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

November 18, 2024

US TECH WORKERS, ET AL., Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 2025B00004
SLALOM, INC., Respondent.	)	

NOTICE OF CASE ASSIGNMENT FOR COMPLAINT
ALLEGING UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

1. A complaint was filed on October 9, 2024, against Slalom, Inc. (Respondent) by US Tech Workers, et al. (Complainant). A copy of the complaint is attached to this Notice of Case Assignment (NOCA). [1] This case is assigned to the Honorable Andrea Carroll-Tipton, Administrative Law Judge.

2. Proceedings in this matter will be conducted according to the OCAHO rules appearing at 28 C.F.R. pt. 68 and the applicable case law.[2] It is imperative that you obtain a copy of the rules

[1] OCAHO does not typically publish a NOCA. *United States v. Liberty Constructors, LLC*, 18 OCAHO no. 1495, 1 n.1 (2023). "However, OCAHO will publish a NOCA when it contains an update to the standard information provided in order to enhance transparency and better inform stakeholders with an interest in OCAHO proceedings." *Id*. "For similar reasons, OCAHO may also publish a NOCA to address an unusual procedural question or to clarify a general issue present at the initiation of a case." *Wangperawong v. Meta Platforms, Inc*, 20 OCAHO no. 1613, 1 n.1 (2024). In the instant case, a new complaint was filed by Complainant against Respondent following the dismissal without prejudice one month earlier of a previous complaint filed by Complainant against Respondent. *See US Tech Workers v. Slalom, Inc*., 20 OCAHO no. 1610 (2024). OCAHO has little precedential guidance regarding the handling of new complaints in such circumstances. Accordingly, OCAHO is publishing this NOCA to clarify issues regarding its handling of a new complaint filed following the dismissal without prejudice of a prior complaint between the same parties. *See infra* ¶¶ 9-12.

[2] Published OCAHO decisions may be accessed on the Executive Office for Immigration Review's (EOIR) website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions, or in the Westlaw

immediately and comply with their requirements in this case. A Portable Document Format (PDF) copy (32 pages) is available on the OCAHO webpage at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations. If you are unable to access the webpage or print a copy, you may call our office at 703-305-0864 and request that a copy be mailed to you at no charge.

Attorneys and unrepresented parties are advised to read the relevant rules in their entirety prior to filing documents. Attorneys are advised that the OCAHO rules sometimes differ from the Federal Rules of Civil Procedure.

Additionally, attorneys and unrepresented parties are encouraged to review and consult OCAHO's Practice Manual. OCAHO's Practice Manual is available at the following link, and provides an outline of the procedures and rules applicable to OCAHO cases: https://www.justice.gov/eoir/reference-materials/ocaho.

All representatives and parties are also required to maintain a current address with OCAHO and to timely file a notice of a change of address with the presiding Administrative Law Judge (or with the Chief Administrative Hearing Officer (CAHO) if the case either has not yet been assigned to an Administrative Law Judge or is under administrative review by the CAHO) and must also serve such notice on the opposing party. *See United States v. Cordin Co.*, 10 OCAHO no. 1162, 4

database "FIM-OCAHO," or in the LexisNexis database "OCAHO." Hard copy volumes of OCAHO decisions up to and including volume 8 may be located at federal depository libraries nationwide, which may be located at http://catalog.gpo.gov/fdlpdir/FDLPdir.jsp. All volumes after 8 are only available online.

(2012) ("It is the Respondent's responsibility (indeed, the responsibility of all parties before OCAHO) to file a notice of change of address or other contact information directly with the [Administrative Law Judge], as well as serving that notice on the opposing party."); *cf.* 28 C.F.R. § 68.6(a) ("Except as required by § 68.54(c) and [§ 68.6(c)], service of any document upon any party may be made . . . by mailing a copy to the last known address.").

3. OCAHO does not have authority to appoint counsel. 28 C.F.R. § 68.34. Unrepresented parties are encouraged to seek and obtain representation and, if appropriate, to avail themselves of available pro bono resources. Private parties may be represented by an attorney who is a member in good standing of the bar of the highest court of any state, the District of Columbia, or any territory or commonwealth of the United States. 28 C.F.R. § 68.33(c)(1). Attorneys must file a Notice of Appearance as required by 28 C.F.R. § 68.33(f). In limited circumstances subject to the requirements of 28 C.F.R. § 68.33(c)(2), private parties may be represented by law students. Private parties may also be represented by certain non-attorney representatives in appropriate circumstances, in accordance with the requirements in 28 C.F.R. § 68.33(c)(3). Non-attorney representatives who wish to appear before the Administrative Law Judge on behalf of a party must seek approval from the Administrative Law Judge pursuant to 28 C.F.R. § 68.33(c)(3). Private parties may also represent themselves and should file a Notice of Appearance in accordance with 28 C.F.R. § 68.33(f) if they do so.

4. The Respondent has the right to file an answer to the complaint. The answer (and two copies) must be filed within thirty (30) days after receipt of the attached complaint by either

Respondent or its attorney (or representative) of record. 28 C.F.R. §§ 68.3(b), 68.9. The answer is considered filed on the date when OCAHO receives the filing. 28 C.F.R. § 68.8(b). If the Respondent fails to file an answer within the time provided, the Respondent may be deemed to have waived its right to appear and contest the allegations of the complaint, and the Administrative Law Judge may enter a judgment by default along with any and all appropriate relief. 28 C.F.R. § 68.9(b).

5. All documents filed by either party, including letters, must be filed and served as follows: (i) File one original signed document and two copies, **including** attachments, with the Administrative Law Judge, and serve one copy on each person on the attached Service List. 28 C.F.R. § 68.6(a);

(ii) Effort should be made to avoid filing by facsimile. Filing by facsimile is permitted only to toll a deadline. 28 C.F.R. § 68.6(c). Exhibits and attachments are never to be filed by facsimile; and

(iii) Include a certificate of service indicating the recipient(s), manner and date of service with every filing. 28 C.F.R. § 68.6(a). A document that does not have a certificate of service will be returned to the party filing it.

6. Procedures for conducting discovery are governed by OCAHO rules and applicable case law. *See generally* 28 C.F.R. §§ 68.6(b), 68.18–68.23. The parties should not initiate discovery until the presiding Administrative Law Judge has set a discovery schedule or otherwise authorized

the start of discovery. *See Ferrero v. Databricks*, 18 OCAHO no. 1505, 4-8 (2023). Should either party believe it is necessary to begin discovery prior to that time, it may seek leave from the presiding Administrative Law Judge to do so through the filing of a motion. *See id*.

7. OCAHO operates a Settlement Officer Program, which is a voluntary program through which the parties can use a settlement officer to mediate settlement negotiations as a means of alternative dispute resolution. The settlement officer may convene and oversee settlement conferences and negotiations, may confer with the parties jointly and/or individually, and will seek voluntary resolution of issues. The parties may request that the presiding Administrative Law Judge refer the case to a settlement officer at any time while proceedings are pending, up to thirty days before the date scheduled for a hearing in the matter. More information about the Settlement Officer Program can be found in the OCAHO Practice Manual: https://www.justice.gov/eoir/reference-materials/ocaho/chapter-4/7.

8. Should the Administrative Law Judge determine that a hearing is required, the Respondent would have the right to appear in person and give testimony at the place and time fixed for the hearing. 28 C.F.R. § 68.39. Due regard shall also be given to the convenience and necessity of the parties or their representatives in selecting a time and place for the hearing. *See* 5 U.S.C. § 554(b); 28 C.F.R. § 68.5(b).

9. As noted *supra*, the instant complaint was filed following the recent dismissal without prejudice of a prior complaint involving the same parties and what appears to be the same, or very similar, issues. In such circumstances, most federal trial courts have local rules treating a second

case filed after the dismissal of an initial case involving the same parties and issues as a related case. *See, e.g*., D.D.C. Civ. R. 40.5(a)(4). OCAHO now clarifies that it will follow that practice as well. In other words, where a case is dismissed and then refiled with the same parties and involving the same, or substantially similar, issues as the first case, OCAHO will treat the second case as a related case and—absent specific, exceptional circumstances—will assign it to the same Administrative Law Judge who presided over the first case. *See generally Wangperawong*, 20 OCAHO no. 1613, at 5-6 (discussing OCAHO's handling of related cases). Accordingly, because the instant case relates to the case that was recently dismissed, *see Slalom, Inc*., 20 OCAHO no. 1610, at 10, and there are no exceptional circumstances counseling otherwise, the instant case has been assigned to the same Administrative Law Judge who presided over the dismissal of the first case.

10. Complainant's prior complaint was dismissed without prejudice.[3] *Slalom, Inc*., 20 OCAHO no. 1610, at 10. Unlike a dismissal with prejudice, such a dismissal does not operate as

[3] If the prior complaint had been dismissed with prejudice, then additional considerations may apply. For example, a subsequent complaint between the same parties involving the same or substantially similar issues following a dismissal with prejudice is typically barred by *res judicata*, *see*, *e.g.*, *Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000) (noting that "a suit that has been dismissed with prejudice cannot be refiled; the refiling is blocked by the doctrine of res judicata"); *Huesca v. Rojas Bakery*, 4 OCAHO no. 654, 550, 557 (1994) ("A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action." (quoting *Nemaizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986))), if *res judicata* is timely pled as a defense, *cf*. Fed. R. Civ. P. 8(c)(1) (directing that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . res judicata"); 28 C.F.R. § 68.1 (noting that the Federal Rules of Civil Procedure may be used as general guidelines in OCAHO proceedings). As an affirmative defense, however, *res judicata* may be waived or forfeited in certain circumstances. *See, e.g.*, *Burton v. Ghosh*, 961 F.3d 960, 965 (7th Cir. 2020) ("An affirmative defense is waived when it has been knowingly and intelligently relinquished and forfeited when the defendant has failed to preserve the defense by pleading it."); *see also United States v. Split Rail Fence Co.*, 11 OCAHO no. 1216, 1-2 (2014) ("Ordinarily a party's failure to plead an affirmative defense in its answer results in the waiver of that defense and its exclusion from the case."). But, even if not timely pled as an affirmative defense, OCAHO has allowed subsequent consideration of *res judicata* arguments in a motion to dismiss when the opposing

an adjudication on the merits. *See*, *e.g.*, *United States v. Sahara Wireless Int'l, Inc.*, 11 OCAHO no. 1262, 2 (2015) ("As pointed out . . . a dismissal without prejudice is one that leaves the parties as if no action had been brought at all. This would leave the [complainant] free to reinstitute the matter at any time by filing a new complaint. A dismissal **with** prejudice, on the other hand, is the equivalent of a decision on the merits; it has both res judicata and collateral estoppel consequences." (emphasis in original) (citation omitted)). Further, unlike a dismissal with leave to amend or some other type of conditioned dismissal,[4] a pure dismissal without prejudice does not stop or toll the running of the statute of limitations. *Compare Elmore*, 227 F.3d at 1011 ("The

party makes no objection to consideration of the defense. *See Split Rail Fence Co.*, 11 OCAHO no. 1216 at 2; *cf. Burton*, 961 F.3d at 965 ("A [trial] court may, however, exercise its discretion to allow a late affirmative defense if the plaintiff does not suffer prejudice from the delay."). Further, in "special circumstances," *res judicata* may be raised *sua sponte* by a court to dismiss a complaint. *See Arizona v. California*, 530 U.S. 392, 412 (2000) ("[I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte,* even though the defense has not been raised. This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting))); *see also Burton*, 961 F.3d at 966 n.1. ("Under certain circumstances, a court may invoke res judicata or claim preclusion *sua sponte* to defend the institutional interests of the judiciary."). Given the multiple potential legal permutations involved when a new complaint is filed following the dismissal of a previous one with prejudice between the same parties, the CAHO generally will not address the applicability of *res judicata* in such circumstances at the time a new complaint is filed and a presiding Administrative Law Judge is assigned. Rather, any resolution of that issue will appropriately be addressed by the presiding Administrative Law Judge in the first instance.

[4] The presiding Administrative Law Judge did not condition her order of dismissal; she also did not discuss whether any amendments to the initial complaint would be viable, nor did she provide a rationale for why she dismissed it without prejudice rather than with prejudice. *See Slalom, Inc.*, 20 OCAHO no. 1610, at 9-10. She did make clear, however, that her order of dismissal was "final," and, thus, that she considered the case completed. *Id.* at 10; *see also* 28 C.F.R. § 68.2 (defining a final order by an Administrative Law Judge). Consequently, for purposes of the second complaint, the undersigned views the dismissal of the first complaint as simply a final, non-contingent dismissal without prejudice and without leave to amend or any expectation of any further continuation of the case. *Cf. Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1020-21 (7th Cir. 2013) (collecting cases and discussing situations in which the dismissal of a complaint may or may not also constitute dismissal of an entire action). Nevertheless, to the extent that it becomes an issue in the instant case and the presiding Administrative Law Judge actually intended or anticipated that Complainant would amend its complaint or refile an amended complaint—or did not intend the order of dismissal of the first complaint to be final for purposes of 28 C.F.R. § 68.2—she may clarify that issue, as appropriate.

filing of a suit stops the running of the statute of limitations, though only contingently. . . . But if the suit is dismissed without prejudice, meaning that it can be refiled, then the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing."), *and Powell v. Starwalt*, 866 F.2d 964, 966 (7th Cir. 1989) ("'Without prejudice' does not mean 'without consequence.' If the case is dismissed and filed anew, the fresh suit must satisfy the statute of limitations."), *with Brennan v. Kulick*, 407 F.3d 603, 607 (3d Cir. 2005) ("Accordingly, we hold that when a complaint is filed within the statute of limitations but is subsequently dismissed without prejudice in an order containing conditions for reinstatement within a specified time period, the statute of limitations is tolled provided that the plaintiff meets those conditions.").[5]

[5] Although federal district courts commonly issue orders dismissing complaints with leave to amend, OCAHO's authority to do so is somewhat less clear. An OCAHO Administrative Law Judge may only permit an amendment to a complaint, *inter alia*, "prior to the issuance of the Administrative Law Judge's final order based on the complaint." 28 C.F.R. § 68.9(e); *accord* 8 U.S.C. § 1324b(e)(1) ("Any such complaint [under 8 U.S.C. § 1324b] may be amended by the [administrative law] judge conducting the hearing, upon the motion of the party filing the complaint, in the judge's discretion at any time *prior to the issuance of an order based thereon*." (emphasis added)). In turn, a "final order" is "an order by an Administrative Law Judge that disposes of a particular proceeding or a distinct portion of a proceeding, thereby concluding the jurisdiction of the Administrative Law Judge over that proceeding or portion thereof." 28 C.F.R. § 68.2. Consequently, to the extent that an Administrative Law Judge orders the dismissal of a complaint, that dismissal, arguably, constitutes a final order which, in turn, precludes the Administrative Law Judge from allowing any further amendment to the complaint under 8 U.S.C. § 1324b(e)(1) and 28 C.F.R. § 68.9(e) and, thus, renders the concept of an order of dismissal with leave to amend something of a legal oxymoron. Nevertheless, OCAHO jurisprudence has long contemplated the authority of Administrative Law Judges to issue orders of dismissal with leave to amend, *see*, *e.g., Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 7 (2016) (noting that "[o]rdinarily the dismissal of a complaint at the pleading stage would be accompanied by leave to amend the complaint"), and the posture of the instant case provides no occasion to definitively resolve the issue. However, to avoid potential confusion and legal uncertainty, an Administrative Law Judge who issues an order of dismissal with leave to amend should consider making clear that the order is not a final order for purposes of 28 C.F.R. § 68.2, at least until any time period to file an amended complaint has run.

11. Moreover, at least one OCAHO Administrative Law Judge has previously found that after a prior dismissal without prejudice, the complainant must either refile a complaint within the already-applicable statute of limitations period (or establish an entitlement to equitable tolling[6] of that period) or timely comply with the statutory conditions precedent for filing a complaint with OCAHO under 8 U.S.C. § 1324b, namely the timely filing of a charge with the Immigrant and Employee Rights Section, which would, in turn, trigger a new statute of limitations period with OCAHO; otherwise, the second complaint is necessarily subject to dismissal as well. *See Horne v. Town of Hampstead*, 6 OCAHO no. 906, 941, 951-56 (1997) (dismissing a second complaint following the dismissal without prejudice of an initial complaint, in part, because the statute of limitations had run and complainant neither demonstrated an entitlement to equitable tolling nor complied with the statutory procedures precedent to filing a complaint with OCAHO).

12. As this brief survey of relevant law makes clear, there are a number of potentially knotty legal issues to sort through when a new complaint is filed following the dismissal of a previous complaint. In light of these various issues and their complexity, the CAHO generally will not address them in a NOCA; rather, the assigned Administrative Law Judge may address them, as appropriate, in the first instance. *Cf. supra* note 3. Accordingly, due to the possibly thorny procedural questions in the instant case based on the dismissal without prejudice of the previous case, the parties should be mindful of the relevant principles outlined above and the applicable

[6] The basis for OCAHO's authority to utilize equitable powers, including equitable tolling, remains unclear. *See United States v. Corrales-Hernandez*, 17 OCAHO no. 1454d, 4 n.6 (2023).

case law and should be prepared to potentially address these issues in their arguments to the presiding Administrative Law Judge.

13. All parties in OCAHO proceedings are expected to act with integrity and in an ethical manner and shall conform their conduct to the Standards of Conduct. 28 C.F.R. § 68.35.

Notice Given By:

James McHenry
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