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

JOSH PHILIP KUPFERBERG, Complainant, v. UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER, Respondent.	)	8 U.S.C. § 1324b Proceeding Case No. 94B00012
JOSH PHILIP KUPFERBERG, Complainant, v. OKLAHOMA CITY, OKLAHOMA DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER	)	8 U.S.C. § 1324b Proceeding Case No. 94B00013

FINAL DECISION AND ORDER GRANTING
RESPONDENTS' MOTIONS TO DISMISS

(November 21, 1994)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Robert V. Varnum, Esq., for Complainant

Nancy M. Moran, Esq.,
for Respondent Department of
Veterans' Affairs Medical Center

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the University of Oklahoma

I. *Procedural History*[1]

By a charge dated January 17, 1994, Josh Philip Kupferberg (Complainant or Kupferberg) alleged that the University of Oklahoma Sciences Center (OU) and the Oklahoma City Veterans Affairs Medical Center (VAMC) discriminated against him by retaliating for assisting another in pursuit of claims under 8 U.S.C. § 1324b, a practice prohibited by § 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b(a)(5). Kupferberg filed his charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Kupferberg, an anesthesiologist, is a member of the anesthesiology staff at VAMC and a faculty member at OU. In June of 1991, his wife, Priscilla Hensel (Hensel), an anesthesiologist who had failed to obtain appointments at VAMC and OU, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against those facilities alleging unfair immigration related employment practices. Hensel alleged that the respondents failed to hire her due to her United States citizenship. The administrative law judge (ALJ) ruled against Hensel; the ALJ concluded that she had not established a prima facie case of discrimination because she had not properly applied for the position and furthermore was not qualified for the position for which she had applied.[2] As a result of her complaints and Kupferberg's support of his wife's lawsuits, Complainant alleges that the Respondents have taken various adverse actions against him resulting in a pattern of retaliation in an attempt to intimidate him and his wife.

On November 1, 1993, OSC advised Kupferberg that it had decided not to file a complaint on his behalf because there was "insufficient evidence of reasonable cause to believe . . . [he was] retaliated against as prohibited by 8 U.S.C. § 1324b." OSC, however, informed Kupferberg of his right to file his own complaint with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

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[1] An in-depth summary of the procedural history was given in the Order of Inquiry issued in each of these dockets on September 23, 1994. Kupferberg, 4 OCAHO 689 (1994) (Order of Inquiry). For this reason, a briefer version is provided in this final decision and order.

[2] Hensel v. Okla. City Veterans Affairs Medical Center and Okla. Health Services Center, 3 OCAHO 532 (1993). Hensel appealed the case to the Court of Appeals for the Tenth Circuit which ruled against her on both federal and state sovereign immunity grounds. See Hensel v. OCAHO, No. 93-9551 1994 U.S. App. LEXIS 25802 at *12 (10th Cir. Sept. 16, 1994).

On January 25, 1994, Complainant filed separate OCAHO complaints reasserting his retaliation charges against VAMC and OU. OCAHO issued its Notices of Hearing (NOH) on January 26, 1994 which transmitted to each Respondent a copy of Kupferberg's respective complaint.

On February 28, 1994, VAMC timely filed an answer, including affirmative defenses. Denying any retaliatory intent or discrimination, VAMC asserts, inter alia, that OCAHO lacks jurisdiction over this complaint under the Doctrine of Sovereign Immunity. VAMC also alleges that the complaint is time-barred because it was not filed within the time limit imposed by IRCA. In addition, VAMC argues that any personnel/administrative decisions made in regard to Kupferberg were valid and that his complaint is barred by issue and claim preclusion. Finally, VAMC alleges that OCAHO does not have subject matter jurisdiction.

On March 3, 1994, OU timely filed its answer which also denied discrimination against Kupferberg and asserted two affirmative defenses: (1) the cause of action is barred by the Eleventh Amendment to the United States Constitution and, (2) the complaint is barred by the statute of limitations.

Both respondents filed motions to dismiss; VAMC's was filed on February 28, 1994 and included an alternative motion to stay. OU's was filed on March 2, 1994.

On March 2, 1994, OU filed a motion to consolidate the two cases. This motion was granted in the September 23, 1994 Order.

An entry of appearance by counsel for Complainant who had previously been pro se was filed on March 16, 1994. Complainant filed a response to VAMC's and OU's motions to dismiss on March 15 and 16, 1994 respectively.

On October 17, 1994, the Tenth Circuit issued its Order and Judgment in Hensel's appeal of the ALJ's adverse ruling. Because that ruling appeared to have a direct impact on these cases before me, I issued an order of inquiry on September 23, 1994 inviting the parties to file comments addressing the viability of Kupferberg's complaint in light of the Tenth Circuit's decision.

Both OU and VAMC filed responses to the Order of Inquiry; the former's was filed on October 21, 1994 and the latter's on October 13,

1994. Complainant also filed a response dated October 14, 1994, to the Order.[3] In addition, VAMC filed a response to Complainant's Response to the Order of Inquiry.

II. *Discussion*

A. VAMC and Federal Sovereign Immunity

In the past, OCAHO jurisprudence has found a waiver of federal sovereign immunity in IRCA. See, e.g., Roginski v. DOD, 3 OCAHO 426 (1992) and Mir v. Federal Bureau of Prisons, 3 OCAHO 510 (1993). The OCAHO precedents notwithstanding, I am bound by the action taken by the Hensel court, the appellate court having judicial review over this case.[4] Under the principle of stare decisis, I must follow the court's decision in Hensel due to the obvious similarities in both this case and Hensel.[5] Moreover, OCAHO rulings finding waivers have addressed discrimination qua discrimination, and not retaliation. OCAHO cases have not previously discussed retaliation in the sovereign immunity context.

The Hensel court dismissed the claims against VAMC on the grounds that: "[t]he United States may not be sued without its consent. . . . Waiver of sovereign immunity must be strictly construed in favor of the sovereign. . . ." LEXIS 25802 at *12 (citing Fostvedt v. United States, 978 F.2d 1201, 1202 (10th Cir. 1992), cert. denied, 113 S.Ct. 1589 (1993)). "Thus absent clear language, the United States is not subject to suit under the IRCA." LEXIS 25802 at *12. The court in Hensel found that IRCA did not contain clear and precise language indicating Congressional intent to waive the immunity of the federal government,

[3] Complainant argues in his Response to the Order of Inquiry that I am not bound by Hensel because it is an unpublished decision and therefore not binding precedent. Whatever weight, if any, this may have had at the time, it is moot in light of the Tenth Circuit's decision to publish Hensel.

[4] 8 U.S.C. § 1324b(i)(1) states that a party may seek review of a § 1324b case "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."

[5] Both Hensel and this case are predicated on alleged wrongs committed by VAMC and OU with regard to discriminatory employment practices arising out of the failure to hire Hensel.

including VAMC.[6] Id. It follows that Kupferberg, no less than Hensel, is precluded by federal sovereign immunity from bringing his cause of action against VAMC.

B. OU and Eleventh Amendment Sovereign Immunity

In contrast to OCAHO case law on federal sovereign immunity, OCAHO jurisprudence has not previously been confronted with an Eleventh Amendment state sovereign immunity claim. However, I am bound to follow the Tenth Circuit's determination that OU is immune from liability under IRCA. The Hensel court is explicit: "In order for the state to be subject to suit, Congress must have made "its intention unmistakably clear in the language of the statute." LEXIS 25802 at *7 (citing Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). The Hensel court held that, like federal sovereign immunity, it could not discern in IRCA an explicit intent to abrogate Eleventh Amendment immunity. LEXIS 25802 at *8. Under Oklahoma law, OU is a branch of the state government[7] and consequently, Complainant is barred from suing OU in this case as well.

III. *Ultimate Findings, Conclusions and Order*

I have considered the complaint filed by Kupferberg, the answers filed by VAMC and OU, and other requests and supporting documents filed by each party. All motions and other requests not specifically ruled upon are denied.

Because Kupferberg's case is subject to judicial review by the Tenth Circuit and in light of that court's recent decision in Hensel, there is no waiver of governmental immunity for either VAMC or OU. For this reason, I find and conclude that:

1. Respondents' Motion to Dismiss is granted;

2. Respondents are immune from liability under the Doctrine of Federal Sovereign Immunity and Eleventh Amendment Sovereign Immunity.

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[6] It has previously been determined that VAMC, as part of the Department of Veteran Affairs, is a branch of the federal government. See Hensel v. OCAHO, No. 93-9551, 1994 U.S. App. LEXIS 25802 at *2 (10th Cir. September 16, 1994).

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order Granting Respondents' Motion to Dismiss is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 21st day of November, 1994.

MARVIN H. MORSE
Administrative Law Judge