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

JENNYFER JOAQUINA SANTOS, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00008
UNITED STATES POSTAL SERVICE, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(April 7, 2004)

I. SUMMARY

On March 18, 2004, Respondent filed a Motion for Summary Decision (Motion). Complainant, who is proceeding pro se, did not file a response or request an extension of time to do so. For the reasons explicated in this Order, I GRANT Respondent's Motion on the ground that Respondent has properly asserted sovereign immunity, and that I do not have subject-matter jurisdiction.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On November 25, 2003, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), in which she alleges that Respondent committed unfair immigration-related employment practices by failing to hire her because of her citizenship status and national origin, Complaint at page 4, and refusing to accept documentation showing her eligibility to work in the United States. Complaint at page 7. As my office had not received a timely answer, I issued, on January 29, 2004, a Notice of Entry of Default, in which I entered a default similar to that specified in Federal Rule of Civil Procedure 55(a).

Because Complainant had not filed a motion for default judgment, I afforded Respondent until February 23, 2004, to file an answer, along with a pleading demonstrating good cause why the answer was not filed in a timely manner On February 12, 2004, Respondent filed its Answer, accompanied by a Motion Seeking Leave to File an Answer to the Complaint. In setting aside my prior entry of default, I concluded that Respondent's failure to file a timely answer was not willful, Complainant had suffered no prejudice from the delay, and Respondent had adequately contested the allegations in the Complaint and set forth the existence of disputed issues in the case. Order Setting Aside Entry of Default and Granting Respondent's Motion for Leave to File an Answer (Feb. 27, 2004).

In its Answer, Respondent denies that it discriminatorily failed to hire Complainant. Answer at page 3, ¶ 1. Respondent states that it is without knowledge or information sufficient to form a belief as to whether Complainant is lawfully admitted for permanent residence in the United States and became eligible to apply for naturalization on April 15, 2003, Answer at page 2, ¶ 4, whether Respondent rejected Complainant's Social Security Card bearing the statement "valid for work only with INS authorization," Answer at page 3, ¶ 6, or whether Respondent refused to accept Complainant's documentation. Answer at page 5, ¶¶ 1-4. Respondent further asserts in its affirmative defenses that OCAHO lacks jurisdiction over the Complaint. Answer at page 6.

On March 18, 2004, Respondent filed the Motion currently before this Court with an attached affidavit and exhibit. According to the certificate of service, Respondent's Motion was served by certified mail on Complainant on March 16, 2004. Under 28 C.F.R. § 68.11(b) (2003), Complainant had ten days after the date of service to file her response to this Motion. However, because the Motion was served by mail and Complainant had the right "to take some action within a prescribed period after the service" of the Motion, 28 C.F.R. § 68.8(c)(2) (2003) provided Complainant an additional five days in which to file her response. Therefore, Complainant had until March 31, 2004, to file her response to Respondent's Motion. She has not filed a response and has not requested an extension of time in which to file.

Also, pursuant to 28 C.F.R. § 68.17 (2003), the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed, on March 19, 2004, a Motion for Leave to File Brief as Amicus Curiae. OSC asserted that it had a substantial interest in the determination of the Respondent's summary decision motion, because the decision "may affect the viability of other charges and complaints brought under the antidiscrimination provision, and may therefore substantially impact the Office of Special Counsel's enforcement responsibilities under the statute." Motion for Leave to File Brief as Amicus Curiae at 1. However, on March 26, 2004, OSC reversed its position by filing a Motion to Withdraw Motion for Leave to File Brief as Amicus Curiae. On April 6, 2004, I granted OSC's Motion to Withdraw its request to file an amicus brief.

III. STANDARDS GOVERNING A MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND A MOTION FOR SUMMARY DECISION

Under 28 C.F.R. § 68.57 (2003), 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 New York, case law precedent from the United States Court of Appeals for the Second Circuit is pertinent. Likewise, relevant OCAHO case law precedent governs the instant proceeding.

While Respondent's Motion is styled as one for summary judgment, it arguably is a "speaking motion" under Federal Rule of Civil Procedure 12(b)(1); 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 Westphal v. Catch Ball Products Corp., 953 F. Supp. 475, 477 n.2 (S.D. N.Y. 1997) (citing Exchange National Bank v. Touche Ross & Co., 544 F.2d 1126, 1130-1131 (2d Cir. 1976), cert. denied 469 U.S. 884 (1984)). 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 "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 (2003). Thus, Federal Rule of Civil Procedure 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 judge has reason to question OCAHO's subject-matter jurisdiction. See, e.g., Ruan v. United States Navy, 8 OCAHO 714, 716-717, 2000 WL 773075 *2 (citing Hammoudah v. Rush-Presbyterian-St. Luke's Med. Center, 8 OCAHO 254, 256-257, 1998 WL 1085948, *2; Artioukhine v. Kurani, Inc. d/b/a Pizza Hut, 1998 WL 356926, *3-4 (OCAHO) (unpublished); Boyd v. Sherling, 6 OCAHO 1113, 1119, 1997 WL 176910, *5; Caspi v. Trigild Corp., 6 OCAHO 957, 960, 1997 WL 131354, *2-3).

The United States Court of Appeals for the Second Circuit treats speaking motions as motions for summary judgment. Westphal, supra, at 477 n.2; see also Fed. R. Civ. Proc. 12(c). Similarly, OCAHO judges treat motions to dismiss as motions for summary decision when the proponent relies upon matters outside the pleadings. United States v. Italy Department Store, Inc., 6 OCAHO 229, 231, 1996 WL 312113, *2; Flores v. Logan Foods Co., 6 OCAHO 545, 549, 1996 WL 525690, *3. Accordingly, I adjudicate Respondent's Motion under the standards governing motions for summary decision.

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. 28 C.F.R. § 68.38(c) (2003); Aguirre v. KDI American Products, Inc., 6 OCAHO 632, 640, 1996 WL 637474, *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. Aguirre, supra (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)).

IV. ANALYSIS

Respondent argues that dismissal is appropriate because it is part of the United States Government, Motion at 5 (citing United States Postal Service v. Flamingo Industries (USA) Ltd., 124 S.Ct. 1321 (2004)), and the Immigration Reform and Control Act (IRCA), Pub. L. No 99-603, 100 Stat. 3359 (1986), does not contain an express waiver of its sovereign immunity. Motion at 6. Respondent also cites a provision in a USPS Handbook, (attached to the Motion as Exhibit A), which it characterizes as a "regulation," and which provides that an individual must either be a United States Citizen or a permanent resident alien to qualify for employment with USPS. Respondent only cites to a Handbook and not the Code of Federal Regulations. Although Respondent does not cite the cases, there is both OCAHO and federal circuit case law supporting Respondent's position that this qualifies as an exception under 28 U.S.C. § 1324b(a)(2)(C). See Tovar v. United States Postal Service, 1OCAHO 1720, 1727 (1990), 1990 WL 512217, * 8, rev'd on other grounds, 3 F.3d 1271 (1993); Sosa v. United States Postal Service, 1 OCAHO 752, 759-60 (1989), 1989 WL 433966 * 8-9.

Respondent further suggests that because Complainant had a social security card with the notation "valid for work only with INS authorization," Complainant must have been lawfully admitted to the United States on a temporary basis. Motion at 2. For purposes of its Motion, Respondent concedes that Complainant sought employment with Respondent and was denied employment based on her temporary resident status. Motion at 3.

A. Complainant's Employment Status

Section 1324b(a)(1) prohibits, as an unfair immigration-related employment practice, employer discrimination in hiring, firing, recruitment, or referral for a fee, "against any individual," other than an unauthorized alien, because of such individual's (1) national origin, or (2) in the case of a "protected individual," as defined at § 1324b(a)(3), because of such individual's citizenship status. Thus, to maintain a citizenship status discrimination claim, an individual must be a "protected individual." See Hsieh v. PMC Sierra, Inc., 9 OCAHO Ref. No. 1100, 18-19, 2003 WL 22519502, *16-17. "Protected individuals" include United States citizens and nationals, lawful permanent residents, lawful temporary residents under 8 U.S.C. § 1160(a) or 1255a(a)(1), and refugees and asylees. 8 U.S.C. §§ 1324b(a)(3)(A)-(B); see also Ondina-Mendez v. Sugar Creek Packing Co., 9 OCAHO Ref. No. 1085, 12, 2002 WL 31663164, *10.

Complainant asserts in her Complaint that she is a lawful permanent resident, Complaint at page 2, and Respondent in its Answer to the Complaint stated that it was without knowledge or information sufficient to form a belief as to the truth of this allegation. Answer at page 2, ¶4. Moreover, even if Respondent had expressly denied the truth of that allegation, for the purpose of deciding this motion, I must assume that Complainant's assertion as to her status is true. Thus, for the purpose of this motion, Complainant's status will be considered that of a lawful permanent resident of the United States.

However, a lawful permanent resident loses "protected individual" status if that individual fails to apply for naturalization within six months of the date he or she first becomes eligible to apply. 8 U.S.C. § 1324b(a)(3)(B)(i). Here, Respondent has failed to show that Complainant lacked "protected individual" status under 8 U.S.C. § 1324b when she applied for a position with Respondent or that she lost "protected individual" status by failing to apply for naturalization within six months of the dates she first became eligible to do so. Therefore, I reject Respondent's assertion that Complainant was not qualified to work for Respondent. At best, Complainant's work status is a disputed issue of material fact, which would preclude the entry of summary decision. See 28 C.F.R. § 68.38(c) (2003); Aguirre, supra, at 640, *7. Given that conclusion, I do not need to consider whether Respondent's policy set forth in the USPS Handbook of hiring only citizens and lawful permanent residents qualifies for the exception set forth in 28 C.F.R. § 1324b(a)(2)(C).

B. Sovereign Immunity

Next, I must determine whether dismissal is appropriate on sovereign immunity grounds. Under the Postal Reorganization Act of 1971 (PRA), 39 U.S.C. § 101, et. seq., the United States Postal Service (USPS) is given the power "to sue and be sued in its official name." 39 U.S.C. § 401(1).

Initially, I would note that complaints have been filed in the past with OCAHO against the USPS pursuant to 28 U.S.C. § 1324b, and apparently the USPS either did not assert sovereign immunity or the cases were not dismissed on that basis.
See, e.g., Tadesse v. United States Postal Service, 7 OCAHO 936 (1997), 1997 WL 1051473; Adepitan v. United States Postal Service, 3 OCAHO 201 (1991), 1991 WL 531907; Suchta v. United States Postal Service, 2 OCAHO 231 (1991), 1991 WL 531750; Huang v. United States Postal Service, 2 OCAHO 99 (1991), 1991 WL 531583; Tovar v. United States Postal Service, supra; Sosa v. United States Postal Service, supra. In a prior decision that was not published, the USPS did raise the defense of sovereign immunity, but because I decided the case in favor of USPS on other grounds, I did not rule on the issue of sovereign immunity. Parham v. United States Postal Service, OCAHO Case No. 97B00122 (November 13, 1997), at p. 7.

Although these prior OCAHO cases were not decided on the basis of sovereign immunity, a recent United States Supreme Court decision cited by Respondent in its motion considerably strengthens its position that the doctrine of sovereign immunity insulated the United States Postal Service from cases brought pursuant to Section 1324b. In United States Postal Service v. Flamingo Industries (USA) Ltd., 124 S.Ct. 1321, 1329-1330 (2004) the Supreme Court held that the waiver of the USPS' sovereign immunity, contained in Section 401 of the Postal Reorganization Act (PRA), 39 U.S.C. § 401, does not suffice by its own terms to subject the USPS to antitrust liability under the Sherman Act. To determine whether the USPS enjoyed immunity from federal antitrust laws, the Court employed a two-part test: (1) "whether there is a waiver of sovereign immunity for actions against the Postal Service;" and (2) "whether the substantive prohibitions of the Sherman Act apply to an independent establishment of the Executive Branch of the United States." Id. at 1327. The Court found a waiver of sovereign immunity in § 401 of the PRA, which "makes the Postal Service amenable to suit, as well as to the incidents of judicial process." Id. (internal citations omitted). The Court noted, however, that no provision of the Sherman Act imposes liability on the USPS. See id. at 1327-1328. Similarly, while the PRA refers to several federal statutes and makes the USPS exempt from some and subject to others, it does not mention the Sherman Act or antitrust laws. Id. at 1329. Therefore, the Court concluded that "absent an express statement from Congress that the Postal Service can be sued for antitrust violations despite its status as an independent establishment of the Government of the United States, the PRA does not subject the Postal Service to antitrust liability." Id.

In this case, I must determine: (1) whether there is a waiver of sovereign immunity for actions against the USPS; and (2) whether the substantive prohibitions of the IRCA apply to the USPS, which is an independent establishment of the Executive Branch of the United States. See id. at 1327. As stated previously, § 401 of the PRA constitutes a waiver of the USPS' sovereign immunity.

Id. Regarding the second part, the substantive prohibitions of the IRCA and other relevant statutes do not seem to apply to the USPS. There is nothing in the IRCA subjecting the USPS to liability under its provisions or otherwise retracting federal immunity. See Kasathko v. Internal Revenue Service, 6 OCAHO 176, 183, 1996 WL 281945, *6; Ruan v. United States Navy, 8 OCAHO 714, 721, 2000 WL 773075, *6. In contrast, other statutes, including Title VII, 42 U.S.C. § 2000e-16(a), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a), include express language permitting the USPS to be sued under those laws. See also Loeffler v. Frank, 486 U.S. 549, 558-559 (1988) (section 2000e-16 of Title VII brings federal employees, including employees of the USPS, within the ambit of Title VII). Moreover, the PRA mentions several federal statutes, specifying that the USPS is exempt from some and subject to others, but does not include the IRCA in this listing. See 39 U.S.C. §§ 409-410. This exclusion suggests that Congress intended not to expose the USPS to liability under the IRCA. See Flamingo Industries (USA) Ltd., supra, at 1329 (absent an express statement from Congress that the USPS can be sued for antitrust violations, the PRA does not subject the USPS to antitrust liability).

Accordingly, I conclude that although Respondent has waived its sovereign immunity in § 401 of the PRA, OCAHO lacks subject-matter jurisdiction to adjudicate this action because the substantive provisions of the IRCA and the PRA do not extend coverage to Respondent.

However, I emphasize that this is a close decision. Flamingo Industries (USA) Ltd. was an antitrust case, involving standards of law that differ from those in the employment discrimination context. In concluding that the USPS is not subject to federal antitrust laws, the Supreme Court noted that the USPS has different goals, obligations, and powers from private market participants. Flamingo Industries (USA) Ltd., supra, at 1329. Specifically, the USPS does not seek profits, is charged with universal mail delivery, and most recently, has special public responsibilities concerning national security. Id. It is questionable whether an exemption from the anti-discrimination provisions of the IRCA would advance the USPS' goals and obligations. Moreover, in this case I have not received any input from Complainant, who is proceeding pro se, or from OSC, which withdrew its request to file a brief as amicus curiae. Indeed, it is unfortunate that OSC, the government agency charged with enforcing the provisions of 28 U.S.C. §1324b, did not wish to be heard on the important issue of whether the United States Postal Service enjoys immunity from the employment discrimination provisions of Section 1324b. Thus, while the instant decision is supported by the language of the IRCA, the PRA, and Flamingo Industries (USA) Ltd., I may reconsider my ruling in a future case.

V. CONCLUSION

Although the PRA, 39 U.S.C. § 101, et. seq., waives the immunity of the United States Postal Service from suit by giving it the power "to sue and be sued in its official name," 8 U.S.C. § 1324b does not contain a waiver of sovereign immunity like the ones found in Title VII, 42 U.S.C. § 2000e-16, and the ADEA. 29 U.S.C. § 633a(a). Accordingly, Respondent is shielded by the sovereign immunity of the United States, and OCAHO lacks subject-matter jurisdiction over this action. Respondent's Motion is GRANTED.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE