

MIKHAIL NAZARENKO,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) OCAHO Case No. 2024B00056
)
SUPPORTYOURAPP, INC.,)
Respondent.)
)

ORDER DISCLOSING EX PARTE COMMUNICATIONS, EXTENDING CASE DEADLINES AND CONVERTING CASE TO ELECTRONIC FILING

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Complainant, Mikhail Nazarenko, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 5, 2024. Complainant alleges that Respondent, SupportYourApp, Inc., discriminated against him based on his citizenship status and nationality in violation of 8 U.S.C. § 1324b(a)(1) when he was not hired for a customer support consultant position, and asserts retaliation in violation of 8 U.S.C. § 1324b(a)(5).

Respondent filed an Answer and Motion to Dismiss on April 30, 2024. On May 28, 2024, the Court issued a General Litigation Order by mail and email. On June 12, 2024, Complainant filed a Response and Motions by e-mail, with the mail copy arriving on June 18, 2024.

The Court ruled on Complainant's various motions in an August 1, 2024, Order on Motions. In the order, the Court granted Complainant's request for an extension of time to reply to the answer until August 28, 2024,¹ and granted Complainant's request for an extension of time to respond to

¹ In its Order on Motions, this Court relied on the default 10-day deadline for responses to motions set forth in 28 C.F.R. § 68.11(b) in granting Complainant an extension of time to reply to the answer. Order on Motions 2 n. 2. The Court notes for clarity that 28 C.F.R. § 68.11(b) discusses responses to “written motion[s],” and may not apply to replies to answers. 28 C.F.R. § 68.9(d).

Respondent's Motion to Dismiss until August 28, 2024. Order on Motions 2-5. The Court also denied Complainant's motion to stay, explained that it would rule on Complainant's motion to amend when it resolves the pending motion to dismiss, denied Complainant's motion to open discovery, and explained to Complainant that it cannot provide Complainant with representation. *Id.* at 5-6. The Court inadvertently issued the Order only by mail, although the certificate of service indicated that it would be issued by both mail and email. *Id.* at 7.

On August 10, 2024, Complainant sent by email a handwritten filing, addressing the Respondent's arguments in its Motion to Dismiss, along with several exhibits. The Court considers this Complainant's Response to the Motion to Dismiss.

On August 28, 2024, Complainant sent three emails to the Court. The first two are duplicates sent from different email inboxes stating that Complainant was not served the Order on Motions by email on August 1, 2024, and the email listed on the certificate of service was not the email Complainant had listed on his e-filing form. Complainant's email also suggested that he had not received the Court's August 1, 2024, Order on Motions until August 28, 2024, and Complainant expressed concern about whether the Court had received his August 10, 2024 filing. Complainant did not attach a certificate of service, nor is Respondent's email listed on any sent line in the email. Complainant discusses Respondent's Motion to Dismiss and attaches a screenshot of this Court's Order and certificate of service, as well as Complainant's e-filing form. The third email appears to be a forward of Complainant's response to the Motion to Dismiss.

II. EX PARTE FILING

Complainant's August 28, 2024, email raises concerns about ex parte communications. *See* 28 C.F.R. § 68.36.² An ex parte communication is generally defined as "[a] communication between counsel or a party and the court when opposing counsel or party is not present." *Zajradhara v. HDH Co.*, 16 OCAHO no. 1417a, 2 (2022) (citations omitted) (emphasis in original). Communications with the Court are not considered ex parte if made "for the sole purpose of scheduling hearings, or requesting extensions of time, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto." 28 C.F.R. § 68.36(a).

If ex parte communication occurs, the Administrative Procedure Act requires disclosure of the communication. *Tingling v. City of Richmond*, 13 OCAHO no. 1324b, 2 (2021) (citing 5 U.S.C. § 557(d)(1)(C)). The ALJ should provide parties the opportunity to review and comment upon the communication. *Id.* at 3.

which allows for replies to answer, does not specify a deadline. *See Zajradhara v. Mariana Pharmacy*, 18 OCAHO no. 1507b, 2 (2024). In any case, under 28 C.F.R. § 68.28(a), the Administrative Law Judge is given "all appropriate powers necessary to conduct fair and impartial hearings," and the Court set a deadline for Complainant's response in its order, and now will afford Complainant more time to reply to the answer.

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

Complainant's August 28, 2024, email runs afoul of OCAHO's rule on ex parte communication, 28 C.F.R. § 68.36. While the majority of Complainant's email concerns the Court's service of its order, Complainant also included a paragraph disputing the substance of Respondent's Motion to Dismiss. Further, even communications about extensions of time must be served on the opposing party. *See* § 68.36(a).

The Court hereby discloses Complainant's email by affixing a copy of Complainant's two emails at Appendix A. As the third email is a copy of the Complainant's previously-served Motion to Dismiss that included a certificate of service and was sent without comment, the Court does not include this email. The Court will allow Respondent thirty (30) days from the date of this Order to provide any response to the August 28, 2024, filings it deems appropriate.

III. CASE DEADLINES

The Court now clarifies for the sake of the parties that the Court received and accepted into the record Complainant's August 10, 2024 filing and considers it Complainant's Response to the Motion to Dismiss.

Given that Complainant may not have received the Court's Order on Motion until August 28, 2024, the same day as the deadline Complainant was given to file a response to the Answer and Respondent's Motion to Dismiss, the Court now EXTENDS Complainant's deadline to file a reply to the Answer. *See* fn.1; 8 C.F.R. § 68.28(a). Complainant has 30 days from the date of this order to file a reply to the Answer.

IV. CONVERSION TO ELECTRONIC FILING

As previously noted, Complainant is a resident of Greece and service by mail will likely involve mail delays. General Litigation Order 4. The Court invited the parties to participate in electronic filing on May 7, 2024. Complainant filed his e-filing registration form on June 12, 2024. To date, Respondent has not filed its e-filing registration form. However, Respondent previously identified legal@supportyourapp.com as the correct email address for Respondent. Notice of Appearance 1.

This Court typically only enrolls cases in electronic filing when both parties have filed e-filing registration forms. *See* OCAHO Practice Manual, Chapter 3.7(c) (Aug. 22, 2022). However, this case involves a Complainant who resides in Greece, while OCAHO's offices are in Virginia. Given the significant delays inherent with mail filing for the parties and for the Court and to avoid the potential for future confusion around deadlines, the Court now puts the parties on notice that it will convert the case to electronic filing unless one or both parties objects in a written filing to the Court.

The Court will utilize ##### for Complainant, the address on his e-filing registration form. The Court will utilize ##### for Respondent, the address identified on Respondent's Notice of Appearance. If either party would prefer a different email address be utilized, they may so indicate in a filing to the Court.

The parties have 30 days from the date of this order to file any objections to the conversion. The Court issues this order both by mail and electronically, to ensure that the parties are in receipt of the Court's order and may object as they deem appropriate.

SO ORDERED.

Dated and entered on September 11, 2024.

Honorable Jean C. King
Chief Administrative Law Judge