

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

June 9, 2016

TERRI ANN JABLONSKI,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 15B00048
)	
KELLY LEGAL SERVICES, ET AL.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER OF DISMISSAL

APPEARANCES

Maria Jablonski
for the complainant

David M. Cessante
for the respondent

I. INTRODUCTION

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Terri Ann Jablonski (Ms. Jablonski or complainant), a United States citizen, alleges that Kelly Legal Services, et al. (Kelly Services or respondent), discriminated against her on the basis of her citizenship status by failing to hire her for various paralegal positions. Kelly Services, who has a location in New York City, provides employment recruitment and placement services. For the reasons described in detail below, Ms. Jablonski's complaint will be dismissed for failure to state a claim upon which relief may be granted.

II. PROCEDURAL HISTORY

Ms. Jablonski, who was initially unrepresented in the above-captioned case, filed a complaint on April 6, 2015, with the Office of the Chief Administrative Hearing Officer (OCAHO). In her complaint, Ms. Jablonski alleged that Kelly Services discriminated against her because she is a United States citizen by not hiring her for paralegal positions. Ms. Jablonski alleges that individuals who are not United States citizens were hired instead of her because of her citizenship status. In addition, Ms. Jablonski claims that Kelly Services retaliated against her when she attempted to obtain information about the individuals that were hired instead of her.

Attached to Ms. Jablonski's OCAHO complaint is a letter from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) dated March 10, 2015, which states that Ms. Jablonski's submission to OSC was not complete because she needed to provide OSC additional information before OSC could determine whether it might have jurisdiction to consider Ms. Jablonski's claims. Specifically, the OSC letter states,

In order to complete your submission and determine if it is within our jurisdiction, we need you to provide us with the following information (for each charge):

1. Was the position you sought filled by anyone? If so, specify who filled the position and the reason you believe you were more qualified than [sic] individual?
2. State with specificity the date of discrimination.

We can only commence an investigation of your claim when we have the above requested information. It is important that we receive this no later than 45 days from your receipt of this letter or within 180 days of the last discriminatory act against you. If your response is not received within 45 days of your receipt of this letter or 180 days of the discriminatory act, whichever date is later, this matter may be dismissed.

On May 18, 2015, Kelly Services filed an answer to Ms. Jablonski's complaint, in which it denied the material allegations of the complaint, raised three affirmative defenses, and requested that the complaint be dismissed. Kelly Services argued that dismissal of Ms. Jablonski's complaint is appropriate because she failed to state a claim upon which relief can be granted, and because her claims are time barred by the applicable statute of limitations. Kelly Services also raised the affirmative defense that Ms. Jablonski failed to mitigate her damages.

On May 20, 2015, Administrative Law Judge Thomas, who previously presided over this matter, issued a Notice and Order to Show Cause to Ms. Jablonski. The Show Cause Order explained that Ms. Jablonski alleged in her OCAHO complaint that on October 10, 2014, she had filed a

charge with OSC, and that she had received a letter from OSC informing her she could now file her own complaint with OCAHO.¹ However, Judge Thomas informed Ms. Jablonski that the evidence of record does not contain any such letter from OSC that demonstrates Ms. Jablonski has satisfied a condition precedent to the filing of the OCAHO complaint. Moreover, Judge Thomas warned Ms. Jablonski in her Order that Ms. Jablonski's OCAHO complaint could be dismissed if she failed to show cause within twenty-one days of the date of Judge Thomas' Order why Ms. Jablonski's complaint should not be dismissed for failure to satisfy a condition precedent to its filing.

On June 2, 2015, Maria Jablonski, Esquire, filed an appearance as counsel for Ms. Jablonski, as well as a Reply to Affirmative Defenses, which included three proposed exhibits. In response to Kelly Service's affirmative defense of failure to state a claim upon which relief may be granted, Ms. Jablonski contended that the OCAHO complaint, attached OSC charge form, and other attachments support a "prima facie case of discrimination based on immigration laws." *Complainant's Reply* at 1. She further argued that respondent's "entire hiring process was discriminatory" and that she "was made to show her I-9 information in registering with Kelly Services, before she was even hired." *Id.* at 2. Ms. Jablonski also contended that her complaint is not barred by the applicable statute of limitations, and that she is entitled to monetary relief. *Id.* The attachments to Ms. Jablonski's reply include: (1) an email to respondent's counsel concerning service of respondent's answer;² (2) information about H-2B applications from the New Jersey Department of Labor and Workforce Development and job search results for paralegal positions; and (3) a portion of a resume of an unnamed "Legal Assistant."³

¹ According to OSC's letter, Ms. Jablonski's charges alleged immigration-related unfair employment practices against three entities: Hire Counsel, Inc., Kelly Services, and Special Counsel. This decision only pertains to Ms. Jablonski's allegations against Kelly Services.

² Although Ms. Jablonski asserts that the manner of service on the Administrative Law Judge and the parties be the same is a "rule of the court," the OCAHO rules do not generally require that the manner of service be the same for all parties. *See* 28 C.F.R. § 68.6(a). When a party serves a filing by facsimile, which is permitted only to toll the running of a time limit, the party must include a certification that service has also been made on the opposing party by, inter alia, facsimile. *Id.* § 68.6(c).

³ On June 10, 2015, Ms. Jablonski filed "Addition to Exhibit 3 of Complainant's Reply to Affirmative Defenses." This filing contains a complete resume of the individual whose resume was provided in complainant's reply, as well as the resume of another unnamed individual. Complainant indicated that these individuals are "non-U.S. citizens, who did not self identify as permanent residents who were employed as paralegals or legal assistant [sic] by Kelly Services."

Furthermore, on June 2, 2015, Ms. Jablonski filed a letter addressed to Judge Thomas in response to the Notice and Order to Show Cause. Ms. Jablonski attached the following submissions: (1) a letter from OSC, dated April 1, 2015, informing Ms. Jablonski that her charges were dismissed because she “failed to provide any relevant information” demonstrating that she was not hired because of her citizenship status; (2) a letter from Ms. Jablonski to OCAHO, dated March 30, 2015, stating that she is “still waiting” for the “90 day letter[]” from OSC; (3) a letter and email from Ms. Jablonski to OSC, dated February 24, 2015, requesting a 90-day letter and indicating that she mailed new charges to OSC; and (4) a letter from Ms. Jablonski to OSC, dated March 18, 2015, identifying details and dates of her job applications submitted to Special Counsel, Inc., Hire Counsel, Inc., and Kelly Services, repeating her assertions that she applied to numerous jobs through Kelly Services but was not hired “even though the job remained open and/or was filled by someone not a citizen,” and inferring that her allegations give rise to an inference of discrimination.⁴ Ms. Jablonski further asserts in her letter dated March 18, 2015, that she is “cancelling” her national origin discrimination claim, which she will pursue with the Equal Employment Opportunity Commission (EEOC).⁵

On June 17, 2015, Kelly Services filed a Response to Complainant’s Response to Order to Show Cause, arguing that Ms. Jablonski’s OCAHO complaint should be dismissed because she failed to satisfy a condition precedent.⁶ Kelly Services recognized that Ms. Jablonski sent OSC a letter in response to its March 10, 2015, letter requesting additional information to complete her charge, but noted that complainant did not provide OSC with the requested information of whom was hired for the jobs to which she applied and why she believed she was more qualified than those (unknown) individuals. *Respondent’s Response* at 2-3. Kelly Services further argued that Ms. Jablonski failed to perfect the filing of a charge with OSC and failed to obtain a letter from OSC authorizing a private cause of action.⁷

⁴ *See supra* n.1.

⁵ Neither Ms. Jablonski’s OSC charge form nor her OCAHO complaint assert national origin discrimination.

⁶ OCAHO rules require that a party request leave of the Administrative Law Judge to file a reply to a response, counter-response to a reply, or any further responsive document. 28 C.F.R. § 68.11(b). No leave was sought to file this response.

⁷ The response included three attachments, which are: (1) the letter from OSC, dated March 10, 2015, requesting that Ms. Jablonski provide additional information to complete her charges; (2) Ms. Jablonski’s email to OSC, dated March 18, 2015, presenting details and dates of the job applications she submitted to respondent; and (3) OSC’s letter to Ms. Jablonski, dated April 1, 2015, in which the agency dismissed her charges.

In response, Ms. Jablonski filed Complainant's Reply to Motion to Dismiss for Lack of Jurisdiction on June 23, 2015, which is actually a reply to Kelly Service's filing dated June 12, 2015. In this reply, Ms. Jablonski primarily argued that she provided sufficient information in her charge to OSC, along with "the numerous attachments," to describe the alleged unfair immigration-related employment practice pursuant to the regulatory definition of a "charge." *Complainant's Reply* at 2. She wrote, "OSC's assessment that she failed to provide evidence that she was not hired because of citizenship status discrimination was a mistake as [OSC] overlooked these facts evidenced in the emails attached to her OSC charge." *Id.* Ms. Jablonski also claimed that the alleged discriminatory practices occurred "while and after Kelly Services was under a consent decree with the OSC regarding Citizenship Discrimination in Schaumburg, Illinois, in requiring excessive I-9 documentation of protected individuals." *Id.* at 6. In addition, Ms. Jablonski asserted that a motion to dismiss for lack of jurisdiction or untimeliness would be "futile." *Id.* at 7. Complainant attached an email correspondence between her and Elizabeth Quaintance, Recruitment Director of Kelly Services.

Because of a lack of clarity about the status of Ms. Jablonski's underlying charge, Judge Thomas made inquiries to OSC to ascertain whether OSC ever accepted Ms. Jablonski's charge within the meaning of 28 C.F.R. § 44.301, whether Ms. Jablonski was notified of its receipt pursuant to 28 C.F.R. § 44.301(a), and whether the ten-day notice was served on Kelly Services in accordance with 28 C.F.R. § 44.301(e). These inquiries were sent on July 22, 2015, and Judge Thomas issued a Stay of Proceedings on July 31, 2015.

On August 3, 2015, Ms. Jablonski filed Complainant's Objection to the July 22 Order of Inquiry to OSC.⁸ Ms. Jablonski wrote that OSC's dismissal of her charge triggered her right to file a private complaint. *Complainant's Objection* at 1. In addition, she claimed that she provided "specific detailed information" in her OSC charge form and that the additional information OSC had requested was "extraneous" and not required to set out a prima facie case of discrimination. *Id.* at 2-3, 5. Ms. Jablonski also wrote she had already provided the additional information that OSC later requested, specifically the dates of discrimination, in her OSC charge form and in the documents attached to the charge. *Id.* at 3. Furthermore, Ms. Jablonski argued that "perfecting a charge" is "nonjurisdictional and subject to waiver." *Id.* at 4. Attached to this filing is a letter from complainant to the Deputy Special Counsel of OSC, dated July 30, 2015, in which she argued that her charges were sufficient. Complainant also attached to this filing a portion of a PowerPoint presentation by OSC on Immigration-Related Unfair Employment Practices and electronic correspondences between Ms. Jablonski and respondent's representatives.

On September 25, 2015, OSC filed its Response to Order of Inquiry. OSC answered Judge Thomas' three inquiries in the negative, indicating that OSC did not accept Ms. Jablonski's

⁸ OCAHO rules do not have a provision for the filing of objections to orders issued by the Administrative Law Judge.

charge within the meaning of 28 C.F.R. § 44.301, did not notify Ms. Jablonski of its receipt within the meaning of 28 C.F.R. § 44.301(a), and did not serve the ten-day notice on respondent in accordance with 28 C.F.R. § 44.301(e).

On October 5, 2015, Ms. Jablonski filed a Motion to Lift the Temporary Stay for Permission to File Reply to OSC's Response to the Order of Inquiry and Reply to the OSC's Response to Order of Inquiry.⁹ In her filing, Ms. Jablonski articulates similar arguments to those made in her previous filings, namely that she has a "private right of action" to file a complaint with OCAHO. *Reply to OSC's Response* at 5-6.

III. APPLICABLE LEGAL STANDARDS AND MS. JABLONSKI'S CLAIMS

A. OCAHO Precedent

Similar to the decisions in *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272 (2016),¹⁰ and *Jablonski v. Yorkson Legal, et al.*, 12 OCAHO no. 1273 (2016), the procedural history in the instant matter is set forth in detail "to facilitate the parties' understanding of which rules apply in this proceeding, what those rules do and do not permit, and what those rules affirmatively require." *Robert Half Legal*, 12 OCAHO no. 1272 at 3. The OCAHO Rules of Practice and Procedure¹¹ provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act [APA], or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. Therefore, in situations where OCAHO rules, the APA, or other authority are applicable, the Federal Rules do not apply. *See United States v. Ulysses, Inc.*, 2 OCAHO no.

⁹ Both these documents claim to be filed "under Federal Rule of Civil Procedure [sic] and 28 C.F.R. § 68.11." The reference to "Federal Rule" is vague and incomplete. In addition, although 28 C.F.R. § 68.11 does authorize a party to respond to an opposing party's motion, OSC is not a party to this proceeding.

¹⁰ 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 been 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>.

¹¹ *See* 28 C.F.R. pt. 68 (2014).

390, 732, 735-36 (1991) (stating that reference to the Federal Rules is not in order when the matter is covered by OCAHO rules) (citing *United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 274, 1771, 1780 (1990) (action by the Chief Administrative Hearing Officer (CAHO) vacating the Administrative Law Judge's Decision and Order)).

While the pleadings of an unrepresented party should generally be afforded more leniency than a party represented by counsel, *United States v. Union Lakeville Corp.*, 8 OCAHO no. 1019, 277, 280 (1998), pleadings filed by members of the bar are expected to conform to traditional standards of practice and professionalism, *United States v. Quickstuff, LLC*, 11 OCAHO no. 1265, 7 (2015) (citing *United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1052, 801, 805 (2000)). Therefore, attorneys appearing in this forum are expected to make reasonable efforts to ascertain and comply with the applicable rules.

B. Relevant OSC Regulations

Moreover, OSC's regulations governing the filing of charges provide that when a charging party's submission is inadequate to state a charge, OSC will notify the charging party that additional information is needed, and the submission is deemed to be a charge as of the date that the requested information is received in writing. *See* 28 C.F.R. § 44.301(c)(1). OSC then serves notice of the charge upon the respondent within ten days of its receipt pursuant to 28 C.F.R. § 44.301(e), undertakes an investigation under 28 C.F.R. § 44.302, and determines within 120 days whether to file a complaint under 28 C.F.R. § 44.303(a). If OSC does not file a complaint within that time, the Special Counsel will notify the charging party, who may then file a complaint within ninety days of the receipt of the notice. *Id.* § 44.303(c). That notice is also referred to as a "90 day letter" and is the functional equivalent of a "right-to-sue" letter, similar to what is issued in cases before the EEOC.

The governing statute provides that OSC shall investigate each charge received. 8 U.S.C. § 1324b(d). The record indicates that OSC did not conduct an investigation and that no "90 day letter" accompanied Ms. Jablonski's complaint. As it was unclear whether Ms. Jablonski ever completed her charge against Kelly Services, Judge Thomas issued inquiries to OSC to request clarification as to the filing of complainant's charge. OSC answered all three inquiries as follows: OSC confirmed that it did not accept Ms. Jablonski's filing as a charge within the meaning of 28 C.F.R. § 44.301; OSC did not notify Ms. Jablonski of its receipt within the meaning of 28 C.F.R. § 44.301(a); and OSC did not serve the ten-day notice on respondent in accordance with 28 C.F.R. § 44.301(e).

C. Ms. Jablonski's Claims For Relief

According to Ms. Jablonski's OCAHO complaint, she filed a charge with OSC on October 10, 2014, and received a letter from OSC on March 10, 2015, telling her she could now file her own complaint with OCAHO. As detailed above, however, this letter does not say what Ms.

Jablonski asserts. Rather, the OSC letter dated March 10, 2015, requested additional information and explained that OSC could only commence an investigation into its jurisdiction to proceed with Ms. Jablonski's claims once it received all requested information. Additionally, OSC warned Ms. Jablonski that her filing could be dismissed if she failed to timely provide the requested information. The record further reveals that in a letter dated April 1, 2015, OSC informed Ms. Jablonski that her charges were dismissed because she did not provide "any relevant information" to show that she was not hired because of her citizenship status.

According to Ms. Jablonski's OSC charge form, Kelly Services discriminated against her on the basis of her United States citizenship. The charge form also makes an allegation of retaliation under 8 U.S.C. § 1324b. Where the form asks for the dates of the alleged discrimination, she wrote November 16, 2014, and "Prior." When asked to explain in detail what occurred, Ms. Jablonski stated,

I was mailed various forms to fill out and interviewed at the office at 99 Park Ave. . . . I submitted . . . a copy of my passport ID and a complete job application. I applied for a job. The placement manager told me that the job was filled by someone else at the interview. She wouldn't tell me why. . . . I have been applying for jobs on this website for years but they don't place me in any job.

The documents attached to the charge form also show that Ms. Jablonski applied for a position as a litigation paralegal through Kelly Services on November 16, 2014. Email correspondences between Ms. Jablonski and Ms. Quaintance further establish the following: On October 10, 2013, complainant submitted her resume to Kelly Services for a litigation paralegal position and received a notice of receipt, which stated, in relevant part, "If you are identified as a potential candidate, a recruiter will contact you to initiate the recruiting process and detail next steps." The following day, Ms. Quaintance informed Ms. Jablonski that Kelly Services would forward complainant's resume to its client in Montvale, New Jersey. Ms. Quaintance then scheduled an interview with Ms. Jablonski for Friday, October 18, 2013. In her email to Ms. Jablonski confirming their appointment, Ms. Quaintance instructed complainant to complete certain paperwork to bring to the interview, to bring two forms of identification from the list of acceptable documents for the Form I-9 requirements, and to complete an online application prior to the interview.

Ms. Jablonski elaborates her discrimination claim in her OCAHO complaint. She writes, "I was displaced as an American Citizen for paralegal or legal assistant or legal services type work, with a visa applicant or an illegal alien, and retaliated against for inquiring further by being ignored, or not hired for later jobs." She continues to state that she was not hired for the jobs to which she applied "even though the job remained open and/or was filled by someone not a citizen. Kelly Legal Services has never hired me for any job." In addition, Ms. Jablonski alleges that these "circumstances give rise to an inference of violations of the [INA]," which "are that at the time

of application, and the time of being rejected from the job, Kelly Services through its recruiters have refused to disclose their client and person hired so as to hide their activities.”

Ms. Jablonski further adds,

I only recently discovered that there are hundreds of available non citizen non greencard recent graduated attorneys and other college graduates who are actively seeking and applying to jobs as paralegals who are willing to work as paralegals for low wages. . . . I found one such resume online Legal assistant . . . who claims that they are a non us citizen nongreencard from Belize who has been employed as a contract paralegal for Kelly Legal Services at First Union Corporation. . . . I believe this indicates that there are several other persons who are being employed like this person by Kelly Legal Services to do paralegal work. I am therefore requesting a toll of any claims that occurred before the 180 days because I did not discover this until just recently.

Ms. Jablonski claims that these facts create the inference that “they were being paid by a visa applicant to advertise and screen out Americans for the jobs, and or because disclosing the employer would ruin their chances of obtaining a visa.” Complainant further contends that respondent’s client law firms are “actively recruiting non-citizens for these jobs . . . because they want to pay them less.”

In addition to the abovementioned events that occurred in October 2013, as laid out in her OSC charge form, Ms. Jablonski further claims in her complaint that on or about November 16, 2014, she applied for a litigation paralegal position advertised by respondent. According to Ms. Jablonski, respondent neither contacted her about the position nor hired her, and, when she called respondent, Kelly Services would not inform her who had been offered the position. Ms. Jablonski states that she was “screened out for this job,” which “was reserved for a visa applicant, (I don’t know which type of visa,) and retaliated against. I was not told who the client law firm or organization hiring was by the agency, and this gives rise to an inference of immigration violations and retaliation.”

D. Ms. Jablonski Failed To State A Claim Upon Which Relief Can Be Granted

Title 28 C.F.R. § 68.7(b) requires in relevant part that a complaint filed pursuant to 8 U.S.C. § 1324b contain “the alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred.” 28 C.F.R. § 68.7(b)(3). Unlike the parallel Federal Rule of

Civil Procedure 8(a)(2),¹² “OCAHO’s rule requires only that the complainant set out facts ‘for each violation alleged to have occurred.’” *United States v. Split Rail Fence Co.*, 10 OCAHO no. 1181, 5 (2013) (order by the CAHO).¹³ OCAHO’s rule also does not require that a complainant plead a prima facie case to pursue a claim under 8 U.S.C. § 1324b. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002). However, the complaint must set forth minimal factual allegations to satisfy 28 C.F.R. § 68.7(b)(3) and to give rise to an inference of discrimination. *Robert Half Legal*, 12 OCAHO no. 1272 at 6.

Kelly Services asserts as an affirmative defense the complainant’s failure to state a claim upon which relief may be granted and requests dismissal of her complaint for this reason. Pursuant to relevant legal standards set forth in OCAHO and Second Circuit precedent, Ms. Jablonski’s OCAHO complaint must be dismissed for failure to state a claim upon which relief can be granted because she has failed to set forth minimal factual allegations that give rise to an inference of discrimination.

Accordingly, there is no need to address whether Ms. Jablonski satisfied a condition precedent to the institution of this proceeding. Moreover, all pending motions are hereby deemed moot.

In determining whether to dismiss a complaint for failure to state a claim upon which relief may be granted, analysis is limited to the four corners of the complaint, with consideration given to any documents incorporated into the complaint by reference and materials subject to judicial notice. *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (referencing *Udala v. N.Y. State Dep’t of Ed.*, 4 OCAHO no. 633, 390, 394 (1994); *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991)). In assessing the facial validity of a complaint, well-pleaded factual allegations are deemed true, but conclusory allegations or legal conclusions couched as a factual allegation are not accepted. *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (citing *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006); *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d. Cir. 2002)). While all reasonable inferences are drawn in

¹² Federal Rule of Civil Procedure 8 is designated “General Rules of Pleading.”

¹³ In *Split Rail Fence Co.*, 10 OCAHO no. 1181 at 5, the CAHO held that the Administrative Law Judge’s decision in *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148 (2012), which declined to use the federal pleading standard, as promulgated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in OCAHO proceedings was correct. The CAHO agreed with the Administrative Law Judge that the federal pleading standard is different than the standard used in OCAHO proceedings because “every complaint filed before OCAHO ‘has already been the subject of an underlying administrative process,’ . . . and thus an OCAHO complaint ‘will ordinarily come as no surprise to a respondent that has already participated in the underlying process.’” *Split Rail Fence*, 10 OCAHO no. 1181 at 5 (citing *Mar-Jac*, 10 OCAHO no. 1148 at 9).

the complainant's favor, only reasonable inferences will be drawn. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 115 (2d Cir. 2008).

Title 8 U.S.C. § 1324b prohibits in relevant part a person or entity from discriminating against an individual with respect to the hiring of the individual for employment, in the case of a protected individual, because of such individual's citizenship status. A "protected individual" includes a United States citizen. 8 U.S.C. § 1324b(a)(3)(A). As a United States citizen, Ms. Jablonski qualifies as a protected individual under the statute.

Ms. Jablonski also claims that Kelly Services retaliated against her in violation of 8 U.S.C. § 1324b(a)(5) because Kelly Services would not inform her "who the client law firm or organization hiring was" and did not hire her when she asked for this information. To qualify as protected conduct for purposes of a retaliation claim, the conduct must implicate some right or privilege specifically secured under 8 U.S.C. § 1324b, or a proceeding under that section. *See Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 5 (2014).

For purposes of this analysis, the following factual allegations set forth by Ms. Jablonski are deemed true: (1) Ms. Jablonski applied for various paralegal and related positions at various law firms and agencies through Kelly Services; (2) Ms. Jablonski interviewed on at least one occasion for such a position through Kelly Services; (3) Kelly Services did not hire Ms. Jablonski for a position from 2013 to the present; and (4) Kelly Services has employed at least one noncitizen in the past. However, the assertion made by Ms. Jablonski that Kelly Services refused to place her in a paralegal position because she is a United States citizen is not deemed true and is not a well-pleaded factual allegation.

Speculation and hypotheses cannot substitute facts. Under the most liberal of pleading standards, claims lacking an adequate factual basis are subject to dismissal. *Robert Legal Half*, 12 OCAHO no. 1272 at 7. The factual allegations presented by Ms. Jablonski do not support any inference of discrimination. An OCAHO complaint alleging citizenship discrimination must contain facts that could reasonably give rise to the conclusion that Kelly Services discriminated against the complainant based on her status as a United States citizen. However, Ms. Jablonski allegations are completely unsubstantiated, and no rational fact finder would be able to find in her favor. Critically, Ms. Jablonski has not pleaded facts that reasonably suggest a nexus between Kelly Services' decision not to hire Ms. Jablonski and Ms. Jablonski's status as a United States citizen.

While Ms. Jablonski may genuinely believe that Kelly Services failed to hire and place her in a paralegal position because she is a United States citizen, there are simply no facts in her OCAHO complaint and attachments to support her contentions and no facts upon which a reasonable factfinder could conclude Kelly Services discriminated against her. The fact that Kelly Services has placed at least one individual who is not a United States citizen in a paralegal position in the past, without any relevant objective facts, does not create a reasonable inference of citizenship

status discrimination.¹⁴ Ms. Jablonski's conclusion that the client law firms of Kelly Services must be hiring "illegal aliens" or "visa applicants" because she was not hired and was "screened out" due to being a United States citizen is wholly unsupported by any facts and appears to be mere conjecture and speculation. Moreover, OSC's failure to accept Ms. Jablonski's charge and OSC's eventual dismissal of her claims supports the finding that she failed to allege facts sufficient to support a reasonable allegation of citizenship discrimination in violation of 8 U.S.C. § 1324b. *See, e.g., United States' Response to Order of Inquiry* at 3 (characterizing Ms. Jablonski's efforts in filing a submission with OSC as timely but "ultimately unsuccessful in OSC's view").

In addition, Ms. Jablonski has failed to state a claim upon which relief may be granted in support of her retaliation claim. In her complaint, Ms. Jablonski stated that after she applied for a position with Kelly Services, respondent did not contact her about the position or hire her. Ms. Jablonski then called to ask who was hired instead of her, and Kelly Services told Ms. Jablonski that they would not provide her that information. In response to the specific question in OCAHO's complaint form related to retaliation, Ms. Jablonski wrote: "I was not hired after I asked about who was hired when I didn't get the job." These facts are simply insufficient to support a claim of retaliation under 8 U.S.C. § 1324b because these alleged facts do not relate to protected conduct pursuant to IRCA's antidiscrimination provisions. *Odongo*, 11 OCAHO no. 1236 at 5. Where a complainant alleges no facts from which an adjudicator could reasonably conclude that the opposing party violated the law, dismissal is the appropriate result. *Robert Legal Half*, 12 OCAHO no. 1272 at 7.

Ms. Jablonski has previously been given an opportunity to rebut Kelly Service's argument that her OCAHO complaint should be dismissed for failure to state a claim upon which relief could be granted. She has had knowledge of these arguments since Kelly Services filed its Answer. Additionally, Ms. Jablonski should have realized that she insufficiently supported her claims in the OSC charge when OSC informed her that it could not decide whether it had jurisdiction over her claims due to her failures in providing essential information in support of her discrimination claim. There is no reason now to provide Ms. Jablonski with another opportunity to "show cause why the complaint should not be dismissed" for failure to state a claim upon which relief can be granted, as she has already had numerous opportunities to substantiate her claims and failed to do so. 28 C.F.R. §§ 68.9(d), 68.10(b). Therefore, Ms. Jablonski has been afforded a full and fair opportunity to address the issue of dismissal for failure to state a claim upon which relief may be granted, and her due process rights have been preserved.

¹⁴ The undersigned takes judicial notice of the fact that according to its website, Kelly Services "provided employment to 550,000 employees in 2015." *See Kelly Services, Company Overview* (2016), <http://www.kellyservices.us/US/About-Us/Company-Information/Company-Overview/>; *see Sellaro v. Elektra Records*, 3 OCAHO no. 495, 961, 968 (1993) (finding of the Administrative Law Judge that it that "is within this Court's power to take judicial notice of adjudicative facts") (citations omitted).

IV. MS. JABLONSKI'S COMPLAINT IS DISMISSED

Ms. Jablonski's complaint and attached filings give no indication that a valid claim of citizenship discrimination and associated retaliation could be made on the facts she presents because there are no concrete facts that give rise to the inference of discriminatory animus by Kelly Services. Where the problem with a cause of action is substantive, better pleading would not cure it and repleading would be futile. *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). While the dismissal of a complaint at the pleading stage would ordinarily be accompanied by leave to amend the complaint, *United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 6 (2012), and notwithstanding the liberality with which leave to amend is freely granted under 28 C.F.R. § 68.9(e), this liberality does not extend to a proposed amendment that would not survive a motion to dismiss, which is the usual test for determining whether a proposed amendment is futile. *Cf. Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 7 (2003). If there is no reasonable possibility that amendment will cure a pleading defect, leave to amend need not be granted. Providing Ms. Jablonski leave to amend would be futile as there is no evidence that the facts she presented could cure the deficiencies with her citizenship status discrimination and retaliation claims. Accordingly, because Ms. Jablonski failed to state a claim upon which relief can be granted, her complaint will be dismissed.

SO ORDERED.

Dated and entered on June 9, 2016.

Stacy S. Paddack
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.