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

February 6, 2025

US TECH WORKERS ET. AL., Complainant, v. NORTHWESTERN MEMORIAL HEALTHCARE, D/B/A NORTHWESTERN MEDICINE, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00070

Appearances: John M. Miano, Esq., for Complainant
Michael P. Palmer, Esq., 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 against Respondent, Northwestern Memorial HealthCare, d/b/a Northwestern Medicine, on March 19, 2024, alleging citizenship status discrimination in hiring.

On May 13, 2024, Complainant filed a Motion to Consolidate and for Leave to File a Consolidated Amended Complaint, to which Respondent filed an opposition on June 7, 2024. On June 24, 2024, Respondent filed a Motion to Dismiss and a Motion to Stay Answer Deadline and Further Proceedings. The Court granted Respondent's request for a stay of the answer deadline and further proceedings on July 11, 2024. *US Tech Workers v. Northwestern Memorial Healthcare*, 19 OCAHO no. 1566c (2024).[1]

[1] 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, seriatim, of the specific entire volume. Pinpoint citations to OCAHO 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

Complainant filed a Response to Respondent's Motion to Dismiss on July 12, 2024. Thereafter on July 19, 2024, Respondent filed a Motion for Leave to File a Reply in Support of its Motion to Dismiss, which the Court granted, followed by its Reply.[2]

II. COMPLAINT

Complainant alleges that Respondent engaged in discrimination based upon 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.[3] Compl. at 21.[4] 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." 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.

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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.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

2 Complainant filed a Response to Respondent's Motion to File Reply on August 27, 2024, which addressed the substance of the Opposition. The Court will construe it as a Reply that was filed without a motion for leave to file a reply.

3 *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).

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

III. MOTION TO DISMISS

A. Position of the Parties

Respondent argues that the Complaint should be dismissed for lack of subject matter jurisdiction because Complainant does not have standing to bring their claims since they have not alleged that any of the injured parties applied, that an application would have been a "futile gesture," or that they were "ready and able to apply." Brief Mot. Dismiss 2. Respondent also moves for dismissal for failure to state a claim upon which relief can be granted because Complainant does not state a recruiting or hiring discrimination claim. *Id.* at 3. Respondent argues that Complainant provides no details about any alleged job available at Northwestern Medicine, nor job postings, nor how many of the injured partes were qualified for such jobs and ready and able to apply for them. *Id.* Further, none of the promotional materials indicated that Respondent preferred H-1B workers or excluded citizens from job opportunities. *Id.* at 4.

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 4–5. He states he is asserting a recruitment claim, citing *United States v. Lasa Mkt.*, 1 OCAHO no. 141, 950, 971 n.21 (1990). Further, making a formal job application is not necessary to establish discrimination when such an application would be a "futile gesture." *See Mid-Atlantic Reg'l Org. Coal v. Heritage Landscape Servs.*, 10 OCAHO no. 1134, 11–12 (2010). Complainant argues that Chicago H-1B Connect was universally recognized as exclusively recruiting H-1B nonimmigrants, citing a number of periodicals and reports. *Id.* at 10–11. These efforts made it clear that US citizens need not apply, argues Complainant. *Id.* at 13. 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 18. Complainant argues that Chicago H-1B Connect is just a name that exists solely as the sum of its members and therefore cannot be sued. *Id.* at 19. As to standing, Complainant argues that the injury is so widespread that the potential pool of complainants extends to the entire class of US workers in specialty occupations, and that there is no need in these situations for an individual to apply, citing to *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 365 (1977). *Id.* at 20–22.

In its Reply to Complainant's Opposition to its Motion to Dismiss, Respondent argues that Congress explicitly expressed its intent that OCAHO comply with Article III standing requirements by limiting § 1324b claimants to those "*adversely affected* directly by an unfair immigration-related employment practice." 8 U.S.C. § 1324b; Reply 2. As to the claim of futility, Respondent argues that a complainant must allege that its hiring and/or recruiting practices "were so permeated with discriminatory animus against U.S. citizens that it would have been futile for them to apply." Reply 2. Respondent argues that its participation in Chicago H-1B Connect alone, which made clear that job postings were open to all, does not excuse them from doing so. *Id.* Lastly, Respondent argues that the Court does not have jurisdiction over Complainant's conspiracy, nor does the Complaint sufficiently allege a conspiracy. *Id.* at 2–3.[5]

[5] Complainant filed a Response to Respondent's Motion to Reply. The Complainant did not seek leave to file the Response. Per OCAHO Rules of Practice and Procedure, parties are not permitted to file a "reply to a response, counterresponse to a reply, or any further responsive document," unless authorized by an Administrative Law Judge (ALJ). 28 C.F.R. § 68.11(b). Thus, parties

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.[6] 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 Fam. 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).

"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).

"must seek leave of Court before filing a reply . . . ." *United States v. Space Expl. Techs. Corp.*, 18 OCAHO no. 1499a, 4 (2023) (citing *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1093, 7 (2003)); *see also Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362g, 4 (2024). As Complainant did not seek leave to file the responsive document, the Court will not consider it.

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

C. Analysis

This Court analyzed an almost identical Complaint in several other cases, and determined that Complainant had not stated a claim upon which relief can be granted. *See, e.g., US Tech Workers et al. v. Matter*, 19 OCAHO no. 1567b (2024); *US Tech Workers et al. v. The Northern Trust Company*, 10 OCAHO no. 1578b (2024). For the reasons stated in those decisions, I similarly 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 file a motion to amend the Complaint to address these deficiencies, and defer issuing a final order on the motion pending any amendments.

The Respondent in this case raised a unique standing argument that bears discussion, however. Respondent argues that Complainant does not have standing to bring the action because it did not allege that any of the supposedly injured parties suffered a "concrete and particularized injury that is fairly traceable to the challenged conduct." Brief, Mot. Dismiss 5 (citing *Carney v. Adams*, 592 U.S. 53, 58 (2020)).

The Federal Circuit has noted that "the starting point for a standing determination for a litigant before an administrative agency is not Article III, but is the statute that confers standing before that agency." *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999); *see also Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 614 (D.C. Cir. 1978) (Bazelon, J., concurring)). The statute provides that "any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person's behalf)" may file a charge. 8 U.S.C. § 1324b(b)(1). The regulations state that a charge may be filed by any injured party, and contain a definition of "injured party," which is "an individual who claims to be adversely affected directly by an unfair immigration-related employment practice." 28 C.F.R. § 44.101(i). The regulations do not define "adversely affected directly" and no OCAHO case law appears to comment on the term's scope.

Both the statute and the regulation specifically relate to filing a charge before the Immigrant and Employee Rights Section of the Department of Justice (IER) whereas the statute and regulations applicable to OCAHO do not contain any mention of who may file before OCAHO. 8 U.S.C. § 1324b(e); 28 C.F.R. §§ 68.2, 68.4. It is unclear whether this provision, then, is a determination that is solely within IER's authority to make as it reviews charges filed before it, or whether OCAHO ALJs may also consider whether a claimant has sufficiently alleged an injury.[7] To the extent that OCAHO's caselaw has considered standing, the cases generally turn on the fact that the complainant was not a "protected individual" as defined in § 1324b(a)(3). *See, e.g.*, *Labombarbe*

[7] ALJs have observed that for purposes of establishing liability under 8 U.S.C. § 1324b(a)(6), a complainant need not suffer actual harm, as an allegation that a respondent violated the statute is sufficient "injury." *United States v. Mar-Jac Poultry*, 12 OCAHO no. 1298, 28–29 (2017) (citing *United States v. Patrol & Guard Enters., Inc.*, 8 OCAHO no. 1040, 603, 625 (2000)). The ALJ's conclusion there rested on the idea that document abuse, like citizenship-status discrimination, "is inherently an unfair immigration-related employment practice" prohibited by § 1324b, in which case "the [unfair practice] itself is the injury." *Id.* at 29 (citing *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4–5 (2017)).

v. U.S. Air Force, 3 OCAHO no. 515, 1110, 1113 (1993) ("In order to be eligible to bring a claim of citizenship status discrimination under IRCA, a Complainant must be a 'protected individual' as defined at 8 U.S.C. § 1324b(a)(3)."); *Salazar-Castro v. Cincinnati Pub. Schs.*, 3 OCAHO no. 406, 86, 91 (1992) ("Only a 'protected individual' has standing to maintain an IRCA discrimination claim."); *Guth v. Kaiser Permanente Haw.*, 10 OCAHO no. 1190, 3 (2013) *Speakman v. Rehab. Hosp. of S. Tex.*, 3 OCAHO no. 469, 743, 746 (1992); *Omoyosi v. Lebanon Correctional Inst.*, 9 OCAHO no. 1119 (2005). In the wake of the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006), however, OCAHO ALJs have not considered this determination to be jurisdictional, but rather is an element to be proven on the merits. *United States v. Mar-Jac Poultry*, 10 OCAHO no. 1148, 7 (2012).

Under Title VII, an analogous statute, a charge of discrimination may be filed with the EEOC "by or on behalf of a person claiming to be aggrieved," 42 U.S.C. § 2000e–5(b), and a civil action for discrimination may be filed "by the person claiming to be aggrieved." § 2000e–5(f)(1). In *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000), the Seventh Circuit addressed whether employment "testers" who experience discrimination as they apply for jobs have standing to sue under Title VII, even if they are not truly interested in employment. The district judge had found that whether the complainants had made a "bona fide application" for a job was a statutory prerequisite to establish standing. The Court of Appeals found, however, that such an inquiry is not a matter of standing under Title VII, but rather went to the merit of the plaintiff's claim. The Court explained that where the reach of a statute is not clear, "the question whether a particular class is protected by it becomes just another issue concerning the merits of the suit." *Id.* Although this case was *pre-Arbaugh* as well, the point is well taken that when an issue is so intertwined with the merits of the case, and needs to be resolved to decide the issues in the case, that is where it should be resolved.

In this case, Respondent urges this Court to determine, as a matter of standing, whether Complainant's allegations that Respondent engaged in recruitment discrimination establish that Complainants were injured. Respondent goes further, and in rebutting Complainant's claim that an application is not required under the futile gesture doctrine, submits evidence in the form of an affidavit that Respondent posted three jobs on Chicago H-1B connect, but that these postings were not discriminatory as they were open to all. Reply Mot. Dismiss 6 & Ex. 1. Consideration of whether the futility doctrine applies to the campaign by Chicago H-1B Connect and Respondent's alleged involvement in it is inextricably intertwined with the merits of the case, which in turn tests the reach of the statute. Moreover, Complainants have asserted that they are a protected class, United States citizens, and that Respondent discriminated on the basis of citizenship status in violation of § 1324b. *See* § 1324b(b)(1); *US Tech Workers et al. v. BMO Bank*, 20 OCAHO no. 1586b, 6 n.7 (2024). The Court finds that this is sufficient to establish that they are protected under the statute, and thus declines to dismiss the case as a matter of standing.

IV. MOTION TO CONSOLIDATE AND FOR LEAVE TO AMEND

A. Position of the Parties

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 argues that consolidation is not appropriate because the underlying facts are unique to each Respondent. Opp. to Consol. 2. Respondent also argues that consolidation will prejudice Respondent by increasing the time and costs spent on litigation and delaying proceedings, and causing confusion. *Id.* Respondent argues that the motion is futile as a conspiracy claim is not a recognized cause of action under § 1324b. *Id.* at 10.

B. Consolidation

This Court has also considered this motion in a number of other similar 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 in 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. MIT*, 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 case 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 full 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 February 27, 2025. Respondent shall have twenty-one 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 February 6, 2025.

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Honorable Jean C. King
Chief Administrative Law Judge