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

August 11, 2022

Ravi Sharma, Complainant, v. NVIDIA CORP., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2022B00023

Appearances: Ravi Sharma, pro se, for Complainant
Patrick Shen, Esq., for Respondent

ORDER DENYING MOTION TO DISMISS

I. INTRODUCTION AND PROCEDURAL HISTORY

On February 2, 2022, Complainant, Ravi Sharma, filed a Complaint[1] with the Office of the Chief Administrative Hearing Officer (OCAHO) asserting that Respondent, NVIDIA Corporation, violated 8 U.S.C. § 1324b by discriminating on the basis of citizenship status.

On March 15, 2022, Respondent, through counsel, filed its Answer and a Motion to Dismiss. On March 23, 2022, Complainant filed an Opposition to the Motion to Dismiss (Opposition).

II. PARTIES' POSITIONS

A. Motion to Dismiss

Respondent argues the Complaint fails to state a claim upon which relief can be granted. *See* Mot. Dismiss 1. Respondent asserts this case merits a heightened pleading standard. In the alternative, Respondent argues the Complaint fails to meet the notice pleading standard. *See id.* at 2.

[1] Complainant alleges: "I believe that Nvidia hired an H-1B visa or OPT visa candidate [for a Senior Logic Design Engineer position] and discriminated against me, an equally qualified U.S. citizen for the position, in violation of U.S.C. § 1324b." Compl. 7.

Respondent first highlights this matter's procedural history before the Immigrant and Employee Rights Section (IER) of the U.S. Department of Justice's Civil Rights Division. *Id.* at 3–4. IER "rejected Complainant's Charge [because] . . . IER 'concluded [Complainant's] submission [did] not constitute a charge as defined by [IER's] regulations[2]' . . . [and that] an allegation of conduct that violates 8 U.S.C. Section 1324b [cannot] reasonably be inferred from [Complainant's] submission.[3]'" *Id*. Respondent proffers "no administrative record was developed." *Id.* at 2.

Respondent argues that the lack of administrative records necessitates a a heightened pleading standard. *See id.* at 2.[4] Specifically, Respondent argues "this Court should apply *Twombly*[5] to this motion to dismiss." *Id.* at 8. Relying on 28 C.F.R. Section 68.1,[6] Respondent concludes "because the OCAHO rule is modeled after FRCP 12(b)(6), OCAHO, like a federal court, should not accept a party's legal conclusions as correct." *Id.*

Respondent argues in the alternative that, even if this Court applied notice pleading standards, the Complaint also fails to meet that standard. *See id.* at 5. Respondent characterizes the Complaint as "mere conclusions . . . [and conjecture]." *Id.* at 10. Respondent argues that notice pleading "requires a complainant to plead sufficient facts to make his or her claim plausible," and Complainant has failed to meet this standard. *Id.* at 2.

B. Opposition

Complainant, appearing pro se, asserts his Complaint is not deficient and should not be dismissed. *See generally* Opp'n. He takes issue with certain statements in the Answer,[7] and requests the case remain in the forum and proceedings (to include discovery) continue. *Id.* at 1–2.

---

[2] Unfair Immigration-Related Employment Practices, located at 28 C.F.R. Part 44, governs the lodging and investigation of a charge of employment discrimination under 8 U.S.C. § 1324b. OCAHO's regulations for conducting proceedings are found at 28 C.F.R. Part 68.

[3] Respondent does clarify "IER is not a party in this matter, and the specifics of its investigation into the charge are not part of the record of proceedings in this matter." Mot. Dismiss 10.

[4] Respondent argues for application of *Twombly* and *Iqbal* pleading standards because IER did not create an administrative record through its pre-complaint investigation process. *See* Mot. Dismiss 8–9 (citing *United States v. Split Rail Fence Co.*, 10 OCAHO no. 1181, 5 (2013) [CAHO Order Declining to Modify or Vacate Interlocutory Order], and then citing *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 9 (2012)) (asserting these cases are factually distinct and therefore inapposite to this matter).

[5] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[6] This provision allows the Court to rely on the Federal Rules of Civil Procedure (FRCP) as general guidance. *See Split Rail Fence Co.*, 10 OCAHO no. 1181, at 4.

[7] The Court observes that factual disputes about the Answer need not be resolved at this juncture. *See Hammoudah v. Rush-Presbyterian- St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 779 (2000).

III. LEGAL STANDARDS

A. Pleading Standard

To meet pleading standards, a complaint must 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).

Statements made in the complaint only need to be "facially sufficient to permit the case to proceed further," *Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 10 (citations omitted), as "[t]he bar for pleadings in this forum is low." *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021). OCAHO's pleading standard does not require a complainant proffer evidence at the pleadings stage. *See Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 10. Rather, pleadings are sufficient if "the allegations give adequate ***notice*** to the respondents of the charges made against them." *See Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003) (emphasis added).

When the complainant appears pro se, the pleading standard may be "liberally construed." *Halim v. Accu-Labs Rsch., Inc.*, 3 OCAHO no. 474, 765, 777 (1992) (citations omitted); *see also United States v. Union Lakeville Corp.*, 8 OCAHO no. 1019, 277, 280–81 (1998).[8]

This forum has recognized the propriety of notice pleading standard where IER investigated claims pre-complaint and, through that process, IER functionally placed employers on notice of the allegations in advance of litigation in this forum. *See Marc-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9.[9] However, notice pleading remains the appropriate standard even when the record is unclear as to what, if anything, IER did with a claim pre-complaint.[10] *See generally Zajradhara v. Misamis Construction (Saipan) LTD.*, 15 OCAHO no. 1396a, 2–4 (2022).

In contrast, federal court utilizes the pleading standard as outlined in the *Twombly* and *Iqbal* decisions and FRCP 8(a).[11] Following *Twombly* and *Iqbal*, OCAHO has explicitly declined to

---

[8] "OCAHO has adopted a standardized and simplified complaint form that is frequently used by pro se litigants in § 1324b cases; the form is designed to focus on the basic minimal elements of a claim while at the same time discouraging the pleading of extraneous, redundant, or overly detailed narratives." *Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9 (citation omitted).

[9] "Unlike complaints filed in the district courts, every complaint filed in this forum, whether pursuant to §1324a, §1324b, or § 1324c, has already been the subject of an underlying administrative process as a condition precedent to the filing of the complaint, either in the form of an [IER] investigation or an ICE inspection." *Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9.

[10] Indeed, in cases arising under § 1324b, there is no mechanism by which the pre-complaint activity of IER enters the record.

[11] *Twombly*, 550 U.S. at 557 ("[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"); *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (endorsing *Twombly*). FED. R. CIV. P. 8(a) provides:

invoke the stricter pleading standard from those cases. *Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, at 4–5; *see, e.g.*, *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6–8 (2016).

Independent of OCAHO precedent and, arguably, most dispositive, are OCAHO's governing procedural regulations, which separately support the use of notice pleading standards. *See* 28 C.F.R. § 68.7. Indeed, OCAHO's pleading standard description at 28 C.F.R. § 68.7 notably diverges from the FRCP 8(a)'s description of pleading standards.[12] *See* 28 CF.R. § 68.1 (stating that the "[FRCP] may be used as a general guideline in any situation ***not provided for or controlled by these rule[s.]***") (emphasis added).

B. Motion to Dismiss Standard

OCAHO's notice pleading standard works in tandem with the legal standard for a motion to dismiss, yet the two standards remain distinct.[13] OCAHO's pleading standard ensures respondents

---

> "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."

[12] A comparison of OCAHO's regulations to the FRCP provides further support for utilizing a notice pleading standard:

> "While certain elements of these two standards are substantially similar (i.e., 'clear and concise' and 'short and plain' statements), the thrust of the two standards is substantially different. OCAHO's rule requires only that the complainant set out facts 'for each violation alleged to have occurred.' The federal standard, by contrast, requires that the 'short and plain statement of the claim' show that 'the pleader is *entitled* to relief.' This language regarding 'entitlement' to relief was central to the Court's decisions in *Iqbal* and *Twombly*. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555 ('a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions.'). Therefore, the federal pleading standard, particularly as interpreted in the aforementioned Supreme Court cases, establishes a different standard for pleadings than is required by OCAHO's regulations."

Split Rail Fence Co., Inc., 10 OCAHO no. 1181, at 5 (internal citations omitted).

[13] While the Court does not apply FRCP 8(a) for the reasons referenced in this Order, analysis of this rule's interplay with Rule 12 remain applicable. *See generally* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1203 (4th ed. 2022) (explaining "it is readily apparent that Rules 8 and 12 are closely related and interdependent and that cases discussing the requisites and sufficiency of a complaint in the context of a motion to dismiss are relevant to the

receive sufficient notice of the complainant's allegations. Separately, the legal standard for a motion to dismiss requires an analysis as to whether the complaint states a claim upon which relief may be granted. 28 C.F.R. § 68.10;[14] *see Heath v. Tringapps, Inc.*, 15 OCAHO no. 1410, 3 (2022).

When reviewing a motion to dismiss, OCAHO "accepts the facts alleged in the complaint as true and construes the facts in the light most favorable to the complainant." *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381d, 10 (2021) (citation omitted).

Complainants must provide more than legal conclusions, but need not plead a prima facie claim of discrimination,[15] to overcome a motion to dismiss. *See Robert Half Legal*, 12 OCAHO no. 1272, 6 ("[A] § 1324b complaint must nevertheless contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination.").[16] In order to "give rise to an inference of discrimination," complaints must include information that links the complainant's protected class and the employment action in question.[17] *Id.*; *Ba v. Wal-Mart Store 1199*, 10 OCAHO no. 1163, 3 (2012) (stating that "[t]here must be some [alleged] facts, not just legal conclusions that 'connect[] his United States citizenship status to his termination.'") (internal citation omitted).

---

question whether a complaint properly states a claim for relief. Therefore, the discussion of Rule 8 must be read in conjunction with the discussion under Rule 12.").

[14] "Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6)." *Heath v. Tringapps, Inc.*, 15 OCAHO no. 1410, 3 (2022).

[15] District courts have embraced a similar understanding of pleading a *prima facie* discrimination claim following *Twombly* and *Iqbal*. *See U.S. EEOC v. Univ. Coll. Of Chapman Univ.*, 2012 U.S. Dist. LEXIS 69982, at *9–10 (N.D. Cal. May 18, 2012) ("*Twombly*, as Defendants concede, explicitly did not overturn the Supreme Court's holding in *Swierkiewicz v. Sorema N.A.* that an employment discrimination complaint under ADEA and Title VII need not contain specific facts establishing a *prima facie* case . . . [.]") (internal quotation marks and citations omitted); *see also EEOC v. Univ. Brixius, LLC*, 264 F.R.D. 514, 516–17 (E.D. Wis. 2009) ("As *Swierkiewicz* made clear, a plaintiff is not required to set forth the elements of a prima facie case of sexual discrimination in a complaint. *Twombly* and *Iqbal* did not change this.").

[16] Separately, the Court did fully consider the potential application of the *Robert Half Legal v. Jablonksi* case as identified by the Respondent; however, that case is both procedurally and factually distinct from the present case, which limits its utility here. 12 OCAHO no. 1272 (2016).

[17] Germane to this case, prima facie claims for non-selection (i.e. hiring) cases contain the following: "(1) complainant's membership of a protected class (citizenship or national origin); (2) an employer seeking applicants for a position; (3) complainant's application for the vacant position; (4) complainant was qualified for the position; and (5) complainant was not selected for the position." *Zajradhara v. Gig Partners*, 14 OCAHO no. 1363c, 7 (2021) (citations omitted).

IV. DISCUSSION & ANALYSIS

A. Propriety of Notice Pleading - The Standard Met by This Complaint

The Court affirms once more the propriety of notice pleading consistent with 28 C.F.R. § 68.7.

OCAHO's pleading standard does not function as "a game of skill in which one misstep by counsel may be decisive to the outcome," but rather, the standard ensures a respondent receives adequate notice of the suit. *See United States v. Villatoro-Guzman*, 3 OCAHO no. 540, 1400, 1412 (1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

For a complaint to provide adequate notice, it must outline sufficient facts for a Respondent to defend against the allegations put forth by the Complainant. *See United States v. Makilan*, 4 OCAHO no. 610, 202, 210 (1994). A complaint cannot be "vague," nor can it be "confusing or ambiguous." *Id.*; *United States v. Italy Dep't Store, Inc.*, 6 OCAHO no. 847, 229, 234 (1996).

With jurisdiction over a narrow scope of employment and immigration matters, OCAHO's docket "differs sharply from that in a federal district court." *Marc-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9. The narrow scope outlined in the statute itself provides baseline notice to employers as to the potential protected class and potential employment action at issue. *See* 8 U.S.C. § 1324b.

Respondent highlights past OCAHO precedent to justify a liberal pleading standard only when the matter has previously been subject to investigation or administrative review by IER.[18] *See* Mot. Dismiss 4–12 (citations omitted). Respondent errs in its analysis as the referenced precedential cases provide a rationale for notice pleading, but not the exclusive or singular rationale for notice pleading. What IER does (or does not do) in conformity with its separate regulations has no bearing on the Court's interpretation and application of 28 C.F.R. § 68.7.[19]

Turning now to an analysis of this Complaint, the Court first notes this Complainant appears pro se, a fact which gives rise to a more liberal view of his efforts to meet the pleading standard.

---

[18] Respondent repeatedly asserts "no administrative record was developed" in the present case. The Court need not analyze this assertion, as prior administrative review is not dispositive of the proper pleading standard.

When IER creates "administrative records," the Court presumes IER does so in conformity with its regulations. OCAHO's administrative record begins with the filing of the Complaint and issuance of the Notice of Case Assignment for Complaint Alleging Unlawful Employment. *See* 28 C.F.R. §§ 68.3–68.7.

[19] *See generally* Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require that Allegations be Presented to an Agency without the Resources to Consider Them*, 21 Geo. Mason U. Civ. Rts. L. J. 213, 249 (2011).

Here, this Complaint identifies the Complainant's membership in a protected class—his citizenship. Compl. 6. Complainant alleges the Respondent sought applicants for a particular position, a Senior Logic Design Engineer. He alleges he applied to this position. *Id.* Complainant alleges that he was qualified for this position, and that he was not selected for the position. Compl. 6–7. He identifies in the Complaint that the Respondent may have alternatively hired a non-citizen into this specific position, positing that the Respondent may have selected the other candidate because of that candidate's citizenship status. *See* Compl. 7.

The Complaint succinctly yet clearly informs the Respondent why Complainant has brought this suit. The specificity of the protected class and position for which Complainant was not selected give Respondent adequate notice to answer the Complaint accordingly.

The Complaint meets the notice pleading standard.

B. Complaint Does Not Warrant Dismissal for Failure to State a Claim

OCAHO's legal standard for a motion to dismiss is "modeled after Federal Rule of Civil Procedure 12(b)(6)." *Tringapps, Inc.*, 15 OCAHO no. 1410, at 3. While Rule 12(b)(6) can serve as a model, case law applying the rule is instructive only to the extent it does not contradict Section 68.10. *See Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, at 4; *infra* Part IV.A. When analyzing a motion to dismiss, "[t]he court must accept the complainant's allegations of fact as true, along with such reasonable inferences as may be drawn in the complainant's favor[.]" *See Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994) (citations omitted).

Bearing in mind the interdependent nature of an analysis of a Rule 12-based motion and pleading standards, by meeting the pleading standard here, the Complaint has stated a claim upon which relief can be granted because he has identified a theory by which this Respondent allegedly violated 8 U.S.C. § 1324b.

V. CONCLUSION

Because the Complainant has met the notice pleading standard and because he has stated a claim upon which relief can be granted, Respondent's Motion to Dismiss is DENIED.

SO ORDERED.

Dated and entered on August 11, 2022.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge