

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

September 23, 2024

US TECH WORKERS, ET AL.,)	
Complainant,)	
)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2024B00089
)	
)	
BOARD OF TRUSTEES OF)	
THE UNIVERSITY OF ILLINOIS,)	
Respondent.)	
_____)	

Appearances: John Miano, Esq., for Complainant
Mary Deweese, Esq., and Kelli Meilink, Esq., for Respondent

ORDER DISMISSING COMPLAINT

I. PROCEDURAL HISTORY

This case arises under the employment discrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. On March 19, 2024, Complainant, US Tech Workers, et al., filed a complaint alleging that Respondent, Board of Trustees of the University of Illinois,¹ violated 8 U.S.C. § 1324b(a)(1)(B). On July 11, 2024, Respondent filed its Answer.

On August 20, 2024, the Court issued an Order to Show Cause to Complainant, noting the Respondent in this case may be a state agency with sovereign immunity, which can give rise to a jurisdictional issue.

¹ The Complaint initially named “Discovery Partners Institute.” In its June 3, 2024 filing, Respondent explained “Discovery Partners Institute is an institute of the University of Illinois. The Board of Trustees of the University of Illinois is the ‘body corporate and politic’ of the University of Illinois with the ‘power . . . to sue and be sued.’” Mot. Extension 1 n.1 (quoting 110 ILCS 305/1); *see also US Tech Workers et al. v. Bd. of Tr. of the Univ. of Ill.*, 20 OCAHO no. 1592, 1-2 (2024).

Respondent was also provided an opportunity to be heard. Both parties submitted matters for the Court's consideration timely.

On September 4, 2024, Complainant submitted a filing arguing this Court has subject matter jurisdiction. Complainant first argues that under *Ex parte Young*, 209 U.S. 123 (1908), granting "prospective relief in the form of an order to conform to [8 U.S.C. § 1324b]" would not invoke Eleventh Amendment sovereign immunity issues. Complainant's Resp. Show Cause 1. Complainant next argues that Respondent waived its immunity because it receives federal funds, or, alternatively, because Respondent "voluntarily invoke[ed] the federal rules governing . . . foreign labor." *Id.* at 2.

On September 13, 2024, Respondent submitted a filing arguing this Court does not have jurisdiction over the Complaint due to Eleventh Amendment sovereign immunity. As the governing board of a state university, Respondent is immune from suit. Resp't's Reply Show Cause 2. Respondent argues there is no indication in § 1324b that "receipt of federal funds . . . waive[s] . . . sovereign immunity," and it is "well-established" in this forum "that 'complaints against state agencies are routinely dismissed . . .'" *Id.* at 4 (quoting *Hossain v. Job Serv. N.D.*, 14 OCAHO no. 1352, 4-6 (2020)). Respondent argues *Ex parte Young* is inapplicable, and dismissal is appropriate." *Id.*

II. LAW & ANALYSIS

The Court "has an independent duty to ensure it only adjudicates matters of which it has subject matter jurisdiction." *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510b, 2 (2024).² The burden of establishing subject matter jurisdiction rests on the party invoking it (i.e. the Complainant). *See Zajradhara v. HDH Co., Ltd.*, 16 OCAHO no. 1417, 2 (2022). As previously noted:

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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

Sovereign immunity³ may be an issue of subject matter jurisdiction in the Seventh Circuit.⁴ For the purposes of sovereign immunity, “[s]tate agencies are treated the same as states.” *Kroll v. Bd. of Trustee of Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991) (citing *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978)). Further, it appears “[u]niversit[ies] and [their] Board[s] of Trustees are state agencies for sovereign-immunity purposes . . .” *Haynes v. Ind. Univ.*, 902 F.3d 724, 731 (7th Cir. 2018) (citing *Perick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep’t*, 510 F.3d 681, 695 (7th Cir. 2007)). Finally, “[s]tate sovereign immunity principles” also “generally apply to actions brought by private parties in administrative adjudications.” *Yeung v. Wash. State Dep’t of Licensing*, 17 OCAHO no. 1473b, 3 (2024) (citing *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 760 (2002)).

US Tech Workers v. Board of Trustees of Univ. Ill., 20 OCAHO no. 1592a, 2 (2024).

Analysis of sovereign immunity appears to have some circuit-specific nuance, and the Court here found the *McHugh* case to be particularly instructive Seventh Circuit decision. *McHugh v. Ill. Dep’t Transp.*, 55 F.4th 529 (7th Cir. 2022). The *McHugh* Court explained that “when it applies, the Eleventh Amendment deprives federal courts of jurisdiction over claims against immune defendants.” *Id.* at 532. Noting the complexity of this topic, the *McHugh* Court noted “‘jurisdictional’ has more than one meaning, [therefore the *McHugh* Court] can accurately say both that the Eleventh Amendment is jurisdictional and it is non-jurisdictional.” *Id.* It is jurisdictional insofar as, when asserted, it “den[ies]... the ‘Judicial power of the United States’ – that is, federal courts’ subject matter jurisdiction.” *Id.* at 532 (citing *Lapides v. Bd. Of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002) (*quoting* U.S. Const. amend. XI)). The *McHugh* Court keys in on the dissonance between subject matter jurisdiction, which can never be waived, and fact that a state may waive its sovereign immunity. *Id.* at 533. Therefore, the sovereign immunity can also be construed as “non-jurisdictional” in the Seventh Circuit. *Id.* at 533.

While jurisdictional distinctions are meaningful, they are not impactful for the case before this Court. Here, the query to the parties was whether sovereign immunity should be treated as subject matter jurisdictional. Neither party directly opined on this critical point, but it is clear from the Respondent’s

³ “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.” U.S. Const. amend. XI; *see also Yeung v. Wash. State Dep’t of Licensing*, 17 OCAHO no. 1473b, 3 (2024).

⁴ Since the Respondent in this case is based in Illinois, the Court may look to the case law of the relevant United States Court of Appeals, here the Seventh Circuit. See 28 C.F.R. § 68.57.

posture that it intends to assert sovereign immunity. As the McHugh Court explained, this immunity, once asserted, is jurisdictional, and its assertion here denies this forum the ability to hear this case.

III. CONCLUSION

The Complaint shall be DISMISSED WITHOUT PREJUDICE. This is a Final Order.⁵

SO ORDERED.

Dated and entered on September 23, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

⁵ This Order concludes the case, pending motions are DENIED at MOOT. Any currently scheduled conferences are cancelled.

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.