

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

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2021A00027
MRD LANDSCAPING & MAINTENANCE,)	
CORP.,)	
)	
Respondent.)	
<hr style="width: 40%; margin-left: 0;"/>)	

Appearances: Martin Celis, Esq., for Complainant
Cynthia Canales, Esq., for Respondent

ORDER GRANTING MOTION TO AMEND COMPLAINT AND DIRECTING
RESPONDENT TO FILE ANSWER

I. PROCEDURAL HISTORY

On April 12, 2021, the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, MRD Landscaping & Maintenance, Corp., violated the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. The complaint reflects that DHS served Respondent with a Notice of Intent to Fine (NIF) on October 1, 2019, and Respondent thereafter timely requested a hearing.

On May 21, 2021, Respondent filed an answer to the complaint. By Order dated June 30, 2021, the Court directed the parties to file prehearing statements and make initial disclosures. Complainant filed its prehearing statement on July 26, 2021. Respondent then filed its prehearing statement on August 31, 2021. DHS also filed a Motion for Leave of Court to Amend Complaint, and an Amended Complaint Regarding Unlawful Employment. Complainant seeks leave of court to amend its complaint to “correct a typographical error in the charging language of

the original complaint, specifically removing ‘timely’ from Count II, failure to timely prepare.” Mot. for Leave of Ct. to Amend Compl. 3. Before filing the motion, Complainant’s counsel sought to obtain Respondent’s consent to the amendment but represents in his motion that he did not receive a response from Respondent’s counsel. *Id.* at 1-2.

Under OCAHO’s Rules of Practice and Procedure for Administrative Hearings, located at 28 C.F.R. part 68 (2021), Respondent had ten days to file a response to Complainant’s motion. *See* 28 C.F.R. § 68.11(b). Respondent did not file a response to DHS’s motion, and Complainant’s Motion for Leave of Court to Amend Complaint is ripe for resolution.

II. LEGAL STANDARDS

28 C.F.R. § 68.9(e) permits a complainant to amend its complaint before the issuance of a final order “[i]f a determination of a controversy on the merits will be facilitated thereby” and “upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties[.]” This rule is analogous to, and was modeled after, Federal Rule of Civil Procedure 15(a). *See United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998).¹ Pursuant to Rule 15(a)(1), a party may amend its complaint once as a matter of course within twenty-one days after serving it, or twenty-one days after service of an answer or a motion under Rule 12(b), (e), or (f), whichever is earlier. In all other circumstances, a party may amend its complaint only with the opposing party’s written consent or by seeking leave of court. Fed. R. Civ. P. 15(a)(2).

In deciding whether to grant or deny leave to amend a complaint under Federal Rule of Civil Procedure 15(a), it is appropriate for the Court to look for

¹ Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision, followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the relevant volume. Pinpoint citations to OCAHO precedents after volume eight, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” the LexisNexis database “OCAHO,” and on the United States Department of Justice website: <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

guidance in federal case law. Like the United States Court of Appeals for the Fifth Circuit, the federal judicial circuit in which this case arises, the Court is guided by the United States Supreme Court's reasoning in *Foman v. Davis*, 371 U.S. 178 (1962). See, e.g., *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864-65 (5th Cir. 2003) (discussing the Supreme Court's analysis in *Foman v. Davis* and finding no abuse of discretion in the district court's denial of the motion to amend). Specifically, the Court will give leave to amend freely "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. at 182. This is consistent with the language of Federal Rule of Civil Procedure 15(a)(2) declaring that leave to amend "shall be freely given when justice so requires." Indeed, the Fifth Circuit has noted that Rule 15(a) "evinces a bias in favor of granting leave to amend." *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. Am. Co.*, 195 F.3d 765, 770 (5th Cir. 1999) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981)).

III. DISCUSSION

Here, Complainant seeks to amend its complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). Mot. for Leave of Ct. to Amend Compl. 2. Rule 15(a)(2) provides that a party may amend its complaint only with the opposing party's written consent or leave of court. Complainant states that it sought, but was unable to obtain, Respondent's written consent to amend the complaint in this matter. Accordingly, Complainant seeks leave of Court to amend its complaint. For the following reasons, the Court now grants Complainant's Motion for Leave of Court to Amend Complaint.

The Court finds that none of the aforementioned considerations in *Foman v. Davis*, 371 U.S. at 182—undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, and futility of amendment—are present here. Complainant seeks to amend its complaint to remove the word "timely" from Count II. Mot. for Leave of Ct. to Amend Compl. 3. Count II of the complaint alleges that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by "failing to *timely* prepare and/or present the Employment Eligibility Verification Form (Form I-9) for thirty-nine (39) employees" Compl. 3 (emphasis added). According to Complainant, the NIF bears the correct language, namely, "failure to prepare," but the complaint inadvertently included the word "timely" in the charge. Mot. for Leave of Ct. to

Amend Compl. 3. Since the NIF contains the correct charging language, Complainant asserts that amending the complaint with language consistent with the NIF will not result in delay or undue prejudice to Respondent. *Id.* The Court agrees. Respondent has had notice of the correct charging language since October 1, 2019, when it was served with the NIF. Thus, Respondent had notice of the charge in Count II more than eighteen months before the filing of the complaint in this matter.

Although not discussed in Complainant's motion, Complainant also seeks to amend the complaint by including a sentence at the end of each count that states the civil monetary penalty assessed by DHS. Am. Compl. 3-4. These penalty calculations are consistent with the civil money penalties set forth in the NIF served on Respondent on October 1, 2019, and, for the same reasons discussed above, the Court sees no undue prejudice or delay to Respondent by their inclusion in the amended complaint. Further, this is the first, and only, amendment of the complaint sought by Complainant, and the parties are still in the early stages of the proceedings. The Court has yet to hold a prehearing conference to set a case schedule, and neither party has filed a dispositive motion. Although Respondent was put on notice of Complainant's motion to amend the complaint, it did not state a position as to the amendment to the complaint when contacted by Complainant, nor did it file a response in opposition to the motion. *See United States v. Sal's Lounge*, 15 OCAHO no. 1394a, 4 (2021) (granting motion to amend filed early in the proceedings to align complaint with the NIF where the respondent did not file a response arguing against the amendment). Lastly, the Court finds no evidence that allowing the amendment will result in prejudice to the public interest. *See* 28 C.F.R. § 68.9(e). Rather, it concludes that permitting the amendment will facilitate "a determination of a controversy on the merits" in this case. *Id.* Therefore, the Court gives leave to amend the complaint. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."). Respondent shall file an answer to the amended complaint.

IV. ORDERS

IT IS SO ORDERED that Complainant's Motion for Leave of Court to Amend Complaint is GRANTED. The Amended Complaint Regarding Unlawful Employment filed July 26, 2021, shall serve as the operative complaint in this matter.

IT IS FURTHER ORDERED that Respondent shall file an answer to the amended complaint within twenty days of the date of issuance of this Order.

ENTERED:

Honorable Carol A. Bell
Administrative Law Judge

DATE: December 17, 2021