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

April 30, 2024

ARTIT WANGPERAWONG, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00007
META PLATFORMS, INC., Respondent.	)	

Appearances: Artit Wangperawong, pro se Complainant
Eliza A. Kaiser, Esq., Matthew S. Dunn, Esq., and Amelia B. Munger, Esq., for Respondent

ORDER DENYING MOTION TO AMEND COMPLAINT

I. BACKGROUND

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b.

On October 3, 2023, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Meta Platforms, Inc., alleging discrimination and retaliation, in violation of 8 U.S.C. §§ 1324b(a)(1) and (a)(5). Compl. 8.

On December 15, 2023, Respondent filed an Answer.

On February 1, 2024, the Court issued an Order Granting in Part and Denying in Part Respondent's Motion Pertaining to Arbitration[1] and to Dismiss. *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510c (2024).[2] As a basis for its motion to dismiss, Respondent advanced several

[1] The Court declined to dismiss or stay the action in favor of arbitration. *Id.* at 3–5.

[2] 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

arguments. Germane to the issues addressed here, the Court granted Respondent's request to dismiss Complainant's retaliation claim and a non-selection discrimination claim (Complainant's non-selection for a position at Respondent in January 2023). *Id.* at 6–9. These claims did not meet the forum's pleading standard. *Id.* The Court separately informed Complainant he could file a motion seeking to amend his Complaint to cure the defects identified in his original Complaint. *Id.* at 9.

On February 20, 2024, the Court issued an Order Dismissing National Origin Allegation Due to Lack of Subject Matter Jurisdiction. *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510d (2024). In that order, the Court found that the national origin theory advanced by Respondent fell outside the jurisdiction of OCAHO. The Court clarified for the parties that unless Complainant was otherwise successful in amending his Complaint, the only matter before the Court would be his claim related to termination based on citizenship status. *Id.* at 4.

On February 21, 2024, Complainant filed a Request to Amend Failure to Hire Claim Based on Citizenship Status, seeking to amend his complaint to add a new claim entirely, pertaining to his non-selection for a different position on January 22, 2024.

On March 4, 2024, Respondent filed an Opposition. For reasons outlined below, the Court denies Complainant's Motion to Amend.

At present, this case will continue with only Complainant's termination claim based on citizenship status. Complainant is not precluded from pursuing his January 22, 2024 non-selection claim through the processes precedent to access to this forum (i.e. through the Immigrant and Employee Rights Section (IER)).

II. POSITIONS OF THE PARTIES

In his Request to Amend Failure to Hire Claim Based on Citizenship Status, Complainant alleges: (1) on January 11, 2024, he applied for a position as a Solutions Engineer, a "PERM position"; (2) on January 19, 2024, a Meta Recruitment Screening Specialist called him to verify his qualifications; and (3) on January 22, 2024 the Screening Specialist emailed Complainant that they had decided not to move forward with his application. Request Amend Failure Hire Claim 1. Complainant alleges this was due to his citizenship.

In its opposition, Respondent notes the proposed amended complaint contains an entirely new allegation not previously referenced in the Complaint, and not addressed by the Court's February 1, 2024 Order. Opp'n Mot. Dismiss 7–8. Respondent argues these new allegations: (1) go beyond the leave to amend provided to Complainant in the Court's Order; (2) do not remedy the

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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.

deficiencies identified by the Court; and (3) would be futile as they would not withstand a motion to dismiss. *Id.* at 5–8. In the alternative, if the Court grants Complainant leave to amend, Respondent argues the amended failure to hire claim must be dismissed because Complainant has failed to exhaust his administrative remedies as to the new allegations, and because Complainant has not plead sufficient facts to state a claim. *Id.* at 9–15.

III. LAW & ANALYSIS

OCAHO's Rules of Practice and Procedure for Administrative Hearings permit amendment of a complaint, providing that "[i]f a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints . . . " 28 C.F.R. § 68.9(e).[3]

"The Court is therefore charged with balancing those interests in determining whether to allow the proposed amendment." *Shater v. Shell Oil Co.*, 18 OCAHO no. 1504b, 2 (2023) (citing *United States v. Sal's Lounge*, 15 OCAHO no. 1394, 1–2 (2020)). "The principal factors to be considered are whether the determination on the merits will be facilitated by the proposed amendments, whether the proposed amendments would be futile, and whether prejudice to the public interest or parties will result . . . [the Court may also consider] [b]ad faith, undue delay and dilatory motive . . . " *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 5 (2003). These factors largely align with those outlined by the Ninth Circuit, which include: (1) undue delay, (2) bad faith, (3) futility of amendment, and (4) prejudice to the opposing party. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006).

In the instant case, undue delay[4] and bad faith are not present, and are not argued by Respondent. At issue here is whether the amendment is futile.

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[3] In addition to 28 C.F.R. § 68.9(e), the Court may also look to Rule 15 of the Federal Rules of Civil Procedure (FRCP), which may be used as guidance in OCAHO proceedings. *See* 28 C.F.R. § 68.1; *United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998) (noting that 28 C.F.R. § 68.9(e) is "analogous to and is modeled upon Rule 15 of the [FRCP], and accordingly it is appropriate to look for guidance to the case law developed by the federal district courts in determining whether to permit requested amendments under that rule."). Relevant here is FRCP 15(a)(2), which states: " . . . [in cases where FRCP 15(a)(1) does not apply] a party may amend its pleading only with the opposing party's written consent or the court's leave."

[4] Undue delay and prejudice can exist, for example, when a complainant seeks to amend his complaint eighteen months later, well after the close of discovery and the filing of summary decision motions. *See, e.g.*, *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450k, 4 (2023).

In contrast, here, Complainant seeks to amend his Complaint rather expeditiously – within the deadline to amend the deficient components of his original Complaint and during the initial stages of discovery.

"The usual test for futility of a proposed amendment is whether or not the amendment would survive a motion to dismiss." *Santiglia*, 9 OCAHO no. 1097, at 7 (citing *Jones v. Cmty. Redevelopment Agency of L.A.*, 733 F.2d 646, 650 (9th Cir. 1984)). If administrative remedies are not exhausted, then a matter can be dismissed. *See id.* at 7.

A complainant has exhausted the administrative process when he receives his "right to sue" letter from IER. 28 C.F.R. §§ 68.4(b)(2), (c). This document permits a complainant to file a Complaint with OCAHO; however, "[t]he scope of a discrimination case pursuant to 8 U.S.C. § 1324b is ordinarily limited to matters within, or like and related to, the administrative charge and the scope of the administrative investigation upon which the action is based." *Wangperawong*, 18 OCAHO no. 1510c, at 5 (quoting *Santiglia*, 9 OCAHO no. 1097, at 7) (internal quotations omitted). This is particularly true when the alleged discrimination is citizenship or national origin based (vice retaliation).[5]

Complainant's proposed amendment admittedly exceeds the scope of the permission the Court provided Complainant to seek leave to amend, which could be grounds to strike the new claim; however, he is also proceeding pro se (a point auguring in favor of flexibility on this point). *See Jameson Beach Prop. Owners Ass'n v. United States*, No. 13-cv-01025, 2014 WL 4925253, at *3, 2014 U.S. Dist. LEXIS 139734, at *10 (E.D. Cal. Sept. 29, 2014) (citations omitted) ("[W]here a prior court order granted limited leave to amend, [courts in the Ninth Circuit] generally strike new claims or parties contained in an amended complaint when the plaintiff did not seek leave to amend.").

[5] OCAHO has previously observed that "[w]hether even unexhausted post-charge acts involving discrete employment actions may be considered after [*National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)] has become the subject of a conflict in the circuits." *Sodi v. Maricopa Cnty. Special Health Care Dist.*, 9 OCAHO no. 1124, 9 n.5 (2007) (collecting cases).

OCAHO has also previously noted that "acts occurring subsequent to the filing of the charge may be included if they grow out of or are reasonably related to the charge." *Santiglia*, 9 OCAHO no. 1097, at 8–9 ("At least as to incidents occurring subsequent to the filing of the charge, it cannot be concluded on this undeveloped record that the claims of retaliation in Santiglia's original complaint would not survive a motion to dismiss") (citing *Lyons v. England*, 307 F.3d 1092, 1104, 1116 (9th Cir. 2002) (reversing dismissal as to 1997 failure-to-promote claim not included in 1996 charge), and then citing *Vasquez v. County of Los Angeles*, 307 F.3d 884, 895 (9th Cir. 2002) (finding that where allegations of retaliation named two different decisionmakers, the exhaustion requirement was satisfied as to the decisionmaker named in the charge, not as to one unrelated to the charge); and then citing *Serpe v. Four-Phase Sys., Inc.*, 718 F.2d 935, 937 (9th Cir. 1983) (deciding that EEOC investigation of charges would have revealed plaintiff's claim that she was denied transfers because she was female).

"Courts are divided as to whether claims of retaliation are even subject to an exhaustion requirement." *Id.* (citing *Lindeman & Grossman, Employment Discrimination Law* 413–14 n.4 (3d ed. Cum. Supp. 2000)).

"[T]he scope of the [IER] charge itself must be considered in order to determine whether the matters raised could reasonably be expected to grow out of the investigation of that charge." *Santiglia*, 9 OCAHO no. 1097, at 7. In the present case, the allegation in the original complaint stems from Respondent's decision to fire Complainant (based on citizenship status) from the position of Applied Research Scientist on January 13, 2023. Compl. 10, 14. Complainant filed a charge of discrimination with IER in April 2023, and IER issued its right to sue letter in August 2023. It is foreseeable that IER's investigation centered around confirming facts surrounding the 2023 termination, and it can be presumed that the scope of IER's investigation pertained to that particular personnel action occurring in that year. The task before the Court is to consider whether a different kind of personnel action related to a different position (possibly in a different location) in a different (future) year is sufficiently "within, or like and related to." While it is a close call, the Court concludes on these facts, it is not "within, or like and related to."

The two personnel actions (termination and non-selection) did not occur close in time. Again, Complainant's termination occurred on January 13, 2023, Compl. 10, whereas Complainant's new failure to hire claim occurred on January 22, 2024, over a year later. *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002) ("In determining whether a plaintiff has exhausted allegations that she did not specify in her administrative charge it is appropriate to consider such factors as the alleged basis of the discrimination, dates of discriminatory acts specified within the charge, perpetrators of discrimination named in the charge, and any locations at which discrimination is alleged to have occurred."). The two positions at issue are also different (terminated from the Applied Research Scientist position and non-selection for a Solutions Engineer position). Indeed, based on the timing of Complainant's non-selection, IER could not have known about his non-selection for an unrelated position (as IER issued its letter five months prior to the Complainant's non-selection).[6]

Because the amendment here falls outside the prospect of "within, or like and related to," it falls prey to the Respondent's arguments[7] related to exhaustion. *See, e.g.*, *Taylor v. Lowe's Corp.*, 852 F. App'x 285, 286 (9th Cir. 2021) (affirming district court's dismissal of failure to hire claim that the plaintiff "did not mention" in his administrative charge); *cf. Head v. Wilkie*, 784 F. App'x 503, 505–06 (9th Cir. 2019) (reversing district court's grant of summary judgment due to failure to exhaust administrative remedies where the complainant alleged in his complaint that he endured a pattern of harassment and disparate treatment and was retaliated against for reporting these actions, as new race-based claims were "reasonably related to allegations in the charge to the extent that those claims [were] consistent with the plaintiff's original theory of the case") (citing *B.K.B.*, 276

[6] *See Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 645–46 (9th Cir. 2003) ("As for Leeds' threat to transfer Vasquez, that event occurred several months after the alleged harassment and even after the EEOC had issued its right-to-sue letter. The EEOC could not have investigated that incident because it had not yet happened at the time the EEOC was conducting its investigation.").

[7] Respondent initially argued the amendment is futile based on failure to state a claim and not exhaustion. Curiously, Respondent analyzes exhaustion only in a scenario where the Court first accepts the amendment and then dismisses it under an exhaustion theory. Neither the Ninth Circuit nor OCAHO decisions require this superfluous step. Proposed procedural curiosities aside, the Respondent's substantive arguments on exhaustion have merit.

F.3d at 1100); *see also Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 398 (9th Cir. 1982) ("Exhaustion rules insure an adequate record, prevent surprise, and avoid the application of judicial resources to matters which might be resolvable at the agency level . . . [A]bsent exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time." (quotation omitted)).

Because the allegation in the amendment is not "within, or like and related to, the administrative charge and the scope of the administrative investigation upon which the action is based," the administrative process has not yet been exhausted. For this reason, this allegation would not survive a motion to dismiss. Consequently, permitting the amendment would be futile, and for this reason it is properly denied.

Because this Complainant is pro se, the Court shall further advise him that this ruling is limited only to whether this allegation can be considered in tandem with his other allegation in the Complaint. Nothing in this Order should be construed as precluding him from filing this charge (or any other charge) with IER. Complainant should be mindful of time restrictions associated with this raising this claim before IER. *See* 8 U.S.C. § 1324b(d)(3) (providing that "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge [IER])."

The matter will continue with only Complainant's termination claim based on citizenship status.

SO ORDERED.

Dated and entered on April 30, 2024.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge