

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

US TECH WORKERS ET AL.,)	
Complainant,)	
)	
)	8 U.S.C. § 1324b Proceeding
v.)	OCAHO Case No. 2024B00038
)	
FIFTH THIRD BANK.)	
Respondent.)	
)	

Appearances: John M. Miano, JD, for Complainant¹
David A. Calles Smith, Esq., Sarah J. Millsap, Esq., and Amy L. Peck, Esq., for Respondent

ORDER ON RESPONDENT’S MOTION TO STAY ANSWER DEADLINE

I. BACKGROUND

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, and amended, 8 U.S.C. § 1324b. On February 9, 2024, Complainant, US Tech Workers, et al., filed a complaint against Respondent, Fifth Third Bank, alleging that Respondent discriminated against it based on citizenship status in violation of 8 U.S.C. § 1324b(a)(1).

On February 21, 2024, the Chief Administrative Hearing Officer (CAHO) sent the Respondent a Notice of Case Assignment for Complaint Alleging Unfair Immigration-Related Employment Practices (NOCA) and the complaint by United States Postal Service (USPS) certified mail. The USPS website tracking service indicates that the NOCA and complaint were delivered to an agent for final delivery on February 27, 2024. Therefore, Respondent’s answer was due no later than March 28, 2024. *See* 28 C.F.R. § 68.9(a).²

¹ The Complaint lists John M. Miano, JD as the “attorney or authorized representative” for Complainant. To the extent that Mr. Miano is an attorney seeking to represent the Complainant in this matter, he must file a notice of appearance in compliance with the requirements of 28 C.F.R. § 68.33(f).

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

On March 28, 2024, Respondent filed the following documents: (1) Respondent’s Motion to Dismiss; (2) Respondent’s Brief in Support of Motion to Dismiss; (3) Respondent’s Motion to Stay Answer Deadline; and (4) notices of appearance of counsel. In its Motion to Stay Answer Deadline, Respondent requests that the Court issue an order staying the deadline to file an answer to the Complaint pursuant to 28 C.F.R. § 68.11. Mot. Stay Ans. Deadline 1. Respondent writes that OCAHO does not have subject matter jurisdiction over the Complaint, because “Complainant has failed to allege that Fifth Third Bank hired a non-U.S. worker at the expense of [Nathan Overby].” *Id.* (citing Fed. R. Civ. P. 12(b)(1); and then citing 28 C.F.R. § 68.7(b)(1)). Therefore, Respondent “respectfully requests that the period for filing an answer be tolled until it is established whether OCAHO has subject-matter jurisdiction over the charge.” *Id.*

II. LAW AND ANALYSIS

OCAHO’s Rules of Practice and Procedure for Administrative Hearings provide that “[t]he filing of a motion to dismiss does not affect the time period for filing an answer.” 28 C.F.R. § 68.10(a). OCAHO’s Rules differ from the Federal Rules of Civil Procedure in this way, as Federal Rule of Civil Procedure 12(a)(4) provides that the filing of a motion under Rule 12 alters the period for filing an answer to 14 days after notice of the court’s denial or postponement of such a motion. Fed. R. Civ. P. 12(a)(4)(A).

However, “[t]he OCAHO Rules vest the Administrative Law Judge (ALJ) with all appropriate powers necessary to regulate the proceedings.” Heath v. Amazee Glob. Ventures, Inc., 16 OCAHO no. 1433, 2 (2022) (citing Hsieh v. PMC-Sierra, Inc., 9 OCAHO no. 1091, 5 (2003));³ 28 C.F.R. § 68.28(a). This includes the power to issue stays of proceedings. United States v. Black Belt Sec. & Investigations, 17 OCAHO no. 1456b, 2 (2023) (citing Hsieh, 9 OCAHO no. 1091, at 5). The issuance of a stay “calls for the exercise of judgment, which must weigh competing interests and maintains an even balance,” and “should not be granted absent a clear bar to moving ahead.” *See* Heath v. ConsultAdd, 15 OCAHO no. 1395b, 2 (2022) (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936), and then quoting Monda v. Saryhab, Inc., 8 OCAHO no. 1002, 86, 91 (1998)). “Prior OCAHO ALJs have issued stays when dismissal may be imminent.” A.S. v. Amazon Web Servs., 14 OCAHO no. 1381o, 3 (2022).

³ Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents after volume eight, 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 through the Westlaw database “FIM OCAHO,” the LexisNexis database “OCAHO,” and on the United States Department of Justice’s website: <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

The Court finds that a stay of the regulatory deadline to file an answer to the Complaint is appropriate in this circumstance. Respondent’s Motion to Dismiss raises arguments related to the Court’s subject matter jurisdiction over the Complaint, and seeks full dismissal—therefore, if meritorious, the Motion to Dismiss would be case-dispositive. Moreover, OCAHO’s Rules require Administrative Law Judges to notify the parties of an initial prehearing conference within 30 days of the filing of an answer, and the initial prehearing conference may be used to set a case schedule. *See* 28 C.F.R. §§ 68.5(a), 68.13(a)(2)(viii). Given that the Motion to Dismiss may be case-dispositive, and that the Court must schedule an initial prehearing conference after receipt of an answer, the Court finds that it would be in the interest of judicial economy to issue a stay of the answer deadline. Moreover, Complainant has not opposed Respondent’s Motion to Stay Answer Deadline, accordingly, the Complainant has effectively conceded that it would not be prejudiced by the grant of a stay.

Given the Court’s inherent authority to issue stays, the fact that a stay of the regulatory answer deadline would be in the interest of judicial economy, and the apparent lack of prejudice to the Complainant, the Court will stay Respondent’s regulatory deadline to file an answer to the Complaint until the Court rules on Respondent’s Motion to Dismiss. If the Court denies the Motion to Dismiss, the Court will reset Respondent’s answer deadline at that time.

III. ORDERS

IT IS SO ORDERED that Respondent’s Motion to Stay Answer Deadline is GRANTED.

IT IS FURTHER ORDERED that Respondent’s regulatory deadline to file an answer to the complaint is STAYED pending resolution of Respondent’s Motion to Dismiss.

SO ORDERED.

Dated and entered April 18, 2024.

John A. Henderson
Administrative Law Judge