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

January 26, 2021

ROBERT HEATH, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00072
ASTA CRS, INC., Respondent.	)	

ORDER ON MOTIONS

I. BACKGROUND

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Complainant, Robert Heath, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 18, 2020, alleging that Respondent, Asta CRS, Inc., discriminated against him based on his citizenship status and national origin in violation of § 1324b. Respondent filed its answer on June 22, 2020. On September 22, 2020, the undersigned held a prehearing conference to set deadlines in this case. Discovery closed November 20, 2020.

On October 26, 2020, Complainant filed a Motion to Compel Respondent to Answer Interrogatories and Requests for Documents. Respondent filed a response on November 6, 2020. This Court denied the motion on November 23, 2020.

On November 20, 2020, Respondent filed a motion to dismiss Complainant's national origin claim, to which Complainant filed an opposition on December 8, 2020. On November 27, 2020, Complainant filed a "Motion that Judge King Designate a Member of Her Staff That Is an Attorney That Can Answer Court Procedural Questions with Authority" (Mot. Procedural Advice) to which Respondent filed an opposition on December 7, 2020.

On November 30, Complainant filed a motion to extend discovery to which Respondent filed an opposition on December 10, 2020. Also on November 30, 2020, Respondent filed oppositions to Complainant's request for subpoenas duces tecum to the Department of Labor as well as Indeed.com.

Lastly, on December 18, 2020, Respondent filed a motion for summary decision, to which Complainant objected in a filing submitted December 23, 2020.

II. MOTION TO DISMISS

A. Standards

"The OCAHO rules expressly provide for motions to dismiss for failure to state a claim upon which relief may be granted at 28 C.F.R. § 68.10 (2004). A motion to dismiss under 28 C.F.R. § 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Seaver v. Bae Sys.*, 9 OCAHO no. 1111, 3 (2004) (citations omitted).[1] When considering a motion to dismiss, the Court accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990) (citations omitted). Additionally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted)." The [C]ourt may, however, consider documents incorporated into the complaint by reference. . . ." *Id.* at 113–14.

B. Discussion

Respondent argues that this Office may not consider national origin claims alleged to have occurred by an employment agency. Mot. Dismiss 2. OCAHO's governing statute, 8 U.S.C. § 1324b(a)(2), contains an exception at § 1324b(a)(2)(B), which expressly excludes "any discrimination because of an individual's national origin that comes within section 703 of the Civil Rights Act of 1964 (the "Act")." Mot. Dismiss 2. "Section 703 of the Act, in turn, applies to acts of discrimination by an employment agency because of an individual's national origin. *See* 42 U.S.C. § 2000e-2(b)." Mot. Dismiss 2. "The definitions section of the Act defines an 'employment agency' as 'any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.' *Id.* at 2000e(c)." Mot. Dismiss 2. Respondent cites to *Williams v. Lucas Associates*, 1 OCAHO no. 254, 1628, 1632 (1990), which held that "[e]mployment agencies are

[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.

not persons or entities covered by IRCA with regard to claims of national origin discrimination." Respondent submitted an affidavit from its Chief Technical Officer who states that "Asta is a consulting and staffing company that recruits applicants for potential employment in the Information Technology field" and "Asta regularly procures prospective employment opportunities for its clients." Mot. Dismiss, Ex. A ⁋⁋ 2–3.

Complainant argues that Respondent may perform a "dual role, . . . performing the role of employer by placing their 'employees' at the worksite address of Respondent's clients while under supervision of the Respondent's client but on Respondent's payroll." Opp. to Mot. Dismiss 2. Additionally, Complainant asserts that "Respondent may also perform duties of a traditional employment agency by recruiting employees that immediately become employees of their client employer." *Id.* Ultimately, Complainant argues that more evidence is needed to make this determination. *Id.*

The issue is whether Respondent is an "employment agency" within the meaning of Title VII, and if so, whether it is being sued in its capacity as an employment agency or as an employer. As to the first question, the "task is two-fold: first, to determine whether the [program] 'regularly undertakes with or without compensation to procure employees . . . or to procure for employees opportunities to work'; and, second, to determine whether the [program] does this for an 'employer' as that term [is] defined in [Title VII]." *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1290 (M.D. Ala. 2010) (citing *Jones v. Se. Ala. Baseball Umpires Ass'n,* 864 F.Supp. 1135, 1138 (M.D. Ala. 1994)). Further, whether a worker assigned by a staffing agency is an employee of the agency for purposes of the statutory definition of employer is a matter analyzed by common law agency principles. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003).

The Court finds that the complaint meets the low pleading threshold for OCAHO cases. *See Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016). While the complaint is not a model in clarity in this regard, construing the complaint in the light most favorable to Complainant, he has met his burden to plead the facts. Even assuming this Court considered the Respondent's affidavit, Respondent's barebones affidavit does little to advance the discourse. It describes itself as a consulting and staffing company and then parrots in a conclusory fashion the definition of "employer." Presumably the company employs consultants at the least, and, as noted by Complainant, it is unclear whether it "procures employees", or staffs them to companies under circumstances that meet the common law definition of employer/employee relationship such as, for instance, by paying their salaries. Lastly, Respondent does not address whether the employers with whom it works meet the definition of "employer" themselves.

Respondent's Motion to Dismiss is DENIED.

III. DISCOVERY MOTIONS

A. Discovery Deadlines

This Court scheduled 60 days for discovery. *See* Order Memorializing Prehearing Conference. It appears that Complainant sought discovery through interrogatories and requests for production. Complainant states that Respondent has avoided responding to any of his discovery requests in a substantive manner, and consequently, Complainant is seeking the information from other sources. Mot. Extend 1–2. On November 18, 2020, days before discovery was due to end, Complainant sought a subpoena duces tecum from the Department of Labor. This office sent the subpoena to Complainant on November 19, 2020. It is unclear whether the subpoena was ever served. On November 23, 2020, after discovery had ended, Complainant sought a subpoena from Indeed.com. According to Complainant, this discovery is intended to identify the "Unknown Employer(s)" named in the Complaint. *Id.* at 2.

> [T]he purpose of discovery under both the OCAHO rules and the Federal Rules of Civil Procedure, to which OCAHO rules refer as a general guide, is to require the disclosure of all relevant information so that the resolution of disputed issues may be based on a full and accurate understanding of the facts. . . . Discovery, in other words, is not a game of cat-and-mouse. A litigant seeking discovery is entitled to true, explicit, responsive, complete, candid, and nonevasive answers to relevant interrogatories and to the production of relevant documents.

Ironworkers Local 455 v. Lake Constr. & Dev. Corp., 6 OCAHO no. 911, 1039, 1046 (1997). While this Court denied Complainant's Motion to Compel as the motion did not meet OCAHO's requirements for a motion to compel, this Court seeks to resolve the case based upon a full understanding of the facts. Further, the Court reminds the parties that "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding[.]" 28 C.F.R. § 68.18(b).

Accordingly, the Court GRANTS Complainant's request to extend the discovery period, but for a limited period. The parties may seek discovery, but all discovery requests must be filed within fourteen days of the issuance of this Order. For any discovery, responses must be served within fourteen days of the request. If a protective order is sought, it must be filed within seven days of service of the discovery request. Any motions to compel must be filed seven days after the discovery response is filed.

B. Subpoenas

Complainant sought a subpoena duces tecum from the Department of Labor, requesting the Labor Condition Applications for eighty-four foreign workers. While Respondent is correct in its opposition that Complainant did not provide a return date, Opp'n to USDOL-OFLC Subpoena

2, this Court has authority to make changes to the subpoena and it supplied a return date. *See* 28 C.F.R. § 68.25(a) (stating that an ALJ may *sua sponte* issue subpoenas). This Court returned the subpoena, and accordingly Respondent's objection is MOOT.

Complainant also seeks a subpoena from Indeed.com. The subpoena asks a number of questions about advertisements placed on Indeed.com's website for Respondent, seeks an investigation, and requests a number of other items. Respondent objects because of the lack of return date, because discovery has closed, and because Complainant is essentially filing interrogatories for a non-party. Opp'n to Indeed Subpoena 2–3.

The second objection is resolved by this Court's extension of the discovery deadline. As to the third objection, as noted by Respondent itself, Opp'n to Indeed Subpoena 3, a subpoena may require attendance and testimony as well as "production of things including, but not limited to, papers, books, documents, records, correspondence, or tangible things in their possession and under their control and access to such things for the purposes of examination and copying." 28 C.F.R. § 68.25(a). The Court recognizes that some courts have taken a more expansive view of subpoena power in other instances, *see EEOC v. Md. Cup Corp.*, 785 F.2d 471, 478 (4th Cir. 1986) (holding that the language of the National Labor Relations Act, 29 U.S.C. § 161(1), where "the subpoena power extends to 'the production of any evidence in his [the respondent's] possession or *under his control*[,]' . . . includes the authority to require the respondent to compile evidence that is not in documentary form"). The OCAHO regulation is worded differently, however, focusing on the words "things" and "tangible[.]" 28 C.F.R. § 68.25(a). There is therefore, no authority to compel the subject of a subpoena to perform an analysis, or otherwise create a document that does not already exist. Accordingly, the Court has reviewed the subpoena and returns the requested subpoena to Complainant, deleting the requests for which this Court finds it has no authority to issue. The Court also notes that discovery is extended only as set forth in this order.

C. Motion for Procedural Advice

Complainant asks the Court to designate an attorney at the Court to answer procedural questions. Mot. Procedural Advice 1. Respondent opposes the request, citing 28 C.F.R. § 68.34, which states this Court "does not have authority to appoint counsel." Opp'n to Mot. Procedural Advice 1. While it does not appear that Complainant is, strictly speaking, asking for counsel, *ex parte* communications with the office are not permitted. 28 C.F.R. § 68.36(a). *See, e.g.*, Code of Conduct for United States Judges, Canon 3(A)(4)(b) (2019) ("A judge may… permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication . . . ."). While the line as to what is administrative or scheduling can be blurry, advice, such as how best to complete a subpoena form, crosses over the line into matters that could be said to give a party an advantage. Complainant's motion is DENIED.

D. Motion for Summary Disposition

Respondent timely filed its motion for summary decision. However, in light of this Court's order extending discovery, the Court will defer resolution of the summary decision motion. As the Court has extended discovery, the Court will also reset the summary decision motion deadline. Respondent may amend its summary decision motion or file a new motion, and assuming such, Complainant may file a motion or amend his opposition.

IV. CONCLUSION

Respondent's Motion to Dismiss is DENIED. Complainant's Motion that Judge King Designate a Member of Her Staff That Is an Attorney That Can Answer Court Procedural Questions with Authority is DENIED. Respondent's Opposition to Complainant's USDOL-OFLC Subpoena is DENIED as MOOT. Respondent's Opposition to Complainant's Indeed.com Subpoena is DENIED in part and GRANTED in part. The Court returns, as modified, Complainant's Indeed.com Subpoena, which is to be served upon Complainant's initiative.

All discovery requests and subpoenas must be served by February 9, 2021; thus, requests for subpoenas must be submitted by February 9, 2021. Responses to discovery must be served within fourteen days of the request. Motions for protective orders must be filed within seven days of the service of the discovery request. Motions to compel must be filed seven days after service of responses. Complainant must file any summary decision motions by March 15, 2021, and Respondent may supplement its own motion for summary decision by that day. Responses to any motions for summary decision must be filed by March 30, 2021.

SO ORDERED.

Dated and entered on January 26, 2021.

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Jean C. King
Chief Administrative Law Judge