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

December 4, 2024

US TECH WORKERS ET AL., Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00084
VALKYRIE TRADING, Respondent.	)	

Appearances: John Miano, for Complainant
Chris Mellee, for Respondent

ORDER ON MOTIONS

I. BACKGROUND

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Complainant, US Tech Workers, et al., filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 19, 2024, against Respondent, Valkyrie Trading. Complainant alleges that Respondent engaged in discrimination based on citizenship status in violation of 8 U.S.C. § 1324b(a)(1).

On May 13, 2024, Complainant filed a Motion to Consolidate and for Leave to File a Consolidated Amended Complaint. On May 23, 2024, Respondent filed a Motion to Dismiss, to which Complainant filed a Response on June 3, 2024.

On June 18, 2024, Respondent filed an Answer and Denial of All Allegations. Given that the regulatory deadline was June 6, 2024, Respondent's Answer was untimely, but in an order dated July 2, 2024, the Court found that Respondent had demonstrated good cause for its failure to file a timely answer, and accepted the Answer. *US Tech Workers et al. v. Valkyrie Trading,* 20 OCAHO no. 1591, 2 (2024).

The Court then issued a stay pending a resolution on the motions. *Valkyrie Trading*, 20 OCAHO no. 1591 at 3. As this Order addresses those motions, the stay is LIFTED.

II. COMPLAINT

Complainant alleges that Respondent engaged in discrimination based on citizenship status when Respondent, "collectively operating with other employers under the name 'Chicago H-1B Connect'" targeted its recruitment efforts toward persons in H-1B visa status.[1] Compl. at 21.[2] Specifically, Complainant argues that Respondent and other Chicago H-1B Connect members promoted their efforts to target workers in H-1B status along with other employers on the Chicago H-1B Connect website, in a press release, on Twitter, and in an Op Ed in Chicago Business. *Id.* at 21-22. Complainant filed similar claims against approximately forty other Chicago-area businesses.

The Complaint form contains a box where the Complainant answered in the affirmative to the question, "[w]ere you discriminated against because of your citizenship." Compl. at 6. Also checked in the affirmative is the question, "[d]id the Business/Employer refuse to hire you?" *Id*. In the box that asks for job title and duties Complainant indicates, "[s]ee attached charge for application details." *Id*. Also checked are the boxes asking whether Complainant was qualified for the job and whether the business employer was looking for workers. *Id.* The box asking when Complainant applied is left blank. *Id*. The boxes asking if the job remained open, whether the Business/Employer continued taking applications and whether someone else was hired for the job are also left blank. *Id.* at 7. Complainant is seeking lost wages as a remedy. *Id.* at 11.

In the attachment, Complainant alleges that by "specifically targeting nonimmigrants in H-1B for employment, Respondent affirmatively discouraged protected individuals from applying for employment and has engaged in unlawful discrimination based upon citizenship status." *Id.* at 22. Complainant then lists nine individuals as "injured parties," and asserts that they are all United States citizens. *Id.* at 23-24. The Complaint lists names of companies who are the "participants in the unlawful conspiracy." *Id.* at 29-35.

III. MOTION TO DISMISS

A. Position of the Parties

Respondent argues that the Complaint should be dismissed for failure to state a claim upon which relief can be granted. Mot. Dismiss 2. Respondent argues that the Complaint does not identify

[1] *See U.S. Tech Workers v. BMO Bank*, 20 OCAHO no. 1586b, 5 n.4 (2024) (taking notice of the U.S. Citizenship and Immigration Services' website's explanation of the H-1B visa classification).

[2] When citing the Complaint, the Court uses the PDF pagination rather than the numbering at the bottom of the page for the form.

any members of US Tech Workers who applied to work at the firm, does not state when they applied, and does not provide job titles or duties for which they applied.[3] *Id.*

In his response to Respondent's Motion to Dismiss, Complainant argues that 8 U.S.C. § 1324b(a) creates a cause of action for the whole pre-employment process, and not just the actual refusal to hire or recruit. Response 4. He states he is asserting a recruitment claim, citing *United States v. Lasa Marketing Firms.*, 1 OCAHO no. 141, 950, 971 n. 21 (1990). *Id.* He details various media articles, press appearances, releases, websites and posts on social media where the purpose of Chicago H-1B Connect was described as "a means to hire H-1B workers." *Id.* at 6-10. Further, Complainant argues that making a formal job application is not necessary to establish discrimination when such an application would be a "futile gesture." *Id.* at 3 (citing *Mid-Atlantic Reg'l Org. Coal v. Heritage Landscape Servs.*, 10 OCAHO no. 1134, 11-12 (2010)). Complainant argues that the Complaint pleads the elements of civil conspiracy, which is "not a distinct tort but rather a method of establishing joint liability." *Id.* at 12.

B. Motion and Pleading Standards

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc*., 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10.[4] 28 C.F.R. § 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing*, 12 OCAHO no. 1291, at 8; *see* 28 C.F.R. § 68.1 (providing that "[t]he Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings). When considering a motion to dismiss for failure to state a claim, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing*, 12 OCAHO no. 1291, at 8 (quoting *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO no. 638, 428, 436 (1994)). OCAHO's Rules of Practice and Procedure require the complaint to 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). Motions to dismiss for failure to state a claim are generally disfavored and will only be granted in extraordinary circumstances. *United States v. Split Rail Fence Co., Inc.,* 10 OCAHO no. 1181, 6 (2013) (CAHO declined to modify or vacate interlocutory order) (citing *Lone Star Indus., Inc. v. Horman Family Trust,* 960 F.2d 917, 920 (10th Cir. 1992); and then citing *United States v. Azteca Rest., Northgate,* 1 OCAHO no. 33, 175 (1988)).

OCAHO's Rules of Practice and Procedure provide, as relevant here, that complaints shall contain: (1) "A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated"; (2) "The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred"; and (3) "A short statement containing the remedies and/or sanctions sought to be imposed against the respondent." 28 C.F.R. § 68.7(a)-(b).

[3] The Court notes that in its Answer, Respondent states that "[o]f the named members of US Tech Workers, only John Robert . . . applied for a job at Respondent" and that this individual applied for a position titled "Support Engineer" in February 2023. Answer 3.

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

"Statements made in the complaint only need to be 'facially sufficient to permit the case to proceed further,' . . . as '[t]he bar for pleadings in this forum is low.'" *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 3 (2022) (quoting *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012), and then quoting *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021)). "[P]leadings are sufficient if 'the allegations give adequate *notice* to the respondents of the charges made against them.'" *Id.* (quoting *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003)); *see generally Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9-10.

While there is no requirement in a case pursuant to § 1324b that a complainant plead a prima facie case, a § 1324b complaint must nevertheless contain sufficient minimal factual allegations to satisfy 28 C.F.R. § 68.7(b)(3) and give rise to an inference of discrimination. *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016).

C. Analysis

1. Recruitment

The Administrative Law Judge in *US Tech Workers v. BMO Bank* analyzed a virtually identical Complaint and found that Complainant did not plead sufficient facts to state a claim for recruitment discrimination. *BMO Bank*, 20 OCAHO no. 1586b, 12-13 (2024). I agree with the decision and also find that Complainant did not plead sufficient facts to state a claim upon which relief can be granted.

In addressing the parties' arguments, I add the following analysis for consideration. Section 1324b provides, "[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…because of such individual's citizenship status" (emphasis added). 8 U.S.C. § 1324b(a)(1). As noted in *BMO Bank*, OCAHO ALJs have only occasionally addressed recruitment discrimination in § 1324b cases. *BMO Bank*, 20 OCAHO no. 1586b, at 10. Where recruitment discrimination has come up, it has either been in cases brought against recruitment firms,[5] or considered in the context of a broad understanding of the hiring process when looking at hiring discrimination claims.[6] It is unclear whether Complainant is asserting the former-discrimination against a recruitment firm, or the latter-discrimination in hiring; specifically, in the recruitment process. *See* Response at 3.

[5] *See, e.g. Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272 (2016); *Lasa Mkt.*, 1 OCAHO no. 141, at 962 (the parties stipulated that Respondent recruiting company was "a covered entity under § 1324b . . . because . . . it is a recruitment or referral for a fee entity . . . .").

[6] *See, e.g. United States v. Facebook,* 14 OCAHO no. 1386b, 8 (2021). OCAHO cases have long held that it is the entire selection process, and not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment. *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 442-43 (1999) (citing *Lasa Mtk.*, 1 OCAHO no. 141, at 971 n. 1); *Mid-Atlantic Reg'l Org. Coal*, 10 OCAHO no. 1134, at 7-8 (citing *Iron Workers Loc. 455 v. Lake Const. & Dev. Corp.*, 7 OCAHO no. 964, 632, 681 (1997)).

The statute does not define hiring, or recruitment or referral for a fee, but the regulations address both terms. 28 C.F.R. § 44.101(h) explains that "[h]iring means all conduct and acts during the entire recruitment, selection, and onboarding process undertaken to make an individual an employee." By contrast, 28 C.F.R. § 44.101(l) defines "[r]ecruitment or referral for a fee" by explaining that the phrase "has the meaning given the terms 'recruit for a fee' and 'refer for a fee,' respectively, in 8 C.F.R. 274a.1, and includes all conduct and acts during the entire recruitment or referral process." 8 C.F.R. § 274a.1, in turn, provides,

> "recruit for a fee means the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employment for that person, for remuneration whether on a retainer or contingency basis; however, this term does not include union hiring halls . . . ."

One ALJ found that the "regulations . . . require both a recruitment and a referral for a fee for each individual in order to establish a cause of action as to recruitment for a fee." *United States v. Schwartz*, 5 OCAHO no. 760, 310, 311 (1995).[7]

Here, Complainant did not plead most of the elements that would satisfy the minimum elements to state a claim for recruitment for a fee under 8 C.F.R. § 274a.1. Looking at the Complaint in the light most favorable to Complainant, Complainant alleges that Respondent was hiring, in the form of a checked box, but then does not identify any positions and does not indicate how or where these positions were advertised. In other words, Complainant does not allege that there was a *solicitation* to refer a *person* to another with the intent of obtaining employment for that person. The Complaint infers that there might be job postings at some point in the future. Further, there are no allegations regarding the arrangement between Respondent and Chicago H-1B Connect as the recruitment agency. Conversely, if Respondent and Chicago Connect are one in the same, there is again no allegation that either entity was recruiting for a fee; rather, the case is one of discrimination in hiring.

[7] OCAHO ALJs appear to apply the same or similar analytical steps to recruitment discrimination cases brought against recruiting firms as it does to hiring discrimination cases brought against employers. For example, in *Williams v. Lucas & Assocs*., 2 OCAHO no. 357, 423, 428 (1991), the ALJ first cites the landmark case that provides the burden of proof analysis utilized in both Title VII case law and OCAHO case law, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), then cites the four-part prima facie formula established in *McDonnell Douglas*: "(1) complainant must show that he or she belongs to a protected class; (2) that he or she applied for and was qualified for a position for which the putative employer was seeking applicants; (3) that despite being qualified, he or she was rejected; and (4) that pursuant to the rejection, the position remained open and the employer continued to seek applications from individuals having complainant's qualifications." *Id*. at 428 n.3. Similarly, where the discrimination occurred in the recruitment process, the ALJs cite the same prima facie standard, as well as an alternative: the individual must show that he is a member of a protected group, that he applied and was qualified for the job, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination. *Mid-Atlantic Reg'l Org. Coal*, 10 OCAHO no. 1134, at 7-8 (citing *Brown v. McLean*, 159 F.3d 898, 902 (4th Cir. 1998)).

Similarly, for most of the same reasons, the Complaint does not state a claim for failure to hire based on discrimination in the recruitment process. Complainant does not assert that there was a recruitment. Complainant checked the box that Respondent was hiring, but left blank any information regarding any jobs that were posted. Complainant identifies nine individuals who it asserts are protected individuals, but Complainant does not identify whether any of these individuals saw a job posting for Respondent, whether they would have been qualified or even interested in a position with Respondent, whether anyone was referred to Respondent, or whether anyone else was selected. Ultimately, there can be no inference of discrimination in recruitment when there is simply no action taken to recruit a person.[8]

2. Futility Doctrine

Complainant argues that under the futility doctrine the posting of an actual job application is not necessary, citing to *International Board of Teamsters v. United States*, 431 U.S. 324, 265 (1977) and *Mid-Atlantic Regional Organizing Coal*, 10 OCAHO no. 1134, at 11-12. Resp. Mot. Dismiss 14. In *Teamsters*, the United States Supreme Court held, in a Title VII case, that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." 431 U.S. at 365 (noting that potential applicants need not "subject themselves to the humiliation of explicit and certain rejection"). To merit relief under the futility doctrine, the nonapplicant plaintiff must meet "the not always easy burden of providing that he would have applied for the job had it not been for [the employer's discriminatory] practices." *Id.* at 368*; see Leskovisek v. Ill. Dep't of Transp.*, 305 F.Supp.3d 925 (C.D. Ill. 2018).

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[8] Title VII prohibits discrimination in advertising. This provision provides that it is an

> unfair employment practice for an employer . . . [or] employment agency . . . to print or publish or cause to be published any notice or advertisement relating to employment by such employer . . . or relating to . . . referral for employment by such employment agency . . . indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-3(b). While this specific provision is not found in § 1324b, recruitment in hiring could arguably encompass advertising. I do not purport to decide the contours of such a claim, but note that it likely would nevertheless have to both meet the elements of a claim under § 1324b, and a complainant would have to show that a person was injured by the advertisement, either as a matter of standing or in the merits of the case. *See Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir. 1972) (holding that a male plaintiff could state a justiciable § 2000e-3(b) claim against an employer that advertised for stewardesses under a "female only" column, but noting that the claimant "must be able to demonstrate that he has a real, present interest in the type of employment advertised…[and] he was effectively deterred by the improper ad from applying for such employment."); *see also Moeller v. District of Colombia*, 253 A.3d 165, 170 (D.C. 2021).

In *Mid-Atlantic Regional Organizing Coal*, the ALJ noted that resort to the futility doctrine was not necessary because § 1324b expressly prohibits discrimination in recruitment as well as hiring, including "any nullification or substantial impairment of employment opportunities, even in the absence of a final rejection." 10 OCAHO no. 1134, at 11 (citing to *Lasa Mkt.*, 1 OCAHO no. 141, at 971 n.21 (observing that active discouragement, based on citizenship, of complainant's attempt to apply for a position can substantially impair employment opportunity)). The ALJ then highlighted a number of cases where the employers had actively discouraged the plaintiffs from submitting applications. *Id.* at 11-12 (citing to *United States v. Gregory*, 871 F.2d 1239, 1241-42 (4th Cir. 1989) (female plaintiff did not formally apply for a deputy position because the employer explicitly said he did not hire women deputies); *Holsey v. Armour & Co.,* 743 F.2d 199, 208-09 (4th Cir. 1984) (employer had no black employees in sales jobs and actively discouraged blacks from applying for sales jobs)).

Here, Complainant did not plead that the "injured parties" would have "applied for the job had it not been for the practices." *Teamsters*, 431 U.S. at 368. Although Complainant does assert that by "specifically targeting nonimmigrants in H-1B for employment, Respondent affirmatively discouraged protected individuals from applying for employment," the Complaint lacks any factual support, such as that Respondent was actively recruiting, that the injured parties sought employment from Respondent, and were discouraged from applying. Compl. 26. Conclusory statements of law and fact are simply not enough to meet even the low pleading standard in this forum. I therefore find that the Complainant has not stated a claim upon which relief can be granted. However, for the reasons set forth in Part V, *infra*, I grant Complainant leave to amend the Complaint to address these deficiencies, and defer issuing a final order on the motion pending any amendments.

IV. MOTION TO CONSOLIDATE

In the Motion to Consolidate, Complainant seeks to consolidate all of the cases filed by U.S. Tech Workers against various firms who were alleged to have been involved in the Chicago H-1B Connect program. Mot. Cons. 2. Complainant asserts he filed a single charge against all the parties with IER, but IER asked him to file a separate charge against each respondent, and the right to sue letters were issued over a month and a half period. *Id.* Complainant states that the complaints involve the same facts, questions of law and concerted action and thus should be consolidated. *Id.* at 3. Complainant argues that "the question for this Court is whether a recruitment campaign like this, where employers band together to create a recruitment campaign to specifically hire H-1B aliens constitutes recruitment discrimination." *Id.* at 4. This allegation is the same for all cases, and thus should be consolidated. Further, while some complaints contain allegations that individuals made futile applications and other complaints do not, these differences create no distinction among Respondents as this was a concerted action creating joint liability. *Id.* at 5.

Respondent did not file an opposition to the Motion to Consolidate. Nevertheless, this Court has considered this motion in a number of other cases, and has determined that the motion does not meet the standards articulated in 28 C.F.R. § 68.16 and in OCAHO caselaw. *See US Tech Workers et al. v. Ulta, Inc.* 20 OCAHO no. 1595b (2024); *US Tech Workers et al. v. Fifth Third Bank*, 19

OCAHO no. 1550a (2024). For the reasons stated on those decisions, namely that there are insufficient common issues of law and fact across the various complaints, and that consolidation would be unlikely to create judicial efficiencies and eliminate confusion and delay, the Motion to Consolidate is DENIED.

V. LEAVE TO AMEND COMPLAINT

OCAHO's regulations provide that an ALJ may amend a pleading "[i]f a determination of a controversy on the merits will be facilitated thereby…upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties." 28 C.F.R. § 68.9(e). This rule is "analogous to and is modeled upon Rule 15 of the Federal Rules of Civil Procedure," a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1." *Talebinejad v. Mass. Ins. Tech.*, 17 OCAHO no. 1464a, 2 (2023) (citing *United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998)).

The Seventh Circuit Court of Appeals, the circuit where this cases arises, has repeatedly stated that "a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519-20 (7th Cir. 2015), citing *Luevano v. Wal–Mart Stores, Inc.,* 722 F.3d 1014, 1024 (7th Cir. 2013); *Bausch v. Stryker Corp.,* 630 F.3d 546, 562 (7th Cir. 2010); *Foster v. DeLuca,* 545 F.3d 582, 584 (7th Cir. 2008); *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 687 & n. 3 (7th Cir. 2004) (collecting cases)). "[N]otwithstanding the liberality with which leave to amend is freely granted under 28 C.F.R. § 68.9(e), this liberality does not extend to a proposed amendment that would not survive a motion to dismiss, the usual test for determining whether or not a proposed amendment is futile." *Jablonski*, 12 OCAHO no. 1272, at 7-8 (citing *United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 6 (2012), *Cf. Santiglia v. Sun Microsystems, Inc.,* 9 OCAHO no. 1097, 7 (2003)). If there is no reasonable possibility that amendment will cure a pleading defect, leave to amend need not be granted.

In Complainant's Motion for Leave to File a Consolidated Amended Complaint, it appears Complainant was seeking solely to amend the Complaint to add the other cases. As the motion to consolidate is denied, such an amendment would not survive a motion to dismiss. The Motion for Leave to File a Consolidated Amended Complaint is therefore DENIED.

I am cognizant of the dictates of the Seventh Circuit Court of Appeals, however, that complainants should be given one opportunity to amend deficient complaints. The practical difficulties of this action in OCAHO proceedings, however, were set forth by the CAHO in *US Tech Workers v. Slalom, Inc.*, 21 OCAHO no. 1617, 8 n. 5 (2024) (CAHO Order) (noting that OCAHO final orders are typically understood to conclude the ALJ's jurisdiction over the case but that OCAHO case law has contemplated the authority of ALJs to issue orders of dismissal with leave to amend). Therefore, while this Complaint is subject to dismissal, I am instead putting Complainant on notice of the deficiencies in the Complaint, and will allow Complainant one opportunity to file a motion to amend his complaint to correct the deficiencies in the Complaint discussed in section III above. *See Zajradhara v. Costa World Corp.*, 19 OCAHO no. 1546 (2024).

Accordingly, I will defer final resolution of the Respondent's Motion to Dismiss. Complainant's Motion to Consolidate the Complaint is DENIED, and to the extent the Motion to Amend the Complaint is solely to consolidate the Complaints, the motion is DENIED.

Complainant may file a motion to amend the Complaint by December 23, 2024. Respondent shall have 21 days after receipt of the motion to respond. If Complainant does not file a motion to amend the Complaint, the Court will issue a final decision on the Motion to Dismiss.

SO ORDERED.

Dated and entered on December 4, 2024.

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Honorable Jean C. King
Chief Administrative Law Judge