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

May 13, 2013

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00059
	)	
SPLIT RAIL FENCE COMPANY, INC.,	)	
Respondent.	)	
	)	

ORDER DECLINING TO MODIFY OR VACATE INTERLOCUTORY ORDER

I. PROCEDURAL HISTORY

On April 11, 2012, the Department of Homeland Security, Immigration and Customs Enforcement (DHS or ICE) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Split Rail Fence Company ("Split Rail" or Respondent) violated two provisions of section 274A of the Immigration and Nationality Act (8 U.S.C. § 1324a(a)(1)(B) and § 1324a(a)(2)). The Notice of Intent to Fine was attached to the complaint, but appears to have been missing the attachments detailing the specific factual allegations against Respondent. On April 26, 2012, OCAHO issued a Notice of Case Assignment to the parties and assigned the case to Administrative Law Judge (ALJ) Ellen K. Thomas.

On May 22, 2012, Split Rail filed a motion to dismiss the complaint, as well as an answer to the complaint. The Motion to Dismiss argued that the complaint and the apparently-incomplete Notice of Intent to Fine did not meet the pleading requirements in OCAHO cases set forth at 28 C.F.R. § 68.7(b).

On May 29, 2012, ICE filed a Motion to Amend the Complaint, which supplied the missing pages from the Notice of Intent to Fine, and a response to the Motion to Dismiss, arguing that the supplemental materials filed with its Motion to Amend the Complaint provided sufficient factual allegations to satisfy the requirement of "a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3).

Respondent filed an opposition to ICE's motion to amend the complaint, arguing that the amendment should not be allowed because it was still insufficient to satisfy the requirement of a clear and concise statement of facts. The ALJ construed Respondent's filings as a motion for a

more definite statement, and issued an order on July 9, 2012, directing ICE to file a more definite statement of the violations alleged to have occurred, and to provide a clear and concise statement of facts for each of those violations.

On July 20, 2012, ICE filed an Amended Complaint, containing specific factual allegations regarding each of the violations alleged to have occurred. On August 22, 2012, Respondent filed two documents: the first, an answer to the amended complaint; and the second, a motion to dismiss the complaint or, in the alternative, a motion to strike deficient allegations (Second Motion to Dismiss). Respondent argued that the Amended Complaint was still not sufficient to satisfy the pleading standard at 28 C.F.R. § 68.7(b), and, therefore, the complaint should be dismissed or the deficient allegations should be stricken from the complaint.

On December 19, 2012, the ALJ issued an Order for Prehearing Statements. On January 18, 2013, DHS filed its prehearing statement, and filed a supplement to that statement on January 23, 2013. On March 6, 2013, Respondent filed its prehearing statement. On April 10, 2013, a telephonic prehearing conference was held between the ALJ, ICE, and Respondent to establish a schedule for further proceedings. On April 11, 2013, the ALJ issued a Memorandum of Case Management Conference (April 11 Order), setting deadlines for discovery, dispositive motions, and responses to those dispositive motions. The April 11 Order also denied Respondent's Second Motion to Dismiss.

II. FILING AND SERVICE OF REQUEST FOR REVIEW

Respondent subsequently filed a Request for Review of Interlocutory Order by the Chief Administrative Hearing Officer. The request was dated April 19, 2013, and was received by OCAHO on April 22, 2013.[1] The request for review contained a Certificate of Service indicating that it had been filed on April 19, 2013, "via mail" to the Chief Administrative Hearing Officer (CAHO), the ALJ, and all parties of record. However, the regulations provide that all "requests for administrative review, briefs, and other filings relating to review by the Chief Administrative Hearing Officer shall be filed and served by facsimile or same-day hand delivery, or if such filing or service cannot be made, by overnight delivery." 28 C.F.R. § 68.54(c). Taking Respondent's Certificate of Service at face value, it appeared that the request for review was not appropriately served in accordance with § 68.54(c).[2]

Accordingly, on April 29, 2013, the CAHO issued an Order Directing Respondent to Demonstrate That Service of the Request for Review of Interlocutory Order Was Properly Served (CAHO Order). Respondent replied to the CAHO Order, showing that the request for review was sent to the CAHO and the ALJ via FedEx overnight delivery, and was simultaneously sent to the local ICE counsel by certified mail. The Respondent's reply indicated that, although the request was not sent to ICE via overnight delivery, as the regulations require,

[1] A request for review of an interlocutory order by the Chief Administrative Hearing Officer must be filed within ten days of the date of entry of that interlocutory order. 28 C.F.R. § 68.53(a)(2). The date of this interlocutory order was April 11, 2013. Since the tenth day after the date of entry was a Sunday (April 21), a request for review had to be filed with OCAHO by the next business day, April 22, in order to be timely.
[2] Despite Respondent's representation on its Certificate of Service, OCAHO received the request for review by facsimile and Federal Express overnight delivery.

but via certified mail, it was received by ICE on April 22, the same day it was received by the CAHO and ALJ.

This method of service on ICE was contrary to the requirements of 28 C.F.R. §§ 68.54(c) and 68.6(c), which require filing *and* service of requests for review and related documents by facsimile, same-day hand delivery, or overnight delivery, and was contrary to standard practice which requires documents to be served on the opposing party in the same manner in which they are filed with OCAHO. However, because opposing counsel in this case received the request for review the same day it was received by the CAHO, and on the same day they would have received it if it had been sent by overnight mail (because April 22nd was the next business day), the defective service did not appear to result in any prejudice to the opposing party. Additionally, ICE received the request for review in time to file a timely response, and did not raise the issue of defective service in its response.[3] Therefore, the request for review was accepted and considered, along with ICE's response.[4]

Nevertheless, parties must take care to properly file and serve requests for review (and all briefs and other related documents) according to the expedited service requirements in 28 C.F.R. § 68.54(c) and § 68.6(c). Because review by the Chief Administrative Hearing Officer must be conducted within strict, short deadlines, *see* 28 C.F.R. §§ 68.53(c), 68.54(b), and 68.54(d), there is rarely sufficient time for parties to correct improper service without prejudice to the other party. Therefore, it is essential that all parties file and serve all requests for review and associated documents according to the expedited filing and service requirements so that the Chief Administrative Hearing Officer has sufficient time to consider the materials submitted and the opposing party has sufficient time to file any responsive briefs or other documents. Furthermore, filing a document with the court by expedited means, while serving the opposing party by regular or certified mail, could put the opposing party at a relative disadvantage with regard to the amount of time it has to review and respond to the filing. Therefore, such a practice is not appropriate, particularly by a member of the bar. *See In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, 729, 731 (2000) (noting that it is "simply unacceptable" to submit documents to this office by expedited means "without showing similar expedited service to the other party.").

III. DISCUSSION

A. Whether Interlocutory Review Is Appropriate

The Chief Administrative Hearing Officer may only review and modify or vacate interlocutory orders issued by the ALJ when specific conditions are met. The party seeking

[3] Service of ICE's response to the request for review also appears to have been defective. It was not filed with the Chief Administrative Hearing Officer, but rather only with the ALJ, and does not indicate the method of service. Additionally, it appears to have been served on Respondent by regular mail, rather than facsimile, same-day hand delivery, or overnight delivery.

[4] In cases involving defective service, typically one instance of defective or improper service will not warrant dismissal. *Cf. Holguin v. Dona Ana Fashions*, 4 OCAHO no. 605, 142, 146 (1994) (deeming a complaint abandoned on the third instance in which the complainant failed to certify service on respondent, after multiple warnings by the ALJ).

review of an interlocutory order must show that: (1) "the order concerns an important question of law on which there is a substantial difference of opinion;" and (2) "an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy." 28 C.F.R. § 68.53(a)(1).[5]

In its brief, Respondent argues persuasively that the appropriate pleading standard in OCAHO cases is an important question of law on which there is a substantial difference of opinion. The pleading standard in OCAHO cases is certainly an important threshold issue that would impact all complaints in OCAHO cases. Furthermore, as Respondent points out, recent Supreme Court case law construing the pleading standard in cases conducted under the Federal Rules of Civil Procedure has created some confusion regarding the application of the federal pleading standard in the context of motions to dismiss, both in federal court and in administrative adjudications such as this one. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Respondent argues that the ALJ's decision in *United States v. Mar-Jac*, 10 OCAHO no. 1148 (2012), which declined to follow the federal rule pleading standard, was inconsistent with federal case law and previous OCAHO case law on the question of the pleading standard in OCAHO cases, creating a substantial difference of opinion on this important legal question.

Respondent also argues that an immediate appeal is necessary here because subsequent review will be an inadequate remedy. Indeed, if the complaint was insufficient to state a claim upon which relief may be granted, such a determination should be made before subjecting the parties to potentially lengthy and costly discovery and/or a full hearing.

Accordingly, the Chief Administrative Hearing Officer has carefully reviewed the Respondent's and Complainant's submissions and the record in this case to determine whether the April 11 Order by the ALJ denying Respondent's Second Motion to Dismiss was correct.

B. Whether the ALJ Order Denying Respondent's Motion to Dismiss Was Correct

Determining whether the ALJ's denial of Respondent's motion to dismiss was correct requires a two-step inquiry: first, what is the appropriate pleading standard in OCAHO cases?; and second, did DHS's complaint satisfy that pleading standard?

1. Pleading standard in OCAHO cases

In *Mar-Jac*, the ALJ addressed the applicability in OCAHO cases of the federal pleading standard as set forth in *Iqbal*, *Twombly*, and other federal case law. The *Mar-Jac* opinion noted that, although this forum may look to the Federal Rules for guidance on questions not covered by OCAHO's regulations, it is not bound by those rules, nor is it bound by case law construing the Federal Rules. *Mar-Jac*, 10 OCAHO no. 1148, 8-9; *see also* 28 C.F.R. § 68.1 ("The Federal

[5] OCAHO regulations also provide that CAHO review of an ALJ's interlocutory order "will not stay the proceeding unless the Administrative Law Judge or the Chief Administrative Hearing Officer determines that the circumstances require a postponement." 28 C.F.R. § 68.53(b). Given the relatively brief time allowed for CAHO review, *see* 28 C.F.R. § 68.53(c), a stay of the proceedings was not required here, although a stay was requested by Respondent. Furthermore, although Respondent also requested oral argument and the regulations provide that the CAHO may conduct oral argument in person or telephonically, 28 C.F.R. § 68.54(b)(2), the parties' filings, along with previous filings by both parties on the questions of pleading and dismissal, were sufficiently thorough and the legal and factual issues adequately clear to make oral argument unnecessary.

Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules."). OCAHO's regulations explicitly address the pleading requirements in OCAHO cases. These requirements, while similar to the requirements in the Federal Rules, are not identical.

OCAHO's regulations require, in relevant part, that the complaint set out "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3). The parallel Federal Rule requires that the pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While certain elements of these two standards are substantially similar (i.e., "clear and concise" and "short and plain" statements), the thrust of the two standards is substantially different. OCAHO's rule requires only that the complainant set out facts "for each violation alleged to have occurred." The federal standard, by contrast, requires that the "short and plain statement of the claim" show that "the pleader is *entitled* to relief." *Id.* This language regarding "entitlement" to relief was central to the Court's decisions in *Iqbal* and *Twombly*. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions."). Therefore, the federal pleading standard, particularly as interpreted in the aforementioned Supreme Court cases, establishes a different standard for pleadings than is required by OCAHO's regulations. Additionally, as *Mar-Jac* explains, unlike complaints filed in district courts, every complaint filed before OCAHO "has already been the subject of an underlying administrative process," in this case in the form of an ICE inspection, and thus an OCAHO complaint "will ordinarily come as no surprise to a respondent that has already participated in the underlying process." *Mar-Jac*, no. 1148, 9. Accordingly, *Mar-Jac* was correct in declining to adopt the federal pleading standard articulated in *Iqbal* and *Twombly* in OCAHO cases given the difference in the two rules and the different circumstances in which OCAHO complaints arise.

2. Whether ICE's complaint satisfied that pleading standard

As previously mentioned, to satisfy the standard for pleading in OCAHO cases, the complaint must contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3). ICE's amended complaint, with the attached (and complete) Notice of Intent to Fine, satisfies the pleading standard, and denial of the motion to dismiss was proper.

For the named employee in Count I (alleging a violation of 274A(a)(1)(B)), the amended complaint identifies the employment eligibility verification document proffered by the employee and the document's expiration date, and alleges that the employee remained employed by Respondent after the document expired. The amended complaint further alleges that Respondent failed to update and reverify the employee's work authorization on the Employment Eligibility Verification Form I-9 after the document expired. This is clearly sufficient to state a claim under 274A(a)(1)(B).

For each of the employees identified in Count II (alleging violations of 274A(a)(2)), the amended complaint lists the individual's name and approximate date of hire; alleges that on or about September 11, 2009, Respondent became aware that the employee was an alien not authorized for employment in the United States after receiving a Notice of Suspect Documents

from ICE; and further alleges that Respondent continued to employ each individual knowing that the individual was an unauthorized alien with respect to such employment.

These factual allegations in ICE's amended complaint are sufficient to satisfy the requirements of 28 C.F.R. § 68.7(b)(3). ICE has pleaded enough to put the Respondent on notice of the alleged violations and the facts underlying those violations. Indeed, much of the factual information that Respondent alleges is lacking from the amended complaint is information that is within the possession of Respondent, and which ICE would have to obtain from the Respondent. For instance, Respondent argues that ICE has not identified whether each of the named employees in Count II is still employed by Respondent, or specified the termination date for any employee no longer in Respondent's employ. This is information that Respondent has in its possession, and thus Respondent cannot complain that it does not have notice of those particular facts.

Motions to dismiss for failure to state a claim are generally disfavored, and will only be granted in extraordinary circumstances. *See, e.g.*, *Lone Star Indus., Inc. v. Horman Family Trust*, 960 F.2d 917, 920 (10th Cir. 1992); *United States v. Azteca Rest., Northgate*, 1 OCAHO no. 33, 175 (1988). Accordingly, the Chief Administrative Hearing Officer hereby declines to modify or vacate the April 11 order by the ALJ denying Respondent's motion to dismiss. Since the CAHO has not modified or vacated the interlocutory order within 30 days, it is deemed adopted. *See* 28 C.F.R. § 68.53(c).

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Robin M. Stutman
Chief Administrative Hearing Officer