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

ALI TALEBINEJAD, Complainant, v. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2023B00002

Appearances: John McGivney, Esq. and David B. Stanhill, Esq., for Complainant
Antonio Moriello, Esq., Leon Rodriguez, Esq., and Edward North, Esq., for Respondent

ORDER ON COMPLAINANT'S MOTION FOR LEAVE TO FILE SUR-REPLY

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. On October 13, 2022, Complainant Ali Talebinejad filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) asserting claims of discrimination and retaliation arising under 8 U.S.C. § 1324b against Respondent Massachusetts Institute of Technology (MIT). After an extension of time to do so, Respondent filed an answer on December 28, 2022.

On February 8, 2023, Respondent filed a Motion to Dismiss. Complainant filed its opposition on March 9, 2023, and Respondent filed its reply on March 23, 2023. On May 1, 2023, Complainant filed a Motion for Leave to File Sur-Reply in Opposition to Respondent's Motion to Dismiss, and Respondent filed an opposition to this request on May 11, 2023.

For the reasons below, Complainant's Motion for Leave to File Sur-Reply is denied.

II. ANALYSIS AND CONCLUSION

Complainant moves for leave to file a sur-reply in opposition to Respondent's Motion to Dismiss, arguing that documents recently produced by Respondent refute Respondent's argument in its Motion to Dismiss that its "internal assignment" of Dr. Bavand Keshavarz to teach course 2.086 was not a "hiring" under 8 U.S.C. § 1324b. Mot. Sur-Reply 1. Complainant contends that the documents will show that Dr. Keshavarz was hired, terminated, and rehired for each semester that he was appointed to teach the course. Id. at 1–2.

Respondent opposes the motion. Respondent counters that the motion seeks to introduce evidence which cannot be considered at the motion to dismiss stage, because the new documents are not incorporated into the Complaint by reference. Id. (citing Montalvo v. Kering America, Inc., 14 OCAHO no. 1350, 3 (2020)).[1] Further, Respondent contends that Complainant's submission of these documents, while discovery is underway, unfairly disadvantages Respondent in that it will not be able to show at the motion to dismiss stage that these records are inaccurate or incomplete. Id. at 1–3.

A sur-reply is usually defined as a "movant's second supplemental response to another party's motion, usually in answer to a surresponse." *Surreply*, BLACK'S LAW DICTIONARY, (11th ed. 2019). In this case, the Complainant's sur-reply is its second opportunity to explain why it believes the Complainant's motion to dismiss should not be granted.

Section 68.11 identifies the elements of motions practice in this forum as the motion itself and an opposition. 28 C.F.R. § 68.11(a). The rules provide that parties shall not file a reply without leave of the Administrative Law Judge; however, the practice with the undersigned is to permit them as a matter of course. Id. § 68.11(b); United States v. JR Contractors, Inc., 15 OCAHO no. 1406, 3 n.1 (2021).

Per Section 68.11, filings outside the traditional motion, opposition, and reply are prospectively forbidden, except as the Administrative Law Judge permits. 28 C.F.R. §68.11(b)[2]

[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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[2] Respondent has argued that the motion for leave to file a sur-reply is untimely filed, citing 28 C.F.R. § 68.11(b). The Court does not address the timeliness issue as distinct from the good cause standard because the rules flatly prohibit all sur-replies and sur-responses, except as the Court permits, offering no guidance or direction on the timeframe within which a party should file a motion seeking to have the court address the issue. Section 68.11(b), which Respondent cites, proscribes a 10-day deadline for filing a response to a motion. However, Complainant's motion seeking leave to file a sur-reply is not a response to a motion—rather, it is its own motion, in that it "request[s] a court to make a specified ruling or order." *Motion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

("Unless the Administrative Law Judge provides otherwise, no reply to a response, counterresponse to a reply, or any further responsive document shall be filed."); *see also* A.S. v. Amazon Web. Servs. Inc., 14 OCAHO no. 1381e, 2 n.3 (2021) ("Generally, replies and sur-replies are prohibited, unless the Court provides otherwise."); Thurlow v. York Hosp., No. 16-cv-179, 2017 WL 90345, at *5 n.4, 2017 U.S. Dist. LEXIS 3187, at *13 n.4 (D. Me. Jan. 10, 2017) ("[T]he Federal Rules . . . [do not] permit[] a party to file a sur-reply to the moving party's reply . . .).[3] In short, sur-replies and sur-responses are disfavored, both in this forum and in federal court.

The Court views Complainant's application for leave to file a sur-reply as requiring "good cause," as it lengthens the briefing schedule, delays proceedings, and deviates from the standard practice of this Court and this forum in general.

In the context of granting leave to file a sur-reply, the courts have found "good cause" when a party demonstrates the need for an additional opportunity to bring to the court's attention information which it was otherwise unable to present in support of its' defense or opposition to a motion. "A sur-reply is appropriate where a party has not had the opportunity to contest matters introduced for the first time in the opposing party's reply." Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 81 (D. Me. 2008) (citing United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 238 F. Supp. 2d 270, 276–77 (D.D.C. 2002) ("The standard for granting leave to file a sur-reply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply. The matter must be truly new.")); *see also* Walsh v. TelTech Sys., Inc., 821 F.3d 155, 159 n.2 (1st Cir. 2016) (finding no basis to conclude district court abused discretion in precluding sur-reply when it refrained from relying on new arguments in reply brief and the plaintiff had the opportunity to make the arguments in her opposition briefing).

The quintessential example of the court's finding good cause to grant a sur-reply is when the moving party introduces new arguments for the first time in its reply in support of the motion. See, e.g. Shell Co., Ltd. v. Los Frailes Service Station, Inc., 596 F. Supp. 2d 193, n.7 (D. P.R. 2008) ("It is common practice in this district for parties to attach the proposed sur-reply to the motion for permission to file. This practice allows the court to "peek" at the merits of the sur-reply and ensure that it *actually addresses new issues raised in the opposing parties' reply brief.")* (emphasis added); Mission Toxicology, LLC v. Unitedhealthcare Ins. Co., 499 F. Supp. 3d 350, 359 (W.D. Tx. 2020) ("[I]n seeking leave to file a surreply brief, a party must identify the new issues, theories, or arguments which the movant raised for the first time in its reply brief.") (citing Weems v. Hodnett, No. 10-cv-1452, 2011 WL 2731263, at *1, 2011 U.S. Dist. LEXIS 75172, at *1–3 (W.D. La. 2011)); Boynton Beach Firefighters' Pension Fund v. HCP,

[3] Since the allegations at issue in this case occurred in Massachusetts, the Court may look to the case law of the relevant United States Court of Appeals, here the First Circuit. *See* 28 C.F.R. § 68.57.

Inc., No. 3:16-cv-1106, 2020 WL 5939159, at *1, 2020 U.S. Dist. LEXIS 181466, at *3 (N.D. Ohio 2020) ("Courts often consider whether the party seeking to file the sur-reply has provided good cause for that brief, such as the need to address an issue that was raised for the first time in a reply brief.").

Under those circumstances, the non-moving party would have no other opportunity to respond except through a sur-reply, as it was unaware of those arguments before the filing of its opposition to the motion.[4]

Complainant has not cited, nor has the Court identified, case law supporting the proposition that the production of new evidence during discovery constitutes a "rare circumstance" warranting additional briefing in opposition to a motion to dismiss. This does not fall under the typical exception to the general prohibition against sur-replies in which a party introduces new arguments or evidence in its reply briefing, to which the opposing party wishes to respond. Moreover, given that this case is in discovery, the Court does not find that fairness or judicial efficiency would be served by providing an opportunity for a sur-reply at this juncture, when additional evidence may still be produced or Respondent may wish to respond to additional briefing by Complainant, prompting additional requests for briefing. *See* Brown v. Pilgrim's Pride Corp., 14 OCAHO no. 1379, 3 (2020) (denying request for sur-reply as falling within the "endless volley of briefs" contemplated in Byrom v. Delta Family Care-Disability & Survivorship Plan, 343 F. Supp. 2d 1163, 1188 (N.D. Ga. 2004)).

For these reasons, Complainant's request for a sur-reply is DENIED.

SO ORDERED.

Dated and entered on December 22, 2023.

Honorable John A. Henderson
Administrative Law Judge

[4] The courts also endorse striking the parts of a reply which introduces arguments not presented during the original motion as an alternate remedy. *See, e.g.*, Hearts with Haiti, Inc. v. Kendrick, No. 2:13-cv-00039, 2013 WL 5729533, at *3, 2013 U.S. Dist. LEXIS 151285, at *7 (D. Me. 2013) ("This court will not address new issues raised for the first time in reply memoranda."); Noonan v. Wonderland Greyhound Park Realty, LLC, 723 F. Supp. 2d 298, 349 (D. Mass. 2010) (same, collecting cases).