

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

March 12, 2021

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2021B00007
)	
FACEBOOK, INC.,)	
Respondent.)	
_____)	

ORDER DENYING RESPONDENT MOTION TO STAY DISCOVERY

I. INTRODUCTION AND PROCEDURAL HISTORY

On December 3, 2020, Complainant, the United States Department of Justice, filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Facebook, Inc., violated 8 U.S.C. § 1324b by discriminating against U.S. workers for permanent labor certification (PERM) positions between January 1, 2018 and September 18, 2019.

On December 28, 2020, Respondent requested a 30-day extension to file a motion to dismiss and an answer. The Court granted this request on January 4, 2021. The Court then provided Complainant until March 30, 2021 to file its response to Respondent’s motion to dismiss.

On February 16, 2021, Respondent requested an additional 45 days to file an answer. The request was opposed by Complainant. The Court gave Respondent an additional 30 days to file its answer. Respondent’s answer is due on or before March 22, 2021.

On February 18, 2021, Respondent filed a Notice of Respondent Facebook, Inc.’s Motion to Dismiss the Complaint (Motion to Dismiss) with a corresponding Memorandum of Law in Support of the aforementioned motion.¹ Contemporaneous with that filing, Respondent filed the instant Notice of Respondent Facebook, Inc.’s Motion to Stay Discovery Pending a Decision on Its Motion to Dismiss the Complaint with a Memorandum of Law in Support of Its Motion to Stay Discovery Pending a Decision on Its Motion to Dismiss the Complaint (Motion to Stay

¹ The Court will issue a ruling on the Motion to Dismiss following receipt of Complainant’s response (or expiration of the time allotted to Complainant to respond).

Discovery).² On March 1, 2021, Complainant filed an Opposition to the Motion to Stay Discovery (Opposition).

II. PARTIES' POSITIONS

In its Motion to Stay Discovery, Respondent states that “discovery may only commence after it files an Answer[.]” and “the parties have yet to hold a conference or exchange initial disclosures, and there are no pending discovery requests.” Mot. Stay Disc. 1, 13. In arguing in favor of a stay, Respondent cites the breadth of the claims, its perception of the future “discovery burden” for its client, the lack of a legal basis for the claims, and the absence of prejudice to the Complainant.³ Mot. Stay Disc. 1. Respondent also argues a stay would “promote judicial efficiency,” taking into consideration the “time and resources” expended by the Court. Mot. Stay Disc. 9. Respondent “expects [Complainant’s future discovery requests] will be overbroad, burdensome, and invasive of individual privacy rights[.]” *Id.* Respondent further speculates that these discovery requests, which it has not yet received, will generate “potentially extensive motion practice.” *Id.* at 9–10.

In its Opposition, Complainant argues that Respondent has not established good cause for its request to stay discovery. Opp’n 1. Complainant relies upon its assessment of the strength and nature of the claims contained in the Complaint. Opp’n 8–9. Moreover, Complaint asserts that the requested discovery stay is not in the interests of justice, characterizing the two previously provided extensions to Respondent as “an effective stay on discovery in this matter until March 22, 2021.” *Id.*

III. LEGAL STANDARDS

Pursuant to 28 C.F.R. § 68.18(a), discovery “may be limited by the Administrative Law Judge upon [her] own initiative or pursuant to a motion[.]” When a motion is filed, the Administrative Law Judge (ALJ) has discretion to issue a protective order “to protect a party or person from annoyance, harassment, embarrassment, oppression, or undue burden or expense” if the moving party demonstrates “good cause.” 28 C.F.R. § 68.18(c). “[T]he party seeking the protective order has the burden of showing that good cause actually exists.” *United States v. Emp. Sols.*

² The regulations which govern cases in this forum, “Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens, Unfair Immigration-Related Practices, and Document Fraud” can be found at 28 C.F.R. part 68.

³ Respondent provides a case, *Franco v. Frank’s Meat Co.*, 3 OCAHO no. 513, 1094 (1993), in which this Court granted a stay of discovery pending a motion to dismiss. Mot. Stay Disc. 4. In that case, the ALJ mentioned a prior order staying discovery, but that order does not contain the facts or the circumstances surrounding the ALJ’s decision to exercise discretion and issue a protective order staying discovery. *Id.* at 1095. This case is of limited utility.

Staffing Grp. II, LLC, 11 OCAHO no. 1234, 4 (2014) (citation omitted).⁴ The moving party demonstrates good cause when it “present[s] particular and specific facts as to why it needs a protective order, and ‘[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.” *Tingling v. City of Richmond*, 13 OCAHO no. 1324, 2 (2019) (quoting *Webb v. Green Tree Servicing, LLC*, 283 F.R.D. 276, 278 (D. Md. 2012)). A demonstration of good cause is fact-specific by its nature.

The Court has previously held that § 68.18(c) “is clearly similar to Rule 26(c) of the Federal Rules of Civil Procedure” and thus “OCAHO jurisprudence addressing discovery proceedings has historically looked to federal cases decided pursuant to Rule 26(c) for guidance in ascertaining whether a sufficient showing has been made to justify a protective order under 28 C.F.R. § 68.18(c).” *In Re Investigation of Conoco, Inc.*, 8 OCAHO no. 1049, 738, 743 (2000) (citations omitted).

According to the Ninth Circuit, good cause is shown when the party seeking protection shows that “specific prejudice or harm will result if no protective order is granted.” *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002) (citations omitted). Additionally, “[t]he Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery when a potentially dispositive motion is depending.” *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011) (citation omitted).

IV. DISCUSSION AND ANALYSIS

Respondent has not met its burden as the moving party because it has not demonstrated the requisite good cause to justify a protective order staying discovery.

Respondent cites judicial economy as a rationale for issuance of a protective order to stay discovery. While judicial economy can be a reason upon which the Court can rely generally, the stage of this litigation does not support such reliance. Here, the only pending motion before the Court is Respondent’s Motion to Dismiss, which the Court will decide regardless of the date discovery commences. There are no pending motions before the Court related to discovery which would utilize the Court’s time and resources (other than, of course, the instant motion which gives rise to this Order).

Respondent also cites to its speculative assessment of the nature of discovery not yet propounded and describes Complainant’s future discovery as objectionable per se as Respondent “expects

⁴ 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 <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

[Complainant’s future discovery requests] will be overbroad, burdensome, and invasive of individual privacy rights.” Mot. Stay Disc. 9–10. As noted above, “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.” *Tingling*, 13 OCAHO no. 1324 at 2.

In addressing the assertion that Complainant will be handling sensitive information could cause concern, Respondent has proffered nothing to demonstrate Complainant’s inability to safeguard such information. Of note, two years prior to the filing of the Complaint, Respondent provided to Complainant information associated with Complainant’s investigation into the matter at issue. Mot. Stay Disc. 11. Presumably Complainant successfully safeguarded this information for the past two years; if it had not, surely Respondent would have cited to that failure in support of its instant motion for a protective order staying discovery. Furthermore, Respondent fails to explain how the timing of commencement of discovery affects Complainant’s handling of sensitive information.

Ultimately, Respondent is not precluded from filing another motion for a protective order (i.e. requesting a stay) in this matter, but it must have evidence that meets the standard for good cause as outlined above. Respondent’s Motion to Stay Discovery is DENIED.

SO ORDERED.

Dated and entered on March 12, 2021.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge