

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

June 9, 2016

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| DONNA YVETTE MILLER, |) | |
| Complainant, |) | |
| |) | |
| v. |) | 8 U.S.C. § 1324b Proceeding |
| |) | OCAHO Case No. 15B00035 |
| |) | |
| UNITED STATES POSTAL SERVICE, GREATER) |) | |
| SOUTH CAROLINA DISTRICT OFFICE |) | |
| Respondent. |) | |
| _____ |) | |

AMENDED FINAL ORDER DISMISSING COMPLAINT
FOR LACK OF SUBJECT MATTER JURISDICTION

This order corrects clerical and typographical errors or mistakes. No substantive finding or ruling has been altered, and the holding remains the same as the initial “Final Order Dismissing Complaint for Lack of Subject Matter Jurisdiction” issued on May 12, 2016. *See* 28 C.F.R. § 68.52(f) (“In cases arising under section 274B of the INA, an Administrative Law Judge may correct any substantive, clerical, or typographical errors or mistakes in a final order at any time within sixty (60) days after the entry of the final order.”).

I. RELEVANT BACKGROUND & PROCEDURAL HISTORY

Donna Yvette Miller (Ms. Miller or complainant), who is proceeding pro se, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on February 25, 2015.¹ The complaint alleges that the United States Postal Service, Greater South Carolina District Office (USPS or respondent), discriminated against Ms. Miller on account of her citizenship

¹ Ms. Miller’s discrimination charge, filed initially with the United States Equal Employment Opportunity Commission, was referred to the Department of Justice’s Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). On January 29, 2015, OSC sent Ms. Miller a letter stating that “it lacks jurisdiction under 8 U.S.C. § 1324b to pursue claims against federal agencies, including the United States Postal Service.” Therefore, OSC informed Ms. Miller that she could file her own complaint with OCAHO.

status when it failed to hire her, thereby violating 8 U.S.C. § 1324b (2012). The undersigned has been assigned this case for adjudication.

In her complaint, Ms. Miller claims that she applied for employment with USPS and attended a session on October 25, 2014, at the Cayce-West Columbia, South Carolina location, during which time prospective employees were to complete the Employment Eligibility Verification Form I-9 (Form I-9). According to complainant, at this session, a USPS employee informed the attendees to “ignore” the Form I-9’s instructions that a List A document or a List B and a List C document are required to complete the form. Rather, Ms. Miller claims that the attendees were instructed to provide three different documents, requiring Ms. Miller to present a document from Lists A, B, and C.

Complainant stated that she presented for employment verification her Social Security card and driver’s license, which are List B and List C documents, respectively. Ms. Miller contends that a Human Resources employee of USPS told Ms. Miller that she also had to present either a birth certificate or a passport. The next day, Ms. Miller informed Human Resources that she planned to obtain a copy of her birth certificate from New Jersey and a new passport, but that she would not have either document by the required start date.

On February 27, 2015, the Chief Administrative Hearing Officer (CAHO) issued a Notice of Case Assignment, which indicated that respondent had thirty (30) days after receipt of the complaint to file an answer. Service of the complaint was completed on March 3, 2015, according to the postal service website. Thus, respondent’s answer was due no later than April 2, 2015. No answer was filed.

On May 12, 2015, the undersigned issued a Notice and Order to Show Cause to USPS, which found USPS in default for failing to file a timely answer and instructed USPS to show cause within fifteen (15) days why it did not file a timely answer and to file an answer which conforms to 28 C.F.R. § 68.9. As this notice was served on respondent by ordinary mail and respondent “has the right or is required to take some action within a prescribed period after the service” of this notice, five (5) days were added to the prescribed time period. *Id.* § 68.8(c)(2). Accordingly, USPS’s response to the Notice and Order to Show Cause was due no later than June 1, 2015.

To date, USPS has not filed an answer. However, on May 29, 2015, USPS filed a Motion for Summary Decision (Motion), in which it argues that Ms. Miller’s complaint must be dismissed for lack of subject-matter jurisdiction. Specifically, USPS contends that it has federal immunity from suits under 8 U.S.C. § 1324b. The certificate of service indicates that service of the Motion was made on complainant by priority mail on May 26, 2015. Complainant had a right to file a response. *See* 28 C.F.R. § 68.38(a). Ms. Miller has not filed a response to this Motion. For the reasons discussed below, USPS’s Motion is granted, and Ms. Miller’s complaint is dismissed for lack of subject-matter jurisdiction.

II. DISCUSSION

A. USPS's Motion

In its Motion, USPS does not dispute the material allegations that Ms. Miller was denied employment when she did not produce a United States passport or birth certificate when attempting to complete her Form I-9. Rather, the gravamen of its Motion is that OCAHO does not have subject-matter jurisdiction over the complaint because USPS is a federal governmental entity immune from suit brought under 8 U.S.C. § 1324b.

The OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68, do not contain a specific provision regarding motions to dismiss for lack of subject-matter jurisdiction. However, according to OCAHO's 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, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. Federal Rule of Civil Procedure 12(h)(3) compels dismissal of an action "at any time" that the court determines it lacks subject-matter jurisdiction. This rule may serve as a "general guideline" when an OCAHO Administrative Law Judge (ALJ) questions OCAHO's subject-matter jurisdiction. *See Ping Ruan v. United States Navy*, 8 OCAHO no. 1046, 714, 716-17 (2000).²

Ms. Miller's cause of action arose in the State of South Carolina. Because the State of South Carolina is within the jurisdiction of the United States Court of Appeals for the Fourth Circuit (Fourth Circuit), Fourth Circuit case precedent is relevant in this case. Pursuant to Fourth Circuit and OCAHO case law, USPS's Motion must be granted and Ms. Miller's complaint must be dismissed.

B. Fourth Circuit Standards Governing Challenges To Subject-Matter Jurisdiction

USPS has presented its Motion as a "Motion for Summary Decision." However, the Motion is more appropriately considered a "factual" motion. In the Fourth Circuit, a defendant (or here, respondent USPS) has two ways of challenging a court's subject-matter jurisdiction. *Kerns v.*

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 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>.

United States, 585 F.3d 187, 192 (4th Cir. 2009). First, a respondent may make a factual challenge by contending ““that the jurisdictional allegations of the complaint [are] not true.”” *Id.* (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). This kind of challenge contests the existence of subject matter in fact, and the plaintiff (or here, complainant Ms. Miller) “bears the burden of proving the truth of such facts by a preponderance of the evidence.” *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347-48 (4th Cir. 2009) (citing *Adams*, 697 F.2d at 1219). When adjudicating a factual challenge to subject-matter jurisdiction, a court “is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. . . . [N]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 774 (M.D.N.C. 2000) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)); *see also Kerns*, 585 F.3d at 192 (citing *Adams*, 697 F.2d at 1219); *Ping Ruan*, 8 OCAHO no. 1046 at 717-18.

Second, a respondent may make a facial challenge by contending ““that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based.”” *See Kerns*, 585 F.3d at 192 (quoting *Adams*, 697 F.2d at 1219). In this situation, the plaintiff essentially receives the ““same procedural protection as [s]he would receive under a Rule 12(b)(6) consideration.”” *Id.* (quoting *Adams*, 697 F.2d at 1219).³ A jurisdictional defect under a facial challenge may be cured. For purposes of a facial challenge, the alleged facts in the complaint are credited as true, and the motion is denied if the complaint alleges facts sufficient to invoke subject-matter jurisdiction. *Id.*

Respondent USPS has made a “factual” attack on OCAHO’s subject-matter jurisdiction because it challenges this forum’s subject-matter jurisdiction in fact, without regard to the formal sufficiency of the allegations made in the complaint. While an OCAHO ALJ may consider matters outside of the pleadings for purposes of adjudicating a factual challenge to subject-matter jurisdiction, USPS does not rely on any. *See generally* Fed. R. Civ. P. 12(d); 28 C.F.R. § 68.10. USPS’s Motion relies only on OCAHO authority and on the allegations as presented in the complaint. Moreover, Ms. Miller did not present any arguments or evidence to rebut USPS’s Motion.

Therefore, USPS’s Motion will not be treated as a Motion for Summary Decision. *Santos v. United States*, 9 OCAHO no. 1105, 3 (2004). Instead, the Motion will be adjudicated based on the pleadings and binding legal authority.⁴ Ultimately, “the trial court is free to weigh the

³ Federal Rule of Civil Procedure 12(b)(6) provides for the defense of “failure to state a claim upon which relief can be granted.”

⁴ Currently, pending before OCAHO are Ms. Miller’s complaint and USPS’s Motion, which will be considered a Motion to Dismiss and not a Motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c). OCAHO rules do not contain a specific provision relating to motions for

evidence and satisfy itself as to the existence of its power to hear the case.” *Keene*, 127 F. Supp. 2d at 774 (citations omitted). Ms. Miller bears the burden of proof with respect to proving that OCAHO has subject-matter jurisdiction. *Adams*, 697 F.2d at 1219.

C. Federal Sovereign Immunity

USPS argues that dismissal of the complaint is warranted because USPS is an entity within the federal government and because the Immigration Reform and Control Act (IRCA) does not contain an express waiver of federal sovereign immunity that would permit suit against USPS. *See* Motion at 2-3. As set forth below, USPS is immune from suit under 8 U.S.C. § 1324b, pursuant to legal precedent from the United States Supreme Court and OCAHO.

The Postal Reorganization Act of 1970, 39 U.S.C. § 101, *et seq.* (PRA), grants USPS the power “to sue and be sued in its official name.” 39 U.S.C. § 401(1). In *Santos v. United States Postal Service*, an OCAHO ALJ decided whether an anti-discrimination claim pursuant to 8 U.S.C. § 1324b could be pursued against USPS. 9 OCAHO no. 1105 at 1. The ALJ in *Santos* discussed

judgment on the pleadings and therefore, the Federal Rules of Civil Procedure may be used as guidance. “A motion for judgment on the pleadings . . . theoretically is directed towards a determination of the substantive merits of the controversy.” *See* 5C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam Steinman, *Federal Practice and Procedure* § 1369 (3d ed. 2015). In the Fourth Circuit, a motion for judgment on the pleadings under Rule 12(c) “is assessed under the same standards as a motion to dismiss under Rule 12(b)(6).” *Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999)). To survive such a motion, “the complaint must contain facts sufficient ‘to raise a right to relief above the speculative level’ and ‘state a claim to relief that is plausible on its face.’” *Id.* at 116 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). “Although a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, . . . dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. . . . One such defense is that of qualified immunity.” *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011) (citations omitted). A motion to dismiss for lack of subject-matter jurisdiction, however, addresses whether a court has the power to hear and decide the case. At this stage, a court cannot determine whether a plausible claim to relief has been made. *See, e.g., Ruan*, 8 OCAHO no. 1046 at 716 (“I am bound to consider the motion regarding subject-matter jurisdiction first, since Respondent’s motion to dismiss for failure to state a claim becomes moot if this court lacks subject-matter jurisdiction.”) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, at 209–10 (2d ed. 1990)). Here, USPS’s Motion undoubtedly questions OCAHO’s authority to hear this case because of respondent’s claim of federal sovereign immunity. Therefore, USPS’s filing will be treated as a Motion to Dismiss, and the relevant standards as provided by the federal rules and Fourth Circuit case law will be applied.

other OCAHO cases where complaints alleging violations of 8 U.S.C. § 1324b had been filed previously against USPS, but in those cases USPS did not assert an affirmative defense of sovereign immunity or the cases were not dismissed on that basis. *Id.* at 6. It is important to note that these prior USPS cases predate the United States Supreme Court decision in *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004).

In *Santos*, the ALJ relied on the Supreme Court’s decision in *Flamingo Industries* to determine that USPS’s federal immunity was not waived for claims under IRCA. 9 OCAHO no. 1105 at 6-7. In *Flamingo*, the Supreme Court held that the waiver in section 401(1) of the PRA did not alone subject USPS to liability under the Sherman Act. The Court held that the determination of whether federal sovereign immunity has been waived entails a two-part inquiry: (1) “whether there is a waiver of sovereign immunity for actions against the Postal Service;” and (2) “whether the substantive prohibitions of the Sherman Act apply to an independent establishment of the Executive Branch of the United States.” 540 U.S. at 743 (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)). The Supreme Court answered the first question in the affirmative because Congress waived USPS’s immunity under the PRA. *Id.* at 744. However, the Supreme Court determined under the second part of the inquiry that USPS was not subject to the Sherman Act because it is not a separate “person” from the United States Government. *Id.* at 744-46.

In *Santos*, following *Flamingo*, the ALJ also answered the first part of the two-prong inquiry in the affirmative. Turning to the second part of the *Flamingo* analysis, the ALJ recognized that IRCA does not expressly subject USPS to liability, while Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16(a), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a), include explicit language allowing USPS to be sued under those laws. 9 OCAHO no. 1105 at 7 (citing *Loeffler v. Frank*, 486 U.S. 549, 558-59 (1988)). In addition, the PRA lists several federal statutes, identifying that USPS is subject to liability under some laws and not liable under other laws. Importantly, IRCA is not listed as a law under which USPS is subject to liability. *Id.* (citing 39 U.S.C. § 409-10). For these reasons, the ALJ found that the substantive prohibitions of IRCA do not apply to USPS, and that USPS cannot be held liable for violating 8 U.S.C. § 1324b. *Id.*

While the ALJ in *Santos* concluded that USPS’s sovereign immunity was not waived for suits under 8 U.S.C. § 1324b, the ALJ characterized his decision as “a close” one. 9 OCAHO no. 1105 at 7 (“It is questionable whether an exemption from the anti-discrimination provisions of the IRCA would advance the USPS’ goals and obligations.”). However, the analysis and holding in *Santos* are on point and persuasive, particularly because they rely on Supreme Court precedent. Moreover, the decision in *Yaming Shen v. Defense Language Institute*, 9 OCAHO no. 1117, 3 (2005), found that since 1995, OCAHO cases have held the federal government and its agencies immune from suit under 8 U.S.C. § 1324b, as IRCA does not contain any “language which could plausibly be read as a waiver of federal sovereign immunity.” *See also McMellon v. United States*, 387 F.3d 329, 340 (4th Cir. 2004) (“[I]t is well established that waivers of sovereign immunity ‘must be construed strictly in favor of the sovereign and not enlarged

beyond what the language requires.’’) (citations omitted). Relying on both United States Supreme Court and OCAHO precedent, USPS is immune from suit for alleged violations of 8 U.S.C. § 1324b, and Ms. Miller’s complaint against USPS must be dismissed.

D. Ms. Miller Cannot Challenge USPS’s Federal Sovereign Immunity

Ms. Miller has proceeded pro se before OCAHO, but was afforded ample time to respond to USPS’s Motion. 28 C.F.R. §§ 68.8(c)(2), 68.38(a). Although certain circumstances would call for issuance of a notice to show cause prior to dismissal, *see, e.g.*, 28 C.F.R. § 68.10(b), the instant matter does not present such a circumstance because USPS submitted a motion that has been analyzed as a motion to dismiss for lack of subject-matter jurisdiction. Moreover, there is “no evidence [Ms. Miller] could gather and no argument she could make that would alter the conclusion that sovereign immunity protects” USPS from suit before OCAHO. *Shen*, 9 OCAHO no. 1117 at 3. Therefore, issuing a notice to show cause to Ms. Miller would have been futile in light of OCAHO’s lack of subject-matter jurisdiction in this case. *Santos*, 9 OCAHO no. 1105 at 6 (relying on *Flamingo Indus.*, 540 U.S. at 743-46). Accordingly, USPS’s Motion is appropriately analyzed as a motion to dismiss for lack of subject-matter jurisdiction, and dismissal of Ms. Miller’s complaint due to lack of subject-matter jurisdiction is the appropriate course of action in this case.

III. CONCLUSION

Although Congress has waived USPS’s immunity from suit by giving it the power “to sue and be sued in its official name,” 8 U.S.C. § 1324b does not contain an express waiver of sovereign immunity, nor does the PRA identify IRCA as a statute under which USPS may be sued. Therefore, USPS, as an independent establishment of the federal government, is shielded by sovereign immunity, and OCAHO lacks subject-matter jurisdiction over this action. Accordingly, USPS’s Motion is GRANTED, and Ms. Miller’s complaint is DISMISSED.

SO ORDERED.

Dated and entered on June 9, 2016.

Stacy S. Paddack
Administrative Law Judge