

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. 2021A00028
SAL'S LOUNGE,)	
)	
Respondent.)	

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

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) against Respondent, Sal's Lounge. The complaint reflects that DHS served Respondent with a Notice of Intent to Fine on February 1, 2021, and Respondent thereafter made a timely request for a hearing.

On May 12, 2021, an attorney filed an answer to the complaint on behalf of Respondent. On May 27, 2021, the Court issued an Order for Prehearing Statements and Initial Disclosures directing the parties to file prehearing statements and make initial disclosures.

On June 23, 2021, Complainant filed its prehearing statement and an Amended Complaint Regarding Unlawful Employment.¹ Among other things, the amended complaint revised the charging language in the original complaint.

¹ Respondent's prehearing statement was due July 26, 2021. Order for Prehearing Statements 4. To date, the Court has not received Respondent's prehearing statement.

On July 16, 2021, the Court issued an Order on Amended Complaint in which it struck the amended complaint for failure to seek leave of the Court or Respondent's written consent. *United States v. Sal's Lounge*, 15 OCAHO no. 1394, 3-4 (2021).²

Subsequently, on July 20, 2021, Complainant filed a Motion for Leave of Court to Amend Complaint (Motion for Leave) and attached the Amended Complaint and Amended Exhibits. Under OCAHO's rules, Respondent had ten days to file a response to Complainant's motion. See 28 C.F.R. § 68.11(b). Respondent has not filed a response, and Complainant's Motion for Leave is ripe for resolution.

II. LEGAL STANDARDS

28 C.F.R. § 68.9(e) provides that, "[i]f a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints[.]" "Section 68.9(e) is 'analogous to and is modeled upon Rule 15 of the Federal Rules of Civil Procedure.'" *Sal's Lounge*, 15 OCAHO no. 1394, at 2 (citing *United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998)); see generally 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline . . .").

As the Court's previously explained in its Order on Amended Complaint, Complainant needed to seek the Court's leave or obtain Respondent's written consent to amend its complaint in this matter because the time allotted to amend the complaint as a matter of course had lapsed. *Sal's Lounge*, 15 OCAHO no. 1394, at 3 (explaining the time parameters and procedures specified in Federal Rule of Civil Procedure 15(a)(1)-(2)).

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 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 at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

The Fifth Circuit Court of Appeals, the federal judicial circuit in which this cases arises, *Sal's Lounge*, 15 OCAHO no. 1394, at 2, provides the following five factors a court should consider “in determining whether to deny leave to amend a complaint: ‘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 the allowance of the amendment, [and] futility of the amendment’” *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); accord *United States v. FRC Balance, LLC*, 14 OCAHO no. 1366, 2 (2020) (citing *Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981)). Absent the enumerated factors, leave to amend shall be freely given. *Rosenzweig*, 332 F.3d at 864; see also Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave when justice so requires.”).

III. DISCUSSION

Complainant states that it sought, but was unable to obtain, Respondent’s written consent to amend the complaint in this matter. Accordingly, Complainant filed the instant Motion for Leave and attached its proposed amended complaint. In doing so, it has complied with the Court’s Order on Amended Complaint and has satisfied the procedural requirements under Federal Rule of Civil Procedure 15(a)(2).

Substantively, Complainant’s motion warrants a grant. Complainant seeks to amend the complaint by modifying the charging language contained in Count I, the sole count of the complaint. It does not seek to add additional counts or charges against Respondent. In its Motion for Leave, Complainant asserts that it is seeking to amend the complaint to delete the word “timely” from the charging language in Count I, being what it asserts was a “typographical error” in the original complaint. Motion for Leave 3. In making that change, Complainant seeks to align the complaint in this matter with the language in the Notice of Intent to Fine (NIF) served on Respondent on February 1, 2021. *Id.* Although not discussed in its Motion for Leave, the proposed amended complaint also includes three numbered, one-sentence paragraphs alleging specific facts contained in the NIF pertaining to the proposed charge against Respondent. This additional language further references the NIF, attached as Exhibit A to the amended complaint. Lastly, a description of the substance of the charge against Respondent has been added underneath Count I. These changes appear to be consistent with Complainant’s intent to align further the complaint in this case with the NIF, incorporated by reference in both versions of the complaint. Given that the NIF “contain[s] the basis for the charge(s) against the

respondent,” 8 C.F.R. § 274a.9(d)(1)(i), the Court finds that Complainant’s proposed changes to the amended complaint are appropriate to facilitate a determination of the controversy on the merits and to avoid prejudicing the parties’ rights. *See* 28 C.F.R. § 68.9(e).

Based upon the Court’s consideration of the materials in the record, none of the Fifth Circuit’s factors warranting the potential denial of Complainant’s Motion for Leave appear to be present here. There is no evidence of undue delay, bad faith, dilatory motive, undue prejudice, or futility of the amendment. Indeed, Complainant filed its Motion for Leave and proposed amended complaint only approximately three months after the original complaint and before the Court had issued a scheduling order for the parties in this matter. Moreover, Respondent has not presented any evidence counseling against amendment, nor did it file a response arguing against the proposed amended complaint. Further, this is the first, and only, amendment of the complaint to date, the NIF is the same, and Respondent appears to have had ample notice of the allegations in the complaint. *See FRC Balance, LLC*, 14 OCAHO no. 1366, at 2. Therefore, the Court now grants Complainant’s motion, gives it leave to amend the complaint in this matter, and orders Respondent to answer the amended complaint and file its prehearing statement.

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 dated July 20, 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 thirty days of the date of issuance of this Order.

IT IS FURTHER ORDERED that, concurrent with the filing of its answer to the amended complaint, Respondent must file its prehearing statement with the Court.

ENTERED:

Honorable Carol A. Bell
Administrative Law Judge

DATE: October 15, 2021