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

April 12, 2016

TERRI ANN JABLONSKI, Complainant, v. ROBERT HALF LEGAL A/K/A ROBERT HALF INTERNATIONAL STOCK SYMBOL RHI, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 15B00021

FINAL DECISION AND ORDER OF DISMISSAL

Appearances
Maria Jablonski
for the complainant

Charles F. Walters
Christine M. Constantino
for the respondent

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2012). Terri Ann Jablonski, a citizen of the United States, filed a pro se complaint on January 14, 2015, alleging that Robert Half Legal discriminated against her on the basis of her citizenship and national origin by failing to hire her for various paralegal positions.[1] Robert Half International, Inc. (Robert Half or the company) filed an answer denying the material allegations

[1] The complaint was accompanied by approximately fifty-four pages of attached materials. OCAHO rules provide that a complaint pursuant to § 1324b must be accompanied by a copy of the charge the individual filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices, and a copy of the Special Counsel's letter of determination. 28 C.F.R. § 68.7(c). No other attachments are sought or encouraged by the rule.

and raising affirmative defenses, together with a simultaneous motion to dismiss Jablonski's complaint based on one of those defenses, failure to state a claim upon which relief may be granted. Jablonski then filed "Complainant's Supplemental Pleading and Affidavit, and Reply to Respondent's Affirmative Defenses" [2] (with attachments), together with "Complainant's Memorandum of Law and 1) Motion for Default Judgment, 2) Complainant's Voluntary Motion to Dismiss Complainant's National Origin Discrimination Claim Without Prejudice, 3) Complainant's Response to Respondent's Motion to Dismiss Unfair Immigration Related Employment Practices and 4) Motion to Supplement the Pleadings" (with attachments). Robert Half filed its opposition to Jablonski's motions for default and for supplementation of the complaint, followed by a motion for leave to amend the company's answer in response to Jablonski's supplemental pleading.

On April 6, 2015, counsel filed an appearance on Jablonski's behalf, together with a reply to Robert Half's opposition to additional pleadings,[3] as well as an opposition to Robert Half's motion for leave to amend its answer. Both parties filed prehearing statements, after which Jablonski filed a revised prehearing statement. Jablonski then filed a motion to compel discovery,[4] and what is captioned as a "Motion for Leave to File Second Amended Complaint." Robert Half filed responses in opposition to both these motions. Prior to the convening of a scheduled telephonic case management conference, Jablonski also filed a "Summary of Complainant's Case Management and Discovery Need to Discuss at July 1 Teleconference."

At the ensuing telephone conference, I denied Jablonski's motion for default as well as her motion to supplement her pleadings and/or file amendments, but granted her motion to dismiss her allegation of discrimination on the basis of national origin. I advised the parties that the rules applicable in this proceeding are those found at 28 C.F.R. pt. 68, and not the Federal Rules of Civil Procedure. I also advised them further that even under OCAHO's minimal standards of

[2] A right of reply to affirmative defenses is authorized pursuant to 28 C.F.R. § 68.9(d), but amendments and supplemental pleadings are permitted only by leave of the administrative law judge and only under certain conditions. 28 C.F.R. § 68.9(e). While this filing purports to reserve a right to supplement or amend the complaint at will, there is no such right to be reserved.

[3] The reply purports to be filed pursuant to 28 C.F.R. § 68.11, but 28 C.F.R. § 68.11(b) expressly provides that while a party opposing a motion has the right to file a response to the motion, no reply to a response or further responsive document is permitted unless the administrative law judge provides otherwise. No authorization was sought or granted for this filing.

[4] OCAHO rules require a motion to compel discovery to include, inter alia, the response or objections of the party upon whom the request was served. 28 C.F.R. § 68.23(b)(2). This motion did not, and is accordingly defective.

notice pleading it was not clear that Jablonski's complaint stated a claim upon which relief may be granted. Robert Half's motion to dismiss and Jablonski's motion to compel discovery were taken under advisement.

Because of a lack of clarity about the status of Jablonski's underlying charge, I indicated to the parties my intent to pose written inquiries to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC or Special Counsel) as to whether the agency ever accepted Jablonski's charge within the meaning of 28 C.F.R. § 44.301, whether Jablonski was notified of its receipt within the meaning of 28 C.F.R. § 44.301(a), and whether the ten-day notice was served on the respondent in accordance with 28 C.F.R. § 44.301(e). After these inquiries were issued, Jablonski filed "Complainant's Objection to the July 22, 2015 Order of Inquiry to OSC," (with approximately thirty-three pages of attachments),[5] followed by "Complainant's Additional Exhibit to Add to the Objection to the July 22 Order of Inquiry." Shortly thereafter I issued a Stay of Proceedings advising the parties to make no additional filings until further notice. After OSC filed its responses to my inquiries, Jablonski filed a "Motion to Lift the Temporary Stay for Permission to Reply to OSC's Response to the Order of Inquiry," and a "Reply to the OSC's Response to the Order of Inquiry and Motion to Excuse Any Condition Precedent on the Basis of Waiver, Equity & Futility."[6]

This pleading history is set forth at length to facilitate the parties' understanding of which rules apply in this proceeding, what those rules do and do not permit, and what those rules affirmatively require. While some leeway in pleading is generally afforded to pro se parties, *United States v. Union Lakeville Corp*., 8 OCAHO no. 1019, 277, 280 (1998),[7] pleadings filed

[5] OCAHO rules make no provision for the filing of objections to orders issued by the administrative law judge.

[6] Both these documents purport to be filed "under Federal Rule of Civil Procedure (sic) and 28 C.F.R. § 68.11." The generalized reference here to "Federal Rule" is so vague as to be meaningless. As was explained to the parties at the telephonic prehearing conference, the Federal Rules have no direct application in this forum, although they may be used as guidance under appropriate circumstances, 28 C.F.R. § 68.1. And while § 68.11 authorizes a party to respond to an opposing party's motion, OSC is not a party to this proceeding and did not file any motions.

[7] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been 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

by members of the bar are expected to conform to traditional standards of practice and professionalism. *United States v. Quickstuff, LLC*, 11 OCAHO no. 1265, 7 (2015) (*citing United States v. Patrol & Guard Enters., Inc*., 8 OCAHO no. 1052, 801, 805 (2000)). This means that attorneys appearing in this forum are expected to make reasonable efforts to ascertain and follow the applicable rules.

As previously explained, OCAHO rules provide that the Federal Rules may be used "as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. This means that in situations that are covered by OCAHO rules, by the APA, or by other authority, the Federal Rules have no application at all, controlling or otherwise. *See United States v. Ojeil & Ishk*, 7 OCAHO no. 976, 904, 907-08 (1997) (denying protective order because, unlike twenty-five interrogatory limit in Fed. R. Civ. P. 33(a), OCAHO rules impose no numerical limit); *see also United States v. Ulysses, Inc.*, 2 OCAHO no. 390, 732, 735-36 (1991) (stating that reference to the Federal Rules is not in order when the matter is covered by OCAHO rules, citing *United States v. Nu Look Cleaners of Pembroke Pines, Inc*., 1 OCAHO no. 274, 1771, 1780 (1990) (action by the Chief Administrative Hearing Officer vacating Administrative Law Judge's order purporting to follow Federal Rules)).

II. BACKGROUND INFORMATION

Jablonski's complaint asserts that she filed a charge with OSC on October 10, 2014, and that OSC sent her a letter on October 24, 2014, "telling me that I can now file my own complaint with OCAHO." Examination of the OSC letter accompanying her complaint, however, reflects that the letter does not tell Jablonski that she can file her own complaint with OCAHO; it says that on October 5, 2014, OSC sent Jablonski a letter requesting specific information, and that the agency also sent her an email. The letter says further that Jablonski responded to the email, and based on the information she provided OSC decided to dismiss her charge for lack of reasonable cause.

Jablonski's charge asserts that Robert Half, a legal recruitment company in New York City, discriminated against her on the basis of her United States citizenship. It makes no allegation with respect to her national origin. In response to the charge form's request to explain in detail what happened, Jablonski answered by stating that Robert Half,

> . . . failed to place a US worker who applied (myself). I have been consistently applying for paralegal jobs since 2006 . . . on their websites and other websites. I interviewed at both locations and

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database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

> they made me fill out paperwork after sending my resume to their clients law firms or corporate law dep't employer. They filled the jobs with someone else. They refused to disclose both the employer law firm and/or corporate law dep't and job applicant. This leads me to either believe they are hiding an illegal and/or visa applicant and/or are fraudulently posting jobs that are not filled on their websites and other websites. I keep applying for jobs but no one places me in any of them. They also have ignored me. Are they really in business to place paralegals or to sell stock?

Regulations governing the filing of OSC charges provide that when a charging party's submission is inadequate to state a charge, OSC will notify the charging party that additional information is needed, and the submission is deemed to be a charge as of the date that the requested information is received in writing. 28 C.F.R. § 44.301(c)(1). OSC then serves notice of the charge upon the respondent within ten days of its receipt, 28 C.F.R. § 44.301(e), undertakes an investigation, 28 C.F.R. § 44.302, and determines within 120 days whether to file a complaint. 28 C.F.R. § 44.303(a). If OSC does not file a complaint within that time, the Special Counsel will notify the person making the charge, and that person may file a complaint within ninety days of the receipt of the notice. *Id.* § 44.303(c). That notice is also referred to as a "90 day letter" and is the functional equivalent of a "right-to-sue" letter from the Equal Employment Opportunity Commission (EEOC).

The governing statute provides that OSC shall investigate each charge received. 8 U.S.C. § 1324b(d). Because there apparently was no investigation and no "90 day letter" accompanied Jablonski's complaint, it was unclear at this point that Jablonski ever completed her charge against Robert Half. I therefore issued inquiries to OSC to request clarification as to the filing of the charge. OSC answered all three of the inquiries in the negative, indicating that the agency did not accept the charge within the meaning of 28 C.F.R. § 44.301, did not notify Jablonski of its receipt within the meaning of 28 C.F.R. § 44.301(a), and did not serve the ten-day notice on the respondent in accordance with 28 C.F.R. § 44.301(e).

If Jablonski's charge was not accepted by OSC, it appears that at least one condition precedent to the filing of Jablonski's complaint was not satisfied. The governing statute provides that no complaint respecting an unfair immigration-related employment practice may be filed unless a charge is filed with the Special Counsel within 180 days of the practice. 8 U.S.C. § 1324b(d)(3). Filing a timely charge is thus a condition precedent to having an actionable claim. *Cf. Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015) (Title VII requires exhaustion of administrative remedies). In addition to the filing of a timely charge, other statutory conditions also include the service of notice of the charge on the person or entity involved within ten days. 8 U.S.C. § 1324b(b)(1). In *United States v. Frank's Meat Co.*, 3 OCAHO no. 513, 1094, 1102-04 (1993), where OSC inadvertently did not serve the respondent with notice of the charge until seventeen days after the notice should have been received, the administrative law judge declined

to dismiss the complaint on those grounds, but nothing in this case suggests that notice to the respondent need not be given at all. *Cf. National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (requirements include not only a timely charge, but also service of notice upon the person against whom the charge is made).

The basic facts asserted in Jablonski's OSC charge are that she is a United States citizen who has applied for many jobs on Robert Half's websites and has not been hired for those jobs. She says she is unaware of who Robert Half's clients are, and unaware of who, if anyone, was hired for the posted jobs. Jablonski says she believes based on those facts that Robert Half is hiring illegal or foreign workers, or is fraudulently posting jobs that are not filled. Jablonski's OCAHO complaint adds in response to a question as to the reasons she was not hired, "I have tried to obtain this information but the company won't tell me why I wasn't hired. I mailed them a letter asking for this information. They refuse to tell me. I have not heard back from them."

III. APPLICABLE STANDARDS

That OCAHO jurisprudence has declined to accept the rigorous pleading standards demanded by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007), *see United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 9 (2012), does not mean that this forum has no pleading standards. Our rules require that a complaint include a clear and concise statement of facts for each violation alleged to have occurred, 28 C.F.R. § 68.7(b)(3), but neither detailed fact pleading nor evidence pleading is contemplated. *See, e.g., United States v. Capitol Arts and Frames, Inc.*, 1 OCAHO no. 229, 1514, 1516 (1990) (noting that a complaint need not relate the basis of every factual detail and its evidentiary foundation). This approach to § 68.7(b)(3) has been followed in OCAHO jurisprudence regardless of whether the particular complaint arose under the sanctions provisions of § 1324a, *e.g., United States v. Broadway Tire, Inc.*, 1 OCAHO no. 250, 1611, 1612 (1990); under the nondiscrimination provisions of § 1324b, *e.g., United States v. Robison Fruit Ranch, Inc*., 4 OCAHO no. 594, 23, 26-27 (1994), *rev'd on other grounds*, 147 F.3d 798 (9th Cir. 1998); or under the document fraud provisions of § 1324c, *e.g., United States v. Villatoro-Guzman*, 3 OCAHO no. 540, 1400, 1411-13 (1993).

Thus while there is no requirement in a case pursuant to § 1324b that a complainant plead a prima facie case, *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002), a § 1324b complaint must nevertheless contain sufficient minimal factual allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination. In assessing the facial validity of a complaint, well-pleaded factual allegations are taken as true, but a legal conclusion couched as a factual allegation need not be accepted. *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006). While all reasonable inferences are drawn in the complainant's favor, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 115 (2d Cir. 2008), only reasonable inferences will be drawn.

It is well established that charge and complaint filing deadlines are not jurisdictional in nature and are subject to equitable remedies such as waiver, estoppel, and equitable tolling, under appropriate circumstances. *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071-73 (1998). Exhaustion of administrative remedies is not a jurisdictional defect either, and is also subject to equitable defenses, *Fowlkes*, 790 F.3d at 384. Such defenses, however, are sparingly applied. *See Nat'l R.R. Passenger*, 536 U.S. at 113. Exhaustion is not an empty formality; it serves to put a respondent on timely notice of the allegations, and also affords a reasonable opportunity to resolve the matter at the administrative stage. *McCaffrey v. LSI Logic Corp.*, 6 OCAHO no. 867, 481, 489 (1996).

IV. DISCUSSION AND ANALYSIS

At the telephonic prehearing conference, Robert Half's motion to dismiss was converted to a motion for summary decision in order to permit consideration of matters outside the pleadings, *cf. United States v. Split Rail Fence Co.*, 11 OCAHO no. 1216, 3 (2014), and was taken under advisement pending the receipt of additional information. Upon further consideration, I now conclude for the reasons more fully set forth herein that such conversion was improvidently made, that Robert Half's motion to dismiss the compliant should have been granted, and that there is no necessity to reach questions about the effect of any failure to satisfy the conditions precedent to the institution of this proceeding.

For purposes of this analysis I accept as true Jablonski's factual assertions that she has been applying for paralegal jobs on Robert Half's website since 2006, that she has not been hired, and that she does not know which jobs were filled, who Robert Half's clients are, or who, if anyone, was hired for any of the jobs. I do not, however, accept as true her bald conclusion that Robert Half must therefore either be hiding illegal workers/visa applicants or fraudulently posting jobs that are not filled. This conclusion is wholly untethered to the facts.

Speculation and hypotheses cannot stand in or substitute for facts, and even under the most liberal of pleading standards, claims lacking an adequate factual basis are subject to dismissal. The facts Jablonski alleges, leaving aside the conclusions she seeks to draw from them, are simply insufficient as a matter of law to support an inference of discrimination. A complaint must plead facts that could reasonably give rise to the conclusion the complaining party wants to draw, and Jablonski offers no facts that would permit a reasonable factfinder to infer that she was discriminated against on the basis of her United States citizenship. Where a complainant alleges no facts from which an adjudicator could reasonably conclude that the opposing party violated the law, dismissal is the appropriate result.

Ordinarily the dismissal of a complaint at the pleading stage would be accompanied by leave to amend the complaint. As explained in *United States v. Ronning Landscaping, Inc.*, 10 OCAHO

no. 1149, 6 (2012), however, notwithstanding the liberality with which leave to amend is freely granted under 28 C.F.R. § 68.9(e), this liberality does not extend to a proposed amendment that would not survive a motion to dismiss, the usual test for determining whether or not a proposed amendment is futile. *Cf. Santiglia v. Sun Microsystems, Inc*., 9 OCAHO no. 1097, 7 (2003).

If there is no reasonable possibility that amendment will cure a pleading defect, leave to amend need not be granted. Jablonski's filings give no indication that a valid claim could be made on the facts she presents because no inference of discriminatory animus arises from those facts. While leave to amend is freely granted in this forum, leave may be denied if amendment would be futile. I have examined Jablonski's attempted supplemental pleadings and her proposed second amended complaint and conclude that the amendments proposed would not cure the problem. Jablonski's supplemental pleading seeks to add time-barred claims from 2013. The filing makes assertions about the citizenship status of a former Robert Half employee who was allegedly the decisionmaker for three of seventy-eight advertised jobs. Jablonski says Robert Half Legal (RHL) is a division of Robert Half International (RHI) and has offices in over twenty countries. She argues that a global presence in itself gives rise to an inference of discrimination. The pleading also seeks to raise a claim of retaliation, but does not assert that Jablonski ever filed a retaliation charge with OSC.

Jablonski's proffered second amended complaint identifies various areas of specialization within the company, and contends that she worked for a predecessor staffing or recruitment company in 2001. Jablonski complains of a time-barred incident on February 28, 2014, and lists jobs she applied for since 2013. What she does not add, however, is concrete facts that give rise to an inference of discrimination. Where the problem with a cause of action is substantive, better pleading would not cure it and repleading would be futile. *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

ORDER

Robert Half's motion to dismiss is granted and the complaint is dismissed for failure to state a claim upon which relief may be granted. All other pending motions are denied.

SO ORDERED.

Dated and entered this 12th day of April, 2016.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order 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, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.