

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

August 23, 2024

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 2023A00079
)	
DUNCAN FAMILY FARMS, INC.,)	
Respondent.)	
)	

Appearances: James Harmony, Esq., for Complainant
Julie A. Pace, Esq., Heidi Nunn-Gilman, Esq., for Respondent

ORDER DENYING RESPONDENT MOTION TO ASSERT THIRD-PARTY COMPLAINT &
DENYING RESPONDENT REQUESTS FOR SUBPOENAS

I. BACKGROUND

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on July 20, 2023, alleging that Respondent, Duncan Family Farms, Inc., violated § 1324a(a)(1)(B). On September 11, 2023, Respondent filed an Answer.

On May 28, 2024, Respondent filed two requests for subpoenas, both on OCAHO's standard subpoena request form (Form EOIR-30), requesting testimony and documents from a third-party, ADP, Inc., a company that provided Respondent with its electronic Form I-9 system. Also on May 28, 2024, Respondent filed Respondent's Motion to Assert Third-Party Complaint, requesting that it be permitted to bring a third-party complaint against ADP. Complainant filed an opposition to Respondent's Motion.

For the reasons that follow, Respondent's request to assert a third-party complaint against ADP is denied. Separately, Respondent's requests for subpoenas for testimony and documents from ADP are denied (for now).

II. MOTION TO ASSERT THIRD-PARTY COMPLAINT

A. Respondent's Motion

Respondent requests it be permitted to bring a third-party complaint against ADP “because ADP is responsible for the penalties imposed for Counts V and VI, if any, both by contract and because they are an agent and acting directly or indirectly in the interests of [Respondent] for purposes of the electronic Forms I-9.” Mot. Assert Third-Party Compl. 10.

Respondent notes Federal Rule of Civil Procedure 14 permits third-party complaints. Under those Rules, a defending party “may, as a third-party plaintiff, serve a summons and complaint on a non-party who is or may be liable to it for all or part of the claim against it.” Fed. R. Civ. P. 14(a)(1). Respondent concludes ADP is a proper third-party defendant under Rule 14, as it guaranteed a compliant electronic Form I-9 system, agreed to indemnify Respondent, and is an agent of Respondent. Mot. Assert Third-Party Compl. 4–8.

Respondent explains a third-party complaint would serve efficiency, as Respondent would otherwise need to file a separate lawsuit against ADP to enforce its right to indemnification, which would risk inconsistent results, and both lawsuits would involve the same issues. *Id.* at 8–9. Finally, Respondent argues that adding ADP would serve the public interest by promoting compliance from third-party electronic services companies such as ADP. *Id.* at 9.

B. Complainant's Response in Opposition

Complainant takes a different position on the applicability of Rule 14 in this forum, noting the Federal Rules of Civil Procedure are not controlling, but rather serve as “general guidelines” in some circumstances. Opp’n Mot. Assert Third-Party Compl. 3. Complainant argues under OCAHO’s Rules, a private party does not have standing to file a complaint with OCAHO for violations of § 1324a, because OCAHO regulations directly preclude such action. *Id.* at 4. Complainant notes that the definition of “complainant” for a § 1324a claim identifies only the

Department of Homeland Security as a proper complainant. *Id.* at 4–6 (citing, *inter alia*, *Alvin J. Griffin, III v. All Desert Appliances*, 14 OCAHO no. 1370, 3 (2020)¹; 28 C.F.R. § 68.2²).

C. Law & Analysis

In *Griffin, III v. All Desert Appliances*, the Court denied a complainant’s request to amend his complaint to raise claims under § 1324a, explaining that “OCAHO has held that ‘[n]o private right of action or third party enforcement mechanism was included either in the employer sanctions provision or its implementing regulations, other than the right of an individual to submit a complaint to the [Department of Homeland Security] for investigation.’” 14 OCAHO no. 1370, at 3 (quoting *Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 3 (2003) (citing 8 C.F.R. § 274a.9(a))). “Thus, a private individual does not have standing to file a complaint with OCAHO seeking remedies for alleged violations of § 1324a.” *Id.* (citation omitted).

For several reasons, the Court concludes the rationale in *Griffin, III* should control. The OCAHO regulations are unequivocal in their identification of who can file a complaint in a § 1324a case – it is only the Department of Homeland Security. 28 C.F.R. § 68.2.³ While it is possible the

¹ Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, *seriatim*, of the specific entire volume. Pinpoint citations to OCAHO precedents after volume eight, 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 through the Westlaw database “FIM OCAHO,” the LexisNexis database “OCAHO,” and on the United States Department of Justice’s website: <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

³ 28 C.F.R. § 68.2 defines a “complainant” as “the Department of Homeland Security in cases arising under sections 274A and 274C of the INA.” As such, the Respondent—as a private company—does not have standing to bring a claim to enforce 8 U.S.C. § 1324a. *See Ecee, Inc., v. Fed. Energy Regul. Comm’n*, 645 F.2d 339, 350 (5th Cir. 1981) (noting that administrative courts, when considering standing, “must always begin with the language of the statute and regulations that provide for an administrative hearing” and where the agency’s own statute and regulations do not address the standing issue raised in a case, it should turn to Administrative Procedures Act); *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 614 (D.C. Cir. 1978) (Bazelon, J., concurring) (noting that “[t]he starting point in determining administrative standing should be the language of the statutes and regulations that provide for an administrative hearing, appeal, or intervention” where they are sufficiently specific).

allegations and points made by Respondent could give rise to consideration of a Rule 14-based third party complaint, it is ultimately not for this administrative court to decide. The Federal Rules cannot serve to justify a deviation from the regulatory limits expressly placed on the forum.

For this reason, Court denies Respondent’s motion to assert a third-party complaint against ADP. This decision does not preclude Respondent from seeking appropriate relief elsewhere.⁴

III. REQUESTS FOR SUBPOENAS

A. Standard of Law

Pursuant to 28 C.F.R. § 68.25, “[a]n Administrative Law Judge . . . upon request . . . by a party . . . may issue subpoenas as authorized by statute . . . Such subpoena may require attendance and testimony of witnesses and production of things including, but not limited to, papers, books, documents, records, correspondence[.]” 8 U.S.C. § 1324a(e)(2) provides that, in conducting a hearing, “administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing”

A subpoena “shall identify the person or things subpoenaed, the person to whom it is returnable and the place, date, and time at which it is returnable; or the subpoena shall identify the nature of the evidence to be examined and copied, and the date and time when access is required. Where a non-party is subpoenaed, the requestor of the subpoena must give notice to all parties” 28 C.F.R. § 68.25(b).

“[S]ince granting the issuance of a requested subpoena is discretionary, [the administrative law judge should] make an appropriate decision after reviewing the requesting party’s showing of general relevance and reasonable scope of the evidence sought.” *United States v. Creation & Innovation, Inc.*, 3 OCAHO no. 491, 941, 941 (1993) (citation omitted).

⁴ To the extent this fact pattern gives rise to a contractual dispute between Respondent and ADP, “OCAHO ALJ’s ‘may not perform duties inconsistent with their duties and responsibilities as administrative law judges.’” *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510c, 4 (2024) (internal citations omitted). “OCAHO’s Administrative Law Judges (ALJs) are ‘appointed pursuant to 5 U.S.C. [§] 3105’ to hear cases arising under 8 U.S.C. §§ 1324a–1324c.” *Id.* (citing 28 C.F.R. §§ 68.1, 68.2). “OCAHO’s rules authorize ALJs to ‘[c]onduct formal hearings in accordance with the provisions of the Administrative Procedure Act’ and ‘[t]ake any action authorized by the Administrative Procedure Act.’” *Id.* (citing 28 C.F.R. § 68.28). OCAHO ALJ’s do not have the authority to resolve contractual disputes. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416c, 8 (2023) (contractual disputes related to a settlement agreement “cannot be resolved in this forum”).

B. Discussion

Respondent requests that the Court issue a subpoena for ADP to appear and give testimony at a “Rule 30(b)(6) deposition,” and that ADP produce certain documents. Respondent’s requests for subpoenas are generally compliant with the regulatory requirements; Respondent used OCAHO’s standard subpoena request form (Form EOIR-30), identified the party subpoenaed and the date and time at which it is returnable, and the nature of the testimony and documents solicited. Respondent also provided Complainant with notice of the subpoenas.

While the Respondent has followed proper procedures for requesting a subpoena, the presiding ALJ, in her discretion, declines to issue subpoenas at this time. As discussed in a prior prehearing conference, prior to issuance of a subpoena, the Court would expect to see evidence that other available methods of securing evidence were unsuccessful.

Separately, Respondent should include additional rationale to assist the Court in understanding the necessity of issuing subpoenas to ADP, a third-party. *See Heath v. Consultadd*, 15 OCAHO no. 1395a, 5 (2022) (“Complainant has not met his burden of demonstrating that the information sought is relevant to the claims and defenses in the matter.”); *see also United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 5 n.6 (2012)

With those caveats in mind, it is worth noting and memorializing⁵ that ADP may possess evidence or information relevant to, at a minimum, an assessment of a civil penalty (should liability be established), and a properly requested subpoena may be the only avenue through which such evidence or information will enter the record. Respondent is certainly not precluded from requesting such a subpoena anew at the appropriate time with the above-provided guidance in mind.

Respondent’s requests for third-party subpoenas are DENIED.

SO ORDERED.

Dated and entered on August 23, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

⁵ Based on credible proffers made by Respondent at a June 25, 2024 prehearing conference.