

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

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

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 MOTION TO DISMISS

I. INTRODUCTION

This matter 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 13, 2022, Complainant Ali Talebinejad filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) asserting claims of discrimination based on citizenship status and retaliation arising under 8 U.S.C. § 1324b against Respondent, the Massachusetts Institute of Technology (MIT). After an extension of time, Respondent filed an answer to the Complaint on December 28, 2022.

This Order addresses Respondent's Motion to Dismiss the Complaint, filed on February 8, 2023. Complainant opposed the motion, filing its response on March 9, 2023. On March 23, 2023, Respondent replied in support of the motion.

On May 1, 2023, Complainant filed a Motion for Leave to File Sur-Reply in Opposition to Respondent's Motion to Dismiss, which Respondent opposed on May 11, 2023. The Court denied Complainant's motion on December 22, 2023. Respondent's Motion to Dismiss is fully briefed and therefore ripe for adjudication.

For the reasons discussed below, Respondent's Motion to Dismiss is granted in part and denied in part.

II. CONSIDERATION OF MATERIALS OUTSIDE THE COMPLAINT

As a threshold matter, the Court must determine which materials it may consider in resolving the motion to dismiss, as both parties have included documents outside of the Complaint with their briefing.¹

This question is intertwined with the nature of the claims pled and the basis of the opposition — a generic motion to dismiss, one not touching on questions of the Court’s jurisdictional basis to hear the claims, would traditionally be limited to the four corners of the complaint, any attachments filed along with the complaint, and any documents incorporated by reference or subject to official notice. Udala v. N.Y. State Dep’t of Educ., 4 OCAHO no. 633, 394 (1994) (“In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint.”); Fed. R. Civ. P. 10(c) (attachments to complaint and incorporations by reference); Compere v. Riordan, 374 F. Supp. 3d 163, 165 (D. Mass. 2019) (documents incorporated by reference). The court traditionally need not review documents outside of the complaint to decide that the complaint fails to state a claim under 28 C.F.R. § 68.10, or under the analogous Rule 12(b)(6) of the federal rules of civil procedure. This is because the purpose of a 12(b)(6) review of the pleading is to determine whether the pleading on its own, with all facts of the nonmoving party assumed as true, is sufficient to create a case which the plaintiff might win. Straying outside of the pleading runs the risk of converting the motion to dismiss into a motion for summary decision. That would be inappropriate, as the standards for summary decision are different from motions to dismiss, as well as premature — generally, motions to dismiss are filed before the parties have engaged in discovery.

By contrast, motions to dismiss for lack of subject matter jurisdiction routinely require the court to consider matters outside of the pleadings. *See* Younggil Kim Jung Windsor v. Captain Glen Landeen, 12 OCAHO no. 1294, 5 (2016); Fed. R. Civ. P. 12(b)(1) (the analogous dismissal for lack of subject matter jurisdiction under the federal rules of civil procedure). This is because the inquiry is not about the strength or weakness of the pleading, but whether the court is empowered to hear the matter at all. For this more fundamental question, due to reasons of judicial economy and the centrality of the issue to the litigants’ rights, the courts engage in a

¹ Respondent attaches to its Motion to Dismiss: 1) Keshavarz 2020–2021 H-1B Application (Mot. Dismiss Ex. A); 2) Keshavarz 2020–2021 H-1B Application Approval Notice (Mot. Dismiss Ex. A-1); 3) Keshavarz 2021–2022 H-1B Application (Mot. Dismiss Ex. B); 4) Keshavarz 2021–2022 H-1B Application Approval Notice (Mot. Dismiss Ex. B-1); 5) Keshavarz 2022–2023 H-1B Application (Mot. Dismiss Ex. C); and 6) Complainant’s Immigrant and Employee Rights Section (IER) Charge (Mot. Dismiss Ex. D). The Court notes that Exhibit D seems to be inadvertently labelled as Exhibit E on the Exhibit cover sheet. Mot. Dismiss 206. Respondent also provides URL links to: 1) USCIS Form I-129, H Classification Supplement to Form I-129, Section 1, Statement for H-1B Specialty Occupations and H-1B1 Chile and Singapore (<https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>); and 2) MIT Policies and Procedures Sections 9.3, 9.7, 7.1.3, 4.1, and 2.3.9. Complainant also attaches to its Opposition an affidavit from Complainant in support of the opposition.

more expansive review of any material which bears on the court’s jurisdictional basis to hear the claims.

Respondent’s Motion to Dismiss argues for dismissal both due to Complainant’s alleged failure to state a claim and due to the alleged lack of subject matter jurisdiction. Respondent argues that Complainant’s claims regarding course assignments prior to the Spring 2022 semester are time-barred under § 1324b(d)(3), and that Complainant has not adequately pled discrimination based on citizenship or retaliation. Respondent also asserts that this Court “lacks jurisdiction over [Complainant’s] allegations and they should be dismissed” because the decision to assign Dr. Keshavarz was an internal assignment and not a hiring. Mot. Dismiss 13.

Addressing the jurisdictional argument, Respondent’s contention that the court is not empowered to hear Complainant’s claims because they are internal reassignments rather than hirings or recruitments refers to 8 U.S.C. § 1324b(a)(1), which provides that it is an unfair immigration-related employment practice to discriminate against a protected 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” Respondent argues that § 1324b(a)(1)’s reference to hiring, recruitment, and termination limits the jurisdictional scope of cases which OCAHO may hear to solely the employment actions identified in the statute.

It is not clear whether § 1324b(a)(1)’s references to hiring, recruitment, or discharge create jurisdictional requirements, as opposed to elements of a claim.² In prior cases, the court has referred to claims regarding terms and conditions of employment, as opposed to hiring, recruitment, or discharge, as beyond the court’s jurisdiction. See Naginsky v. Dep’t of Defense, 6 OCAHO no. 891, 748, 780–81 (1996) (noting that “the only action properly before me is that of an employee’s termination from employment, not the conditions of employment as to which OCAHO jurisprudence confirms there is a lack of § 1324b jurisdiction,” and collecting cases referring to terms and conditions claims as “beyond the scope” of § 1324b).

But since those cases, the Supreme Court decided Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006), which addressed the statutory interpretation of jurisdiction in Title VII cases. In United States v. Mar-Jac Poultry, Inc., the court examined Arbaugh in the context of § 1324b, explaining that “a threshold limitation on a statute’s scope should be treated as jurisdictional only when the legislature clearly says that it is jurisdictional. When Congress does not rank a statutory limitation as jurisdictional, it should be treated as non-jurisdictional.” United States v. Mar-Jac Poultry, Inc., 10 OCAHO no. 1148, 6–7 (2012). “To decide whether a limitation is a jurisdictional rule or a claim-processing rule, we consider the statutory

² The court has previously considered which aspects of § 1324b constitute jurisdictional requirements, and which aspects constitute elements of a claim. See, e.g., United States v. Facebook, Inc., 14 OCAHO no. 1386b, 6–8 (2021) (considering whether the exceptions at § 1324b(a)(2) are jurisdictional); United States v. Mar-Jac Poultry, Inc., 10 OCAHO no. 1148, 6–8 (2012) (considering whether the “protected individual” requirement at § 1324b(a)(1)(A) is jurisdictional).

‘condition’s text, context, and relevant historical treatment.’” Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth., 4 F.4th 63, 70 (1st Cir. 2021) (quoting Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010)).

Like Title VII’s numerosity requirement in Arbaugh, § 1324b(a)(1) “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district court,” and “appears in a separate provision” from those granting jurisdiction to the ALJs. Arbaugh, 546 U.S. at 515; *see, e.g.*, § 1324b(a)(2) (enumerating those parties not subject to § 1324b(a)(1)), § 1324b(g)(2)(A) (authorizing ALJs to make final determinations of liability for any party “named in the complaint [that] has engaged in or is engaging in such unfair immigration-related employment practice”).

Insofar as Congress did not provide a “clear statement,” paraphrasing the language of Arbaugh, that hiring, recruitment, or discharge are jurisdictional requirements for § 1324b(a)(1), this Court declines to treat them in that manner. *See, e.g.*, United States v. Dávila-Reyes, 84 F.4th 400, 412 (1st Cir. 2023) (finding that a provision of the Maritime Drug Law Enforcement Act was not jurisdictional because the statutory text provided “no support for the conclusion that Congress intended the phrase ‘subject to the jurisdiction of the United States’ . . . to impose a limitation on the subject matter jurisdiction of courts,” nor “any basis for concluding that Congress’s use of the phrase constitutes the kind of clear statement required by Arbaugh to impose such a limitation”).

Consequently, the Court will consider, in the context of the motion to dismiss, the allegations in the Complaint and material incorporated by reference into or integral to the Complaint. More specifically, the Court will consider Dr. Keshavarz’s H-1B visa materials attached to the Motion to Dismiss (Exs. A–D) as incorporated by reference into the Complaint, as the Complaint references both Dr. Keshavarz’s visa and discussed Respondent’s obligations pursuant to the visa. The Court will also consider the Form I-129 referenced in the Motion to Dismiss as a government document subject to official notice, *see* Heath v. Tringapps, Inc., 15 OCAHO no. 1410d, 3–4 (2022), as well as MIT’s Policies and Procedures as incorporated by reference into the Complaint, *see* Compl. Ex. 4. However, the Court will not consider Complainant’s affidavit attached to his opposition to the Motion to Dismiss, as this document was not attached to, incorporated by reference into, or integral to the Complaint, nor subject to official notice.

III. FACTS

On a motion to dismiss, the Court considers all allegations of fact in the complaint as true and construes all reasonable inferences in the complainant’s favor. Udala, 4 OCAHO no. 633, at 394.

A. Background and Experience

Complainant is a United States citizen with a Ph.D. in Mechanical Engineering. Compl. 4; id. Attach. A, 1.

Complainant received his first teaching placement at MIT as a lecturer in the Mechanical Engineering (MechE) department in 2011. Id. Attach. A, 1. Complainant first taught course 2.086, Numerical Computation for Mechanical Engineers in the Fall 2017 semester, and again in Fall 2019 and Spring 2020. Id. at 1, 2.

B. Spring 2021 Semester

In October 2020, Professor Daniel Frey invited Complainant to apply to be a 100%-effort (full-time) lecturer for Course 2.086 in the upcoming Spring 2021 semester. Id. at 2. Complainant responded on October 26, 2020, by accepting the professor's offer to teach at 100%-effort for the Spring 2021 semester. Id.; Ex. 1. In response to Complainant's acceptance email, Professor Frey apologized for any confusion and informed Complainant that the Department Head contemplated "put[ting] another Professor in there with [Prof. Frey]," and so he asked that Professor Frey "wait for clarification . . . before committing to anyone." Id.

On November 30, 2020, Professor Rohit Karnik, the head of the MechE department sent an email announcing the teaching assignments for the Spring 2021 semester listing Dr. Bavand Keshavarz as the other 100% lecturer for course 2.086 along with Professor Frey. Id. Professor Frey emailed Complainant, noting that "there's a teaching staff member named Bavand Keshavarz who is on a visa specifying he has to teach each term, so that was considered the priority." Id.; id. Ex. 2.

Dr. Keshavarz had not previously served as a full-time lecturer for course 2.086 and, Complainant alleges, Dr. Keshavarz possessed less relevant professional experience than Complainant. Id. Attach. A, 1.

On December 3, 2020, Complainant emailed Professor Karnik to express his continued interest in teaching course 2.086 for the upcoming Spring 2021 semester, noting his status as a U.S. citizen. Id. Ex. 2. Professor Karnik responded that "[Complainant's] primary role at MIT [is] as a Research Scientist, and there is no agreement between [Complainant] and the department that guarantees a teaching role every year." Id.

On or around January 13, 2021, Complainant met with Professor Karnik via Zoom. Id. Attach. A, 3. Professor Karnik stated that "he did not believe MIT was obliged to offer [Complainant] the '100% effort' lectureship for course 2.086 based on citizenship." Id. Attach. A, 3.

Course 2.086 was ultimately staffed by three lecturers for the Spring 2021 semester. Id. The MechE department offered Complainant a quarter-time appointment for the 2.086 course in Spring 2021, which Complainant accepted. Id.

C. Fall 2021/Spring 2022 Semesters

On April 14, 2021, Complainant emailed Professor Karnik to reaffirm his interest in teaching course 2.086 in the Fall 2021 semester. Id. Ex. 3. Professor Karnik responded that there were “enough faculty available to staff 2.086 in Fall ’21,” but that he would keep him in mind if a need arose. Id.

Professor Keshavarz was appointed to teach course 2.086 for the Spring 2022 semester. Id. Ex. 4. Complainant emailed Professor Karnik, contesting this appointment. Id. Professor Karnik responded that there was enough staff for course 2.086 in the Spring 2022 semester. Id. Complainant responded that Professor Keshavarz was less qualified and not a U.S. citizen. Id.

On October 15, 2021, Complainant met with Professor Karnik and Human Resources (HR) “to discuss his concerns concerning hiring.” Id. Attach. A, 4. During the meeting, Ms. Mathias, the MechE Administrative Officer, told Complainant that MIT’s decision not to offer him the full-time lectureship was “not a reflection of [Complainant’s] credentials, skills, performance or feedback.” Id. She added that the personnel decision was made in compliance with MIT’s policies and requirements but offered no further explanation for Complainant’s repeated non-selection. Id. Following the meeting, Ms. Mathias sent an email documenting the meeting, including that HR “provided context about our ‘recurring’ teaching staff and non-recurring ‘ad-hoc’ teaching staff that we hire to meet unfulfilled or temporary needs.” Id. Ex. A, 24. Complainant then met with Professors Wang and Frey of the MechE department on November 3, 2021. During that meeting, Complainant reiterated his complaints regarding MIT’s hiring policies, highlighting details from USCIS’s Program for Combating Fraud and Abuse in the H-1B Visa. Id. Attach. A, 5; id. Ex. 5.

In January 2022, Professor Karnik approved Complainant for a quarter-time appointment for the 2.086 course for the Spring 2022 semester. Id. Attach. A, 5. Complainant rejected the appointment, citing his desire for a full-time lectureship. Id.; id. Ex. 6.

D. Fall 2022 Semester

In February 2022, Complainant emailed Professor Karnik stating that he would “like to apply for one of the 2.086 teaching positions for Fall 202[2],” noting his U.S. citizenship and his prior experience teaching the course. Id. Ex. 7. Professor Karnik responded on March 6, 2022, that “as of now we have enough professors teaching [2.086].” Id.

On or around August 31, 2022, the MechE Department offered Complainant a half-time lectureship for a different course during the Fall 2022 semester. *Id.* Attach. A, 5; *id.* Ex. 8. Complainant again rejected the offer, citing his desire for a “full-load teaching assignment.” *Id.*

E. Spring 2023 Semester

On October 3, 2022, Complainant emailed Professor Karnik expressing his “readiness and interest” in teaching 2.086 in Spring 2023. *Id.* Attach. A, 5; *id.* Ex. 8. Professor Karnik responded that there may be an opportunity for 2.671 in the spring—Complainant replied that this course did not match his interest or expertise, and asked about the status of course 2.086, and whether it would be taught by Professor Keshavarz. *Id.* Attach. A, 5; *id.* Ex. 8.

Complainant currently believes that Dr. Keshavarz continues to occupy the full-time lectureship for the 2.086 course and that MIT has repeatedly refused to appoint him to the same role based on his status as a United States citizen. *Id.* Attach. A, 5–6.

F. Email List Removal

On December 30, 2021, Complainant emailed Dr. Evelyn N. Wang, copying Professor Frey, asking about the date and time of a farewell event. *Id.* Attach. A; Compl. 11. He asked to be put back on the email lists for MechE seminars/talks and news, as he had been removed from all the MechE email lists by Joanne Mathias after he protested his removal from his “2.086 teaching job” in favor of Professor Keshavarz. *Id.* He argued that this removal was wrong and retaliatory, and that he had been on these email lists since he received his PhD from the MechE department. *Id.*

IV. LEGAL STANDARD ON A MOTION TO DISMISS

The court may dismiss a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10.³ This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 7 (2016)⁴ (citing *United States*

³ OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

⁴ 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 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>.

v. Spectrum Tech. Staffing Servs., Inc., 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1).

“In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint.” Udala, 4 OCAHO no. 633, at 394.

To meet OCAHO pleading standards, a complaint must contain “[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred.” 28 C.F.R. § 68.7(b)(3). Statements made in the complaint only need to be “facially sufficient to permit the case to proceed further,” Mar-Jac Poultry, Inc., 10 OCAHO no. 1148, at 10 (citations omitted), as “[t]he bar for pleadings in this forum is low,” United States v. Facebook, Inc., 14 OCAHO no. 1386b, 5 (2021). Section 1324b complainants must provide more than legal conclusions, but need not plead a prima facie claim of discrimination, to overcome a motion to dismiss. *See* Jablonski v. Robert Half Legal, 12 OCAHO no. 1272, 6 (2016) (“[A] § 1324b complaint must nevertheless contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination.”). To give rise to an inference of discrimination, complaints must include information that links the complainant’s protected class and the employment action in question. *See id.*; Sharma v. NVIDIA Corp., 17 OCAHO no. 1450, 5 (2022). Moreover, the evidentiary standards set forth in McDonnell Douglas Corp. v. Greene, 411 U.S. 492 (1971) do not apply in the motion to dismiss context. Heath v. Tringapps, Inc., 15 OCAHO no. 1410, 5 (2022).

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. Moreover, 28 C.F.R. § 68.1 directs that the Federal Rules of Civil Procedure may be used as a general guideline when the regulations or statute provide no direct guidance.

V. CONCLUSIONS OF LAW

A. Time-Bar: 8 U.S.C. § 1324b(d)(3)

Respondent argues that Complainant’s claims regarding course assignments prior to the Spring 2022 semester are time-barred under § 1324b(d)(3), which provides 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 with [IER].” *Id.* at 20–23.

“Filing a timely IER charge is . . . a condition precedent to the filing of a private action with OCAHO.” A.S. v. Amazon Web. Servs., Inc., 14 OCAHO no. 1381d, 14 (2020) (citing Ndzerre v. Wash. Metro. Area Transit Auth., 13 OCAHO no. 1306, 8 (2017)). “Claims, under § 1324b, based on events occurring more than 180 days prior to the filing of an IER charge are

ordinarily barred by operation of the law.” *Id.*; *see also* Dakarapu v. Arvy Tech, Inc., 13 OCAHO no. 1308, 4 (2018) (“[T]he statutory requirement that an unfair immigration related charge be filed within 180 days is a prerequisite for OCAHO cases.”) (citing Lundy v. OOCL (USA) Inc., 1 OCAHO no. 215, 1438, 1445 (1990)).

There are two typical exceptions to this timing requirement. “First, the Court may use equitable tolling to set aside an untimely filing with IER when the complainant shows “(1) that he has been pursuing [his] rights diligently, and (2) that some extraordinary circumstance stood in [his] way and prevented timely filing.” *A.S.*, 14 OCAHO no. 1381d, at 14 (alterations in original) (citing Ndzerre, 13 OCAHO no. 1306, at 8–9)); *see also* Tiplea v. Reynolds Elec. & Eng’g Co., Inc., 3 OCAHO no. 548, 1448, 1450 n.1 (1993) (noting that “fraudulent concealment of employee’s rights by the employer, employer acts which lulled employee into inaction, employee’s timely filing in the wrong forum, inadequate notice of the right to sue, court action which has misled the filing party into believing that it has complied with the court’s requirements, and facts which amount to ‘extraordinary circumstances’ have all been found to be a basis for equitable tolling”) (citations omitted). “Second, when a petitioner has filed a charge with the EEOC under 8 U.S.C. § 1324b, and it is determined to be the wrong forum or if the complaint is properly before the EEOC and involves a subsidiary question under OCAHO’s

jurisdiction, OCAHO may toll the statute of limitations.” *A.S.*, 14 OCAHO no. 1381d, at 14 (citing Caspi v. Trigild Corp., 6 OCAHO no. 907, 957, 964 (1997)).

As Complainant filed his charge with IER on March 25, 2022, claims occurring before September 26, 2021, are time-barred by 8 U.S.C. § 1324b(d)(3). OCAHO case law holds that “[f]or purposes of triggering the statute of limitations, an employment decision is made and communicated when the aggrieved party receives unequivocal notice of that decision, that is, when that party ‘knew, or reasonably should have known, that the adverse employment decision had been made’ by the employer.” Walker v. United Air Lines, Inc., 4 OCAHO no. 686, 791, 814 (1994) (citations omitted). Therefore, unless an exception applies, Complainant’s claims based on failure to hire for Course 2.086 for the Spring 2021 and Fall 2021 semesters are time-barred, leaving Complainant’s claims for discriminatory failure to hire for the Spring 2022, Fall 2022, and Spring 2023 semesters, given that Complainant received notice that he was not selected for these positions after September 26, 2021. *See* Compl. Exs. 4, 5, 8; C’s Opp’n 21.

Neither party asserts that either of the two typical exceptions to this bar apply in this circumstance, nor do facts supporting either of these exceptions appear in the Complaint. Instead, Complainant asserts that he alleges at least one discriminatory act within the 180-day limitations period, and that the continuing violation doctrine applies. *Id.* at 23.

“OCAHO caselaw specifically recognizes the theory of a ‘continuing violation’ of IRCA’s § 1324b, which has enabled complainant to offer proof that respondent had engaged in

uninterrupted conduct over a period of time, provided at least one (1) violation had occurred within the 180-day statutory limitation period.” Hammoudah v. Rush-Presbyterian-St. Luke’s Med. Ctr., 8 OCAHO no. 1050, 751, 772 (2000). “However, this doctrine does not apply to ‘discrete acts’ of alleged discrimination that occur on a ‘particular day’ . . . Instead, it applies only to claims that cannot be said to occur on a particular day and that by their very nature require repeated conduct to establish an actionable claim, such as hostile work environment claims.” Ayala v. Shinseki, 780 F.3d 52, 57 (1st Cir. 2015).⁵ “[T]he continuing violation doctrine is meant to protect plaintiffs from losing the ability to file suit for [] claims that might, by their nature, take time to materialize” as “Plaintiffs might not realize that a violation has occurred, or might not have sufficient evidence to support a [] claim until more than the general time limit to file their claims has elapsed.” Id. at 58. “This consideration is not applicable to discrete acts . . . which are easy to identify and immediately actionable.” Id.

Complainant alleges that he was not selected to teach Course 2.086 at 100% effort after he expressed interest for five consecutive semesters, and instead, Dr. Keshavarz was selected to teach the course at 100% effort each semester. These are easily identifiable instances of alleged discrimination based on failure to hire, and accordingly the continuing violations doctrine, based on the notion that the discrimination accretes over time rather than occurring as discrete acts, does not apply.

The Court also considers, as an alternate to the continuing violation theory Complainant advances, a continuing violation theory based on systemic violations, akin to a “pattern or practice” of discrimination. Thornton v. United Parcel Serv., Inc., 587 F.3d 27, 33 (1st Cir. 2009); *see also* 42 U.S.C. § 2000e-6 (authorizing suit in Title VII cases where a “pattern or practice” of discrimination is alleged). In a systemic discrimination case, the violations must occur “in the wake of some continuing policy, itself illegal[.]” By contrast, a “series of discrete discriminatory acts motivated by a discriminatory animus cannot be a systemic violation.” Id. (quoting Mack v. Great Atl. & Pac. Tea Co., Inc., 871 F.2d 179, 183 (1st Cir. 1989), and then quoting Megwinoff v. Banco Bilbao Vizcaya, 233 F.3d 73, 76 (1st Cir. 2000)). Here, Complainant has not alleged that Respondent had a discriminatory policy, but rather that the employer engaged in citizenship-based discrimination through its prioritization of its visa obligations to Dr. Keshavarz over Complainant with regard to teaching positions.

Complainant argues that Hammoudah stands for the proposition that a Complainant “can establish a violation which includes [an] earlier act if he or she can prove the later decision was the result of continuing discrimination having earlier origins and motivating the earlier decision as well.” C’s Opp’n 22. But that case relied on Seventh Circuit precedent and, as Respondent

⁵ “In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination.” Chellouf v. Inter Am. Univ. of P.R., 12 OCAHO no. 1269, 5 (2016).

notes, involved a hiring decision based on an allegedly discriminatory evaluation which occurred outside the limitations period. The Court does not find that this case constitutes persuasive authority in light of intervening Supreme Court and First Circuit case law which affirm that repeated discriminatory failures to hire constitute distinct discrimination claims.

Accordingly, Complainant's discrimination claims based on failure to hire for the Spring 2021 and Fall 2021 semesters are time-barred, and Respondent's motion to dismiss discrimination claims based on those hiring decisions is granted.

B. Citizenship Status Discrimination

Respondent argues that Complainant's citizenship status discrimination claim should be dismissed because (1) Respondent's decision to staff Dr. Keshavarz on Course 2.086 was an "internal assignment," and not a "hiring" under § 1324b(a)(1), (2) Respondent was under contractual and regulatory obligations to assign Dr. Keshavarz to a lecturer role, and (3) even if Dr. Keshavarz was hired instead of Complainant to teach Course 2.086, United States citizens are not entitled to preferential treatment over non-citizens. Mot. Dismiss 10–17. Respondent also argues that Complainant has not adequately pled his citizenship discrimination claim. *Id.* at 17. Specifically, Respondent asserts that Complainant has not alleged a nexus between the assignment of Dr. Keshavarz to Course 2.086 and Complainant's citizenship status. *Id.* at 17–20.

1. "Hiring" v. "Internal Assignment"

Respondent first argues that its decision to staff Dr. Keshavarz on Course 2.086 was an "internal assignment" and not a "hiring" under § 1324b. Mot. Dismiss 11. Complainant responds: (1) that he has adequately alleged that the appointment of Dr. Keshavarz to Course 2.086 was a "hiring" under § 1324b(a)(1), and not an internal assignment; (2) that the facts in this case are distinguishable from the cases cited by Respondent; (3) that Respondent's contention that this was not a "hiring" wrongly focuses on Dr. Keshavarz, rather than Complainant; and (4) that Respondent's argument is contrary to the wording and broad protections of § 1324b(a)(1). C's Opp'n 2–15.

The Court finds that Complainant has adequately alleged that Respondent's decision to staff Dr. Keshavarz on Course 2.086 constituted a "hiring" within the meaning of the statute. As stated above, 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 discharge of the individual from employment . . . in the case of a protected individual . . . because of such individual's citizenship status." 28 C.F.R. § 44.101(h) defines "hiring" as "all

conduct and acts during the entire recruitment, selection, and onboarding process undertaken to make an individual an employee.”

In A.S., 14 OCAHO no. 1381d, the court granted a motion to dismiss citizenship discrimination claims involving 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” under § 1324b(a)(1). 14 OCAHO no. 1381d, at 15. Specifically, the Court dismissed claims for a position to which the complainant applied which was “more akin to a promotion or the terms of conditions of employment than a new hire,” as “allegations related to denial of opportunities to transfer internally . . . fail[ed] to state a claim” Id.

However, unlike in A.S., the factual allegations in the Complaint are ambiguous as to whether Respondent’s decisions to have Dr. Keshavarz teach Course 2.086 full time in the Spring 2021 through Spring 2023 semesters constituted a failure to “hire” Complainant for the position. Specifically, it is unclear from the allegations what the nature of Complainant’s ongoing employment relationship with Respondent was, and therefore, whether the selection process for Course 2.086 falls under “conduct and acts . . . undertaken to make [Complainant] an employee.” *See* 28 C.F.R. § 44.101(h); Davis v. GTE Fl. Inc., 1997 WL 562114, at *4 (1997) (dismissing discrimination claim as based on conditions of employment when the complainant was “in a continuing employment relationship with Respondent”).

To be direct, it is unclear at this stage of the proceedings whether, each time Complainant was assigned to teach a class, that act constituted a term employment, one which would presumably end when the class ended, or whether his teaching employment relationship was an ongoing one, such that the teaching assignments could be more fairly characterized as appointments within an unbroken period of employment. *See, e.g.*, Compl. Ex. 2 (alleging that in the ten years since his “first teaching placement at MIT,” all of Complainant’s “appointments with [the] ME department have been as a ‘lecturer,’ NOT as a ‘Research Scientist,’” in contrast

to an email suggesting that “[Complainant’s] primary role at MIT [is] as a Research Scientist, and there is no agreement between [Complainant] and the department that guarantees a teaching role every year”). Communications from a MechE Administrative Officer suggest that, at least from the MechE department’s perspective, appointments of ad-hoc teaching staff constituted “hirings,” albeit for temporary teaching roles. *See id.* Ex. 4 (email differentiating between “recurring” teaching staff and “ad-hoc” teaching staff “that we hire to meet unfulfilled or temporary needs,” with the suggestion that Complainant fell into the latter category, and noting that Policy 2.3 states that “departments may appoint members to the instructional staff to provide supplementary teaching to meet unfulfilled or temporary needs” which are “for a definite term and carry no expectation of tenure of promotion,” clarifying that Professor Karnik was “authorized to make hiring decisions for teaching staff”).

In keeping with the Court’s obligation to draw all reasonable inferences in Complainant’s favor, *see Udala*, 4 OCAHO no. 633, at 394, the Court declines to dismiss Complainant’s citizenship status discrimination claim on this basis.

2. Contractual and Regulatory Obligations

Next, Respondent argues that it was under contractual and regulatory obligations to assign Dr. Keshavarz to a lecturer role. Mot. Dismiss 13–15. Complainant responds that Respondent’s alleged contractual obligations to Dr. Keshavarz are irrelevant to determining whether Respondent discriminated against Complainant based on citizenship status. C’s Opp’n 15–17.

Respondent does not specify why its H-1B visa obligations to Dr. Keshavarz warrant dismissal of Complainant’s discrimination claim. 8 U.S.C. § 1324b(a)(2)(C) provides an exception for § 1324b(a)(1) for

discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

But here, although Respondent argues that it had a “legal obligation” to assign Dr. Keshavarz to teach courses in the MechE department throughout his H-1B visa period, Respondent does not cite OCAHO case law addressing whether an employer’s decision to sponsor an employee for an H-1B visa creates an exception to its § 1324b(a)(1) obligations as discrimination “required in order to comply with law [] or regulation . . . or required by Federal, State, or local government contract.” *See also Facebook, Inc.*, 14 OCAHO no. 1386b, at 7 n.9 (finding that compliance with the permanent labor certification (“PERM”) process did not fall under the § 1324b(a)(2)(C) exception as “[t]he PERM process is not required by law, rather it is an elective process”).

Insofar as Respondent argues that a desire to comply with its H-1B visa sponsorship commitments constituted a legitimate, non-discriminatory reason for deciding not to appoint Complainant to Course 2.086, “the *McDonnell Douglas* burden-shifting framework does not apply at the motion to dismiss stage.” *Ackermann v. Mindlance*, 17 OCAHO no. 1462b, 9 n.9 (2023) (citation omitted). Accordingly, Respondent’s motion to dismiss on this basis is denied.

3. Preferential Treatment

Respondent argues that even if Respondent hired Dr. Keshavarz instead of Complainant to teach Course 2.086, United States citizens are not entitled to preferential treatment over non-citizens, contrary to Complainant’s assertions in his Complaint. Mot. Dismiss 15–16.

Complainant responds that a comparison of Complainant and Dr. Keshavarz's qualifications is more appropriate for a motion for summary decision. *Id.* at 17–19. The Court agrees that a comparison of Dr. Keshavarz' qualifications relative to Complainant is not appropriate at the motion to dismiss stage, and accordingly the Court declines to dismiss on this ground.⁶

4. Nexus

Respondent next argues that Complainant has not alleged a nexus between Respondent's decision to appoint Dr. Keshavarz to teach Course 2.086 and Complainant's citizenship status. Mot. Dismiss 17–19.

“[A] § 1324b complaint must [] contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination.” *Jablonski*, 12 OCAHO no. 1272, at 6. To give rise to an inference of discrimination, complaints must include information that links the complainant's protected class and the employment action in question. *See id.*; *Sharma*, 17 OCAHO no. 1450, at 5. However, the complaint need not establish the elements of a prima facie case under *McDonnell Douglas*, or any of the other proof schemes used in employment discrimination cases, to withstand a motion to dismiss. Consequently, discussions about the alleged absence of a nexus between the protected category (Complainant's citizenship status) and the adverse employment action (the nonselections) is inappropriate at the motion to dismiss stage. Nonetheless, the Court finds that Complainant has pled facts sufficient to demonstrate a cause of action. Complainant has alleged that Dr. Keshavarz, who Complainant alleges is neither a U.S. Citizen nor national, was selected for multiple job opportunities instead of Complainant. Complainant further contends that he is a U.S. Citizen and was better qualified than Dr. Keshavarz. One can readily infer from these facts that Complainant alleges he was not selected due to his citizenship. Accordingly, Respondent's motion to dismiss is denied on this ground.

5. Retaliation Claim

Finally, Respondent argues that Complainant has not adequately pled his retaliation claim. Mot. Dismiss 17. Specifically, Respondent asserts that Complainant has not alleged facts indicating that he was retaliated against for asserting his rights under § 1324b and, specifically, that Complainant has not alleged a causal connection between the protected activity he engaged in and an adverse employment action. *Id.* at 17–20.

The arguments related to the absence of a causal connection fail for the same reason as the objection to the citizenship discrimination claim — a party is not required to allege the

⁶ The Court notes per the statute and OCAHO caselaw, it is not an illegal act for an employer to prefer a United States citizen or national over a non-citizen or national if the two applicants are equally qualified. *United States v. Estopy*, 11 OCAHO 1252, 8 (2015) (citing 8 U.S.C. § 1324b(a)(1)(B)); *cf.* § 1324b(a)(4). However, as noted above, an actual comparison of Dr. Keshavarz' qualifications to Complainant's is inappropriate at the motion to dismiss phase, and is better left for summary decision or a hearing.

evidentiary elements of a prima facie case of retaliation to withstand a motion to dismiss. They need only offer facts from which one might make a reasonable inference that the Complainant was retaliated against because of his protected activity. To this, Complainant describes multiple instances in which he protested Dr. Keshavarz' hiring or appointment to teaching positions. Complainant further contends that during these instances, he informed Respondent that he believed these actions were taking place because of his citizenship status. Complainant referenced his own citizenship, Dr. Keshavarz' visa status, Dr. Keshavarz' alleged inferior qualifications, and USCIS. Complainant appeared to raise the issue of his teaching in the context of his citizenship regularly from December 2020 until fall 2022. Complainant applied to teach or otherwise advised Respondent of his interest in teaching, and Complainant was rejected from teaching Course 2.086 at 100% effort in October 2021, January 2022, March 2022, August 2022, and October 2022. Complainant also contends that in December 2021 he was removed from a MechE email list in retaliation for his complaints of discrimination; he alleges that the listserv alerted him to opportunities for professional development and connected him with his colleagues within the department.

Assuming the allegations in the Complaint as true, the Court concludes that Complainant has pled facts from which one might make a reasonable inference of retaliation. Complainant alleges that his protected activity, complaining to the administration about how he had been discriminated against due to his citizenship status by not being selected for teaching positions, preceded his nonselection for teaching positions in the next semester. Complainant also alleges that his complaints and the nonselections were relatively close in time to each other.

“[T]emporal proximity between an employer’s knowledge of a protected activity and the adverse employment action may alone establish causality. Ackermann, 17 OCAHO no. 1462b, at 12 (citation omitted). “[M]ere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action . . . may be deemed ‘sufficient evidence of causality to establish a prima facie case’ when the temporal proximity is ‘very close.’” Campbell v. Bristol Comm. College, 395 F. Supp. 3d 175, 190 (D. Mass. 2019) (quoting Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273–74 (2001)). “The First Circuit has held that a period of roughly a month may qualify as sufficiently close in time to establish a prima facie case.” Id. (citing Calero-Cerezo v. U.S. Dep’t. of Just., 355 F.3d 6, 25 (1st Cir. 2004)).

Given the continuing nature of Complainant’s protected activity, and its closeness in time to Complainant’s rejections, the Court finds that Complainant has adequately pled causation at this juncture. Accordingly, Respondent’s motion to dismiss on this ground is denied.

VI. ORDERS

It is SO ORDERED that Respondent's Motion to Dismiss is GRANTED as to claims of discrimination based on failure to hire for the Spring 2021 and Fall 2021 semesters; and

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss is otherwise DENIED.

SO ORDERED.

Dated and entered on October 29, 2024.

Honorable John A. Henderson
Administrative Law Judge