

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

October 30, 2020

| | | |
|-------------------------------|---|-----------------------------|
| ROBERT HEATH, |) | |
| Complainant, |) | |
| |) | |
| v. |) | 8 U.S.C. § 1324b Proceeding |
| |) | OCAHO Case No. 2020B00061 |
| |) | |
| IKON SYSTEMS AND AN ANONYMOUS |) | |
| EMPLOYER, |) | |
| Respondent. |) | |
| _____ |) | |

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT’S MOTION TO
COMPEL DISCOVERY

I. BACKGROUND

This case 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(a)(1)(B). On March 18, 2020, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Ikon Systems and an Anonymous Employer. Complainant alleges that Respondent discriminated against him based on his nationality and citizenship status when it refused to hire him in violation of § 1324b. Respondent filed an answer on April 27, 2020. On July 22, 2020, Respondent filed its First Amended Answer. The next day, on July 23, 2020, the undersigned held a prehearing conference setting the deadlines in this matter.

On September 29, 2020, Complainant filed a Motion to Compel Respondent to Answer Interrogatories and Requests for Documents (“Motion to Compel”). Respondent filed a response on October 5, 2020 (“Opposition”). Complainant filed a Response to Respondent’s Objection to Complainant’s Motion to Compel (“Reply”) on October 15, 2020. On October 20, 2020, Respondent filed a Reply to Complainant’s Response to Respondent’s Response in Opposition of Complainant’s Motion to Compel (“Sur-Reply.”)

II. STANDARDS

An OCAHO Administrative Law Judge has the authority to “compel the production of documents” and to compel responses to discovery requests, pursuant to 28 C.F.R. § 68.23 and § 68.28. *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 2 (2016). The OCAHO rules permit parties to file motions to compel responses to discovery if the responding party fails to adequately respond or objects to the request. 28 C.F.R. § 68.23(a). However, pursuant to OCAHO Rule § 68.23(b), a motion to compel must set forth and include:

- (1) The nature of the questions or request;
- (2) The response or objections of the party upon whom the request was served;
- (3) Arguments in support of the motion; and
- (4) A certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge.

III. DISCUSSION

Complainant filed a motion to compel requesting that the Court require Respondent to answer Complainant’s interrogatories.¹ Complainant’s discovery propounded upon Respondent, Ikon Systems, seeks information not only from Respondent, but also from Dice.com and John Doe Employers.

Respondent reasserted its objections that Complainant’s interrogatories were vague, overbroad, and unduly burdensome. Opp’n 2–4. Additionally, Respondent cited to Federal Rule of Civil Procedure 33 to object to the number of interrogatories Complainant propounded. Opp’n 3–4. Moreover, Respondent denies being an agent of either Dice.com or John Doe Employers, and, thus cannot respond to discovery directed to them. Opp’n 4. Finally, Respondent noted Complainant’s failure to even attempt to meet and confer in order to resolve the discovery dispute. Opp’n 4.

A. Procedural Issues

The procedural requirements of Rule § 68.23(b) “provide the basis upon which to rule, and they encourage parties to work together to solve discovery disputes.” *Mbitaze v. Greenbelt Police Dep’t*, 14 OCAHO no. 1360a, 2 (2020). Moreover, for a motion to compel in OCAHO proceedings to be prima facie valid, it must include a certification indicating movant’s good faith attempt to confer. *United States v. Allen Holdings, Inc.*, 9 OCAHO no. 1059, 5 (2000). Here, Complainant included neither Respondent’s responses and/or objections to the discovery, nor a

¹ Although entitled, “Motion to Compel Respondent to Answer Interrogatories and Requests for Documents,” the Motion to Compel only addresses interrogatories and does not contain arguments regarding the production of documents.

certification noting that prior to filing his Motion to Compel, he attempted in good faith to confer with Respondent in an effort to obtain the requested information without judicial intervention. These omissions are grounds for denial of Complainant's Motion to Compel. *See Mbitaze*, 14 OCAHO no. 1360a at 2.

Without seeking leave to file a reply, Complainant filed a Response to Respondent's Objection to Complainant's Motion to Compel. 28 C.F.R. § 68.11(b) provides that "no reply to a response, counter-response to a reply, or any further responsive document shall be filed" unless the Administrative Law Judge provides otherwise. Respondent noted this provision in its Sur-Reply, Sur-Reply 1, but still filed its Sur-Reply. Complainant's Reply and Respondent's Sur-Reply were filed in derogation of OCAHO rules because they did not seek leave to file such a reply; therefore, Complainant's Reply and Respondent's Sur-Reply are not considered. *Ogunrinu v. L. Res.*, 13 OCAHO no. 1332, 1–2 (2019) (citing *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 1–2 (2012)).²

B. The Merits of Complainant's Motion to Compel

Notwithstanding Complainant's failure to meet and confer, the Court will still address the merits of his motion. Respondent provided the full text of its objections, which aids this Court in resolving the discovery dispute. Complainant's discovery falls into two categories: those directed at Ikon Systems and those directed at third parties, specifically Dice.com and Third Party Employers.

- i. Complainant's Discovery Directed at Respondent
 - a. Interrogatory No. 5 for Ikon Systems

Interrogatory No. 5 for Ikon Systems requests Respondent "[i]dentify all employees of Dice, Inc. that played a role in serving the account of Ikon Systems." Mot. to Compel 1. Respondent objects on the grounds that the interrogatory is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Opp'n 2–3. The

² Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders>.

interrogatory, as currently phrased, is overbroad since a response could reveal Dice Inc.'s employees who have no relation to the allegedly discriminatory practices of Respondent.³ Moreover, this interrogatory is more appropriately propounded upon Dice Inc., who is in a better position to reveal the identities of its own employees who worked on Respondent's account. As explained further below, such an interrogatory is inappropriately propounded upon Respondent. The Court hereby DENIES Complainant's Motion to Compel with respect to Interrogatory No. 5 for Ikon Systems.

b. Interrogatory No. 6 for Ikon Systems

Interrogatory No. 6 for Ikon Systems requests Respondent "[i]dentify all clients of Ikon Systems, aka John Doe Employers, on whose behalf Ikon Systems has worked to procure employees or workers." Mot. to Compel 1.

Respondent cited to Federal Rule of Civil Procedure 33⁴ to object to the number of interrogatories that Complainant propounded. Opp'n 3–4. Although "[t]he Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by [OCAHO rules of practice and procedure,]" 28 C.F.R. § 68.1, "the OCAHO rules of practice do not limit a party to serving 25 interrogatories." *Kalil v. Utica City Sch. Dist.*, 9 OCAHO no. 1101, 8 (2013). *See also United States v. Emp. Sols. Staffing Grp. II, LLC*, 11 OCAHO no. 1234, 5 (2014). Therefore, Respondent's objection as to the number of interrogatories propounded is overruled.

Respondent also objected on the same grounds that the interrogatory is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Opp'n 3–4. The scope of discovery extends to "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 28 C.F.R. § 68.18(b). Insofar as Complainant is alleging that Respondent engaged in discriminatory practices in refusing to refer him to potential clients, he is entitled to a list of entities to which Respondent attempted to place an individual with the qualifications and skills similar to the advertisement at issue in this case. However, the request should be limited because as Respondent noted, such a list would be voluminous, and could span decades such that the burden of the interrogatory would inappropriately outweigh the benefit. *See United States v. Durable, Inc.*, 11 OCAHO no. 1221, 10 (2014). Therefore, Interrogatory No. 6 for Ikon Systems is limited to one year preceding July 20, 2019, the time Complainant applied for a position with Respondent, as well as to individuals with the IT skills

³ Respondent explained in its first amended answer that Dice.com is a career website in which Respondent had placed job postings. First Amended Answer 1.

⁴ Federal Rule of Civil Procedure 33(a)(1) states that "[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts."

and qualifications listed in the Complaint at section 7. The Court hereby GRANTS IN PART Complainant's Motion to Compel with respect to Interrogatory No. 6 for Ikon Systems.

ii. Complainant's Discovery Directed at Dice.com and John Doe Employers

Complainant propounded interrogatories against Respondent that were labeled "Interrogatories for Dice.com" and "Interrogatories for John Doe Employers." Mot. to Compel 2-4. Respondent denies being an agent of Dice.com and John Doe Employers and thus is unable to respond to those interrogatories. Opp'n 4. Neither Dice.com nor John Doe Employers are parties to this action. "[C]aution must be exercised in imposing the burdens of discovery on nonparties." *Durable*, 11 OCAHO no. 1221 at 6 (citing *United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 5 n.6 (2012)). Therefore, the discovery directed at Dice.com and John Doe Employers were inappropriately propounded upon Respondent. The Court hereby DENIES Complainant's Motion to Compel with respect to interrogatories directed at Dice.com and John Doe Employers. Insofar as Complainant is seeking responses to the interrogatories for Dice.com and John Doe Employers, Complainant should file a request for a subpoena per 28 C.F.R. § 68.25, because this is the appropriate avenue to obtain discovery from a nonparty, as opposed to propounding discovery directed to a nonparty upon a party. The subpoena form can be found on the OCAHO website.

IV. CONCLUSION

As such, Complainant's Motion to Compel is GRANTED IN PART, and Respondent is compelled to supplement its response to Complainant's Interrogatory No. 6 for Ikon Systems, but the response is limited to one year preceding July 20, 2019, the time Complainant applied for a position with Respondent, as well as to individuals with the IT skills and qualifications listed in the Complaint at section 7. Respondent must submit its responses subject to this Order by November 12, 2020. Complainant's Motion to Compel is DENIED IN PART as to Interrogatory No. 5 for Ikon Systems and all the interrogatories for Dice.com and John Doe Employers.

SO ORDERED.

Dated and entered on October 30, 2020.

Jean C. King
Chief Administrative Law Judge