

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

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| US TECH WORKERS ET AL., | ) |                             |
| Complainant,            | ) |                             |
|                         | ) |                             |
|                         | ) | 8 U.S.C. § 1324b Proceeding |
| v.                      | ) | OCAHO Case No. 2024B00038   |
|                         | ) |                             |
| FIFTH THIRD BANK,       | ) |                             |
| Respondent.             | ) |                             |
|                         | ) |                             |

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Appearances: John M. Miano, Esq., for Complainant  
David A. Calles Smith, Esq., Sarah J. Millsap, Esq., and Amy L. Peck, Esq. for Respondent

ORDER DENYING MOTION TO CONSOLIDATE

I. BACKGROUND

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. On February 9, 2024, Complainant, US Tech Workers, et al., filed a complaint against Respondent, Fifth Third Bank, alleging that Respondent discriminated against it based on citizenship status in violation of 8 U.S.C. 1324b(a)(1).

On March 28, 2024, Respondent filed a motion to dismiss and a motion to stay the answer deadline pending a decision on the motion to dismiss. The Court granted the motion for a stay. US Tech Workers et al., v. Fifth Third Bank, 19 OCAHO no. 1550 (2024).<sup>1</sup>

On May 21, 2024, Complainant filed its Motion to Consolidate and for Leave to File a Consolidated Amended Complaint. Through the motion, Complainant requested that the Court consolidate the 42 complaints it filed against various employers alleged to have “collectively engaged in a recruitment program they called ‘Chicago H-1B Connect.’” Mot. Consolidate 2.

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<sup>1</sup> Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, serialim, of the specific entire volume. Pinpoint citations to COAHO precedents after volume eight, 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,” and on the United States Department of Justice’s website: <https://www.justices.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

Complainant argues consolidation is proper in this case for two reasons: (1) because liability in each case depends on the same question of law, specifically, whether the alleged “recruitment campaign” constituted recruitment discrimination in violation of 8 U.S.C. §§ 1324b(a)(1) and (3); and (2) because the Respondents “act[ed] in concert . . . all members are jointly liable [for] the consequences of any unlawful recruitment.” Id. at 3–5.

Respondent opposed the motion to consolidate, filing its opposition on May 28. Respondent argues that § 1324b does not authorize claims of civil conspiracy and that OCAHO’s practice manual permits consolidation where “the cases have identical factual circumstances, identical legal issues, and the evidence is ‘relevant and material’ to each issue in each case.” Resp. Mot. Consolidate 1–2 (quoting OCAHO Practice Manual 4.5(a)). Respondent argues that Complainant has not alleged common facts justifying a motion to consolidate, and at the pre-discovery phase of the litigation, it is impossible to know if there are common facts justifying consolidation of the cases. Id. at 2.

## II. LEGAL STANDARDS

OCAHO’s regulations allow for the consolidation of cases. *See* 28 C.F.R. § 68.16. Consolidation is warranted where “the same or substantially similar evidence is relevant and material to the matters at issue” in each case. Id. The decision to grant or deny a motion to consolidate is within the sound discretion of the trial court. Id. (“[T]he Administrative Law Judge assigned *may* . . . order that a consolidated hearing be conducted.”).

“When considering whether to consolidate cases, courts often consider factors such as the interest of justice, expeditious results, conservation of resources, and avoiding inconsistent result, and conversely, whether consolidation would risk confusion, delay, or prejudice.” United States v. Walmart Inc. (Bethlehem), 17 OCAHO no. 1475d, 8 (2023) (citing 8 MOORE’S FEDERAL PRACTICE § 42.13).

Similarly, when federal courts address the issue of consolidation of cases, “the existence of common questions of law and fact is a prerequisite for any consolidation.” Magnavox v. APF Electronics, Inc., 496 F. Supp. 29, 32 (N.D. Ill. 1980). If such common questions exist, it is then within the judge’s discretion to consolidate. King v. Gen. Elec. Co., 960 F.2d 617, 626 (7th Cir. 1992). When exercising this discretion, district court judges have weighed factors like those analyzed by OCAHO ALJs: “judicial economy, avoiding delay, . . . avoiding inconsistent results[,] . . . the possibility of juror confusion or administrative difficulties.” Habitat Educ. Center, Inc. v. Kimbell, 250 F.R.D. 390, 394 (E.D. Wis. 2008) (citing 8 MOORE §§ 42.10(4)(a), (5)).

## III. DISCUSSION

In the instant case, the Court finds that neither the Complaint nor the Motion to Consolidate sufficiently allege a common question of law or fact with Complainant’s other cases. For this reason and others discussed below, the Court denies Complainant’s Motion to Consolidate.

### A. The Complaint's Allegations Are Insufficient to Raise a Common Question of Fact

In ruling on the motion to consolidate, the Court must first answer the threshold question of whether a common question of law or fact exists across all the cases. The Court finds that Complainant's motion fails this initial consideration. The Court first addresses the lack of a common question of fact.

Complainant has alleged that each of the respondents, including the named Respondent in this instant matter, participated in a recruitment effort titled "Chicago H-1B Connect." Compl. 21–22. However, assuming for the purposes of this motion that this claim is true, it is insufficient to warrant having all the litigants' claims tried together.

This difficulty is in large part due to a lack of clarity about what Chicago H-1B Connect is, the respondents' relationship to the program, and how the respondents used it to recruit job applicants. The Court assumes, for the purpose of the motion, that Chicago H-1B connect is, as the Complaint describes it, a "coalition of Chicagoland companies who are willing to sponsor the H1-B visas for technology workers who have been displaced in the nationwide technology industry layoffs." Compl. 21.

The Court further assumes for the purpose of the motion that the instant Respondent, and the respondents in the other cases which US Tech Workers have filed, are participants in the H-1B Connect program.

However, these assumptions only advance Complainant's case so far. Complainant offers no argument or pleading describing how Respondent Fifth Third Bank or the respondents in other US Tech Workers cases participated in H-1B Connect, other than that the companies were receptive to sponsoring H-1B visa holders in the technology field. Complainant does not, for instance, assert that Respondent Fifth Third Bank posted a job vacancy through H-1B Connect, or that it received a referral from H-1B Connect, or that it preferred a non-US citizen or legal permanent resident over Nathan Overby, the applicant in the instant matter. Complainant offers no argument or explanation as to how Respondent Fifth Third Bank advertised its connection to H-1B Connect. Complainant is similarly short on details with regard to the other respondents' interactions with H-1B Connect.

Indeed, Complainant offers no explanation as to how H-1B Connect functioned at all, except to describe it as a "conspiracy by forty-three Chicago area employers to engage in an unlawful program of recruitment based on immigration status" which "by specifically targeting nonimmigrants in H-1B for employment . . . affirmatively discouraged protected individuals from applying for employment[.]" Compl. 22, 25. The obvious questions which arise from this sweeping claim are: How? In what manner? Involving whom? To this, the Complaint offers only a generic answer that "these employers continue [to] promote their targeted requirement[s] of H-1B nonimmigrants on a website,<sup>2</sup> through press releases, and through media interactions." *Id.* at 25.

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<sup>2</sup> The Complaint in the present matter, and in the other matters presently before this Court, includes a hyperlink identified as exhibit A which Complainant cites to support its claims of respondents' advertising practices involving H-1B Connect. As of the date of this Order, the hyperlink is not functional. See Complaint Ex. A

The motion to consolidate appears to presume that all companies who participated in H-1B connect operated in lockstep with regard to their recruitment and hiring practices for H-1B visa holders, or perhaps that these distinctions are immaterial because the very act of participating in a coalition deprived U.S. citizens and lawful permanent residents of job opportunities. However, this assumption cannot be supported given the significant factual differences among the complaints involving US Tech Workers.

For instance, in some cases Complainant fails to allege that a specific individual sought employment with Respondent for an open position, whereas in others (as in the case presently before this Court) the Complaint alleges a specific individual applied for an open, identifiable position.<sup>3</sup>

In the cases where an applicant did apply to an open position, some complaints allege the applicant was eventually interviewed for the position, while others allege the applicant was simply notified of their non-selection or failed to hear back from the employer altogether.<sup>4</sup> A complainant's having interviewed for a position presents a different factual scenario which would yield different testimony and evidence related to whether or not a particular respondent engaged in discrimination in hiring, as opposed to cases where no interview took place. Different discovery requests could be made, and different witnesses could be asked to testify at a hearing.

As the moving party on this motion, Complainant bears the burden of demonstrating sufficient factual questions to merit a consolidation of the claims. In this case, however, the pleadings and motion are short on facts, and where facts are present, they vary widely. Accordingly, the Court finds that Complainant has failed to make its burden.

#### B. The Complaint's Allegations Are Insufficient to Raise a Common Question of Law

The Court also finds that Complainant's motion fails to articulate sufficiently common legal questions to merit consolidation of claims. Complainant has not alleged a pattern or practice of discrimination, or an adverse impact case, whereby a common policy or procedure either intentionally or unintentionally works to disfavor a protected group. To the extent Complainant argues an advertising discrimination claim, whereby an employer expresses a preference in an

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(<https://gotechchicago.com/h1b/>). The Complaint does not include a printed copy of the information identified in the hyperlink.

<sup>3</sup> Cf. Water Saver Faucet and Zebra Techs., Co. complaints (alleging no applicant) with Fifth Third Bank complaint (naming specific applicant and position applied for).

<sup>4</sup> The Walgreens complaint alleges that John Donaldson applied for the position of "Software Engineer - Mobile App Testing," and that he participated in a telephone interview for the position. Likewise, the Boston Consulting Grp. complaint alleges that John Robert applied for the position of "TDA/Platinion Core Technology Senior IT Consultant," and that he was interviewed for the position in February 2023. By contrast, the Caterpillar, Discovery Financial Services, W.W. Grainger, Rheaply and TransUnion, LLC complaints all allege that the applicant was informed of their non-selection by the respondent. Meanwhile, the Fifth Third Bank, Avant, Calamos Investments, Deere & Co., Illinois Tool Works, Inc., and U. Chicago complaints allege that the respondent only acknowledged the application's receipt or failed to respond altogether.

advertisement for or against protected persons in the context of § 1324b<sup>5</sup>, the pleading itself does not include facts supportive of this claim, and as described above the respondents' advertising through H-1B Connect is opaque at best. Complainant similarly offers no direct evidence in its complaints of discriminatory intent.

The Court therefore presumes, in the absence of other argument or evidence, that Complainant intends to proceed on these claims using the disparate treatment theory of liability, reliant on the McDonnell-Douglas prima facie proof scheme.

A prima facie case of discrimination in hiring requires a complainant to prove that there was an open position for which they applied and were not selected. See Zajradhara v. Gig Partners, 14 OCAHO no. 1363c, 7 (2021); Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle, 3 OCAHO no. 550, 1454, 1474 (1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Therefore, in the cases in which Complainant failed to allege there was either an open position or an applicant, different evidence and testimony would likely be necessary for Complainant to meet its burden as opposed to the cases in which an open position and applicant were alleged in the complaint.

The resolution of these respective matters, then, appears to not rest on “the same or substantially similar evidence.”

These allegations of conspiracy fail to raise a common question of law or fact. Accordingly, they cannot serve as a basis for consolidating these matters.

### C. Respondents' Answers Support the Idea that the Questions of Law and Fact are Unique in Each Case

In addition to the differences noted across the complaints, the respondents' respective answers also possess important distinctions—most notably the unique affirmative defenses they raise. The fact that the respondents would rely on different theories to challenge the same allegations of discrimination in recruitment/hiring supports the idea that the facts surrounding the allegations in each case are different, which weighs against consolidation.

In one case the respondent has challenged the allegations of discrimination by stating that the position for which the Complainant applied was never filled,<sup>6</sup> while others contend that no foreign citizens were hired for the position in question.<sup>7</sup> These defenses, if proven, would prevent a court from finding a complainant's non-selection was based on their citizenship-status, as the

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<sup>5</sup> The Court expresses no opinion in this order on whether § 1324b permits a cause of action for advertising discrimination, similar to Section 704(b) of Title VII's prohibition on discriminatory advertisements. See 42 U.S.C. § 2000e-3(b). The parties have not briefed the issue, and the complaints' lack of clarity on the actual advertising efforts of the respondents relative to H-1B Connect, among other things, prevent the granting of the motion to consolidate. The Court reserves for another day the scope of § 1324b with regard to advertising discrimination.

<sup>6</sup> U. Chicago answer, 6.

<sup>7</sup> W.W. Grainger answer, 3; Calamos Investments answer, 6.

complainant could not point to an individual from a different citizenship-class than their own who was selected for the position.

Conversely, other respondents have contended that discrimination could not have occurred because the complainant who applied was not qualified for the advertised position, or the complaint failed to allege as much.<sup>8</sup> To succeed under this theory, respondents would need to provide evidence demonstrating the desired qualifications for the position as well as evidence demonstrating the complainant's qualifications were substandard. This type of evidence is clearly different from that required to show a position was not filled or was filled by a U.S. citizen and it would be unique to each respondent, as the qualifications for their respective positions were likely different.

Simply put, these cases present several individual questions of fact and law which are critical to determining the success or failure of Complainant's claim of citizenship-status discrimination.

#### D. Even If Common Questions of Law or Fact Existed, the Balance of the Relevant Factors Weighs Against Consolidation in this Case

As described above, when deciding whether to consolidate cases containing common questions of law or fact, courts look at several factors "such as the interest of justice, expeditious results, conservation of resources, and avoiding inconsistent result, and conversely, whether consolidation would risk confusion, delay, or prejudice." Walmart Inc. (Bethlehem), 17 OCAHO no. 1475d, at 8 (citing 8 MOORE'S FEDERAL PRACTICE § 42.13).

Consolidation is warranted where doing so would conserve judicial resources. In this case, consolidation would likely expend more judicial resources than if the matters remained separate. For instance, it appears likely that most of the remaining respondents will present unique legal arguments and evidence in their defense. Accordingly, the Court sees little opportunity to address overlapping discovery through consolidation, or to otherwise use the parties' and court's time more efficiently through consolidation at this phase of the proceedings. Insofar as Complainant offers differing circumstances with different applicants, the dispositive motions practice and hearings would likely address different matters, which again militates against consolidation. Further, the Court notes the practical difficulties in conducting a prehearing conference or evidentiary hearing where more than forty respondents are a party to the proceeding, each with their own agenda.

As a result, consolidating these cases would mean the Court would have to parse each order to make sure it rules in favor or against the correct parties, as well as indicating where other parties remain unaffected by the ruling. This would require more effort of the Court than if the cases remained separate, and it would also increase the risk for confusion and/or inconsistent rulings.

Further, Complainant has not argued that consolidation would serve the interest of justice; and the Court finds that it would not. Where a proposed course would increase the risk of confusion, delay, or inconsistency, justice demands that course of action be avoided, especially

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<sup>8</sup> Fifth Third Bank Mot. Dismiss, 5–6; Calamos Investments answer, 6; Walgreens answer, 6.

where there is no evidence that doing so would prejudice a party in any way. Therefore, on balance, the relevant factors weigh against consolidation in this case.

#### IV. CONCLUSION

Upon review, the Court finds that no common question of law or fact exists among the cases filed by Complainant, and that even if one did exist, the relevant factors still weigh against consolidating these cases. Accordingly, Complainant's Motion to Consolidate is DENIED.

SO ORDERED.

Dated and entered November 5, 2024.

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Honorable John A. Henderson  
Administrative Law Judge