who fail to apply for naturalization within six months of the date they first become eligible to do so. Other than the disqualification provision of § 1324b(a)(3)(B), the statute makes no distinction between native-born citizens versus naturalized citizens. Thus, the plain language of § 1324b(a) supports the maintenance of a citizenship status discrimination claim by a naturalized citizen who applied for naturalization within six months of first becoming eligible to do so. This interpretation is consistent with the purpose of the Immigration Reform and Control Act of 1986 (IRCA) to provide a remedy against employers who exclude "foreign-looking or foreign-sounding"citizens out of fear of being sanctioned under 8 U.S.C. § 1324a. See H.R. Conf. Report No. 99-100, 99th Cog., 2d Sess. 87 (1986).

Along these lines, OCAHO Judges have held that discrimination under § 1324b can implicate an individual's citizenship status as a naturalized U.S. citizen. Roginsky v. Department of Defense, 3 OCAHO 278, 280, 1992 WL 535565, at *2; Naginsky v. Department of Defense, 6 OCAHO 748, 752, 1996 WL 670177, at *3. The complainants in Roginsky and Naginsky were naturalized U.S. citizens denied a U.S. Department of Defense security clearance under the "5/10 year rule," which provided that an immigrant from one of certain designated countries was required either to have been a U.S. citizen for at least five years or a resident for ten years to obtain a security clearance. Roginsky at 279-280, at *1-2; Naginsky at 753-754, at *4. Another relevant case involved a U.S. citizen, born in Puerto Rico, who was naturalized by operation of law under the concept of collective naturalization. United States v. Marcel Watch Corp., 1 OCAHO 988, 992, 1990 WL 512157, at *3-4 (citing 8 U.S.C. § 1402). Where the employer required the complainant, and not other U.S. citizens, to produce a green card, id. at 994-996, at *5-7, the Judge held that the employer discriminated against the complainant on the basis of her citizenship status. Id. at 1003-1005, at *13-14. Roginsky, Naginsky, and Marcel Watch Corp. demonstrate that a naturalized citizen may state a claim based on citizenship status if they are treated less favorably by employers in the hiring process than native-born U.S. citizens.

In addition, the cases cited by Respondent do not support Mesa's argument that OCAHO has jurisdiction over a claim of citizenship discrimination by a naturalized citizen such as Nickman only in cases of over-documentation under 8 U.S.C. § 1324b(a)(6), or where a complainant alleges discrimination in favor of non-citizens. See Motion at 6, citing Curuta v. U.S. Water Conservation Lab, 19 F.3d 26 (1994), 1994 U.S. App. LEXIS 3239, at *3 (copy attached to motion as Exhibit J). In Curuta v. U.S. Water Conservation Lab, 3 OCAHO 636 (1992), the Administrative Law Judge

concluded that Curata had not alleged citizenship status discrimination because he had not alleged such discrimination in either his charge form filed with OSC or in the complaint filed with OCAHO, choosing only to mark the boxes asserting national origin discrimination and leaving the box relating to citizenship status discrimination blank in both the charge form and complaint. Id. at 638-639, 641. On appeal, the federal circuit court affirmed the Judge's holding, stating that Curata did not allege any facts in his complaint suggesting he was discriminated against on the basis of his U.S. citizenship. 19 F.3d 26 (9th Cir. 1994) (unpublished). The pivotal issue in Curuta was the complainant's failure to allege citizenship status discrimination in his charge or complaint, and not whether claims of discrimination by naturalized citizens, such as Curata, were viable under 28 U.S.C. § 1324b.

Similarly, the OCAHO Judge in Mir v. Federal Bureau of Prisons, 3 OCAHO 1761, 1993 WL 597394, did not address whether he had jurisdiction under 28 U.S.C. § 1324(b) of a claim that an employer discriminated against a naturalized U.S. citizen in favor of native-born U.S. citizens. Rather, the Judge held that the complainant U.S. citizen, in that instance, failed to state a claim for citizenship status discrimination. See id. at 1764-1765, at *3. Lastly, Cholerton v. Hadley, 7 OCAHO 222, 1997 WL 1051435, was a tax protester case in which the OCAHO Judge dismissed the complainant's citizenship claim because the complainant failed to state a prima facie case of discrimination. Id. at 233-236, at *7-9. The case did not address whether a naturalized U.S. citizen can state a claim under § 1324b by alleging less favorable treatment than native-born U.S. citizens. Thus, I agree with OSC that the prohibition in 28 U.S.C. § 1324b against citizenship status discrimination extends to naturalized United States citizens who allege discrimination in favor of native-born United States citizens. Amicus Brief at 4.

2. Failure to Allege Citizenship Status Discrimination in the OSC Charge

Respondent argues that dismissal is appropriate because Nickman failed to check the box in the OSC Charge asserting discrimination based on citizenship status, failed to amend his OSC Charge, and therefore the Charge only raises the issue of discrimination based on national origin. Alternatively, Respondent argues that Nickman's Charge and Complaint, on their face, do not sound in citizenship status discrimination. Motion at 4-6.

Complainant asserts that his OSC Charge does not need to be amended, as the Complaint clearly alleges citizenship status discrimination on pages 2 and 3. Complainant's Response to Defendant's Statement Regarding Alleged Improper Filing of Charges by Complainant at 1. In its Amicus Brief OSC agrees with Complainant and argues that under relevant case law and in furtherance of OSC's purpose in handling charges, a complainant's failure to check the box for citizenship status discrimination in the Charge filed with OSC does not preclude an Administrative Law Judge from hearing a later complaint predicated on citizenship status discrimination. Amicus Brief at 8-10. Citing several cases, OSC asserts that it is well settled that the law permits filing of

complaints which are like or related to the original charges or that are reasonably expected to grow out of investigations of them. Id. at 8.

Respondent does not cite any authority holding that the failure to allege citizenship status discrimination in the OSC Charge bars such an allegation in a later complaint. See Motion at 4-5 (citing Espinoza v. Farah Manugacturing Co., 414 U.S. 86, 87 (1973); Shah v. Wilco Systems, Inc., 99 Civ. 12054 (S.D.N.Y. 2001); Mir, supra). Respondent claims that under the definition of "national origin" propounded in these cases, one cannot reasonably read Nickman's Charge and Complaint to allege citizenship status discrimination. While Respondent is correct that Complainant did not allege citizenship status discrimination by checking the appropriate box in his OSC Charge, Nickman clearly alleged citizenship status discrimination at pages 3 and 4 of the Complaint. Thus, the definition of "national origin" in Espinoza, Shah, and Mir is not relevant.

I agree with Complainant and OSC that a complainant's failure to check the box for citizenship status discrimination in the Charge filed with OSC does not necessarily preclude the complainant from alleging such discrimination in his complaint filed with OCAHO if the allegation of citizenship status discrimination can be considered "like or related to the original charges or which were reasonably expected to grow out of them." Here, I find that the allegations of national origin discrimination and citizenship status discrimination are closely related. Moreover, I reject Respondent's assertion that Nickman's Complaint does not allege citizenship status discrimination. See Complaint at 3-4. Accordingly, Respondent's motion to dismiss Complainant's citizenship status claim for lack of jurisdiction is denied.

C. Retaliation

I raise the issue of my jurisdiction over Complainant's retaliation claim sua sponte because if I lack jurisdiction over Nickman's cause of action, there is no need to decide whether the Complaint states a claim upon which relief can be granted. See Cruz v. Able Service Contractors, Inc., 6 OCAHO 144, 149-150, 1996 WL 229220, at *3. In pertinent part, 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice for an entity "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint . . . under this section." OCAHO has jurisdiction over retaliation claims even in the absence of national origin or citizenship status discrimination. Cruz, supra, at 150, at *4. Several cases have held that even if there is no jurisdiction over the underlying national origin/citizenship status discrimination claim, that does not affect jurisdiction over the complainant's related cause of action for retaliation. Id.; Adame v. Dunkin Donuts, 5 OCAHO 1, 6, 1995 WL 217517, at *4; Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 428, 449, 1994 WL 443692, at *13; Fakunmoju v. Claims Administration Corp., 4 OCAHO 308, 321, 1994 WL 318046, at *9. Therefore, I have jurisdiction over Complainant's retaliation claim, regardless of my jurisdiction over his claims of national origin and citizenship status discrimination.

V. FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND SUMMARY DECISION

A. Citizenship Status

Respondent also argues that dismissal of Complainant's citizenship status claim is appropriate because Complainant fails to satisfy the elements of a prima facie case of disparate treatment. Second Addendum at 2-4. In the alternative, Respondent asserts legitimate non-discriminatory reasons for not hiring Nickman, namely, his failure to maintain proficiency in his instrument flying and vague, insufficient, and/or contradictory responses to questions during his interview. Id. at 5. Finally, Respondent claims that Complainant cannot produce specific and substantial evidence that Mesa's proffered reasons are pretextual. Id. at 5-9. Respondent supports its arguments with affidavits of six different Mesa employees.

In response, Complainant claims that Respondent deliberately discriminated against him based on his status as a naturalized U.S. citizen and that Respondent's proffered reasons for not hiring him are pretext. Motion for Stay at 4. Complainant provides his own version of the circumstances surrounding his interview with Mesa. However, "conclusory allegations unsupported by factual data" cannot defeat summary decision, see Rivera v. National Railroad Passenger Corp., 331 F.3d 1074, 1078 (9th Cir. 2003), and Complainant's Motion for Stay is not supported by affidavits or other evidence. Thus, Respondent's affidavits are uncontested and the facts therein are taken as undisputed.

As discussed previously, an employer may not discriminate against a "protected individual" because of the individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B). In employment discrimination cases, the complainant must establish a prima facie case of discrimination; then the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and, if the respondent does so, the complainant must show by a preponderance of the evidence that the respondent's reason is untrue and the respondent intentionally discriminated against the complainant. Hsieh v. PMC-Sierra, Inc., 9 OCAHO Ref. No. 1093, 11, 2003 WL 1190042, at *10 (citing Bendig v. Conoco, Inc., 9 OCAHO Ref. No. 1077, 5-6, 2001 WL 1754725, at *5; Wisniewski v. Douglas County School District, 1 OCAHO 153, 156-57, 1988 WL 409452, at *3-4; Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-143 (2000)). A complainant establishes a prima facie case of citizenship discrimination by alleging and demonstrating that: (1) he belongs to a class protected by 8 U.S.C. § 1324b; (2) he suffered an adverse employment action; (3) he was qualified for the job for which he applied; and (4) there was disparate treatment from which the Court may infer a causal relationship between his protected status and the adverse employment action. Id. (citing Lee v. Airtouch Communications, 6 OCAHO 891, 902, 1996 WL 780148, at *8; Wisniewski, supra, at 157, at *4; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

In this case, Complainant belongs to a "protected class." I have already rejected Respondent's argument that Nickman, as a naturalized U.S. citizen, cannot be considered a member of a protected class for purposes of his citizenship status claim. A "protected individual" means, among other things, an individual who is a citizen of the United States. 8 U.S.C. § 1324b(a)(3)(A). It is undisputed that Complainant is a naturalized citizen of the United States. See Complaint at 2, attachments to Complaint. Hence, Complainant has satisfied the first prong of his prima facie case because he is a member of a protected class.

Similarly, the parties do not dispute that Respondent failed to hire Nickman as an airline pilot. Complainant thus has met the second prong of his prima facie case by alleging that he suffered an adverse employment action.

Complainant also has alleged that there was disparate treatment from which I may infer a causal relationship between his protected status as a naturalized citizen and Respondent's failure to hire him. Specifically, Complainant contends that Respondent deliberately chose not to hire him, a naturalized citizen, while it hired the rest of his classmates who are all native-born citizens. Complaint at 2-4, attachments to Complaint; Motion for Stay at 4. In opposition, Respondent states that Mesa has offered and declined to offer first officer positions to native-born U.S. citizens, naturalized U.S. citizens, and non-U.S. citizens. Second Addendum at 6-7. Respondent attaches the affidavit of Ms. Karen Kinsella, a Mesa recruiter who represents that during the same time frame in which Nickman interviewed, Mesa has denied employment to both naturalized and native-born citizens. Id. RX-3 at ¶¶11-12 (Kinsella Affidavit). Respondent also points to the 1995 hiring and subsequent promotion of Mr. Zakullah Khogyani, a high-ranking Mesa pilot and naturalized U.S. citizen, to show that Mesa does not discriminate based on national origin. Id. RX-4 (Khogyani Affidavit). Although he does not provide any specific numbers, Mr. Khogyani states that he has personal knowledge that Mesa has hired numerous naturalized United States citizens, and non-United States citizens as first officers. RX-4 at ¶ 9. He also states that he has personal knowledge that numerous graduates of the San Juan College flight who were not hired were native-born United States citizens. Id.

Although the Kinsella and Khogyani affidavits are strong evidence that Mesa does not engage in any type of pattern and practice discrimination against naturalized United States citizens, they do not conclusively establish that Respondent did not discriminate against Respondent because of his naturalized citizenship status. The complaint in this case does not allege a pattern and practice of discrimination against naturalized citizens; it alleges that Respondent discriminated against Complainant on the basis of his naturalized status. While the affidavits constitute relevant evidence that Respondent does not discriminate in favor of native-born citizens because it has hired naturalized citizens, and rejected some native-born graduates, the affidavits fail to establish that Respondent did not discriminate against Complainant based on his naturalized status. Accordingly, Complainant has satisfied (albeit marginally) prong four of his prima facie case.

By contrast, Complainant has not shown that he was qualified for the job for which he

applied. According to the un-rebutted evidence submitted by Respondent, applicants for a position as pilot with Mesa Airlines are interviewed by a Pilot Interview Board which consists of an experienced Captain and First Officer. See Second Addendum RX-1, ¶ 6 (Cristl Affidavit); RX-2, ¶ 6 (Moman Affidavit); RX-5, ¶ 6 (Clark Affidavit); RX-6, ¶ 6 (Sturges Affidavit). Among the most important attributes evaluated by the Pilot Interview Board are the ability to demonstrate a strong understanding of Cockpit Resource Management skills and a complete grasp of commercial flying procedures and protocols. Id. On February 27, 2003, Nickman was interviewed by Captain Todd Clark and First Officer Jason Sturges, who served on the Pilot Interview Board. See Second Addendum RX-5, ¶ 7 (Clark Affidavit); RX-6, ¶ 7 (Sturges Affidavit). Clark and Sturges stated that they were concerned by Nickman's failure to maintain proficiency in his instrument flying since his graduation date. RX-5 at ¶ 9; RX-6 at ¶ 9. They explained that in the airline industry, "currency" refers to an individual's legal ability as determined by the Federal Aviation Administration (FAA) to undertake a particular flight activity, while "proficiency" refers to maintaining those skills required to safely and efficiently undertake a given task. RX-1 at ¶ 11; RX-2 at ¶ 11. They were further troubled by Nickman's responses to Crew Resource Management hypothetical situations. For example, in response to a question designed to force a First Officer to take control of a potentially unsafe situation initiated by the Captain, instead of taking control Nickman responded that he would not have taken action because "the Captain is God." RX-5 at ¶ 12; RX-6 at ¶ 12. Subsequently, in response to technical flight questions, Nickman provided inappropriate responses to questions regarding an approach briefing despite that fact that he had been provided an approach plate containing all of the information necessary to respond to the questions. RX-5 at ¶ 13; RX-6 at ¶ 13. Based on this interview and their conversation with each other, Clark and Sturges recommended against offering Nickman a position with Mesa. RX-5 at ¶ 14; RX-6 at ¶ 14.

Mesa's Certificate Chief Pilot Captain Steven Cristl, and Captain and Vice President of Flight Operations Mickey Moman also jointly interviewed Nickman. Second Addendum RX-1 (Cristl Affidavit); RX-2 (Moman Affidavit). Although the date of the interview is not stated, the affidavits indicate that it occurred after Nickman's February 27, 2003, interview by the Pilot Interview Board. Captains Cristl and Moman explained that occasionally they will interview candidates not recommended by the Pilot Interview Board. In accord with Clark and Sturges, both Cristl and Moman expressed their dismay with Nickman's failure to maintain proficiency in his instrument flying. RX-1 at ¶ 10; RX-2 at ¶ 10. During the interview, Nickman acknowledged that he did not consider himself to be proficient in his instrument flying, and both Cristl and Moman were particularly concerned by this admission. RX-1 at ¶¶10-11; RX-2 at ¶¶ 10-11. They also found that Nickman's responses to many of their questions were vague, insufficient or contradictory. RX-1 at ¶ 12; RX-2 at ¶ 12. Based on their interview with Nickman and their joint discussion, Cristl and Moman jointly concurred with the Pilot Interview Board and declined to offer Nickman a position with Mesa. The affidavits by Clark, Sturges, Cristl and Moman raise serious doubts about Nickman's qualifications for a position as a pilot at Mesa.

I recognize that, unlike written tests or other objective criteria, interviews are somewhat subjective. However, Nickman's application was not rejected based on one interview with one

person. Instead, he was interviewed on two separate occasions by a total of four people, some of whom were very senior captains, who agreed that he was not qualified for instrument flying. The interviewers clearly are experienced, knowledgeable pilots. The Pilot Interview Board, which conducted the first interview, consisted of a captain and a first officer, who stated that they interview many applicants for pilot positions with Mesa Airlines. RX-5 at ¶ 5; RX-6 at ¶ 5. Moreover, Mesa did not base its decision only on the initial Pilot Interview Board's interview. Nickman later was interviewed by Captain Moman, who is Vice President of Flight Operations, and Captain Christl, who is Certificate Chief Pilot. After conducting their interview, they concurred with the Board's decision and declined to offer Nickman a position as first officer. RX-1 at ¶ 13; RX-2 at ¶ 13. All four interviewers were concerned by Nickman's failure to maintain proficiency in his instrument flying.

I do note that the Cristl Affidavit and Moman Affidavit are nearly identical, and similarly, the Clark Affidavit and Sturges Affidavit are almost carbon copies. Although the affidavits clearly were prepared by counsel, I conclude that the affidavits are reliable because they are sworn and signed by the affiants, they contain facts that would be admissible in evidence, they rely on personal knowledge, and they show that the affiants are competent to testify to the matters stated therein. 28 C.F.R. § 68.38(b) (2004). Moreover, Complainant has not submitted any countervailing affidavits by himself or anyone else. The OCAHO rules of practice and the FRCP, upon which the OCAHO rules are based, both provide that when a motion for summary decision or summary judgment is supported by affidavits, the party opposing the motion may not rest upon the mere allegations or denials in his pleading but rather the adverse party's response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing. See 28 C.F.R. § 68.38(b) (2004); Fed. R. Civ. Proc. 56(e). Complainant's response fails to set forth facts, in affidavits or other similar documents, showing that there is a genuine issue of fact for the hearing.

Specifically, Complainant has not adduced any evidence to counter these pilots' assertions or to show that he was proficient in instrument flying. After asking Complainant objective and technical questions, Cristl, Moman, Clark, and Sturges agreed that Nickman was unqualified for the position because he lacked proficiency in instrument flying. Considering the public safety concerns inherent in flying commercial aircraft, I am reluctant to second guess the judgment of these four experienced pilots. Therefore, based on the Cristl, Moman, Clark, and Sturges affidavits, I conclude that Nickman has not shown that he was qualified for the position for which he applied, and thus he has failed to establish the third prong of his prima facie case. No genuine issue of material fact thus remains with respect to Complainant's citizenship status claim, and Respondent is entitled to decision as a matter of law. See Aguirre, supra, at 640, at *7 (internal citations omitted).

In addition, even had Nickman satisfied the elements of a prima facie case of citizenship status discrimination, Respondent has adduced legitimate non-discriminatory reasons for not hiring Complainant. Cristl, Moman, Clark, and Sturges elected not to recommend Nickman for hire because they concluded he was not proficient in instrument flying and also he failed to satisfactorily

answer other questions dealing with safety issues. They based their conclusions upon Complainant's response to technical questions and not upon Nickman's citizenship status. Complainant has presented no evidence that would support an inference that the proffered reasons of these four experienced pilots were pretext to citizenship status discrimination. Accordingly, summary decision is also appropriate because Respondent has adduced un-refuted legitimate non-discriminatory reasons for declining to hire Complainant. See Hsieh, supra, at 11, at *10.

B. Retaliation

As noted previously, I have jurisdiction of a valid retaliation claim brought pursuant to 28 U.S.C. § 1324b(a)(5) even in the absence of national origin or citizenship status discrimination. See Cruz v. Able Service Contractors, supra at 150. Thus, Complainant's failure to establish a case of national origin or citizenship status discrimination would not be fatal to his complaint if he were able to establish a prima facie case under 28 U.S.C. § 1324b(a)(5).

Respondent argues that dismissal of Complainant's retaliation claim is appropriate not only because Nickman has failed to present any evidence that he suffered an adverse employment action attributable to filing a complaint under 8 U.S.C. § 1324b, but he also admitted during the November 16, 2004 conference that he had suffered no adverse employment action which he attributed to filing this claim. Second Addendum at 9. As stated in the "Jurisdiction" section of this Order, 8 U.S.C. § 1324b(a)(5) makes it an unfair immigration-related employment practice for an entity "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint . . . under this section." To establish a prima facie case under § 1324b, Complainant must show that: (1) he engaged in a protected activity; (2) Respondent was aware of the protected activity; (3) he suffered adverse treatment following the protected activity; and (4) a causal connection exists between the protected activity and the adverse action. Cruz v. Able Service Contractors, Inc., 6 OCAHO 144, 150-151, 1996 WL 229220, at *5 (internal citation omitted). Similarly, to defeat summary judgment on a retaliation claim in the Title VII context, a plaintiff must show (1) involvement in a protected activity; (2) an adverse employment action; and (3) a causal link between the two; thereafter, the burden of production shifts to the employer to present legitimate reasons for the adverse employment action, and once the employer carries this burden, the plaintiff must demonstrate a genuine issue of material fact as to whether the reason advanced by the employer was pretext. Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) (internal citation omitted).

In this case, Complainant engaged in the protected activities of filing a Charge with OSC and a Complaint with OCAHO. In his Complaint, Nickman avers that Ms. Michelle Miller of Respondent's Human Resources Department told him he would lose his rights to internal arbitration if he complained to an outside agency. Complaint at 6. During the November 16 conference, Nickman stated that other than this remark by Ms. Miller, there was nothing done by anyone at Mesa

that he considered a threat, coercion, or intimidation. PHC Tr. 69.

Representations in a complaint are not competent evidence in resisting a motion for summary decision. However, even if Nickman had referenced the Miller statement in an affidavit, Ms. Miller's statement does not suggest intimidation, a threat, coercion, or retaliation against Nickman for pursuing his rights under § 1324b. Rather, Ms. Miller merely stated the fact that Nickman would forfeit his right to internal arbitration if he chose to complain to an outside agency. Therefore, the putative remark by Ms. Miller does not serve to establish a prima facie case of retaliation even if taken as true.

Complainant also refers to derisive comments, attitudes, and actions by his instructors, who were employees of MPD, Inc. (Mesa Pilot Development). Attachments to Complaint; see also PHC Tr. 41-42. Respondent asserts that MPD, Inc. is an aviation training program that is an independent contractor of San Juan College. PHC Tr. 46-47. Even if I infer for purposes of the instant Motion that MPD, Inc. is an agent of Mesa, the MPD, Inc. instructors lack authority to hire pilots on behalf of Mesa. The Mesa Pilot Interview Board makes hiring decisions and none of Nickman's interviewers made derogatory comments based on his nationality, citizenship status, or intent to file a charge with OSC or a complaint with OCAHO. See PHC Tr. 55-56; Second Addendum RX-1 (Cristl Affidavit), RX-2 (Moman Affidavit), RX-5 (Clark Affidavit), RX-6 (Sturges Affidavit). Thus, the asserted discriminatory conduct by Nickman's instructors has no nexus to Respondent's alleged discriminatory failure to hire Nickman. In any event, the fact that Nickman was an Honor roll student who ranked in the top 5% of his class academically and was asked to speak at graduation seems to belie any inference of discrimination on the part of his instructors. See attachments to Complaint; PHC Tr. 40-43.

In summary, Complainant has failed to establish, or even allege, a prima facie case under 8 U.S.C. § 1324b(a)(5). Therefore, dismissal is appropriate because Nickman cannot prove any set of facts that would justify relief on his section 1324b(a)(5) claim. See Reyes-Martinon, supra, at 9, at *7.

VI. CONCLUSION

I GRANT Respondent's Motion because I lack jurisdiction over Complainant's national origin discrimination claim, Complainant has not alleged a prima facie case of citizenship status discrimination or retaliation, and Respondent has adduced un-refuted evidence of legitimate non-discriminatory reasons for not hiring Complainant. Because I am granting Respondent's Motion, for Summary Decision, Complainant's motion for a stay is moot.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This Order constitutes a final agency decision. As provided by statute, no later than 60 days after entry of this final Order, a person aggrieved by such Order may seek a review of the 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. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2004).