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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.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 15B00022
YORKSON LEGAL, ET AL., Respondent.	)	

FINAL DECISION AND ORDER OF DISMISSAL

Appearances:

Maria Jablonski
for the complainant

Sarah Kim
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 Yorkson Legal (Yorkson or the company) discriminated against her on the basis of her citizenship and national origin.[1] Yorkson, by its President Michael Reichwald, filed an answer denying the material allegations of the complaint and requesting that

[1] The complaint was accompanied by approximately fifty-five 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.

the complaint be dismissed. Jablonski then filed what is captioned as "Complainant's Reply Affidavit to Respondent's Response to Unfair Immigration Related Employment Practices (points 1-7),[2] and Complainant's Opposition to Respondent's Motion to Dismiss," together with approximately sixty pages of additional materials. Yorkson then filed its "Response in Opposition to Complainant's Reply to Respondent's Answer to Complaint Alleging Unfair Immigration Related Practices and Motion to Dismiss And Request for Hearing and Protective Order," accompanied by two exhibits.

On April 6, 2015, counsel filed an appearance for Jablonski, together with "Complainant's Reply to Respondent's Motions and Answer to Complaint; and Complainant's Motion to Compel Discovery" with eleven pages of attachments, not, however, including Yorkson's responses to Jablonski's discovery requests.[3] Yorkson subsequently filed "Respondent's Objections and Responses to Complainant's Request for Production of Documents, Interrogatories, and Requests for Admissions," with one attachment, followed by an "Answer to Complainant's Reply to Respondent's Motion to Dismiss[4] and Reply to Complainant's Motion to Compel Discovery."

Jablonski then filed "Complainant's Reply to Respondent's Reply to Motion to Compel Discovery" [5] with approximately thirty-two pages of additional materials. Both parties filed prehearing statements, after which Jablonski also filed an amended prehearing statement with nine pages of attached materials. Yorkson filed a "Second Answer to Complainant's Second Reply to Respondent's Motion to Dismiss, and Second Answer to Complainant's Second Reply to Complainant's Motion to Compel Discovery," with one exhibit. On July 13, 2015, Jablonski filed "Complainant's Renewed Motion to Compel Discovery and to Compel Discovery of May 5, 2015 Second Discovery Request."

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[2] OCAHO rules provide the right to reply to an affirmative defense raised in an answer, but unless otherwise authorized, there is no right to reply to the answer itself. 28 C.F.R. § 68.9(d). No affirmative defenses were pleaded in the answer, and no reply to the answer was authorized to be filed.

[3] OCAHO rules require a motion to compel 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). A motion that does not include the opposing party's responses and objections is accordingly defective.

[4] OCAHO rules provide that a party opposing a motion has the right to file a response, but unless the administrative law judge provides otherwise, no reply to a response or further responsive document is permitted. 28 C.F.R. § 68.11(b). No authorization was sought or granted for this filing.

[5] No authorization was sought or granted for this filing either. *See* 28 C.F.R. § 68.11(b).

At a telephonic prehearing conference on July 21, 2015, 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 notice pleading it was not clear that Jablonski's complaint stated a claim upon which relief may be granted, and that because 8 U.S.C. § 1324b(d)(3) limits complaints to practices occurring more than 180 days prior to the filing of a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC or Special Counsel), no claims that arose prior to April 13, 2014, would be considered. Yorkson's motion to dismiss and Jablonski's motions to compel discovery were taken under advisement pending inquiries to be made to the Office of Special Counsel.

Because of a lack of clarity about the status of Jablonski's underlying charge, I made inquiries to OSC to ascertain 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). These inquiries were issued on July 22, 2015, and a simultaneous stay of proceedings was issued. Jablonski filed "Complainant's Objection to the July 22 Order of Inquiry to OSC and Objection to the Stay of Proceedings," [6] accompanied by approximately sixty-two pages of additional materials. This filing was followed shortly by "Complainant's Additional Exhibit to Add to the Objection to the July 22, Order of Inquiry."

In due course, OSC responded to the inquiries, after which Jablonski filed "Complainant's Motion to Lift the Temporary Stay for Permission to File Reply to OSC's Response to the Order of Inquiry," together with "Complainant's Reply to the OSC's Response to Order of Inquiry & Motion to Excuse Any Condition Precedent on the Basis of Equity and Futility."[7]

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

[7] 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. 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.

This pleading history is set forth at length to facilitate the parties' understanding of which rules apply in this proceeding, what those rules do or 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),[8] pleadings filed 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 of Civil Procedure 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 December 12, 2014, telling her that she could now file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Examination of the two letters OSC sent to Jablonski reflects, however, that neither letter told Jablonski she could file her own complaint. The first letter, dated October 22, 2014, advises Jablonski that her charge against Yorkson is incomplete, and that certain additional information is needed before OSC can commence an investigation. The second, dated December 12, 2014, says that based on the

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

information Jablonski provided, OSC would dismiss her charge and not file a complaint because of lack of reasonable cause.

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

> I have been consistently applying for paralegal jobs (please see my work search record attached) and litigation paralegal jobs on their website and related websites. I spoke with Sarah Kim from Yorkson on 10/2/14. She originally sent me a paralegal job e-mail but told me that I was on a distribution list and didn't qualify for the ERISA paralegal job. She said my experience was more "litigation paralegal." I applied for three litigation jobs on the Yorkson Legal website from 10/2 - 10/7/14. I haven't heard any response regarding these litigation paralegal jobs. Please see my work search record attached, I have been applying for litigation paralegal jobs since 2006 but haven't been placed in any job (remainder is illegible).

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 Yorkson. I therefore issued inquiries to OSC to request clarification 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). 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 Jablonki's complaint was not satisfied. The governing statute in this forum 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 paralegal jobs on Yorkson's website and has not been hired for any of them. She does not know who, if anyone, was hired, and does not know who Yorkson's clients are. Her 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

Yorkson's motion to dismiss and Jablonski's motions to compel were previously taken under advisement. Upon further consideration, I conclude for the reasons more fully set forth herein, that Yorkson's motion to dismiss 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 Yorkson's website and related websites since 2006, and that she has not been placed in any job. Jablonski evidently does not know which jobs were filled, who Yorkson's clients are, or who, if anyone, was hired for any of the jobs. I do not accept as true Jablonski's bald conclusion that Yorkson is discriminating against her on the basis of her United States citizenship because her 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. 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

Yorkson'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.