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

October 12, 2017

HABAKUK NDZERRE, Complainant, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Respondent.	)))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 17B00077

ORDER GRANTING IN PART RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

This matter arises under 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 (2012). Complainant Habakuk Ndzerre (Mr. Ndzerre) alleges that the Respondent Washington Metropolitan Area Transit Authority (WMATA) discriminated against him on the basis of his national origin and also retaliated against him for asserting his rights under 8 U.S.C. § 1324b in violation of 8 U.S.C. § 1324b(a)(5). WMATA filed an answer, denying the allegations, and a Motion to Dismiss, contending, in part, that Mr. Ndzerre failed to satisfy the 180-day statutory filing period. The record establishes that Mr. Ndzerre's complaint raises several charges that either do not fall within this court's jurisdiction, or fail to satisfy the filing limitations period, or both. Thus, those charges will be dismissed and Respondent's Motion to Dismiss will be **GRANTED IN PART**. This order denies the motion to dismiss as it relates to the retaliation claim. Dismissal of the retaliation claim is premature at this preliminary stage and thus the parties should consult and present proposed dates for a pre hearing conference.

II. PROCEDURAL HISTORY AND BACKGROUND

A. Immigrant and Employee Rights Charge

Mr. Ndzerre, who is *pro se*, is a United States citizen. He filed a charge with the Department of Justice's Immigrant and Employee Rights Section (IER) against WMATA, on March 7, 2017. The IER charge is a twenty-five page document that he denominated "Complaint," and is dated March 1, 2017. According to the charge, Mr. Ndzerre has been employed by WMATA since approximately January 3, 2000. The charge claimed that since "2006 and continuing to the present, WMATA has engaged in an ongoing pattern and practice of discrimination and hostile or abusive work environment, harassment toward Ndzerre on the basis of his national origin (Cameroon), and in retaliation for his participation in EEOC activity." *See* IER Charge at 3.

In relevant part, the charge contended that on January 7, 2013, a rail supervisor was "wrongfully demoted." *Id.* Mr. Ndzerre's supervisor, Hernando O'Farrell[1] approached him "for collaboration in furnishing an incident report" to justify the demotion. Mr. Ndzerre was presented with an incident report that he claims he never saw, drafted, or signed, but which contained his signature. He asserts that he filed an internal complaint with Respondent's Responsible Management Official (RMO). Mr. Ndzerre states that "[u]pon further investigation," he discovered that Mr. O'Farrell had drafted the report and used Complainant's signature because he presumed that Complainant "did not know how to write English," because of his Cameroonian national origin. *Id*. at 4. According to Mr. Ndzerre, Respondent's Office of Inspector General threatened to terminate him if he refused to "be part of this criminal activity and unlawful employment practice." *Id*.

On February 7, 2013, Complainant was instructed to report to WMATA's Employee Assistance Program (EAP), which he asserts was part of an effort to discriminate and harass him because of his national origin, and to retaliate against him for the various reports he filed. IER Charge at 5. On March 14, 2013, Complainant returned from vacation and was directed to report again to the EAP, where he received a letter stating that he was being "held off from work . . . effective immediately, for a fitness evaluation/assessment." *Id*. at 5-6. He explains that he was then suspended for ninety-days pending "a fitness for duty assessment and evaluation without pay." *Id.* at 6. He states that the "held off notice" fraudulently bore the signature of an EAP employee, Ms. Kimberly. On June 10, 2013, Mr. Ndzerre filed a charge with the Equal Employment Opportunity Commission (EEOC) against WMATA, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964.

Mr. Ndzerre identified additional grievances, which included not being properly compensated for performing supervisory duties. *Id.* at 7. He attributed the lack of proper compensation to his Cameroonian national origin and his participation in "prior protected EEO activity." *Id.* He also

[1] Mr. Ndzerre refers to this individual throughout the record as "O'Farrell Hernando." However, documents that appear to be officially issued from WMATA or emails issued by this individual identify his name as "Hernando O'Farrell." Ex. C-3. The decision will accordingly use the latter name.

claimed that the employee responsible for administering the employment promotion tests stated that Complainant would never pass while she was in charge and that he was taken out of a safety and security class, also in retaliation for filing an EEOC charge. On April 30, 2015, the EEOC informed Mr. Ndzerre that it was dismissing his charge and that he could now file his own claim in federal district court, which he did on July 30, 2015. *Id.* at 8-9. The case was heard by Judge Richard Leon in the United States District Court for the District of Columbia (D.D.C.), where it has since been dismissed. *Id.* at 6-7; *Ndzerre v. Washington Metro. Area Transit Auth.*, No. CV-15-1229, 2017 WL 3579890 at *1 (D.D.C. Aug. 16, 2017); *see also infra* at II.E.

Approximately eleven pages of the charge relate to events involving Respondent's alleged violations of the Family and Medical Leave Act (FMLA), which Complainant also attributes to discrimination on account of his national origin and in retaliation for protected activity. *Id.* at 11-22.

On October, 12-13, 2016, Mr. Ndzerre was involved in an incident where he claims O'Farrell requested that he perform testing of a snow-melting device despite knowledge that performing the procedure in this manner was a violation of safety protocols. Complainant's 7/26/2017 Response to Show Cause Order at 11-12; Ex. Cc-21, Ex. Cc-22. He then claims that because of this incident, he was written up for insubordination. Complainant's 7/26/2017 Response to Show Cause Order at 12; Ex Cc-21, Ex. Cc-22. On November 11, 2016, Mr. Ndzerre claims that O'Farrell physically assaulted him after he asked him to leave the train control room to limit distractions while he performed his duties. Complainant's 7/26/2017 Response to Show Cause Order at 13-14. He then claims that O'Farrell's recommendation that he be suspended was retaliatory. *Id*. These events occurring after September 8, 2016 are discussed in Mr. Ndzerre's briefing to the court but not in his initial complaint to IER or to OCAHO. Complainant's 7/26/2017 Response to Show Cause Order at 11-14; *Cf.* IER Charge.

Mr. Ndzerre's attachments reflect that he filed a second EEOC retaliation charge against WMATA on December 6, 2016, which EEOC also dismissed. OCAHO Complaint at 58. In addition, he included with his IER complaint the EEOC charge that he filed on April 17, 2017, against Local Union 689 which alleged discrimination on account of race, retaliation, sex, and national origin.

B. OCAHO Complaint

In a letter dated March 21, 2017, IER informed Mr. Ndzerre that it was dismissing his national origin discrimination and retaliation charge against WMATA. *See* IER Letter of Determination (Mar. 21, 2017). Specifically, the letter stated that IER determined that his charge was untimely because he did not file the charge within the statutory 180-day period after the alleged discrimination, which he claims occurred on March 14, 2013 (he filed the IER charge on March 7, 2017). *Id.* IER also informed Mr. Ndzerre that he could nevertheless pursue his own claim by

filing a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), which he did on May 3, 2017.

The OCAHO complaint alleges that Respondent discriminated against Complainant because of his national origin and then retaliated against him. He claims that WMATA terminated him on March 14, 2013, because of his national origin. Complainant also states that he was fired after he "blew the whistle on a document bearing [his] electronic signature" that he did not draft or sign and that was fraudulently drafted. *See* OCAHO Complaint at 10. In addition, Complainant indicates, "I have been reinstated, but, my employer continued to retaliate against me because I filed a charge with the EEOC and the Federal Court in the District of Columbia." *Id.*

In support of his claim that he was retaliated against, Complainant states that he "opposed [an] unlawful employment practice by denying to participate (sic) in furnishing a fraudulent incident report to justify" the demotion of a supervisor. *Id.* at 11. Complainant asserts that Respondent's "Office of Inspector General and [EAP] aided, abetted and coerced or retaliated against [him] for blowing the whistle" on the document that bore his signature but that he did not sign. *Id.* Complainant seeks back pay from March 14, 2013, and does not request reinstatement because he "ha[s] been back[] to work." *Id.* at 13. He also requests removal of a false performance review or false warning document in his personnel file and removal of restrictions on and/or changes to his work assignments as relief. *Id.*

C. Respondent's Motion to Dismiss

A timely answer to the complaint was due June 12, 2017. On June 14, 2017, WMATA filed a Motion to Dismiss the OCAHO complaint (Respondent's Motion). WMATA requested dismissal on two grounds: (1) the complaint is based on the same set of facts that Complainant presented in the charges he filed with the EEOC, which is proscribed by 8 U.S.C. § 1324b(b)(2), and (2) the alleged discriminatory conduct alleged in his complaint occurred more than 180 days prior to the date he filed the IER charge, in violation of 8 U.S.C. § 1324b(d)(3)'s filing limitations period.

The Motion also notes that Mr. Ndzerre's suit against WMATA was pending at the time of filing before Judge Richard Leon of the D.D.C. According to WMATA, Mr. Ndzerre filed a second complaint against it in the D.D.C. that is based on the December 6, 2016 EEOC charge. *See* Respondent's Motion at 2. On February 13, 2017, WMATA filed a motion to dismiss this second complaint, which at that time was still pending before the D.D.C. *Id.*

On June 28, 2017, I issued an Order to Show Cause to WMATA because it had not filed an answer to the complaint, noting that OCAHO rule 28 C.F.R. § 68.10(a) provides that the "filing of a motion to dismiss does not affect the time period for filing an answer."[2] Respondent was

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

therefore ordered to show good cause for its failure to file an answer and to file an answer that comports with 28 C.F.R. § 68.9 no later than July 14, 2017.

The following day, I issued an Order directing Mr. Ndzerre to respond to WMATA's Motion to Dismiss. OCAHO rule 28 C.F.R. § 68.11(b) permits a party to respond to a motion within ten days after service of the motion; WMATA served Complainant with the Motion on July 14, 2017, thereby making a timely response due on July 24, 2017. Because it appeared that the complaint was subject to dismissal, based on WMATA's pleadings, I instructed him to respond to Respondent's Motion on or before July 28, 2017.

The July 28, 2017 Order directed Complainant to clarify his allegations in support of his retaliation claim, noting that Complainant's OCAHO complaint did not indicate he engaged in protected activity pursuant to 8 U.S.C. § 1324b(a)(5). His factual allegations suggested that he was retaliated against for the protected activity of filing the EEOC charge against WMATA. OCAHO case law, however, holds that a "'claim of retaliation for the filing of an EEOC charge is not cognizable in this forum and must be referred to EEOC itself.'" *See* Order Directing Complainant to Respond (Jun. 29, 2017) (quoting *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 6 (2015) (citing *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 5 (2014))).[3] Mr. Ndzerre's response was due July 28, 2017. WMATA was instructed to file a reply and supplemental materials on or before August 18, 2017.

D. Complainant's Opposition to the Motion to Dismiss

On June 29, 2017, the Complainant filed an Opposition to WMATA's Motion (Complainant's Opposition), to which he attached the following two exhibits: (1) Ex. C-1, April 17, 2017 EEOC charge alleging discrimination on account of race, sex, and retaliation filed against Local Union 689 and the attendant EEOC Intake Questionnaire; and (2) Ex. C-2, which includes several documents, Notification of Investigation by Foreman, a WMATA Memorandum indicating that Complainant was suspended on December 6, 2016, for sleeping on the job, and a copy of a pay stub.

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[3] 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.

The Complainant's Opposition first claims that the IER charge was timely because it alleged a "continuous pattern of discrimination, harassment and retaliation" occurring from 2006 until December 2016. *See* Complainant's Opposition at 4 (internal citation omitted). He states that the last act of discrimination and retaliation occurred within the 180-day filing period. *Id.* (citing Ex. C-1). He then describes the standards set out by the United States Supreme Court to demonstrate a discriminatory hostile or abusive work environment. *Id.* at 5 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). He also contends that Supreme Court precedent provides that as long as one of the acts that contributed to the hostile work environment occurred within the filing period, other acts that did contribute to the claim but did not occur within the filing period may nonetheless be considered. *Id.* (quoting *Vickers v. Powell*, 493 F.3d 186, 198 (D.C. Cir. 2007)). In light of these principles, Complainant asserts that his IER charge was timely filed and should not be dismissed.[4]

In support of his retaliation claim, Mr. Ndzerre claims that there was a causal connection between the protected activity he engaged in—opposing discrimination—and the materially adverse employment action by his employer. Complainant's Opposition at 4-6. He contends that he has sufficiently pled facts in support of his claims. Complainant reasserts several other grievances from his EEOC claim that he allegedly suffered, also as set forth in his IER charge, including WMATA's wrongful denial of his FMLA leave and the failure of his union to respond to his grievances, which caused him to file an EEOC charge against the union on April 17, 2017. *Id.* at 9 (citing Ex. C-2).

On July 13, 2017, WMATA filed a response to the June 28, 2017 Order to Show Cause. Counsel for Respondent, Michael Guss, indicates that the Office of General Counsel received the complaint on May 15, 2017, s evidenced by the copy of the complaint that he attached, and that he was assigned the case on May 16, 2017. Based on the May 15, 2017 date, Mr. Guss believed he had until June 14, 2017, to file the answer. Nevertheless, as an answer was not filed, Mr. Guss acknowledges that it was error to believe that filing a motion to dismiss would affect the time period to file an answer. WMATA subsequently filed an answer, denying the material allegations of the complaint and raising the same affirmative defenses it presented in its Motion—Complainant's failure to satisfy the statutory filing period and the "No Overlap with EEOC complaints" provision under 8 U.S.C. § 1324b(b)(2).

Although Respondent's failure to review OCAHO's rules is no excuse, Respondent has demonstrated sufficient good cause to warrant vacating the default on account of the failure to file a timely answer. This is because, (1) the delay in filing an answer appears to have been inadvertent; (2) vacating the default and accepting the late answer does not appear to prejudice Mr. Ndzerre, particularly because a motion to dismiss was filed, thereby providing him with

[4] As discussed *infra*, the jurisdiction of this court to hear cases is limited by the authorizing statute pursuant to 8 U.S.C. § 1324b.

some notice of Respondent's defenses; and (3) as discussed above, Respondent has asserted a meritorious defense. *See Sapre v. Dave S.B. Hoon-John Wayne Cancer Inst.*, 12 OCAHO no. 1305, 4-5 (2017) (discussing the factors a judge should consider in determining whether "good cause" exists for vacating an entry of default).

On July 25, 2017, Mr. Ndzerre filed a Response to my Order Directing Complainant to File a Response to the Motion to Dismiss and to Clarify his Retaliation Claim (Complainant's Response). He attached the following twenty-four proposed exhibits: Ex. Cc-1, WMATA Memorandum regarding the demotion of Mildred Wood; Ex. Cc-2, WMATA Initial Incident Form,; Ex. Cc-3, Revisions to WMATA's Whistleblower Policy; Ex. Cc-4, Whistleblower Protection Act of 1989; Ex. Cc-5, WMATA Memorandum to Complainant regarding a medical appointment; Ex. Cc-6, WMATA Memorandum requesting to "hold off" complainant; Ex. Cc-7, WMATA Medical Office Return to Duty Notice; Ex. Cc-8, Documentation related to Complainant's medical evaluation; Ex. Cc-9, Email correspondence regarding the authenticity of the medical memorandum; Ex. Cc-10, Email correspondence regarding Complainant's return to duty; Ex Cc-11, WMATA Return to Work Agreement; Ex. Cc-12, Letter from the U.S. Department of Labor regarding retaliation; Ex. Cc-13, Complainant's June 10, 2013 EEOC charge against WMATA and related April 30, 2015 Dismissal and Notice of Rights; Ex. Cc-14, Email correspondence Re: Complainant's attendance for certain courses; Ex. Cc-15, Complainant's certificates of completion for various transit related courses; Ex. Cc-16, Additional Email correspondence Re: Complainant application for supervisor and subsequent compensation; Ex. Cc-17, Duplicate of documents at Ex. Cc-13; Ex. Cc-18, Complainant's medical documents relating to an impending surgery; Ex. Cc-19, WMATA Memorandum denying Complainant's request for FMLA leave; Ex. Cc-20, Documents related to Complainant's request for FMLA leave; Ex. Cc-21, WMATA, Preventative Maintenance and Technical Procedures Manual, Snowmelter Inspection and Test; Ex. Cc-22, Email correspondence, Re: Snowmelter incident; Ex. Cc-23, WMATA Employee Statement Form; and Ex. Cc-24 Amalgamated Transit Union Grievance.[5]

Despite being instructed to do so before August 18, 2017, WMATA has not filed a reply and supplemental materials regarding Complainant's retaliation claim, per the June 29, 2017 order.

E. Decisions by the United States District Court for the District of Columbia

On June 21, 2017, Judge Leon granted WMATA's Motion, dismissing Mr. Ndzerre's claims related to violations of (1) the Federal Family and Medical Leave Act (FMLA); (2) the District of Columbia Family and Medical Leave Act (DCFMLA); and (3) the District of Columbia

[5] The undersigned designated Complainant's exhibits that were attached to his Opposition and Response with "C' and "Cc" for clarity.

Human Rights Act (DCHRA). *Ndzerre v. Washington Metro. Area Transit Auth.*, No. CV 17-90 (RJL), 2017 WL 2692609, at *1 (D.D.C. June 21, 2017).

On August 16, 2017, Judge Leon granted WMATA's Motion for Summary Judgment and dismissed Mr. Ndzerre's claims related to Title VII, including alleged acts of discrimination due to national origin and in retaliation for Mr. Ndzerre's participation in statutorily protected activities. Mr. Ndzerre had alleged that WMATA suspended him on March 14, 2013, in retaliation for his forgery complaint. Judge Leon found that Mr. Ndzerre was not in fact suspended on March 14, 2013, rather, he was placed on a temporary hold from work by the Employee Assistance Program (EAP) in order to undergo a fitness-for-duty examination. Thus, there was no adverse employment action under Title VII and the retaliation claim was thereby dismissed. Additionally, during the retaliation discussion, Judge Leon noted: "While this Court has its doubts as to whether plaintiff's complaint concerning his forged signature qualifies as protected activity under Title VII, I need not resolve that issue because plaintiff has clearly failed to demonstrate that he was subjected to an adverse employment action." *Ndzerre v. Washington Metro. Area Transit Auth.*, No. CV 15-1229, 2017 WL 3579890, at *4 (D.D.C. Aug. 16, 2017). Judge Leon questioned whether the alleged forgery was protected activity but did not reach a finding on this issue. *Id.* He observed, however, that the U.S. Secret Service conducted a handwriting analysis and found the signature on the document was likely the Complainant's. *Id.* Notably, the case before Judge Leon did not raise the issue of Mr. Ndzerre's alleged suspension in December 2016, and it was therefore not addressed in the D.D.C. decision.

III. DISCUSSION AND ANALYSIS

The statute governing this proceeding provides that no complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge with IER. 8 U.S.C. § 1324b(d)(3); *see also Angulo*, 11 OCAHO no. 1259 at 2-4. Filing a timely IER charge is thus a condition precedent to the filing of a private action with OCAHO. *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). Because of the statutory limitation in § 1324b(d)(3), claims based on events occurring more than 180 days prior to the filing of an IER charge are ordinarily barred by operation of law.[6]

There are, of course, exceptions to the normal timing requirements imposed by the statute of limitations. For instance, the court may use equitable tolling to set aside such failure when the

[6] As discussed *infra* note 8, there are certain exceptions that allow a late filed claim to be considered. For instance, if a claim has been inadvertently filed to the EEOC that should have been made to IER, for purposes of the statute of limitations, the EEOC filing date will be the effective date of the filing. This is because a memorandum of understanding between EEOC and IER states that each agency will be "the agent of the other for the sole purpose of receiving charges." Notice, 63 Fed Reg. 5518, 5519 (Feb. 3 1998); *Caspi*, 6 OCAHO no. 907 at 964.

petitioner "shows (1) that he has been pursuing [his] rights diligently, and (2) that some extraordinary circumstance stood in [her] way and prevented timely filing." *Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013) (quoting *Holland v. Florida*, 560 U.S. 631 (2010)) (internal brackets altered). In addition, when a petitioner has filed a charge with the EEOC under 8 U.S.C. § 1324b, either before the wrong forum or if the complaint is properly before the EEOC and involves a subsidiary question under OCAHO's jurisdiction, this court may toll the statute of limitations.[7] *Caspi v. Trigild Corp*., 6 OCAHO no. 907, 957, 964 (1997).

Mr. Ndzerre filed his IER charge on March 7, 2017, so that events occurring prior to September 8, 2016, are not cognizable in this proceeding. While Mr. Ndzerre complains of events going back as far as 2006, these are not independently actionable, and the scope of this case must be limited to events occurring on or after September 8, 2016.[8]

Further, the governing statute in this forum, 8 U.S.C. § 1324b, is limited by its terms to claims involving the hiring, recruitment or discharge of employees, 8 U.S.C. § 1324b(a)(1), retaliation for engaging in protected activity, 8 U.S.C. § 1324b(a)(5), and certain prohibited documentary practices, 8 U.S.C. § 1324b(a)(6). Complaints about work assignments, pay differentials,

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[7] Nonetheless, our statute mandates that there can be no overlapping or simultaneous charges before both the EEOC and OCAHO. The statute states that, "[n]o charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.], unless the charge is dismissed as being outside the scope of such title." 8 U.S.C. § 1324b(b)(2); *see also Walker v. United Air Lines, Inc.*, 4 OCAHO no. 686, 791, 820 (1994).

[8] The statute of limitations is not a statutory bar to consideration of an 8 U.S.C. § 1324b claim. This tribunal may set aside the timing requirement if Mr. Ndzerre has demonstrated his "[due diligence [a]s the sine qua non for equitable relief." *Sabol v. N. Mich. Univ*., 9 OCAHO 1107 (2004). Mr. Ndzerre does not directly address the question of how his filing before the EEOC or the District Court adequately tolls his current claim under 8 U.S.C. § 1324b. By (continued…) (… continued) citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), he argues that dismissal of his claims before the EEOC and District Court do not on their own, preclude his claims in this forum. This, of course, is true. But, Mr. Ndzerre does not brief the issue of whether the statute of limitations is tolled because EEOC is an agent of IER. *See supra* note 6. Without any explanation or excuse for why this claim has been late filed, this tribunal cannot equitably toll the statute of limitations because "[e]quitable remedies under either approach are sparingly applied." *Id*. There is also no indication that the EEOC or D.D.C. filings by the claimant were inadvertent or that he was misled to file in the wrong forum. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 90 (1990). Absent any indicia for delay, there is no basis for equitably tolling the statute of limitations.

promotions, and other terms and conditions of employment, are not encompassed in the governing statute and may not be pursued in this forum. *See supra* note 7. The same is true with respect to allegations of harassment, hostile work environment, and similar matters. To the extent Mr. Ndzerre's allegations are about the terms and conditions of ongoing employment, these do not constitute independently actionable events.

Accordingly, any claims related to adverse employment actions that occurred prior to 180 days from when Mr. Ndzerre filed his IER charge—September 8, 2016—and any claims related to the terms and conditions of his ongoing employment, are not properly before this court and are hereby DISMISSED. To the extent that Respondent's Motion to Dismiss addresses these claims, it is GRANTED IN PART.

The only possible remaining claim involves Mr. Ndzerre's complaint that he was suspended on December 6, 2016, in retaliation for engaging in protected activity. This potential adverse employment action allegedly occurred within the 180 day period prior to Mr. Ndzerre's filing of his IER charge. Further, while Judge Leon's decision found that the 2013 "suspension" was not an adverse employment action, the reasoning was that the action taken in 2013 was found to be a "temporary hold from work" by the EAP in order to undergo a fitness-for-duty examination, rather than a suspension. *Ndzerre*, 2017 WL 3579890, at *4. If the December 2016 action was an actual suspension, as opposed to an EAP temporary hold from work, then it may qualify as an adverse employment action.

It is not clear to the tribunal whether Mr. Ndzerre has demonstrated sufficient facts to allege a prima facie case of retaliation. To do so, he must point to evidence that: 1) he engaged in conduct protected by § 1324b; 2) the employer was aware of the protected conduct; 3) he suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009). The tribunal notes that WMATA failed to respond to the June 29, 2017 order directing further briefing on the sufficiency of Complainant's retaliation claim. Absent a response, the dismissal of the retaliation claim is denied without prejudice.[9]

[9] The tribunal notes that certain events described in Mr. Ndzerre's July 25, 2017 brief that occurred after September 8, 2016 are not articulated either in the IER charge or in the OCAHO complaint. *Supra* I.B. For the retaliation claim to survive dismissal, it "must arise from the administrative investigation that can reasonably be expected to follow the charge of discrimination." *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir.1995), cert. denied, 519 U.S. 811, 117 (1996) (citing *Cooper v. Henderson*, 174 F. Supp. 3d 193, 204 (D.D.C. 2016)). As noted in the June 29, 2017 order, "the OCAHO complaint does not suggest that Complainant engaged in activity that is considered protected under 8 U.S.C. § 1324b(a)(5)." Further, this court is in no position to consider events or claims described in argument that are not grounded in the complaint. The complaint must "ple[a]d information related to what

Given that that the complainant is *pro* se, he is reminded that future dispositive motions will be governed under a less lenient standard for summary decision. This next stage of the litigation is analogous to summary judgment in federal court and requires a genuine issue of material fact to survive summary dismissal. *See e.g.*, *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Dispositive motions are governed by OCAHO regulation 28 C.F.R. § 68.38(c) which states that an ALJ "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

Based on the findings in this order, the parties are directed to consult and present the court with three dates for a pre-hearing conference by October 23, 2017. This hearing will establish a timetable for discovery, dispositive motions, and set a date for an evidentiary hearing.

ORDER

WMATA's Motion to Dismiss is granted in part. The only remaining claim is related to Mr. Ndzerre's allegation of retaliation surrounding employment actions that occurred since September 8, 2016.

SO ORDERED.

Dated and entered on October 12, 2017.

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Priscilla M. Rae
Administrative Law Judge

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his [retaliation claim] is." J*ack N. Toussaint v. Tekwood Data Processing Consulting* 6 OCAHO 892, 784, 800 (1996).