

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

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2021A00027
MRD LANDSCAPING & MAINTENANCE,)	
CORP.,)	
)	
Respondent.)	
_____)	

Appearances: Martin Celis, Esq., for Complainant
Cynthia Canales, Esq., for Respondent

ORDER DISCHARGING ORDER TO SHOW CAUSE AND
FOR INITIAL PREHEARING CONFERENCE

I. PROCEDURAL HISTORY

On April 12, 2021, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, MRD Landscaping & Maintenance, Corp., violated the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. The complaint reflects that ICE served Respondent with a Notice of Intent to Fine on October 1, 2019, Compl. 2, and Respondent thereafter timely requested a hearing before OCAHO. Compl. Ex. B.

On May 21, 2021, Respondent, through counsel, filed an answer to the complaint (Answer to Compl.). Through its Order for Prehearing Statements and Initial Disclosures dated June 30, 2021, the Court directed the parties to file prehearing statements, make their initial disclosures, and begin seeking discovery. Both parties then filed their prehearing statements.

On July 26, 2021, Complainant filed a Motion for Leave of Court to Amend Complaint and an Amended Complaint Regarding Unlawful Employment. In its motion, Complainant sought the Court's leave to amend the complaint to remove "'timely' from Count II, failure to timely prepare[.]" and to include information pertaining to civil monetary penalties. Mot. for Leave of Ct. to Amend Compl. 3. On December 17, 2021, the Court granted Complainant's motion to amend the complaint in this matter and ordered Respondent to file an answer to the amended complaint within twenty days of the date of issuance of the order. *See United States v. MRD Landscaping & Maint., Corp.*, 15 OCAHO no. 1407, 4-5 (2021).

Not having received Respondent's answer to the amended complaint, the Court issued a Notice and Order to Show Cause Regarding Answer to Amended Complaint (Order to Show Cause) on March 3, 2022. *See United States v. MRD Landscaping & Maint., Corp.*, 15 OCAHO no. 1407a (2021). The Court ordered Respondent to file both a "response in which it must show good cause for its failure to file an answer to the amended complaint" and an answer to the amended complaint that comports with 28 C.F.R. § 68.9.¹ *Id.* at 3. Moreover, the Court warned that if Respondent failed to respond or demonstrate good cause, "the Court may find that Respondent has abandoned its request for a hearing and, consequently, dismiss that request." *Id.* The Court gave Respondent through March 28, 2022, to submit a filing showing good cause for its failure to file its answer to the amended complaint and to file its answer to the amended complaint. *Id.* As the Court explained in its Order to Show Cause, Respondent must file an answer that comports with 28 C.F.R. § 68.9. *Id.*

On March 18, 2022, the Court received a letter dated March 16, 2022, from Respondent's counsel. No certificate of service was attached. In this letter, Respondent's counsel said that she would submit a "Reply Answer" to the Order to Show Cause. She asserted that she had filed Respondent's "Answer" with the Court by facsimile on January 6, 2022, and served a copy of the "Answer" on Complainant via electronic mail (e-mail) and through the United States Postal Service. In support for her assertions, Respondent's counsel enclosed a copy of a filing entitled "Respondent's Answer to Order Granting Motion to Amend Complaint and Directing Respondent to File Answer" (Answer to Order Amending Compl.). Rather

¹ The parties must familiarize themselves with OCAHO's Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. part 68 (2022). OCAHO's rules are available on OCAHO's homepage on the United States Department of Justice's website. *See* <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations>.

than an answer to the amended complaint, this “Answer” stated that “Respondent does not oppose the Court’s Order granting the Claimant’s Motion for Leave of Court to Amend Complaint.” Answer to Order Amending Compl. 2. Respondent’s counsel also enclosed copies of documents and communications reflecting her transmission of “Respondent’s Answer to Order Granting Motion to Amend Complaint and Directing Respondent to File Answer” by facsimile to the Court on January 6, 2022, and service of that filing on Complainant via e-mail and first class U.S. mail.

On March 25, 2022, Respondent filed Respondent’s Answer to Notice and Order to Show Cause Regarding Answer to Amended Complaint (Response to Order to Show Cause) and attached its answer to the amended complaint (Answer to Amended Compl.).²

On March 28, 2022, the Court issued an Order on Respondent’s Submission. *See United States v. MRD Landscaping & Maint., Corp.*, 15 OCAHO no. 1407b (2021). The Court rejected Respondent’s letter, finding the submission to be an ex parte communication that violated OCAHO’s Rules of Practice and Procedure for Administrative Hearings. *Id.* at 4. Specifically, the Court explained that Respondent had violated 28 C.F.R. § 68.36(a) because its letter was substantive in nature, discussing both an anticipated court filing and providing documentation pertaining to a prior filing. *Id.* The Court noted that, under 28 C.F.R. § 68.36(a), ex parte communications are permitted only to schedule hearings or request extensions of time. *Id.* The Court also explained that Respondent had run afoul of 28 C.F.R. § 68.6(a) because it failed to include a certificate indicating service of its submission to all parties of record. *Id.*

II. LEGAL STANDARDS

A. Filing Requirements

OCAHO’s Rules of Practice and Procedure for Administrative Hearings allow parties to file pleadings and briefs by facsimile “only to toll the running of a time

² The answer to the amended complaint Respondent filed on March 25, 2022, more closely aligns with Respondent’s answer to the complaint filed on May 21, 2021. It is a different filing from the “Answer” Respondent served by facsimile on the Court on January 6, 2022, in which Respondent merely stated its lack of opposition to the Court’s order amending the complaint in this matter.

limit” imposed by statute, regulation, or court order. 28 C.F.R. § 68.6(c). In order to toll the running of a time limit, the filer must forward “[a]ll original signed pleading and other documents” concurrently with the transmission of the facsimile. *Id.* OCAHO’s rules further require that the party filing by facsimile certify in its certificate of service that the original pleading was served on the opposing party by facsimile or same-day hand delivery, or, if those methods are not feasible, by overnight delivery service. *Id.* “Service by electronic mail is not listed among the acceptable concurrent filing methods.” *See Y.Y. v. Zuora, Inc.*, 15 OCAHO no. 1402, 3, 6 (2021). “Fax transmissions which fail to comply with the rule will be treated as a nullity and the effective filing dates for such documents will be the date of receipt of the mailed original in this office.” *In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, 728, 731 (2000).³

B. Good Cause

If a party fails to respond to the Court’s orders, it may waive its right to appear and its right to contest the allegations in the complaint. *See* 28 C.F.R. § 68.9(b). A judgment by default may follow. *See id.* Although OCAHO’s Rules of Practice and Procedure for Administrative Hearings give courts the option of resolving such cases by entering default judgments, OCAHO courts prefer to evaluate and resolve cases on their merits. *See, e.g., D’Amico, Jr., v. Erie Cmty. Coll.*, 7 OCAHO no. 927, 61, 63 (1997) (citations omitted) (explaining that courts reserve default judgments for situations where “the inaction or unresponsiveness of a particular party is unexcusable and the inaction has prejudiced the opposing party.”); *see also United States v. R & M Fashion Inc.*, 6 OCAHO no. 826, 46, 48 (1995) (“The preferred disposition of any case is upon its merits and not by default judgment.”) (citation omitted).

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 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 at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

Given the preference for resolving cases on their merits, OCAHO courts have issued orders to show cause as to why a default judgment should not be entered and have given the nonresponsive party an opportunity to explain its failure to respond to court orders. *See, e.g., United States v. Sal's Lounge*, 15 OCAHO no. 1394b, 4 (2022) (ordering the respondent to show good cause for failure to file an answer to the amended complaint); *see also United States v. Shine Auto Serv.*, 1 OCAHO no. 70, 444, 445-46 (1989) (Vacation by the CAHO of the Administrative Law Judge's Order Denying Default Judgment) (explaining that the court may issue an order to show cause where the respondent failed to file a timely answer). Such was the case here. *See MRD Landscaping & Maint., Corp.*, 15 OCAHO no. 1407a, at 3.

In deciding whether to credit a party's explanations and accept a late filing, OCAHO courts employ a standard of good cause. *See, e.g., United States v. Quickstuff*, 11 OCAHO no. 1265, 4 (2015) ("A showing of good cause is nevertheless a condition precedent to permitting a late answer, and where that showing is not made, a late answer may not be accepted.") (citation omitted). As a means of determining whether good cause exists, OCAHO courts may look to the law of the appropriate United States Court of Appeals for guidance. *See* 28 C.F.R. § 68.56 (explaining that judicial review of a final OCAHO order is sought before the appropriate United States Court of Appeals); *see also United States v. Sal's Lounge*, 15 OCAHO no. 1394c, 3-7 (2022) (discussing and applying factors from appropriate Court of Appeals precedent in making a good cause determination).

Here, the appropriate circuit under 28 C.F.R. § 68.56 is the Fifth Circuit Court of Appeals. As such, in conducting its good cause analysis, the Court will consider the following non-exhaustive factors employed by the Fifth Circuit: "(1) whether the failure to act was willful; (2) whether setting the [order to show cause] aside would prejudice the adversary; and (3) whether a meritorious claim has been presented." *Effjohn Int'l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003) (citation omitted). Courts need not consider all of these factors, and may identify and consider other factors. *Dierschke v. O'Cheskey (In re Dierschke)*, 975 F.2d 181, 184 (5th Cir. 1992). The ultimate inquiry is whether the circumstances in a particular case warrant a finding of good cause to discharge an order to show cause or set aside a default. *Id.*

III. DISCUSSION AND ANALYSIS

A. The Timeliness of Respondent's Filing

The Court first addresses the timeliness of Respondent's filing captioned "Respondent's Answer to Order Granting Motion to Amend Complaint and Directing Respondent to File Answer."

Although Respondent transmitted its filing by facsimile to the Court on January 6, 2022, the Court did not receive the original, signed filing concurrently with the facsimile. *See* 28 C.F.R. § 68.6(c) (requiring the filer to forward "[a]ll original signed pleadings and other documents . . . concurrently with the transmission of the facsimile."). Respondent acknowledges that it failed to serve the filing properly and did not concurrently forward the original filing to the Court. Response to Order to Show Cause 3. Rather, the Court contacted Respondent on or about March 15, 2022, to obtain a signed copy of the filing Respondent transmitted by facsimile on January 6, 2022.

Even if Respondent had concurrently forwarded the original, signed filing to the Court, its facsimile still would not have tolled the running of the Court's deadline of January 6, 2022. As explained above, to toll the running of a time limit, the party filing by facsimile must serve its filing on the opposing party by facsimile, same-day hand delivery, or, if neither method is feasible, by overnight delivery service. 28 C.F.R. § 68.6(c). As OCAHO courts have explained, the purpose of this rule is "to ensure basic fairness and due process to an opposing party." *In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, at 731. Here, Respondent asserts that it served Complainant with its January 6, 2022, filing by e-mail and U.S. mail, Response to Order to Show Cause 3, although the certificate of service attached to its January 6, 2022, filing reflected service on Complainant only by e-mail. *See* Answer to Order Amending Compl. 4. Given that the certificate of service also included Complainant's mailing address, Respondent may have intended to indicate that service was accomplished both by e-mail and U.S. mail.⁴ But service by first class U.S. mail, like service by e-mail, is not listed among the acceptable concurrent filing methods under 28 C.F.R. § 68.6(c). *See* Y.Y., 15 OCAHO no. 1402, at 3, 6

⁴ The likelihood of a typographical error is supported by the attachments to Respondent's letter to the Court dated March 16, 2022. Those attachments included a photocopy of the outside of an envelope addressed to Complainant and stamped for delivery by first class U.S. mail on January 6, 2022.

(finding that the respondent failed to satisfy the requirement of concurrent transmission under 28 C.F.R. § 68.6(c) when it served the opposing party by e-mail and Federal Express without specifying whether that delivery was completed overnight). Therefore, the facsimile transmission is nullified and the Court considers Respondent's Answer to Order Granting Motion to Amend Complaint and Directing Respondent to File Answer to be filed as of the date the Court received the original, signed copy by mail, namely, March 18, 2022.

B. Good Cause

The Court exercises its discretion and considers whether good cause exists to discharge the Order to Show Cause against Respondent. Construing good cause generously, the Court finds that the circumstances in this case weigh in favor of accepting Respondent's answer to the amended complaint filed on March 25, 2022, and discharging the Order to Show Cause so that this matter may be decided on the merits.

First, the Court considers whether Respondent's failure to act was due to a willful disregard for the legal process. *See Effjohn*, 346 F.3d at 563. Respondent argues that it prepared what it "believed to be a timely response to the Court's Order Granting Motion to Amend Complaint and Directing Respondent to File Answer" dated December 17, 2021, and transmitted its response by facsimile to the Court on January 6, 2022, being the Court's deadline. Response to Order to Show Cause 3. After acknowledging that its errors resulted in its response being untimely filed, Respondent asserts that its mistakes were unintentional and that it did not intend to disregard the Court's order. *Id.* at 2. What Respondent fails to acknowledge is that the pleading it sent the Court by facsimile on January 6, 2022, was not Respondent's answer to the amended complaint. Rather, Respondent submitted a two-paragraph response—captioned as Respondent's "Answer"—in which it stated its lack of opposition to the Court's order granting Complainant's motion to amend the complaint. *See Answer to Order Amending Compl. 2*. The Court did not order Respondent to file such a position statement, nor did it advance the case since the Court had already ruled on Complainant's motion. As reflected in its order dated December 17, 2021, the Court ordered Respondent to file "an answer to the amended complaint." *MRD Landscaping & Maint., Corp.*, 15 OCAHO no. 1407, at 5. The Court did not receive Respondent's answer until March 25, 2022. Response to Order to Show Cause, Ex. 1.

Despite the tardiness of Respondent's answer to the amended complaint, the Court finds credible Respondent's assertions that it did not willfully disregard the

legal process or intentionally fail to respond to this litigation. Rather than disregarding the Court's order of December 17, 2021, Respondent appears to have misunderstood it. As evidenced by its facsimile of January 6, 2022, Respondent attempted to respond timely to the Court's order and transmitted by facsimile a filing by the Court's deadline. It was, quite simply, the wrong filing. The Court ordered Respondent to file an answer to the amended complaint, but received a position statement captioned "Respondent's *Answer* to Order Granting Motion to Amend Complaint and Directing Respondent to File Answer" (emphasis added). While the Court concludes that Respondent did not intentionally fail to respond as ordered, it admonishes Respondent to read the Court's orders more carefully.

Second, the Court considers whether Complainant would be prejudiced if the Court sets aside the Order to Show Cause. *See Effjohn*, 346 F.3d at 563. Respondent's confusion has resulted in a notable delay in this case, given that its answer to the amended complaint was filed approximately seventy-eight days after the Court's deadline. Yet OCAHO courts have made it clear that "[m]ere delay alone does not constitute prejudice without any resulting loss of evidence, increased difficulties in discovery, or increased opportunities for fraud and collusion." *Nickman v. Mesa Air Group*, 9 OCAHO no. 1106, 3 (2004); *see also* 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2699 (4th ed. 2021) (discussing types of prejudice and costs to the non-defaulting party). There is no such evidence before the Court. While the passage of time can increase difficulties in gathering evidence as witnesses' memories may fade and documents may be lost, neither party indicated a need for discovery in its prehearing statement. *See* Complainant Prehearing Statement 7; Resp't Prehearing Statement 3.

Assuming the parties' discovery needs have changed, they have been free to undertake discovery since June 30, 2021—months before the delays associated with the filing of Respondent's answer to the amended complaint—and the Court has not set any deadlines for the completion of their discovery. *See* Order for Prehearing Statements and Initial Disclosures 3. Further, Respondent's answer to the amended complaint raises no new issues or arguments. It is almost identical to Respondent's answer to the initial complaint in this matter, lessening the potential prejudice of the filing delay. *Cf.* Answer to Compl. *with* Answer to Amended Compl. Lastly, Complainant has neither moved the Court for an entry of default nor alleged that it has been prejudiced by Respondent's untimely filing of its answer to the amended complaint. The Court therefore finds no evidence of prejudice to Complainant and concludes that this factor weighs in favor of discharging the Order to Show Cause against Respondent.

Finally, the Court considers whether Respondent has presented any meritorious defenses to the amended complaint. *See Effjohn*, 346 F.3d at 563. The purpose of looking at this factor is to “determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.” *See Sinha v. Infosys*, 14 OCAHO no. 1373a, 5 (2021) (internal citation omitted). Although Respondent appears not to dispute the alleged violations, it contests the civil monetary penalty both on statutory and non-statutory grounds. *See Answer to Amended Compl.* 2-5. Specifically, Respondent argues for mitigation of the penalty amount based on a multitude of factors, including but not limited to, its small business size, inability to pay, lack of prior violations, employment of individuals authorized to work in the United States, and good faith. *Id.* Respondent represents that it is a small commercial landscaping company that closed during the COVID-19 pandemic and, due to its closure, coupled with personal debt stemming from the owners’ health issues, is unable to pay the penalty amount Complainant seeks for the alleged violations. *Id.* at 2-4. It references various supporting documentation for its arguments, including financial documentation filed with the State of Texas. *Id.* at 4. Although Respondent has not conclusively established its claims and defenses, it need not to do so for these purposes. There is enough in its Answer to Amended Complaint to “give the factfinder some determination to make.” *Kanti v. Patel*, 8 OCAHO no. 1007, 166, 171 (1998) (citations omitted). The Court therefore finds that this factor likewise weighs in favor of discharging the Order to Show Cause.

In total, after weighing the above-cited factors, and because of the strong preference to resolve cases on their merits, this Court will set aside the Order to Show Cause against Respondent and accept its Answer to Amended Complaint as a filing in this matter. As set forth below, the next step in this case will be to hold a telephonic prehearing conference with the parties.

IV. INITIAL PREHEARING CONFERENCE

The Court will hold an initial telephonic prehearing conference in this matter in order to develop a case schedule, including dates for the completion of discovery, the filing of motions, and a hearing in this matter. 28 C.F.R. § 68.13. The Court also may schedule dates for the submission of a proposed final prehearing order and final prehearing conference.

The parties shall confer and provide the Court in writing with a minimum of five proposed agreed dates and times in Eastern Standard Time for the telephonic prehearing conference. The Court will confirm the date and time for the prehearing conference as soon thereafter as practicable.

At the conference, the parties should be fully prepared and have authority to discuss any questions regarding the case, including questions raised by the pleadings, jurisdiction, pending motions, motions contemplated to be filed, the probable length of time needed for discovery, and the possibility of settlement of the case. The parties will have the opportunity to discuss any problems confronting them, including the need for time in which to prepare for a hearing.

Before the conference, the parties shall confer regarding their preference for a virtual or in-person hearing. If the parties prefer an in-person hearing, they shall be prepared to tell the Court their preferred location for the hearing. Sections 274A(e)(3)(B) and 274C(d)(2)(B) of the INA require that the Court hold a hearing “at the nearest practicable place to the place where the person or entity resides or to the place where the alleged violation occurred.” 28 C.F.R. § 68.5(b).

Also, before the conference, the parties shall confer regarding their interest in participating in the OCAHO Settlement Officer Program, a voluntary program through which the parties use a settlement officer, namely another OCAHO Administrative Law Judge, to mediate settlement negotiations as a means of alternative dispute resolution.⁵ The settlement officer would act as a neutral third party and assist the parties in seeking voluntary resolution of the issues in this case, including any assessment of penalties.

If the parties need to reschedule the initial prehearing conference, at least five business days in advance of the date set for the prehearing conference, they shall provide the Court with a written motion that includes a minimum of three proposed agreed dates and times in Eastern Standard Time for the rescheduled conference. In addition to a written filing, the parties should communicate their request to the Court either by telephone or email. The Court will confirm the date and time for the rescheduled conference either telephonically or in writing as soon thereafter as practicable.

⁵ The Executive Office for Immigration Review’s Policy Memorandum 20-16 describes the policies and procedures for the use of settlement officers in OCAHO cases and is available at <https://www.justice.gov/eoir/page/file/1300746/download>.

V. DECISION AND ORDERS

The Court having found that, for the above-stated reasons, good cause exists, IT IS SO ORDERED that the Order to Show Cause against Respondent, MRD Landscaping & Maintenance, Corp., is DISCHARGED.

IT IS FURTHER ORDERED that Respondent's late-filed Answer to Amended Complaint is ACCEPTED as a filing in this matter.

IT IS FURTHER ORDERED that the Court will hold an initial telephonic prehearing conference in this matter. The parties shall confer and provide the Court in writing with a minimum of five proposed agreed dates and times in Eastern Standard Time for the telephonic prehearing conference. The Court will confirm the date and time for the prehearing conference as soon thereafter as practicable.

SO ORDERED.

Dated and entered on June 8, 2022.

Honorable Carol A. Bell
Administrative Law Judge