

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

May 9, 2016

WASHINGTON YOUNGGIL KIM,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 15B00032
)	
RANDALL T. GETZ, SERGEANT, FLUSHING)	
RECRUITING CENTER)	
Respondent.)	
_____)	

FINAL ORDER & DISMISSAL FOR LACK OF SUBJECT-MATTER JURISDICTION

I. RELEVANT BACKGROUND & PROCEDURAL HISTORY

Washington Younggil Kim (Mr. Kim or complainant), who is proceeding pro se, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on February 19, 2015. The complaint alleges that Sergeant Randall T. Getz, United States Army Flushing Recruiting Center (United States Army or respondent), discriminated against Mr. Kim on account of his citizenship status and national origin in violation of 8 U.S.C. § 1324b (2015), when the United States Army decided not to hire Mr. Kim. Mr. Kim also alleges that respondent retaliated against him for filing a complaint in violation of 8 U.S.C. § 1324b(a)(5), and that respondent committed document abuse by requesting additional documents from complainant for the employment verification process in violation of 8 U.S.C. § 1324b(a)(6).¹ These alleged violations occurred at the United States Army Flushing Recruiting Center in Flushing, Queens, New York, on September 5, 2014.

¹ The facts alleged in Mr. Kim’s Complaint are not entirely clear. For example, in support of his retaliation claim, Mr. Kim asserted that “Sergent [sic] Getz threatened me that he will kick me out of the US Army if I file a complaint to DOJ.” *OCAHO Complaint* at 6. However, it is not evident that Mr. Kim was ever a member of the Army. Mr. Kim also stated that Getz denied him a bonus that Mr. Kim was qualified for, in light of high test scores. *Id.* Again, this suggests Mr. Kim had been a member of the Army, but there is no evidence supporting this allegation.

Complainant, who is a Lawful Permanent Resident, seeks to be hired into an “intelligence unit job” with the United States Army, and he seeks back pay. The undersigned has been assigned this case for adjudication.

On February 25, 2015, the Chief Administrative Hearing Officer (CAHO) issued a Notice of Case Assignment, which provides that respondent had thirty days after receipt of the complaint to file an answer. The United States Postal Service website indicates that service of the complaint was completed on March 2, 2015. Respondent’s answer was thus due no later than April 1, 2015. No answer has been filed.

On June 26, 2015, I issued a Notice and Order to Show Cause, instructing Mr. Kim to explain why the complaint should not be dismissed in light of respondent’s apparent sovereign immunity as a United States Army Recruiting Center, a component of the Department of Defense, which would deprive this forum of subject-matter jurisdiction over the claim. Complainant’s response was due no later than July 27, 2015. No response has been filed.

For the reasons discussed below, I dismiss the complaint for lack of subject-matter jurisdiction.

II. DISCUSSION

A. OCAHO’s *Sua Sponte* Authority To Determine Subject-Matter Jurisdiction

The issue of subject-matter jurisdiction may be raised at any time, ““even by the court, *sua sponte*.”” *Earl Russell Horne, Jr. v. Town of Hampstead*, 6 OCAHO no. 906, 941, 945 (1997) (quoting *Capitol Credit Plan of Tenn. v. Shaffer*, 912 F.2d 749, 750 (4th Cir. 1990)).² A court has a duty to determine *sua sponte* if it has subject-matter jurisdiction. *Durant, Nichols, Houston, Hodgson, & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 63-64 (2d Cir. 2009).

² 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>.

The OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68, do not contain a specific provision regarding dismissal of actions for lack of subject-matter jurisdiction. According to OCAHO Rules, however, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) “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. The relevant Federal Rules, as well as case law interpreting these rules from the United States Court of Appeals for the Second Circuit (Second Circuit),³ therefore serve as “general guidance” when an OCAHO Administrative Law Judge (ALJ) questions OCAHO’s subject-matter jurisdiction. *Ping Ruan v. United States Navy*, 8 OCAHO no. 1046, 714, 716-17 (2000).

Federal Rule of Civil Procedure 12(h)(3) compels dismissal of an action “at any time” that the court determines it lacks subject-matter jurisdiction. A case is properly dismissed for lack of subject-matter jurisdiction when a court “lacks the statutory or constitutional authority to adjudicate it.” *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). An OCAHO ALJ has the authority to determine whether OCAHO retains subject-matter jurisdiction over a dispute. *Horne*, 6 OCAHO no. 906 at 946. The burden of proof is on the plaintiff to establish the existence of subject-matter jurisdiction by a preponderance of the evidence. *Makarova*, 201 F.3d at 113; *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012); *Ruan*, 8 OCAHO no. 1046 at 718.

In determining *sua sponte* whether there is a factual basis to support a court’s exercise of subject-matter jurisdiction, a court may refer to any material in the record. *Transatlantic Marine Claims Agency, Inc. v. Ace Young Inc.*, 109 F.3d 105, 108 (2d Cir. 1997) (collecting cases); *see also Makarova*, 201 F.3d at 113. Here, the record consists of the OCAHO Complaint,⁴ the Notice of Case Assignment, the Notice of Reassignment, the Notice and Order to Show Cause, and a Notice of New Mailing Zip Code for All OCAHO Matters. Attached to the OCAHO Complaint filed by Mr. Kim is a letter dated December 11, 2014, from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to Mr. Kim and a copy of the OSC Charge Form filed by Mr. Kim.

³ The Second Circuit is the reviewing United States Court of Appeals for this case, should it be appealed, as the alleged violation occurred in the state of New York. 28 C.F.R. § 68.57.

⁴ The complaint filed with OCAHO is missing pages two, four, six, and eight of the nine-paged “Complaint/Questionnaire” Form. *OCAHO Complaint*. The OSC Charge Form Attached to the OCAHO complaint appears to contain all sections and pages of OSC’s Charge Form, which describes in detail Mr. Kim’s allegations. However, the fact that pages are missing from Mr. Kim’s OCAHO complaint does not hinder adjudication because this case must be dismissed for lack of subject matter jurisdiction on account of the Army’s immunity from suit before OCAHO.

Pursuant to the undersigned's *sua sponte* authority, it is essential to determine initially whether OCAHO has subject matter jurisdiction to consider Mr. Kim's discrimination claim against the United States Army Recruiting Office. As set forth below, OCAHO lacks subject matter jurisdiction over this discrimination complaint, and the complaint will be dismissed.

B. Complaint Filed Against The United States Army And Its Employee

Mr. Kim's complaint identifies Getz as the "business or employer," who allegedly discriminated against Mr. Kim when he was not hired for an Army intelligence job. *OCAHO Complaint* at 3. The employer's address provided in the complaint is "3640 Main Street, Flushing, NY 11354," which is the address for the United States Army Recruiting Office. *OCAHO Complaint* at 3. Getz was the Army recruiter with whom Mr. Kim met when he sought employment at the United States Army Recruiting Office. *OCAHO Complaint* at 3, OSC Charge Form. The crux of the complaint is that Getz refused to hire Mr. Kim, who sought employment with the United States Army.

The material in the record demonstrates that Mr. Kim has alleged discrimination by the United States Army Recruiting Office based on the official acts of Getz, when he failed to hire Mr. Kim. Mr. Kim seeks back pay, a bonus, and current employment with the Army as remedies for Getz's official acts on behalf of the United States Army Recruiting Office. Mr. Kim has not alleged that Getz was acting in any "personal capacity" or outside of the scope of his official duties or official capacity when failing to hire Mr. Kim. *See Robinson v. Overseas Military Sales Corp.*, 827 F. Supp. 915, 923 (E.D.N.Y. 1993), *aff'd*, 21 F.3d 502 (2d Cir. 1994) ("claims for damages against . . . a federal agency[] and against the individual defendants in their official capacities are essentially claims against the United States and will be barred by the doctrine of sovereign immunity unless . . . Congress has unequivocally waived the immunity of the United States.") (internal citations omitted).

The United States Army is a component of the Department of Defense, which is a federal agency. "In deciding whether an action is in reality one against the Government, the identity of the named defendant is not controlling; the dispositive inquiry is 'who will pay the judgment?'" *Stafford v. Briggs*, 444 U.S. 527, 542 n.10. If it is found that the relief sought by the complainant "requires 'payment of money from the Federal Treasury, interferes with public administration, or compels or restrains the government,'" the United States as sovereign is the real party in interest. *Chung v. Federal Bureau of Prisons, FCI Greenville*, 6 OCAHO no. 881, 629, 631 (1996) (quoting *Stafford*, 444 U.S. at 542 n.19).

Mr. Kim requests back pay and a bonus. Based on the material in the record and facts alleged in the complaint, Mr. Kim seeks back pay and a bonus to be paid by the Army for Getz's failure to hire Mr. Kim. In essence, Mr. Kim seeks back pay from the Department of Defense, which would be paid from the Federal Treasury. Therefore, this is a suit against the United States as sovereign. *Id.*

In addition, Mr. Kim seeks equitable relief, as he also requests to be hired into a current position with the Army. This kind of relief can only be obtained from a recruiter at the United States Army Recruiting Office, acting on behalf of the Army. Any order requiring the Army to hire Mr. Kim would be an order compelling the Department of Defense to perform a specific act. As such, “the effect of the judgment would be to restrain the Government from acting, or to compel it to act,” which OCAHO does not have jurisdiction to do. *Connecticut v. Cahill*, 217 F.3d 93, 106 (2d Cir. 2000) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)).

Accordingly, because this is a suit against an agent of a federal agency acting in his official capacity, it is in reality a suit against the United States. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (citing *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), and *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985)). As set forth below, OCAHO lacks jurisdiction in this case against the United States Army Recruiting Office and its employees.

C. OCAHO Lacks Jurisdiction Due to the Army’s Federal Sovereign Immunity

“Absent a waiver, sovereign immunity shields the federal Government and its agencies from suit [Thus, s]overeign immunity is jurisdictional in nature.” *Wake v. United States*, 89 F.3d 53, 57 (2d Cir. 1996) (quoting *Dorking Genetics v. United States*, 76 F.3d 1261, 1264 (2d Cir. 1996)); *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003). The defense of sovereign immunity may be raised at any point in the proceeding—on appeal, in summary judgment motions, even by the Court *sua sponte*. *McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001). A defendant’s delay in asserting the defense cannot constitute a waiver. *Coniff v. Vermont*, No. 2:10-CV-32, 2013 WL 5429428, at *9 (D. Vt. Sept. 30, 2013), *aff’d sub nom. Beaulieu v. Vermont*, 807 F.3d 478 (2d Cir. 2015).

OCAHO case law has held that the Immigration and Nationality Act (INA) “contain[s] no language which could plausibly be read as a waiver of federal sovereign immunity.” *Yaming Shen v. Def. Language Inst.*, 9 OCAHO no. 1117, 3 (2004). In *Shen*, an OCAHO ALJ recognized that since 1995, OCAHO case law has consistently held that federal government agencies are not amenable to suit under 8 U.S.C. § 1324b. *Id.* (citing OCAHO cases that have dismissed § 1324b suits against federal agencies). The ALJ in *Shen* dismissed a citizenship status discrimination claim for lack of subject-matter jurisdiction because the ALJ determined that the United States Army language institute was a Department of Defense entity entitled to sovereign immunity.

Following the relevant OCAHO precedent in *Shen*, Mr. Kim’s complaint must be dismissed for lack of subject-matter jurisdiction because Mr. Kim failed to prove that OCAHO retains

jurisdiction over his complaint against Getz and the United States Army Recruiting Office.⁵ *See, e.g., Santos v. United States Postal Serv.*, 9 OCAHO no. 1105, 7 (2004) (finding that although the Postal Reorganization Act of 1970 waived sovereign immunity for the Postal Service, nothing in the act subjects USPS to suit under the INA). Accordingly, the complaint is dismissed for lack of subject-matter jurisdiction.

SO ORDERED.

Dated and entered on May 9, 2016.

Stacy S. Paddack
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.

⁵ The Second Circuit has instructed that “a district court should not dismiss an action pending before it without first providing the adversely affected party with notice and an opportunity to be heard.” *McGinty*, 251 F.3d at 90 (citing *Acosta v. Artuz*, 221 F.3d 117, 124 (2d Cir. 2000)). The Notice and Order to Show Cause issued to Mr. Kim on June 26, 2015, provided Mr. Kim with notice that the undersigned was contemplating dismissal for lack of subject-matter jurisdiction. Moreover, based on the legal precedent discussed herein, there is “no evidence [Mr. Kim] could gather and no argument [h]e could make that would alter the conclusion that sovereign immunity protects” the Department of Defense from this proceeding. *Shen*, 9 OCAHO no. 1117 at 3. At this posture, dismissal is appropriate.