

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

December 23, 2016

WASHINGTON YOUNGGIL KIM JUNG WINDSOR,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	OCAHO Case No. 16B00058
)	
CAPTAIN GLEN LANDEEN,)	
Respondent.)	
_____)	

FINAL ORDER AND DISMISSAL FOR LACK OF
SUBJECT-MATTER JURISDICTION

I. INTRODUCTION

This is an action arising under the antidiscrimination provisions the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Complainant Washington Younggil Kim Jung Windsor (Mr. Windsor) alleges that Respondent Glen Landeen (Captain Landeen), who is a captain of the United States Army (the Army), discriminated against Mr. Windsor on account of his national origin and citizenship status and retaliated against him for asserting his rights under 8 U.S.C. § 1324b. Mr. Windsor is *pro se*. As discussed in detail below, Mr. Windsor’s complaint will be dismissed for lack of subject-matter jurisdiction.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On June 26, 2016, Mr. Windsor filed a charge alleging national origin discrimination and retaliation against Captain Landeen with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). He states that he is a United States citizen and that he filed

an “Equal Opportunity petition to captain Landeen through female Drill Sergeant Mellisa Barrett” on May 12, 2015.¹ *See* OSC Charge at 2. However, instead of an investigation into Mr. Windsor’s complaints, Captain Landeen allegedly then “put [Complainant] into flag system as adverse involuntary separation.” The charge claims that on June 30, 2015, Captain Landeen “made a separation decision” with respect to Mr. Windsor. In addition, the charge alleges that Respondent “threatened . . . to block [Complainant] to join military branches of [the] United States.” *Id.* at 3.

In a letter dated July 22, 2016, OSC informed Mr. Windsor that it was dismissing his charge based on its determination that OSC “lacks jurisdiction to pursue claims against federal agencies, including the United States Army.” OSC also informed Mr. Windsor that he could now file his own complaint with OCAHO, which he did on September 6, 2016.

The OCAHO complaint alleges that Captain Landeen failed to hire Mr. Windsor on account of his citizenship status and national origin,² terminated him because of his citizenship status and national origin, and retaliated against him.³ Mr. Windsor is a United States citizen who was a lawful permanent resident (LPR) at the time of the alleged discriminatory acts. He claims that he was hired by the United States Army Recruiting Command in New York, but that Captain Landeen, who has the “final authority” to hire him, refused to do so because of Mr. Windsor’s South Korean national origin and because of “retaliation.” *See* Complaint at 9. Mr. Windsor reiterates that Captain Landeen “threatened” him for filing the “Equal Opportunity” complaint. *Id.* at 11. Complainant seeks, *inter alia*, to be hired, or rehired, by the Army and back pay from the Army. *Id.* at 13.

¹ Mr. Windsor states that he filed this “petition” with the Army’s “Equal Opportunity” office. In addition, he filed a complaint based on the same facts alleged in the OSC Charge with the Inspector General of the U.S. Department of Defense. OSC Charge Form at 4.

² Mr. Windsor did not check “Citizenship status” or “National Origin” where the complaint asks why the employer/business refused to hire you. *See* OCAHO Complaint at 8. However, in the “Discrimination in Hiring, Recruitment, or Referral for a Fee” section of the complaint, he wrote that United States citizens were hired and that he was a “green card holder at that time.” *Id.* at 9. He also stated that he was the only individual of South Korean national origin at that time. The undersigned construes these statements as allegations of discrimination based on citizenship status and national origin.

³ The complaint also obliquely alleges discrimination by Captain Landeen on account of Mr. Windsor’s religion. Complaint at 10. That claim is beyond OCAHO’s jurisdiction regardless of Respondent’s sovereign immunity and would be subject to dismissal even if OCAHO otherwise had jurisdiction over Mr. Windsor’s other claims. *See* 8 U.S.C. § 1324b.

On September 20, 2016, the Chief Administrative Hearing Officer (CAHO) issued a Notice of Case Assignment, which provides that Respondent had thirty days after receipt of the complaint to file an answer. The United States Postal Service website indicates that service of the complaint was completed on September 28, 2016. Respondent's answer was thus due no later than October 28, 2016. No answer has been filed.⁴

On November 10, 2016, Administrative Law Judge Robert Lesnick, who previously presided over this matter, issued a Notice and Order to Show Cause to Complainant. The Order instructed Mr. Windsor to explain why the complaint should not be dismissed in light of Respondent's apparent sovereign immunity as a captain of the Army, a component of the U.S. Department of Defense, which would deprive OCAHO of subject-matter jurisdiction over the claim. Complainant's response was due no later than December 12, 2016. No response has been filed.⁵

III. DISCUSSION

A. OCAHO's *Sua Sponte* Authority To Determine Subject-Matter Jurisdiction

The Supreme Court has clearly stated that “[s]overeign immunity is jurisdictional in nature.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted). “Indeed, the ‘terms of [the United States’] consent to be sued in any court define that court’s jurisdiction to entertain the suit.’” *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586, (1941)); *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”).

⁴ As discussed herein, sovereign immunity precludes OCAHO jurisdiction over this matter; thus, a default judgment for Mr. Windsor is not appropriate, notwithstanding Respondent's failure to file an answer. 28 C.F.R. § 68.9(b).

⁵ Because I find Mr. Windsor's complaint is due to be dismissed for another reason as discussed herein, I do not address whether his failure to comply with Judge Lesnick's Notice and Order to Show Cause also warrants dismissal of his complaint. *See* 28 C.F.R. § 68.37(b)(1) (providing that a complaint may be dismissed due to abandonment, and a party who fails to respond to orders issued by an Administrative Law Judge shall be deemed to have abandoned a complaint).

A question of jurisdiction may generally be raised at any time. *McGrath v. Kristensen*, 340 U.S. 162, 167 (1950). Moreover, the issue of subject-matter jurisdiction may be raised ““even by the court, *sua sponte*.”” *Horne v. Town of Hampstead*, 6 OCAHO no. 906, 941, 945 (1997) (quoting *Capitol Credit Plan of Tenn. v. Shaffer*, 912 F.2d 749, 750 (4th Cir. 1990)).⁶ Indeed, a court has a duty to determine *sua sponte* if it has subject-matter jurisdiction. *See, e.g., Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)). A claim of sovereign immunity is jurisdictional in nature and may be raised at any point in the proceeding. *Normandy Apartments v. U.S. Dep’t of Housing and Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992).

The OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68, do not contain a specific provision regarding dismissal of actions for lack of subject-matter jurisdiction. According to the OCAHO Rules, however, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) “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. The relevant Federal Rules, as well as case law interpreting these rules from the United States Court of Appeals for the Tenth Circuit,⁷ therefore, serve as “general guidance” when an OCAHO Administrative Law Judge (ALJ) questions OCAHO’s subject-matter jurisdiction. *Ruan v. U.S. Navy*, 8 OCAHO no. 1046, 714, 716-17 (2000) (referencing Fed. R. Civ. P. 12(h)(3)).

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. Dismissal for lack of subject-matter jurisdiction is proper where a court lacks authority to adjudicate a case. *See* Fed. R. Civ. P. 12(b)(1); *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994). An OCAHO ALJ has the

⁶ 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>.

⁷ According to the OSC Charge Form, the alleged discriminatory acts occurred in Oklahoma, where Captain Landeen is located. The Tenth Circuit is therefore the reviewing United States Court of Appeals for this case, should it be appealed. 28 C.F.R. § 68.57.

authority to determine whether OCAHO retains subject-matter jurisdiction over a dispute. *Horne*, 6 OCAHO no. 906 at 946. The party invoking jurisdiction bears the burden of proof. *Penteco Corp., Ltd. P'ship--1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991) (citing *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)); *Ruan*, 8 OCAHO no. 1046 at 718.

In determining whether there is a factual basis to support a court's exercise of subject-matter jurisdiction, a court is not limited to the allegations in the complaint and may consider other material in the record. *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995); *see generally Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (“[W]hen a question of the District Court’s jurisdiction is raised, either by a party or by the court on its own motion, the court may inquire by affidavits or otherwise, into the facts as they exist.”) (internal citations omitted). Here, the record consists of the OCAHO Complaint, the Notice of Case Assignment, the Notice of Reassignment, and the Notice and Order to Show Cause. Attached to the OCAHO Complaint is the letter from OSC to Mr. Windsor, a copy of the OSC Charge Form filed by Mr. Windsor, a letter from the Army’s Office of the Inspector General to Mr. Windsor with respect to his complaint, and two letters from the Army Review Boards Agency to Mr. Windsor.

Because sovereign immunity is a jurisdictional issue and because the facts of this case clearly implicate that issue, it is incumbent on the undersigned, as it was with Judge Lesnick, to determine initially whether OCAHO has subject-matter jurisdiction to consider Mr. Windsor’s claims against the Army. As set forth below, OCAHO lacks subject-matter jurisdiction over this discrimination complaint, and the complaint will be dismissed.

B. Complaint Filed Against The United States Army And Its Employee

Mr. Windsor’s complaint identifies Captain Landeen as the “Business/Employer,” who allegedly discriminated and retaliated against Mr. Windsor. OCAHO Complaint at 6. According to the complaint, Captain Landeen has the “final authority” to hire Mr. Windsor, who seeks employment with the Army, but did not because of Mr. Windsor’s South Korean national origin. *Id.* at 9. In addition, the complaint sets forth that Respondent unlawfully terminated Mr. Windsor and retaliated against him for filing a complaint with the Equal Employment Opportunity Commission.

The material in the record demonstrates that Mr. Windsor has alleged discrimination by the Army based on the acts of Captain Landeen in his official capacity when he failed to hire Mr. Windsor. Mr. Windsor seeks, *inter alia*, back pay and current employment with the Army as remedies for Captain Landeen’s acts on behalf of the Army. Mr. Windsor has not alleged that Captain Landeen was acting in any personal capacity or outside of the scope of his official duties or official capacity. *See Atkinson v. O’Neill*, 867 F.2d 589, 590 (10th Cir. 1989) (“When an action is one against named individual defendants, but the acts complained of consist of actions

taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States.”) (citations omitted).

The Army is a component of the U.S. Department of Defense, which is a federal agency. “In deciding whether an action is in reality one against the Government, the identity of the named defendant is not controlling; the dispositive inquiry is ‘who will pay the judgment?’” *Stafford v. Briggs*, 444 U.S. 527, 542 n.10 (1980) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949)). If it is found that the relief sought by the complainant “requires ‘payment of money from the Federal Treasury, interferes with public administration, or compels or restrains the government,’” the United States as sovereign is the real party in interest. *Chung v. Fed. Bureau of Prisons, FCI Greenville*, 6 OCAHO no. 881, 629, 631 (1996) (quoting *Stafford*, 444 U.S. at 542 n.19); *see also New Mexico v. Regan*, 745 F.2d 1318, 1320 (10th Cir. 1984) (“[S]overeign immunity is determined not by the party named as the defendant, but by the issues presented and the effect of the judgment. If the relief sought against a federal officer in fact operates against the sovereign, then the action must be deemed as one against the sovereign.”) (citations omitted).

Based on the material in the record and facts alleged in the complaint, Mr. Windsor seeks relief that can only be obtained from the Army, including back pay which would be paid out of the federal treasury. Thus, overall, the record is clear that his claims lie against the United States as sovereign. Accordingly, because this is a suit against an agent of a federal agency acting in his official capacity, it is, in reality, a suit against the United States. Therefore, unless a relevant statute contains an explicit waiver of sovereign immunity, OCAHO lacks jurisdiction over this case.

C. OCAHO Lacks Jurisdiction Due to Federal Sovereign Immunity

“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *Meyer*, 510 U.S. at 475. Federal sovereign immunity is generally presumed until established otherwise, and the complainant bears the burden of proving that the federal government has waived its immunity and that the tribunal has the jurisdictional right to hear the case. *See McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188-89 (1936). To be effective, “a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Moreover, the unequivocal expression must occur in statutory text. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Any ambiguity regarding whether a waiver exists is construed in favor of immunity. *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Similarly, any ambiguity regarding the scope of a waiver is also construed in favor of the sovereign. *Id.*

OCAHO case law has consistently held that sovereign immunity precludes jurisdiction over claims against the federal government under 8 U.S.C. § 1324b, particularly involving claims against the U.S. Department of Defense. *See, e.g., Kim v. Getz*, 12 OCAHO no. 1279 (2016);⁸ *Shen v. Def. Language Inst.*, 9 OCAHO no. 1117, 3 (2004); *Ruan*, 8 OCAHO no. 1046. Moreover, OCAHO case law has held that “the provisions of 8 U.S.C. § 1324b contain no language which could plausibly be read as a waiver of federal sovereign immunity.”⁹ *Shen*, 9 OCAHO no. 1117 at 3. In *Shen*, an OCAHO ALJ recognized that since 1995, OCAHO case law has consistently held that federal government agencies are not amenable to suit under 8 U.S.C. § 1324b. *Id.* (citing OCAHO cases that have dismissed § 1324b suits against federal agencies). The ALJ in *Shen* dismissed a citizenship status discrimination claim for lack of subject-matter jurisdiction because the ALJ determined that the U.S. Army Defense Language Institute Foreign Language Center was a U.S. Department of Defense entity entitled to sovereign immunity. *See also Getz*, 12 OCAHO no. 1279 at 5-6 (following *Shen* and dismissing a complaint against a sergeant at a U.S. Army Recruiting Center).

Following the relevant OCAHO precedent in *Shen*, *Ruan*, and *Getz*, Mr. Windsor’s complaint must be dismissed for lack of subject-matter jurisdiction because Mr. Windsor failed to prove that OCAHO retains jurisdiction over his complaint against Captain Landeen and the Army.¹⁰ *See, e.g., Santos v. United States Postal Serv.*, 9 OCAHO no. 1105, 7 (2004) (finding that although the Postal Reorganization Act of 1970 waived sovereign immunity for the Postal

⁸ The complainant in *Getz* shares a notably significant portion of his name with Complainant in the instant case; however, the record does not indicate whether the two complainants are related.

⁹ The ALJ in *Getz* broadened this quotation from *Shen* to suggest that no waiver of sovereign immunity exists anywhere in the INA. *Getz*, 12 OCAHO no. 1279 at 5. That expansion may be something of an overstatement as the provisions of 8 U.S.C. § 1324a, which are part of the INA, have explicitly applied to the federal government since 1996. *See* 8 U.S.C. § 1324a(a)(7). Nevertheless, the original statement in *Shen* was limited to a discussion of 8 U.S.C. § 1324b, and there remains no indication that its provisions contain any unequivocal waiver of sovereign immunity.

¹⁰ Although Mr. Windsor is *pro se*, the Notice and Order to Show Cause issued to Mr. Windsor on November 10, 2016, provided him with notice that the OCAHO was contemplating dismissal for lack of subject-matter jurisdiction and an opportunity to respond. Moreover, based on the legal precedent discussed herein, there is “no evidence [Mr. Windsor] could gather and no argument [h]e could make that would alter the conclusion that sovereign immunity protects” the U.S. Department of Defense from this proceeding. *Shen*, 9 OCAHO no. 1117 at 3. Thus, any potential amendment to his complaint would be futile, and dismissal is appropriate.

Service, nothing in the act subjects USPS to suit under the INA). In short, neither 8 U.S.C. § 1324b nor any other applicable statute¹¹ waives the Army’s sovereign immunity in this proceeding. Accordingly, the complaint is dismissed for lack of subject-matter jurisdiction.¹²

SO ORDERED.

Dated and entered on December 23, 2016.

James R. McHenry III
Administrative Law Judge

¹¹ In addition to back pay and rehiring, Mr. Windsor seeks non-monetary relief in the form of the removal of certain documents from his personnel file and the removal of restrictions or changes to his work assignments. Complaint at 13. Subject to other restrictions, the Administrative Procedure Act (APA) generally waives sovereign immunity for relief “other than [for] money damages.” 5 U.S.C. § 702. The waiver only applies, however, to individuals legally wronged, adversely affected, or aggrieved by “agency action.” *Id.* In turn, the phrase “agency action” is defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. §§ 551(13), 701(b)(2). Mr. Windsor’s allegations, which essentially assert personnel or employment actions by an agency acting as an employer rather than action by an agency *qua* agency, do not appear to fall within the ambit of the definition of “agency action” for purposes of the APA. *See generally* 5 U.S.C. § 551. Moreover, to the extent that there is any ambiguity regarding whether his allegations do reflect agency action by the Army—and would, thus, implicate 5 U.S.C. § 702—that ambiguity must be resolved in favor of a finding of sovereign immunity. *See Cooper*, 132 S. Ct. at 1448. Consequently, as applied to the facts of Mr. Windsor’s case, the APA also does not provide a waiver of sovereign immunity unequivocal enough to warrant OCAHO jurisdiction over even the non-monetary relief portions of his claim.

¹² Because I conclude that sovereign immunity deprives OCAHO of jurisdiction over Mr. Windsor’s complaint, I need not address whether his complaint is also subject to dismissal because the Army, as part of a federal agency, is not a “person or entity” addressed by 8 U.S.C. § 1324b. *See Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices*, 6 Op. O.L.C. 121 (1992) (opining that the phrase “person or other entity” in 8 U.S.C. § 1324b does not include federal agencies).

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.