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

February 16, 2018

RAVI NARAYANA KUMAR DAKARAPU, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 17B00095
ARVY TECH, INC., Respondent.	)	

FINAL ORDER OF DISMISSAL

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(1)(B) (2017). Ravi Narayana Kumar Dakarapu (Complainant) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 3, 2017, alleging that Arvy Tech, Inc., (Respondent) violated 8 U.S.C. § 1324b by discriminating against him. Respondent's Motion to Dismiss is now pending. Respondent argues that the complaint should be dismissed because it was untimely, and filed beyond the statutory 180-day limitations period. For reasons set forth herein, Respondent's Motion will be **GRANTED**, as the charge was untimely filed and the complaint is dismissed.

II. BACKGROUND AND PROCEDURAL HISTORY

Complainant is an Indian national who was authorized to work in the United States between February 25, 2016 and July 26, 2016.[1] OCAHO Compl. at 4. Mr. Dakarapu asserts that

[1] The complaint indicates that Complainant's work authorization covered a period from February 25, 2017 to July 26, 2017, but a discrepancy later indicates that he was authorized to work from February 24, 2016 to July 26, 2016. OCAHO Compl. at 5. Considering that the alleged conduct occurred exclusively in 2016, the discrepancy is presumed a typographical error and this Order considers the work authorization to cover a period in 2016.

his H1B Visa was revoked on March 23, 2016 and that he worked for the employer (Respondent) until June 23, 2016. *Id*. On April 20, 2017, Complainant initially filed a discrimination charge with the Department of Justice's Immigrant and Employee Rights Section (IER), alleging that discriminatory action occurred between March 2016 and June 23, 2016.

In a letter dated May 9, 2017, IER informed Complainant that it was dismissing his charge because the "submission is untimely filed." *See* OCAHO Compl. at 15, IER Letter of Determination (May 9, 2017) (citing 8 U.S.C. § 1324b; 28 C.F.R. § 44.300(b)). IER stated that Complainant could nevertheless present his claims by filing a complaint with OCAHO, which he did on August 3, 2017. Dakarapu's completed questionnaire, submitted with the complaint, indicates that Respondent discriminated against him on account of his citizenship status and during the Forms I-9 process and retaliated against for exercising his rights under 8 U.S.C. § 1324b. OCAHO Compl. at 1-5. In the explanatory section of the complaint he alleges that the employer "has not given me any relevant documents for my hiring and has not paid my salary for a single day." OCAHO Compl. at 9. The alleged discriminatory acts occurred in Johns Creek, Georgia, located in the U.S. Court of Appeals for the Eleventh Circuit's jurisdiction.

OCAHO sent Respondent a Notice of Case Assignment For Complaint Alleging Unfair Immigration-Related Employment Practices and a copy of the complaint on August 8, 2017, via certified mail through the U.S. Postal Service (USPS). Respondent filed a Motion to Dismiss on September 6, 2017. Respondent did not file an answer.[2] The Motion asserts that the last alleged discriminatory act occurred on June 23, 2016. This is more than 180 days prior to April 20, 2017, the date Complainant filed a charge with IER. Motion to Dismiss at 1. Respondent asserts that this action must be dismissed because the complaint is time barred. On December 5, 2017, I issued an Order to Show Cause, directing Complainant to explain why the case should not be dismissed in light of Respondent's allegation the charge was untimely.

[2] Department of Justice regulations provide that, "[f]ailure of the respondent to file an answer within the time provided may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default." 28 C.F.R. § 68.9(b) (2017). The undersigned notes Respondent's failure to file an answer could be the basis for dismissal. However, it is deemed a limited appearance for the purpose of contesting the 180-day statute of limitations which is appropriately raised in this matter. Therefore, a notice to show cause was not issued, and discretionary dismissal on this basis alone is not warranted here. *See, e.g., United States v. Kampe,* 3 OCAHO no.454, 602, 604 (1992) (Dismissal for failure to file an answer is subject to ALJ's discretion).

On December 29, 2017, Complainant filed a response to the Show Cause Order indicating that he emailed IER on July 31, 2016 and November 15, 2016.[3] Complainant maintains that these two communications are sufficient to satisfy the statute of limitations. Response to Show Cause Order (Complainant's Response) at 1, 13-16. Complainant's July 31, 2016 email to IER identifies the following questions for the investigators to consider: (1) why it should be held against him that his employer (Respondent) failed to provide information to the "immigration team"; (2) "why [his] VISA was cancelled"; and (3) confirmation of his U.S. Citizenship and Immigration Services (USCIS) records. As noted, Complainant's November 2016 email: (1) refers to a salary dispute; (2) presents facts that "can help you to prove [Respondent] as a fraud." Complainant's Response at 13. These allegations involve an assorted list of allegations that involve project assignments, Complainant's interaction with vendors and whether employer-Respondent Arvy Tech paid employee-Complainant earned wages.

III. 180-DAY DEADLINE TO FILE CHARGE WITH IER

As originally set forth in the Show Cause Order, a Complainant, alleging immigration-related employment discrimination, must file a charge with IER within 180 days of the alleged discrimination. This deadline is a prerequisite for bringing a case before OCAHO under 8 U.S.C. § 1324b. For instance, 8 U.S.C. § 1324b(d)(3) mandates 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 [IER]." Allegations in the complaint are considered as true and are to be construed in Complainant's favor when a case is in the preliminary stage of litigation. *Osorno v. Geraldo*, 1 OCAHO no. 275, 1782, 1786 (1990). [4]

[3] Complainant filed a certificate of service indicating that on January 24, 2018, he served Lucy Lu Associates (Respondent's counsel) with a copy of his Response to the Show Cause Order. His December 29, 2017 response to the Show Cause Order contained no certificate of service as required by 28 C.F.R. § 68.6. The tribunal notes that by failing to complete service on opposing counsel and to file a certificate of service, January 24, 2018 becomes the effective date for his filing. The response to the show cause order therefore was untimely because the Show Cause Order required a response by January 3, 2018. Failure to comply with the Show Cause Order by January 3, 2018 is noted for the record but is nonetheless not the basis for this dismissal.

[4] The OCAHO Rules of Practice and Procedure are set forth at 28 C.F.R. part 68 (2017). 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

Again, the statutory requirement that an unfair immigration related charge be filed within 180 days is a prerequisite for OCAHO cases. *Lundy v. OOCL (USA) Inc*., 1 OCAHO no. 215, 1438, 1445 (1990).

Complainant alleges that the last discriminatory act occurred on June 23, 2016, but he filed a charge with IER more than 180 days later, on April 20, 2017. A timely charge should have been filed by December 20, 2016. OCAHO Compl. at 9; 8 U.S.C. § 1324b(d)(3). Neither the OCAHO complaint nor Complainant's response to the Show Cause Order asserts that a *charge* was filed before April 20, 2017. OCAHO Compl. at 3; Complainant's Response. The May 9, 2017 letter from IER dismissed the charge as untimely. It acknowledges an April 20, 2017 charge only. Complainant's Response at 10. Complainant did not supplement the record to show whether IER acknowledged receipt of the July and November 2016 emails. Without providing sufficient documentation, Complainant has provided the undersigned with an insufficient record to evaluate IER's preliminary response, if any.

Complainant's July and November 2016 emails to IER do not constitute a charge because they do not allege an unfair immigration-related employment practice under 8 U.S.C. § 1324b.[5] The theme of these emails to IER is "to inform you about the fraudulent behaviour of my H1B Employer." Complainant's Response at 13. This Order addresses only whether the charge was timely submitted to IER within 180 days of the alleged discrimination and not whether the complaint failed to state a claim upon which relief can be granted according to 28 C.F.R. § 68.10. That being said, OCAHO's jurisdiction under "8 U.S.C. § 1324b is limited to claims that involve the hiring, recruitment, or discharge of employees, 8 U.S.C. § 1324b(a)(1), retaliation for engaging in protected conduct, 8 U.S.C. § 1324b(a)(5), and document abuse, 8 U.S.C. § 1324b(a)(6)." *Thompson v. Sanchez Auto Servs.*, 12 OCAHO no. 1302, 4 (2017). It is well established that wage and hour disputes are not properly before IER and OCAHO. *Id.* This is relevant because, on its face, the July and November 2016 emails contain no justiciable issue under 8 U.S.C. § 1324b; and, therefore, there are no issues for IER to investigate. Complainant's

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

[5] OCAHO and IER hold jurisdiction to hear disputes that relate to "[d]ocument abuse within the meaning of 8 U.S.C. § 1324b(a)(6) [which] occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin." *Angulo v. Securitas Sec. Servs. USA, Inc*., 11 OCAHO no. 1259, 5-6 (2015). Use of the E-Verify system may be related to document abuse, but the vague reference to E-Verify in Complainant's July and November 2016 emails are insufficient to raise an articulable claim of document abuse. *See eg*., *United States v. Mar-Jac Poultry Inc*., 12 OCAHO 1298, 25 (2017) ("Document abuse . . . [may involve] participation in the E-Verify program.") (internal citations omitted).

November 15, 2016 email raises the following unrelated questions: (1) "[h]ow can Arvy Tech sign a Master Service agreement on 10 May 2016 with A2C (E-Verify: Case Verification Number: 2016078122515TT)"; and (2) "[w]hy [he] was not notified about [his] H1B revoke [sic] on 23rd Mar 2016." Complainant's Response at 13. The only facts relating to IER's jurisdiction in these emails concern the H-1B Visa program and E-Verify. Simple mention of these subjects without at least some factual or legal argument linking to 8 U.S.C. § 1324b is insufficient to constitute a charge.

Evaluating whether Complainant's allegations are sufficient to constitute a charge is comparable to the question in *Caspi*. There, the ALJ determined that the statute of limitations prevented consideration of the complaint because the documentation had "no hint of any such [justiciable] allegation." *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071 (1998). *Caspi* determined that the allegations were untimely because "a fair reading of the information contained in the questionnaire [does not] even touch[] on the issue." *Id.* at 1069. Here, the July and November 2016 emails contain no hint of an unlawful employment practice. Section 1324b only restricts discrimination "because of such individual's national origin," 8 U.S.C. § 1324b(a)(1)(A), on account of an "individual's citizenship status," 8 U.S.C. § 1324b(a)(1)(B), or document abuse relating to "request[s] . . . for more or different documents . . . with the intent of discriminating . . . " 8 U.S.C. § 1324b(a)(6). Accordingly, the emails submitted in response to the Show Cause Order contain no articulable claim of discrimination under 8 U.S.C. § 1324b, which limits IER's ability to investigate the claim.

In determining what constitutes a charge, OCAHO is guided by IER's regulations that define a charge. Unfair Immigration–Related Employment Practices, 28 C.F.R. § 44.101 (2017).[6] The regulation indicates that a charge must include under oath "a statement sufficient to describe the circumstances, place, and date of an alleged unfair immigration related employment practice." 28 C.F.R. § 44.101(a)(5).[7] IER provided additional explanation in its 2016 final rule. IER Final Rule, 81 Fed. Reg. 91768-91792. Even if the charge is inadequate to constitute a complete charge as defined in § 44.101(a) information provided later may make the charge complete. *Id.* at 91768; 28 C.F.R § 44.301(d)(1) and (d)(2)). The final rule states that "[a]s long

[6] On January 18, 2017, the Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section. *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act (IER Final Rule), 81 Fed. Reg. 91768-92 (Dec. 19, 2016); 28 C.F.R. § 0.53 (2017). This Order refers to IER instead of prior reference to the Office of Special Counsel (OSC).

[7] The alleged unfair immigration-related employment practices occurred in the State of Georgia; and the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) is the appropriate reviewing court, if this Order is appealed. *See* 8 U.S.C. § 1324b(i)(1). Pursuant to 28 C.F.R. § 68.57, the appropriate reviewing court is the Eleventh Circuit Court of Appeals and consequently, this Order incorporates precedent from that Circuit.

as the initial submission is timely, nothing in the statute prevents the Attorney General from later deeming the submission to be a charge." IER Final Rule, 81 Fed. Reg. at 91778. The publication in the federal register also indicates that what constitutes a charge in 28 C.F.R § 44.301(d) parallels the guidance and case law interpreting Title VII. *Id.* (citing *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 109 (2002). There is no evidence that IER opined on whether the July and November 2016 emails were part of the charge. Absent an argument from Complainant that the initially incomplete charge was later completed, and by further failing to submit IER's response to his incomplete charge, there is no basis to determine the charge became complete and was therefore timely. *See* 28 C.F.R. § 44.301(d)(1); IER Final Rule, 81 Fed. Reg. at 91778-79 (Discussion of grace period to amend submission after request from IER).

Relatedly, the Eleventh Circuit uses the Equal Employment Opportunity Commission's (EEOC) definitions, similar to IER's definition of a charge in 28 C.F.R § 44.101(a)(5), to determine whether allegations are sufficient to constitute a charge. *See Wilkerson v. Grinnell Corp*., 270 F.3d 1314, 1317 (11th Cir. 2001) ("[E]ven if a charge does not contain the suggested information, the EEOC will deem a charge minimally sufficient when it receives from the charging party a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.") (internal citations omitted). The July and November 2016 emails were not submitted under oath, but more importantly, these emails are not, according to EEOC's guidance "minimally sufficient." *Id.* These emails do not allege an unfair immigration related practice pursuant to 8 U.S.C. 1324b(b)(1).

Complainant filed an IER charge on April 20, 2017, which is more than 180 days after the last alleged discriminatory act on June 23, 2016. Though the emails were submitted within the statute of limitations period, they nonetheless do not constitute a charge because the subject matter is not substantively connected to a discrimination claim.[8] Consequently, the charge is untimely.

IV. EQUITABLE TOLLING

Given the untimely nature of the charge before IER, the inquiry turns to whether Complainant may present his claims before OCAHO and set aside the time limits of the statute under the theory of equitable tolling. In certain limited situations, the ALJ may equitably toll the 180-day requirement to file a charge before IER pursuant to 8 U.S.C. § 1324b. *Sabol v. N. Mich. Univ.*, 9 OCAHO no. 1107, 6 (2004); *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 794 (1996). Exceptions allowing for equitable tolling are narrow and it is Complainant's

[8] Complainant does not assert his July and November 2016 emails form part of a charge and were submitted within the statutory period. For instance, Complainant failed to allege that IER either did not respond to the July and November 2016 emails, or that these emails articulate a claim sufficient for IER's to investigate.

burden to show that relief is warranted. *Hajiani v. Ali Properties, LLC, Airport Shell*, 10 OCAHO no. 1188, 6 (2013). For equitable tolling, Complainant must "demonstrate an excusable reason for not complying with the timeliness requirements." *Caspi*, 7 OCAHO no. 991, at 1072.

Complainant argues that his July and November 2016 emails to IER are sufficient to toll the 180-day time limit, established by 8 U.S.C. § 1324b(d)(3). Complainant asserts three reasons show good cause for his delay in filing a charge before IER: (1) he resides in India; (2) he is a *pro se* litigant and cannot afford an attorney; and (3) he does not have experience with the American legal system. Complainant's Response at 1. The fact that he is *pro se* is alone insufficient as a basis for equitable tolling. *Caspi*, 7 OCAHO No. 991 at 1072. The only instance of his due diligence is that Complainant appraised IER of his wage and hour concerns when he did "not receive any justice" from a related claim to the Department of Labor. Complainant's Response at 1.

Complainant appears in search of a proper venue to file a complaint which primarily involves a wage dispute. His 2016 emails to IER did not put either IER or Respondent on notice of allegations of 8 U.S.C. § 1324b discrimination. There is no indication that Respondent misled Complainant to file in the wrong forum. *Sabol*, 9 OCAHO no. 1107 at 8. Complainant also did not argue that IER erred when it failed to consider that his July or November 2016 emails formed part of the charge. *C.f. Goel v. Indotronix Int'l Corp.*, 9 OCAHO no. 1102, 9 (2003) ("[U]nder limited circumstances an agency error which materially affects the rights of a complainant might give rise to equitable modification of a filing deadline."). Both OCAHO and Eleventh Circuit precedent provide that only in "extraordinary circumstances" can equitable tolling be used to set aside the 180-day statute of limitations in 8 U.S.C. § 1324b. *Hajiani*, 10 OCAHO no. 1188 at 5 (citing *Jackson v. Astrue*, 506 F.3d 1349, 1353-54 (11th Cir. 2007)). But, Complainant's mere "[i]gnorance of filing requirements does not entitle [him] to a time extension." *Grodzki v. OOCL (USA) Inc.*, 1 OCAHO no. 295, 1948, 1955 (1991). The July and November 2016 emails (which also do not relate to 8 U.S.C. § 1324b), nor Complainant's inexperience with the legal system are sufficient to justify tolling the statute of limitations. There is no record of extraordinary circumstances sufficient to support equitable tolling.

V. CONCLUSION

Complainant's July and November 2016 email communications with IER are not minimally sufficient to constitute a charge because they are not substantively related to an unfair immigration-related employment practice. Therefore, the April 20, 2017 IER charge was untimely and exceeds the statutory period for filing. Complainant also failed to meet his burden of showing that his communication with IER is sufficient to justify invoking the rarely used remedy of equitable tolling. Thus, there is no basis to set aside the 180-day filing deadline imposed by 8 U.S.C. § 1324b(d)(3). The complaint is hereby **DISMISSED** as untimely filed and Respondent's Motion to Dismiss is **GRANTED**.

SO ORDERED.

Dated and entered on February 16, 2018.

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Priscilla M. Rae
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.