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

TRAVIS DARNELL AUSTIN, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2023B00009
SPECIALIZED STAFFING SOLUTIONS, INC., Respondent.	)	

Appearances: Travis Austin, pro se Complainant
Leah Toro, Esq., and Courtney Tedrowe, Esq., for Respondent

ORDER ON RESPONDENT'S MOTION FOR SANCTIONS

I. PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. On November 21, 2022, Complainant, Travis Austin, filed a Complaint against Respondent Specialized Staffing Solutions, Inc. (SSSI). Complainant alleges that SSSI discriminated against him on account of citizenship status and national origin, in violation of 8 U.S.C. § 1324b(a)(1); retaliated against him for engaging in § 1324b protected activity, in violation of 8 U.S.C. § 1324b(a)(5); and engaged in unfair documentary practices, in violation of 8 U.S.C. § 1324b(a)(6). On January 3, 2023, Respondent filed its Answer and Affirmative Defenses.

On March 30, 2023, the Court held a prehearing conference in this matter. Respondent's counsel appeared on behalf of Respondent. Complainant did not attend.

On April 19, 2023, the Court issued an Order summarizing the March 30, 2023 Prehearing Conference. In the Order, the Court required Complainant to submit a filing explaining why he did not attend the initial prehearing conference as scheduled and to address whether he failed to timely file his initial prehearing conference statement (and if so, why). PHC Order 2. The Order also memorialized the case schedule set by the Court. Id. at 3. The Court set May 30, 2023, as the close of all discovery, including discovery motions. Id. To date, Complainant has not filed an initial prehearing statement or a good cause explanation of his failure to file an initial prehearing statement or to attend the prehearing conference.

On May 30, 2023, Respondent filed a Motion to Compel Discovery. In the motion, Respondent moved the Court to compel Complainant's response as to ten Requests for Production of Documents and either to compel Complainant's response to or deem one Request for Admission to have been admitted by Complainant. Mot. Compel Disc. 4.

On October 31, 2023, the Court granted in part and denied in part Respondent's Motion to Compel Discovery. The Court granted Respondent's Motion as to Request for Admission No. 6, deeming it to have been admitted by Complainant. Austin v. Specialized Staffing Solutions, Inc., 18 OCAHO no. 1513, 4 (2023).[1] The Court then ordered Complainant to respond to the following Requests for Production by November 17, 2023:

- **No. 1:** "'[A]ll documents identified in [Complainant's] answers' which he used to prepare answers to the Requests for Admission";
- **No. 2:** "[A] true and correct copy of [Complainant's] social security card," or admit that the document located at Exhibit 4-D is genuine;
- **No. 6:** "[D]ocuments in any format 'which relate in any [manner] to the facts alleged in the Complaint'";
- **No. 7:** "[A]ll documents relating to any complaints or reports of discrimination and/or retaliation that [Complainant] made to or about SSSI and/or Printing Acts";
- **No. 9:** "[A]ll documents relating to [Complainant's] efforts to seek employment from May 15, 2022";
- **Amended No. 4a:** "'[A]ll documents and communication(s) in any form,' between Complainant and Respondent 'concerning the claims and/or underlying facts alleged in the Complaint'";
- **Amended No. 5a:** "'[A]ll documents and communication(s) in any form,' between Complainant and Printing Arts 'concerning the claims and/or underlying facts alleged in the Complaint'"; and
- **Amended No. 8:** "'[A]ll documents relating to any income or other compensation received by [Complainant]' between 'May 15, 2022 to present,'" excluding documents related to Social Security benefits and disability benefits.

Id. at 5-10 (quoting Mot. Compel Disc. Ex. 1, 5-6).

On December 20, 2023, Respondent filed its Motion for Sanctions for Failure to Comply with Court's October 31, 2023 Order. Respondent stated that Complainant had not produced any documents or responses to the Court's prior order, nor had Complainant advised Respondent concerning the anticipated date for compliance with the Order. Mot. Sanctions Failure Comply

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

2. Relying on 28 C.F.R. § 68.23(c), Respondent requested the Court impose an adverse inference sanction as to any documents or other evidence in Complainant's possession or control responsive to Respondent's Requests for Production of Documents Nos. 1, 2, 6, 7, and 9 as originally drafted and Nos. 4a, 5a, and 8 as amended by the Court's Order on Respondent's Motion to Compel. Id. Respondent further requested that the Court impose a sanction disallowing Complainant from introducing into evidence or otherwise relying upon documents or other evidence responsive to Respondent's Requests for Production of Documents Nos. 1, 2, 6, 7, and 9 as originally drafted and Nos. 4a, 5a, and 8 as amended by the Court's October 31, 2023 Order. Id. at 3.

Complainant did not respond to the motion for sanctions or seek leave for additional time to comply with the Court's order. On May 3, 2024, Complainant filed Complainant's Response to Respondent's Motion to Stay Proceedings, in which he appeared belatedly to address some of Respondent's discovery requests but did not address the motion for sanctions. Resp. Mot. Stay Procs. 1-2. Respondent filed a response on May 13, 2024. Respondent's Motion to Stay was granted by this Court on April 26, 2024. Austin v. Specialized Staffing Solutions, Inc., 18 OCAHO no. 1513a (2024).

On May 20, 2024, the Court received Complainant's Sworn Affidavit in Support of Complainant's Response to Respondent's Motion for Production Request.

The issue of sanctions being fully briefed, it is ripe for a decision.

II. LEGAL STANDARDS

In addition to the discovery sanctions available to the Court under 28 C.F.R. § 68.23(c), the Court may also look to the case law of the controlling Circuit Court, *see* 28 C.F.R. § 68.57, and the Federal Rules of Civil Procedure for guidance, *see* 28 C.F.R. § 68.1. Together, OCAHO's Rules of Practice and Procedure and Seventh Circuit case law on Federal Rule of Civil Procedure 37, which tracks OCAHO's own sanctions regulation at various points, delineate when the requested adverse inference and non-introduction sanctions are appropriate.

A. Standards for OCAHO Discovery Sanctions

28 C.F.R. § 68.23(c)(1)-(7) identifies the actions the presiding Administrative Law Judge (ALJ) may take upon a determination that a party has failed to comply with a prior order, including, but not limited to, an order for the production of documents. An ALJ may take these actions "for the purposes of permitting resolution of the relevant issues[,] . . . disposition of the proceeding[,] and to avoid unnecessary delay[.]" 28 C.F.R. § 68.23(c).

More specifically, 28 C.F.R. § 68.23(c)(1) allows the ALJ to "[i]nfer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party[.]" 28 C.F.R. § 68.23(c)(3) allows the ALJ to "[r]ule that the non-complying party may not introduce into evidence or otherwise rely upon . . . the documents or other evidence, in support of or in opposition to any claim or defense[.]"

The sanctions listed in 28 C.F.R. § 68.23(c) are "intended not only for purposes of deterrence, but also to ensure that a party does not benefit from a failure to comply." Iron Workers Loc. 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 674 (1997). Additionally, "an evasive or incomplete response to discovery may be treated as a failure to respond." 28 C.F.R. § 68.23(d). The Court's goal in imposing discovery sanctions is "to put the parties in the same relative positions they would have been in but for the noncomplying party's failure." Iron Workers Loc. 455, 7 OCAHO no. 964, at 675.

An adverse inference sanction under § 68.23(c)(1) is appropriate when it would sufficiently reprimand the noncomplying party, allow them to preserve their "day in court," and "facilitate litigation." Ravines De Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc., 15 OCAHO no. 1388f, 6 (2022). The Court has also repeatedly found § 68.23(c)(3)'s non-introduction sanction appropriate upon a party's failure to respond to court orders. *See, e.g.*, United States v. Guewell, 3 OCAHO no. 444, 519, 519-20 (1992) (issuing, *inter alia*, a non-introduction sanction after respondents violated an order compelling discovery, despite respondents' argument that the documents could not be located). *But see* Iron Workers Loc. 455, 7 OCAHO no. 964, at 674 (hesitating to impose a non-introduction sanction due to "concern for the constitutional limitations on sanctions" and a preference to hear the claim on its merits).

B. Standards for Seventh Circuit Discovery Sanctions

To supplement OCAHO's own limited case law, the Court turns to the law of the applicable United States Court of Appeals, here the Seventh Circuit.[2] Particularly relevant is Seventh Circuit case law on Federal Rule of Civil Procedure 37(b)(2)(A), which outlines permissible sanctions upon a party's "fail[ure] to obey an order to provide or permit discovery," and case law on Rule 37(c)(1), which states that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

1. Standards for Imposing Discovery Sanctions under Federal Rule 37(b)

In the Seventh Circuit, once the court has issued "an order compelling disclosure or discovery" and "the person subject to the order fails to comply with it, . . . the party seeking discovery [may] move on to Rule 37(b) and ask for sanctions." Evans v. Griffin, 932 F.3d 1043, 1046 (7th Cir. 2019) (quoting, in part, Fed. R. Civ. P. 37(a)(1)).

A party's "failure to comply with [a court order is] a sufficient basis to impose sanctions under Rule 37(b)(2)(A)," and a party's "culpability for that failure 'determines . . . which sanctions the court should impose[.]'" e360 Insight, Inc. v. Spamhaus Project, 658 F.3d 637, 642 (7th Cir. 2011) (citation omitted) (quoting, in part, Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 473 (7th Cir. 1984)).

In the Seventh Circuit, "negligence . . . is a degree of fault sufficient for imposing sanctions" under Federal Rule 37(b)(2)(A) for failure to comply with a court order. Id. at 642-

[2] 28 C.F.R. § 68.57 designates for appeal purposes "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."

43; *see also* DR Distribs., LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 919 (N.D. Ill. 2021) ("[O]nly negligence, not intent, is required for sanctions under [Federal Rule 37(b)]."). The Seventh Circuit has also held that "willful and repeated" discovery violations warrant the more severe sanctions of dismissal or default. *See, e.g.*, Nelson v. Schultz, 878 F.3d 236, 239 (7th Cir. 2017) (dismissal); *see also* In re Golant, 239 F.3d 931, 936-37 (7th Cir. 2001) (ruling that an implicit finding of a party's "willfulness, bad faith, or fault" in violating discovery orders justified a default judgment).

In imposing Rule 37(b)(2) sanctions, the court must ensure the sanctions are "just" and "specifically related to the particular 'claim' which was at issue in the order to provide discovery." Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982). Sanctions should be "tailor[ed] . . . to the severity of [the noncomplying party's] misconduct[.]" Nelson, 878 F.3d at 238-39. While a court need not select the least severe sanction, the chosen sanction must be one a "reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction." In re Golant, 239 F.3d 931 at 937 (quoting Salgado v. Gen. Motors Corp., 150 F.3d 735, 740 (7th Cir. 1998)). To make this decision in the Rule 37 dismissal context, the Seventh Circuit has considered the following factors:

> "[1] the plaintiff's pattern of and personal responsibility for violating orders, [2] the prejudice to others from that noncompliance, [3] the possible efficacy of lesser sanctions, and [4] any demonstrated merit to the suit."

EEOC v. Wal-Mart Stores E., L.P., 46 F.4th 587, 599 (7th Cir. 2022) (quoting Pendell v. City of Peoria, 799 F.3d 916, 917 (7th Cir. 2015)); *see also* Pendell, 799 F.3d at 917 (requiring prior warning of possible dismissal).[3] A single "discovery mishap," without a warning, does not meet this standard. Gregory v. Byrd, No. 20-3204, 2023 WL 2013915, at *1, 2023 U.S. App. LEXIS 3666, at *1 (7th Cir. 2023). In the past, the Seventh Circuit has also considered "the effect of [a party's] failures on the court's time and schedules[.]" Rice v. City of Chi., 333 F.3d 780, 784 (7th Cir. 2003) (quoting Williams v. Chi. Bd. of Educ., 155 F.3d 853, 857 (7th Cir. 1998)).

Various OCAHO cases have looked to similar factors in considering dismissal under § 68.23(c)(5), the parallel dismissal sanction applicable in this forum.[4] *See, e.g.*, Rodriguez v. Tyson Foods, Inc., 9 OCAHO no. 1109, 4-6 (2004) (looking to culpability, prejudice, and efficacy of lesser sanctions, among other factors); Ravines De Schur, 15 OCAHO no. 1388f, at 3-6 (same); De Leon v. Longoria Farms, 13 OCAHO no. 1320a, 3-5 (2019) (looking to complainants' failure to comply with a court order).

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[3] The 4-factor EEOC test cites Pendell; however, there is some confusion in Pendell, as noted in Nelson v. United States, 712 Fed. App'x. 573, 575 (7th Cir. 2018) (citing Pendell, 799 F.3d at 917) regarding whether dismissal was justified under Rule 37 or Rule 41. Rule 41(b) provides that "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." However, since EEOC mentions only Rule 37, the Court takes the decision as a sufficient adoption of the 4-factor test for Rule 37 purposes. Still, to ensure proper consideration, the Court also notes the Rice factors, which are nearly identical.

[4] § 68.23(c)(5) permits an ALJ to "[r]ule that . . . a decision of the proceeding be rendered against the non-complying party[.]" *See also* United States v. Tech. Marine Maint. Tex., LLC, 13 OCAHO no. 1312, 5 (2018) (noting that 28 C.F.R. § 68.23(c)(5) "grants the judge the power to dismiss an action").

2. Standards for Imposing Discovery Sanctions under Federal Rule 37(c)

Federal Rule 37(c) is related to 37(b) and provides an alternate basis from which to consider this dispute. Rule 37(c)(1) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Rule 26(a) and (e) relate to parties' obligations in federal court to make initial and supplemental discovery disclosures, respectively. Rule 26(e)(1)(A) also more specifically provides that a party who has responded to some kind of discovery request "must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete," and the "additional . . . information has not otherwise been made known to the other parties during the discovery process or in writing[.]"

The sanction under Rule 37(c) for failing to do so resembles the non-introduction sanction available under Rule 37(b)(2)(A)(ii). *See* 8B Wright, Miller & Marcus, Federal Practice & Procedure, Civil § 2289.1 (3d ed. June 2024 Update). In fact, Rule 37(c) authorizes courts to employ any sanction available under Rule 37(b)(2)(A)(i)-(vi), either in place of, or in addition to, Rule 37(c)'s non-introduction sanction. Fed. R. Civ. P. 37(c)(1)(C).

But before imposing any such sanction, a court must establish that the noncomplying party's failure was neither "substantially justified" nor "harmless." Fed. R. Civ. P. 37(c)(1). The Seventh Circuit looks to the following factors in making this determination:

> "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date."

David, 324 F.3d at 857.

III. ANALYSIS

Here, the sanctions requested are appropriate. The Court issued a discovery order on October 31, 2023 (Order on Motion to Compel), where it ordered Complainant to respond to Respondent's Requests for Production Nos. 1, 2, 6, 7, and 9, and to respond to amended Requests for Production Nos. 4a, 5a, and 8, by November 17, 2023. Austin, 18 OCAHO no. 1513, at 10. The requirement that an order compelling discovery be in place is therefore fulfilled.

In the Order on Motion to Compel, the Court warned Complainant that "failure to comply may result in a sanction pursuant to 28 C.F.R. § 68.23." Id.; *see also* Gen. Lit. Order 8 (warning the parties that noncompliance with a court order may result in sanctions under § 68.23(c)). Complainant has failed to comply with the Order. This warrants the consideration of discovery-related sanctions.

A. Discovery sanctions are appropriate under OCAHO case law.

The Court first turns to the appropriateness of Respondent's requested sanctions under OCAHO case law. Like the complainant in Ravines De Schur, Complainant is pro se and has submitted some filings, but failed to respond to various discovery requests. Ravines De Schur, 15 OCAHO no. 1388f, at 4, 6. Thus, an adverse inference sanction is appropriate because, like in Ravines De Schur, it will serve to advance the litigation, reprimand Complainant, and allow him to preserve his "day in court." The non-introduction sanction is also appropriate in light of the similarity to the arguments raised and the court's conclusion in Guewell. 3 OCAHO no. 444, at 519-20. Like in that case, here, Complainant violated an Order on Motion Compel (in addition to the General Litigation Order) and impliedly argued well after-the-fact that various documents could not be located due to destruction or theft. Resp. Mot. Stay Procs. 1-2.

B. Discovery sanctions are appropriate under Federal Rule 37(b)(2).

Discovery sanctions are also warranted under the Federal Rules of Civil Procedure and Seventh Circuit case law. The procedural history of this case illustrates that Complainant's noncompliance surpasses negligence and constitutes "willful and repeated" violations of Court orders. *See* Nelson, 878 F.3d at 239. Complainant violated this Court's discovery-related orders on two separate occasions: he failed to respond to a variety of Respondent's discovery requests within 30 days of receipt, *see* Gen. Lit. Order 3; Austin, 18 OCAHO no. 1513, at 4, and he failed to comply with the compelled discovery response deadline in the October 31, 2023 Order on Motion to Compel, *see* Austin, 18 OCAHO no. 1513, at 10; Order Staying Procs. 1. *See also* In re Golant, 239 F.3d at 937 (requiring a Rule 37 sanction's proportionality be judged from the perspective of a "reasonable jurist[] *apprised of all the circumstances*" (emphasis added) (quoting Salgado, 150 F.3d at 740)); *see also* United States v. Tech. Marine Maint. Tex. LLC , 13 OCAHO no. 1312, 8 (2018) (finding, "[b]ased on the totality of circumstances," that a discovery sanction was appropriate under 28 C F.R. § 68.23(c)).

Complainant's decision to selectively engage with this litigation also suggests that his failure to comply in this instance is not a matter of accident, but rather a willful choice. He registered for the Court's electronic filing program. Order on Elec. Filing. He previously responded to Respondent's counsel via email, Mot. Compel Disc. Ex. 2, responded to nine out of ten of Respondent's Requests for Admission in May 2023, id. at Ex. 3, and, in fact, served Respondent with his own set of Requests for Production of Documents and Requests for Admission also in May 2023. Id., Ex. 4. However, when the Order on Motion to Compel was served upon Complainant at the email address he provided and had used to communicate with Respondent's counsel, he did not respond.

With this background in mind, the Court first notes that Respondent's requested sanctions are appropriately tailored to the circumstances, as required under Seventh Circuit law. They correspond with sanctions available to the Court under 28 C.F.R. § 68.23(c), specifically relate to the Requests for Production that the Court ordered Complainant to produce, and appropriately reflect the seriousness and the impact of Complainant's failure to comply. By imposing an adverse inference sanction regarding the compelled discovery and ruling that Complainant may not introduce into evidence documents or other evidence responsive to the compelled discovery, this Court aims to "ensure that [Complainant] does not benefit from a failure to comply." Iron Workers Loc. 455, 7 OCAHO no. 964, at 674.

Next, the factors discussed in EEOC more than support these sanctions. Though the EEOC factors relate to dismissal, their near-total fulfillment in this case provides all the more reason for the sanctions Respondent requests. First, Complainant is solely responsible for his repeated noncompliance with Court orders. As mentioned above, Complainant has sometimes chosen to engage in this litigation, yet ignored Court orders multiple times. Such conduct suggests "intentional disobedience." Rodriguez, 9 OCAHO no. 1109, at 5. Second, Complainant's conduct prejudiced Respondent. The Court set November 17, 2023, as the discovery response deadline to give Respondent an appropriate window to supplement its Motion for Summary Decision by December 22, 2023. By December 20, 2023, however, Complainant still had not complied with the Court's Order, *see* Mot. Sanctions Failure Comply 2-3, undermining Respondent's ability to supplement its Motion for Summary Decision. Third, the efficacy of lesser sanctions is less relevant here, as Complainant has already had multiple chances to avoid the present result. *See* Mot. Compel Disc. Ex. 2; Austin, 18 OCAHO no. 1513 (2023); *see also* Ravines De Schur, 15 OCAHO no. 1388f, at 6-7 (finding that an adverse inference sanction *was* the "lesser sanction[]" for a complainant's "fail[ure] to respond to several orders" and discovery requests). Fourth, given Complainant's various unsupported assertions, *see, e.g.*, Resp. Mot. Stay Procs. 2 (implying that certain discovery requests could not be fulfilled because the information was located in the now-destroyed "U.S.A. Republic Capitol Building"), the Court hesitates to find "demonstrated merit" in this suit. Finally, Complainant's noncompliance with discovery orders has had an impact on this Court's time and schedules.

It is also worth noting that Complainant's Response to Respondent's Motion to Stay Proceedings, filed May 3, 2024, does not fulfill this Court's Order on Motion to Compel. Respondent's responses were filed more than five months after the deadline for submission. Austin, 18 OCAHO no. 1513 at 10; *see also* Ravines De Schur, 15 OCAHO no. 1388f, at 2, 5 (finding that a three-month period of silence following a court order could be an independent reason to "find Complainant's failures to comply to be willful acts of intentional disobedience made in bad faith"). Moreover, Complainant's response failed to make any "declaration stating that he could not find [the documents] after a diligent search," making his implicit claim of non-possession unpersuasive. *see* Nelson, 878 F.3d at 239 (upholding lower court sanctions due, in part, to a litigant's failure to make a "diligent search" for requested discovery);[5] Resp. Mot. Stay Procs. 1-2. Ultimately, Complainant's response is extraordinarily tardy, incomplete at best, and evasive at worst. 28 C.F.R. § 68.23(d) (stating that evasive or incomplete responses "may be treated as a failure to respond"); *see also* Ackermann v. Mindlance, Inc., 17 OCAHO no. 1462e, 5 (2024) (finding that complainant's "statement that she does not have any responsive documents, that everything was disclosed previously, is woefully inadequate").

C. Discovery sanctions are appropriate under Federal Rule 37(c)(1).

Alternatively, discovery sanctions are also warranted under Rule 37(c)(1). As contemplated by Rule 26(e)(1)(A), Complainant "learn[ed] that in some material respect," his "response [was] incomplete" through the Court's Order on Motion to Compel. Austin, 18 OCAHO no. 1513 (2023). Also, as evidenced by Respondent's Motion to Compel, Mot. Compel

[5] Though the lower court in Nelson explicitly required either production or documentation of a "diligent search," *see* 878 F.3d at 238, and the undersigned did not explicitly require the same here, the Court still takes Complainant's failure to even attempt to detail any efforts to locate the relevant documents as further evidence of his disinterest in meaningfully engaging in this matter.

Disc. 3, and subsequent Motion for Sanctions, Mot. Sanctions Failure Comply 2, the information sought "[had] not otherwise been made known to the other [party][.]" Thus, by failing to timely supplement his responses, Complaint violated Rule 26(e)(1)(A), and thereby, Rule 37(c)(1).

As a result, Rule 37(b)(2)(A) sanctions again become available, *see* Rule 37(c)(1)(C), but, even more directly, the non-introduction sanction is "automatic and mandatory." David, 324 F.3d at 857 (quoting Salgado, 150 F.3d at 742).

Complainant's only recourse to avoid this result is showing that the relevant noncompliance is "substantially justified" or "harmless," which requires consideration of the four David factors. However, given Complainant's discovery violations and unresponsiveness, *see supra* Section III.B, a showing on either front is precluded. Indeed, the first factor presumes the noncomplying party eventually offered some kind of evidence. *See* S. States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 596 (4th Cir. 2003) ("Rule 37(c)(1)['s] . . . general rule exclud[es] evidence that a party *seeks to offer* but has failed to properly disclose[.]" (emphasis added)). Here, Complainant has produced no discovery. *See* Austin, 18 OCAHO no. 1513, at 4; Austin, 18 OCAHO no. 1513a, at 1. However, even assuming Complainant's Response to Respondent's Motion to Stay Proceedings was an attempt to make an untimely response, there are concerning prejudice issues. Given the delay created from Complainant's noncompliance, Respondent's ability to engage in meaningful investigation in response to Complainant's claims may very well be hindered or futile. Thus, it is also entirely possible that such prejudice could not be cured, relating to Davis factors two and three. Finally, as discussed above, Complainant's conduct has multiple indicia of bad faith.

Thus, in addition to the propriety of discovery sanctions under 28 C.F.R. § 68.23(c) and Rule 37(b)(2) for Complainant's disregard of this Court's discovery-related orders, any present attempt via Complainant's May 3, 2024, filing is untimely and, even if considered under Rule 37(c), would almost certainly fail to clear the "substantially justified" or "harmless" bars. As a result, Complainant's noncompliance runs afoul of Rule 37(b) and, alternatively, Rule 37(c).[6]

IV. ORDERS

Respondent's Motion for Sanctions for Failure to Comply with Court's October 31, 2023 Order is GRANTED, and Complainant will be sanctioned as followed:

> It will be inferred that any documents or other evidence in Complainant's possession or control that are responsive to Respondent's Requests for Production of Documents Nos. 1, 2, 6, 7, and 9 as originally drafted and Nos. 4a, 5a, and 8 as amended by the Court's Order on Respondent's Motion to Compel would have been adverse to Complainant if produced.

[6] The Court notes Complainant's Sworn Affidavit in Support of Complainants Response to Respondent's Motion for Production Request, filed May 20, 2024. However, this document is similarly untimely as a discovery response. Austin v. Specialized Staffing Solutions, Inc., 18 OCAHO no. 1513, 10 (2023). Additionally, the transcribed conversation does not appear to relate to alleged unfair immigration-related employment practices or discovery requests involving Respondent. Resp. Mot. Stay Procs. 3 (noting a conversation recording with "Louis" from "Elite Staffing Global, Inc[.]"); *see generally* Sworn Aff. (referring to "Lewis").

> "[W]hen Respondent utilizes an adverse inference fact, Respondent must annotate the discovery request number as the source, and if appropriate, explain the way in which the evidence would have been adverse to Complainant." Ravines De Schur, 15 OCAHO no. 1388f, at 7.
>
> Additionally, Complainant may not introduce into evidence or otherwise rely upon documents or other evidence responsive to Respondent's Requests for Production of Documents Nos. 1, 2, 6, 7, and 9 as originally drafted and Nos. 4a, 5a, and 8 as amended by the Court's Order on Respondent's Motion to Compel, in support of or in opposition to any claim or defense, including any response to Respondent's dispositive motion or supplementation of Respondent's dispositive motion.

Given the sanctions imposed, the Court now gives Respondent the opportunity to amend its Motion for Summary Decision, originally filed on September 1, 2023. Respondent's amended Motion for Summary Decision, should it elect to file one, is due 30 days from the date of this Order.

Complainant will have 30 days from the date Respondent files its Amended Motion for Summary Decision to file a response. The Court reminds Complainant of the importance of abiding by deadlines set by the Court.

If either party wishes to request an extension of its deadline, they should submit a motion for an extension in advance of their deadline. *See* Gen. Lit. Order 3.

SO ORDERED.

Dated and entered on July 31, 2024.

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John A. Henderson
Administrative Law Judge