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

WALIED SHATER, Complainant, v. SHELL OIL COMPANY, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2022B00025

Appearances: Walied Shater, pro se Complainant
Ethel J. Johnson, Esq., for Respondent

ORDER ON RESPONDENT'S MOTION TO DISMISS

I. PROCEDURAL HISTORY

This case arises out of the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b.

On February 16, 2022, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent discriminated against him based on national origin and citizenship status and retaliated against him for asserting rights protected under § 1324b.

Presently before the Court is Respondent's Motion to Dismiss. Complainant has opposed the motion. For the reasons that follow, the Court finds that Respondent has established that Complainant's complaint is time-barred by 8 U.S.C. § 1324b(d)(3), and Respondent's Motion to Dismiss is granted.

II. MOTION TO AMEND COMPLAINT

On May 12, 2022, Complainant submitted a filing titled: "Additional Information By Complainant [] As Respondent [] Failed to Reply to [NOCA] Under EOIR Policy Manual 3.5 Filing an Answer." In this filing, Complainant writes that he intends to file a complaint under 28 C.F.R. § 0.53(b)(1)–(5) with the Deputy Special Counsel of IER to "document how the Respondent failed to provide relevant information, material facts known to Respondent and/or

misled the DOJ/IER" regarding his IER charge, which he asserts are documented in depositions in a federal court Title VII discrimination lawsuit. Additional Information 1. Within its filing, Complainant also alleges that the Respondent's Corporate Security (CS) team failed to adhere to its Code of Conduct. *See generally* id.

The Court construes this filing as a motion to amend the Complaint. OCAHO Rule 68.9(e) permits a complainant to amend a complaint "[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 interests and the rights of the parties[.]" The Court is therefore charged with balancing those interests in determining whether to allow the proposed amendment. United States v. Sal's Lounge, 15 OCAHO no. 1394, 1–2 (2020) (citing United States v. Mr. Z Enters., 1 OCAHO no. 162, 1128, 1128 (1990) (internal citations omitted)).[1]

OCAHO Rule 68.9(e) is "analogous to and is modeled upon Rule 15 of the Federal Rules of Civil Procedure," a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1. United States v. Valenzuela, 8 OCAHO no. 1004, 3 (1998). 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.

Federal Rule of Civil Procedure 15(a)(2) provides that: "[i]n all other cases, 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."

Insofar as the filing was submitted more than 21 days after the Complaint, and without a submission indicating the consent of the Respondent, Rule 15(a)(2) applies.

Since the allegations at issue in this case occurred in Texas, the Court may look to the case law of the relevant United States Court of Appeals, here the Fifth Circuit. *See* 28 C.F.R. §

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

68.57.[2] In the Fifth Circuit, courts consider several factors in deciding whether to grant or deny the motion to amend pursuant to Rule 15(a)(2): "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." Waddleton v. Rodriguez, 750 F. App'x 248, 257 (5th Cir. 2018) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Here, there is no evidence of undue delay, bad faith, or dilatory motive. Moreover, Complainant submitted this filing early in the proceedings, prior to the filing of an answer, and this is Complainant's first request to amend. Similarly, there is no evidence of prejudice to the Respondent in permitting this belated filing.

While the other elements tilt towards granting the motion to amend, the Court declines to grant the motion because the granting would be futile to the claims in the complaint. As the court has previously noted, "a court may deny as futile a motion to amend a complaint when the proposed complaint would not survive a motion to dismiss." Ogunremi v. Law Resources, 13 OCAHO no. 1332, 3 (2019) (citing James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996)). Here, as discussed in more detail below, Complainant's allegations regarding instances of discrimination or retaliation which occurred prior to March 4, 2021 are time-barred pursuant to 8 U.S.C. § 1324b(d)(3). Complainant's Additional Information filing does not contain allegations regarding instances of discrimination or retaliation which occurred on or after March 4, 2021. Moreover, Complainant's only allegations regarding events after that date do not relate to discrimination or retaliation against him, but rather, generalized disagreements with Respondent's conduct. *See* Additional Information 1 (setting forth allegations regarding Respondent's actions in Ukraine in 2022), 16 (alleging that another Shell employee was relocating as Regional Security manager in 2022), 32 (alleging that the former President of Mauritania was jailed in June 2021). The additional allegations in Complainant's Additional Information filing would not survive a motion to dismiss and would therefore be futile.

Accordingly, the Court declines to consider Complainant's Additional Information filing as an amendment to the Complaint.

III. STANDARD OF REVIEW

An OCAHO Administrative Law Judge (ALJ) may dismiss a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10. This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). S. v. Discover Fin. Servs., LLC, 12

[2] It is not clear from the allegations in the Complaint where Complainant was located when the alleged act of discrimination/retaliation at issue occurred; but he was "repatriated" back to Houston, and was hired as a "Houston-based employee." Compl. 19. Respondent is, likewise, located in Houston. Id. at 6.

OCAHO no. 1292, 7 (2016) (citing United States v. Spectrum Technical Staffing Servs., Inc., 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1).

"In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint." Udala v. N.Y. State Dep't of Educ., 4 OCAHO no. 633, 390, 394 (1994). The complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor. Id.

To meet OCAHO 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," United States v. Mar-Jac Poultry, Inc., 10 OCAHO no. 1148, 10 (2012) (citations omitted), as "[t]he bar for pleadings in this forum is low," United States v. Facebook, Inc., 14 OCAHO no. 1386b, 5 (2021). Section 1324b complainants must provide more than legal conclusions, but need not plead a prima facie claim of discrimination, to overcome a motion to dismiss. *See* Jablonski v. Robert Half Legal, 12 OCAHO no. 1272, 6 (2016) ("[A] § 1324b complaint must nevertheless contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination."). 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. *See* id.; Sharma v. NVIDIA Corp., 17 OCAHO no. 1450, 5 (2022). Moreover, the evidentiary standards set forth in McDonnell Douglas Corp. v. Greene, 411 U.S. 492 (1971) do not apply in the motion to dismiss context. Heath v. Tringapps, Inc., 15 OCAHO no. 1410, 5 (2022).

IV. ALLEGATIONS IN THE COMPLAINT

The facts are drawn from the Complaint and its attachments, *see* Fed. R. Civ. P. 10(c). The allegations in the Complaint are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor. Udala, 4 OCAHO no. 633, at 394.

Complainant is a "non-white person of Arab/Middle Eastern (Egyptian and Sudanese) race and national origin," Muslim, and a United States citizen. Compl. 4, 15, 19. He is also a former special agent with the United States Secret Service. Id. at 11. Complainant began working for Shell Expatriate Employment US Inc. and Shell Oil Company as a Country Security Manager (CSM) in August 2013. Id. at 19.

In 2017, Complainant was denied a promotion to the position of Regional Security Manager—Americas "because of [his] race and national origin." Id. The position was instead given to a white, non-Muslim, British individual. Id. On February 12, 2018, Complainant filed a charge with the Equal Employment Opportunity Commission (EEOC) against Respondent, alleging that he was unlawfully denied the promotion. Id. On February 5, 2020, the EEOC

issued a Right to Sue Notice, and on April 24, 2020, Complainant filed a lawsuit against Respondent in federal district court, alleging that the denial of the promotion violated Title VII of the Civil Rights Act of 1964. Id.

On April 28, 2020, Complainant was informed by the VP of Corporate Security (a white, non-Muslim, British individual) that he was "being removed from [his] job, repatriated to the United States (Houston), and terminated effective October 30, 2020, unless [he] found a new job within Shell before that date." Id. Respondent's articulated reason for this action was that Complainant had stopped a guard who challenged him about bringing an unregistered guest into a Shell office in Dubai in November 2019. Id.

Complainant alleges that Respondent's reason for his termination is untrue, and that CCTV footage shows that the guard did not challenge him. Id. Complainant alleges that for months, Respondent refused to give him this CCTV footage, ultimately relented and produced the video, but effected his termination nonetheless. Id. Complainant's performance evaluations, including his 2020 evaluation given to him by his supervisor and Human Resources (HR) in February 2021 were "all outstanding." Id. In contrast, white, non-Muslim, British employees in the Corporate Security (CS) Department at Shell "faced no repercussions for their actions" when the committed some "egregious offense," a fact Complainant pointed out to Shell. Id. at 19–22. (listing alleged "inappropriate conduct" by Shell employees).

Complainant further alleges that one of the individuals involved in Complainant's removal, repatriation, and termination was an HR employee and Industrial Relations Lead who Complainant heard had made racist and derogatory comments about men of Middle Eastern descent in 2019. Id. at 22.

When Respondent removed Complainant from his job and repatriated him, it claimed that two Shell HR Advisors based on Houston would help him find a new position within Shell. Id. However, one ever assisted him. Id. Complainant applied on his own for 13 job positions within Shell, and was rejected from each one between May 26, 2020 and October 21, 2020. Id. at 22–23.

In June 2020, Complainant complained to Respondent's Chief Ethics and Compliance Officer about his removal and repatriation, alleging that it was discriminatory and retaliatory. Id. at 23. His complaint was turned over to the Business Integrity Department (BID) for investigation. Id. His last day at Shell was to be October 30, 2020, but on October 23, 2020, an HR Manager told him that BID's investigation was not completed, and he would therefore be placed on "Personal Leave with Pay" until November 30, 2020, but in the interim, all his access to Respondent's systems would be cut off, he would have to return his company-issued laptop and phone, and he would not be able to apply for any jobs with Respondent. Id. On November 19, 2020, Respondent confirmed that Complainant's termination would take effect on November 30, 2020. Id.

Complainant alleges that Respondent "misled and/or lied" to the DOJ when he filed his original complaint and subsequent retaliation complaint, and that this "information only surfaced as the result of sworn depositions." Id. at 11.

V. ANALYSIS

Respondent moves for dismissal on two grounds. First, Respondent argues that the Complaint is time-barred under 8 U.S.C. § 1324b(d)(2), which provides that a claimant must filed a complaint with OCAHO "within 90 days after the date of receipt of the notice" of his right to sue from IER. Mot. Dismiss 2. Respondent contends that Complainant's IER complaint is untimely by one day. Id. Second, Respondent contends that the Complaint is time-barred under 8 U.S.C. § 1324b(d)(3), which provides 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 [IER]." *See* id. at 2–3 (citing 8 U.S.C. § 1324b(d)(3), and then citing Galindo v. Office of the Chief Admin. Hearing Officer, 856 F. App'x 746, 750 (10th Cir. 2021)). Respondent contends that Complainant's allegations of discrimination and retaliation all occurred outside the 180-day timeframe of the filing of the Complaint, or before March 4, 2021. The Court addresses the second allegation first, concerning the timeliness of the underlying allegations.

A. Timeliness: 8 U.S.C. § 1324b(d)(3)

8 U.S.C. § 1324b(d)(3) provides 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 [IER]." "Filing a timely IER charge is thus a condition precedent to the filing of a private action with OCAHO." A.S. v. Amazon Web. Servs., Inc., 14 OCAHO no. 1381d, 14 (2020) (citing Ndzerre v. Wash. Metro. Area Transit Auth., 13 OCAHO no. 1306, 8 (2017)). "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.; *see also* Narayana Kumar Dakarapu v. Arvy Tech, Inc., 13 OCAHO no. 1308, (2018) ("[T]he statutory requirement that an unfair immigration related charge be filed within 180 days is a prerequisite for OCAHO cases.") (citing Lundy v. OOCL (USA) Inc., 1 OCAHO no. 215, 1438, 1445 (1990)).

As Respondent notes, Complainant's IER charge was filed on August 31, 2021, and therefore, to be timely, the conduct at issue must have occurred on or after March 4, 2021. However, each of the allegations in the Complaint occurred prior to March 4, 2021—in particular, the set of facts leading to Complainant's firing and repatriation occurred between April 28, 2020 and November 30, 2020, when his termination took effect. *See* Compl. 19, 22–23. Complainant does not allege instances of post-employment discrimination or retaliation taken by Respondent, other than claiming in his response to the Motion to Dismiss that he was

able to demonstrate to IER that "there were retaliatory actions by [Respondent] after [Complainant] was terminated on November 30, 2020." Complainant's Opp'n 2. Complainant does not describe those incidents in any detail, or describe when they occurred—i.e., before or after March 4, 2021. His motion to amend also does not shed light on when any of these alleged incidents occurred. As such, his claims are time-barred under § 1324b(d)(3).

There are two exceptions to the normal timing requirements imposed by the statute of limitations. *See* Galindo, 856 F. App'x at 750. "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.'" A.S., 14 OCAHO no. 1381d, at 14 (alterations in original) (citing Ndzerre, 13 OCAHO no. 1306, at 8–9)). "For equitable tolling, Complainant must 'demonstrate an excusable reason for not complying with the timeliness requirements.'" Narayana Kumar Dakarapu, 13 OCAHO no. 1308, at 7 (citation omitted). "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." A.S., 14 OCAHO no. 1381d, at 14 (citing Caspi v. Trigild Corp., 6 OCAHO no. 907, 957, 964 (1997)).

Here, Complainant has not asserted, nor do the facts show, that he was diligently pursuing his rights and some extraordinary circumstance prevented timely filing. "The fact that he is pro se is alone insufficient as a basis for equitable tolling." Narayana Kumar Dakarapu, 13 OCAHO no. 1308, at 7 (citing Caspi, 7 OCAHO no. 991, at 1072).

Concerning the potential of Complainant having mistakenly filed his charge in the wrong forum, the record reflects that Complainant has filed two charges with the EEOC. *See* Compl. 19 (alleging that Complainant filed an EEOC charge regarding a 2017 promotion denial on February 12, 2018), 16 (alleging that he filed a charge "based on this set of facts" with the EEOC on November 30, 2020). However, the EEOC Charge filed in 2018 does not appear to relate to the claims at issue here, and the record does not reflect that the EEOC charge filed on November 30, 2020 was determined to be in the wrong forum or involved a subsidiary question under OCAHO's jurisdiction. Accordingly, the Court will not toll the statute of limitations based on these charges, and will dismiss the allegations as time-barred under 8 U.S.C. § 1324b(d)(3).

In the Fifth Circuit, courts "should not dismiss pro se complaints pursuant to Rule 12(b)(6) without first providing the plaintiff an opportunity to amend, unless it is obvious from the record that the plaintiff has pled his best case." Hale v. King, 642 F.3d 492, 503 (5th Cir. 2011); *see also* Pena v. United States, 157 F.3d 984, 987 n.3 (5th Cir. 1998) ("Because [Rule 12(b)(6)] dismissals [of pro se complaints] are disfavored, a court should grant a pro se party every reasonable opportunity to amend."). In the matter presently before the Court, an additional opportunity to amend will not be granted, for two reasons: first, Complainant has already filed a document which the court has construed as a motion to amend. As described previously in this

order, that pleading discusses Complainant's many disagreements with Respondent at length, but fails to plead a claim which concerns himself, is justiciable by this Court, and which is within the statute of limitations. Further, given the broad ranging subject matter in Complainant's filing, it is unlikely that Complainant would have withheld from his motion a claim that Respondent has, in addition to its other perceived failings, also prevented Complainant from filing a charge with IER or otherwise acted in a way which creates grounds for equitable tolling. Complainant's vague allegations that Respondent deceived him are insufficient to create a triable question of fact.

Second, Complainant's adverse employment actions are, in the light most favorable to Complainant, roughly three months untimely relative to the date of the filing of his charge. Complainant does not present a circumstance where the untimeliness is so slight that facts pled in an additional motion to amend might change the outcome. Moreover, Complainant addresses the untimeliness in his opposition to the motion to dismiss, and his arguments therein present no new facts which would alter the analysis or justify the court entertaining another motion to amend.

REMAINING MOTIONS

On December 12, 2023, Complainant filed a Motion for Referral to the Department of Justice Pursuant to 28 C.F.R. § 68.11(a). On December 13, 2023, Complainant filed a Motion for Referral to the Securities and Exchange Commission (SEC) Pursuant to 28 C.F.R. § 68.11(a). Complainant requests that the Court "refer" these proceedings to the DOJ and SEC based on "compelling evidence" of violations of criminal and securities laws. Respondent has opposed these motions, and Complainant filed a reply.

As a threshold matter, on December 28, 2023, Respondent filed a Motion to Strike Complainant's Response to Respondent's Opposition to Complainant's Motion for Referral as an impermissible reply. Complainant opposed the Motion to Strike. "OCAHO's Rules of Practice and Procedure for Administrative Hearings do not allow parties to file replies or sur-replies unless the Court provides otherwise." United States v. Space Exploration Techs. Corp., 18 OCAHO no. 1499a, 4 (2023) (citing 28 C.F.R. § 68.11(b)). "A party must seek leave of Court before filing a reply . . . and the decision whether to allow a reply or sur-reply 'is solely within the judge's discretion.'" Id. (citing Hsieh v. PMC-Sierra, Inc., 9 OCAHO no. 1093, 7 (2003), and then citing Diaz v. Pac. Mar. Assoc., 9 OCAHO no. 1108, 3 (2004)). Here, given Complainant's pro se status and the (belated) reason for filing a reply offered in his opposition to the Motion to Strike—that Respondent's opposition to his Motion for Referral raised novel issues which will remain "unaddressed" without the opportunity for a reply brief—the Court exercises discretion to accept the reply brief, and denies Respondent's Motion to Strike.

This Court has previously denied requests for referral of cases to agencies involved in the enforcement of criminal laws, citing the limited authority of OCAHO ALJ's. *See, e.g.*, Sharma v. NVIDIA Corp., 17 OCAHO no. 1450h, 2 (2023) (declining to refer the matter to the U.S. Attorney's Office for perjury charges, noting that it was disinclined to "create the appearance of an endorsement of Complainant's theory relative to a criminal allegation"); Sharma v. Lattice Semiconductor, 14 OCAHO no. 1362d, 23 (2023) (same, noting that the requesting party had not demonstrated that the other party had engaged in misconduct). Here, Complainant lists alleged violations of criminal and securities law committed by Respondent, which are beyond the allegations at issue in the Complaint here, and beyond the Court's limited authority to enforce the provisions of 8 U.S.C. §§ 1324a–1324c. Insofar as Complainant wishes to pursue causes of action based on violations of criminal or securities laws, he may bring these claims before the appropriate fora. As such, Complainant's motions are denied.

SO ORDERED.

Dated and entered on February 29, 2024.

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John A. Henderson
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.