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

November 12, 2024

SEAN SIMON ROSEMAN, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00109
WALMART INC., Respondent.	)	

Appearances: Sean Simon Roseman, pro se Complainant
Patrick Shen, Esq., for Respondent

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b.

On May 21, 2024, Complainant, Sean Simon Roseman, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging Respondent, Walmart Supercenter, discriminated against him (citizenship status and national origin), retaliated against him, and engaged in document abuse, all in violation of 8 U.S.C. §§ 1324b(a)(1), (a)(5), and (a)(6).

On August 12, 2024, Respondent filed both its Answer and a Motion to Dismiss. On August 15, 2024, Complainant filed its Response. Parties filed several other replies and motions; however, because the motion to dismiss disposes of the case, the Court need not adjudicate the parties' additional motions (i.e. they are denied as MOOT).

II. BACKGROUND AND PROCEDURAL HISTORY[1]

In his Complaint,[2] Complainant identifies himself as a Legal Permanent Resident (LPR) of the United States, born in South Africa. Compl. 2.[3] He became an LPR on June 2, 1982. *Id*. Despite being eligible to naturalize in 1987, to date, he has not applied for naturalization. *Id.*

On November 30, 2023, Respondent sent Complainant an offer of employment, which he accepted the same day. *Id.* at 7, 24. A hiring manager scheduled a December 5, 2023 orientation, telling Complainant "the only things [he] would need to bring with [him] was [his] California Driver's License and Social Security Card." *Id.* at 24.

At Complainant's orientation, he was directed to complete the Form I-9 (electronically) to verify his eligibility for employment. *Id.* at 25–26. When Complainant indicated on the electronic Form I-9 he was an LPR, the system prompted Complainant to provide his A-Number. *Id.* at 26. Complainant did not remember his A-Number, and was unable to complete the form at that time. *Id.* Complainant retrieved from his home and produced for the hiring manager a photocopy of his LPR card (the original had been stolen). *Id.* The hiring manager informed Complainant the photocopy was insufficient, and, based on guidance the hiring manager received, Complainant would need to produce the original card. *Id.* at 27.

Complainant believes another individual at the orientation was able to complete his Form I-9, even though this individual "forgot something" as well. Complainant presumes this man is in a similar "class"[4] as the hiring manager, and view his own "class" to be different.

On December 6, 2023, Complainant returned to the employer and spoke with a store manager about the Form I-9. *Id.* at 30–31. This manager confirmed the hiring manager still required the Complainant produce the original LPR card. During this conversation, Complainant informed this manager he had "already made a complaint to the United States Department of Justice, Civil Rights Division, Immigrant & Employee Rights Section." *Id.* at 31.

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[1] The facts are drawn from the Complaint. For the purposes of adjudicating the motion to dismiss, are accepted as true with all reasonable inference drawn in Complainant's favor. *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994); Fed. R. Civ. P. 10(c).

[2] Using the OCAHO Complaint Form, Complainant stated Respondent has fifteen or more employees, and it discriminated against him on four separate bases: (1) national origin, (2) citizenship status, (3) retaliation for exercising his rights under 8 U.S.C. § 1324b, and (4) document abuse, or requiring more or different documents than those required for the employment eligibility verification process. *Id.* at 4, 6. Complainant also indicates that he was qualified for the job and that after his non-selection, Respondent "continued to advertise for the job position on the internet until all the required positions had been filled." *Id.* at 6–7.

[3] Cites to the Complaint are to the page numbers of the PDF document.

[4] Despite making an allegation of citizenship status and/or national origin discrimination, Complainant defines his protected status as a function of his "color" and his "race." Compl. 29.

On December 11, 2023, the hiring manager called Complainant to learn whether Complainant was "still interested in the job position." *Id*. Complainant did not answer the question; instead, he asked the hiring manager "if he was aware they had violated a federal law during [Complainant's] hiring and Orientation." *Id.*

III. POSITION OF THE PARTIES

A. Respondent Motion to Dismiss

Respondent argues that Complainant's claims of national origin discrimination, citizenship status discrimination, and document abuse fail because Complainant himself admits in the Complaint that he is not a "protected individual" as defined in § 1324b(a)(3)(B)(i). Mot. Dismiss, 2–3. It also argues that, even if Complainant were a "protected individual," this Court would not have subject matter jurisdiction over his claim of national origin discrimination, as Respondent has more than 15 employees. *See id.* at 4–5.

Respondent finally alleges that even if the Court were to take all the allegations in the Complaint to be true, Complainant fails to sufficiently allege a claim of retaliation or document abuse. *Id.* at 6–9. Regarding the retaliation claim, Respondent argues Complainant failed to allege he engaged in any protected activity, and Complainant's narrative about the meeting with the store manager "merely describes a disagreement between two parties," and that "[t]here is nothing in the description to suggest [management officials] 'intimidated, threatened, coerced, or retaliated against' Complainant for asserting his rights under 8 U.S.C. § 1324b." *Id.* at 7–8. Regarding the document abuse claim, Respondent contends Complainant failed to allege facts establishing that "any discussion between him and [Respondent] regarding 'documents' was for purposes of verifying his work authorization," or that Respondent had any discriminatory intent when it refused the documents provided. *Id.* at 9.

B. Complainant Response

In his response, Complainant concedes that "OCAHO lacks jurisdiction over National Origin Discrimination claims against a company that employs 15 or more people." Resp. 4. As to whether he is covered by the statute as a protected individual, Complainant argues that "these exceptions do not pertain to or affect permanent resident aliens with documents that don't expire. . .. [Complainant's] Green Card is one with no expiration date . . . and thus does not affect his protected Citizenship Status." *Id.* at 5. Complainant then points to the California Civil Rights Department as providing guidance on whether he is a protected individual.[5] *Id.* at 9–10.

[5] Complainant also cites two California state laws as a basis for his discrimination and document abuse claims. Compl. 6–8.

OCAHO only adjudicates document abuse claims arising under 8 U.S.C. § 1324b(a)(6), the Court will not address these state law-based arguments. *See United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021) (holding that OCAHO ALJs "can only hear cases within the jurisdiction that Congress had prescribed").

IV. LAW & ANALYSIS

A. Motion to Dismiss Standards

"In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint." *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994). Moreover, "[t]he complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor." *Zajradhara v. Am. Sinopan, LLC*, 20 OCAHO no. 1581, 6 (2024).

B. Subject Matter Jurisdiction – National Origin Claim

OCAHO "lacks subject matter jurisdiction over a national origin discrimination claim if the employer employs less than four or more than fourteen employees." *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 6–7 (2021); *see also Zajradhara v. Misamis Constr. (Saipan) Ltd.*, 15 OCAHO no. 1396a, 2 (2022). Here, Complainant agrees Respondent employs more than fourteen individuals. Compl. 4. As Respondent correctly noted, this Court lacks subject matter jurisdiction over Complainant's claim of national origin discrimination. Accordingly, that claim is DISMISSED WITH PREJUDICE.

C. Failure to State A Claim Upon Which Relief Can Be Granted – Citizenship & Document Abuse Claim

The Court 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). *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 7 (2016) (citing *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1).

> To succeed on a citizenship discrimination claim under the statute, a complainant bears the burden of establishing they were a protected individual at the time of the alleged discrimination. *See Zu v. Avalon Valley Rehab Ctr.*, 14 OCAHO no. 1376, 6 (2020) (citing, inter alia, *McNier v. S.F. State Univ.*, 7 OCAHO no. 947, 411, 417 n.3 (1997) (explaining that the key date for assessing an individual's protected status is the date of the alleged discrimination); *Pio Terek v. Anderson Cleaning Sys., Inc.*, 3 OCAHO no. 590, 1919, 1922–23 (1993) (dismissing citizenship status discrimination claim when the complainant was not a protected individual at the time of the alleged discrimination, but later became a protected individual)).

Contreras v. Cavco Indus., Inc. d/b/a Fleetwood Homes, 16 OCAHO no. 1440c, 3 (2024).

> To succeed on a document abuse claim under the statute, a complainant bears the burden of establishing they were a protected individual at the time of the alleged discrimination. *See Mar-Jac Poultry*, 12 OCAHO no. 1298, at 30; *Rodriguez Garcia*, 17 OCAHO no. 1449a, at 3–8; *Vieri Verdesi v. Ark Rustic Inn, LLC*, 13 OCAHO no. 1311, 7–9 (2018) ("claims under 8 U.S.C. § 1324b(a)(6) based on

> citizenship status only apply to protected individuals as defined in 8 U.S.C. § 1324b(a)(3).").

Contreras v. Cavco Indus., Inc. d/b/a Fleetwood Homes, 16 OCAHO no. 1440e, 3 (2024).

"8 U.S.C. § 1324b(a)(3)(B) expressly excludes those who do not 'timely' apply for naturalization from the definition of protected individuals." *Contreras*, 16 OCAHO no. 1440c, at 3 (citing *Rodriguez Garcia v. Farm Stores*, 17 OCAHO no. 1449a, 3, 9 (2024). To "timely" apply for naturalization for purposes of being a protected individual, one must do so "within six months of the date [they] first become[] eligible (by virtue of period of lawful permanent residence) to apply for naturalization." 8 U.S.C. § 1324b(a)(3)(B). Here, Complainant indicated that he became a legal permanent resident on June 2, 1982, making him eligible to apply for citizenship in 1987 (at least as it relates to time in LPR status). Compl. 2. Complainant has yet to apply for naturalization, so he has not "timely" applied for such status as required to trigger coverage under the statute. Consequently, he fails to state a claim of citizenship status discrimination and document abuse.

Accordingly, those claims are DISMISSED WITH PREJUDICE.

D. Failure to State a Claim Upon Which Relief Can Be Granted – Retaliation Claim

Although Complainant is not a "protected individual" as defined by § 1324b(a)(3), he still may maintain a claim for retaliation "because . . . § 1324b(a)(5) protects 'any individual.'" *R.O. v. Crossmark, Inc.*, 11 OCAHO no. 1236, 12 (2014). That section makes it unlawful for an individual or employer "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 complaint" with OCAHO. 8 U.S.C. § 1324b(a)(5).

In the Complaint, Complainant alleges the retaliation occurred on December 6, 2023, the day following his failed attempt at completing orientation with Respondent. *Id.* at 9. On the facts as set forth in the Complaint, the Court can divine two possible theories advanced by Complainant. Both potential theories involve Complainant's engagement in a protected activity (contact with IER), and Respondent's knowledge of that protected activity (Complainant told the store manager). After these two commonalities, the theories diverge. The first theory of retaliation involves the store's decision to maintain its position that Complainant would need to furnish the original LPR card, and not a photocopy. The second involves the contents or nature of the conversation between the store manager and the Complainant. Each are addressed in turn below.

1. Respondent Maintained Its Position Requiring the Original LPR Card Post-Knowledge of the Protected Activity – the First Retaliation Theory

As it relates to a retaliation theory involving an employer or prospective employer taking a retaliatory action, "[a] prima facie case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual's protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action." *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 11 (2024) (citing *Chellouf v. Inter Am. Univ. of*

P.R., 12 OCAHO no. 1269, 5–6 (2016)); *see also Kama v. Mayorkas*, 107 F.4th 1054, 1059 (9th Cir. 2024) ("A *prima facie* case requires a plaintiff to adequately allege that: "(1) she engaged in an activity protected under Title VII; (2) her employer subjected her to adverse employment action; [and] (3) there was a causal link between the protected activity and the employer's action.").

The first retaliation theory advanced in the Complaint does not state a claim upon which relief can be granted, because, as alleged, there is no causal link between the protected activity and Respondent's action. On December 5, 2023, Respondent informed Complainant it required Complainant furnish the original LPR card (not a photocopy). Following Complainant's protected activity (and Respondent's "knowledge" of that protected activity), Respondent did not alter its position to Complainant's detriment (or at all) relative to the LPR card, rather it maintained the same position it held before any protected activity transpired. Because Complainant's protected activity had no impact on Respondent's position relative to the LPR card, the allegation does not set forth a causal link between the two. Complainant's first theory of retaliation fails.

2. Respondent Maintained Its Position Requiring the Original LPR Card Post-Knowledge of the Protected Activity – the Second Retaliation Theory

Complainant's second theory, that he had an adversarial conversation with the store manager, also does not, as he has alleged it, state a claim upon which relief can be granted. Like a theory involving the requirement to furnish an original LPR card, the Court must look to what transpired after Respondent learned of the IER activity. According to the Complaint, when the store manager learned of Complainant's protected activity, "[s]he had turned around at that point and mumbled something under her breath. [Complainant] didn't hear what she was saying." Compl. 31. Complainant then tried to explain the situation again, but the store manager interrupted his explanation, saying, "You keep repeating yourself and I already gave you my answer and nothing is going to change!" *Id.* at 32. For additional context, the hiring manager contacted Complainant on December 11, 2023, to inquire whether Complainant was still interested in the position with Respondent. A conversation terminated when Complainant hung up the phone.

In examining the scope of Title VII's protection from retaliation, the Supreme Court has observed:

> An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely to "deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).[6]

[6] This is consistent with decisions from the Ninth Circuit, which has held that "[n]ot every employment decision amounts to an adverse employment action." *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 869 (1996). Further, "declining to hold a job open for an employee and

Here, the Complaint alleges facts which, even when read in the light most favorable to Complainant, cannot show he was threatened or intimidated. He initiated the conversation with the store manager; specifically, he sought out the store manager and engaged her in a discussion about the hiring manager's requirement. Her statements served only to explain to Complainant he would not be able to convince her to deviate from the hiring manager's requirement, and she made no reference to his protected activity in any of her statements. The Complaint does not allege facts demonstrating intimidation or threatening statements or behavior (on the part of the store manager), rather the facts alleged seem to demonstrate the store manager found Complainant's unsolicited demands about the hiring process to be a frustrating interruption in her work day, and (light most favorable to Complainant), her conduct could be described as a "lack of good manners." Indeed, even after Respondent learned of Complainant's protected activity, they still contacted him days later, hoping to complete his onboarding, a process he appears to terminate.

Ultimately, the store manager's conduct and statements do not rise to the level of intimidating or threatening, which is what the statute requires. Accordingly, the facts as alleged here do not support an actionable claim of retaliation.

Therefore, because neither theory for retaliation set forth in the Complaint states an actionable claim, Complainant's retaliation claim is DISMISSED WITH PREJUDICE.

E. Dismissal/Leave to Amend

"Leave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to pro se plaintiffs." *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003). However, a court "does not abuse its discretion in denying leave to amend where amendment would be futile." *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002).

In this case, an amendment could not possibly cure the defects with the national origin, citizenship status, and document abuse claims, as Complainant does not qualify for § 1324b's protection regarding those claims. Therefore, these claims are DISMISSED WITH PREJUDICE and without leave to amend. An amendment of Complainant's retaliation claim would be similarly futile. As a result, this claim is also DISMISSED WITH PREJUDICE and without leave to amend.

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badmouthing an employee outside the job reference context do not constitute adverse employment actions." *Brooks v. City of San Mateo*, 229 F.3d 917, 928–29 (2000); *see also Nunez v. City of L.A.*, 147 F.3d 867, 875 (1998) (refusing to find retaliation where "[a]ll [plaintiff] has shown is that he was bad-mouthed and verbally threatened").

V. CONCLUSION

Complainant's national origin discrimination, citizenship-status discrimination, retaliation, and document abuse claims are DISMISSED WITH PREJUDICE for the reasons outlined above.

This is a Final Order. [7]

SO ORDERED.

Dated and entered on November 12, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

[7] In conformity with 28 C.F.R. § 68.52(e), this is the Final Order in this case. OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

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.