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

November 6, 2024

US TECH WORKERS ET AL., Complainant, v. MORNINGSTAR, INC., Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00100

Appearances: John M. Miano, Esq., for Complainant
Tejas Shah, Esq., for Respondent

ORDER DENYING MOTION TO CONSOLIDATE

I. PROCEDURAL HISTORY

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 April 23, 2024, against Respondent, Morningstar, Inc., alleging citizenship discrimination in hiring.

On May 6, 2024, the Chief Administrative Hearing Officer sent a Notice of Case Assignment for Complaint Alleging Unfair Immigration-Related Employment Practices and a copy of the Complaint (the "Complaint package") by United States Postal Service (USPS) certified mail to the Complainant. The Court resent the complaint package on July 3, 2024. Respondent asserted that it was served with the Complaint by certified mail on July 8, 2024. After this Court issued an Order to Show Cause, s*ee US Tech Workers et al. v. Morningstar, Inc.*, 20 OCAHO no. 1603a, 1 (2023),[1] Respondent filed its Answer To Complaint and Order to Show Cause which was accepted by this Court on October 22, 2024.

[1] Citations to OCAHO precedents after volume eight, where the decision has not yet been reprinted in a bound volume, include the volume and case number of the decision. Pinpoint citations 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

Relevant to this Order, Complainant filed a Motion to Consolidate, Stay Discovery, and for Leave to File a Consolidated Amended Complaint on July 30, 2024. After seeking an extension of time, Respondent filed a Response in Opposition to Complainant's Motion to Consolidate and for Leave to File a Consolidated Amended Complaint on September 10, 2024. Complainant's motion is denied.

II. POSITIONS OF THE PARTIES

Complainant seeks to consolidate all of the cases filed by US Tech Workers against forty firms that Complainant alleges "collectively engaged in a recruitment program they called 'Chicago H-1B Connect'" which was a recruitment effort "specifically targeted at hiring nonimmigrants in H-1B status" through a website, press releases, media interviews and social media. Mot. Cons. 2. Complainant asserts he filed a single charge against all the parties with the Immigrant and Employee Rights Section (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.* at 2-3. 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. He argues that this allegation is the same for all cases, and thus should be consolidated. *Id.* Further, while some complaints contain allegations that individuals made futile applications and other complaints do not, Complainant's position is that these differences create no distinction among Respondents as this was a concerted action creating joint liability. *Id.* at 5.

Respondent argues that consolidation is not appropriate because the underlying facts are unique to each Respondent. Opp. to Consol. 2. Respondent argues that the Complaint asserts discrimination on the part of Respondent, a factually unique claim that will turn on its unique posting, whether any of the "injured parties" applied or tried to apply for the posting, Respondent's hiring decision and recruitment process. *Id.* Respondent argues that it will be prejudiced as the time and cost spent on litigation will be substantially increased, proceedings will likely be delayed and consolidation would create confusion. *Id.*

III. DISCUSSION

A. Consolidation

OCAHO's regulations address consolidation in the context of hearings, and permit consolidation where "the same or substantially similar evidence is relevant and material to the matters at issue" in each hearing. 28 C.F.R. § 68.16. OCAHO Administration Law Judges (ALJs) have consolidated a number of cases when the cases involved common parties, issues, and/or witnesses. *See Guzman v. Yakima Fruit & Cold Storage*, 9 OCAHO no. 1063, 3 (2000) (collecting cases). "When considering whether to consolidate cases, courts often consider factors such as the interest

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of justice, expeditious results, conservation of resources, and avoiding inconsistent results, 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) (Matthew Bender 3d Ed., 2024)).

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's Federal Practice §§ 42.10(4)(a), (5) (Mathew Bender 3d ed., 2024)).

The Complaint alleges that the Respondent is liable for discrimination on the basis of citizenship status in violation of 8 U.S.C. § 1324b. Compl. 21 ¶ 2.[2] The Complaints assigned to the undersigned are substantially similar with the exception that some allege that individual applications were made to the company, as in this case, whereas others do not. The Answers filed in the cases differ substantially.[3]

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." 8 U.S.C. § 1324b(a)(1). In recruitment cases, OCAHO ALJs have applied the landmark case that provides the burden of proof analysis utilized in Title VII cases, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Williams v. Lucas & Assocs*., 2 OCAHO no. 357, 423, 428 (1991).

Thus, Complainant will have to first establish a prima facie case. Where the discrimination occurred in the recruitment process, OCAHO ALJs have required the individual to "(1) show [she] was a protected individual; (2) [she approached Respondent, a recruiting entity] and sought to apply for a position or be referred to an advertised position; (3) despite her qualifications she was not referred or considered; and (4) the Respondent [a recruiting entity] referred U.S. citizens and permanent resident for employment subsequent to the rejection of Complainant." *United States Tech Workers et al. v. BMO Bank*, 20 OCAHO no. 1586b, 11 (2024), citing *United States v. Lasa*

[2] The undersigned was assigned seventeen cases filed by the United States Tech Workers, and fifteen remain pending. Thus I only have authority to consolidate the following OCAHO case numbers: 2024B00068, 2024B00069, 2024B00070, 2024B0071, 2024B00072, 2024B00074, 2024B00075, 2024B00084, 2024B00086, 2024B00100, 2024B00101, 2024B00102, 2024B00103, 2024B00104, 2024B00105.

[3] For instance, the Answer in this case asserted a general denial of the allegations and put forth two defenses. *United States Tech Workers v. Reveal Data Corporation*, OCAHO no. 2024B00101, in contrast, addressed each allegation, and asserted twenty-seven defenses.

Marketing Firms, 1 OCAHO no. 141, 950, 965 n.15 (1990).[4] Once a prima facie case is established, Respondent may articulate a legitimate, nondiscriminatory reason for the employment action, and if it does, the Claimant must prove by a preponderance of the evidence that the articulated reason was false and the respondent intentionally discriminated against the claimant. *See Reed v. Dupont Pioneer Hi-Bred Int'l, Inc.*, 13 OCAHO no. 1321a, 3 (2019).

These factors will require evidence unique to each employer to include each employer's involvement in "Chicago H-1B Connect," whether there was a job posting, the nature of the job posting, the experience required and whether the applicant, if there was one, was qualified, who else applied and whether they were qualified, the recruitment process, knowledge of the applicants' status, and the reasons for the hiring decisions. Presentation and analysis of a legitimate non-discriminatory reason will likely be different for each company as evidenced by the diversity of answers, and thus discovery will be related to all these factors and will be unique to each employer. *See King v. General Elec. Co.*, 960 F.2d 617, 626 (7th Cir. 1992)(denying motion to consolidate where there were different allegations and violations occurred at different times); *Mabry v. Village Mgmt., Inc*., 109 F.R.D. 76, 80 (N.D. Ill. 1985) (denying motion to consolidate where the court found no common question of law and "no economies [were] likely to be achieved" by consolidation).

Further, consolidated proceedings would be unlikely to eliminate confusion or delay and result in judicial economy. The cases are in different procedural postures where some have pending motions to dismiss, and consolidation would delay progress on those that do not. A prehearing conference with all the cases and different counsel, or even with just the cases assigned to the undersigned, would likely be complicated and confusing, as would discovery and depositions, particularly as, again, the issues of law and fact are not common. This Court would need to ensure that each order accounts for the discreet issues raised by each company, a complex task.

B. Conspiracy

Complainant argues that the crux of the case is the conspiracy, and that the complaints together present one case of conspiracy to recruit based on citizenship status. Complainant appears to be proceeding under either a theory of civil conspiracy, where pursuant to an agreement between two or more actors to participate in an unlawful act, the injury caused by one of the parties creates liability for all, or joint liability, where, presumably, Complainant is alleging that each company acted in concert to produce a single injury. *See, e..g. Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (citing Restatement (Second) of Torts, § 875 (1976)). Complainant cites to state law to support the statement that it has pled the elements of civil conspiracy. Mot. Consol. 5. Complainant has not cited, nor has the undersigned found, any cases applying civil conspiracy in OCAHO's proceedings. OCAHO only has the jurisdiction prescribed by Congress in its enabling statute, and a claim under § 1324b is a statutory claim, not a tort. *See Patel v. USCIS Boston,* 14 OCAHO no. 1353, 3 (2020); *BMO Bank*, 20 OCAHO no. 1586b, at 6

[4] The Administrative Law Judge in *Lasa Marketing* noted that active discouragement of an attempt to apply for a position based solely on citizenship status would be a prohibited employment practice under § 1324b. *Lasa Marketing Firms*, 1 OCAHO no. 141, at 971 n.21 (1990); *Williams v. Lucas & Assocs.*, 2 OCAHO no. 357, 423, 433.

n. 7. *See also Great Am. Fed. Savings & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979) (no cause of action under 28 U.S.C. § 1985(3) exists for conspiracy to violate Title VII).

C. Joint Liability

OCAHO has held entities jointly liable. *See United States v. Burns and Intra-Continental Ent.,* 5 OCAHO no. 759 (1995); *United States v. Tech. Marine Maint. And Gulf Coast Workforce*, 13 OCAHO 1312b (2018). In such cases, a complainant must establish liability as to each Respondent. *See, e.g., Fillmore v. Page*, 358 F.3d 496 (7th Cir. 2004) ("[j]oint liability is appropriate only where all of the defendants have committed the negligent or otherwise illegal act, and so only causation is at issue."). However, the Complaint only asserts in a bald statement that concerted activity existed. Missing is how the companies acted in concert, such as what each entity's agreements, financial ties, procedures for recruitment were with Chicago H-1B, and relationships among the employers and whether they were common to all. Or that there was a common injury, given the presence of individual applicants for some but not others, and a dearth of allegations regarding how the other individuals listed in the Complaints were injured. Given the lack of detail, the Court does not find that a common issue of fact or law has been presented by these cases.

D. Conclusion

At this early stage, the undersigned does not exercise her discretion to consolidate the fifteen cases filed by United States Tech Workers assigned to her, and thus the Motion to Consolidate is DENIED. This is not to say that consolidation will never be appropriate; there may be instances as the litigation moves forward where consolidation might be appropriate, perhaps for certain limited purposes. As to 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. The Motion for Leave to File a Consolidated Amended Complaint is therefore DENIED.

SO ORDERED.

Dated and entered on November 6, 2024.

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Honorable Jean C. King
Chief Administrative Law Judge