

MIKHAIL NAZARENKO,  
Complainant,

v.

SUPPORTYOURAPP, INC.,  
Respondent.

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8 U.S.C. § 1324b Proceeding  
OCAHO Case No. 2024B00056

## ORDER ON MOTIONS

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Complainant, Mikhail Nazarenko, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 5, 2024. Complainant alleges that Respondent, SupportYourApp, Inc., discriminated against him based on his citizenship status and nationality in violation of 8 U.S.C. § 1324b(a)(1) when he was not hired for a customer support consultant position, and asserts retaliation in violation of 8 U.S.C. § 1324b(a)(5).

On May 28, 2024, the Court issued by mail and e-mail a General Litigation Order, deferring holding an initial prehearing conference until the motion to dismiss is resolved. Gen. Lit. Order 1. The Court also did not authorize discovery. Because Complainant had not filed a response to Respondent's Motion to Dismiss and it was unclear if Complainant had received the motion, the Court gave Complainant an additional ten days to file an opposition by mail, with a courtesy copy by email.

On June 12, 2024, Complainant filed his Response and Motions by e-mail, with the mail copy arriving on June 18, 2024. Complainant states that on May 27, 2024, he received “an envelope

with objections from Support Your App.”<sup>1</sup> Resp. Mot. 1. He states that he “[has] not yet had time and other conditions to read these documents and comprehend them fully,” but responds to certain aspects of the answer. *Id.* The Court now addresses the various requests in that filing.

## II. MOTION FOR EXTENSION

Complainant states that he “need[s] additional time to prepare sufficient objections,” seemingly to Respondent’s affirmative defense in its Answer that it had a legitimate, non-discriminatory reason not to hire Complainant because Complainant lacked the skills and experience necessary. Complainant’s Resp. 1. Complainant also requests that this Court “give [him] a period of time to fully study the employer’s objections and the legislation to which the employer and court referred,” and refers to his status as a pro se litigant and the financial and personal difficulties he is facing. *Id.* at 2, 3. Complainant also states that because English is not his native language it is “difficult for [him] to provide information and documents to the court in a timely manner” and requests “understanding” as a result. *Id.* at 3. Complainant also appears to ask this Court to not make a final decision on the case until the “administrative employees” of the United States Department of Justice make their decision, and to forward additional allegations to them. *Id.* at 1-2.

The Court interprets this collectively as Complainant requesting an extension of time to reply to the Answer, an extension for time to respond to Respondent’s Motion to Dismiss, and a request to stay the case while the Immigrant and Employee Rights Section of the Civil Rights Division (IER) considers the filings.

### A. Motion for Extension of Time to Reply to Answer

When a Complainant files a complaint against a company, the company must file an answer which responds to the Complaint and sets forth the company’s defense. 28 C.F.R. § 68.9. Complainants may, but are not required, to file a reply responding to each affirmative defense asserted. 28 C.F.R. § 68.9(d).

Complainant’s request for an extension of time to file a reply is late.<sup>2</sup> In this circumstance, the Court must consider whether the Complainant showed both good cause for the delay, and whether the delay was due to excusable neglect. *United States v. Quickstuff, LLC*, 11 OCAHO no. 1265, 5

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<sup>1</sup> It is unclear whether Complainant received both the Answer and the Motion to Dismiss on May 27, 2024, but the Court provided Complainant with a courtesy copy of the motion to dismiss on May 28, 2024, when it issued the General Litigation Order.

<sup>2</sup> Normally, a party has ten days to reply, with an additional five days added if the filing is by mail. 28 C.F.R. §§ 68.8(c), 11(b). Because the Answer was served on April 24, 2024, the deadline to respond to Respondent’s affirmative defenses was May 9, 2024. However, Complainant appears to have received the Answer on May 27, 2024. Nevertheless, even taking into account the date Complainant received the answer, the request for an extension was received on June 12, 2024, sixteen days after Complainant received the Answer.

(2025) (citing Federal Rule of Civil Procedure (Fed. R. Civ. P.) 6(b) and 4B Wright & Miller, § 1165 (3d ed. 2002 & Supp. 2014)) (“[W]here the [extension] request is untimely made, the showing that must be made includes both good cause and excusable neglect.”).<sup>3</sup>

For the Court to find good cause, there must be “a demonstration of good faith on the part of the party seeking an enlargement of time and some reasonable basis for noncompliance with the time specified in the rule.” *Tingling v. City of Richmond*, 13 OCAHO no. 1324c, 2 (2021) (citations omitted). “Factors to consider in applying the excusable neglect standard are (1) the danger of prejudice to the non-movant, (2) the length of the delay and its impact on the judicial proceedings, (3) the reason for the delay (including whether the delay was within the control of the movant), and (4) the movant’s good faith.” *US Tech Workers et al. v. Oak Street Health*, 19 OCAHO no. 1574, 2 (2024) (quoting *United States v. Quickstuff, LLC*, 11 OCAHO no. 1265 at 5).

Taking into account Complainant’s pro se status, the Court finds that Complainant has satisfied both standards. There is little danger of prejudice to the Respondent because the approximately three-month delay is unlikely to affect the progress of the case, particularly given that Complainant appears to have filed this request only sixteen days after receiving the answer. *See In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 401 F.2d 143, 154 (3d Cir. 2005) (finding an eight-day delay in filing a motion to extend time to appeal “minimal”). Although Complainant’s filing is not entirely clear about the specific reason for his delay in requesting an extension, he does cite his pro se status, Resp. Mot. 1, 2, his personal financial circumstances, *id.* at 2-3, and the fact that English is not his native language, *id.* at 3. The Court also notes that his residence in Greece appears to have contributed to the delay. Moreover, Complainant appears to be asking for an extension in good faith. Under the circumstances, the Court finds these reasons to meet the standards.

The Court therefore GRANTS Complainant’s request for an extension of time to reply to the answer. The Court will not grant five months, however. Complainant must file his reply to the Answer by mail, with a courtesy copy sent by email by August 28, 2024.

#### B. Motion for Extension of Time to Oppose Motion to Dismiss

Respondent filed a motion to dismiss the case, arguing that the discrimination claims based on citizenship and nationality must be dismissed because Complainant is not an individual in a United States immigration status that the statute protects, and that Respondent is not covered by 8 U.S.C. § 1324b because of the number of employees. In its General Litigation Order, out of concern about

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<sup>3</sup> 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 <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

whether Complainant had received the motion to dismiss, the Court gave Complainant an extension of time to file an opposition to the Motion to Dismiss, setting a deadline of June 7, 2024. However, Complainant did not file this request for an additional extension until June 12, 2024, five days after the extended deadline.

Nevertheless, the Court finds that the Complainant has fulfilled the requirements for excusable neglect, for the reasons already explored above. The Court GRANTS Complainant's request for an extension of time to file an opposition to Respondent's Motion to Dismiss. Complainant must file his opposition by mail, with a courtesy copy sent by email by August 28, 2024.

The Complainant should limit his arguments in his reply to the motion to dismiss to the grounds articulated by Respondent, that is, that the case must be dismissed because Complainant is not an individual in a United States immigration status that the statute protects, and that Respondent is not covered by 8 U.S.C. § 1324b because of its size.<sup>4</sup>

### C. Motion to Stay

The Complainant states that Respondent hid from him the true reason he did not hire him, and that the "administrative employees of the US Department of Justice," which appears to be IER, did not have an opportunity to consider this. Resp. Mot. at 1-2. He asks this Court not to make a decision until IER issues an opinion on the matter, and to "forward the objections of the Employer and my present response to these objections to the administrative employees of the US Department of Justice for evaluation, making judgments and taking action when necessary." *Id.* at 2.

IER receives a copy of all filings in this and any case filed under 8 U.S.C. § 1324b, thus it is in receipt of the Answer, Motion to Dismiss and Complainant's submission. This Court has no authority to compel IER to reinvestigate the case, however. IER issued Complainant a letter notifying him that it closed its investigation. Compl. at 55-56. IER may seek to intervene in these proceedings at any time, and may continue to investigate a charge. 28 C.F.R. §§ 44.303(d) and (e). Thus far, IER has not done either. Given this, and the fact that the new facts do not bear on the issues presented to the Court by the motion to dismiss, the Court does not find good cause to stay proceedings. *United States v. Fresco Produce*, 19 OCAHO 1530, 4 (2024) (quoting, in part, *Monda v. Staryhab, Inc.*, 8 OCAHO no. 1002, 86, 91 (1998)) (A stay is warranted if there is "good cause" and, more specifically, if there is a "clear bar to moving ahead." ).

### III. MOTION TO AMEND COMPLAINT

In his motion, Complainant also appears to request to amend his complaint, first "ask[ing] to add one more violation on the part of the Employer" because "the Employer did not inform [Complainant] within a reasonable time the true reason for the refusal to hire," Resp. Mot. 1, and second, requesting to "sue LinkedIn as a co-defendant and seek compensation from LinkedIn and Support Your App for [his] inconvenience" because he was not aware that "the position was being offered only to those who were (or are) authorized to work in the United States," *id.* at 2.

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<sup>4</sup> The Respondent did not address the retaliation claim.

The Court interprets these requests as a motion to amend the complaint. Given the pendency of the motion to dismiss, the Court will not consider the motion to amend at this time, but will do so at the time it resolves the motion to dismiss.

#### IV. MOTION TO OPEN DISCOVERY

Complainant states that he “would like to know in more detail how exactly the employer came to the conclusion that [he] lack[ed] experience in customer support” and “why . . . [he was] initially informed only that, in the employer’s opinion, [he] was allegedly under US sanctions.” Resp. Mot. 2. This appears to be a request to begin discovery.<sup>5</sup>

In the General Litigation Order, this ALJ explained that she did not authorize the commencement of discovery given that the Respondent filed a motion to dismiss. Gen. Lit. Order 1. The Notice of Case Assignment (NOCA) for this case explained that the parties could “seek leave from the presiding [ALJ] to [begin discovery] through the filing of a motion.” NOCA 4. “OCAHO recognizes there may be situations in which . . . limited discovery” before the presiding ALJ has issued an order opening discovery “may be necessary—*e.g.*, to avoid the possible unintentional spoliation of evidence or to resolve a motion to dismiss that turns on a factual finding, such as one related to jurisdiction . . .” *Ferrero v. Databricks*, 18 OCAHO no. 1505, 7 (2023). That discovery may be granted upon a written request. *Id.*

The pending motion to dismiss raises whether Complainant falls under the definition of a protected individual for the purposes of citizenship discrimination, Mot. Dismiss 2-3, and whether Respondent falls within the statute because Respondent employed fewer than four individuals during the relevant period, Mot. Dismiss 3-4, *id.*, Affidavit. Although the Court would find limited discovery on either topic appropriate at this juncture, Complainant requests discovery on other factual issues, specifically Respondent’s reason for not hiring him. Resp. Mot. 1, 2. Because the proposed discovery does not relate to the factual issues relevant to the motion to dismiss, and a grant of any of the grounds of the motion to dismiss would limit the scope of the case, the Court DENIES Complainant’s request. The Court will adjudicate the motion to dismiss once it has been fully briefed.

#### V. MOTION TO BE PROVIDED AN ATTORNEY

Complainant also requests “that an attorney, lawyer [or] advocate be provided” to him. Resp. Mot. 2. Complainant states that he is unable to pay for attorney’s fees and explains his financial circumstances. *Id.*

“The Office of the Chief Administrative Hearing Officer does not have authority to appoint counsel.” 28 C.F.R. § 68.34; *see also* Notice of Case Assignment 3. The Court encourages Complainant to review paragraph 3 of the Notice of Case Assignment, which discusses

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<sup>5</sup> Discovery is the process by which the parties exchange information in preparation for a hearing. *Discovery*, Encyc. Britannica, <https://www.britannica.com/topic/discovery-law> (last visited July 31, 2024).

representation before this forum. Although this Court cannot provide Complainant with representation, it does encourage him to seek any pro bono resources that may be available to him.

IT IS SO ORDERED that Complainant's motions for extension of time to file a reply to the Answer and a reply to the Motion to Dismiss is GRANTED. Both replies must be submitted by August 28, 2024.

SO ORDERED.

Dated and entered on August 1, 2024.

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Honorable Jean C. King  
Chief Administrative Law Judge