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

August 21, 2020

ALVIN J. GRIFFIN, III, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00068
ALL DESERT APPLIANCES DBA, ADA REPAIR, INC., Respondent.	)	

ORDER ON MOTIONS AND DISMISSING COMPLAINT IN PART

I. BACKGROUND

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Respondent, All Desert Appliances d/b/a ADA Repair, Inc., hired Complainant for a temporary contract on August 3, 2016. Am. Compl. at 3. To verify his employment eligibility, Complainant presented his social security card and an expired driver's license. Complainant alleges that he did not know his driver's license was expired and Respondent refused to permit him to present other documentation to verify his employment eligibility. *Id.* at 4. Respondent terminated Complainant on August 10, 2016, because his driver's license had expired. *Id.* On August 22, 2016, Complainant filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that Respondent discriminated against him based on his disability. *Id.* The EEOC issued a Notice of Suit Rights on January 19, 2017. On July 29, 2017, Complainant filed a discrimination charge against Respondent with the Nevada Equal Rights Commission. In August 2017, the Nevada Equal Rights Commission transferred the charge to the EEOC and the EEOC issued a Notice of Suit Rights in November 2017. Am. Compl. at 4–5. Complainant filed a charge with the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER) on March 25, 2020. Compl. at 3. IER determined that Complainant's charge was not timely filed and dismissed the charge on April 13, 2020. IER Letter of Determination. On April 21, 2020, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent discriminated against him based on his citizenship status, engaged in document abuse, and retaliated against him. Respondent filed an answer on May 29, 2020. Complainant filed a Reply to Respondent's Answer on June 8, 2020.

On June 9, 2020, the undersigned issued an Order to Show Cause requiring Complainant to show cause why his complaint should not be dismissed for failure to timely file an IER charge. On June, 12, 2020, Complainant filed a Motion to Amend his Complaint and Motion for Protective Order. Respondent did not file a response to the motions. On June 29, 2020, Complainant filed Exhibits in Support of the Complaint and Response to Show Cause, and on June 30, 2020, Complainant filed a response to the show cause order.

II. DISCUSSION

A. Motion to Amend Complaint

In the Motion to Amend Complaint, Complainant seeks to add detail to his complaint, which he says he was not able to in the Department of Justice complaint form. He also seeks to add a new allegation of retaliation that he asserts occurred after he filed his OCAHO complaint. Additionally, Complainant seeks to add claims under 8 U.S.C. § 1324a for violations of the employment eligibility verification requirements. The motion is a detailed recitation of his claims but it does not contain a new complaint. *See* Mot. Am. Compl. at 2–15. Respondent did not oppose the Motion to Amend Complaint.

The OCAHO Rules of Practice and Procedure permit a complainant to amend a complaint "[if] a determination of a controversy on the merits will be facilitated thereby" and "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) (2018). This rule is analogous to and is modeled after the Federal Rule of Civil Procedure 15(a), and accordingly, it is appropriate to look for guidance in federal case law to determine whether to permit requested amendments under Rule 15(a). 28 C.F.R. § 68.1; *see United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998); *United States v. Mr. Z Enters.*, 1 OCAHO no. 162, 1128, 1129 (1990).[1] Rule 15(a) provides that a party may amend his or her complaint once "as a matter of course" before a responsive pleading is served; after a responsive pleading is served, the "party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a). As Respondent filed an answer, the complaint may only be amended by leave of this court.

In the Ninth Circuit Court of Appeals, the circuit in which this cases arises, the propriety of a motion for leave to amend is generally determined by reference to several factors: (1) undue

[1] 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 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 in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the OCAHO website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders.

delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of S. California*, 648 F.2d 1252, 1254 (9th Cir. 1981). None of these factors appear to be present regarding his claims of discrimination, document abuse, and retaliation. The Motion to Amend Complaint was filed less than two months after the complaint. Complainant filed the original complaint using OCAHO's complaint form, which provides complainants with minimal space to allege their claims. Complainant states that his amended complaint alleges more facts supporting his discrimination, document abuse, and retaliation claims, including retaliation claims that arose after he filed his complaint. Respondent did not oppose the amendment or otherwise argue that no facts exist to make out a valid claim. *See Rosas v. Geico Casualty Co.*, 365 F.Supp.3d 1123, 1128-29 (D. Nev. 2019) ("An amendment is futile only if no set of facts can be proven under the amendment that would constitute a valid and sufficient claim."). Further, Respondent has had ample notice of Complainant's claims as he has filed claims against Respondent based on the same underlying facts in multiple forums. As such, the Court finds that Complainant's Motion to Amend the Complaint as to his discrimination, document abuse, and retaliation claims is GRANTED. As Complainant is *pro se* and the Motion to Amend Complaint contains detailed factual allegations supporting his claim, the undersigned will construe paragraphs 2–35 of the Motion to Amend Complaint as the Amended Complaint. Pursuant to the instructions below, Respondent should file an answer to the Amended Complaint within **thirty (30) days** of this Order. *See infra* Part III.

Additionally, in the Motion to Amend Complaint, Complainant seeks to add three new claims under 8 U.S.C. § 1324a, also known as the employer sanctions provision. Complainant states that he wants to bring to the Court's attention the violations Respondent committed on his Form I-9. He alleges that Respondent failed to prepare or make available for inspection his Form I-9, failed to properly complete section 2 of his Form I-9, failed to ensure that he properly completed section 1 of his Form I-9, and failed to properly reverify his employment eligibility after rejecting his driver's license.

While leave to amend is freely granted in this forum, leave may be denied if the amendment would be futile. *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 8 (2016). OCAHO has held that "[n]o private right of action or third party enforcement mechanism was included either in the employer sanctions provision or its implementing regulations, other than the right of an individual to submit a complaint to the [Department of Homeland Security] for investigation." *Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 3 (2003) (citing 8 C.F.R. § 274a.9(a)). Thus, a private individual does not have standing to file a complaint with OCAHO seeking remedies for alleged violations of § 1324a. *Id.* As such, Complainant does not have standing to bring claims under § 1324a for violations of the employment eligibility verification requirements and his Amended Complaint alleging such claims is futile. Complainant's Motion to Amend Complaint to add claims under § 1324a is DENIED.

B. Motion for Protective Order

Complainant seeks a protective order, stating that he seeks to prevent Respondent from further retaliating against him. He alleges that each time he has filed a charge or an action against Respondent, Respondent's agent, Macinkiewich, engaged in or initiated a retaliatory action.

Complainant cites 28 C.F.R. § 68.18(c) in stating that he seeks a protective order to protect him from annoyance, harassment, embarrassment, oppression, or undue burden or expense.

Section 68.18(c) provides, upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge (ALJ) may make an order that justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) The discovery not be had;
(2) The discovery may be had only on specified terms and conditions, including a designation of the time, amount, duration, or place;
(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery; or
(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters.
§ 68.18(c).

By its terms, section 68.18(c), authorizes ALJs to issue a protective order to protect a party from *discovery*-related matters. It does not authorize an ALJ to issue an order protecting a party from harassment or retaliation unrelated to discovery. *See id.* It is unclear what Complainant is asking the Court to do, but to the extent that he is seeking a no contact order, or an injunction to prevent Respondent from applying to the Nevada state court for a protective order against him, this Court has no authority to do so. As such, Complainant's Motion for Protective Order is DENIED.

C. Timeliness of IER Charge

Complainant alleges that Respondent discriminated against him based on his citizenship status and engaged in document abuse when it terminated him because he provided an expired driver's license for the purpose of verifying his employment eligibility. Respondent terminated Complainant on August 10, 2016. Exhibits in Resp. to Order to Show Cause (Exs. in Resp.), Ex. 4D. Complainant also alleges that Respondent retaliated against him in 2016, 2018, and 2020. Complainant filed a charge with IER on March 25, 2020. Complainant acknowledges he filed his IER charge related to his discrimination and document abuse claims outside the statutory period. Nonetheless, Complainant argues that the Court should find that equitable tolling applies to his IER charge.

1. Discrimination and Document Abuse

Section 1324b(d)(3) states, "No 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 the [IER]." IER's regulations and OCAHO's regulations also state that IER charges must be filed within 180 days of the violation. 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4. Timely filing a charge with IER is a prerequisite for filing a private action with OCAHO. *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 793 (1996) (citing *Bozoghlanian v. Hughes Radar Sys. Group*, 5 OCAHO no. 741, 148, 154 (1995)). Generally, the 180-day limitations

period begins to run from the time the individual is informed of his termination, which in this case was August 10, 2016. *Id.* at 793. Thus, to be timely filed, Complainant would have had to file the charge by February 6, 2017.

While an IER charge must generally be filed within 180 days of the violation, OCAHO has found that equitable modification may apply for those charges filed beyond the 180-day time limit. *Id.* at 794. However, equitable remedies are sparingly applied and "[d]iscrete acts of discrimination which occurred outside the statutory filing periods are thus ordinarily time-barred." *Sabol v. Northern Michigan Univ.*, 9 OCAHO no. 1107, 5 (2004) (citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)).

Complainant bears the burden of demonstrating that the Court should permit equitable tolling. *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 779 (1992). "Equitable tolling applies when the [complainant] is prevented from asserting a claim by wrongful conduct on the part of the [respondent], or when extraordinary circumstances beyond the [complainant's] control made it impossible to file a claim on time." *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999). Specifically, OCAHO has found that the filing period may be extended for periods during which:

(1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) the employer lulled the applicant into inaction during the filing period by misconduct or otherwise; or (3) the charging party timely filed his charge in the wrong forum. *Toussaint*, 6 OCAHO no. 892 at 794 (citing *Bozoghlanian*, 5 OCAHO no. 741 at 154–55). Complainant does not argue that the first two items apply. Instead, Complainant argues that his IER charge was timely filed because he timely filed charges with the Equal Employment Opportunity Commission (EEOC) and the Nevada Equal Rights Commission. In support, Complainant cites the Memorandum of Understanding (MOU) between the EEOC and IER for the proposition that his charge was timely filed with the EEOC and since the EEOC acts as an agent for IER to accept charges, his IER charge was also timely filed.

"[T]o prevent any loss of rights arising from the operation of a filing deadline against an individual who mistakenly files with the wrong agency, [IER] and EEOC have entered into a [MOU]." *Caspi v. Trigild Corp.*, 6 OCAHO no. 907, 957, 964 (1997). Under the MOU, IER and the EEOC each appointed the other "to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits." *Toussaint*, 6 OCAHO no. 892 at 794 (quoting MOU, 54 Fed. Reg. 32,499, 32,500 (1989)); *see* MOU, 63 Fed. Reg. 5518-01, 5519 (Feb. 3, 1998). The MOU ensures "that a party will not be penalized for selecting the wrong forum in which to file." *Caspi*, 7 OCAHO no. 991 at 1068.

Nonetheless, to be considered timely filed with IER pursuant to the MOU, an EEOC charge must still be filed within 180 days of the alleged unfair employment practice. *Toussaint*, 6 OCAHO no. 892 at 795. The MOU does not operate to render timely a charge filed with the appropriate agency years after the unfair employment practice occurred. *See* MOU, 63 Fed. Reg. 5518-01, 5519 (Feb. 3, 1998); § 1324b(d)(3); *Toussaint*, 6 OCAHO no. 892 at 795.

Complainant filed a charge with the EEOC alleging disability discrimination on August 22, 2016, twelve days after the alleged discrimination and document abuse. Reply Answer at 7. The EEOC issued a Dismissal and Notice of Suit Rights on January 19, 2017. Exs. in Response, Ex. 8H. Even if the statute of limitations was tolled while his 2016 EEOC charge was pending, the 180-day period recommenced on January 19, 2017, and expired on July 6, 2017. *Toussaint*, 6 OCAHO no. 892 at 794. Complainant filed his charge with IER more than two years later on March 25, 2020.

On July 29, 2017, Complainant filed a charge of disability discrimination with the Nevada Equal Rights Commission and Complainant alleges that the statute of limitations was also tolled pending this charge. He asserts that the limitations period for filing with the state agency is 300 days. He alleges that the Nevada Equal Rights Commission forwarded his charge to the EEOC on August 8, 2017, and the EEOC closed the case in November 2017. Resp. Order Show Cause at 5.

OCAHO case law states that the MOU between the EEOC and IER does not extend the 180-day charge filing period under § 1324b to 300 days for deferral states. *Walker v. United Air Lines, Inc.*, 4 OCAHO no. 686, 791, 822 (1994). Thus, although Complainant filed his charge with the Nevada Equal Rights Commission within the 300-day period, but beyond the 180-day period, his charge with the Nevada Equal Rights Commission does not extend the limitations period to make his IER charge timely. *Id.*[2] Further, even if the limitations period was tolled pending his first EEOC charge, that period ended on July 6, 2017, and his Nevada Equal Rights Commission charge was filed on July 29, 2017, several weeks after the limitations period to file a charge with IER ended.

Complainant also argues that he did not learn about IER until recently. However, "[m]ere ignorance of filing requirements does not justify equitable tolling." *Halim*, 3 OCAHO no. 474 at 780. "Even coupled with pro se status, lack of knowledge of proper filing procedure does not entitle a complainant to an extension of time." *Id.* at 781; *see Williams v. Deloitte & Touche*, 1 OCAHO no. 258 (1990) (ALJ refused to equitably toll a pro se complainant's filing of complaint four days after expiration of the filing period); *Grodzki v. OOCL*, 1 OCAHO no. 295 (1991) (ALJ did not extend the complainant's filing period for one day in the absence of a recognized equitable consideration). Here, the fact that Complainant did not know about IER or OCAHO until several years after the alleged discriminatory conduct is not grounds for equitably tolling the 180-day filing period. *Id.*

The Court finds Complainant filed his IER charge more than three and a half years after the alleged discrimination and document abuse. Thus, Complainant did not timely file his IER charge related to those claims. Further, Complainant has not established that the Court should

[2] Additionally, Complainant's charge with the Nevada Equal Rights Commission was transferred to the EEOC, and the EEOC issued a Notice of Suit Rights in November 2017. Complainant has not provided any argument as to why the Court should equitably modify the 180-day filing period for the period of time between November 2017 and March 25, 2020, when he filed his charge with IER.

equitably toll the § 1324b(d)(3) limitations period. As such, Complainant's claims of citizenship status discrimination and document abuse are DISMISSED.

2. Retaliation

Complainant alleges that Respondent engaged in multiple retaliatory actions after he filed charges in this matter. In his Amended Complaint, Complainant appears to allege that Respondent's retaliatory actions are continuing violations, or constitute a pattern or practice of retaliation.

Complainant alleges that Respondent terminated him August 10, 2016, and on August 22, 2016, he filed a charge with the EEOC alleging Respondent discriminated against him. In November 2016, Complainant alleges that he filed for state unemployment insurance benefits and, in that same month, Respondent learned of his EEOC charge. Resp. to Order to Show Cause at 7. He alleges that Respondent retaliated against him by providing false statements to the state unemployment insurance benefits agency in November 2016. *Id.* at 7.

Complainant then alleges that in April 2018, he filed a wrongful termination suit against Respondent in Nevada state court. *Id.* at 8. The day after Respondent was served with the Complaint and Summons, Complainant alleges that Respondent's agent, Macinkiewich, retaliated against him for filing the suit by filing an emergency application for protection. *Id.* at 9. He alleges that Respondent's agent filed the application to interfere with his lawsuit. *Id.* The Nevada state court granted the application for protection in June 2018, and in July 2018, Respondent was arrested for violating the protection order. *Id.* at 10.

Complainant also alleges that after filing his OCAHO complaint in April 2020, Macinkiewich applied for another emergency protection order in Nevada state court on June 15, 2020. *Id.* at 11. Additionally, Complainant alleges that on June 16, 2020, he was served with Macinkiewich's petition to declare Complainant as a vexatious litigant filed in Nevada state court. *Id.* at 12–13.

Despite Complainant's attempt to allege that his retaliation claim is timely for all of the alleged actions based on a continuing violation theory, the Supreme Court has held that each alleged retaliatory action is a separate and discrete action. *Morgan*, 536 U.S. at 114; *see Scott v. Gino Morena Enterps., LLC*, 888 F.3d 1101, 1112 (9th Cir. 2018). Each discrete retaliatory act "starts a new clock for filing charges alleging that act." *Scott*, 888 F.3d at 1112 (quoting *Morgan*, 536 U.S. at 113). Complainant alleges that Respondent engaged in four discrete retaliatory actions. To be timely, each separate retaliatory action must have occurred within the 180-day limitation for filing an IER charge. *See id.*; § 1324b(d)(3). Complainant did not file his IER charge until April 2020, thus, Complainant's allegations of retaliation occurring in 2016 and 2018 are not timely. § 1324b(d)(3). However, Complainant's retaliation claims related to the June 15, 2020, application for protection order, and the June 16, 2020, petition to declare Complainant as a vexatious litigant were timely filed.

As such, Complainant's retaliation claims for the retaliatory actions in 2016 and 2018 are untimely and are DISMISSED. Complainant's retaliation claims related to Respondent's Nevada state court filings in June 2020 are timely.

III. CONCLUSION

Complainant's Amended Complaint related to claims under 8 U.S.C. § 1324a is futile because he lacks standing to bring claims under § 1324a. Thus, Complainant's Motion to Amend Complaint related to claims under 8 U.S.C. § 1324a is DENIED. Complainant's Motion to Amend Complaint related to his discrimination, document abuse, and retaliation claims is GRANTED. The Court construes paragraphs 2–35 of the Motion to Amend Complaint as the Amended Complaint.

Complainant's Motion for Protective Order is DENIED. Additionally, Complainant's IER charge was not timely regarding his document abuse and discrimination claims, and Complainant did not establish that equitable tolling should apply. Thus, Complainant's discrimination and document abuse claims are not timely and are therefore DISMISSED.

Complainant's IER charge regarding retaliatory actions in 2016 and 2018 was not timely filed. However, Complainant's IER charge regarding Respondent's alleged retaliatory actions in June 2020 was timely filed. As such, Complainant's retaliation claims related to Respondent's alleged retaliatory actions in 2016 and 2018 are DISMISSED.

Respondent shall file an answer to the Amended Complaint within **thirty (30) days** of this Order. Respondent does not need to address the discrimination, document abuse, and retaliation allegations in the Amended Complaint that have been dismissed. Instead, Respondent need only answer the allegations pertaining to Complainant's retaliation claims for the alleged retaliatory actions in June 2020.

SO ORDERED.

Dated and entered on August 21, 2020.

_____

Jean C. King
Chief Administrative Law Judge