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

April 7, 2021

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

ORDER REFRAMING SCOPE OF COMPLAINT AND
PARTIALLY GRANTING MOTION TO DISMISS

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, a pro se litigant, filed his Complaint, a 487-page document, in which he provided numerous cross-references to different sections, documents, tables, and various emails as exhibits.

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

Parties are currently engaged in discovery. Per the Order Memorializing Prehearing Conference (Order Memorializing PHC) dated December 21, 2020, the Court informed the parties: "[d]iscovery requests must be served at least 30 days before, responses to discovery must be served by, and any motions to compel or other discovery motions must be filed by March 16,

2021." Order Memorializing PHC 1. Parties may file "dispositive motions," to include motions for summary decision, on or before April 15, 2021. Order Memorializing PHC 1.

Following Respondent's March 10, 2021 Motion for Extension of Discovery Period, the Court determined there was good cause to extend the period of discovery and reset remaining case deadlines. The updated deadlines are as follows:

Discovery requests must be served at least 30 days before, responses to discovery must be served by, and any motions to compel or other discovery motions must be filed by: May 24, 2021

Dispositive Motions due: June 23, 2021

Responses to Dispositive Motions due: July 23, 2021

Tentative Hearing date and location: October 2021, in Dallas, TX

If a dispositive motion is filed prior to the June 23, 2021 deadline, such as a motion for summary decision, the response to that motion will be due thirty days after service of the motion.

On January 28, 2021, the Court issued an Order to Complainant to Show Cause and Invitation for Amicus Curiae (Order to Show Cause). *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381a, 1 (2021).[1] In that order, the Court: inquired as to the effect of Complainant's material misrepresentations related to his Equal Employment Opportunity Commission (EEOC) charge; ordered Complainant to show cause related to timeliness of allegations; and ordered Complainant to identify the protected activity which gives rise to his retaliation allegation. *Id.* at 4–5. Additionally, the Court invited the Immigrant and Employee Rights Section of the U.S. Department of Justice (IER) to provide an amicus filing related to the legal effect of the material misrepresentation and other comments as appropriate. *Id.* at 5–6. The Court also provided Respondent time to file a response to Complainant's response to the Order to Show Cause. *Id.* at 6.

[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.

On February 17, 2021, Complainant filed a Response to the Order to Show Cause (Response OTSC). IER filed an amicus brief entitled United States' Statement of Interest (IER Amicus) on February 26, 2021.[2] On March 1, 2021, Respondent concurrently filed Respondent's Reply to Complainant's Response to the Court's order to Show Cause (Reply OTSC) and a Motion to Dismiss. Complainant filed a Response to Respondent's Reply to Complainant's Response to Order to Show Cause on March 3, 2021.[3] Complainant filed a Response to Respondent's Motion to Dismiss (Opposition to MTD) on March 13, 2021 and a Response to Respondent's Motion for Extension of Discovery Period (Motion for Reconsideration) on March 15, 2021.[4] Each filing will be discussed in turn below.

On March 25, 2021, the Court held a brief prehearing conference in which it informed the parties of the pending issuance of this order and explained the effect of this order on other pending motions related to discovery. [5] The Court directed the parties to a recently published decision pertaining to retaliation.

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[2] The Court thanks IER for providing its amicus brief. The information and analysis contained therein was relevant and helpful, aiding in comprehension of the facts of the case and applicable laws and regulations.

[3] The Court notes that Complainant did not seek leave from the Court to file this brief. As the Court previously noted "28 CFR § 68.11(b) makes clear that "[u]nless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive document shall be filed." *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381b, 2 (2021). Complainant did not seek leave to file such a reply, as such it will not be considered. *See id.* at 3.

[4] As Complainant filed his response following the Court's Order Granting Motion for Extension of Discovery Period, the Court will treat the filing as a motion for reconsideration.

[5] On March 26, 2021, the day following the prehearing conference, Complainant filed a submission entitled Complainant's Response Regarding Prehearing Conference on 25th Mar 2021 (Response to PHC), in which he expresses confusion and a desire for clarity. Resp. PHC 1. These concerns are ultimately addressed and resolved by way of this order, which the Court informed the parties was forthcoming at the prehearing conference. Complainant also explains his concerns with what appear to be on-going discovery disputes. Resp. PHC 5. As this order narrows and focuses the scope and nature of this litigation, the scope of discovery will also narrow, ultimately changing the scope of relevant information. For these reasons, and as explained in greater detail in this Order, pending motions related to discovery will be DENIED as moot. Finally, Complainant requests another prehearing conference. Resp. PHC 7. Given the Court's discretion to hold prehearing conferences, 28 C.F.R. § 68.13(a)(1), the Court declines the request.

II. SUBMISSIONS OF THE PARTIES

A. Complainant's Response to Order to Show Cause

In Complainant's Response to the Order to Show Cause, he discusses the status of discovery, which is not germane to the information requested in the Order to Show Cause. Resp. OTSC 2.

As to the material misrepresentation Complainant made about the existence of his pending EEOC charge, Complainant states that he responded "No" to the query on the OCAHO Complaint Form because, according to Complainant, the "term 'set' means unique or no duplicate as per Computer Science data structures." Resp. OTSC 5. Complainant states that he did email IER about his EEOC activity. Resp. OTSC 5.

As to the timeliness issue raised in the Order to Show Cause, Complainant relays that he filed a charge with IER on March 25, 2019 (DJ 197-82-156). Resp. OTSC 7. But Complainant did not present a "right to file" letter from IER associated with that reference number in his Complaint. That IER activity does not form a part of the procedural conditions precedent to the Complaint filed in June 2020. Thus, it will not be considered a "protected activity" in the case at bar. Complainant did provide a "right to file" letter from IER dated April 9, 2020 as part of his Complaint for IER case number DJ 197-82-163. Compl. 12.[6]

As to the retaliation inquiry wherein the Court ordered Complainant to specifically identify the protected activity and the location in the record such information can be found, Complainant cites to a charge made to IER on March 25, 2019 (DJ 197-82-156), which does not appear in the four corners of the Complaint. Resp. OTSC 9. Regarding Respondent's knowledge of Complainant's other allegedly protected activity, Complainant identifies Exhibit C-1 of his Prehearing Statement, a 637-page document. Resp. OTSC 10–11. Exhibit C-1 appears to be recycled from the Complaint.

B. IER Amicus Filing

IER provides additional factual context related to the issues raised in the Order to Show Cause. IER confirms that Complainant filed a charge on March 25, 2019 (DJ 197-82-156); however, that charge was dismissed "for failure to state a claim." IER Amicus 1. Further, IER states that it did not notify Respondent of the March 25, 2019 charge because 28 C.F.R. § 44.301(a), (d) does not require notice to the employer for incomplete charges; it only requires notice to the employer for complete charges. IER Amicus 1 n.1.

[6] For convenience, pinpoint citations to the Complaint are to the internal page numbers of the PDF, as opposed to the varied numbering on the actual pages of the Complaint.

The Court requested briefing from IER on the following question: "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?" *Amazon Webservices Inc.*, 14 OCAHO no. 1381a at 6. IER provided case law, regulations, and analysis demonstrating that a deficiency, omission, or misrepresentation in an IER Charge Form or reflected in a Complaint does not strip the Court of jurisdiction, rather the contents and timing of the charge are considered "conditions precedent" subject to discretion and "equitable doctrines." IER Amicus 3–5.

As to the EEOC charge, IER was on notice of the EEOC activity related to this case. IER Amicus 6. IER ultimately concluded that "any misrepresentations in filings submitted to OCAHO may be addressed through the Court's discretion to impose sanctions on a party that misrepresents information to the Court. Furthermore, . . . the Court may give credibility concerns raised by any misrepresentations the attention and weight they deserve." IER Amicus 6.

Finally, IER notes that the "INA's prohibition against retaliation encompasses protected activities beyond formal contact with IER," providing case law and analysis discussed at length in the law and analysis section. IER Amicus 7. IER identifies two instances in which Complainant claims he notified Respondent of his IER charges: 1.) in or around March 2019;[7] 2.) on September 5, 2019.[8] *Id.* IER cites to a June 15, 2019 email as additional, potential protected activity. *Id.*

C. Respondent's Reply to OTSC and Motion to Dismiss

[7] IER does not specify where in the Complaint Complainant alleged that he informed Respondent of his IER charge; but it is not IER's burden to identify such. The Court ordered Complainant to identify the instances of protected activity with citations to the record. *Amazon Webservices Inc.*, 14 OCAHO no. 1381a at 5. In response to the Order to Show Cause, Complainant only provided his filings of IER charges as instances of protected conduct. Resp. OTSC 9–10. Despite these deficiencies in Complainant's filings, the Court reviewed Complainant's 487-page Complaint for instances referenced by IER. Based on the Court's review of the Complaint, the only discrete activity occurring in March 2019 is a March 12, 2019 email. Compl. 82.

[8] Once again, it is not clear where in the Complaint Complainant alleged that he informed Respondent of his IER charge. IER provided the date of September 5, 2019. Based on the Court's review of the Complaint, the only activity that occurred on September 5, 2019 that may potentially constitute protected activity is a September 5, 2019 email located at page 103 of the Complaint.

Respondent's Reply to OTSC and Motion to Dismiss provide arguments for dismissal of the Complaint.[9] Both filings present by way of substance as motions to dismiss, thus the summary below is a consolidation of the information and argument contained in both.

Respondent argues that Complainant's material misrepresentation to the Court about the existence of his charge with the EEOC warrants dismissal. Reply OTSC 2. Moreover, Respondent argues that Complainant's rationale associated with computer science definitions is "specious" and Complainant, while pro se, is a savvy litigant as he has filed and litigated several complaints in this forum. Reply OTSC 2.

As to the contents of the Complaint, Respondent argues that Complainant fails to state a claim upon which relief can be granted with respect to citizenship, citing that Complainant's filings do not show his termination was "under circumstances giving rise to an inference of unlawful discrimination." Mot. Dismiss 4 (citing *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 115 (1997)).

Respondent also notes that internal transfer actions fall outside the scope of the statutory definition of hiring, thus a claim related to citizenship discrimination predicated upon an internal transfer occurring or not occurring should be dismissed. Mot. Dismiss 7.

Respondent argues that Complainant's allegations are time-barred based on the timely file condition precedent required in § 1324b(d)(3). Reply OTSC 4–5.

As to the protected activity, Respondent confirms it had no knowledge of a March 5, 2019 IER charge. Mot. Dismiss 15. Respondent concedes the existence of the June 25, 2019 email, but contends it does not constitute protected activity. Mot. Dismiss 15. Respondent also highlights that Complainant must show that the "decision maker" knew of Complainant's protected activity. Mot Dismiss 13 (citing *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007)).

Finally, Respondent states that "Complainant was terminated for legitimate reasons-falling below performance and behavior standards – unrelated to his citizenship." Mot. Dismiss 10. Respondent then proceeds to detail specific instances of "insubordination, misconduct, aggressive behavior, intentional disregard of instructions, and failure to complete work in an acceptable manner" occurring close in time to Complainant's termination. Mot. Dismiss 10. Respondent invites the Court to incorporate the information by reference consistent with the legal standards for motions to dismiss.

Upon dismissal, Respondent requests attorney's fees pursuant to 28 C.F.R. § 68.52(d)(6). Reply OTSC 8; Mot. Dismiss 19.

[9] Respondent requested oral argument. Mot. Dismiss 1; Reply OTSC 1. The Court finds oral arguments unnecessary and thus rejects Respondent's requests pursuant to 28 C.F.R. § 68.11(c).

D. Complainant's Response to Motion to Dismiss

Complainant timely filed a Response to Respondent's Motion to Dismiss, a 106-page document with additional exhibits labelled "A" through "T." Complainant's filing details discovery disputes in which he is engaged with Respondent. At the time Complainant filed his Response to the Motion to Dismiss, there were no issues related to discovery properly before this Court.[10] Portions of Complainant's opposition describing discovery disputes are irrelevant to the issue of what, if any, portions of the Complaint are subject to dismissal.

As to the assertions contained in Respondent's Motion to Dismiss, Complainant does not specifically counter legal arguments posited by Respondent, rather he maintains that Respondent discriminated and retaliated against him.

E. Complainant's Response to Motion for Extension of Discovery Period

On March 15, 2021, Complainant filed a Motion for Reconsideration of the Court's extension of the discovery period.[11] This response was filed after the Court issued an extension of the discovery window. Complainant states that he "has no issues in terms of extension of deadline, Respondent should be open and honest, in terms of exactly how many more days needed, for providing truthful and honest responses." Resp. Mot. Extension 12. It is clear from his filings that Complainant is still very much engaged in discovery and stands to benefit from the extension of time as well. Furthermore, this order will clarify the nature of the matters before the Court, and as a point of fundamental fairness, parties should have the opportunity to engage in discovery following such a clarification. The Court reaffirms its March 12, 2021 Order Granting Motion for Extension of Discovery and DENIES Complainant's Motion for Reconsideration.

F. Complainant's Second Motion to Compel Response to Discovery

[10] The Court had previously ruled on both Complainant's Motion to Compel Response to Discovery and Complainant's Motion to Reconsider Regarding "Motion to Compel Response to Discovery."

[11] As the Court previously noted in its Order Denying Complainant's Motion to Reconsider, "[t]he standard of review for reconsideration of interlocutory orders is 'as justice requires.'" *Amazon Webservices, Inc.*, 14 OCAHO no. 1381b at 2 (citing *Lexington Ins. Co. v. Ace Am. Ins. Co.*, 192 F. Supp. 3d, 712, 714 (S.D. Tex. 2016)). Additionally, "courts should exercise their power 'sparingly in order to forestall the perpetual reexamination of orders and the resulting burdens and delays,' which disserve the interests of justice." *Amazon Webservices Inc.*, 14 OCAHO no. 1381b at 3 (citing *Theriot v. Bldg. Trades United Pension Tr. Fund*, 408 F. Supp. 3d 761, 765 (E.D. La. 2019)).

On March 21, 2021, Complainant filed a Second Motion to Compel Response to Discovery. In this filing, Complainant continues to detail and describe his ongoing discovery disputes with Respondent. The Court declines to analyze the motion's deficiencies as the contents of this Order render the motion moot.[12] Given the extended period of discovery and the hardening contours of the limits of what is at issue before the Court, Complainant's Second Motion to Compel Response to Discovery is DENIED as MOOT. Neither party is precluded from filing motions to compel discovery after receipt of this order and the commencement of the extended period of discovery.

III. LEGAL STANDARDS AND ANALYSIS

A. Complainant Misrepresented Material Information to the Court

In its January 28, 2021 Order to Show Cause, the Court noted that:

> [b]ased 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.

Amazon Webservices Inc., 14 OCAHO no. 1381a at 4.

After receiving the submissions of IER and Complainant on this point, the Court finds that Complainant informed IER of his EEOC activity in October 2020. IER indicated in its amicus filing that it was not "misled" by Complainant with respect to Complainant's EEOC activity. IER Amicus 1–2.

The record is now updated to reflect that Complainant only misled the Court (and not both IER and the Court as originally contemplated) by way of Complainant's sworn Complaint. In its Order to Show Cause, the Court provided Complainant an opportunity to explain the contents of

[12] On multiples occasions, the Court has provided clear guidance on what parties must demonstrate prior to the Court's involvement in compelling discovery. *Amazon Webservices Inc.*, 14 OCAHO no. 1381b at 3–4; *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381, 2 (2020).

his Complaint and the inconsistency related to his EEOC activity. *Amazon Webservices Inc.*, 14 OCAHO no. 1381a at 4. Complainant informed the Court that when asked on the OCAHO Complaint form about the set of facts upon which his Complaint was predicated, he defined "set" as "unique or no duplicate as per Computer Science data structures." Resp. OTSC 5. This novel definition and application was apparently reserved only for the Court, as IER did in fact receive the information. This rationale is made all the more perplexing and likely disingenuous when the Court considers, as Respondent noted, that Complainant has filed complaints in this forum previously. On balance, the material misrepresentation to the Court found in the sworn Complaint coupled with the "Computer Science data structure" rationale for hiding information from the Court is significant and troubling. This misrepresentation directly calls into question Complainant's integrity and will cause the Court to draw an adverse inference with respect to the credibility of evidence put forth by Complainant. Furthermore, Complainant is hereby ADMONISHED for misleading the Court and wasting significant time and resources on determining the veracity of basic information in the Complaint. Complainant should also take note that further misrepresentations may lead to a dismissal of the Complaint in its entirety. *See Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 n.2 (S.D. Tex. 2010) (citations omitted); *see also* Fed. R. Civ. P. 11.

As to the potential effect of this material misrepresentation on jurisdiction, "[t]he Court has both the authority, and the duty, to determine *sua sponte* if it has subject matter jurisdiction." *Sinha v. Infosys*, 14 OCAHO no. 1373, 2 (2020) (citing *Windsor v. Landeen*, 12 OCAHO no. 1294, 4–5 (2016)). The Court largely adopts the law and analysis of IER provided in its amicus filing. The Supreme Court has held that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006); *e.g., Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, l 850 (2019). Thus, "the requirements for the content and timing of a charge under 8 U.S.C. § 1324b(b)(l), as set forth in 28 C.F.R. §§ 44.101(a) and 44.300, are considered nonjurisdictional conditions precedent to filing an OCAHO complaint." IER Amicus 4 (first citing 28 C.F.R. § 44.301, and then citing *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 4 (2019)).

B. Protected Activity Identified in the Complaint

Employers are prohibited from intimidating or retaliating "against any individual for the purpose of interfering with any right or privilege secured *under this section* or because the individual 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*." 8 U.S.C. § 1324b(a)(5) (emphasis added). Included in the rights protected under §1324b is "the right to oppose an employer's alleged discriminatory hiring practices." *Diarrassouba v. Medallion Fin. Corp.*, 9 OCAHO no. 1076, 9 (2001). Interactions with IER, including filing a charge, fall within the ambit of activity designed to be protected by the statute. *See* 8 U.S.C. § 1324b(a)(5).

"Claims of retaliation that are cognizable in this forum do not include claims of retaliation for conduct other than that specifically protected under the governing statute." *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 5 (2014) (citing § 1324b(a)(5)). For example "filing with [the] EEOC is not protected activity within the meaning of 8 U.S.C. § 1324b(a)(5)." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 6 (2015) (citing *Hajiani*, 10 OCAHO no. 1212 at 5; *e.g., Ndzerre v. Wash. Metro. Area Transit Auth.*, 13 OCAHO no. 1306, 5 (2017) (citations omitted).

Additionally, discrimination claims exceeding OCAHO's purview (such as national origin claims that fall under EEOC purview) and their accompanying retaliation claims are not subject to consideration by OCAHO. *Yefremov v. NYC Dep't of Transp*., 3 OCAHO no. 562, 1556, 1605 (1993) ("With respect to retaliation in context of national origin claims which exceed OCAHO jurisdiction, the better rule would seem to be that jurisdiction follows the underlying claim, i.e., EEOC, not OCAHO."). The administrative law judge in *Yefremov* also noted that within the context of retaliation claims that are under OCAHO jurisdiction (such as citizenship status discrimination), the "good faith, reasonable belief of discrimination" rule applies. *Id.*

With these standards and definitions in mind, the Court now turns to the filings of Complainant and IER.

1. Complainant's Activities in Other Fora Do Not Constitute Protected Activity in This Forum

In his Complaint, Complainant alleges his protected activities that serve as the basis of his retaliation claim are "complaining to the Defendant and various agencies like USDOL, USDOJ IER and EEOC Dallas TX, Earned Sick leave for Dallas county employees etc. . . . about the wrong doing [sic] of the Defendant[.]" Compl. 21. For the reasons detailed above, section 1324b does not protect filing complaints with the EEOC, U.S. Department of Labor, or Texan agencies.

2. Complainant's Activities Related to Terms of Employment Do Not Constitute Protected Activity

Complainant expresses concern related to matters involving H-1B visa holders and terms of employment, and, presumably, he believes Respondent retaliated against him as a result. This activity cannot be considered a protected activity in this forum as section 1324b(a)(5) requires the triggering activity to be "under this section," and thus, it must relate to "to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment[.]" § 1324b(a)(1). "[S]ection 1324b only covers the practices of

hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms and conditions of employment." *Costigan v. NYNEX*, 6 OCAHO no. 918, 1151, 1157 (1997) (citations omitted). Consequently, correspondence about H-1B visa holders receiving promotions or training opportunities do not constitute protected activity, and thus do not trigger the anti-retaliation provisions of the statute.

3. Complainant's March 2019 IER Activity Cannot Be Considered As Requisite Protected Activity

The Court asked Complainant to identify his allegations of protected activity and their location in the record, and explain when and how Respondent learned of the protected activity. *Amazon Webservices Inc.*, 14 OCAHO no. 1381a at 5. In response, Complainant cites to a charge made to IER on March 25, 2019 (DJ 197-82-156), Resp. OTSC 8, which does not appear in the four corners of the Complaint, and "a separate [IER] charge" filed on December 2019 (DJ 197-82-163). Resp. OTSC 10. Complainant identifies Exhibit C-1 of his Prehearing Statement, a 637-page document, as instances where Respondent learned of Complainant's allegedly protected activity. Resp. OTSC 10–11.

Although filing a charge with IER is a protected activity, Complainant's March 2019 IER charge cannot form the basis for Complainant's retaliation claim. It was not alleged or even mentioned in the Complaint. Furthermore, the record does not support Respondent had knowledge of this IER activity as Respondent stated it had no knowledge of the previous IER charge from March 2019, Mot. Dismiss 15; IER's amicus filing corroborates this position. IER Amicus 1 n.1.

4. Discussion of Complainant's Emails Constituting Protected Activity

Based on the filings the Court received, there are four instances of which warrant further analysis within the four corners of the Complaint: a March 12, 2019 email, Compl. 82; an April 2, 2019 email, Compl. 94; a June 15, 2019 email, Compl. 91; and a September 5, 2019 email. Compl. 103.[13]

i. Complainant's March 12, 2019 Email is Not a Protected Activity

In the March 12, 2019 email that Complainant sent to an individual in Human Resources (HR), Complainant alleges he is facing national origin and age-based discrimination, "[o]ther illegal/unfair employment practices/violations[,]" and retaliation when he reports the

[13] Exhibit F of the Complaint seems to be duplicative of Exhibit A of the Complaint in that they both contain the emails mentioned.

discrimination. Compl. 82. This email does not constitute protected activity. The purview of this forum is limited to the contents of its governing statute. This Court cannot and will not look into allegations of retaliation when those allegations are not based on citizenship-oriented or national origin-oriented activities. Thus, his complaints of discrimination based on characteristics beyond his national origin and citizenship status are not properly before this forum and will not be considered. Moreover, as noted in the Order to Show Cause, this Court will not decide matters of national origin discrimination because those allegations belong before the EEOC given that Respondent employs more than fifteen employees. *Amazon Webservices Inc.*, 14 OCAHO no. 1381a at 3. Therefore, the national origin discrimination referenced in this email is not a protected activity in this forum, as this allegation must follow the underlying claim to the EEOC.

ii. Complainant's April 2, 2019 Email is Not a Protected Activity

In the April 2, 2019 email that Complainant sent to the Human Resources individual, Complainant states that the reassignment of his customer to a H-1B visa based TAM is an "adverse employment action whereby US Workers are asked to initially do work on a project and later visa workers are replacing them." Compl. 94. The email is not activity that is protected under § 1324b because it references the terms and conditions of employment, which is not covered by the INA. *See Costigan*, 6 OCAHO no. 918 at 1157.

iii. Complainant's June 15, 2019 Email Can Constitute a Protected Activity

The June 15, 2019 email was sent from Complainant to the same individual in Human Resources. Compl. 91. In this email, Complainant states the following:

> I strongly believe this is discrimination on the basis of citizenship as US citizens are not getting opportunities for training as well as advancement. It's not equal opportunities for US workers. Any job positions (even if the employer is not H-1B dependent) there should be serious efforts to hire US citizens who are either better or equally qualified than foreign workers. Only in case when the US workers are not found or not up to the mark then foreign workers should be tried out. As per Company's policies, any time any internal candidate is not being selected or considered for any job, there should be valid reasons provided.

Compl. 91.

In contrast to the March 12, 2019 email, this June 15, 2019 email raises the specter of citizenship discrimination. The email also references hiring actions, one of the personnel actions available for OCAHO consideration under § 1324b(a)(1).

iv. Complainant's September 5, 2019 Email is Not a Protected Activity

In the September 5, 2019 email that Complainant sends to the same Human Resources individual, Complainant lists grievances related to his terms of employment. Compl. 103. Like the April 2, 2019 email, this September 5, 2019 email is not protected because it does not concern his charge with IER, complaint with OCAHO, or hiring, firing, or recruitment for a fee.

Ultimately, of the above-referenced emails, only the June 15, 2019 email that meets the low pleading-stage standard for protected activity under § 1324b for the retaliation claim. As the Court previously noted, Complainant's telephone call with IER that occurred on November 22, 2019 constitutes protected activity. OTSC 5. Finally, Complainant's IER charge filed in December 2019, which forms the basis of this case, is also protected activity.

C. Respondent's Motion to Dismiss

1. Legal Standard for Motion to Dismiss

OCAHO does not require the plausibility standard for complaints; rather, complaints only need to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." *United States v. R&SL Inc.*, 13 OCAHO no. 1333, 4 (2019) (quoting 28 C.F.R. § 68.7(b)(3)). "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. Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990). "But [the Court] will not accept a legal conclusion couched as a factual allegation as true." *Montalvo v. Kering Ams., Inc*., 14 OCAHO no. 1350, 4 (2020) (citation omitted). There must be some facts, not just legal conclusions, that "connect[] his United States citizenship status to his termination," in order for the complaint to be sufficiently plead. *Ba v. Wal-Mart Store 1199*, 10 OCAHO no. 1163, 3 (2012).

At the motion to dismiss phase, the Court does not "require that a complainant plead a prima facie case to pursue a claim under 8 U.S.C. § 1324b." *Jablonski v. Kelly Legal Servs.*, 12 OCAHO no. 1282, 10 (2016) (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002)). Nevertheless, "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, 5 (2016).

Additionally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *AK Steel*, 7 OCAHO no. 930 at 113 (citations omitted). "The [C]ourt may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113–14 (citation omitted). If, on a motion to dismiss for failure to state a claim or on a motion for judgment on the pleadings, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). This conversion only transpires if the Court elects to consider matters outside the pleadings.

2. Motion to Dismiss Portions of Complaint as Untimely

Respondent argues that Complainant's allegations are time-barred based on the timely file condition precedent required in § 1324b(d)(3) because the charge was filed more than 180 days after the alleged discriminatory practice. Reply OTSC 4–5.

Under § 1324b, "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge with [IER]." 8 U.S.C. § 1324b(d)(3); *see also Ndzerre*, 13 OCAHO no. 1306 at 8. Filing a timely IER charge is thus a condition precedent to the filing of a private action with OCAHO. *See Ndzerre*, 13 OCAHO no. 1306 at 8. Claims, under § 1324b, based on events occurring more than 180 days prior to the filing of an IER charge are ordinarily barred by operation of the law. *Id*.

Here, Complainant filed a charge with IER on December 11, 2020. Compl. 1. Complainant alleges various instances of discriminatory and/or retaliatory conduct occurring on or before June 14, 2019.

While there are exceptions to the normal timing requirements imposed by the statute of limitations, none of the exceptions apply in this case. First, the Court may use equitable tolling to set aside an untimely filing with IER when the complainant shows "(1) that he has been pursuing [his] rights diligently, and (2) that some extraordinary circumstance stood in [his] way and prevented timely filing." *Ndzerre*, 13 OCAHO no. 1306 at 8–9 (citing *Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013)). Complainant has not asserted, nor do the facts show, that he was diligently pursuing his rights and that some extraordinary circumstance prevented timely filing. Second, when a petitioner has filed a charge with the EEOC under 8 U.S.C. § 1324b, and it is determined to be the wrong forum or if the complaint is properly before the EEOC and involves a subsidiary question under OCAHO's jurisdiction, OCAHO may toll the statute of limitations. *Id*. (citing *Caspi v. Trigild Corp.*, 6 OCAHO no. 907, 957, 964 (1997)). Complainant puts forth no evidence associated with such a contention. Neither exception to the normal timing requirements applies in this case.

The Court finds that any allegation occurring before June 14, 2019 is time-barred. As required by the applicable standards, the Court need not look beyond the four corners of the initial Complaint to arrive at this conclusion. Respondent's Motion to Dismiss is GRANTED with regard any instance occurring before June 14, 2019.

3. Motion to Dismiss Portions of Complaint Which Rely on Personnel Actions Falling Outside the Scope of the Statute

Respondent notes that internal transfer actions fall outside the scope of the statutory definition of hiring, thus a claim related to citizenship discrimination predicated upon an internal transfer occurring or not occurring should be dismissed. Mot. Dismiss 7–8. Respondent notes that

> Transfers to another role within a company falls outside the statutory definition of hiring. Under 28 CFR § 44.101(h) 'Hiring means all conduct and acts during the entire recruitment, selection, and onboarding process undertaken *to make an individual an employee*.' (Emphasis added.) Further, 8 U.S.C. § 1324b does not reach employment issues such as compensation, shift assignments, or other terms, conditions, or privileges of employment. *Julio Ricardo Sanchez Molina v. Securitas Security Services USA, Inc.*, 11 OCAHO [no.] 1261, 7 (2015).

Mot. Dismiss 7.

In his Complaint, Complainant enumerates "three specific cases where either Defendant followed unfair hiring practices/Citizenship based discrimination or retaliation after coming to know that plaintiff was involved in protected activities." Compl. 33–34. First, Complainant references a position that he applied to on or around May 20, 2018. Compl. 35. In addition to being time-barred as discussed above, such an allegation also falls outside the scope of the statute as it is more akin to a promotion or the terms and conditions of employment than a new hire. Second, Complainant alleges he was not permitted to work remotely unlike other employees. Compl. 41. This claim is a term and condition of employment, and thus, not covered by OCAHO. Third, Complainant asserts that his supervisor stopped referring him for other positions within Amazon. This claim is not covered by OCAHO because it is regarding promotions, and terms and conditions of employment.

In conclusion, to the extent Complainant seeks to advance allegations related to denial of opportunities to transfer internally because of his citizenship, these allegations fail to state a claim and will not be considered. Respondent's Motion to Dismiss is GRANTED as to any instance involving a personnel action not related "to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment[.]" § 1324b(a)(1).

4. Motion to Dismiss Portions of Complaint Related to Citizenship Status

While a complainant "does not need to present evidence of discrimination at this stage of litigation, he does need to allege facts that link the alleged discrimination with his [protected status]." *Tymczak v. Tex. S. Univ.*, No. 4:16-CV-2621, 2017 U.S. Dist. LEXIS 59150, at *11-12 (S.D. Tex. Apr. 18, 2017);[14] *accord Thompson v. Sanchez Auto Servs., LLC*, 12 OCAHO no. 1302, 7–8 (2017).

Complainant was provided several opportunities to clarify his citizenship-status discrimination claim in his 487-page Complaint, his Response to the Order to Show Cause, and his Response to the Motion to Dismiss; yet, he simply asserts in a general and conclusory fashion that Respondent discriminated against him based on his citizenship status, without citing to specific facts giving an inference to causation. For example, Complainant concludes that "Complainant's Prehearing statement had enough details . . . which proves Citizenship based discrimination" and then generally references six exhibits totaling hundreds of pages. *See* Resp. MTD 14. The Court is not inclined to embark on another scavenger hunt through Complainant's 487-page Complaint to uncover clues raising a specter of citizenship discrimination on his behalf. While the Court has afforded much flexibility to this pro se Complainant, such a prospect falls far outside the ambit of deference afforded to pro se litigants.

The complaint must provide "clear and concise" factual allegations sufficient to raise an inference of discrimination. 28 C.F.R. § 68.7(b)(3); *Robert Half Legal*, 12 OCAHO no. 1272 at 5. Simply asserting termination and then asserting citizenship status is insufficient to meet this standard with respect to causation. *See Thompson*, 12 OCAHO no. 1302 at 7 (dismissing national origin discrimination claim because cursory allegations of unpaid wages because of the complainant's Dominican nationality were insufficient).

In sum, the Court concurs with Respondent's assessment of the Complaint with respect to citizenship discrimination, and the portions of the Motion to Dismiss related to citizenship status discrimination allegations is GRANTED.

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[14] In *Tymczak*, the court found that the plaintiff made "conclusory assertions that he was discriminated against based on his race, and present[ed] the fact that [the p]laintiff is Caucasian and [the chosen individual] is African-American, but [the p]laintiff's subjective belief that he was discriminated against is not sufficient to state a claim under Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq]." 2017 U.S. Dist. LEXIS 59150, at *12. *Cf. Salas v. N.Y.C. Dep't of Investigation*, 298 F. Supp. 3d 676, 687 (S.D.N.Y. 2018) ("employees must provide 'at least minimal support for the proposition that the employer was motivated by discriminatory intent[.]'") (citation omitted). The undersigned adopts the law and rationale provided in this corollary Title VII based litigation. *See Chellouf v. Inter Am. Univ. of P.R.*, 12 OCAHO no. 1269, 5 (2016) (holding that Title VII case law provides general guidance for OCAHO § 1324b cases).

5. Deferral of Legitimate, Nondiscriminatory and Nonretaliatory Reasons

Respondent has asserted several legitimate, nondiscriminatory and non-retaliatory reasons for Complainant's termination. Mot. Dismiss 10, 15. The Court will not comment on the validity of these reasons at this early phase of litigation. On a motion to dismiss, the Court only needs to determine whether the complaint pleads sufficient facts to raise an inference of discrimination. *See Kelly Legal Servs.*, 12 OCAHO no. 1282 at 10; *accord Kelleher v. Fred A. Cook, Inc*., 939 F.3d 465, 470 (2d Cir. 2019). Consideration of these legitimate nondiscriminatory and non-retaliatory reasons would convert the motion to dismiss into a motion for summary decision based on the volume of information in the record outside the scope of the Complaint. *See United States v. R2M2 Rebar & Stressing, Inc.*, 14 OCAHO no. 1357, 2 (2020) (citation omitted). As such, the Court defers consideration of the reasons Respondent proffered; however, Respondent is not foreclosed from reasserting them at a later point in time under a summary decision analysis.

6. Clarification to Parties of Issues Remaining in Litigation – Retaliation Only

Based on the submission of the parties, the Court determines there are three instances of protected activities which could give rise to an allegation of retaliation in this forum. These are the June 15, 2019 email in which Complainant informs an individual in HR that he believes individuals are being discriminated against in hiring actions because of their citizenship status and the contact, Compl. 91; Complainant's phone call to IER on November 22, 2019, Compl. 17; and Complainant's IER charge filed in December 11, 2019. Compl. 1.

In an effort to provide clarity to the parties and promote efficiency of the process, the Court also identified instances in the Complaint which could give rise to an allegation of retaliation. The retaliation allegations are now framed as follows:

i. Did Complainant enter short term disability placement on July 1, 2019 because of the email he sent to the individual in HR on June 15, 2019 wherein he informed her of alleged citizenship discrimination?
ii. Did Complainant lose access to the intranet on July 1, 2019 because of the email he sent to the individual in HR on June 15, 2019 wherein he informed her of alleged citizenship discrimination?
iii. Was Complainant denied internal transfer opportunities listed in Exhibit F of the Complaint at pages 7–9 (Compl. 217–19) because of the email he sent to the individual in HR on June 15, 2019 wherein he informed her of alleged citizenship discrimination?
iv. Was Complainant terminated from employment with Respondent on September 30, 2020 because of the email he sent to the individual in HR on June 15, 2019 wherein he informed her of alleged citizenship discrimination?

v. Was Complainant not selected for a position with Respondent on January 31, 2020 because of the email he sent to the individual in HR on June 15, 2019 wherein he informed her of alleged citizenship discrimination?
vi. Was Complainant non-selected for a position with Respondent on January 31, 2020 because of his engagement with IER in November and December of 2019?[15]

These allegations constitute the closed universe of allegations properly before the Court. Given the remaining retaliation claims, the Court DEFERS Respondent's request for attorney's fees as premature.

IV. CONCLUSION

Complainant's Motion for Reconsideration is DENIED.

Complainant's Motion to Compel Discovery is DENIED as MOOT. Parties are not precluded from filing motions related to discovery after receipt of this Order.

Complainant is ADMONISHED for materially misrepresenting the existence of his EEOC activity in his sworn Complaint and the Court will draw appropriate adverse inferences with respect to Complainant's credibility as a result.

Respondent's Motion to Dismiss is GRANTED as it relates to: claims occurring before June 14, 2019; claims involving a personnel action not related to the hiring, or recruitment or referral for a fee, and citizenship status discrimination claims. Respondent's Motion to Dismiss is DEFERRED as it relates to legitimate, non-retaliatory reasons for taking particular actions (i.e. affirmative defense); and the motion is DENIED as it relates to the remaining retaliatory claims outlined above.

Respondent's request for attorney's fees is DEFERRED as premature.

As a final administrative matter, parties are ORDERED to adhere to the following filing limitations for all future matters submitted to the Court. For future filings, all non-dispositive motions shall be limited to twenty-five pages, exclusive of tables of contents, table of authorities, and exhibits. All oppositions shall be also so limited. Additionally, all dispositive motions and opposition briefs shall be limited to a maximum of fifty pages. All oppositions shall be also so limited. This limitation is exclusive of the cover page, index, table of cases relied upon, and exhibits.

[15] The record does not indicate the date Respondent learned of the Complainant's engagement with IER. This fact will have to be established by Complainant in order for Complainant to be successful on this allegation.

Parties must file for leave of the Court and demonstrate good cause to deviate from such limits.

SO ORDERED.

Dated and entered on April 7, 2021.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge