

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

April 10, 2020

MELODY GAY BROOKS,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00038
)	
ANTHEM, INC.,)	
Respondent.)	
_____)	

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

On January 23, 2020, Complainant, Melody Gay Brooks, filed a complaint against Respondent, Anthem, Inc., alleging that Respondent terminated her based on her national origin and citizenship status, and retaliated against her in violation of 8 U.S.C. § 1324b. On March 2, 2020, Respondent filed an answer and a motion to dismiss. Complainant did not file a response to the motion. On March 23, 2020, Complainant filed a motion to dismiss seeking to voluntarily dismiss her complaint without prejudice. Respondent did not file a response to Complainant’s motion to dismiss.

Taking Complainant’s motion first, the OCAHO rules explicitly provide for dismissal of complaints under three circumstances: “(1) ‘[w]here the parties or their authorized representatives or their counsel have entered into a settlement agreement’ (28 C.F.R. § 68.14); (2) when a complaint or a request for hearing is abandoned by the party or parties who filed it (28 C.F.R. § 68.37(b)); (3) by default (28 C.F.R. § 68.37(c)).” *LeEdwards v. Kumagai Int’l USA Corp.*, 4 OCAHO no. 609, 197, 200 (1994).

The OCAHO rules do not specifically cover a voluntary dismissal by the complainant, but the Federal Rules of Civil Procedure may be used as a general guideline for any situation not covered by the OCAHO rules, the Administrative Procedure Act, any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1. Under Federal Rule of Civil Procedure 41(a)(2), the Court may, in certain circumstances, order dismissal of an action at the plaintiff’s request. “Such an order is proper only if a plaintiff has made a motion for dismissal.” *LeEdwards*, 4 OCAHO no. 609 at 200. The Court “should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a [respondent] can show that it will suffer some plain legal

prejudice as a result.” *Hughes v. Fiat Chrysler Automotive*, 13 OCAHO no. 1336, 1 (2019) (quoting *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001)).

Rule 41(a)(2) allows the Court to dismiss with or without prejudice, with the most important consideration being the interests of the defendant. *Schwarz v. Folloder*, 767 F.2d 125, 129 (5th Cir.1985). If the plaintiff moves under Rule 41(a)(2) for voluntary dismissal and specifies that he or she wishes dismissal with prejudice, the court must grant that wish. *Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir.1964); *Shepard v. Egan*, 767 F.Supp. 1158, 1165 (D.Mass.1990). If, however, the plaintiff moves for dismissal under Rule 41(a)(2) and asks that the dismissal be without prejudice or does not specify that it be with or without prejudice, the matter is left to the sound discretion of the court. *Kapowas v. Williams Insurance Agency, Inc.*, 11 F.2d 1380, 1385 (7th Cir.1993); *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 986 (5th Cir.1989); *Mangir v. TRW, Inc.*, 4 OCAHO no. 672, 722, 725 (1994)(granting dismissal without prejudice where Respondent did not object).

Voluntary dismissal without prejudice is not a matter of right. *Zagano v. Fordham University*, 900 F.2d 12, 14 (2d Cir. 1990). Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any “undue vexatiousness” on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and, the adequacy of plaintiff's explanation for the need to dismiss. *See Bosteve Ltd. v. Marauszwiki*, 110 F.R.D. 257, 259 (E.D.N.Y. 1986); *Harvey Aluminum, Inc. v. American Cyanamid Co*, 15 F.R.D. 14, 18 (S.D.N.Y. 1953); *Huesca v. Rojas Bakery*, 4 OCAHO no. 654 (1994)(dismissing with prejudice where case was pending for 15 months, Complainant provided no explanation for motion to dismiss, Respondent's motion to dismiss and/or for summary decision was pending, discovery had taken place, and Complainant did not have standing to bring citizenship status discrimination claim).

In the instant case, Complainant has moved to withdraw her complaint against Respondent, and seeks dismissal without prejudice. While the case has not been pending long, Complainant responded to Respondent's motion to dismiss by filing this motion to dismiss. Complainant provided no explanation for why she seeks dismissal, and did not respond to the motion to dismiss on the merits. When the Court grants Complainant's motion, as it must, Respondent's motion to dismiss is rendered moot, thereby defeating a decision regarding the adequacy of the pleading. To balance the interests of the parties, the Court will grant the motion to dismiss with prejudice.

The Court finds that Complainant's Motion to Dismiss is GRANTED. The Complaint is DISMISSED WITH PREJUDICE. Respondent's Motion to Dismiss is DENIED as moot.

SO ORDERED.

Dated and entered on April 10, 2020.

Jean C. King
Chief Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order 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, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.