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

July 17, 2018

M. S.,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 17B00060
	)	
DAVE S.B. HOON – JOHN WAYNE CANCER INSTITUTE,	)	
Respondent.	)	
	)	

ORDER DENYING MOTION FOR RECONSIDERATION
AND MOTION TO AMEND

I. INTRODUCTION

This case arose under the anti-discrimination provisions of 8 U.S.C. § 1324b (2012) and was dismissed by a Final Order of Dismissal on May 22, 2018. *M.S. v. Dave S.B. Hoon – John Wayne Cancer Inst.*, 12 OCAHO no. 1305a (2018).[1] The Final Order of Dismissal disposed of the complaint by M.S. (Complainant), because her charge was filed beyond the 180-day statute of limitations period in 8 U.S.C. § 1324b(d)(3). Complainant subsequently filed a Motion for Reconsideration / Reversal of Judgment (Motion). For the reasons set forth herein, there is no basis for Complainant's Motion. M.S. has not met her burden for permitting a late amendment to her complaint because she has not shown that allowing an amendment would facilitate a timely and just resolution of the case. There is also no manifest injustice sufficient to justify

[1] 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.

reconsideration because the administrative record reveals that M.S.'s charge was either filed on January 22, 2016 or September 5, 2016, and either of these dates would render her charge untimely. The Motion is therefore DENIED and the case remains DISMISSED.

II. BACKGROUND

In the Final Order of Dismissal issued on May 22, 2018, the undersigned determined that the information M.S. submitted to the Immigrant and Employee Rights Section (IER) within the statutory period was insufficient to constitute a charge.[2] In addition, the undersigned determined there was no basis to toll the statute of limitations. M.S.'s OCAHO complaint asserts M.S. submitted a charge to IER on January 22, 2016, which is well beyond the 180-day statute of limitations of 8 U.S.C. § 1324b(d)(3). Therefore, the complaint was dismissed.[3] On June 1, 2018, M.S filed a Motion for Reconsideration / Reversal of Judgment (Motion). The Motion contradicts the complaint and asserts that the charge was actually filed with IER on June 26, 2015.

On June 11, 2018, Dave S.B. Hoon-John Wayne Cancer Institute (Respondent) filed Respondents' Opposition to Complainant's Motion for Reconsideration (Opposition). This Opposition argues that the Motion is procedurally improper because it does not present any new evidence. Opposition at 9. Respondent asserts that even if the Motion had presented new facts, they were presented too late and would not change the outcome. *Id*. In the alternative, Respondent also asserts that the undersigned should apply footnote eleven in the Final Order of Dismissal as a holding and dismiss the complaint because M.S. is not a protected individual. *Id.* at 10.

On June 15, 2018, the undersigned sent an Order of Inquiry (Order) requesting that IER clarify the date M.S. filed the charge. Order at 1. This office received the United States' Response to the Order of Inquiry (Response) on June 15, 2018. The Response specified that "Complainant M.S. filed her charge with IER on September 5, 2016." Response at 2. OCAHO then served the parties with a copy of the Order and the Response on June 19, 2018, and on June 20, 2018, the undersigned provided the parties an opportunity to respond to the Order and Response by June 25, 2018. On June 21, 2018, the Respondent filed Respondents' Statement Re

[2] On January 18, 2017, the Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section. *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act (IER Final Rule), 81 Fed. Reg. 91768-92 (Dec. 19, 2016); 28 C.F.R. § 0.53 (2017). This Order refers to IER instead of prior reference to the Office of Special Counsel (OSC).

[3] On June 7, 2018, the undersigned issued an amended Final Order of Dismissal which corrected clerical and typographical errors.

Order of Inquiry and Response (Respondents' Statement) asserting that the complaint should remain dismissed because IER indicates the charge was filed September 5, 2016, well beyond the statute of limitations. Respondent concludes that regardless of which date the undersigned uses, January 22, 2016 or September 5, 2016, the charge was untimely. Respondents' Statement at 2.

On June 25, 2018, M.S. filed Complainants Response to OCAHO June 20, 2018 Order to IER & IER Letter Dated June 19, 2018 (Complainant's Response). M.S. argues that the IER response should be disregarded, and in the alternative, that the Response should be considered as evidence of IER's negligence and intentional efforts to mislead her. Complainant's Response at 4. Later in the response, M.S. then cites the long-held principle that "allegations in the complaint should be considered as true." *Id*. at 14 (citing *Osorno v. Geraldo,* 1 OCAHO no. 275, 1782, 1786 (1990)).

III. DISCUSSION

The January 22, 2016 date which is used to calculate the timeliness of the complaint was taken as true because it was the date M.S. used in her complaint. *Osorno*, 1 OCAHO no. 275, at 1786. Regardless of whether the undersigned uses the charge-filing date pled in the Complaint (January 22, 2016) or the date IER indicates the charge was filed (September 5, 2016), the charge remains untimely and therefore, there is no basis to reconsider the Final Order of Dismissal or to allow Complainant to amend her complaint. Accordingly, the case remains DISMISSED.

a. Motion for Reconsideration

The undersigned styles this Motion as a Motion to Reconsider.[4] OCAHO rules do not specifically authorize a Motion to Reconsider, but, 28 C.F.R. § 68.1 incorporates the Federal

[4] There is some support for the contention that an OCAHO Administrative Law Judge (ALJ) may reconsider a final order within sixty days of the final order in cases under 8 U.S.C. § 1324b. Under the title "Corrections to orders," for cases arising under 8 U.S.C. § 1324b, an ALJ is authorized to "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." 28 C.F.R. § 68.52(f). ALJ Morse found that a 1992 rule change adding the word "substantive" to what is now 28 C.F.R. § 68.52(f) supports the conclusion that an ALJ may grant reconsideration of a final order in cases under 8 U.S.C. § 1324b. *United States v. Workrite Unif. Co.*, 5 OCAHO no. 755, 266-267, 268 (1995). *Contra United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1098, 2 (2003) (ALJ Thomas stated that "[i]t is not necessarily apparent and I am not necessarily persuaded that the amendment of the rule was intended to permit the parties to file unsolicited pleadings subsequent to the issuance of a final decision"). The undersigned need not reach the question of whether there is authority to reconsider a final order in § 1324b cases because there

Rules of Civil Procedure "as a general guideline in any situation not provided for or controlled by these rules . . . . " "Although [Federal Rule of Civil Procedure] 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted).[5] Under Federal Rule of Civil Procedure 60(b)(2), reconsideration is appropriate if there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time." Relief under this rule is only employed '"sparingly' and only where necessary 'to prevent manifest injustice.'" *United States v. Wilson*, 27 F. App'x 852, 853 (9th Cir. 2001) (quoting *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir.1997)). M.S. was given ample notice of the deficiency in her charge and through reasonable diligence should have offered this information earlier.[6] Her Motion offers only conclusory allegations that her charge was timely, and nevertheless, these allegations are contradicted by IER's Response indicating the charge was actually filed on September 5, 2016. *See* Response at 1. There is no basis to set aside the Final Order of Dismissal because granting the Motion to Reconsider would not prevent manifest injustice, nor does the record justify the extraordinary remedy of reconsideration.[7]

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is no substantive basis to reconsider or any substantive errors to correct pursuant to 28 C.F.R. § 68.52(f).

[5] The alleged unfair immigration-related employment practices occurred in the State of California; and the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) is the appropriate reviewing court, if this Order is appealed. *See* 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. Therefore, this Order incorporates precedent from the Ninth Circuit.

[6] In her December 11, 2017 filing, Replying to Judge Lesnick's Order Dated Nov 29, 2017. (Reply), M.S. stated that "on June 26, 2015 itself, I had already submitted a) uniformed intake questionnaire, b) fully filled charge form, [and] c) 10-page detailing complaint," which referenced four attachments submitted to IER. Reply at 1. However, as discussed in the Final Order of Dismissal, M.S. did not attach documents to this Reply which indicated that the charge was timely submitted. *See* Reply Ex.'s A-F. She refers to these documents in passing, but only attaches a questionnaire submitted to the EEOC, Reply. Ex. B, and other cursory emails which were insufficient to constitute a charge. 12 OCAHO no. 1305a, 5-6. M.S. was obliged to clearly state how her charge was sufficient to constitute a charge or to state explicitly that she wished to amend her complaint to reflect a new filing date. She did neither.

[7] In her various *pro se* filings, including her Motion and Complainant's Response, M.S. makes several unsubstantiated arguments that reassert her earlier claims, including: (1) that IER is a fiduciary or has a trust relationship with M.S.; (2) that extraordinary circumstances justify tolling; (3) and that because she is an F1-OPT visa holder, the holding in *Dakarapu v. Arvy Tech Inc*., 13 OCAHO no. 1308, 3-4 (2018), does not apply. The undersigned has already rejected these arguments in the Final Order of Dismissal and the Motion does not raise any new issues of

b. Motion to Amend

M.S. wants it both ways. She urges the undersigned to disregard the date IER indicates the charge was filed and then to consider this date as evidence that IER misled her not to file a timely charge. Complainant's Response at 1. While M.S. has styled this as a Motion for Reconsideration, by arguing that the undersigned should consider her charge as filed on June 26, 2015, her Motion is requesting her complaint reflect a new date her charge was filed with IER. Motion at 2-3. The undersigned has therefore liberally construed her *pro se* Motion as a Motion to Amend because this date contradicts her complaint. *See Erickson v. Pardus*, 551 U.S. 89, 94, (2007) ("A document filed *pro se* is to be liberally construed") (internal citations omitted). In fairness to M.S.'s claim that her complaint should reflect a date within the statute of limitations (as a constructive amendment), the undersigned issued an Order of Inquiry to IER. M.S. is correct in citing OCAHO precedent that the face of a well pleaded complaint is taken as true. Complainant's Response at 14 (citing *Osorno*, 1 OCAHO no. 275 at 1786. To this end, the undersigned initially considered the filing date from the complaint as true, concluding that the complaint was untimely filed, and to the extent she filed documents within the statute of limitations, these filings did not constitute a charge. Final Order of Dismissal, 12 OCAHO no. 1305a. Even if the undersigned found a basis to reconsider, which there is not, it would be imprudent to allow M.S. to amend her complaint after a final order was issued based on facts that were previously available to her.

28 C.F.R. § 68.9(e) allows for "appropriate amendments to complaints and other pleadings *at any time prior* to the issuance of the Administrative Law Judge's final order based on the complaint." 28 C.F.R. § 68.9(e) (emphasis added). M.S. appears *pro se* and therefore her Motion is liberally construed as a request to amend her complaint to reflect a charge date of June 26, 2015. The Motion is too late, however, as it was offered only after the Final Order of Dismissal was entered and the timeliness of her charge had been fully litigated. Nonetheless, an Administrative Law Judge (ALJ) has discretion to allow amendment "[i]f a determination of a controversy on the merits will be facilitated thereby . . . ." 28 C.F.R. § 68.9(e); *see United States v. Alexander's Inc.*, 3 OCAHO no. 504, 1037 (1993) (the rule "confers broad discretion on the judge"). Even if M.S. offered the Motion to Amend in a timely fashion, the amendment would not facilitate a timely and just resolution of the case and therefore must be denied. "While leave to amend should be 'freely give[n] . . . when justice so requires,' . . . the district court [is] permitted to deny leave here due to [Complainant's] 'undue delay' in raising the claim and the 'prejudice to the opposing party' that late amendment would cause." *Neidermeyer v. Caldwell*,

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law. In particular, the holding in *Dakarapu*, 13 OCAHO no. 1308, 6 (2018), requires that the allegations contained in the charge be sufficient to constitute a charge, and this holding is not limited to certain types of visa holders as claimed by M.S. These assorted legal theories are neither new nor do they justify reconsideration as M.S. does not raise evidence of a "clear error or . . . intervening change in the controlling law." *Kona Enterprises, Inc.*, 229 F.3d at 890 (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

718 F. App'x 485, 488 (9th Cir. 2017) (quoting *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004)).

The Ninth Circuit notes that "late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) (citing M*/V American Queen v. San Diego Marine Constr. Corp*., 708 F.2d 1483, 1492 (9th Cir.1983). If M.S.'s allegations in her Motion are true, then she had access to this information when ALJ McHenry and Lesnick issued Orders to Show Cause directing her to explain whether her charge was timely. [8] Had M.S. timely moved to amend her complaint, such amendment would nevertheless have been futile because the evidence contradicts M.S.'s claim that her charge was filed on June 26, 2015. Therefore, the late filed amendment proposing a new effective date of the charge—June 26, 2015—is offered too late and must be DENIED because it would cause undue delay to the case, would unduly prejudice Respondent, and would be futile, as the evidence contradicts the proposed amendment.

ORDER

Whether the Motion is construed as a Motion to Reconsider or a Motion to Amend, it must be **DENIED**. The Final Order of Dismissal stands because the Complainant's charge was untimely filed. There is simply no basis (either factual or legal) to grant reconsideration, and there is also no basis to constructively allow a late-filed Motion to Amend the complaint. M.S.'s Motion Disqualifying Legal Representation of Defendant Hoon by Mr. Riaz is **DENIED** as Moot and the case remains dismissed. [9]

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[8] The factual allegation that M.S.'s charge was filed on January 22, 2016, is accepted as true, but the undersigned need not accept the facts in her proposed amendment as true because they are not supported by sufficient facts in the record. *See e.g., Jablonski v. Kelly Legal Serv.'s*, 12 OCAHO no. 1282, 10 (2016) ("conclusory allegations or legal conclusions couched as a factual allegation are not accepted"). The undersigned has an obligation to review factual allegations of the amendment as "futile amendments should not be permitted." *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983). IER certifies that M.S.'s charge was filed on September 5, 2016. In contrast, M.S. fails to provide support for her allegation that she actually submitted the charge on June 26, 2015, as the exhibits in her Motion are not date stamped nor were they attached in briefing before the Final Order of Dismissal. This record indicates that M.S.'s proposed amendment is a baseless legal conclusion.

[9] The undersigned states no opinion on whether denying the Motion to Reconsider impacts the appeal period. M.S. is reminded, however, that the initial date of the Final Order of Dismissal, May 22, 2018, not the date of the Amended Final Order of Dismissal, June 7, 2018, is used to calculate the beginning of the sixty-day period for perfecting an appeal. The Amended Final Order of Dismissal only corrected non-substantive issues. *See e.g., United States v. Buffalo*

SO ORDERED.

Dated and entered on July 17, 2018.

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Priscilla M. Rae
Administrative Law Judge

Transportation, Inc., 11 OCAHO no. 1263a, 3 n.2 (2015) ("an amended judgment does not toll or renew the period for filing an appeal . . . if that amended judgment solely corrects clerical or non-substantive errors").