

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

November 7, 2019

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 19A00044
	)	
R&SL INC., D/B/A TOTAL EMPLOYMENT	)	
AND MANAGEMENT (TEAM),	)	
	)	
Respondent.	)	
_____	)	

ORDER ON MOTION TO AMEND AND MOTION TO DISMISS

I. BACKGROUND

On August 7, 2019, Complainant, the Department of Homeland Security Immigration and Customs Enforcement, filed a complaint against Respondent, R&SL Inc., D/B/A Total Employment and Management (TEAM), alleging four counts of violations of 8 U.S.C. § 1324a. Complainant attached the Notice of Intent to Fine (NIF) to the Complaint, and included an attachment that listed the names and hire dates of the employees whose Forms I-9 allegedly contain violations.

On September 23, 2019, Respondent filed a Motion to Dismiss and its Answer. Respondent’s Motion to Dismiss seeks a dismissal of the complaint for failure to state a claim upon which relief can be granted. On September 30, 2019, Complainant filed a response to the motion to dismiss and, contemporaneously, filed a Motion to Amend Complaint. Complainant seeks to amend its complaint to incorporate a more detailed statement of facts for each alleged violation, a detailed calculation of the monetary penalty, and to include seventeen additional violations in Count III. Respondent filed a response opposing the motion for leave to amend on October 17, 2019.

II. STANDARDS

The OCAHO Rules of Practice and Procedure permit a complainant to amend a complaint “[if] a determination of a controversy on the merits will be facilitated thereby” and “upon such

conditions as are necessary to avoid prejudicing the public interest and the rights of the parties.” 28 C.F.R. § 68.9(e) (2018).<sup>1</sup> This rule is analogous to and is modeled after the Federal Rule of Civil Procedure 15(a), and accordingly, it is appropriate to look for guidance in federal case law to determine whether to permit requested amendments under Rule 15(a). 28 C.F.R. § 68.1. *See United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998); *United States v. Mr. Z Enters.*, 1 OCAHO no. 162, 1128, 1129 (1990).<sup>2</sup> Rule 15(a) provides that a party may amend the complaint once “as a matter of course” before a responsive pleading is served; after a responsive pleading is served, the “party may amend the party’s pleading only with the opposing party’s written consent or the court’s leave.” FED. R. CIV. P. 15(a). Leave should be freely granted in the absence of undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or futility. *Caffaso, U.S. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

### III. POSITIONS OF THE PARTIES

In Count I of the complaint, Complainant alleges that Respondent knowingly hired and/or continued to employ two unauthorized workers. In Count II, Complainant alleges that Complainant failed to prepare and/or present I-9s for 518 employees. In Count III, Complainant alleges Respondent failed to timely prepare and/or present I-9s for 259 employees. In Count IV, Complainant alleges Respondent failed to ensure the employee properly completed section one of the I-9 and/or failed to properly complete section two or three of the I-9s for 1,224 employees. Complainant seeks to amend Count III to include seventeen additional violations that it asserts it left off the complaint in error, for a total of 276 alleged violations.<sup>3</sup> Complainant also seeks to amend its complaint to incorporate a more detailed statement of facts for each violation. Specifically, Complainant seeks to incorporate a chart for each count and includes detailed allegations pertaining to each alleged violation. Complainant also seeks to incorporate its detailed penalty calculations.

Respondent argues that neither the original complaint nor the amended complaint satisfy the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007). Therefore, the amended complaint would not survive a motion to dismiss and the Court should

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<sup>1</sup> *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2018).

<sup>2</sup> 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>.

<sup>3</sup> The original complaint seeks \$225,687.00 in penalties for Count III. The amended complaint seeks the same amount. Thus, the addition of the seventeen omitted violations does not alter the penalty amount sought for Count III or the total proposed penalty amount.

deny the motion to amend. Specifically, Respondent argues that the amended complaint is still insufficient to apprise Respondent of the specific alleged violations. Respondent contends that the amended complaint only contains legal conclusions because “mere allegations that violations occurred, without the attachment of the actual Form I-9s in question, is not an allegation of fact, but rather an unsubstantiated premature conclusion that cannot be verified.” Resp. Mot. Am. at 2. Therefore, Respondent argues that the amended complaint would not survive a motion to dismiss as Complainant did not provide the relevant Forms I-9, so Respondent cannot evaluate the specific violations without the forms. Respondent also argues the allegations in the charts are insufficient because Respondent does not know the meaning of the abbreviations Complainant used in the charts.

#### IV. DISCUSSION

##### A. Motion for Leave to Amend

First, OCAHO does not demand the “plausibility” standard required in federal courts as outlined by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 8–10 (2012); *United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 5 (2013) (CAHO declined to modify or vacate interlocutory order). OCAHO’s rules merely require the complaint to contain “[t]he 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); *Split Rail Fence*, 10 OCAHO no. 1181 at 5. OCAHO does not require complainants “to present evidence at the pleading stage; the task here is not to assess evidence and predict at the outset what [Complainant] will be able to prove.” *Mar-Jac Poultry*, 10 OCAHO no. 1148 at 10.

Complainant’s amended complaint includes lists pertaining to each count and contains specific factual allegations regarding each of the 2,020 alleged violations. Regarding the two alleged violations in Count I, Complainant lists the employee’s name, hire and termination dates, employment authorization status, and includes a section titled “Notes” which provides specific factual allegations for each alleged violation for knowingly hiring an unauthorized worker. For the 518 alleged violations in Count II, the chart includes the employee’s name, approximate date of hire, date of termination, I-9 retention date, employment authorization status, and a “Notes” section with the alleged facts related to each alleged violation for failure to prepare and/or present Forms I-9.

For the 276 alleged violations in Count III, the chart includes the employees’ names, hire date, the date the employer signed section two of the I-9, employment authorization status, and a “Notes” section contains specific allegations of fact related to each alleged violation for failure to timely prepare and/or present Forms I-9.

For the 1,224 alleged violations in Count IV, Complainant lists the employee’s name, hire date, termination date, employment authorization status, and includes a “Notes” section which alleges specific facts as to the alleged violations contained in each I-9 Form. As such, the factual allegations in Complainant’s amended complaint are sufficient to satisfy the requirements of 28

C.F.R. § 68.7(b)(3). *See Split Rail Fence*, 10 OCAHO no. 1181 at 5–6 (CAHO finding that an amended complaint alleging similar details was sufficient to satisfy the requirements of § 68.7(b)(3)).

Respondent also asserts that the charts in the amended complaint are insufficient because they contains Complainant’s own shorthand and abbreviations, so Respondent cannot decipher Complainant’s allegations. On the last page of the chart for each count, Complainant provided a definition for the abbreviations used for that count.

Respondent also argues that Complainant should be required to attach the I-9 forms at issue because without the I-9s “Complainant’s mere allegation that violations occurred . . . is not an allegation of fact, but rather an unsubstantiated premature conclusion that cannot be verified.” Resp. to Mot. Am. at 2. In support, Respondent relies on a previous OCAHO decision, *United States v. Imacuclean Cleaning Servs.* 13 OCAHO no. 1327 (2019). In *Imacuclean*, the Administrative Law Judge found, on a motion for summary decision, that ICE did not establish a violation for failure to properly prepare section two or three of one employee’s I-9 because ICE did not provide the I-9 form at issue. *Id.* at 5. The *Imacuclean* decision is not applicable here because this case is not at the summary decision stage and OCAHO’s pleading standard does not require ICE to produce evidence of the alleged violations in the Complaint. Instead, complainants must provide “a clear, concise statement of facts” for each alleged violation. § 68.7(b)(3). As previously discussed, Complainant’s amended complaint provides a statement of facts for each of the 2,020 alleged violations.

Finally, in the alternative, Respondent argues that if the Court does not deny the motion for leave to amend, the Court should order Complainant to provide a more definite statement. As discussed above, the amended complaint provides specific factual allegations for each of the 2,020 alleged violations. A more definite statement is unnecessary. For the foregoing reasons, Complainant’s Motion to Amend is GRANTED.

#### B. Motion to Dismiss

Respondent seeks to dismiss the original complaint and argues that the complaint lacks factual allegations to state a claim upon which relief can be granted. Respondent argued that the complaint lacked factual allegations as to any of the specific violations. Since Complainant’s motion for leave to amend complaint is granted and the amended complaint contains specific allegations regarding each of the 2,020 alleged violations, Complainant provides clear, concise statements of the facts for each violation. As such, Respondent’s Motion to Dismiss is denied as MOOT.

V. CONCLUSION

As such, Complainant's Motion to Amend is GRANTED. Respondent's Motion to Dismiss is DENIED as MOOT.

SO ORDERED.

Dated and entered on November 7, 2019.

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Jean C. King  
Chief Administrative Law Judge