

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

July 15, 2020

ROBERT HEATH,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00051
)	
F18 CONSULTING AND AN ANONYMOUS)	
EMPLOYER,)	
Respondent.)	
_____)	

NOTICE AND ORDER TO SHOW CAUSE

I. BACKGROUND

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Complainant, Robert Heath, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on February 18, 2020, alleging that Respondent, F18 Consulting and an anonymous employer, discriminated against him based on his citizenship status and national origin by declining to hire him and engaged in document abuse.

On February 27, 2020, this office sent F18 Consulting a Notice of Case Assignment for Complaint Alleging Unlawful Employment and a copy of the complaint via certified mail. The package was returned to OCAHO as undelivered because the entity address had moved and did not provide a forwarding address. Complainant then provided OCAHO with an email address for individuals working for F18 Consulting. On April 7, 2020, this office sent F18 Consulting the Notice of Case Assignment for Complaint Alleging Unlawful Employment and a copy of the complaint via e-mail. The Notice of Case Assignment directed that an answer was to be filed within thirty (30) days of receipt of the complaint, that failure to answer could lead to default, and that proceedings would be governed by Department of Justice regulations.¹ Thus, F18 Consulting’s answer was due no later than May 7, 2020. Respondent did not file an answer.

On May 22, 2020, the undersigned issued a Notice of Entry of Default, explaining that F18 Consulting was in default because it failed to file an answer. The undersigned required F18 Consulting to file an answer and show good cause for its failure to file a timely answer within

¹ Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2018).

fifteen days of the Notice. The undersigned warned that the Court may enter a default judgment against F18 Consulting if it failed to file an answer and show good cause. Respondent did not file a response to the Notice of Entry of Default, an answer, or otherwise file anything with OCAHO indicating that it intends to defend this action.

As F18 Consulting has not participated in this action, the undersigned needs additional information to determine the identity of the unknown employer named in the complaint and to determine if OCAHO has jurisdiction to hear Complainant's claims against F18 Consulting. See *Strauss v. Rite Aid Corp.*, 4 OCAHO no. 721, 1135, 1136 (1994).

II. JURISDICTION

Although Respondent has not filed a responsive pleading in this matter, the Court may not issue a default judgment if the Court lacks subject matter jurisdiction over a complainant's claims. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO no. 919, 1167, 1170 (1997).² OCAHO Administrative Law Judges (ALJs) have the authority to determine whether OCAHO has jurisdiction over a dispute. *Windsor v. Landeen*, 12 OCAHO no. 1294, 4–5 (2016); *Wilson*, 6 OCAHO no. 919 at 1172 (citing *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) (“when entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the court . . . has an affirmative duty to look into its jurisdiction over the subject matter[.]”)).

Further, a court has “an obligation to inquire *sua sponte* into its own subject matter jurisdiction.” *McCulloch v. Velez*, 364 F.3d 1, 5 (1st Cir. 2004). OCAHO has held that “the issue of subject matter jurisdiction may be raised at any time, ‘even by the court, *sua sponte*.’” *Kim v. Getz*, 12 OCAHO no. 1279, 2 (2016) (quoting *Horne v. Town of Hampstead*, 6 OCAHO no. 906, 941, 945 (1997)). Additionally, “[w]hen a forum lacks subject matter jurisdiction, a default judgment must be vacated and the case dismissed.” *Wilson*, 6 OCAHO no. 919 at 1172.

The OCAHO rules do not contain a specific provision regarding dismissals for lack of subject matter jurisdiction. See 28 C.F.R. § 68; *Getz*, 12 OCAHO no. 1279 at 3. Under the OCAHO rules, the Federal Rules of Civil Procedure “may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.” 28 C.F.R. § 68.1. Thus, the Federal Rules and case law from the United States Court of Appeals for the First Circuit, where this case arises,

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 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>.

serve as “general guidance” when an OCAHO ALJ questions OCAHO’s subject matter jurisdiction. *Getz*, 12 OCAHO no. 1279 at 3. Under Federal Rule of Civil Procedure 12(h)(3), “[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” The party invoking jurisdiction bears the burden to establish that the court has jurisdiction. *Windsor*, 12 OCAHO no. 1294 at 4.

III. COMPLAINANT IS ORDERED TO SHOW CAUSE WHY HIS CLAIMS SHOULD NOT BE DISMISSED

A. Lack of Subject Matter Jurisdiction

Complainant asserts that F18 Consulting discriminated against him based on his national origin. From the face of the complaint, it is not clear how many employees F18 employs. In the complaint, Complainant did not state how many employees F18 Consulting employs and, in the IER charge form attached to the complaint, Complainant stated that the number of employees was unknown or he was unable to estimate. In its Letter of Determination, IER dismissed his charge for lack of subject matter jurisdiction based on the number of employees that F18 Consulting employed.

Similar to lower federal courts, OCAHO is a forum of limited jurisdiction “with only the jurisdiction which Congress has prescribed.” *Wilson*, 6 OCAHO no. 919 at 1173. OCAHO does not have jurisdiction to hear national origin or citizenship status discrimination claims if the employer employs three or less individuals. § 1324b(a)(2)(A). Further, OCAHO only has jurisdiction to hear national origin discrimination claims against employers with between four and fourteen employees. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020). Since Complainant has not asserted on the face of the complaint whether OCAHO has jurisdiction to hear claims against F18 Consulting, Complainant must show good cause as to why his complaint should not be dismissed for lack of subject matter jurisdiction. Specifically, Complainant should provide a response to the following question: how many employees does F18 Consulting employ?

B. Unknown Employer

Complainant also brings claims against an “unknown employer.” Complainant alleges that F18 Consulting provides employees for an “unknown employer” and appears to allege that the unknown employer also discriminated against him based on his citizenship status and national origin. The complaint does not contain any information about the unknown employer’s identity or location.

District courts in the Ninth Circuit, the Circuit in which Complainant alleges this case arises, have found that “[w]hile there is no specific rule in federal practice against the use of fictitious names when the actual names of parties are unknown,” fictitiously-named respondents are not favored. *Stafford v. Hernandez*, 05CV1703-JAH(POR), 2008 WL 4836523, at *1 (S.D. Cal. Aug. 4, 2008) (adopted by *Stafford v. Hernandez*, 2009 WL 3334821, at *2–3 (C.D. Cal. Feb. 17, 2009)). However, a complainant may use a fictitiously-named respondent “if the complaint

alleges why the [respondent's] real name was not [] known or ascertainable.” *Id.* If the complainant later discovers the identity of the fictitiously-named respondent, then the complainant should amend his complaint to name the respondent. *Id.*; see also *Johnson v. Udall*, 292 F.Supp. 738, 751 (C.D. Cal. 1968) (on a judicial review of an administrative agency action the court found “there is no prohibition in judicial or administrative practice to openly and frankly use a fictitious [name] until the true one is made known so long as due process is accomplished.”). Courts in the Ninth Circuit have applied certain limitations to the length of time a complainant may use a fictitious name for a respondent. Specifically, the *Stafford* court found that authorities clearly support the proposition that fictitiously-named defendants “must be identified and served within 120 days of the commencement of the action against them.” *Stafford*, 2008 WL 4836523, at *2 (quotation marks omitted) (citing *Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995); FED. R. CIV. P. 4(m) & 15(c)(1); Propriety of Use of Fictitious Name of Defendant in Federal District Court, 139 A.L.R. Fed. 553, 3b (1998)). Nonetheless, “if the [complainant] shows good cause for the failure [to identify and serve fictitiously-named respondents within 120 days], the court must extend the time for service for an appropriate period.” FED. R. CIV. P. 4(m).

Here, Complainant named F18 Consulting as a respondent and also named an “unknown employer.” Complainant alleges that F18 Consulting was recruiting for the software engineer positions at issue for an unknown employer. As the unknown employer has not been identified, OCAHO cannot serve the unknown employer with the complaint without further information. Further, Complainant filed the complaint on February 18, 2020, and June 17, 2020, is 120 days from that date. Therefore, Complainant must show why his claims against the unknown employer should not be dismissed. Complainant must provide any information he has about the “unknown employer,” including its name and address or location. To the extent that Complainant cannot provide the requested information, Complainant should show good cause for the failure to identify and serve the unknown employer within 120 days of the service of the complaint.

IV. CONCLUSION

On or before August 3, 2020, Complainant must show cause why his claims against F18 Consulting should not be dismissed for lack of subject matter jurisdiction and why his claims against the unknown employer should not be dismissed as he has not identified the party and the party has not been served with the complaint. Complainant's response should address the following questions:

1. How many employees does F18 Consulting employ?
2. Complainant must provide any information he has about the “unknown employer,” including its name and address or location.

SO ORDERED.

Dated and entered on July 15, 2020.

Jean C. King
Chief Administrative Law Judge