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

January 28, 2021

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| A.S.,<br>Complainant,<br><br>v.<br><br>AMAZON WEBSERVICES INC.,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | 8 U.S.C. § 1324b Proceeding<br>OCAHO Case No. 2020B00073 |

ORDER TO COMPLAINANT TO SHOW CAUSE AND INVITATION FOR AMICUS CURIAE FROM IMMIGRANT AND EMPLOYEE RIGHTS SECTION

## I. INTRODUCTION & PROCEDURAL HISTORY

This action arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b.

Complainant, A.S., alleges that Respondent, Amazon Web Services Inc. (Amazon), failed to comply with the provisions of § 1324b, which preclude certain employers from engaging in discrimination based on citizenship or immigration status. It also prohibits employer retaliatory actions following a protected activity.

On June 12, 2020, Complainant filed his Complaint.

On August 27, 2020, Respondent filed its Answer in which it denied the allegations contained in the Complaint.

Both parties submitted prehearing statements on October 3, 2020, and November 13, 2020, respectively. Parties are currently engaged in discovery. No dispositive motions have been filed.

Following a reassignment of the case, the undersigned ordered the parties to participate in a prehearing conference on December 16, 2020. During the prehearing conference, Complainant

confirmed he had engaged the Equal Employment Opportunity Commission (EEOC). Following that revelation, the Court ordered Complainant to produce "all correspondence he received from

the Equal Employment Opportunity Commission regarding the two matters identified during the Prehearing Conference." Order Memorializing Prehearing Conference 2. In compliance with that Order, Complainant provided two documents, an EEOC Form 5 (dated April 1, 2019), and an EEOC Form 5 (dated October 4, 2019). The provision of the two documents now gives rise to this Order to Show Cause.

## II. FACTS UPON WHICH ORDER TO SHOW CAUSE IS PREMISED

Complainant, a United States citizen, was employed by Respondent until September 30, 2019. Compl. 2, 8.[1] Respondent employs more than fifteen employees. Answer 4.

On April 1, 2019, Complainant filed a charge with the EEOC alleging discrimination based on national origin (among other categories) for disparate treatment during various instances spanning from December 2018 through April 2019. EEOC Form 5, 1, Apr. 1, 2019.

On May 20, 2019 Complainant allegedly applied for a specific internal position for which he was not selected. Compl. 7. According to Complainant, an "H-1B visa holder" was selected for the position. Compl. 7. On May 21, 2020, Complainant demonstrated awareness he was not or would not be selected for the position. Compl. 156.

Following the filing of this charge with the EEOC on April 1, 2019, Complainant continued employment with Respondent through September 30, 2019, on which date he was terminated. Compl. 8. Complainant asserted a rationale for his termination was both related to his status as a U.S. Citizen and was "retaliatory" in nature. Compl. 11.

On October 4, 2019, Complainant filed a second charge with the EEOC citing disability and reprisal, but not national origin for allegations spanning February 2019 through his termination on September 30, 2019. EEOC Form 5, Oct. 4, 2019. In this charging document, Complainant specifically stated "my supervisor retaliated against me on Sept. 30, 2019, [by] terminating my employment." *Id.*

On November 22, 2019, Complainant first made contact with Immigration and Employee Rights Section (IER) by way of a phone call. *See* Compl. 17. On December 11, 2019, Complainant filed a charge with IER. Compl. 1. In the charging document, Complainant informed IER he was discriminated against when he was terminated on September 30, 2019. *See* Compl. 16.

[1] Pinpoint citations to the Complaint are to the internal page numbers of the PDF, as opposed to the inconsistent numbering on the actual pages of the Complaint.

Complainant informed IER that the discriminatory personnel action was taken because of his citizenship status and for retaliatory motives. Compl. 15.

As part of the process of filing a charge, Complainant was specifically asked, "Has a charge based on this set of facts been filed with any federal, state, or local governmental agency?" Compl. 17. Complainant checked the box labelled, "No[.]" Compl. 17.

## III. DISCUSSION AND ANALYSIS

The Immigration and Nationality Act, 8 U.S.C. § 1324b(a)(1), prohibits discrimination based on national origin or citizenship status. The INA also prohibits retaliatory actions on the part of an employer related to allegations of discrimination under the INA. § 1324b(a)(5).

The statute does not provide for complete and comprehensive coverage of allegations of discrimination as there are some exceptions. Germane to this case are two exceptions: the exclusion of national origin discrimination covered by Title VII of the Civil Rights Act of 1964; and the prohibition on charges that have been presented to, but not yet dismissed by, the Equal Employment Opportunity Commission. §§ 1324b(a)(2)(B), (b)(2).

Because Amazon employs more than fifteen employees, national origin charges appropriately fall to the EEOC. *See Gonzalez-Hernandez v. Ariz. Fam. Health P'ship*, 11 OCAHO no. 1254, 6 (2015). [2] This leaves only citizenship-oriented allegations and retaliation-based allegations as potentially before this Court.

[2] 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 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 website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

As OCAHO case law makes clear,[3] the mere pursuit of a charge before the EEOC does not preclude an individual from filing and pursuing a matter with IER premised on the same set of facts; however, a complainant must be forthright in his submissions to IER.

A. Show Cause Regarding Complainant's Material Misrepresentation to IER

"In determining what constitutes a charge, OCAHO is guided by IER's regulations that define a charge." *Dakarapu v. Arvy Tech, Inc.*, 13 OCAHO no. 1308, 5 (2018) (citing Unfair Immigration–Related Employment Practices, 28 C.F.R. § 44.101 (2017)). Section 44.101(a) provides requirements for a charge brought before IER. A charge must be under oath and, among other requirements, must "[i]ndicate[] whether a charge based on the same set of facts has been filed with the Equal Employment Opportunity Commission, and if so, the specific office, and contact person (if known)[.]" § 44.101(a)(10).

Based on the record as developed thus far, the Court finds that Complainant did file a charge with the EEOC related to his termination. The Court also finds that Complainant filed that charge before making contact with and ultimately filing a charge with IER. The Court also finds that Complainant made a misrepresentation to IER when he informed IER that he had not "filed a charge based on the same set of facts" with the EEOC. The Court finds this misrepresentation to be material as it relates to an express requirement of the procedure outlined in IER regulations.

Complainant is ORDERED to show cause as to why his allegations related to his termination on September 30, 2019 should not be dismissed due to this material misrepresentation.

B. Show Cause Regarding Timeliness

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[3] Only a national origin claim is susceptible to the Title VII coverage exception to §1324b jurisdiction and to the no-overlap provision. Very early in the development of IRCA caselaw, it became clear that those provisions, *i.e.*, §§1324b(a)(2)(B) and (b)(2), did not bar dual EEOC/OCAHO claims arising out of the same facts but based on differentiated rationale. *United States v. Marcel Watch Corp.*, 1 OCAHO 143 (3/22/90); *Romo v. Todd*, 1 OCAHO 25, *aff'd*, *U.S. v. Todd Corporation*, 900 F.2d 164 (9th Cir. 1990) (rejecting a claim that EEOC national origin jurisdiction bars §1324b citizenship status discrimination consideration, recognizing that an EEOC policy statement "adopted February 26, 1987 explicitly recognized that the same conduct can be in violation of both the prohibition against national origin discrimination and against citizenship discrimination.") 1 OCAHO 25 at 9.

*Adame v. Dunkin Donuts*, 4 OCAHO no. 691, 904, 908 (1994).

Section 1324b(d)(3), and OCAHO case law, clearly state that "[n]o 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 Special Counsel."

Complainant filed his charge with IER on December 11, 2019. Compl. 1. However, he alleges Respondent discriminated against him based on his citizenship status and retaliated against him on May 20, 2019. Compl. 6–7. In an email dated the next day, Complainant indicated that he knew he would not be selected for the position. *See* Compl. 156. This alleged discrimination occurred more than 180 days prior to his filing of his IER charge.

Complainant is ORDERED to show cause as to why allegations predicated on the alleged discriminatory behavior prior to June 14, 2019 should not be dismissed for lack of timeliness.

C. Show Cause Regarding Retaliation

Section 1324b(a)(5) prohibits intimidation or retaliation "because the [complainant] intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section."

In the present case, the record as developed thus far shows the first instance of protected activity occurring on November 22, 2019, when Complainant contacted IER by telephone. If this is the first instance of protected activity, then it is temporally impossible for an instance of retaliation to occur before November 22, 2019.

Complainant is ORDERED to identify the protected activity upon which his retaliation claim is predicated.

Complainant is ORDERED to provide the date and circumstances under which Respondent learned of Complainant's protected activity.

Complainant is ORDERED to identify in the record (name the document and page number) where this above described information can be found. If Complainant is unable to identify the location in the record, he must inform the Court of his inability to do so.

## IV. INVITATION TO IER TO FILE AMICUS CURIAE

This case presents unique issues of jurisdiction related to IER regulations. The views of IER as to the jurisdictional issues would be helpful to the Court. Before proceeding on this issue, the Court therefore solicits IER's views and comments including but not limited to:

1. On its Charge Form, IER asks the following question: "Has a charge based on this set of facts been filed with any federal, state, or local governmental agency?" If an individual responds in the affirmative, what does IER do with that information? Stated another way, what is the value or relevance of that information to IER?

2. Does a complainant's misrepresentation of the status of filings in other fora render the charge (and thus the complaint) or the affected portion of the charge (and thus the affected portion of the complaint) outside the jurisdiction of OCAHO? Why or why not?

   a. If it is IER's position that an Administrative Law Judge does not have jurisdiction over a portion of a fact pattern wherein the complainant has misrepresented the status of filing in other fora, does IER believe separate allegations based on a retaliation theory (i.e. occurring after the filing of an IER charge) could survive as viable claims in this forum? Why or why not?

Of note, 28 C.F.R. § 68.17 contemplates amicus curiae briefs filed "by leave of the Administrative Law Judge upon motion or petition." While the regulation does not contemplate an invitation to file amicus curiae briefs, OCAHO precedent indicates it is a viable method to

solicit information and argument which would assist the Administrative Law Judge in properly applying law or interpreting regulation. *Caspi v. Trigild Corp.*, 6 OCAHO no. 907, 957, 966 (1997).

## V. CONCLUSION

Complainant is ORDERED to respond to this Order within twenty-one (21) calendar days of issuance of this Order. The date of issuance shall be calculated based on the date the Certificate of Service is executed.

Respondent shall have ten (10) calendar days from the date of receipt of Complainant's response to this order to file a response for the Court's consideration.

The Court invites IER to file an amicus curiae brief within thirty (30) calendar days of the issuance of this Order. The date of issuance shall be calculated based on the date the Certificate of Service is executed.

SO ORDERED.

Dated and entered on January 28, 2021.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge