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

SUTATIP UTHAI WOODS, Complainant, v. PHILIPS NORTH AMERICA, LLC, d/b/a PHILIPS HEALTHCARE, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00070

Appearances: Sutatip Uthai Woods, pro se Complainant
Patrick Shen, Esq., and Carl Hampe, Esq., for Respondent

FINAL ORDER OF DISMISSAL

I. INTRODUCTION

This case arises under the unfair immigration-related employment practices provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. Complainant, Sutatip Uthai Woods, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 4, 2020, alleging that Respondent, Philips North America, LLC, doing business as Philips Healthcare, discriminated against her and retaliated against her in violation of 8 U.S.C. §§ 1324b(a)(1) and (a)(5). Respondent, through counsel, filed an answer to the complaint on August 6, 2020.

Presently before the Court is Respondent's Amended Motion to Dismiss. For the reasons set forth herein, Respondent's Amended Motion is Dismiss is granted, and the complaint is dismissed.

II. PROCEDURAL HISTORY

On May 4, 2020, Complainant filed a complaint with OCAHO containing allegations arising under 8 U.S.C. § 1324b against Respondent. After the Complainant filed the complaint, the Chief Administrative Hearing Officer (CAHO) sent copies of the complaint and a Notice of Case Assignment for Complaint Alleging Unfair Immigration-Related Employment Practices (NOCA) to the parties by United States Postal Service (USPS) certified mail on May 8, 2020. Through the NOCA, the CAHO informed the parties that these proceedings would be conducted according to OCAHO's Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. part 68 (2024),[1] and applicable case law. Notice Case Assign. ¶ 2. A link to OCAHO's Rules was provided to the parties, along with contact information for OCAHO. *Id.* The CAHO advised Respondent that it had the right to file an answer to the complaint and that its answer must be filed within thirty days after it was served with the complaint. *Id.* ¶ 4. The CAHO informed Respondent that, if it failed to file an answer, the Court might deem it to have waived the right to appear and contest the allegations in the complaint and that the ALJ may enter a judgment by default. *Id.* (citing 28 C.F.R. § 68.9(b)). The USPS mail tracking service indicated that the complaint and NOCA addressed to Respondent were delivered on May 11, 2020. OCAHO received a USPS Domestic Return Receipt PS Form 3811 for the delivery which was signed by a representative of Respondent. Respondent's answer to the complaint therefore was due no later than June 11, 2020. No answer was filed.

Due to Respondent's failure to file an answer to the complaint, the Court issued a Notice of Entry of Default on July 2, 2020. The Court notified the parties that "[a] party that fails to answer a complaint within the time specified is already in default," and that "[f]ailure to file 'an answer within the time provided may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default.'" Notice Entry Default 1 (citing *United States v. Quickstuff LLC*, 11 OCAHO no. 1265, 4 (2015)[2] and then citing 28 C.F.R. § 68.9(b)). The Court

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[1] OCAHO's Rules are available on OCAHO's homepage on the United States Department of Justice's website. *See* https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations.

[2] 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

ordered Respondent to file an answer pursuant to 28 C.F.R. § 68.9(c) within fifteen days and to show good cause for its failure to file a timely answer. *Id*. at 2.

Respondent filed a Motion for Enlargement of Time on July 28, 2020, requesting that the Court grant an extension through August 11, 2020, to file an answer to the complaint and a response to the Court's Notice of Entry of Default.

Before the Court ruled on Respondent's Motion for Enlargement of Time, Respondent filed its Answer to the Complaint, a Response to the Order to Show Cause, and a Motion to Dismiss on August 6, 2020. Respondent then filed an Amended Motion to Dismiss on August 10, 2020.

On August 18, 2020, Complainant submitted a filing entitled "Additionall [sic] Information" (Additional Info.). Through this filing, Complainant provided additional factual allegations regarding the events that gave rise to her complaint. Complainant also attached the following documents to her Additional Information filing: (1) a tuition statement from Everett Community College dated September 12, 2018, with a photocopy of the front side of her student identification card on top; (2) a tuition statement from Edmond Community College dated August 14, 2020, with a photocopy of the front side of her student identification card on top; (3) a photocopy of her Certificate of Completion for completing twenty-one hours of domestic violence training through the Domestic Violence Services of Snohomish County; (4) a photocopy of her Certificate of Naturalization dated November 26, 2019; (5) a statement dated October 13, 2019, addressed to her from Swedish Hospital Billing; and (5) an email exchange dated August 10-11, 2019, between her and an instructor at EDCC regarding her request to drop a course. Additional Info. 9-16.

The Court issued an Order Granting Motion for Enlargement of Time and Discharging Entry of Default on August 21, 2020. *Woods v. Philips N. Am., LLC*, 14 OCAHO no. 1371 (2020). Through this order, the Court granted Respondent's

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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 through the Westlaw database "FIM-OCAHO," the LexisNexis database "OCAHO," or the United States Department of Justice's website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

Motion for Enlargement of Time in which to file its answer and response to the Court's Notice of Entry of Default. *Id.* at 4. The Court then found that Respondent had shown good cause in its response to the Notice of Entry of Default for its failure to file a timely answer. *Id.* Accordingly, the Court set aside the Court's Notice of Entry of Default and accepted Respondent's answer. *Id.* The Court then addressed Respondent's Amended Motion to Dismiss and ordered Complainant to file any response to the Amended Motion to Dismiss by September 11, 2020. *Id.*

On September 16, 2020, Complainant untimely filed its Response to Respondent's Amended Motion to Dismiss. On September 25, 2020, Respondent filed a Request for Leave to Reply and attached to the filing its Reply to Response to Amended Motion to Dismiss. The Court granted Respondent's request for leave to file a reply in support of its Motion to Dismiss on October 28, 2020, explaining that Complainant's response contained new assertions outside her complaint and finding that Respondent should have the opportunity to address the issues raised in her response. Order Granting Leave Reply 1–2.

On November 30, 2022, the Court issued an Order Issuing Stay of Proceedings. *Woods v. Philips N. Am., LLC*, 14 OCAHO no. 1371a (2020). The Court explained that OCAHO Administrative Law Judges (ALJs) had observed in recent decisions that the United States Supreme Court's decision in *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021)—in which the Supreme Court found that the unreviewable authority of Patent Trial and Appeal Board Administrative Patent Judges (APJs) was incompatible under the Appointments Clause of the United States Constitution with the APJs' appointment to an inferior office—presented "an unresolved question as to the Court's ability to issue a final order in § 1324b cases that address non-administrative questions." *Id.* at 1 (collecting cases). Given this unresolved question, the Court cited recent cases in which OCAHO ALJs sua sponte issued stays of proceedings in cases arising under 8 U.S.C. § 1324b when a "final case disposition appeared imminent." *Id.* at 2–3 (collecting cases).

Considering these legal developments, the Court issued a stay of proceedings in this matter on November 30, 2022. *Woods*, 14 OCAHO no. 1371a, at 3. During the stay of proceedings, the Court explained that it would "not consider or adjudicate submissions filed by the parties," but that the parties were "not precluded from contacting the Court and requesting a status update." *Id.* The Court would "timely inform the parties in writing when the stay is lifted." *Id.*

On October 17, 2023, the CAHO issued a Notice of Reassignment reassigning this case to the undersigned pursuant to 28 C.F.R. §§ 68.2 and 68.26.

On September 19, 2024, the Court issued an Order Lifting Stay of Proceedings. *Woods v. Philips N. Am., LLC*, 14 OCAHO no. 1371b (2024). The Court explained that "the United States Department of Justice published an interim final rule providing for review by the Attorney General of the United States of OCAHO ALJs' final orders in cases arising under 8 U.S.C. § 1324b." *Id.* at 5 (citing Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68)). Given the interim final rule's publication and codification at 28 C.F.R. part 68, the Court found that "*Arthrex, Inc.*, no longer presents a 'clear bar to moving ahead' in this matter." *Id.* (quoting *Heath v. ConsultAdd*, 15 OCAHO no. 1395b, 2 (2022)).

With the stay of proceedings lifted, the Court now addresses Respondent's Amended Motion to Dismiss.

III. FACTS

The facts set forth below are drawn from the complaint and its attachments, *see* Fed. R. Civ. P. 10(c), as well as materials incorporated by reference into the complaint or properly subject to official notice. *See Khoja v. Orexigan Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).[3] For the purposes of this Order, the Court assumes all well-pleaded facts are true and draws all inferences in Complainant's favor. *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994).

At the time of the complaint, Complainant was a United States citizen of Thai national origin. Compl. 4; IER Charge 1. A photocopy of Complainant's Certificate of Naturalization reflects that she became a citizen of the United States on November 26, 2019. Additional Info. 12.

In spring 2018, Complainant worked for several months as a temporary worker at one of Respondent's facilities in Washington, through a company she

[3] The Court also considers the case law of the United States Court of Appeals for the Ninth Circuit as it is the controlling circuit for purposes of judicial review. 28 C.F.R. § 68.57 (providing for review of a final agency 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.").

identified as "Ranstad."[4] IER Charge 2. She claimed that a rumor about her from a previous employer "spread in Philips Company." *Id.* Complainant was unhappy with how the employees treated her in that they liked workplace "drama," "gang[ed] up on [her]," and did not want her to be "part of the team." Compl. 9; IER Charge 2–3. Complainant voluntarily left "Ranstad." Compl. at 10; IER Charge 2.

After Complainant left her job, she alleged that, in May 2018, employees continued to cause "chaos and drama" by calling her derogatory names and spreading personal rumors about her "everywhere in WA." Compl. 11; IER Charge 2–3. She asserted that these rumors continued in June 2019 when she worked at another company for a few months where she was treated badly. IER Charge 3–4. She claimed that "[s]ince 2018 until now, I was suffered for too long." *Id.* at 4.

On April 12, 2020, Complainant filed a charge of retaliation against Respondent with the Immigrant and Employee Rights Section (IER) of the United States Department of Justice's Civil Rights Division. IER Charge 1. On April 20, 2020, a Senior Equal Opportunity Specialist with IER sent Complainant a letter of determination informing her that IER had concluded that her complaint did not constitute a charge, that no allegation of misconduct could be inferred from her submission, and that IER was dismissing her submission. Letter of Determination 1. The Senior Equal Opportunity Specialist also stated in the letter that, if Complainant believed that IER's determination was incorrect, Complainant could present her claims to OCAHO by filing a complaint. *Id.*

IV. THE PARTIES' POSITIONS

A. Respondent's Amended Motion to Dismiss

In its Amended Motion to Dismiss, Respondent moves the Court to dismiss the complaint in its entirety for failure to state a claim. Respondent argues that the complaint "lacks sufficient information to support a prima facie claim of discrimination or retaliation." Am. Mot. Dismiss 4. Respondent asserts that Complainant "made conclusory statements" about "disparaging actions and remarks" made by unidentified individuals of unknown employment and failed to allege any facts in her complaint connecting this behavior to her status as a United

[4] Respondent identified this company as Randstad Sourceright and stated that, although Complainant was not Respondent's employee, she "was assigned to Respondent's Bothell, WA facility on a temporary assignment." Answer 1.

States citizen. *Id.* Respondent also argues that Complainant did not show that she was engaged in protected activity or establish a causal connection between that activity and the alleged mistreatment. *Id.* As to the perpetrators of the alleged disparagement, Respondent notes that Complainant does not allege that these perpetrators worked for Respondent or were acting on its behalf. *Id.* Respondent further argues that, when Respondent left her position, she did so on her own volition. *Id.* Respondent therefore concludes that Complainant's allegations are not covered by 8 U.S.C. § 1324b's protection against discrimination in "hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . ." *Id.*

In addition to seeking dismissal for Complainant's claimed failure to plead a prima facie case of discrimination or retaliation, Respondent moves the Court to dismiss the complaint for being untimely. Am. Mot. Dismiss 5. Specifically, Respondent argues that Complainant's retaliation claim is time barred because the events at issue took place more than 180 days before Complainant filed her charge of discrimination with IER. *Id.*

B. Complainant's Response to Respondent's Amended Motion to Dismiss

In her Response to Respondent's Amended Motion to Dismiss,[5] Complainant acknowledges that Respondent did not refuse to hire her and did not fire her, Resp. Am. Mot. Dismiss 1, 3, and she confirmed that she "left a job because of petty drama . . . ." *Id.* at 1. She claims that Respondent's employees engaged in "disparaging actions that displayed discrimination for rivals in Washing[ton] State," which affected "every part" of Complainant's life. *Id.* at 3.

As to the nexus between her citizenship status or protected activity and alleged discriminatory and retaliatory treatment, Complainant states that she "did not like the way . . . [she] had been treated disrespectfully [by] Respondent's employees inside Respondent's facility" and that, "after [she] left a job, Respondent's employees intentional[ly] put [her] on the spot and defamed [her] on the spot, so [she] was a victim of rumors, bully behavior, harassment and stalking from Respondent's employees . . . ." Resp. Am. Mot. Dismiss 2.

[5] As discussed in Section VI, Subsection A(1), below, the Court has exercised its discretion and accepted Complainant's untimely filed response and is considering both filings when adjudicating the present motion.

As to whether the individuals who acted disparagingly toward Complainant were associated with Respondent, Complainant claims that "Respondent acknowledged that Respondent's employees discriminated [against] Complainant for rivals by spreading . . . rumors to make Complainant less desir[able] to society, and Respondent can identify individuals who made chaos in Washington State." Resp. Am. Mot. Dismiss 3.

Lastly, Complainant uses the response to make new allegations that fall outside the complaint. Specifically, she alleges that "Respondent also acknowledged that [C]omplainant was not a United States citizen because of Complainant's race, and Randstad acknowledged that Complainant had permanent resident status when Complainant got hired." Resp. Am. Mot. Dismiss 2.

C. Respondent's Reply to Response to Amended Motion to Dismiss

In Respondent's Reply to Response to Amended Motion to Dismiss, Respondent states that Complainant admitted in her "untimely filed" Response to Respondent's Amended Motion to Dismiss that "Randstad," not Respondent, was her actual employer and that she was simply assigned to work at a Philips facility by Randstad. Reply Am. Mot. Dismiss 1–3. Further, Respondent states that Complainant acknowledged in her response that Respondent did not fire or refuse to fire her. *Id.* at 1. Rather, Respondent notes that Complainant admitted that she left her job voluntarily. *Id.* Respondent states that Complainant asserted for the first time in her response that she was a permanent resident at the time of the alleged discrimination. *Id.* at 2. Respondent asserts that "Section 1324b(a)(1) does not address conditions of employment, and thus she has asserted no claim under 8 U.S.C. § 1324b." *Id.*

Respondent next addresses Complainant's assertions regarding her citizenship status, noting that her complaint alleged that she was a United States citizen at the time of the alleged discrimination while her response suggested that Randstad knew that she was a permanent legal resident. Reply Am. Mot. Dismiss 2. Respondent further notes that Complainant "suggest[ed] that Respondent knew or should have know[n] she was not a citizen 'because of [her] race' but does not explain how." *Id.* Respondent argues that Complainant failed to allege "facts sufficient to create a reasonable inference that anyone knew of her citizenship status and thus that such status could have been the basis for discriminatory conduct by Respondent." *Id.*

Even assuming that Complainant was a protected individual at the time of the alleged discrimination, Respondent emphasizes that Complainant had not alleged any nexus between any alleged mistreatment by her co-workers and her protected status. Reply Am. Mot. Dismiss 2. As for Complainant's retaliation claim, Respondent again argues that Complainant had not engaged in any protected activity, nor had she alleged any causal relationship between any such activity and any retaliatory actions by Respondent. *Id*. at 3.

V. STANDARDS OF LAW

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that an ALJ "may dismiss the complaint, based on a motion by the respondent or without a motion from the respondent, if the [ALJ] determines that the complainant has failed to state a claim upon which relief can be granted." 28 C.F.R. § 68.10(b). As the CAHO has explained, OCAHO's pleading standards "require 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) (quoting 28 C.F.R. § 68.7(b)(3)). The complainant is not required to plead a prima facie case to overcome a motion to dismiss for failure to state a claim upon which relief can be granted. *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002); *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016).

When considering a motion to dismiss, the Court accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990). Additionally, complaints filed by pro se complainants "must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel." *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 777 (1992).

When analyzing a motion to dismiss, "the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The [C]ourt may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113–14. Additionally, "a copy of a document attached to a pleading is a part of that pleading for all purposes." *Reed v. Dupont Pioneer Hi-Bred Int'l*, 13 OCAHO no. 1321, 3 (citing Fed. R. Civ. P. 10(c)); *Sharma v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 8 (2016) (citing Fed. R. Civ. P. 10(c)).

VI. DISCUSSION AND ANALYSIS

A. Preliminary Matters

Before considering the merits of Respondent's Amended Motion to Dismiss, the Court addresses two preliminary matters. First, it considers the question of the timeliness of Complainant's Response to Respondent's Amended Motion to Dismiss. Second, it addresses the fact that Complainant's Additional Information filing and her Response to Respondent's Amended Motion to Dismiss contain new factual allegations that fall outside the complaint and, in the case of the Additional Information filing, new evidentiary submissions.

1. The Timeliness of Complainant's Response to Respondent's Amended Motion to Dismiss

The Court first addresses the issue of the timeliness of Complainant's Response to Respondent's Amended Motion to Dismiss. In Respondent's Reply to Response to Amended Motion to Dismiss, Respondent argued that Complainant's Response to Respondent's Amended Motion to Dismiss was not timely filed. Reply Am. Mot. Dismiss 3. Respondent noted that it mailed its motion to Complainant on August 6, 2020, and that Complainant mailed her response on September 9, 2020. *Id.* The Court finds no prejudice to Respondent from the minimal, five-day delay in filing which did not impact these proceedings and notes that Complainant acted in good faith by dating and mailing her response before the Court's deadline. As such, the Court finds that Complainant's failure to meet the Court's filing deadline was due to excusable neglect and exercises its discretion to accept the late filing. *See Villegas-Valenzuela v. INS*, 103 F.3d 805, 811 n.5 (9th Cir. 1996) (citing 28 C.F.R. § 68.11(b)) ("The [OCAHO] ALJ maintains discretion to accept pleadings within a time period he may fix."); *see also Ehere v. HawaiiUSA Fed. Credit Union*, 17 OCAHO no. 1471, 3 (2023) (accepting late-filed prehearing statement considering that the case was in its early stages, the delay had little impact on the proceedings, and the complainant was proceeding pro se). In making this determination, the Court also has considered that "[Federal Rule of Civil Procedure] 6(b) permits a court, at its discretion, to accept a late filing when the movant's failure to meet the deadline was the result of excusable neglect." *Zajradhara v. Aljeric Gen. Servs.*, 16 OCAHO no. 1432f, 5 (2023) (quoting *Alexander v. Principi*, 16 F. App'x 755, 759 (9th Cir. 2001)).

2. Complainant's New Factual Allegations and Evidentiary Submissions

As an additional threshold matter, the Court considers that Complainant has raised new factual allegations in her Additional Information filing and her Response to Respondent's Amended Motion to Dismiss. Complainant's filings include some new factual allegations that differ from those raised in the complaint and its attachments. Complainant also has attached various documents to her Additional Information filing.

When determining whether to consider Complainant's newly raised factual allegations that fall outside the complaint, the Court is guided by OCAHO precedent and the case law of the Ninth Circuit Court of Appeals. As discussed above, when analyzing a motion to dismiss, "the [C]ourt must limit its analysis to the four corners of the complaint" and any documents attached to it and incorporated by reference. *Jarvis*, 7 OCAHO no. 930, at 113–14; *see also Cook v. Pro Source, Inc.*, 7 OCAHO no. 960, 559, 567 (1997) ("In considering a motion to dismiss, our analysis is limited to the four corners of the complaint, together with any documents incorporated into the complaint by reference and materials subject to judicial notice.").

"A motion to dismiss for failure to state a claim upon which relief can be granted under [28 C.F.R. §] 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Bunn v. USX/US Steel*, 7 OCAHO no. 985, 996, 999 (1998); *see also Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510c, 6 (2024) (28 C.F.R. 68.10 "is modeled after Federal Rule of Civil Procedure 12(b)(6)."). The Ninth Circuit Court of Appeals has counseled that, "[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. Cal. Dep't of Corrs.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in original). District courts in the Ninth Circuit also have declined to consider new factual allegations raised in a response to a motion to dismiss. *See, e.g.*, *Xianhua v. Oath Holdings, Inc.*, 536 F. Supp. 3d 535, 559 (N.D. Cal. 2021) (explaining that, "in ruling on a motion to dismiss, the Court cannot look beyond Plaintiff's Complaint to Plaintiff's opposition brief."). This is true even where the case involved a pro se plaintiff. *See, e.g.*, *Minor v. FedEx Off. & Print Servs., Inc.*, 182 F. Supp. 3d 966, 977 (N.D. Cal. 2016) (holding that the pro se plaintiff "may not use his opposition to raise and argue new allegations or claims not in the complaint"). The Court therefore will not consider the new factual

allegations raised by Complainant in her Additional Information filing and in her Response to Respondent's Amended Motion to Dismiss.

Further, the Court has reviewed the documents attached to Complainant's Additional Information and finds that all but one of the attached documents are not among the traditional matters of judicial notice, and it will not take official notice of the facts contained therein. *See* 28 C.F.R. § 68.41. The exception is the photocopy of Complainant's Certificate of Naturalization[6] as it is a governmental record containing Complainant's full name, photograph, date of naturalization, and signature of an official with the United States Citizenship and Immigration Service. The Court will take official notice of facts contained therein as it is an official legal record of the United States Department of Homeland Security, being a governmental source "whose accuracy cannot reasonably be questioned," and it is a governmental record containing facts which "can be accurately and readily determined." Fed. R. Evid. 201(b)(2). *See Cook*, 7 OCAHO no. 960, at 567; 28 C.F.R. § 68.41 ("Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice.").

B. Respondent's Amended Motion to Dismiss

The Courts turns now to Respondent's Amended Motion to Dismiss. When considering this motion, the Court limits its analysis to the complaint and to its attachments, being the IER determination letter and the IER Charge, and Complainant's Certificate of Naturalization.

1. Discrimination

a. Whether the Complaint Raises Discrimination Claim

[6] Although the complaint does not reference the Certificate of Naturalization, Complainant stated that she was a United States citizen in the complaint and her citizenship status is a material fact in these proceedings, insomuch as both United States citizens and legal permanent residents are protected individuals under 8 U.S.C. § 1324b. Compl. 4; IER Charge 1; 8 U.S.C § 1324b(a)(3) (defining a protected individual for the purposes of citizenship status discrimination as including U.S. citizens and lawful permanent residents, excepting those who do not apply for naturalization within six months of eligibility or who timely apply for naturalization but do not naturalize within two years of the application). *See infra*, footnote 8.

The Court first addresses whether Complainant's complaint raises a claim of discrimination under 8 U.S.C. § 1324b(a)(1). Section 6 of the OCAHO complaint form requires a complainant to identify the basis of any alleged discrimination. Here, Complainant checked "Yes" as to retaliation in Section 6. Compl. 8. She did not answer the remaining questions in Section 6 which asked whether she was discriminated against because of her national origin and citizenship status and whether she was asked for more or different documents than required for the employment verification process. *Id.* Likewise, Complainant selected retaliation as the only type of discrimination she was alleging in her IER Charge. IER Charge 1–2. In contrast, Complainant completed Sections 7 and 8 of the OCAHO complaint form which related to allegations of discrimination in hiring, recruitment, and referral for a fee, not retaliation. Compl. 9–10.

Given Complainant's pro se status and the Court's duty to read the allegations in the complaint liberally, the Court construes the complaint to raise a claim of discrimination under 8 U.S.C. § 1324b(a)(1). *See Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443a, 2 (2022) ("The Court construes the pleadings of pro se litigants such as Complainant liberally."); *see also Mbitaze v. Greenbelt Police Dep't*, 13 OCAHO no. 1345, 1–2 (2020) (explaining that "complaints of pro se complainants 'must be liberally construed and less stringent standards must be applied than when a [complainant] is represented by counsel.'") (quoting *Halim*, 3 OCAHO no. 474, at 777).

b. Subject Matter Jurisdiction Over National Origin Discrimination

As noted above, Complainant did not answer the question in Section 6 of the OCAHO complaint form regarding whether she had been discriminated against due to her national origin. Compl. 8. She only referenced her national origin as part of her personal information in the IER Charge, *see* IER Charge 1, and it was not among the specifics discussed in the complaint or IER Charge. Insofar as Complainant could be considered to have raised a claim of discrimination based on Complainant's Thai national origin under 8 U.S.C. § 1324b(a)(1)(A) in the complaint, the Court now considers whether it has subject matter jurisdiction over that claim.

The Court has both the authority and the duty to determine sua sponte if it has subject matter jurisdiction. *See, e.g.*, *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510d, 3 (2024) (citing *Heath v. Ancile, Inc.*, 15 OCAHO no. 1411, 2

(2022)); *see also Windsor v. Landeen*, 12 OCAHO no. 1294, 4–5 (2016) (citing *Horne v. Town of Hampstead*, 6 OCAHO no. 906, 946 (1997)); *Kim v. Getz*, 12 OCAHO no. 1279, 2–4 (2016). The party invoking jurisdiction bears the burden to establish that the Court has jurisdiction. *Windsor*, 12 OCAHO no. 1294 at 5; *see also Wangperawong*, 18 OCAHO no. 1510d, at 3 (citing *Zajradhara v. HDH Co., Ltd.*, 16 OCAHO no. 1417, 2 (2022)) (accord).

Like lower federal courts, OCAHO is a forum of limited jurisdiction "with only the jurisdiction which Congress has prescribed." *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO no. 919, 1167, 1173 (1997). OCAHO lacks jurisdiction to hear national origin discrimination claims where the employer employs three or less individuals. 8 U.S.C. § 1324b(a)(2)(A). Yet OCAHO's jurisdiction with larger employers is likewise limited. OCAHO has jurisdiction to hear national origin discrimination claims against employers with between four and fourteen employees, *see* 8 U.S.C. § 1324b(a)(2)(A), (B); *Zajradhara*, 16 OCAHO no. 1417, at 2, while the EEOC has jurisdiction over national origin discrimination claims against employers with more than fourteen employees. *See, e.g.*, *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020); *Basua v. Walmart #1554*, 3 OCAHO no. 535, 1351, 1355 (1993). This Court has dismissed national origin charges where evidence had established that the respondent employed more than fourteen employees, and the case was properly before the EEOC. *See Nickman v. Mesa Air Group*, 9 OCAHO no. 1113, 7 (2004); *Caspi v. Triglid Corp.*, 7 OCAHO no. 991, 1064, 1065 (1998); *DeGuzman v. First American Bank*, 3 OCAHO no. 585, 1889, 1891 (1993).

Here, Complainant represented in its complaint and IER Charge that Respondent employed more than fifteen employees. Compl. 6; IER Charge 2. In its reply brief, Respondent likewise acknowledged that it "has over fifteen (15) employees[.]" Reply Am. Mot. Dismiss 2. It further submits that "Respondent does not come within the jurisdiction of 8 U.S.C. § 1324b for purposes of national origin discrimination."[7] *Id.* (citing 28 C.F.R. § 44.200(b)(1)(ii); 42 U.S.C. 2000e-2). The Court agrees. Based on the allegations in the complaint, Complainant has not met her burden of establishing that OCAHO has subject matter jurisdiction over her national origin discrimination claim. "The appropriate disposition of a

[7] Although Respondent raised this argument for the first time in its reply brief, *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citation omitted) (courts "need not consider arguments raised for the first time in a reply brief"), the Court is cognizant of its duty to address subject matter jurisdiction sua sponte.

jurisdictionally deficient complaint is dismissal of the case." *Zajradhara v. HDH Co., Ltd.*, 16 OCAHO no. 1417c, 6 (2022). Therefore, the Court dismisses Complainant's national origin discrimination claim under 8 U.S.C. § 1324b(a)(1)(A) for lack of subject matter jurisdiction.

c. Failure to State a Claim – Citizenship Discrimination

The Court next addresses any claim of discrimination based on citizenship status raised in the complaint, despite Complainant's failure to complete Section 6 of the OCAHO complaint form identifying the bases of discrimination. Compl. 8. The Court finds that Complainant has failed to state a claim for discrimination based on citizenship status in violation of 8 U.S.C. § 1324b(a)(1)(B).

8 U.S.C. § 1324b(a)(1) provides that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . ."[8] This Court has dismissed claims based on personnel actions not related "to the hiring, or recruitment or referral for a fee, of the individual for employment or discharging of the individual from employment" as being beyond the reach of the statute. *See A.S. v. Amazon WebServices Inc.*, 14 OCAHO no. 1381d (2021); *see also Ricardo Sanchez Molina v. Securitas Security Servs. USA, Inc.*, 11 OCAHO no. 1261, 7 (2015) ("Assignments to a particular worksite or shift, compensation, and other terms and conditions of employment, however, are not encompassed within the reach of the statute.").

[8] The Court notes that Complainant did not adequately allege that she was a protected individual at the time of the alleged discrimination for purposes of her citizenship status discrimination claim. Based on Complainant's Certificate of Naturalization, she became a United States citizen on November 26, 2019. Additional Info. 12. She does not allege what her citizenship status was at the time she left her employment with Respondent in spring 2018. *See* IER Charge 2. Although Respondent did not raise this issue, a complainant's failure to allege that he or she was a protected individual as defined by 8 U.S.C. § 1324b(a)(3) at the time of the alleged discrimination merits dismissal of a citizenship discrimination claim for failure to state a claim. *See generally Contreras v. Cavco Indus., Inc.*, 16 OCAHO no. 1440c (2024). Because the Court is dismissing the claim on other grounds, it need not reach this issue.

Here, Complainant has not alleged that Respondent terminated her as required by 8 U.S.C. § 1324b(a)(1). Complainant stated that she was not fired in the complaint. Compl. 8. Rather, Complainant explained that she "decided to leave [the] job by myself[,]" *id.* at 10, and stated that she left her position working at Respondent's facility voluntarily. IER Charge 2. The Court's analysis does not end here though because this forum has recognized that a constructive discharge falls within the scope of 8 U.S.C. § 1324b(a)(1). *See, e.g.*, *Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379, 4 (2020). "A constructive discharge occurs when an employer makes working conditions so intolerable that a reasonable person would be forced to resign." *Id.* (quoting *Paz-Martinez v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1260, 7 (2015)) (internal quotations omitted).

Complainant alleged that she left her employment with Respondent because she "was not happy with the way [she] was treated from coworkers," she did not like workplace drama, and she did not get respect at work from her coworkers and bosses. IER Charge 2–4. Complainant's vague allegations of workplace drama and disrespect fall short of alleging that conditions were "intolerable." *See Green v. Brennan*, 578 U.S. 547, 558 (2016) (describing constructive discharge as "discrimination severe enough that a reasonable person . . . would resign"); *see also Hwang v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC*, No. 22-16396, 2024 WL 208139, at *1, 2024 U.S. App. LEXIS 1271, at *2–3 (9th Cir. 2024) (allegations of a racist comment, criticism, and false accusations were not enough to establish constructive discharge, because "[t]he working conditions must be so 'severe' as to compel a reasonable employee to resign").

Even if Complainant had alleged that Respondent terminated her or constructively discharged her, the allegations in the complaint do not meet OCAHO's pleading standard. To survive a motion to dismiss, a complainant before OCAHO must allege "minimal factual allegations" to satisfy 28 C.F.R. § 68.7(b)(3). *See Jablonski*, 12 OCAHO no. 1272, at 6 ("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."). The Court has found sufficient minimal factual allegations where the pleadings "notify [the] Respondent adequately about his theory of liability, i.e., what facts lead him to believe that Respondent's decision not to hire him was caused by discrimination based on citizenship status or national origin." *Wangperawong*, 18 OCAHO no. 1510c, at 7–8 (citing *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 7 (2022) (finding OCAHO's pleading standard met "because [the complaint] identified a theory by which [the] Respondent allegedly violated 8 U.S.C. § 1324b" namely, that the respondent "may

have alternatively hired a non-citizen into the specific position [for which the complainant applied, for which he was qualified, and for which he was not selected] because of that [non-citizen] candidate's citizenship status")).

The complaint does not contain the requisite "minimal factual allegations" to satisfy 28 C.F.R. § 68.7(b)(3) and to allow the Court to reasonably conclude that Respondent violated the law. The complaint's allegations do not explain what facts led Complainant to believe that Respondent discriminated against her based on her citizenship status. Complainant did not explain why she believed that the treatment, drama, and lack of respect she experienced at work, *see* IER Charge 2–4, were connected to her citizenship status. *See, e.g.*, *Amazon Webservices Inc.*, 14 OCAHO no. 1381d, at 16 (dismissing claim of citizenship status discrimination claim when the complainant alleged "in a general and conclusory fashion that Respondent discriminated against him based on his citizenship status, without citing to specific facts giving an inference to causation") (citing, inter alia, *Thompson v. Sanchez Auto Servs., LLC*, 12 OCAHO no. 1302, 7–8 (2017) (dismissing discrimination claim "bereft of any allegations related to [] national origin apart from cursory assertions")); *Paz-Martinez*, 11 OCAHO no. 1260, at 8 ("Discrimination suits require some evidence of discrimination."). The allegations in the complaint do not even suggest that Respondent was aware of Complainant's citizenship status. *Ackermann v. Mindlance, Inc.*, 17 OCAHO no. 1462b, 8, 10 (2023) (citing *Zajradhara v. GIG Partners*, 14 OCAHO no. 1363c, 12 (2021) (dismissing national origin discrimination claim on summary decision when the complainant had not "establish[ed] Respondent's knowledge of his national origin")).

2. Retaliation

Complainant clearly identified retaliation as the basis of the alleged discrimination in Section 6 of the OCAHO complaint form and in the IER Charge. Compl. 8; IER Charge 1–2. The Court however finds that Complainant has failed to state a claim of retaliation under 8 U.S.C. § 1324b(a)(5).

"Title 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice 'to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [8 U.S.C. § 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.'" *Ackermann*, 17 OCAHO no. 1462b, at 11. "Although Complainant does not have to plead a prima facie case at this stage, the elements are instructive: A prima facie case of retaliation is established by

presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual's protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action." *Id*. (citing *Rainwater v. Doctor's Hospice of Georgia, Inc.*, 12 OCAHO no. 1300, 17 (2017)).

Here, Complainant has not alleged that she engaged in conduct protected by 8 U.S.C. § 1324b. "In order to qualify as protected conduct in this forum, the conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section." *Wangperawong*, 18 OCAHO no. 1510c, at 8–9 (citations omitted). Generally, Complainant alleged that, after she left her job with Respondent, its employees spread rumors about her, announced that she was "not good enough for them," made people in Washington choose sides, controlled her in public, and harassed and stalked her, all in order to "make [her] not to be accepted by anyone in society to make [her] no one wants and hiring [her]." Compl. 9, 11; IER Charge 3–4. But Complainant did not allege that any of this post-employment harassment and rumor spreading was in response to her engaging in protected activity, such as complaining of discrimination or making or intending to make a complaint to IER. Although 8 U.S.C. § 1324b(a)(5) covers a broad range of protected activity, *see Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 18–21 (2024), even reading the complaint liberally, Complainant has not alleged any protected activity that the Court can decipher or shown that Respondent knew of any such protected activity.

Given that Complainant has not alleged that she engaged in any protected activity, the Court need not determine whether Complainant has alleged a nexus between such activity and the presence of an adverse employment action. The Court dismisses Complainant's retaliation claim under 8 U.S.C. § 1324b(a)(5) for failure to state a claim.[9]

[9] The Court notes that Respondent has argued that Complainant's retaliation claim was untimely because Complainant alleged that the retaliation took place in May 2018, and she did not file a charge with IER until April 12, 2020, more than 180 days after the alleged retaliation. Am. Mot. Dismiss 5 (citing 28 C.F.R. § 44.300(b)). Complainant however asserted that the rumors continued in June 2019 when she worked at another company for a few months where she was treated badly. IER Charge 2–3. She also alleged that she was harassed and stalked "with rumors." Compl. 7. She claimed that "[s]ince 2018 until now, I was suffered for too long." *Id.* at 4. Given the Court's finding that Complainant has not stated a claim of retaliation, the Court need not reach this argument.

3. Leave to Amend the Complaint

Lastly, the Court considers whether Complainant should be afforded the opportunity to amend her complaint to attempt to correct its deficiencies. The Court recognizes that Complainant is pro se and that the Ninth Circuit has explained that "[u]nless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam).

The Court may consider the allegations and evidence outside the complaint submitted with Complainant's filings in determining whether to provide Complainant with an opportunity to seek leave to amend her complaint. *See, e.g.*, *Broam v. Bogan*, 320 F.3d 1023, 1026 n. 2 (9th Cir. 2003) ("Facts raised for the first time in plaintiff's opposition papers should be considered by the court in determining whether to grant leave to amend or to dismiss the complaint with or without prejudice.") (citing *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137–38 (9th Cir. 2001)).

Here, the Court finds that the new allegations in Complainant's Additional Information filing and her Response to Respondent's Amended Motion to Dismiss would not cure the identified deficiencies. The new allegations do suggest that Complainant was a protected individual, namely, a lawful permanent resident, at the time of the alleged discrimination, but they do not suggest that Complainant was constructively discharged. They also do not suggest a nexus between any constructive discharge and Complainant's protected status or that Complainant was engaged in protected activity of which Respondent was aware. Instead, the new allegations amount to largely vague assertions that Respondent's employees were spreading personal rumors about Complainant.

Given the complete absence of any allegations of discrimination based on Complainant's citizenship status or of retaliation based on protected activity, the Court finds that this is an instance in which it is "absolutely clear" that the deficiencies in the complaint would not be cured by amendment. *Lucas*, 66 F.3d 245, at 248. Therefore, the Court does not grant Complainant permission to seek leave to amend. *See, e.g.*, *Cook*, 7 OCAHO no. 960, at 571 (dismissing complaint without permitting amendment because "it appear[ed] to a certainty that an amendment would be futile[.]").

VII. CONCLUSION

Having found that dismissal of the complaint is warranted, the Court now grants Respondent's Amended Motion to Dismiss. Complainant's national origin discrimination claim under 8 U.S.C. § 1324b(a)(1)(A) is dismissed for lack of subject matter jurisdiction, while Complainant's claim of discrimination based on citizenship status in violation of 8 U.S.C. § 1324b(a)(1)(B) and claim of retaliation under 8 U.S.C. § 1324b(a)(5) are both dismissed for failure to state a claim. Dismissal of the complaint shall be with prejudice to refiling. *See, e.g.*, *Bunn*, 7 OCAHO no. 985, at 1006 (dismissing with prejudice complaint alleging citizenship status discrimination and document abuse for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and for being untimely filed); *Harris v. Argyle Television Operations, Inc.*, 7 OCAHO no. 943, 357, 360 (1997) (dismissing with prejudice to refiling a complaint alleging immigration-related employment practices based on national origin discrimination); *Cook*, 7 OCAHO no. 960, at 572 (dismissing complaint with prejudice for lack of subject matter jurisdiction).

VIII. ORDERS

IT IS SO ORDERED that the Amended Motion to Dismiss filed by Philips North America, LLC, doing business as Philips Healthcare, is GRANTED; and

IT IS FURTHER ORDERED that the complaint filed in this case by Sutatip Uthai Woods is DISMISSED WITH PREJUDICE.

SO ORDERED.

Dated and entered on September 30, 2024.

_____

Honorable Carol A. Bell
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review 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. *See* 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.