COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	**Labor Case No. 19-025**
Zaji O. Zajradhara,	)	
Complainant,	)	**ORDER GRANTING MOTION FOR SANCTIONS**
v.	)	
Nippon General Trading Corporation *dba* Country House Restaurant,	)	
Respondent.	)	

I. INTRODUCTION

This matter came on for a Prehearing Conference August 27, 2019 at 1:30 p.m. at the Administrative Hearing Office. Complainant Zaji O. Zajradhara ("Complainant") was present and unrepresented by counsel. Respondent Nippon General Trading Corporation *dba* Country House Restaurant ("Respondent") was present and represented by Attorney Mark Scoggins and General Manager Katsuko Kato. The Department's Enforcement Section was also present and represented by Investigators Bonifacio J. Castro and Jerrick Cruz.

II. BACKGROUND

This matter concerns an alleged violation of the CNMI labor laws. On January 18, 2019, Respondent posted a job vacancy announcement ("JVA") for a Waitress/Waiter ("JVA 19-01-65024"). On April 29, 2019, Complainant filed a complaint in connection to the JVA 19-01-65024 for a violation of the CNMI employment preference statute and

retaliation. Generally, Complainant alleges that he is entitled to damages because he was not hired and being retaliated against for filing both local and federal claims against Respondent. Complainant filed additional information on May 29, 2019, stating, among other things: (1) he was qualified for the position; (2) he was never interviewed; and (3) on information and belief, Respondent hired a foreign worker for the position.

On June 12, 2019, Respondent filed an Answer and Affirmative Defenses, claiming, in part: (1) Complainant did not apply for employment in good faith; (2) Complainant does not legitimately seek employment; (3) Complainant files only to harass, coerce, and extort monetary settlement; (4) Complainant's claims are fraudulent; (5) Complainant failed to mitigate damages; and (6) Complainant fails to state a claim because a foreign worker was not hired as a result of JVA 19-01-65024 and Respondent meets or exceed the job preference requirements.

On June 14, 2019, Respondent filed a Motion to Dismiss as to the claim for retaliation. Therein, Respondent argued that this office lacks jurisdiction to adjudicate the retaliation claim because Complainant was not an employee.[1] Additionally, on June 18, 2019, Respondent filed a Motion for Sanctions as to the claim for violation of the CNMI employment preference statute. On July 21, 2019, Complainant filed an Opposition to Respondent's Motion to Dismiss.[2] The arguments were unclear, muddled issues, and overall nonresponsive to the legal arguments. On June 26, 2019, Enforcement filed a written determination of their investigation in this matter. Therein, Enforcement found

[1] The pleadings never specified the claim for retaliation. This motion was construed as a Motion to Dismiss for failure to state a claim because retaliation pursuant to NMIAC § 80-20.1-455(l) falls within this Office's jurisdiction.

[2] Complainant was electronically served on June 18, 2019. This Opposition was untimely. The Referral and Scheduling Order states, in part, "[t]he timelines for any oppositions or replies shall be governed by NMIAC § 80-20.1-470(e)." The regulations provide, "[w]ithin ten days after a written motion is served . . . any party to the proceeding may file and serve a response in opposition to the motion. Within three days after an opposition brief is served, the moving party may file and serve a reply to the opposition." NMIAC § 80-20.1-470(e).

that Respondent complied with the local labor laws and recommended judgment in favor of Respondent.

Ultimately, upon review of the filings and applicable law, Respondent's Motion to Dismiss the claim for retaliation was granted by a written order, issued on August 1, 2019. Therein, the undersigned cited that Retaliation under the local regulations does not extend for prospective employees.[3] Further, Complainant failed to establish: (1) that he was employee of Respondent at the time of filing the complaint; (2) that Respondent took adverse action against Complainant; or (3) that the filing was a substantial factor in termination or such adverse action. Lastly, the undersigned noted that, in the event that the claim for retaliation is made pursuant to federal law, this Office lacks jurisdiction to hear, enforce, or adjudicate said claim.

Oral arguments for Respondent's Motion for Sanctions were heard during the noticed Prehearing Conference. Complainant was unprepared, overly disruptive, and stormed out during Respondent's oral argument. *See* Order issued August 29, 2019.[4] Respondent was permitted to conclude his oral arguments, as outlined in the written motion. Simply, Respondent argued: (1) Complainant is aware of the standards of an employment preference claim, given the multiple of cases Complainant has filed against various employers; (2) Complainant is aware of the numerous deficiencies preventing him from proving his claim, yet he insists in pursuing it; and (3) Complainant has a history of harassing Respondent with unmeritorious claims in various venues. Respondent seeks sanctions in the form of attorney's fees. Also, in light of the above-mentioned

[3] Generally, a claim for retaliation under this office occurs when an employers takes any adverse action against an employee for filing a complaint. NMIAC § 80-20.1-455(l) ("An ***employer*** shall not retaliate against an ***employee*** for filing a complaint. Such retaliation is a separate cause of action against the employer.") (Emphasis added).

[4] Before storming out of the Hearing, Complainant stated that he was contesting the imposition of sanctions due to his personal debts, expenses, and dependents. As discussed below, the inquiry in whether to impose a sanction is based on whether the claim or defense is frivolous, without merit, or in bad faith. As such, Complainant's debts, expenses, and dependents have no bearing on the issue of whether sanctions are warranted.

deficiencies, Respondent orally moved to have the case dismissed. The undersigned took the matter under advisement and vacated the scheduled administrative hearing.

III. LEGAL STANDARD

The Administrative Hearing Office has original jurisdiction to resolve all employment preference claims. 3 CMC § 4525(b).

"A citizen or CNMI permanent resident or U.S. permanent resident who is qualified for a job may make a claim for damages if an employer has not met the requirements of 3 CMC § 4525, the employer rejects an application for the job without just cause, and the employer employs a person who is not a citizen or CNMI permanent resident or U.S. permanent resident for the job." 3 CMC § 4528(a)[5]; *see also* NMIAC § 80-20.1-455(f); *see also* NMIAC § 80-20.1-220(a). Generally, in order to prevail on a claim for damages, a complainant has the burden to prove the following elements: (1) that he/she was qualified for the job; (2) that his job application was rejected by the respondent/employer without just cause;[6] (3) the respondent/employer then hired a foreign national worker for

[5] Section 4525 states, "[i]n the full-time workforce or any employer, the percentage of citizens, U.S. permanent residents, and CNMI permanent residents and their immediate relatives employed shall equal or exceed the percentage of citizens, U.S. permanent residents, and CNMI permanent residents and their immediate relatives in the available private sector workforce unless attainment of this goal is not feasible within the current calendar year after all reasonable efforts have been made by the employer." 3 CMC § 4525. "The current percentage specified by the Department . . . is 30%." NMIAC § 80-20.1-210(c)(3). This provision, however, "shall not apply to employers of fewer than five employees, provided however, the Secretary may, by regulation, require each business to have a least one employee who is a citizen or CNMI permanent resident and U.S. permanent resident, or remove the exemption available to employers against whom two or more judgments are entered in Department proceedings in any two year period. "No waivers are available with respect to the workforce participation objective." NMIAC § 80-20.1-210(f); *contra* NMIAC § 80-20.1-215.

[6] The Department's regulations provide further guidance. Thereunder, "[t]he term 'just' cause' for rejecting an application for employment includes the lawful criteria that an employer normally applies in making hiring decisions such as rejecting persons with criminal records for positions of trust, rejecting persons who present fraudulent or inaccurate documentation in support of the application; rejecting persons without an education degree necessary for the position, rejecting persons with unfavorable recommendations from prior employment, rejecting persons with an employment history indicating an ability to perform the job successfully, rejecting persons with an educational background making it unlikely that the necessary education or training to hold the position could be accomplished successfully within a reasonable time; and similar just causes." NMIAC § 80-20.1-455(f)(1). Notably, the aforementioned list of "just causes" is not exhaustive. "Any criteria in making hiring decisions advanced in

that positions and;[7] (4) the respondent/employer failed to meet the 30% workforce objective requirement. *Zajradhara v. Woo Jung Corporation*, LC-18-059 (Administrative Order issued May 16, 2019 at 6). An employer must make a good faith effort to hire a citizen, CNMI permanent resident or U.S. permanent reside for a job vacancy. NMIAC § 80-20.1-235(d).

A complainant who files a frivolous claim at the Administrative Hearing Office is subject to sanctions.[8] "A motion to recover sanctions and attorney's fees for an opposing party's advocation of a claim or defense that is frivolous, without merit, or in bad faith shall be permitted pursuant to [NMIAC § 80-80.2-140]." NMIAC § 80-20.1-130(c)(5). "Any complainant or respondent may by motion, file and recover sanctions and attorney's fees for an opposing party's advocation of a claim or defense that is ***frivolous, without merit, or in bad faith***." NMIAC § 80-20.2-140 (emphasis added). The underlying principle of this rule is to make whole a party who has incurred needless costs defending against said claims. While the regulations do not define the terms "frivolous," "without merit," or "in bad faith," said terms are not novel concepts.[9] Here, the undersigned finds it is appropriate to look to established Commonwealth law for guidance. The Commonwealth Supreme Court has found a claim to be frivolous if "no justiciable question has been presented and [it] is readily recognizable ***as devoid of merit in that there is little prospect***

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support of just cause must be consistent with the published job vacancy announcement for the job and must be a part of the employer's established hiring procedures." NMIAC § 80-20.1-455(f)(2).

[7] An employer may reject persons who are referred using the employer's normal hiring criteria or may reevaluate their employment needs and hire no one for the proposed position. NMIAC § 80-20.1-235(c).

[8] An administrative hearing officer has authority to impose sanctions. *See* NMIAC § 80-20.1-485(c)(13). Specifically, the administrative hearing officer is authorized to: "[i]mpose such other sanction, order or relief as may reasonably give effect to requirements of Commonwealth law." *Id*.

[9] The Commonwealth Superior Court, the Commonwealth Supreme Court, and the District Court of the Northern Mariana Islands have similar standards with regards to sanctioning frivolous filings. *See* NMI R.Civ.P 11; *see also* Com.R.App.P. 38(a); *see also* Fed.R.Civ.P.11. Rule 38(a) of the Commonwealth Rules of Appellate Procedure, concerning the imposition of sanctions for filing frivolous appeals, is patterned after Rule 11 of the Federal Rules of Civil Procedure, which applies to trial practice. *Tenorio v. Superior Ct.,* 1 NMI 112 (1990). Ultimately, these rules impose a duty on the parties' to "stop and think before filing documents with court." *Id*.

that it can ever succeed." *Commonwealth v. Sablan*, 2016 MP 12 ¶ 17 (*citing Commonwealth v. Kawai*, 1 NMI 66, 72 n.4 (1990)) (emphasis added); *see also Pacific Amusement, Inc. v. Villanueva III*, 2006 MP 8 ¶ 20. Moreover, "a legal argument is frivolous if no reasonable person could conclude that the argument is likely to succeed on the merits." *Pangelinan v. Itaman*, 1996 MP 16 ¶ 1; *see also Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 NMI 79 (1992). Further, bad faith can be demonstrated by a showing of some malicious intent of the filings, such as, delay or harassment.

IV. DISCUSSION

Based on the filings, Respondent seeks sanctions on the basis that the Complaint is frivolous, devoid of merit, and in bad faith. Upon review of the record and applicable law, the undersigned issues the following findings of fact and conclusions of law:

1. This Complaint is frivolous and devoid of merit because Complainant cannot establish a claim for a violation of the Employment Preference Statute.

On April 29, 2019, Complainant filed a complaint alleging the following:

> I applied for the job of waitstaff, I have experience [*sic*] I am being Retaliated [*sic*] against for filing both local & federal claims against this Company. As I was not interviewed-nor hired- As a U.S. Citizen [*sic*].

Complaint at 1. The above-stated allegations fail to address all the elements of the claims. Complainant was advised of the severe deficiencies of his claim and ordered to file additional information to support his claim. On May 29, 2019, Complainant filed an Additional Affidavit and Amended Complaint, which alleged, among other things:

> 1. On about 01/2019 I saw an advertisement on the CNMI department of Labor website for the position of Sales Rep renewal-2 jva –19-01-65027 and renewal-5 jva – 1901-65024 (the "Position") available with Nippon General Trading Corporation (the "Company").

2. I believed I was qualified for the Position because I have previous wait staff experience . . . . I am also a United States citizen.
3. On about 01/28/?2019 [*sic*] – I applied for the Position with the Company.
4. I applied for the Position by email referral via Mr [*sic*] James Ulloa of the CNMI dept of labor [*sic*].
5. I did not followed [*sic*]up to see when the Company would interview me due to pending legal issues with said company.
6. I was never called for an interview.
7. On information and belief [*sic*] I allege that the Company hired a foreign worker for the position, or submitted an application to hire a foreign worker due to the jva stating "renewal", [*sic*] despite the fact that I am a United States citizen and qualified for the Position.

Additional Affidavit and Amended Complaint at 1-2.[10]

Here, Respondent argues that Complainant cannot prevail on a claim for damages pursuant to the CNMI employment preference statute, as provided in 3 CMC § 4528(a). First, Respondent argues that Complainant's application was rejected with just cause. Second, Respondent argues that Complainant knows he cannot show that Respondent hired a foreign worker in connection to the relevant JVA. Third, Respondent argues that Complainant cannot show Respondent violated the 30% workforce objective requirement.

With respect to the just cause element, Respondent states that Complainant submitted a resume with inaccuracies and misrepresentations, which gives rise to legitimate concerns for Complainant's honesty and integrity. *See* NMIAC § 80-20.1-455(f)(1). Specifically, the addresses listed under business establishments for a bar and a school that

[10] Given the drastic changes in formatting and language, it is reasonable to assume Complainant sought legal assistance in preparing this templated document. Further, Complainant has stated, on numerous occasions, he needs to refer to legal counsel and his ghost-writer. A notice of appearance was never filed on behalf of Complainant. While it is clear that Complainant is a pro se litigant, he undercuts his arguments for additional accommodations as an unknowledgeable pro se litigant.

Complainant claimed to work was an apartment building. This issue was litigated in a previous case between the parties. In Labor Case No. 17-018, Complainant's claim was dismissed, in part, due to the inaccuracies in Complainant's resume. *See Zajradhara v. Nippon General Trading Corporation dba Country House Restaurant*, Labor Case 17-018 (Administrative Order issued March 19, 2019 at 2) ("A discovery of falsification of references or misstatement of employment justified a lack of confidence in the applicant to the point of rejection."). On appeal, the Secretary of Labor found that the dismissal was appropriate and just cause for rejection existed. *Zajradhara v. Nippon General Trading Corp.*, SA-2019-001 (Final Order issued June 13, 2019 at 7) ("Given the inability to perform and the viewed misrepresentations by Appellant, the undersigned finds that Appellee had just cause to reject Appellant's application."). Given that the same resume, with the same misstatements and inaccuracies, was submitted for this position, precedent dictates that Respondent had just cause to reject Complainant's application for this position.

With respect to the foreign worker element, Respondent states that, given the new requirements under federal regulations, he could not re-advertise the position until certain federal requirements were met.[11] As a result, Respondent claims the company did not hire a foreign worker with respect to this JVA. Specifically, Respondent argues that the company hired two U.S. Citizens in connection with this JVA, but then stopped recruitment activities in order to understand and follow new federal regulations. A review of the Respondent's Total Workforce Listing, submitted August 9, 2019, shows the following hires for a waiter/waitress in 2019:

[11] Respondent argues that, as a matter of law, the company could not hire a foreign worker until satisfying the new federal regulations. The undersigned does not completely agree with this argument. The new federal regulations were published in April of 2019, after this JVA was announced. Further, the regulations applied to CW hires with an employment start date in fiscal year 2020. Accordingly, there was a possibility in hiring a CW with a start date in fiscal year 2019.

1. Oh, J. (US Citizen) hired February 25, 2019 as a part-time[12] waiter;
2. Rooselvelt, R. (Chuuk) hired February 26, 2019 as a full-time waitress;
3. Dizon Ljean, G. (US Citizen) hired March 5, 2019 as a full-time waitress;
4. Yamaoka, R. (CW1) hired June 30, 2019 as a full-time waitress; and
5. Fabella, J. (US Citizen) hired September 20, 2019 as a part-time waiter.

It is unclear whether Ms. Yamaoka was hired pursuant to JVA 19-01-65024. It is also unclear how many CWs, if any, were renewed in connection to JVA 19-01-65024. However, as Respondent argues, it is Complainant's burden to prove his case. Here, Complainant offered no proof to support the allegations that a CW was hired in connection to JVA 19-01-65024.

With respect to the thirty percent (30%) workforce objective requirement, Respondent states that their company has always met or exceeded the thirty percent (30%) workforce objective requirement.[13] Here, Respondent's Total Workforce Listing submitted for the Second Quarter of 2019[14] shows the following information:

1. There are 40 total employees listed;
2. Of the 40 total employees, there are 36 full-time[15] employees listed;
3. Of the 36 full-time employees, 5 have resigned so there are only 31 currently employed full-time employees listed; and
4. Of the 31 current full-time employees, there are 15 status qualified employees.

[12] Pursuant to the applicable law, the part-time positions do not need to be advertised. *See* NMIAC § 80-20.1-225(a).
[13] Any employer, unless exempt, who employs workers on a full-time basis must certify that 30% or more of its full-time employees are U.S. citizens, U.S. permanent residents, and/or CNMI permanent residents. 3 CMC § 4525 and NMIAC § 80-20.1-210(c)(3).

[14] This Second Quarter Total Workforce Listing was submitted August 9, 2019 and is the most current submission on record. The Total Workforce Listing for the third quarter is not due until October 31, 2019. As of this writing, there is no knowledge of any significant changes from the Second Quarter Total Workforce Listing.

[15] The Total Workforce Listing includes a mistake; one employee was listed as both part-time and full-time. Despite the error, the calculations show that Respondent would meet the thirty percent (30%) workforce objective requirement either way.

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As shown by Respondent's Total Workforce Listing, the company has exceeded the thirty percent (30%) requirement.

Based on the above-stated information, Complainant cannot establish three of the four elements to support a claim for damages under the employment preference statute. First, Complainant cannot show that his application or resume was rejected without just cause. Second, Complainant has not set forth any evidence to rebut Respondent's claim that no foreign workers were hired in connection to JVA 19-01-65024. Third, Complainant cannot show that Respondent has not met the thirty percent (30%) work force objective. Accordingly, pursuant to the applicable law, there is no prospect that the claim could succeed.

2. There is not enough showing of bad faith.

Here, Respondent's Answer alleges that Complainant does not legitimately seek employment, instead, systematically files labor complaints to harass and extort monetary settlements from businesses. Further, Respondent's Motion argues that Complainant files complaints, knowing he cannot meet or prove his claim. Lastly, during the Prehearing Conference, Respondent offered into evidence a number of exhibits to show the history of unmeritorious filings by Complainant against Respondent.

Upon review of the oral and written record, the undersigned hesitates to find bad faith. It is an uncontroverted fact that Complainant has a history of filing many labor complaints. It has also been demonstrated that Complainant has initiated a series of unmeritorious claims in various venues against Respondent. However, that being said, there is no testimony or evidence to determine the motive of those filings, more importantly, this present complaint. Without more evidence to show harassment or extortion, Respondent

has simply proven that Complainant is litigious. Without more, being litigious is not the equivalent of bad faith.

V. CONCLUSION

Based on the foregoing, the complaint in this matter is deemed to be frivolous and devoid of merit. Accordingly, Respondent's Motion for Sanctions is hereby **GRANTED** and Respondent is **AWARDED** reasonable attorney's fees, in an amount to be determined.

Respondent shall file an itemized billing of the accrued fees in this matter, a memorandum to justify the accrued fees as reasonable, and an affidavit to attest to its veracity. Pending review of said filings, the undersigned will issue a separate judgment.

So ordered this **30th** day of September, 2019.

/s/
Jacqueline A. Nicolas
Administrative Hearing Officer