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

January 22, 2024

HIM YEUNG, Complainant, v. WASHINGTON STATE DEPARTMENT OF LICENSING, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2023B00010

Appearances: Him Yeung, pro se Complainant
Janelle Peterson, Esq., for Respondent

ORDER GRANTING MOTION TO DISMISS

I. BACKGROUND

This case arises under the employment discrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324 b. Complainant, Him Yeung, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Respondent, the Washington State Department of Licensing (DOL), discriminated against him based on his citizenship status in violation of § 1324b(a)(1).

On June 6, 2023, Respondent, through counsel, filed an answer.

On June 22, 2023, the Court held a telephonic prehearing conference pursuant to 28 C.F.R. § 68.13.[1] During this conference, the Court set a case schedule, noting dispositive motions were due by October 20, 2023, and responses were due by November 19, 2023.

[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

On September 21, 2023, Respondent filed a Motion to Dismiss. Additionally, Respondent filed a Motion for Extension of Time to File Dispositive Motion on October 19, 2023.[2] The following day, October 20, 2023, Respondent filed a Motion for Summary Decision.
Complainant did not file a response to any of the three motions.

For the reasons outlined below, Respondent's Motion to Dismiss is granted, and all remaining motions (Motion for Extension of Time and Motion for Summary Decision) are moot.[3]

II. LAW & ANALYSIS[4]

Respondent moves to dismiss the Complaint pursuant to 28 C.F.R. §§ 68.1 and 68.10 and Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. OCAHO's governing regulations contemplate dismissal when a complainant fails to state a claim upon which relief can be granted, but don't similarly contemplate dismissal on other grounds listed in the Federal Rules of Civil Procedure at Rule 12(b). *See* 28 C.F.R. § 68.10(b). In such an instance, the Court may turn to the Federal Rules of Civil Procedure for guidance. *See id.* § 68.1 (providing 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 . . . ."); *see also Seaver v. Bae Sys.*, 9 OCAHO no. 1111, 2 (2004) (citations omitted).[5]

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[2] Respondent filed this Motion for Extension one day before the deadline for dispositive motions, precluding the Court from ruling on the motion in advance of the deadline as Complainant was afforded his regulatory 10-day response window. *See* 28 C.F.R. § 68.11(b).

[3] The Court was presented with two dispositive motions for consideration. Motions related to jurisdictional issues must be considered before addressing motions that implicate a claim's merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (rejecting process of assuming jurisdiction to dispose of a case by alternate principle).

[4] The allegations occurred in Washington. Where appropriate, the Court may consider case law of the relevant United States Court of Appeals, here the Ninth Circuit. *See* 28 C.F.R. § 68.57.

Additionally, this decision cites to the Federal Rules of Civil Procedure, and the Court finds it prudent to separately acknowledge its use of the Federal Civil Rules Handbook 2023 for reference, a text which includes both the Rules and a helpful compilation of relevant caselaw. Steven Baicker-McKee & William M. Janssen, *Federal Civil Rules Handbook* (2023).

[5] 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

Respondent, the State of Washington, argues this Court lacks subject matter jurisdiction because the Complaint is barred by Eleventh Amendment state sovereign immunity.[6]

"The Eleventh Amendment to the U.S. Constitution states, '[t]he 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.'" *Hossain v. Job Serv. N.D.*, 14 OCAHO no. 1352, 3 (2020). State sovereign immunity principles generally apply to actions brought by private parties in administrative adjudications. *See Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 (2002). "Under OCAHO case law, it is well-established that 'complaints against state agencies are routinely dismissed in this forum.'"[7] *Hossain*, 14 OCAHO no. 1352, at 4 (quoting *Ugochi v. N. Dakota Dep't Hum. Servs.*, 12 OCAHO no. 1304, at 4).

A party asserting sovereign immunity "must submit proof that it is, in fact, a 'state entity.'" *Wong-Opasi v. Tennessee*, 8 OCAHO no. 1042, 643, 652 (2000). "[S]tate agencies and entities may be understood to act as the state's alter-ego, in which case the entity may invoke state sovereign immunity," and "[b]ecause state law sets forth which entities are considered alter-egos of the state," state law on the question "must be examined." *Elhaj-Chehade v. Univ. Of Tex.*, 8 OCAHO no. 1022, 305, 311, 313 (1999) (quoting *D'Amico v. Erie Comm. College*, 7 OCAHO

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

[6] Respondent argues the Washington State Department of Labor (DOL) is an arm of the state, and therefore, Eleventh Amendment state sovereign immunity protects it from suit. Resp't's Mot. Dismiss 3, 5. In the alternative, Respondent argues no exceptions to sovereign immunity apply; Congress has not abrogated state immunity to suit in cases arising under 8 U.S.C. § 1324b, nor has Washington waived its immunity. *Id.* at 3–5.

[7] "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." *Hossain*, 14 OCAHO no., 1352, at 4 (citing *Ugochi*, 12 OCAHO no. 1304 at 5; and then citing *Reffell*, 9 OCAHO no. 1057 at 4 (collecting cases)). Further, "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." *Id.* (citations omitted).

no. 948, 436 (1997)). The Washington State Department of Labor (DOL), a state agency, is a state entity.[8]

With the understanding that the Respondent is a state entity entitled to sovereign immunity under the Eleventh Amendment, the Court now considers how this implicates its subject matter jurisdiction, which is the basis by which the Respondent moves the Court to dismiss this case. The Court is convinced by Respondent's arguments that sovereign immunity, through the lens of the Eleventh Amendment, can implicate this forum's subject matter jurisdiction.[9]

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[8] *See* Resp't's Mot. Dismiss 6 (citing Wash. Rev. Code § 46.01.020 (2023) (establishing the DOL as a "department of the government of [Washington] state"); and then citing *Kim v. Wash. State Dep't of Licensing*, 168 F. App'x 774 (9th Cir. 2006) (affirming district court's dismissal of action against DOL on sovereign immunity grounds)).

[9] Subject matter jurisdiction, and thus motions under Rule 12(b)(1) challenge the power of the forum to hear the matter. *See Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 254 (2010). By contrast, personal jurisdiction, and thus motions under Rule 12(b)(2), argue that a Respondent may be dismissed from the matter because the Court lacks jurisdiction over the person or property. The distinction matters as it bears on who must prove or raise what, and when such issues must be raised.

Sovereign immunity and the Eleventh Amendment have been thoroughly analyzed by legal scholars and various courts. The Court found the following separate analysis to be consistent with Respondent's arguments and particularly persuasive:

> The general law of sovereign immunity involves an immunity from compulsory process. Because it limits a court's *process*, it affects whether a sovereign may be haled into court. And because it concerns *compulsory* process, it can be waived by consent, as part of the doctrine we now call "personal jurisdiction."
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> The Eleventh Amendment is different. It restricts "[t]he Judicial power of the United States"—a reference to subject-matter jurisdiction, not personal jurisdiction. It creates a categorical rule limiting the federal courts' power to adjudicate certain cases, even if the parties were ready and willing to appear. Eleventh Amendment cases lie outside "[t]he Judicial power of the United States," so they can't be tried by consent.

William Baude & Stephen E. Sachs, The Misunderstood Eleventh Amendment, 169 U. Pa. L. Rev. 609 (2021). This approach was cited by the dissent (not the majority) in *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2264–65 (2021). While this approach was not adopted by the majority, who concluded Eleventh Amendment immunity is waivable, this issue remains an active one among the circuit courts. *Id.* at 2262; *See, e.g.*, *Mowrer v. U.S. Dep't of*

Subject matter jurisdiction may be raised at any time, by any party, or by the Court (even after judgment). *See Arbaugh v. Y&H Corp*., 546 U.S. 500 (2006). *Id*. at 514. Further, it is the party asserting subject matter jurisdiction (the Complainant), who must establish it. *See Thompson v. Gaskill*, 315 U.S. 442, 446 (1942).

While Respondent raised this issue after filing its answer, at no point did Complainant oppose the treatment of sovereign immunity as subject matter jurisdiction, and at no point did Complainant articulate by way of a submission that the Court does have subject matter jurisdiction (as it would be his burden to do).

In the alternative, even if the Court were to hold that sovereign immunity was waivable (and thus not jurisdictional), the Court would conclude, on this record, that Respondent's conduct was "compatible with an intent to preserve" its immunity, because it raised the defense through a timely-filed motion to dismiss. *See Tobar v. United States*, 639 F.3d 1191, 1195 & n.1 (9th Cir. 2011) (finding it "irrelevant" that the United States failed to assert with specificity an affirmative defense of sovereign immunity in its answer which was later raised in a Rule 12(b)(1) motion to dismiss, as sovereign immunity may "be raised at any time by the government").

Transportation, 14 F.4th 723, 735–36 & n.2 (D.C. Cir. 2021) (Katsus, concurring) (collecting cases); *WCI, Inc. v. Ohio Dep't of Pub. Safety*, 18 F.4th 509, 513 (6th Cir. 2021).

Particularly germane here, the Ninth Circuit treats Eleventh Amendment sovereign immunity as "quasi-jurisdictional" in nature, and capable of being raised in a Rule 12(b)(1) motion to dismiss based on subject matter jurisdiction. *Sato v. Orange County Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017).

In addition to a finding that sovereign immunity under the Eleventh Amendment can implicate subject matter jurisdiction, the Ninth Circuit has provided an additional, separate analysis wherein "[Eleventh Amendment sovereign immunity may be] an affirmative defense that must be raised early in the proceedings to provide fair warning to the plaintiff," and that while "[e]xpress waiver is not required," a state "waive[s] its Eleventh Amendment immunity by conduct that it incompatible with an intent to preserve that immunity." *Walden v. Nevada*, 945 F.3d 1088, 1095 (9th Cir. 2019) (citing *Aholelei v. Dep't of Pub. Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007)). For example, in a different case, the Ninth Circuit has found that a state waived an Eleventh Amendment sovereign immunity defense over federal law claims when it removed a case from state court to federal court, and where the defense was only clearly raised four years into litigation. *Id.* at 1094.

Ultimately, because the Ninth Circuit permits analysis of Eleventh Amendment sovereign immunity under the framework of Rule 12(b)(1) (the argument advanced by Respondent), the Court may (and does) conclude such an analytical framework is appropriate here.

III. CONCLUSION

The Court concludes Respondent is a state agency entitled to sovereign immunity from these proceedings pursuant to the Eleventh Amendment to the U.S. Constitution. Respondent's Motion to Dismiss is GRANTED. Respondent's remaining motions are denied as MOOT. The Complaint is DISMISSED. This is a Final Order.

SO ORDERED.

Dated and entered on January 22, 2024.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review 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. See 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.