

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

ROBERT HEATH,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	
)	OCAHO Case No. 2021B00045
ANCILE, INC.,)	
Respondent.)	
)	

Appearances: Robert Heath, pro se Complainant
Ralph Hua, Esq., and Andrew Hoag, Esq., for Respondent

NOTICE AND ORDER

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. On July 12, 2021, Complainant, Robert Heath filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Ancile, Inc. Complainant alleges that Respondent engages in employment-based discrimination against American workers by preferring to hire individuals who possess foreign work visas. On August 11, 2021, Respondent timely filed an answer denying all liability.

On July 18, 2022, the undersigned issued an Order related to the Respondent’s Notification of Complainant’s Passing and Motion to Dismiss. *See Heath v. Ancile, Inc.*, 15 OCAHO no. 1411, 1 (2022).¹ The Court indicated that it would take official notice of Complainant’s death, subject to the parties’ opportunity to comment per OCAHO Rule 68.41.² *Id.* The Court further directed the parties to file any briefs concerning the applicability of Federal Rule of Civil Procedure 25 (Rule 25) to these proceedings. *Id.* at 1–2. The Court additionally directed that the parties shall file any submissions to these questions within 30 days of the Order. *Id.* at 2.

¹ 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 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 “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

Neither Complainant nor his successor in interest filed a response to the Order concerning judicial notice. Complainant also did not file a submission concerning the applicability of Rule 25. Respondent's August 15, 2022 submission on this question urged the Court to deem Rule 25 applicable to this matter, and further sought for the Court to rule that no person should be substituted for Complainant.

Addressing the first question, concerning official notice of Complainant's death, OCAHO Rule 68.41 states in part that "official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice." Official notice is subject to the procedural safeguard of the Court, which identifies the matters which it intends to take notice and offers the parties an opportunity to evaluate the matters and object. *See id.* While recent decisions have described official notice as the functional equivalent of Federal Rules of Evidence 201's judicial notice, *see United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387, 2 (2021), other courts describe official notice as a broader concept, including the traditional subjects of judicial notice as well as information which an executive branch agency³ uncovers in the course of the exercise of its duties. *De La Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (citing *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992), and then citing *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)); *see also Kaczmarczyk v. INS*, 933 F.2d 588, 596 (7th Cir. 1991) (noting that courts allow agencies "wide latitude in taking official notice.") (citations omitted). In *Castillo-Villagra*, the court affirmed adoption of a "rule of convenience" for administrative notice, stating that "the ALJ should take notice of adjudicative facts, whenever 'the ALJ at the hearing knows of information that will be useful in making the decision.'" 972 F.2d at 1026 (quoting in part *Banks v. Schweiker*, 654 F.2d 637 (9th Cir. 1981)) (referencing Social Security adjudication, in which the Administrative Procedures Act applies). The items for which OCAHO has taken official notice are varied, including the date of a holiday, the number of people that a company employs, and the date of service of a complaint. *E.g.*, *Sabol v. N. Mich. Univ.*, 9 OCAHO no. 1107, 7 n.5 (2004); *Harris v. State of Haw., Dep't of Ed.*, 6 OCAHO no. 922, 1214, 1217 (1997); *United States v. Vazquez-Guerrero*, 1 OCAHO no. 37, 204, 204 (1989). Notwithstanding the broader conception of official notice which those courts espouse, all forms of notice (whether judicial or official) require prior notice to the parties and the parties' opportunity to comment or oppose the court's taking notice of the proposed fact. *See* 28 C.F.R. § 68.41.

Federal Rule of Evidence 201 describes a matter for which one might traditionally take judicial notice as:

"[A] fact that is not subject to reasonable dispute because it:

³ Final Report of the Attorney General's Committee on Administrative Procedure, 1941, pp. 71–73 ("If information has come to an agency's attention in the course of investigation of the pending case, it should be adduced only by the ordinary process . . . [.] But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience [and, they should take notice of such facts.]").

- 1) Is generally known within the trial court's territorial jurisdiction; or
- 2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

Fed. R. Evid. 201(b). A matter may be the subject of judicial notice either by a party presenting it to the Court or by the Court noting the matter on its own. Fed. R. Evid. 201(c). The comment to Rule 201(b) states that matters appropriate for judicial notice are those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." Fed. R. Evid. 201(b), advisory committee's note. Indeed, "[i]n order for a fact to be judicially noticed under Rule 201(b), indisputability is a prerequisite [...]. Since the effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and in effect, directing a verdict against him as to the fact noticed, the fact must be one that only an unreasonable person would insist on disputing." United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) (citations omitted). The matter which is subject to judicial notice should also be relevant to the proceedings. United States v. Falcon, 957 F.Supp. 1572, 1585 (S.D. Fla. 1997) (noting that "a court may refuse to take judicial notice of facts that are irrelevant to the proceeding or (in certain contexts) otherwise excludable under the Federal Rules.") (citations omitted).

In the matter presently before the Court, Respondent has offered the death certificate of Robert Heath for judicial notice. The document states that Mr. Heath expired on May 18, 2022; his death was registered with the State of Florida on June 1, 2022; and the death certificate was issued on June 24, 2022. The death notice appears to be an official document produced by the State of Florida's Bureau of Vital Records. It contains Complainant's full name, his address, the state file number for the death certificate, and the name of the physician who certified his death.

Whether under the broader concept of official notice or under the more circumscribed evidentiary rule 201 judicial notice analysis, Complainant's death certificate meets the standard, and accordingly the Court takes official notice of the document. *See* 28 C.F.R. § 68.41. The Court notes that no one has objected that the death certificate is inaccurate or an improper subject of official notice. The death certificate is an official record created by the State of Florida, falling within Rule 201(b)(2)'s stricture of a document coming from a source "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Further, as a public record the contents of the document can be "readily and accurately determined." *See id.* The death certificate contains a reference number at the top left-hand corner, from which one might presumably obtain a duplicate copy to check its veracity. Finally, the death notice is unquestionably relevant to this matter, in that it bears on Complainant's ability to proceed in this litigation.

Based on the Court taking official notice of the death certificate, the Court finds that Complainant Robert Heath died on May 18, 2022.

Addressing the second question, the applicability of Federal Rule of Civil Procedure 25 to OCAHO proceedings, 28 C.F.R. § 68.1 provides that the Federal Rules "may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative

Procedures Act, or by any other applicable statute, executive order, or regulation.” Neither party has objected to the application of Rule 25 to these proceedings. Further, OCAHO has in the past approvingly cited to Rule 25’s provisions concerning the substitution of parties. Lee v. AT&T, 7 OCAHO no. 924, 9 n.5 (1997) (“Although the OCAHO rules do not directly address the issue of substitution of parties, the Federal Rules of Civil Procedure may be utilized as a general guideline in any situation not covered by the OCAHO Rules [...] Therefore, Rule 25 of the FRCP may be relevant to the issue of substitution of the parties in this case.”) (internal citation omitted). The Court determines that neither the OCAHO Rules nor the Administrative Procedures Act present a conflict with Rule 25, and accordingly the Court determines that Rule 25 should apply.

Respondent also objects to the substitution of any person for Complainant in this matter. The Court finds this objection to be premature—to date, no party has sought to be substituted for Complainant.⁴ Finally, neither party raises the question of whether Complainant’s claim has been extinguished due to his death, and the Court need not decide the question at this juncture.

Per Rule 25, should a party fail to file a motion “within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.” Fed. R. Civ. P. 25(a)(1).

Complainant appeared pro se in this litigation. Thus, he did not have counsel who would, in the ordinary course, provide notification to the Court of their client’s death. The Court’s determination that Complainant is deceased would normally trigger the ninety-day window for filing motions for substitution per Rule 25. However, courts have noted that upon the determination that a party is deceased, notice must be provided to that party’s successor in interest or executor, regardless of whether the nonparty has entered an appearance or otherwise advised the court of their interest in the litigation. *See, e.g., Diamond Resorts Int’l, Inc. v. US Consumer Attorneys, PA*, No. 18-80311-CIV-REINHART, 2020 WL 11423190, at *3 (S.D. Fla. Oct. 13, 2020) (“Numerous decisions . . . have held that a deceased party’s personal representative is a ‘nonparty’ who must be identified in the Suggestion of Death and personally served, pursuant to Rule 4 before the ninety-day deadline for substitution is triggered.”) (citations omitted); Williams v. Scott, No. 07-22617-CIV, 2011 WL 541343, at *3 (S.D. Fla. Feb. 8, 2011) (holding that failure to notice a successor or representative of the deceased, such as an executor or administrator, is insufficient to begin the Rule 25 ninety-day period) (citations omitted); Atkins v. City of Chi., 547 F.3d 869, 873 (7th Cir. 2008) (“[N]onparties with a significant financial interest in the case, namely the decedent’s successors (if his estate has been distributed) or personal representative (it has not been), should certainly be served.”); Barlow v. Ground, 39 F.3d 231, 233 (9th Cir. 1994) ([The moving party must] serve other parties and nonparty successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute.”); Farris v. Lynchburg Foundry, 769 F.2d 958, 962 (4th Cir. 1985) (same).

⁴ Respondent may re-raise either of these objections (or any other that it deems appropriate) upon a motion by a third party to substitute themselves for Complainant.

Mindful of this precedent, the Court provides notice to Robert Heath's apparent successor in interest. The certification of death identifies Tonya Heath, residing in Raleigh, North Carolina,⁵ as his daughter. The Court further notes that Ms. Heath is identified in the Circuit Court in Palm Beach County, Florida's website as the personal representative for Complainant's estate. eCaseView, <https://appsgp.mypalmbeachclerk.com/eCaseView/search.aspx> (last visited Oct. 14, 2022). The Court therefore intends to take official notice, subject to the parties' opportunity to comment and advise, of Ms. Heath as Complainant's executor. Respondent and Ms. Heath may advise or object, by no later than 14 days from the issuance of this Order, concerning the Court's intention of taking official notice of Ms. Heath as Complainant's executor pursuant to Rule 68.41.

The Court further provides that Ms. Heath shall be included in the certificate of service, and shall be served via certified mail with a copy of this Order.

SO ORDERED.

Dated and entered on October 20, 2022.

Honorable John A. Henderson
Administrative Law Judge

⁵ The death certificate provides a full address for Ms. Heath; the Court includes this address in the certificate of service but not the body of the Order out of concern for Ms. Heath's privacy.