

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

August 12, 2020

ROBERT HEATH,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2020B00060
)	
VBEYOND CORPORATION 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. § 1324b. Complainant, Robert Heath, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 17, 2020, alleging that Respondent, Vbeyond Corporation and unknown client businesses of Vbeyond Corporation, discriminated against him based on his citizenship status and national origin by declining to hire him and engaged in document abuse.

On March 20, 2020, this office sent Vbeyond Corporation a Notice of Case Assignment for Complaint Alleging Unfair Immigration-Related Employment Practices and a copy of the complaint (the package) via certified mail. According to the U.S. Postal Service tracking information, the package was served on May 5, 2020. 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, Vbeyond Corporation’s answer was due no later than June 5, 2020. Respondent did not file an answer.

On June 26, 2020, the undersigned issued a Notice of Entry of Default, explaining that Vbeyond Corporation was in default because it failed to file an answer. The undersigned required Vbeyond Corporation to file an answer and show good cause for its failure to file a timely answer within fifteen days of the Notice. The undersigned warned that the Court may enter a

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

default judgment against Vbeyond Corporation 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 Vbeyond Corporation 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 Vbeyond Corporation. *See Strauss v. Rite Aid Corp.*, 4 OCAHO no. 721, 1135, 1136 (1994).

II. JURISDICTION

Although Vbeyond Corporation 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[.]”)).

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, 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),

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>.

“[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 Vbeyond Corporation discriminated against him based on his national origin and citizenship status. From the face of the complaint, it is not clear how many employees Vbeyond Corporation employs. In the complaint, Complainant stated the number of employees Vbeyond Corporation employs is unknown, but in the Immigrant and Employee Rights Section of the Department of Justice charge form attached to the complaint, Complainant stated that Vbeyond Corporation employs fifteen or more employees.

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 enough facts in the complaint to support OCAHO’s exercise of jurisdiction to hear claims against Vbeyond Corporation, 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 Vbeyond Corporation employ?

B. Unknown Employer

Complainant also brings claims against Vbeyond Corporation’s unknown client businesses. Complainant alleges that Vbeyond Corporation is a staffing and placement firm that provides employees for other businesses, including Infosys, HCL, Larsen & Toubro, Tech Mahindra, and others. Complainant names the unknown client businesses of Vbeyond Corporation as a respondent, but does not otherwise identify the unknown respondents. He alleges that the unknown businesses 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.

The Third Circuit has explained that fictitiously-named defendants are “routinely used as stand-ins for real parties until discovery permits the intended defendants to be installed.” *Hindes v. F.D.I.C.*, 137 F.3d 148, 155 (3d. Cir. 1998) (quoting *Scheetz v. Morning Call, Inc.*, 130 F.R.D. 34, 36 (E.D. Pa. 1990)). Nonetheless, fictitiously-named defendants “must eventually be dismissed, if discovery yields no identities, and [] an action cannot be maintained solely against [fictitiously-named] defendants.” *Id.* (citing *Scheetz*, 130 F.R.D. at 37; *Scheetz v. Morning Call*,

Inc., 747 F.Supp. 1515, 1534–35 (E.D. Pa. 1990) (noting that the Federal Rules do not contemplate a plaintiff proceeding without a tangible defendant except in extraordinary circumstances), *aff'd on other grounds*, 936 F.2d 202 (3d. Cir. 1991); *Breslin v. City & Cnty of Philadelphia*, 92 F.R.D. 764 (E.D. Pa. 1981) (dismissing complaint against identified defendants warrants dismissing unnamed defendants). In *Heath v. F18 Consulting*, 14 OCAHO no. 1365, 3–4 (2020), the ALJ relied on Ninth Circuit case law regarding fictitiously-named respondents and found that a complaint has 120 days from the date of the complaint to identify the unnamed respondent and, if the respondent is not identified after that 120-day period, the complainant must show good cause as to why his claims against the unknown respondent should not be dismissed.

Here, Complainant named Vbeyond Corporation as a respondent and also named the unknown clients of Vbeyond Corporation. Complainant alleges that Vbeyond Corporation was recruiting for the UI developer position 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 March 20, 2020, and July 20, 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 September 11, 2020, Complainant must showcause why his claims against Vbeyond Corporation 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 Vbeyond Corporation 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 August 12, 2020.

Jean C. King
Chief Administrative Law Judge