Published 6/22/16 12 OCAHO no. 1283

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. SPECIAL COUNSEL AND THEIR EMPLOYERS CLIENTS, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 15B00049

FINAL DECISION AND ORDER OF DISMISSAL

APPEARANCES

Maria Jablonski
for the complainant

Matthew W. Clarke
for the respondent

I. INTRODUCTION

This is an action arising under the antidiscrimination 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 Special Counsel, Inc. (Special Counsel, the company, or respondent)[1] discriminated against her on the basis of her citizenship status by failing to hire her for various paralegal positions. Respondent, who is located in New York City, is a provider of temporary

[1] In her OCAHO complaint, Ms. Jablonski identifies the employer who allegedly discriminated against her as "Special Counsel and their employer clients." The undersigned notes that the record contains information pertaining only to Special Counsel, Inc., and not to any of the company's employer clients. *See also supra* discussion Parts III, IV. According to the complaint, Ms. Jablonski does not know who Special Counsel's clients are. Therefore, references to "respondent" in this decision pertain only to Special Counsel, Inc.

and project legal professionals. For the reasons provided 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 Special Counsel discriminated against her because she is a United States citizen by failing to hire her for paralegal positions. Ms. Jablonski claims that individuals who are not United States citizens were hired instead of her because of her citizenship status. In addition, Ms. Jablonski contends that Special Counsel retaliated against her when she attempted to obtain information about the individuals who were hired instead of her.

Attached to Ms. Jablonski's 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 would 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 that [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 20, 2015, Administrative Law Judge Thomas, who previously presided over this matter, issued a Notice and Order to Show Cause to complainant. 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.[2] However, Judge Thomas informed Ms. Jablonski that the evidence of record does not contain any such letter from OSC that demonstrates that Ms. Jablonski has satisfied a condition precedent to the filing of the OCAHO complaint. Moreover, Judge Thomas warned Ms. Jablonski in her Order that her OCAHO complaint could be dismissed if Ms. Jablonski 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, 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.[3] 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).[4]

On June 8, 2015, Special Counsel filed an answer, in which it denied the material allegations of the complaint, raised several affirmative defenses, and requested that the complaint be dismissed. Special Counsel 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 she failed to satisfy a condition precedent to filing an OCAHO complaint.

On June 16, 2015, Maria Jablonski, Esquire, filed an appearance as counsel on behalf of Ms. Jablonski and a Reply to Answer[5] and Motion to Strike Portions of Respondent's Affirmative

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[2] 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 Special Counsel.

[3] *See supra* n.2.

[4] Neither Ms. Jablonski's OSC charge form nor her OCAHO complaint assert national origin discrimination.

Defenses. In response to Special Counsel's affirmative defense of failure to state a claim upon which relief may be granted, Ms. Jablonski contended that she pleaded facts of a *prima facie* case of discrimination, showing that: she is a protected individual, she applied for various jobs within the statutory period, she was not hired, the jobs remained open and noncitizens were hired, and the "circumstances of her rejection create inferences of unfair immigration discrimination." *Complainant's Reply* at 2. She thus contended she has a cause of action under 8 U.S.C. § 1324b. *Id.* Ms. Jablonski further stated that she satisfied the charge requirements, indicating that she sent a letter to OSC providing the agency with the requested additional information about her claim (March 18, 2015, letter). She also sought to strike the remaining affirmative defenses. Attached to this reply is a personal declaration by Ms. Jablonski, in which she discussed providing Michelle Ellwood, Esquire, respondent's Placement Director, her resume and asserted that Special Counsel must have "deliberately ignored her" since she was qualified and has applied to numerous jobs.

On June 26, 2015, Special Counsel filed a Response to Petitioner's Motion to Strike Portions of Respondent's Affirmative Defenses. Special Counsel reasserted its request that Ms. Jablonski's complaint be dismissed for failure to state a claim upon which relief may be granted and for failure to comply with the statutory condition precedent. In relevant part, respondent contended that on the face of the complaint, Ms. Jablonski's "entire case is plainly built upon nothing more than inferences, speculation, and conjecture." *Respondent's Response* at 5. Special Counsel also noted that OSC determined Ms. Jablonski did not provide enough information to complete her OSC charge and ultimately dismissed it. Special Counsel also stated that Ms. Jablonski's assertion that the fact that Special Counsel never contacted her about the jobs for which she applied gives rise to an inference of discrimination does not properly allege or establish she was denied any position because of her citizenship status. Respondent added, "[I]t is commonplace for employers to not have such discussions with online applicants." *Id.* at n.5.

Because of a lack of clarity about the status of Ms. Jablonski's underlying charge, Judge Thomas made inquiries to OSC to ascertain whether the agency 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 Special Counsel 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, including discovery, on July 30, 2015.

On August 3, 2015, Ms. Jablonski filed Complainant's Objection to the July 22 Order of Inquiry to OSC and Complainant's Response to the Respondent's Motion for Stay of Discovery.[6] She

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[5] 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.

[6] OCAHO rules do not have a provision for the filing of objections to orders issued by the Administrative Law Judge. In addition, as Judge Thomas issued the Stay of Proceedings on July

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 that she had already provided the additional information 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 non-jurisdictional and subject to waiver. *Id.* at 4.

Attached to this filing is a letter from complainant to OSC, dated July 29, 2015, in which she argued that her charges were sufficient, as she "included a multitude of documents attached her job applications describing in detail and cover letters her qualifications as an experienced and educated paralegal." Ms. Jablonski also attached to this filing a portion of a PowerPoint presentation by OSC on Immigration-Related Unfair Employment Practices, a personal declaration, a November 26, 2014, letter from complainant to Special Counsel requesting information about the company's hiring decisions, and a March 18, 2015, letter from complainant to OSC listing the jobs for which she applied through respondent.

On September 25, 2015, OSC filed its Response to Order of Inquiry. OSC answered Judge Thomas' three inquiries in the negative, indicating that the agency did not accept Ms. Jablonski's 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 a Reply to the OSC's Response to Order of Inquiry and to Excuse Any Condition Precedent on the Basis of Waiver, Equity & Futility.[7] On October 12, 2015, Special Counsel filed a Response to Petitioner's Motion to Lift the Temporary Stay for Permission to File Reply to OSC's Response to the Order of Inquiry. On October 23, 2015, Ms. Jablonski filed a Reply to the Respondent's Response to the Motion to Lift the Stay and Response to OSC's Response.[8]

30, 2015, the undersigned will not address Ms. Jablonski's opposition to Respondent's Motion for a Stay of Discovery.

[7] 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 too vague to have any meaning. 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.

[8] The reply purports to be filed pursuant to 28 C.F.R. § 68.11, but 28 C.F.R. § 68.11(b) expressly provides that while a party opposing a motion has the right to file a response to the motion, no reply to a response or further responsive document is permitted unless the

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

A. OCAHO Precedent

Similar to the decisions in *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272 (2016), 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 Procedure[9] 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. 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

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administrative law judge provides otherwise. No authorization was sought or granted for this filing.

[9] *See* 28 C.F.R. pt. 68 (2014).

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 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 Special Counsel, 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 state 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, Special Counsel 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 26, 2014, July 9, 2014, "and prior to these dates through 2013." When asked to explain in detail what occurred, Ms. Jablonski stated,

> I keep applying to jobs at this agency and their clients who are advertising the jobs through various websites. I have been applying for paralegal and legal jobs with this employment agency for years and they are ignoring me. They don't place me in any jobs even though I have the education and experience and am qualified. . . . They refuse to hire me.

The OSC charge form was accompanied by approximately twenty-nine pages of attached materials that indicate Ms. Jablonski applied online to numerous paralegal positions through Special Counsel in 2013 and 2014.

Ms. Jablonski elaborates her discrimination claim in her OCAHO complaint. When asked to list the reasons she was not hired, she states, "I was not given any information as to why I was not hired. The agency refuses to disclose who the client was or who was hired." OCAHO Complaint at 5. She further 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, and or not hired for later jobs." *Id.*, Attachment. 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. Special Counsel has never hired me for any job." Ms. Jablonski alleges that these "circumstances give rise to an inference of violations of the [INA]," which are that at "the time being rejected for the job, Special Counsel Services through its recruiters have refused to disclose their client and person hired so as to hide their activities." *Id.*

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 who claims that they are a non us citizen non greencard from China who has been employed doing a coding project which a paralegal usually does, for Special Counsel at a law firm. . . . I believe that this indicates that there are several other persons who are being employed like this person by Special Counsel Legal Services to do what is essentially 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.

Id.

Ms. Jablonski claims that these facts create the inference that "they are either 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 Special Counsel's client law firms are "actively recruiting non-citizens for these jobs . . . because they want to pay them less." Complainant sets forth that she applied to "at least" twenty-eight jobs through Special Counsel and that Special Counsel never contacted her about these jobs and did not provide her with information about why she was not hired, who the client was, or who

was hired, which she avows are all facts that give rise to an "inference of unfair immigration hiring."

Moreover, in support of her charge of retaliation under 8 U.S.C. § 1324b(a)(5), Ms. Jablonski wrote in her OCAHO complaint that Special Counsel retaliated against her by not hiring or recruiting her after she asked why she was not hired for various jobs.

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),[10] "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).[11] 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.

Special Counsel 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.

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[10] Federal Rule of Civil Procedure 8 is designated "General Rules of Pleading."

[11] 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).

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 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 Special Counsel retaliated against her in violation of 8 U.S.C. § 1324b(a)(5) because Special Counsel would not inform her who their client was or who was hired instead of her, and Special Counsel 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 Special Counsel; (2) Special Counsel did not hire Ms. Jablonski for a position from 2013 to the present; and (3) Special Counsel has employed at least one noncitizen in the past. However, the assertion made by Ms. Jablonski that Special Counsel 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 Special Counsel discriminated against 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 Special Counsel's decision not to hire Ms. Jablonski and Ms. Jablonski's status as a United States citizen.

While Ms. Jablonski may genuinely believe that Special Counsel 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 Special Counsel discriminated against her. The fact that Special Counsel 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. Ms. Jablonski's conclusion that the client law firms of Special Counsel 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 3-4 (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 Special Counsel, respondent did not contact her about the position or hire her. Ms. Jablonski then called to ask who was hired instead of her, and Special Counsel 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 or recruited after I asked why I wasn't hired for various jobs." 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 Special Counsel'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 Special Counsel 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.

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 Special Counsel. 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.

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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.