Published 8/7/17 12 OCAHO no. 1304

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

July 13, 2017

CHIAHA UGOCHI, Complainant, v. NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 17B00072

FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

This matter arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. Complainant Chiaha Ugochi (Ms. Ugochi) alleges that Respondent North Dakota Department of Human Services (ND DHS) discriminated against her because of her citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1), retaliated against her in violation of 8 U.S.C. § 1324b(a)(5), and committed document abuse in violation of 8 U.S.C. § 1324b(a)(6). Ms. Ugochi is a United States citizen who was born in Nigeria and is of Nigerian national origin. ND DHS denied the allegations and filed a Motion to Dismiss, predicated, in part, on its Eleventh Amendment sovereign immunity. For the reasons provided below, the Motion to Dismiss will be **GRANTED**, and the complaint will be dismissed in its entirety.

II. BACKGROUND AND PROCEDURAL HISTORY

On September 15, 2016, Ms. Ugochi filed a charge with the Department of Justice's Immigrant and Employee Rights Section (IER) against the North Dakota State Hospital, ND DHS, alleging discrimination based on her citizenship status and national origin, retaliation, and document abuse. The alleged discrimination occurred on September 9, 2016, in Jamestown, North Dakota.

In a letter dated December 15, 2016,[1] IER informed Ms. Ugochi that IER decided to dismiss her charge and not file a complaint on her behalf because "there is insufficient evidence of reasonable cause to believe you were discriminated or retaliated against as prohibited by 8 U.S.C. § 1324b." *See* IER Letter of Determination (Dec. 15, 2016). The letter also stated that IER referred her charge to the Equal Employment Opportunity Commission (EEOC) for the EEOC's "consideration under Title VII of the Civil Rights Act of 1964, which prohibits national origin discrimination by employers with more than 14 employees." *Id.* at 2. IER also advised Ms. Ugochi that she could nevertheless file her own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), which she did on May 1, 2017.

The OCAHO complaint further contends that Respondent refused to hire Ms. Ugochi on October 18, 2016, because of her citizenship status and national origin, but also terminated her on September 9, 2016. She explains, "I hold a strong belief that other reason(s) for my being fired was my inability to produce excessive and different documents than required for employment eligibility verification process such as the electronic employment eligibility verification 'E-Verify' system." OCAHO Complaint at 10. In support of the retaliation claim, Complainant states that she was evicted from her home, which was located on the hospital premises, and ordered to sign documents agreeing to be demoted from her position of Addiction Counselor II. *Id.* at 11. Respondent purportedly threatened to terminate her if she did not sign the documents.

Moreover, Complainant alleges that Respondent rejected or refused to accept the documents she presented to prove her identity and/or authorization to work in the United States and asked her for more documents than required for establishing her work authorization, but she wrote "Not Applicable" when asked to identify which documents Respondent rejected or requested. *Id.* at 12. Complainant seeks relief in the form of back pay, reinstatement, removal of a false performance review or warning document from her personnel file, and removal of restrictions and/or changes to her work assignment, work shifts, or movements. *Id.* at 13.

On June 7, 2017, Respondent filed a timely answer and a Motion to Dismiss (Motion). The answer denies the material allegations of the complaint and raises the following affirmative defenses: (1) Complainant's failure to state a claim upon which relief may be granted; (2) as a state institution and state agency, Respondent is entitled to state sovereign immunity under the Eleventh Amendment to the United States Constitution; (3) Respondent employs more than fourteen employees; and (4) Respondent had legitimate, non-discriminatory reasons for terminating Complainant's probationary employment. *See* Answer at 4-5. Respondent states that it conditionally hired Complainant on July 6, 2016, and terminated her on or around September 9, 2016, because she failed to pass a background check.

[1] In an email dated February 1, 2017, IER sent Ms. Ugochi the letter of determination because the original letter was returned to IER as undeliverable.

The Motion similarly argues that Ms. Ugochi's complaint should be dismissed because of Respondent's sovereign immunity. Respondent indicates that the North Dakota State Hospital is the specific unit of ND DHS that hired Ms. Ugochi and qualifies as a "state institution" that "enjoys the sovereign immunity of the state." Motion at 3 (citing N.D. Cent. Code § 32-12.2-01(9)). In addition, the Motion contends that OCAHO does not have jurisdiction over Ms. Ugochi's national origin claim because Respondent employs more than fourteen employees and is accordingly subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 et seq., and not 8 U.S.C. § 1324b. *See id.* at 3-4 (citing 8 U.S.C. § 1324b(a)(2)(B)). Attached to the Motion is an affidavit of Marcie Wuitschick, the Director of Human Resources at ND DHS. Complainant did not file a response to the Motion and the period to timely do so has passed.[2]

III. APPLICABLE LEGAL PRINCIPLES

A. Motion to Dismiss

A respondent may move for dismissal of the complaint on the ground that it fails to state a claim upon which relief may be granted, and an OCAHO Administrative Law Judge (ALJ) may dismiss a complaint based on such a motion. 28 C.F.R. § 68.10.[3] OCAHO's rule for such motions is modeled after Federal Rule of Civil Procedure 12(b)(6). *United States v. Spectrum Technical Staffing Servs., Inc., and Personnel Plus, Inc.*, 12 OCAHO no. 1291, 8 (2016);[4] *see also* 28 C.F.R. § 68.1 (noting that the Federal Rules of Civil Procedure may be used as a general guideline in OCAHO proceedings). Although Respondent presented its Motion as one for

[2] Respondent served the Motion by Federal Express, overnight mail on June 5, 2017. *See* 28 C.F.R. 68.8(c)(1). OCAHO regulations provide a ten-day period during which a party may respond after service of a motion. *Id.* § 68.11(b). A timely response was therefore due June 15, 2017.

[3] *See* OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2017).

[4] 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.

dismissal based on failure to state a claim under 28 C.F.R. § 68.10, the undersigned will treat it as a motion to dismiss for lack of subject-matter jurisdiction, in accordance with Federal Rule of Civil Procedure 12(b)(1). *See Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1042-43 (8th Cir. 2000) (recognizing that a motion to dismiss on sovereign immunity grounds may be treated as a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and that it is error to treat it as a 12(b)(6) motion to dismiss for failure to state a claim) (citing *Brown v. United States*, 151 F.3d 800, 804 (8th Cir. 1998)).[5]

The OCAHO Rules of Practice and Procedure do not contain a specific provision regarding dismissal of actions for lack of subject-matter jurisdiction but 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. The relevant Federal Rules, as well as case law interpreting these rules from the Eighth Circuit, therefore, serve as "general guidance" when an ALJ questions OCAHO's subject-matter jurisdiction. *Windsor v. Landeen*, 12 OCAHO no. 1294, 4 (2016) (citing *Ruan v. U.S. Navy*, 8 OCAHO no. 1046, 714, 716-17 (2000)). In determining whether there is a factual basis to support a court's exercise of subject-matter jurisdiction, a court is not limited to the allegations in the complaint and may consider other material in the record. *Green Acres Enters. v. United States*, 418 F.3d 852, 856 (8th Cir. 2005) (citing *Osborn v. United States*, 918 F.2d 724, 728-30 (8th Cir. 1990)); *see also Reffell v. Prairie View A&M Univ.*, 9 OCAHO no. 1057, 3 n.5 (2000).

Here, the record consists of the OCAHO complaint, the Notice of Case Assignment, and Respondent's answer and Motion. As the undersigned will treat the Motion as one for lack of subject-matter jurisdiction, my review is not limited to the allegations of the complaint and I will adjudicate the Motion based on the pleadings, other materials in the record, and binding legal authority.

1. Eleventh Amendment Sovereign Immunity

The Eleventh Amendment provides, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the amendment's terms themselves do not bar suits against a state by its own citizens, the United States Supreme Court "has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *see also Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 (8th Cir. 1999) (citing U.S. Const. amend. XI; *Edelman*, 415 U.S. at 662-63)).

[5] The alleged discrimination occurred in the State of North Dakota. Therefore, the United States Court of Appeals for the Eighth Circuit is the reviewing court of appeals, should this Order be appealed. 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57.

The party seeking immunity from suit has the burden of establishing that the Eleventh Amendment applies to it. *Reffell*, 9 OCAHO no. 1057 at 4 (citing *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 285-86 (5th Cir. 2000)).

There are two exceptions to a state's immunity from suit under the Eleventh Amendment. *See Barnes v. Missouri*, 960 F.2d 63, 64 (8th Cir. 1992). "'The first exception to Eleventh Amendment immunity is where Congress has statutorily abrogated such immunity by 'clear and unmistakable language.'" *Id.* (quoting *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 474 (1987)). The second exception exists when the state has waived its immunity, "but 'only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.'" *Id.* at 65 (quoting *Welch*, 483 U.S. at 473); *see also Wong-Opasi v. Tennessee*, 8 OCAHO no. 1042, 643, 652 (2000) (quoting *Edelman*, 415 U.S. at 678). The waiver must apply to a waiver from suit in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984) ("[T]he Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.").

OCAHO case law provides that "complaints against state agencies are routinely dismissed in this forum when the immunity defense is timely asserted." *Guerrero v. Cal. Dep't of Corr. and Rehab.*, 11 OCAHO no. 1264, 2-3 (2015) (citing *Reffell*, 9 OCAHO no. 1057 at 2); *see also Nix v. Norman*, 879 F.2d 429, 432 (8th Cir. 1989) ("Generally, a suit brought solely against a state or a state agency is proscribed by the Eleventh Amendment.") (citations omitted). ND DHS timely asserted this defense in both its answer and Motion. Moreover, based on the above-mentioned principles, Respondent has demonstrated its immunity from suit under 8 U.S.C. § 1324b.

Respondent is a state entity. *Wong-Opasi*, 8 OCAHO no. 1042 at 652. The North Dakota State Hospital, which employed Ms. Ugochi, is a component of ND DHS and is considered a "state institution." *See* N.D. Cent. Code § 32-12.2-01(9). Moreover, in North Dakota, the definition of "state" includes a department of the state, such as ND DHS. *See* N.D. Cent. Code § 32-12.2-01(7); *see Morstad v. Dep't of Corr. & Rehab.*, 147 F.3d 741, 743 (8th Cir. 1998) (recognizing that the North Dakota Department of Health and Human Services is a state actor); *see also* Respondent's Motion, Wuitschick Aff. (affirming that the North Dakota State Hospital is an "employing unit" of ND DHS). As Ms. Ugochi filed the complaint solely against ND DHS, her suit is against the State of North Dakota.

Turning to the first possible exception to Eleventh Amendment immunity, it is well-established OCAHO precedent that Congress did not express any intent to abrogate the states' sovereign immunity when it enacted 8 U.S.C. § 1324b. *Reffell*, 9 OCAHO no. 1057 at 4 (collecting cases). In *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 508-09 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held that § 1324b did not abrogate either federal or state sovereign immunity, and no OCAHO decision since then has held otherwise. *Reffell*, 9 OCAHO no. 1057 at 4.

Concerning the second possible exception, North Dakota has not consented to suit under 8 U.S.C. § 1324b, as it has asserted Eleventh Amendment immunity as a ground for dismissal. Moreover, although North Dakota has abrogated its state sovereign immunity from certain claims, *see, e.g.*, N.D. Cent. Code § 32-12.2-02; *Bulman v. Hulstrand Constr. Co.*, 521 N.W.2d 632, 637, 639 (N.D. 1994) (abolishing the State's common-law sovereign immunity from tort liability) (relying on N.D. Const., art. I, § 9), North Dakota has specifically preserved its Eleventh Amendment sovereign immunity by statute. *See* N.D. Cent. Code § 32-12.2-10 ("This chapter does not waive the state's immunity under the Eleventh Amendment to the United States Constitution in any manner, and this chapter may not be construed to abrogate that immunity.").

Importantly, the doctrine of *Ex parte Young*, 209 U.S. 123, 158-59 (1908), which holds that individual state officials or employees may be sued in federal court for prospective injunctive relief when the plaintiff alleges that the officials or employees are violating federal constitutional rights and laws, is inapplicable. *See also Green v. Mansour*, 474 U.S. 64, 68 (1985). Ms. Ugochi did not file her complaint against any individual ND DHS employees or officials. Although reinstatement is part of the relief she seeks and is a form of prospective relief, *Hopkins v. Saunders*, 199 F.3d 968, 977 (8th Cir. 1999), the *Young* doctrine "'has no application in suits against the States and their agencies, which are barred regardless of the relief sought.'" *Hensel*, 38 F.3d at 509 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)); *see also Monroe v. Ark. State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007). Accordingly, because Ms. Ugochi's complaint is only against the State of North Dakota and no exception to North Dakota's Eleventh Amendment sovereign immunity is present, ND DHS cannot be sued in this forum and Ms. Ugochi's complaint must be dismissed.

IV. CONCLUSION

Respondent ND DHS is a state agency that enjoys immunity from these proceedings pursuant to the Eleventh Amendment. Neither exception to immunity is present in the instant matter. Congress has not abrogated the states' Eleventh Amendment immunity to suit under 8 U.S.C. § 1324b, nor has North Dakota expressly or implicitly waived its Eleventh Amendment immunity from suit in federal court. Accordingly, because Ms. Ugochi's complaint against ND DHS under IRCA is barred, the Motion to Dismiss on the grounds of Eleventh Amendment immunity will be granted and the complaint will be dismissed.[6] As Respondent cannot be sued in this tribunal, I

[6] Although Ms. Ugochi is *pro se*, because ND DHS filed a Motion to Dismiss, which the undersigned considered as one for lack of subject-matter jurisdiction, Ms. Ugochi received notice that the complaint was potentially subject to dismissal because of ND DHS's immunity from suit under the Eleventh Amendment. OCAHO regulations provided Ms. Ugochi with the opportunity to respond, *see* 28 C.F.R. § 68.11(b), but she failed to do so. Moreover, based on the legal precedent discussed herein, there is "no evidence [Ms. Ugochi] could gather and no argument

need not address ND DHS's challenge to subject-matter jurisdiction because of the number of its employees.

SO ORDERED.

Dated and entered on July 13, 2017.

_____

Priscilla M. Rae
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.

---

she could make that would alter the conclusion that sovereign immunity [under the Eleventh Amendment] protects" ND DHS from this proceeding. *Shen v. Def. Language Inst.*, 9 OCAHO no. 1117, 3 (2004). Thus, issuing a Notice to Show Cause to Ms. Ugochi prior to this dismissal, as well as any potential amendment to her complaint, would be futile, and dismissal is appropriate.