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

August 9, 2023

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| RAVI SHARMA,<br>Complainant,<br><br>v.<br><br>NVIDIA CORP.,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | 8 U.S.C. § 1324b Proceeding<br>OCAHO Case No. 2022B00023 |

Appearances: Ravi Sharma, pro se Complainant
Patrick Shen, Esq., K. Edward Raleigh, Esq., and Samantha Caesar, Esq., for Respondent

ORDER ON COMPLAINANT'S MOTION TO AMEND COMPLAINT

## I. BACKGROUND

On February 2, 2022, Complainant, Ravi Sharma, filed a complaint, pro se, with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant alleges that Respondent, NVIDIA Corporation (NVIDIA), declined to hire him on account of his citizenship status in violation of § 1324b(a)(1).

On March 15, 2022, Respondent filed an answer. Respondent concurrently filed a motion to dismiss, which the Court denied. *Ravi Sharma v. NIVIDIA Corp.*, 17 OCAHO no. 1450 (2022).

On March 13, 2023, Respondent filed a Motion for Summary Decision. This motion is still pending before the Court. On April 10, 2023, Complainant filed his Response.

On July 11, 2023, Complainant filed a Motion for Leave to Amend his Complaint. Mot. Leave Amend. Compl. In the motion, Complainant asks to be allowed to amend his complaint to add a claim of retaliation pursuant to 28 C.F.R. § 68.9(e).[1] *Id* at 1. In support of his motion,

[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

Complainant explains he reviewed an unrelated OCAHO order issued on June 15, 2023, which caused him to notice that there is a separate section for retaliation on the OCAHO Complaint form, and "study relevant OCAHO cases regarding amendment including cases about retaliation." *Id.* He "realized that [he has] a potential retaliation claim in the instant case." *Id.* He then describes a theory of retaliation wherein the Respondent "asked him questions about [his] visa status" before making a decision on whether to further interview him. *Id.* Complainant asserts that there will be "no new discovery involved" and that he is "not moving to amend in bad faith or with a dilatory motive." *Id.* at 2.

On July 19, 2023, Respondent timely filed its opposition, describing Complainant's filing as "unduly prejudicial" from a timing perspective and "futile" from a substantive perspective. R's Opp'n 1. As to prejudice, Respondent notes discovery closed on February 6, 2023 (well over 100 days prior to Complainant's motion) and Respondent's motion for summary decision is pending before the Court. *Id.* at 3, 8–10.[2] As to futility, Respondent argues Complainant did not identify the requisite protected activity which temporally preceded the proposed adverse action taken by Respondent. *Id.* at 6–8.

## II. LEGAL STANDARDS

OCAHO's rules permit amendment of a complaint, as relevant: (1) "[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," and (2) "[w]hen issues not raised in the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties," in which case they "shall be treated in all respects as if they had been raised in the pleadings," and "may be made as necessary to make the pleading conform to the evidence." 28 C.F.R. § 68.9(e).

[2] Citing, inter alia, *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (noting that the "need to reopen discovery and therefore delay the proceedings" supports a finding of prejudice from a delayed motion to amend); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (finding district court did not abuse discretion in denying leave to amend considering the delay of two years and the fact that new claims would require the defendant to undertake an "entirely new course of defense" late in litigation); *Texaco Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991) (denying leave to amend where moving party "waited until after discovery was over, just four and a half months before the trial date, before moving to amend the complaint," finding undue prejudice); *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) ("[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the case of action." (citation omitted)).

In addition to OCAHO Rule 68.9(e), the Court may also look to Rule 15 of the Federal Rules of Civil Procedure, which may be used as guidance in OCAHO proceedings. *See* 28 C.F.R. § 68.1; *United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998). Applicable here (due to the late procedural stage of this matter) is FRCP 15(a)(2), which states: " . . . [in cases where FRCP 15(a)(1) does not apply][3] a 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."

Finally, the Court may utilize United States Court of Appeals for the Ninth Circuit case law based on the location of the parties. *See* 28 C.F.R. § 68.56. In the Ninth Circuit, courts look to four factors when considering a motion to amend: (1) undue delay, (2) bad faith, (3) futility of amendment, and (4) prejudice to the opposing party. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). Undue delay is determined in part by "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990).

## III. DISCUSSION

Respondent does not consent to amending the Complaint, and the parties filings do not demonstrate they ever considered a retaliation theory as in the scope of the original complaint. *See* 28 C.F.R. § 68.9(e)(2). As a preliminary matter, the Court declines to consider bad faith. It was not raised by Respondent. While the presence or absence of bad faith may be generally relevant, on these facts, its absence is not dispositive.

As to undue delay, Complainant's explanation does not excuse the undue delay. Here, Complainant seeks to amend his Complaint 18 months after filing it,[4] and four months after Respondent's Motion for Summary Decision. An eight-month delay between the time of obtaining a relevant fact and seeking a leave to amend may be unreasonable. *AmerisourceBergen Corp.*, 465 F.3d at 953 (citing *Texaco, Inc.*, 939 F.2d at 799). While Complainant claims he did not realize section nine (the retaliation section) of the OCAHO Unfair Immigration-Related Employment Practices Complaint Form (EOIR-58) existed, a review of his Complaint shows he completed that very section. (answering "no" to six retaliation questions). Mot. Leave Amend Compl. 1; Compl. 6, 9. Simply put, the OCAHO complaint form prompts

[3] Federal Rule of Civil Procedure Rule 15(a)(1) states that: "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

[4] Indeed, he could have availed himself of the more permissive provisions of FRCP 15(a)(1) had he sought to amend his Complaint earlier in these proceedings.

complainants to consider whether their pleading should contain an allegation of retaliation. At the time this Complainant completed the form, he knew or should have known of the theory[5] raised by his proposed amendment.
Second, amending the Complaint at this juncture would cause significant prejudice to Respondent.

The significant amount of elapsed time alone creates meaningful prejudice; Respondent presumably preserved evidence in anticipation of presenting relevant defenses to claims arising under the original legal theory advanced by Complainant. Passage of time only serves to reduce a respondent's capability to internally preserve evidence related to Complainant's novel theories. Further, while Complainant states he would not engage in further discovery, it is entirely foreseeable that Respondent would feel compelled to do so. *See Jackson,* 902 F.2d at 1387–88; R's Opp'n 9 ("Respondent . . . has a duty to investigate and defend against claims against it."). Reopening discovery further delays proceedings and forces Respondent to incur additional costs in time and resources, which could have been avoided or significantly mitigated had Complainant's proposed amendment been timely. Ultimately, for the reasons outlined above, the Court concludes amending the Complaint at this juncture would result in significant prejudice to the opposing party. *See Lockheed Martin Corp.*, 194 F.3d at 986 (citing *Solomon v. North Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir.1998)).

Here, the undue delay and prejudice are significant and augur strongly against amending the Complaint. For this reason, the Court is disinclined to examine the futility of the proposed amendment. Even if the new amended complaint met the pleading standard, the prejudice to the Respondent is significant enough in this particular case, that an amendment is not what justice requires.[6]

[5] Here, this proposed amendment is predicated upon a desire to advance a new legal theory arising from the same set of facts. Advancing a motion to amend a complaint when new facts arise could (and perhaps should) result in a completely different analysis.

[6] Denying the motion to amend is "necessary to avoid prejudicing the . . . rights of the parties[.]" 28 C.F.R. § 68.9(e). *See Jackson*, 902 F.2d at 1388 n.4 (noting that because the Ninth Circuit concluded that the district court correctly denied appellants' motion for leave to amend on the grounds of undue prejudice and undue delay, it did not need to "reach the futility point"); *Texaco, Inc.*, 939 F.2d at 798–99 (affirming district court denial of motion to amend due to undue delay and unreasonable prejudice without considering futility or bad faith, noting that "[s]ome courts have stressed prejudice to the opposing party as the key factor") (citations omitted).

Accordingly, Complainant's Motion for Leave to Amend his Complaint is DENIED.

SO ORDERED.

Dated and entered on August 9, 2023.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge