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

June 26, 2018

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

FINAL ORDER OF DISMISSAL

I. INTRODUCTION

This matter arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2012). Complainant Habakuk Ndzerre (Mr. Ndzerre or Complainant) alleges that the Respondent Washington Metropolitan Area Transit Authority (WMATA or Respondent) retaliated against him for asserting his rights under 8 U.S.C. § 1324b in violation of 8 U.S.C. §1324b(a)(5). As discussed herein, the complaint must be dismissed because there is no genuine issue of material fact sufficient to raise a triable issue. Complainant has failed to assert any material facts in dispute indicating he was retaliated against for exercising his rights under 8 U.S.C. § 1324b. The Equal Employment Opportunity Commission (EEOC) and United States District Court for the District of Columbia have already dismissed a related Title VII complaint, and the undersigned previously dismissed a national origin claim as untimely—therefore, the remaining retaliation claim must be **DISMISSED**. WMATA's Motion for Summary Decision is **GRANTED**.

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. 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 OCAHO.

B. OCAHO Complaint

The OCAHO complaint which was filed on May 3, 2017, alleges that Respondent discriminated against Complainant because of his national origin and then retaliated against him for protected activity. Complainant 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 neither drafted nor signed. *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 [refusing] to participate 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 the Employee Assistance Program [(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.* Mr. Ndzerre's attachments to the OCAHO complaint reflect that he filed a second EEOC retaliation charge against WMATA on December 6, 2016, which the EEOC also dismissed. OCAHO Compl. at 58. In addition, he included with his 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.

C. Respondent's Motion to Dismiss

On June 27, 2017, WMATA filed a Motion to Dismiss (Mot. to Dismiss) the OCAHO complaint. 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 contained 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.

On June 29, 2017, the undersigned issued an Order Directing Complainant to File a Response to the Motion to Dismiss and to Clarify his Retaliation Claim (Order Regarding 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 [the] EEOC itself.'" *See* Order Directing Complainant to Respond (June. 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))).[1] 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 and Response to Motion to Dismiss

On June 29, 2017, the Complainant filed an Opposition to WMATA's Motion to Dismiss (Complainant's Opp'n), 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).

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 Opp'n 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 Family Medical Leave Act request 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).[2]

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

On July 25, 2017, Mr. Ndzerre filed a response to my Order Regarding Retaliation Claim (Complainant's Response). He attached twenty-four proposed exhibits, one of which (Ex. Cc-24 Amalgamated Transit Union Grievance) describes a supposed retaliation by O'Farrell Hernando invoking unrelated "Federal Safety Law or regulation, Section 20109(a)(1)," but the grievance does not provide a specific reference to the law he claims was violated. Complainant's Response Ex. Cc-24 at 2. This exhibit also describes allegations of retaliation for whistleblowing relating to preventive maintenance policies and procedures. *Id.* at 8.

The Complainant's Response asserts that on October 12-13, 2016, Mr. O'Farrell Hernando (his supervisor at WMATA) requested that he perform testing of a snow-melting device despite his supervisor knowing that performing the procedure in this manner was a violation of safety protocols. Complainant's Response at 11-12; Ex. Cc-21, 22. He then claims that when he refused to do so, he was written up for insubordination. *Id*. at 12, Ex. Cc-21, 22. Mr. Ndzerre also claims that on November 11, 2016, O'Farrell Hernando physically assaulted him after Complainant asked O'Farrell Hernando to leave the train control room so that Complainant could perform his duties without distraction. *Id.* at 13-14. He then claims that O'Farrell Hernando's recommendation that he be suspended was retaliatory. *Id*. The events occurring after September 8, 2016, are discussed in Mr. Ndzerre's brief but not in his initial complaint to IER or to the Office of the Chief Administrative Hearing Officer (OCAHO). *Id.*; *Cf.* IER Charge. He asserts that these actions culminated in a December 2016 retaliatory suspension.

E. Order to Show Cause, WMATA's Failure to File A Timely Answer

The undersigned issued a June 28, 2017 Order to Show Cause which directed WMATA to explain why it did not file an answer in the case. WMATA responded on July 13, 2017 indicating that the WMATA Office of General Counsel received the complaint on May 15, 2017. Michael Guss, Counsel for Respondent, was only assigned the case on May 16, 2017. A timely answer to the complaint was due June 12, 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 extend the time-period in which 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 to Dismiss—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).

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

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

On June 21, 2017, Judge Richard Leon of the United States District Court for the District of Columbia granted WMATA's Motion, dismissing Mr. Ndzerre's claims before the District Court related to violations of: (1) the Federal Family and Medical Leave Act; (2) the District of Columbia Family and Medical Leave Act; and (3) the District of Columbia Human Rights Act. *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 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 therefore 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.*, 275 F. Supp. 3d 159, 165 (D.D.C. 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 only addressed the issue of Mr. Ndzerre's alleged suspension notice of this potential violation because it was not pled in the complaint. *Id*. at 162 n.1. Despite mentioning the events describing the December 6, 2016 retaliation only in a footnote, the EEOC "retaliation [claim was] . . . accordingly dismissed." *Id.*

G. Partial Dismissal

On October 12, 2017, the undersigned issued an order Granting in Part Respondent's Motion to Dismiss. *Ndzerre v. Washington Metro. Area Transit Auth.*, 13 OCAHO no. 1306 (2017). The Order dismissed the national origin discrimination claim as untimely filed, but denied the Motion to Dismiss insofar as it relates to the 8 U.S.C. § 1324b retaliation claim. At that phase in the litigation which was prior to discovery and thus based solely on the face of the complaint, the undersigned was unable to discern whether the events described in the retaliation claim were untimely as they may have occurred within 180 days of when the charge was filed with IER. This Partial Dismissal noted that certain events in Complainant's retaliation claim that occurred after September 8, 2016, were not articulated either in the IER charge or in the OCAHO complaint.

Although the allegations in the complaint may have been sufficient to survive a Motion to Dismiss, Complainant was reminded that a Motion for Summary Decision would be reviewed under a different legal standard. 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)). The October 12, 2017 order indicated that "the OCAHO complaint does not suggest that Complainant engaged in activity that is considered protected under 8 U.S.C. § 1324b(a)(5)." The partial dismissal also noted that the undersigned was not in a position to consider events or claims not grounded in the complaint. Complainant must "ple[a]d information related to what his [retaliation claim] is." *Jack N. Toussaint v. Tekwood Data Processing Consulting* 6 OCAHO 892, 784, 800 (1996).

The October 12, 2017 Partial Dismissal disposed of parts of the complaint as untimely which were filed beyond the statute of limitations. All 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, were not properly before this court and were thereby dismissed. The case proceeded through discovery to allow Complainant an opportunity to substantiate his retaliation claim.

H. Motion to Compel

On April 2, 2018, the Complainant filed a Motion to Compel asserting that the Respondent had not complied with its discovery obligations by failing to respond to interrogatories and a request for production of documents. Respondent did not reply to the Motion within the customary ten days pursuant to 28 C.F.R. § 68.11(b). On April 16, 2018, the undersigned issued an Order to Show Cause and Compelling Answers to Discovery. This Order required the Respondent to explain the failure to respond to the Motion to Compel and to provide Complainant with the requested discovery. On April 26, 2018, the Respondent filed a Response to the April 16, 2018 Order to Show Cause. Respondent asserted that confusion over the Complainant's filings delayed a response to discovery. However, Respondent asserts that the Motion to Compel was not served and that there was no attempt to confer before filing the Motion to Compel. To this end, Complainant's Motion to Compel does not contain a certificate of service, which is a requirement for all filings in this forum. *See* 28 C.F.R. § 68.6(a). For the reasons provided by the Respondent, I found just cause for the late filing.

I. Motion for Summary Decision

On April 13, 2018, Respondent filed a Motion for Summary Decision (Mot. for Summary Decision). The Motion asserts that OCAHO lacks jurisdiction to hear the claim as WMATA enjoys Eleventh Amendment sovereign immunity. Respondent asserts that the Constitution

deprives OCAHO of jurisdiction because WMATA was created by an interstate compact which did not waive sovereign immunity. Mot. for Summary Decision at 2-3. Respondent indicates there is a "clear declaration" under the law that it did not intend to submit to federal jurisdiction. Mot. for Summary Decision at 3 (citing *Coll. Say. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 675-76 (1999)). The Motion also asserts that the case should be dismissed because Complainant was suspended for the legitimate non-discriminatory purpose of disciplining Mr. Ndzerre for sleeping on the job. Attached to the Motion was a deposition of Respondent (Mot. for Summary Decision Ex. R-a) and a photo which purports to show Mr. Ndzerre sleeping on the job (Mot. for Summary Decision Ex. R-c). Respondent also claims Mr. Ndzerre's supervisor(s) had no knowledge of any plans to file a complaint with IER. The Motion asserts that the protected activity referenced in the charge was for a complaint made with the EEOC in 2012. Respondent concludes that the complaint should be dismissed because 8 U.S.C. § 1324b prohibits retaliation for activity protected under this statute, and not for an unrelated national origin discrimination claim properly before the EEOC.

Mr. Ndzerre filed an Opposition to Defendant WMATA's 28 C.F.R. § 68.38 Motion for Summary Decision Memorandum of Points and Authorities (Summary Decision Opp'n) one day late, on May 15, 2018. Given that Mr. Ndzerre is *pro se* and completed the motion on May 11, 2018, but did not account for the time delay in filing through USPS, the undersigned will consider the untimely response. Complainant also attaches a Response to Defendant WMATA's Statement of Material Fact Not In Dispute and Statement of Facts In Dispute (Response to Material Facts). First, in response to whether the Eleventh Amendment shields WMATA from suit, Mr. Ndzerre points to *United States, et al. ex rel. Shahiq Khwaja* v. *Washington Metro. Area Transit Auth.*, Civil Action No. 12-00268 (RJL). Summary Decision Opp'n at 2-3. A Westlaw and LexisNexis search do not, however, show a relevant District Court case captioned *Shahiq Khwaja.* As to the substance of the retaliation claim, Complainant indicates that the suspension on December 6, 2016, "was in retaliation to the fact that Plaintiff Ndzerre blew the whistle on Mr. O'Farrell Hernando['s] wrongful employment practice." Response to Material Facts at 2-3. The Opposition contests the timestamp and purpose of the photo which purports to show Mr. Ndzerre sleeping while in the train control room while on duty. Summary Decision Opp'n. at 8. He further indicates that after WMATA upper management learned of his protected practices to blow the whistle on Mr. O'Farrell Hernando, management retaliated against him with unnecessary scrutiny and a suspension. The Summary Decision Opposition indicates the "protected activity" was his filing "a complaint with the United States Department of Labor's Occupational Safety and [H]ealth Administration (OSHA), and the District Court for the District of Columbia and making a report to the Defendant WMATA's General Manager." *Id.* at 8.

III. DISCUSSION AND ANALYSIS

The remaining claim involves Mr. Ndzerre's complaint that he was suspended on December 6, 2016, in retaliation for engaging in protected activity. This potentially adverse employment action allegedly occurred within the 180 day period prior to Mr. Ndzerre's filing of

his IER charge. Judge Leon found that the 2013 "suspension" was not an adverse employment action, reasoning that the 2013 action was a "temporary hold from work" by the EAP in order to undergo a fitness-for-duty examination, rather than a suspension. *Ndzerre*, 275 F. Supp. 3d at 165. However, WMATA does not argue that the December 2016 suspension is similar in nature to the EAP temporary hold from work, and therefore the suspension constitutes an adverse employment action. *See id.* (citing *Douglas v. Donovan*, 559 F.3d 549, 552 (D.C. Cir. 2009)) ("an adverse employment action must be 'a significant change in employment status'"). This Order draws this inference in Complainant's favor and presumes that the December 2016 suspension was an adverse employment action. Despite that fact, the claim fails because there are no material facts in dispute to sustain a prima facie case alleging protected activity or causation for retaliation under 8 U.S.C. § 1324b.

A. Summary Decision Standard of Review

This 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, [or] material[s] obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." To this end, "the court must view all facts and all reasonable inferences to be drawn from them 'in the light most favorable to the non-moving party.'" *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 3 (2000) (quoting *Matsushita*, 475 U.S. at 587).

B. Retaliation under 8 U.S.C. § 1324b.

The statute which authorizes retaliation claims before OCAHO clarifies a narrow scope of practices that a complainant can bring under 8 U.S.C. § 1324b.[3] The statute specifically prohibits retaliatory practices intended to impede a complainant's right to file a charge or complaint under 8 U.S.C. § 1324b(a)(5). There are two ways to prove retaliation — through direct evidence or by circumstantial evidence through the *McDonnell Douglas* burden shifting

[3] The statute specifies the types of activity which constitute retaliation. "It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g), to have been discriminated against." 8 U.S.C. § 1324b(a)(5).

test. *Breda v. Kindred Braintree Hosp*. LLC, 10 OCAHO no. 1202, 7 (2013) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)). Employers, however, "are unlikely to 'leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent." *Breda*, 10 OCAHO no. 1202, at 17 (quoting *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991)). Many cases therefore turn on indirect evidence which creates an inference of discrimination. To make a prima facie case for retaliation through indirect evidence, a complainant must show: 1) the employee engaged in some conduct or activity which comes within the protection of the statute; 2) the employee suffered an adverse employment decision: and, 3) there is a causal link between the protected activity and the adverse employment decision." *Santiglia v. Sun Microsystems*, 9 OCAHO no. 1110, 9 (2004) (quoting *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996)); *see e.g., Paquin v. Federal Nat'l Mortgage Ass'n*, 119 F.3d 23, 31 (D.C. Cir. 1997) (D.C. Circuit retaliation test articulates a similar prima facie case).[4] To survive under the first prong of this test, "[t]he claim must implicate a right or privilege specifically secured under § 1324b, or a proceeding under that section." *Shortt v. Dick Clark's AB Theatre*, LLC, 10 OCAHO no. 1130, 11 (2009) (citing *Harris v. Haw. Gov't Emps. Assoc*., 7 OCAHO no. 937, 291, 295 (1997)). OCAHO decisions add that there must be some knowledge of the protected activity to prove a retaliatory motive. *Shortt*, 10 OCAHO no. 1130 at 6. If a complainant makes a prima facie case, the burden then shifts to the Respondent (the employer) to articulate a "legitimate, nondiscriminatory reason" for the action. *Breda*, 10 OCAHO no. 1202, at 17.

C. Retaliation Claim Fails

There is no genuine dispute of material fact enabling the retaliation claim to survive summary decision, as Complainant has failed to plead or allege facts indicating he was retaliated against for asserting his rights under 8 U.S.C. § 1324b. Given that Mr. Ndzerre does not claim there is direct evidence of a violation of his rights, the question turns on whether there is indirect evidence of retaliation under the *McDonnell Douglas* test. *Santiglia*, 9 OCAHO no. 1110, 9 (2004). It is possible to bring a retaliation claim before OCAHO even after a related discrimination complaint before the EEOC has been dismissed, *Rainwater*, 12 OCAHO no. 1300 at 22 n.24, but the OCAHO complaint must plead and allege retaliation for activity covered by 8 U.S.C § 1324b.[5] *See* 8 U.S.C. § 1324b(a)(5) ("It is also an unfair immigration-related

[4] The alleged unfair immigration-related employment practices occurred in the District of Columbia and the U.S. Court of Appeals for the District of Columbia (D.C. 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 D.C. Circuit.

[5] As discussed in a prior order in this case "our statute mandates that there can be no overlapping or simultaneous charges before both the EEOC and OCAHO. *Ndzerre*, 13 OCAHO no. 1306, 7 n.6 (2017) (citing 8 U.S.C. § 1324b(b)(2); *Walker v. United Air Lines, Inc*., 4 OCAHO no. 686, 791, 820 (1994)). The undersigned need not resolve the Title VII retaliation claim because it has already been dismissed. *Ndzerre*, 275 F. Supp. 3d at 167. The doctrine of

employment practice . . .[to] retaliate against any individual . . . because the individual intends to file or has filed a charge or a complaint. . . .” Additionally, the Partial Dismissal issued by the undersigned clarified that that Title VII retaliation claims could not be heard by OCAHO and instead must be referred to the EEOC itself. *Ndzerre*, 13 OCAHO no. 1306 (citing *Angulo*, 11 OCAHO no. 1259 at 6).

WMATA asserts that the complaint must be dismissed because there was no discrimination on the basis of activity protected by § 1324b. Mot. For Summary Decision at 4. Mr. Ndzerre asserts that his protected activity involved whistleblowing, and retaliation for having asserted his rights before OSHA and the EEOC. Summary Decision Opp’n at 9. The factual history articulated by Judge Leon indicates a virtually identical set of events to the present complaint in that “plaintiff alleges that he was pressured into supporting a fraudulent Incident Report because O'Farrell [Hernando] perceived that [Ndzerre] did not know how to write English based on [his] national origin.” *Ndzerre*, 275 F. Supp. 3d at 162. While retaliation was not Judge Leon’s focus, he dismissed the complaint in its entirety including the allegation of retaliation because “Plaintiff never mentioned . . . a ‘continuing action [in the complaint].”’ *Id.* at 167. As discussed *supra* note 5, Judge Leon conclusively dismissed the entirety of the Title VII claim, which encompasses the Title VII retaliation claim. The Title VII retaliation claim has already been dismissed and in any case, cannot be heard in the first instance by the undersigned because retaliation for filing a complaint before the EEOC is actionable only before the EEOC. *Angulo*, 11 OCAHO no. 1259 at 6. Essentially, Mr. Ndzerre wants another bite at the apple now that his EEOC retaliation claim was dismissed and has repurposed his Title VII retaliation in an

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claim preclusion or res judicata holds that once a court has issued a final judgment on a cause of action (for the Title VII claim), the subsequent claim is precluded from consideration in another court. *Mackentire v. Ricoh Corp*., 5 OCAHO no. 746, 191, 196 (1995). In this case, the Title VII retaliation claim is precluded because there has been: “1) a final judgment on the merits in an earlier action; 2) [the] identity of parties or privies in the two suits [are the same]; and, 3) [the] identity of the cause of action in both suits [are the same].” *United States v. Split Rail Fence Co*., 11 OCAHO no. 1216, 5 (2014). Judge Leon’s dismissal is viewed broadly as having dismissed the entirety of the Title VII complaint, which includes a charge of retaliation. Judge Leon stated that “Our Circuit has instructed that ‘[t]he goals behind the requirement of prior resort to administrative relief would be frustrated if the filing of a general charge with the EEOC would open up the possibility of judicial challenges to any related conduct that took place in connection with the employment relationship.’ And this Court will not frustrate the purposes of the Title VII by allowing Ndzerre to pursue allegations outside the scope of his discrimination charge. Plaintiff's additional allegations of national origin discrimination, retaliation, and hostile work environment are accordingly dismissed.” *Ndzerre*, 275 F. Supp. 3d at 167 (quoting *Park v. Howard Univ*., 71 F.3d 904, 908 (D.C. Cir. 1995). The District Court docket for *Ndzerre* 275 F. Supp. 3d at 167 indicates that there was no appeal perfected on the case and thus, the decision by Judge Leon was the final decision which conclusively dismissed the Title VII claims. Mr. Ndzerre fully litigated the Title VII retaliation claim and his complaint was dismissed.

attempt to fit it under our statute. The narrow question here turns on whether the complaint makes out a prima facie case for retaliation under only 8 U.S.C. § 1324b(a)(5).

The prima facie case for retaliation under 8 U.S.C. § 1324b(a)(5) fails under prong one and three of the *McDonnell Douglas* test. *Santiglia*, 9 OCAHO no. 1110 at 9. Specifically, the prima facie case for retaliation fails because there is no dispute of material fact that "the employee engaged in some conduct or activity which comes within the protection of the statute." *Id*.[6] 8 U.S.C. § 1324b(a)(5) enumerates a specific set of circumstances that are considered unlawful employment practices such as retaliation for filing a charge or complaint in this forum. His allegation of retaliation only indicates that "the suspension request . . . was in retaliation to the fact that Plaintiff Ndzerre blew the whistle on Mr. O'Farrell [Hernando]." Response to Material Facts at 2-3. The activity of "blowing the whistle" is not specifically regulated by 8 U.S.C § 1324b but it is generously construed as a claim of retaliation. The supposed retaliation only involves "WMATA's General Manager, Deputy General Manager, Safety Department, Transit Police, The Union Local 689 . . . [for activity regulated by] OSHA." *Id.* at 2. In a deposition, Mr. Ndzerre also did not specify any allegations of activity protected under 8 U.S.C. § 1324b. Mot. Summary Decision, Ex. R-a at 10.[7]

Mr. Ndzerre also asserts there is a dispute of material facts about the incident leading up to the suspension, but he asserts no facts connecting alleged retaliation under 8 U.S.C. § 1324b. *Id.* at 4; Complainant's Response, Ex. Cc-24. The record indicates that the IER charge was filed on March 7, 2017. OCAHO Compl. at 3, 83. The OCAHO complaint was then filed on May 3, 2017. *Id*. at 1. The only activity protected by the statute addressed by Complainant—filing a

[6] The burden does not shift here under the *McDonnell Douglass* framework because Mr. Ndzerre has not made out a prima facie case of retaliation. The undersigned therefore does not reach the question of whether WMATA's decision to suspend Mr. Ndzerre from his position for sleeping on the job was "a legitimate, non-retaliatory reason for the alleged adverse job action." *Rainwater v. Doctor's Hospice of Georgia, Inc*. 12 OCAHO no. l300, 16 (2017).

[7] The undersigned has broadly construed what Mr. Ndzerre refers to as "blowing the whistle" to incorporate an allegation of retaliation under 8 U.S.C. § 1324b(a)(5). However, (continued…) (…continued) he may also be referring to activity regulated by statutes that are outside the jurisdiction of the undersigned. The undersigned has already dismissed these unrelated claims in the Partial Dismissal as both untimely and not properly before this forum. *Ndzerre*, 13 OCAHO no. 1306, 10 (2017). The Partial Dismissal dismissed Mr. Ndzerre's claims "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." *Id*. As discussed in *Rainwater*, prior dismissal of the Title VII retaliation claim does not foreclose the 8 U.S.C. § 1324b(a)(5) retaliation claim which prohibits different activity. *Rainwater*, 12 OCAHO no. 1300 at 22 n.24. This Order therefore considers allegations relating to U.S.C. § 1324b(a)(5).

charge and complaint under 8 U.S.C. § 1324b—occurred months *after* the alleged December 6, 2016 retaliation. *See also* Complainant's Response Ex. Cc-24 at 2 (union grievance for December incident fails to mention IER, OCAHO or activity governed by 8 U.S.C. 1324b). Neither the Response to Material Facts nor the Summary Decision Opposition indicate any facts related to rights that are "specifically secured under § 1324b." *Shortt*, 10 OCAHO no. 1130 at 6. The complaint must therefore be dismissed because these facts and circumstances only allege violations of Title VII and various other statutes, which Judge Leon had previously dismissed. *Ndzerre*, 275 F. Supp. 3d at 167; *Ndzerre* 2017 WL 2692609, at *1; *see e.g., Split Rail Fence Co*., 11 OCAHO no. 1216 at 5 (res judicata or issue preclusion prevents relitigation of an identical claim against the same litigants in another court after a final judgment on the merits).

Additionally, Mr. Ndzerre has not stated any facts in dispute or alleged that WMATA had knowledge of his plans to file a complaint with OCAHO or IER that creates a genuine dispute of material fact under prong three of the prima facie case of retaliation. *See Sun Microsystems* 9 OCAHO no. 1110 at 9 (quoting *Nidds*, 113 F.3d at 919) (knowledge is related to "but for" causation). In a deposition, Mr. Ndzerre indicates that he is not alleging his supervisors had knowledge of his claims in this forum: "I don't know if Mr. Hung is aware of it . . . . I am not aware if Mr. O'Farrell [Hernando] is aware." Mot. Summary Decision, Ex. R-a at 10. The sworn deposition of Mr. Ndzerre makes no claim that WMATA was aware of the OCAHO and IER complaint. Without even an allegation of WMATA's knowledge, much less evidence indicating the employer's knowledge, the prima facie case fails. Mr. Ndzerre's apparently secret intention to file a retaliation claim before OCAHO and IER is insufficient to put WMATA on notice and create a triable issue of "but for" causation. *See Shortt*, 10 OCAHO no. 1130 at 6 (citing *Smith v. Riceland Foods, Inc*., 151 F.3d 813, 818 (8th Cir. 1998) (treating employer knowledge as a component of the element of causation)).

Even after construing the facts in a light most favorable to Mr. Ndzerre, *WSC Plumbing, Inc*., 9 OCAHO no. 1062 at 3, the retaliation claim must be dismissed. There is no genuine dispute of material fact that Mr. Ndzerre was retaliated against for filing a charge and complaint under 8 U.S.C. § 1324b because the alleged retaliation occurred before the protected activity. The complaint is therefore dismissed because it fails to state a prima facie case of retaliation. [8]

D. Sovereign Immunity

[8] The October 12, 2017 Order Granting in Part Respondent's Motion to Dismiss indicated that the undersigned would not consider allegations in the retaliation claim that are not grounded in the complaint. *Ndzerre v. Washington Metr. Area Transit Auth*., 13 OCAHO no. 1306, 9 (2017). The Complainant did not offer an amendment to supplement the factual allegations of the retaliation claim. The only activity in the complaint protected by § 1324b is the filing of the IER charge and the OCAHO complaint. Complainant was specifically warned of these shortcomings in the complaint but nonetheless failed to amend the complaint or to specifically articulate how he has stated a prima facie case of retaliation. *Id.*

WMATA also claims for the first time in its Motion for Summary Decision that it is immune to suit under the Eleventh Amendment. Mot. for Summary Decision at 2. WMATA did not assert sovereign immunity in its answer as an affirmative defense and has not previously provided Complainant with notice of this defense. Respondent's Answer; *see also* Mot. to Dismiss (no assertion of sovereign immunity defense). WMATA cites *Elhaj-Chehade v. Univ. of Tex., Sw. Med. Ctr. of Dallas*, 8 OCAHO no. 1022, 318 (1999), for the contention that Respondent is immune from suit. While *Elhaj-Chehade*, 8 OCAHO no. 1022, 318 dismisses the action for lack of jurisdiction, there, the Respondent asserted the sovereign immunity defense in its answer. Here, the Respondent asserts this defense anew, without first moving to amend its answer pursuant to 28 C.F.R. § 68.9(e). In the interest of fairness to the Complainant, the undersigned will not consider the substance of this affirmative defense as it was not properly pled. The complaint is dismissed on the alternative ground that the Complainant did not present sufficient material facts to make out a prima facie case of retaliation and therefore, the undersigned does not reach the sovereign immunity issue.

IV. CONCLUSION

The retaliation claim must be dismissed as there is no genuine dispute of material fact regarding WMATA's alleged retaliation against Mr. Ndzerre. The Response to Material Facts by Mr. Ndzerre do not create a triable issue of fact that he engaged in activity protected by 8 U.S.C. § 1324b. He also fails to demonstrate that there is a triable issue of fact on causation or that WMATA had knowledge of his allegedly protected activity sufficient to show causation. The undersigned does not resolve whether WMATA is immune from suit because the Respondent did not plead the Eleventh Amendment sovereign immunity issue as an affirmative defense. Accordingly, the complaint must be dismissed because the retaliation claim does not survive summary decision.

ORDER

Respondent did not attach a certificate of service in his Motion to Compel, and consequently the Order to Show Cause must be vacated as there was not proper service on the underlying Motion. The Order to Show Cause and Compelling Answers is accordingly **VACATED**. For the reasons set forth above, the Respondent's Motion for Summary Decision is **GRANTED** and the complaint is **DISMISSED**, as there is no genuine dispute of material fact sufficient to maintain a prima facie case of retaliation pursuant to 8 U.S.C. § 1324b(a)(5).

SO ORDERED.

Dated and entered on June 26, 2018.

_____

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.