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

June 7, 2018

M. S., Complainant, v. DAVE S.B. HOON – JOHN WAYNE CANCER INSTITUTE, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 17B00060

A Final Decision and Order was initially issued in the above-captioned case on May 22, 2018. Pursuant to 28 C.F.R. § 68.52(f), this Amended Final Order and Dismissal amends the order issued on May 22, 2018, and corrects clerical and typographical errors.

AMENDED FINAL ORDER OF DISMISSAL

I. INTRODUCTION

This is an action arising under the anti-discrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). M.S. (the complainant) filed a charge against Dave S.B. Hoon-John Wayne Cancer Institute (the respondent). The complaint alleges the respondent discriminated against M.S. and thereby violated 8 U.S.C. § 1324b. Respondent's Motion to Dismiss is now pending. Respondent argues that the complaint should be dismissed because it was untimely, as it was 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

A. Charge and Complaint

M.S., who is appearing *pro se*, signed a Department of Justice Immigrant and Employee Rights Section (IER) Charge Form on June 26, 2015, but did not actually submit the charge to IER until more than five months later — on January 22, 2016. *See* OCAHO Complaint at 3, 31.[1] M.S.'s charge alleges that the respondent discriminated on the basis of citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1), retaliation for asserting her rights under 8 U.S.C. § 1324b in violation of 8 U.S.C. § 1324b(a)(5), and document abuse in violation of 8 U.S.C. § 1324b(a)(6). The charge further asserted that the date of the alleged discrimination was February 13, 2015, which is the date M.S. claims the respondent terminated her.

In a letter dated December 6, 2016, IER notified M.S. it was dismissing the charge because the "submission [was] not timely and/or [did] not constitute a charge as defined by our regulations." IER Letter of Determination (citing 8 U.S.C. § 1324b(d)(3); 28 C.F.R. §§ 44.101, 44.301(d)(1)).[2] Section 1324b(d)(3) of title 8 U.S.C. states, in part: "No 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 Special Counsel." In addition, 28 C.F.R. § 44.301(g) requires that IER "dismiss a charge or inadequate submission that is filed more than 180 days after the alleged occurrence of an unfair immigration-related employment practice, unless the Special Counsel determines that the principles of waiver, estoppel, or equitable tolling apply." The letter of determination also informed M.S. that the claims could nevertheless be presented in court by filing a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

On March 17, 2017, M.S. filed a complaint with OCAHO. OCAHO Compl. at 3. This complaint referenced "a complaint [which] was previously reported to [the Equal Employment Opportunity Commission] EEOC and [U.S. Citizenship and Immigration Services] USCIS." *Id*. Similar to the IER charge, the OCAHO complaint contends that respondent discriminated against M.S. because of her citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1), retaliated against her for asserting her rights under § 1324b in violation of § 1324b(a)(5), and committed document abuse in violation of § 1324b(a)(6). The complaint does not provide dates of the alleged retaliation or document abuse. *See id*. at 10-12. M.S. seeks back pay from

[1] On January 18, 2017, the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices changed its name to IER. *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91768-01 (Dec. 19, 2016); *see also* 28 C.F.R. § 0.53. In addition, IER replaced the term "document abuse" with the term "unfair documentary practices" as a description of a violation of 8 U.S.C. § 1324b(a)(6); nevertheless, the undersigned will continue to use the term "document abuse" for purposes of this Order.

[2] In light of the January 2017 amendments to IER's regulations at 28 C.F.R. pt. 44, the regulation cited to in IER's Letter of Determination is now found at 28 C.F.R. § 44.301(g).

February 13, 2015. An attachment to the complaint outlines various alleged grievances against the respondent, but M.S. does not identify dates that are relevant to the claimed discrimination, with the exception of the February 13, 2015 termination. Her OCAHO complaint asserts that she was intentionally misled to believe the position was for full time work. OCAHO Compl. at 9. She also alleges the respondent "took undue advantage of the vulnerability of my F1 visa status." *Id*.

The respondent filed an untimely answer, denying the material allegations of the complaint. The untimeliness of respondent's answer, filed on April 28, 2017, was excused in an Order Discharging Show Cause, Vacating Entry of Default, and Denying Complainant's Motion for Default Judgment issued on July 21, 2017. M.S. requested a default judgment, but Administrative Law Judge (ALJ) Robert J. Lesnick concluded that the late answer would be accepted as "[d]efault judgments are not favored in this forum." *Id.* at 5.

B. Order to Show Cause- Failure to State A Claim

On May 4, 2017, ALJ James McHenry III issued an Order to Show Cause to M.S.[3] The Order directed M.S. to show cause no later than July 14, 2017, why the complaint should not be dismissed for an apparent failure to state a claim upon which relief may be granted pursuant to 28 C.F.R. § 68.10. M.S. did not file a response to that Order. Failure to respond to the orders issued by an ALJ may be considered abandonment of a complaint, which is grounds for dismissal. *See* 28 C.F.R. § 68.37(b)(1). There is no proffered excuse for the failure to respond to the Order to Show Cause and such failure would ordinarily result in dismissal. But, pending resolution of the timeliness issue, ALJ Lesnick stayed the May 4, 2017 Order. Aug. 4, 2017 Notice and Order to Show Cause at 3. It is therefore not ripe for the undersigned to decide whether the complaint fails to state a claim.

C. Order to Show Cause- Timeliness of the Complaint

On August 4, 2017, ALJ Lesnick issued a show cause order directing M.S. to address the untimeliness of the charge. The order determined that without additional facts and information, ALJ Lesnick could not yet conclude whether equitable relief was available. Accordingly, M.S. was ordered to show cause why the OCAHO complaint should not be dismissed for failure to comply with the statutory 180-day filing requirement.[4] M.S. was also ordered to provide

[3] The case was originally assigned to ALJ James R. McHenry III, on March 22, 2017, then reassigned to ALJ Robert J. Lesnick on June 1, 2017, and finally to the undersigned on May 3, 2018.

[4] The parties were also reminded that a pleading is "not deemed filed until received" by the ALJ assigned to the case. *See* 28 C.F.R. § 68.8(b).

documentation why the IER charge should be considered timely and/or why the charge was not filed within the 180-day statutory period.

On August 28, 2017, M.S. responded to the August 4, 2017 Show Cause Order. M.S. presents numerous exhibits, and in pertinent part, submits evidence of submissions to several governmental entities between February 13, 2015 and January 22, 2016. Complainant's Response to Show Cause Order (Complainant Response) at 2. M.S. first states that a complaint was filed with USCIS and ICE. M.S. then asserts a timely complaint was filed with the Department of Labor, EEOC and the California Attorney General. *Id.*

More pertinently, M.S. states she made contact with IER within the statutory period, 133 days after the alleged discrimination. *Id.* M.S. asserts that IER's response was meant to discourage filing of a complaint which "re-iterated that, [the] statute only protects U.S. citizens, Lawful Permanent Residents, Asylees, and Refugees and hence is not applicable to OPT individuals . . . ." Complainant Response at 2 (internal citations omitted). Essentially, M.S. cites this record as evidence of her due diligence to support tolling the statute of limitations. *Id*. at 4. M.S. requests that the undersigned use discretion to consider matters in the public interest "that lie outside the scope of title of judicial authority." *Id*. at 7.

On September 21, 2017, the respondent filed a response entitled Position Regarding August 4, 2017 Order to Show Cause to Complainant. Response at 1. The respondent asserts that while M.S. prepared the complaint within the statutory period, the charge was not filed until January 22, 2016, after the statutory period expired. *Id*. The respondent further points out that IER rejected the charge as untimely. *Id.* at 4. Respondent then cites a claim from M.S. that the choice to file with IER was made only after communicating with the California Attorney General. *Id*. Respondent argues that this explanation for failing to comply with the statutory requirements of 8 U.S.C. 1324b is unjustified. Respondent additionally alleges that the complaint should be dismissed for failure to state a claim because M.S. is not a protected individual. *Id.* at 2.

M.S. filed a timely reply on December 11, 2018. Reply at 1.[5] The reply indicates that the complainant was shuttled from agency to agency "in absence of concrete laws surrounding Stem F1 OPT." Reply at 2. M.S. adds that she contacted IER within the statutory period on May 28, 2015, and June 26, 2015, but that the charge was not accepted for filing. The reply then cites *Caspi v. Trigild Corp*., 7 OCAHO no. 991, 1064, 1071 (1998), for the proposition that the charge

[5] Normally, 28 C.F.R. § 68.11(b) does not authorize a reply to a response. Seeing that this issue could permanently dispose of the case, ALJ Lesnick authorized M.S. to file a reply by December 11, 2018. Nov. 29, 2017 Order Granting Leave to File A Reply/ Denying Request to Seal and Not To Serve Opposing Counsel. The Order denied the respondent's request to respond to the reply. *Id.*

should not have been dismissed due to equitable circumstances. *Id*. at 5.[6] This reply submits a number of attachments which outline her communication with USCIS, the EEOC, IER and the California Attorney General.

III. DISCUSSION

A. 180-Day Time Limit

M.S.'s communication with IER within the statute of limitations is insufficient to constitute a charge. The filing of a timely IER charge (i.e. within 180 days of discrimination), is a condition precedent to the filing of a private action with OCAHO. *See* 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.300(b); *Woode v. Cent. Reg'l Hosp. NCDHHS Agency*, 11 OCAHO no. 1235, 1-2 (2014) (citing *Aguirre v. KDI Am. Prods., Inc.*, 6 OCAHO no. 882, 632, 644 (1996); *Bozoghlanian v. Raytheon Co., Electromagnetic Sys. Div.*, 4 OCAHO no. 660, 602, 609 (1994)). In recent precedent, the undersigned determined that emails which are not "minimally sufficient" do not constitute a charge and could not be used as evidence of a timely charge. *Dakarapu v. Arvy Tech Inc*., 13 OCAHO no. 1308, 6 (2018) (citing 28 C.F.R. § 44.301(d)(1); IER Final Rule, 81 Fed. Reg. at 91778-79).

M.S. argues that two emails were submitted within the 180 day statutory period of 8 U.S.C. § 1324b(d)(3). M.S. sent an email on May 28, 2015 to IER, which requested an investigation for "hiring of non-immigrant temporary visa workers on deceitful projects, taking undue advantage of F1 OPT visa." Reply Ex. F. Then on June 26, 2015, M.S. sent another email to IER requesting an investigation of "an employer, who has deliberately misled in hiring STEM OPT taking undue advantage of work visa." Reply Ex. H. These emails to IER are admittedly within the statute of limitations period, but they cannot be said to be "minimally sufficient" to constitute a charge. *Dakarapu*, 13 OCAHO no. 1308 at 6. (citing *Wilkerson v. Grinnell Corp*., 270 F.3d 1314, 1317 (11th Cir. 2001)). We are guided by IER's regulation, which establishes minimal sufficiency for a charge: "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).

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[6] 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 website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

To constitute a charge, the regulation also requires the charge "[i]ndicate[] whether the basis of the alleged unfair immigration-related employment practice is discrimination based on national origin, citizenship status, or both; or involves intimidation or retaliation; or involves unfair documentary practices." 28 C.F.R. § 44.101(a)(6). The closest M.S. comes to fulfilling requirements of the regulation within the statutory period is her May 28, 2015 "[p]lea to investigate discriminatory employment practices by employer located in CA." Reply Ex. F. Mentioning "discrimination" however is not enough.[7] The charge must do more and must provide sufficient factual detail of the "discrimination [a]s the factual statement contained therein." *McWilliams v. Latah Sanitation, Inc.*, 149 F. App'x 588, 590 (9th Cir. 2005) (citing *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002), *as amended* (Feb. 20, 2002)).

The Ninth Circuit indicates that "[t]he [EEOC] charge intake process is principally designed to facilitate the processing of valid charges while screening out invalid charges at the earliest possible time." *Casavantes v. California State Univ., Sacramento*, 732 F.2d 1441, 1442 (9th Cir. 1984), *abrogated by Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008).[8] But IER did not deem the charge valid in the present case like the EEOC did in *Fed. Exp. Corp.*, 552 U.S. 389.[9] The undersigned must construe M.S.'s allegations liberally because the charge is "made by those unschooled in the technicalities of formal pleading." *Kaplan v. Int'l Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1359 (9th Cir.1975) *abrogated on other grounds* by *Laughon v. Int'l Alliance of Theatrical Stage Employees*, 248 F.3d 931 (9th Cir.2001). Even after liberally construing the complaint, M.S. has failed to provide minimally sufficient facts to determine that communication submitted within 180 days of the alleged discrimination

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

[8] The Supreme Court decision of *Fed. Express. Corp* abrogated portions of *Casavantes* and found that after EEOC deems a charge sufficient, it "must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights." *Fed. Express Corp*, 552 U.S. at 402.

[9] M.S. does not argue submission of the IER questionnaire was an attempt to amend the charge. The regulation empowers IER to review "[a]n incomplete charge that is later deemed to be complete under this paragraph [in such a case, the charge] is deemed filed on the date the initial but inadequate submission is postmarked or otherwise delivered or transmitted to the Special Counsel." 28 C.F.R. § 44.301(d)(2). Instead of deeming the initial inadequate charge timely, IER responded to M.S. that the submission(s) were not sufficient to constitute a charge. IER Letter of Determination (citing 8 U.S.C. § 1324b(d)(3)). IER chose not to deem the charge timely despite its flexibility to do so under 28 C.F.R. § 44.301(d)(2).

constitutes a charge. Here, as in *Dakarapu*, 13 OCAHO no. 1308 at 5, the complainant submitted insufficient allegations during the statutory period.

M.S. alleges the unlawful termination occurred on February 13, 2015. OCAHO Compl. at 10. Accordingly, a timely charge under 8 U.S.C. § 1324b should have been filed by August 12, 2015. M.S. acknowledges that the charge was not submitted until January 22, 2016, which is well beyond the statutory period. As explained, M.S.'s submissions to IER on May 28, 2015 and June 26, 2015 were insufficient to constitute a charge. The January 22, 2016 charge is therefore untimely.

B. Equitable Tolling

There is no basis to equitably toll the statute of limitations because the complainant had actual notice of the statute of limitations and chose to ignore the warning. The filing deadlines imposed by 8 U.S.C. § 1324b(d)(3), are "subject to equitable remedies such as waiver, estoppel, and equitable tolling, under appropriate circumstances." *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 7 (2016) (citing *Caspi*., 7 OCAHO no. 991 at 1071-73); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112-14 (2002). These remedies, however, are sparingly applied. *Nat'l R.R. Passenger*, 536 U.S. at 113. M.S. has demonstrated persistent efforts to contact IER and other governmental entities about the claims of discrimination. This contact includes communication within the statutory period to USCIS, ICE, the Department of Labor, the EEOC and the California Attorney General. Reply at 1-3.

This record is insufficient to equitably toll the statute of limitations as persistence alone is not adequate for an "extraordinary remedy." *Thompson v. Prestige Towing Serv's*., 13 OCAHO no. 1309, 4 (2018) (quoting *Halim v. Accu-Labs Research, Inc*. 3 OCAHO no. 474, 765, 779, (1992)). In equitable tolling, the Ninth Circuit "focuses on whether there was excusable delay by the plaintiff." *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002). This delay may be excused if complainant did not have "actual [or] constructive notice of the filing period." *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997). M.S. completed the charge form on June 26, 2015, OCAHO Compl. at 31, and chose not to submit the form until after the statutory period ended. IER's charge form states, in pertinent part, that "[t]his charge form must be mailed . . . or emailed . . . within 180 days of the alleged date of discrimination." OCAHO Compl. at 27. Complainant therefore had actual notice of the statute of limitations and chose to ignore IER's warning because she signed the form *within* the statutory period. Furthermore, M.S.'s "pro se status, [and] lack of knowledge of proper filing procedure does not entitle [her to] . . . an extension of time." *Halim*, 3 OCAHO no. 474 at 765, 779.

M.S. also claims that a memorandum of understanding (MOU) between IER and EEOC is sufficient to toll the late filed charge. Reply at 3. EEOC and IER have appointed each other to accept charges meant for the other. *Caspi*, 7 OCAHO no. 991 at 1071; Office of Special Counsel for Immigration Related Unfair Employment Practices; Coordination of Functions;

Memorandum of Understanding, 63 Fed Reg. 5518, 5519 (Feb. 3 1998). The MOU states that EEOC staff shall refer national origin complaints to IER when:

> all of the following conditions are met: (1) The charge alleges discrimination against the complainant with respect to his or her hiring, discharge, or recruitment or referral for a fee; (2) The charge is outside the jurisdiction of the EEOC in that the employer (a) does not have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year or (b) is an employer that is expressly excluded from coverage under Title VII; and (3) The employer may have had at least 4 employees, including both full-time and part-time employees, on the date of the alleged discriminatory occurrence as required by the Special Counsel's regulations at 28 CFR Part 44.

63 Fed Reg. 5519. M.S. does not address these issues in her subsequent briefing and does not assert that the national origin claim is properly before OCAHO. The complaint does not address the alleged size of the employer nor clarify the fate of the EEOC charge.[10] *See generally,* OCAHO Compl. The EEOC charge submitted on March 11, 2015, does not provide a description of the alleged discrimination except that it checks the box listing as a basis for discrimination Race, Sex, National Origin, Religion and Retaliation. Reply Ex. B at 2. The charge M.S. made with EEOC does not assert document abuse or citizenship status discrimination. Reply Ex. B. Here, just as in *Caspi,* the completed EEOC questionnaire "discloses no allegations which are recognizable as raising any issue about document abuse." *Caspi,* 7 OCAHO no. 991 at1071. Furthermore, M.S. does not assert the national origin discrimination claim is properly before OCAHO because the respondent has at least four, but fewer than fifteen employees. Complainant Response; Reply. Consequently, there was nothing for EEOC to refer and tolling under the MOU is inappropriate.

The failure to file a valid complaint within the statutory period is fatal to the claim. The complainant has failed to justify the extraordinary remedy of equitable tolling and the complaint is accordingly dismissed.[11]

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[10] To bring a national origin discrimination claim before OCAHO, an employer must have at least four, but fewer than fifteen employees. *Hernandez v. Arizona Family Health P'ship* 11 OCAHO no. 1254, 6 (2015) (quoting 42 U.S.C. § 2000e(b)).

[11] This Order does not address whether M.S. is a protected individual and entitled to the protections of 8 U.S.C. 1324b. The undersigned observes however that M.S. does not assert that individuals with nonimmigrant F1-OPT status should be considered protected individuals. M.S. claims citizenship status discrimination under 8 U.S.C. § 1324b(a)(1), retaliation for asserting rights under 8 U.S.C. § 1324b in violation of 8 U.S.C. § 1324b(a)(5), and document abuse in violation of 8 U.S.C. § 1324b(a)(6). However, "[t]he Immigration Reform and Control Act of

IV. CONCLUSION

The respondent's motion to dismiss the complaint is **GRANTED**. Complainant filed the charge more than 180 days after the alleged discriminatory conduct occurred and thereby failed to meet a condition precedent to filing this 8 U.S.C. 1324b complaint with OCAHO. The contact M.S. made with IER within the statutory period is insufficient to constitute a charge because it was not "minimally sufficient." *Dakarapu*, 13 OCAHO no. 1308 at 6. There is also no basis to equitably toll the statute of limitations because complainant had actual notice of the statute of limitations and ignored IER's warning that a charge must be timely filed. Therefore, the complaint must be **DISMISSED** as untimely.

SO ORDERED.

Dated and entered on June 7, 2018.

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Priscilla M. Rae
Administrative Law Judge

1986 enacted the general rule that prohibits employers from discriminating against any *protected individual* 'with respect to the hiring, or recruitment or referral for a fee, of the individual for employment ... because of such individual's citizenship status.'" *United. States v. Mar-Jac Poultry Inc*., 10 OCAHO no. 1148, 3 (2012) (citing 8 U.S.C. § 1324b(a)(1)) (emphasis added). Protected individuals are "defined in § 1324b(a)(3) as including citizens of the United States, lawful permanent residents, refugees, asylees, and certain lawful temporary residents not including persons having TPS." *Id.* The F1 OPT visa for which M.S. was authorized to work in the United States is not included in the list of protected individuals. In fact, M.S. acknowledges that limitation by claiming "[i]f my being on F1 OPT, is hurdle in filing a charge, the US Government itself take full control of the case . . .; but must not allow Hoon lab [the respondent] to escape their liability." Reply at 5. Flexibility to ignore the statute is not within the undersigned's discretion. Protected status alone does not preclude a claim that an individual was retaliated against for exercising their rights under 8 U.S.C. § 1324b. *Rainwater v. Doctor's Hospice of Georgia, Inc*., 12 OCAHO no. 1300, 23 (2017). Nonetheless, the undersigned dismisses the claim as untimely and does not determine her protected status and its legal effect.

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.