

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

March 5, 2024

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 2023A00015
)	
WALMART INC (BETHLEHEM),)	
Respondent.)	
_____)	

ORDER

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. On February 23, 2024, Chief Administrative Law Judge (ALJ) Jean King issued an Order on Motion to Dismiss First Amended Complaint (“Order on Motion to Dismiss”) in the above-captioned case. On March 4, 2024, the Office of the Chief Administrative Hearing Officer (OCAHO) received Respondent’s Motion for Interlocutory Review of the Administrative Law Judge’s Order on Respondent’s Motion to Dismiss (“Motion for Interlocutory Review”), pursuant to 28 C.F.R. § 68.53(a)(2). Respondent’s Motion for Interlocutory Review challenges the Chief ALJ’s conclusions with respect to whether the First Amended Complaint met OCAHO’s pleading standard.

As a threshold matter, the Chief Administrative Hearing Officer (CAHO) may only review interlocutory orders issued by an ALJ if certain conditions are met. More specifically—and regardless of whether interlocutory review is initiated by action of an ALJ, a party, or the CAHO, *see* 28 C.F.R. §§ 68.53(a)(1)-(3)—interlocutory review is appropriate only if (1) “the order concerns an important question of law on which there is a substantial difference of opinion,” and (2) “an immediate appeal will advance the ultimate termination of the proceeding or . . . subsequent review will be an inadequate remedy.” 28 C.F.R. § 68.53(a)(1).

In its Motion for Interlocutory Review, Respondent argues that both conditions are met in this case. Regarding the first condition, Respondent asserts that “[t]he ALJ’s Order . . . departs from OCAHO’s Pleading Standard . . . and presents a substantial difference of opinion with previous OCAHO case law.” Motion for Interlocutory Review, 3. As Respondent points out, the CAHO has previously noted that “[t]he pleading standard in OCAHO cases is certainly an important threshold issue that would impact all complaints in OCAHO cases.” *Id.* at 4 (quoting *United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 4 (2013)). Respondent further argues that “the efficient use of OCAHO resources” and “the novelty of Complainant’s allegations” further counsel in favor of interlocutory review. *Id.* Additionally, Respondent asserts that there is a substantial difference of opinion because the ALJ’s order “is contrary to OCAHO

regulations and case law because the ALJ strayed beyond the four corners of the [First Amended Complaint] in an attempt to supplement and clarify Complainant’s vague, confusing, and ambiguous allegations.” *Id.* at 5.

As to the second condition, Respondent asserts both that interlocutory review would advance the ultimate termination of the case and that subsequent review would be an inadequate remedy. *See id.* at 10-12. First, Respondent argues that “an order resulting in the dismissal—or at least clarification—of Complainant’s allegations would focus Respondent’s legal defense and this court’s review.” *Id.* at 11. Second, Respondent notes that “[s]hould review be delayed until after the ALJ’s final order, and the CAHO then concludes the ALJ committed legal error during the pleading stage, the harms to Respondent (and OCAHO) will have already occurred.” *Id.* at 12. Accordingly, Respondent requests that the CAHO grant Respondent’s Motion for Interlocutory Review.

Respondent has made the requisite showing required for interlocutory review under 28 C.F.R. § 68.53(a)(1) and (2). As Respondent noted—and as a prior CAHO has previously determined—“[t]he pleading standard in OCAHO cases is . . . an important threshold issue,” *United States v. Split Rail Fence Co.*, 10 OCAHO no. 1181, 4 (2013), and Respondent asserts that the Chief ALJ’s analysis of that issue departed from previous OCAHO case law, which—if true—would constitute the “substantial difference of opinion” required by 28 C.F.R. § 68.53(a)(1)(i). Additionally, immediate appeal is appropriate because “if the complaint was insufficient to state a claim upon which relief may be granted, such a determination should be made before subjecting the parties to potentially lengthy and costly discovery and/or a full hearing.” *Split Rail Fence Co.*, 10 OCAHO no. 1181 at 4; *cf. Ferrero v. Databricks*, 18 OCAHO no. 1505, 4-5 (2023) (discussing that the general view in federal civil litigation that a motion to dismiss, including one asserting a failure to state a claim upon which relief may be granted, “should generally be resolved *before* discovery begins” in order to avoid unnecessary costs to the parties and the court (emphasis in original)).

Moreover, the undersigned is cognizant that the instant case is one of twenty similar cases filed nationwide against different locations of the same retailer alleging over 11,000 combined violations of 8 U.S.C. § 1324a, that Respondent’s counsel is also counsel in the additional nineteen cases, that all twenty cases raise similar questions about OCAHO pleading standards, and that all twenty cases may be affected by review in the instant case. *See generally* Motion for Interlocutory Review, 4-5, 10-12; *see also United States v. Walmart, Inc. (Bethlehem)*, 17 OCAHO no. 1475d, 7 (2023) (noting that “it appears that . . . each of the pending cases [related to the instant case] contain[s] substantially similar types of charges and factual allegations”). Thus, if Respondent’s arguments are correct, interlocutory review would not only advance the termination of the instant case—and also save potentially unnecessary costs which may not be able to be recouped upon subsequent review—but would do so for multiple other cases as well. In sum, Respondent’s Motion sufficiently establishes a basis for interlocutory review under OCAHO’s regulations. Accordingly, Respondent’s Motion for Interlocutory Review is GRANTED.¹

¹ To be clear, the undersigned’s determination that Respondent has met the threshold criteria for interlocutory review should not be construed in any way as a commentary on the merits of Respondent’s arguments. Indeed, OCAHO has long held that “[m]otions to dismiss for failure to state a claim are generally disfavored, and will only be granted in extraordinary circumstances.” *Split Rail Fence Co.*, 10 OCAHO no. 1181, at 6. Moreover, although Respondent raised

Additionally, in its Motion for Interlocutory Review, Respondent requests that if the CAHO grants Respondent’s Motion, the parties be allowed twenty-one days from the date of the CAHO’s order to submit additional briefing, rather than the twenty-one days from the date of the ALJ’s order provided for in OCAHO’s regulations.² Motion for Interlocutory Review at 1, 13; *see also* 28 C.F.R. § 68.53(c) (referring to, *inter alia*, 28 C.F.R. § 68.54(b), which provides that parties may file briefs related to an administrative review within twenty-one days of the date of entry of the ALJ’s order).

OCAHO’s regulations provide that in cases of interlocutory review, if the CAHO does not modify, vacate, or remand the ALJ’s order within thirty days of the date of entry of that order, the ALJ’s interlocutory order is deemed adopted. 28 C.F.R. § 68.53(c). Therefore, unless the CAHO issues an order modifying, vacating, or remanding the Chief ALJ’s order on or before March 24, 2024, the Chief ALJ’s order will be deemed adopted. Respondent’s requested briefing deadline—twenty-one days from the date of this order—would fall outside the CAHO’s window to modify, vacate, or remand the Chief ALJ’s order; therefore, that order would be deemed adopted before the parties had an opportunity to brief the issues and before the undersigned could complete the review. Respondent has identified no authority allowing the CAHO to extend or ignore the regulatory deadline for modification, vacatur, or remand of an interlocutory order, and the undersigned is aware of none. *See, e.g., United States v. Corrales-Hernandez*, 17 OCAHO no. 1454d, 2-3 (2023) (discussing a similar request to extend the briefing deadline during an administrative review).

Nevertheless, the undersigned recognizes that 28 C.F.R. § 68.53(c) imposes an arguably short deadline for interlocutory review and that the issues raised by Respondent are complex and involve an underlying novel and developing area of law. Thus, the undersigned finds that Respondent has established good cause for a limited extension of time for briefing and will GRANT, IN PART, Respondent’s request.

The parties may file briefs or other written statements related to the interlocutory review by **3:00 p.m. Eastern Daylight Time on March 18, 2024**. *See* 28 C.F.R. § 68.54(b)(1) (permitting briefs to be filed within twenty-one days of the date of entry of the ALJ’s order); 28 C.F.R. § 68.54(b)(2) (“At the request of a party . . . the [CAHO] may . . . permit or require additional filings . . .”). Parties should file and serve their briefs or other written statements by email, pursuant to the Chief ALJ’s January 18, 2023 Order Directing Parties to File Case Documents by Email. *See* OCAHO Instructions for Filing by Email, ¶ 11 (noting that parties participating in electronic filing

the prospect of the Chief ALJ ordering Complainant to file a more definite statement regarding the original complaint, *see* Respondent’s Motion to Dismiss, 18 n.4, that issue became moot when the Chief ALJ granted Complainant’s request to amend its original complaint. *See United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475a, 2 (2023). The record is unclear as to whether Respondent sought to move for a more definite statement regarding the First Amended Complainant (FAC) in light of its repeated assertions that the FAC is “vague” and “ambiguous.” *See* Motion for Interlocutory Review, 1, 5, 8; *cf.* FED. R. CIV. P. 12(e) (“A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.”). Nevertheless, that may be a procedural option available to Respondent as an alternative to dismissal. Overall, Respondent still bears the burden of establishing its entitlement to relief on the merits of the interlocutory review—i.e., that dismissal of the FAC is warranted for failure to state a claim on which relief may be granted—and nothing in the instant Order relieves it of that burden.

² Twenty-one days from the date of the Chief ALJ’s order would be March 15, 2024. Twenty-one days from the date of this CAHO order would be March 26, 2024.

before an ALJ may also utilize electronic filing for review proceedings conducted by the CAHO).³ The parties are further reminded that the undersigned “ordinarily expects both parties to fully develop their positions and arguments during an administrative review.” *See United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, 5 (2023).

Finally, the undersigned has determined that the circumstances of this case warrant a stay of the underlying proceedings for the duration of the administrative review period. *See* 28 C.F.R. § 68.53(b). In particular, in her Order on Motion to Dismiss, the Chief ALJ ordered the parties to provide the Court with a list of claims subject to dismissal on the grounds specified in her order by March 22, 2024. *See* Order on Motion to Dismiss, 26. Because that deadline falls within the thirty-day administrative review period, and because this administrative review may impact the list of claims subject to dismissal, the undersigned hereby orders that the proceedings before the Chief ALJ in the instant case, including all deadlines for party action, are STAYED pending the outcome of this interlocutory review. The stay will dissolve automatically at the conclusion of the administrative review, and upon conclusion of the review, the Chief ALJ shall reset all stayed deadlines, if appropriate.

It is SO ORDERED, dated and entered this 5th day of March, 2024.

James McHenry
Chief Administrative Hearing Officer

³ The undersigned notes Respondent’s statements in the Certificate of Service included with its Motion for Interlocutory Review regarding difficulties in attempting to fax a copy of the motion to OCAHO. Because this case is enrolled in electronic filing, parties may file all case documents (including documents related to interlocutory review) by email, using the same OCAHO email address as they have for previous filings. Thus, it is not necessary for the parties to also fax a copy of those filings or transmit them to OCAHO via other means unless specifically directed to do so. Nevertheless, OCAHO will look into the Respondent’s reported issue with filing documents by facsimile.