

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

August 30, 2021

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

ORDER SUMMARIZING PREHEARING CONFERENCE AND
GRANTING EXTENSION TO SUPPLEMENT DISCOVERY RESPONSES

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Complainant, the Immigrant and Employee Rights Section (IER) of the Civil Rights Division of the United States Department of Justice, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Facebook, Inc. (Facebook), violated 8 U.S.C. § 1324b by discriminating against “U.S. workers” in its hiring and recruiting practices related to positions it earmarked for the permanent labor certification (PERM) process between January 1, 2018, and September 18, 2019.

On August 11, and 12, 2021, the Court held prehearing conferences, which are the subject of this order issued pursuant to 28 C.F.R. § 68.13(c). Julia Heming Segal, Jasmin Lott, Erik Lang, and Tamara Hoflejzer¹ appeared on behalf of Complainant; Michael Martinez, Eliza Kaiser, Nathan Schwartzberg, and Matthew Dunn appeared on behalf of Respondent. During this prehearing conference, the Court also discussed the outstanding Respondent’s Motion Requesting Extension of Time to Supplement Responses to Complainant’s First Set of Interrogatories and First Set of Requests for Admission (Motion for Extension to Supplement Discovery Responses) and the United States’ Opposition to Respondent’s Motion for Extension of Time to Respond to Discovery (Opposition) and rendered an oral decision now memorialized in this order.

¹ Trial Attorney Tamara Hoflejzer filed a Notice of Appearance on August 12, 2021.

I. PROCEDURAL HISTORY AND PARTIES' POSITIONS ON EXTENSION

On March 11, 2021, the Court denied Respondent's Motion to Stay Discovery Pending a Decision on Its Motion to Dismiss the Complaint, which had the practical effect of initiating the discovery phase of this case. Indeed, on April 9, 2021, Complainant served its First Set of Requests for Production of Documents, Interrogatories, and Requests for Admission. Opp'n 2. Complainant correctly notes that, consistent with regulatory requirements, Respondent's responses were due on or before May 10, 2021. Opp'n 2; *see* 28 C.F.R. §§ 68.19(b), 68.20(d), 68.21(b).

On May 4, 2021, Respondent informed Complainant it required an additional three weeks to respond to the requests for production (i.e. completion estimated at May 25, 2021), and additional time to respond to interrogatories and requests for admissions. Opp'n 2.

On May 7, 2021, the Court received an unopposed motion from Respondent requesting an extension of 60 days to respond to the interrogatories and requests for admissions.² That same day, the Court granted the unopposed motion in an Order Granting Respondent's Motion Requesting Extension of Time to Respond to Discovery Requests. The order specified that "Respondent shall begin production of responsive information to Complainant's first set of interrogatories and first set of requests for admission on or before May 24, 2021. Respondent shall supplement those responses on or before July 24, 2021." Order Granting Resp'ts Mot. Req. Ext. Time Respond Disc. Req. 1.

On June 21, 2021, the Court issued an order on Discovery and Scheduling Conference in which it ordered the parties to file a joint discovery plan by August 2, 2021.

On July 23, 2021, the day prior to the deadline to supplement discovery responses, Respondent filed a motion for an extension of the July 24, 2021 because "(i) Respondent's supplemental responses to the Discovery Requests require continued document collection and subsequent production; (ii) the parties' anticipated proposed fact-discovery deadline is April 11, 2022; and (iii) the parties' Proposed Stipulated Protective Order needs to be cured before Respondent can produce confidential materials necessary for those supplemental responses[.]" Mot. Ext. to Suppl. Disc. Resps. 2. Respondent did not specify in its motion the date it wished the deadline to be extended to and only asked "that the deadline . . . be extended to a later date to be set at the August 11, 2021 Scheduling Conference." *Id.* (citation omitted).

That same day, Complainant filed its Opposition arguing that Respondent "has failed to establish good cause supporting its requested extension and should not be allowed to continue to delay these proceedings." Opp'n 1. Complainant asserts that Respondent has attempted to delay the proceedings since the filing of the complaint: Respondent sought two extensions to file its answer, unsuccessfully requested a stay of discovery pending adjudication of the motion to dismiss, and

² While sections 68.19(b) and 68.21(b) permit the Court to grant extensions for deadlines of responses to interrogatories and admissions pursuant to, section 68.20 does not provide such discretion for responses to requests for production of documents. Nevertheless, OCAHO ALJs have previously granted extensions to respond to requests for production of documents. *See Kalil v. Utica City Sch. Dist.*, 9 OCAHO no. 1101, 4 (2003).

already requested an extension to respond to the discovery that is subject to the instant motion. Opp'n 4–5. Moreover, Complainant notes that the “discovery requests have been pending without meaningful response since April 6, 2021 – over 100 days.” *Id.* at 5.

Regarding Respondent’s allegation that the fact-discovery deadline necessitates an extension of time to supplement the discovery responses, Complainant contends that the mutually agreed date already accounts for the delays to date, “the complexity of the pending litigation[,]” and the discovery that is anticipated to be “extensive[.]” *Id.* at 5. Further, Complainant argues that Respondent should not wait until the issuance of the protective order to produce the requested documents because Complainant is bound to confidentiality by its stipulation with Respondent, the Privacy Act, 5 U.S.C. § 552 et. seq., and the Department of Justice Civil Rights Division’s System of Records Notice, 68 F.R. 47610. *Id.* at 6. Finally, Complainant asserts that it was Respondent’s burden to timely raise its confidentiality concerns at numerous junctures, especially prior to the lapse of the Court’s extension to supplement the responses. *Id.*

On August 2, 2021, the parties filed their Joint Discovery Plan pursuant to the Court’s Order on Discovery and Scheduling Conference.

On August 9, 2021, the Court issued an Order Granting Unopposed Motion for Entry of Joint Stipulated Protective Order and Stipulated Protective Order.³

On August 13, 2021, the Court received Motion of Jasmin Lott to Withdraw as Counsel as she will no longer work for IER, but she noted that three attorneys continue to represent Complainant in this proceeding.

II. PREHEARING CONFERENCE SUMMARY

A. Applicable Discovery Regulations

At the outset of the August 11, 2021 prehearing conference, the Court highlighted several regulatory references for the benefit of discussion. Pursuant to 28 C.F.R. § 68.18(a), the Court may limit the frequency or extent of discovery methods upon its own initiative; however in this case, the Court declined to do so at this time.

Section 68.18(d)(3) permits the Court may impose a duty to supplement responses beyond what is required at § 68.18(d)(1); again, in this case, the Court declined to do so at this time.

Next, the Court directed the parties’ attention to 28 C.F.R. §§ 68.19(b), 68.21(b), which establish a default response time for admissions and interrogatories of thirty days from the date of service. According to the regulations, the Court has authority to create a longer or shorter response time.

³ On June 29, 2021, the parties filed a Proposed Stipulated Protective Order. The Court issued an Order Rejecting Stipulated Protective Order on July 19, 2021, noting the parties failed to file a motion demonstrating the requisite good cause. On August 1, 2021, Respondent filed a Motion for Entry of a Joint Stipulated Protective Order to which Complainant filed a Notice of Non-Opposition to on August 2, 2021.

Therefore, the Court highlighted that the default response time is thirty days unless the parties desire an alternate response time for the requests for admission and interrogatories.

B. Joint Discovery Plan

The Court acknowledged receipt of the timely filed Joint Discovery Plan and, in response to a query contained in that filing, the Court explained it would not require any filings related to the production of Electronically Stored Information (ESI). The Court informed the parties it could submit a revised joint discovery plan based on the ruling on Respondent's Motion for Extension to Supplement Discovery Responses. A revised joint discovery plan must be submitted on or before October 1, 2021.

C. Outstanding Motion for Extension to Supplement Discovery Responses and Opposition

Next, the Court addressed Respondent's outstanding Motion for Extension to Supplement Discovery Responses and Complainant's Opposition. The Court invited the parties to be heard orally regarding the motion prior to issuance of a decision.

Respondent stated it would be unable to fully comply with the discovery request (interrogatories and requests for admission) until January 11, 2022 due to the nature of the request and the interrelated nature of production of documents and responses to the interrogatories.

Complainant cited multiple previous delays in discovery, and argued that, based on the amount of time elapsed between Respondent's receipt of the discovery requests to present, a reasonable extension of the deadline would be an extension of several weeks, to August 25, 2021.

Following discussion on this issue, the Court provided the parties an opportunity to meet and confer about the extension, with the resumption of the prehearing conference the following day.

On August 12, 2021, the parties represented that they were able to meet and confer and clarify the scope of discovery sought. Ultimately, the parties were at impasse, and the Court provided an oral preview of the decision, now memorialized in this prehearing conference summary.

III. ORDER GRANTING EXTENSION TO SUPPLEMENT DISCOVERY RESPONSES

Based on the foregoing, the Court GRANTS Respondent an extension until October 8, 2021 to supplement its responses to Complainant's First Set of Interrogatories and First Set of Requests for Admission.

Respondent cited "unexpected" delay in obtaining a protective order as a reason for requiring an extension;⁴ however, the Court notes that a protective order is not required to begin internal

⁴ As noted in the prehearing conference, it is the parties who are in the best position to recommend realistic deadlines as they, presumably at the discovery phase, know the contours of the litigation best. Looking at the issue from Respondent's perspective as outlined in filings, the protective order was a "requirement" upon which production of information is predicated. The Court

collection of discoverable information; rather a protective order squarely relates to the production of discoverable information.

In considering the effect of the protective order on discovery deadlines, the Court notes there is nothing in the record indicating Respondent was precluded from requesting the protective order at an earlier date. In considering the timing of the request, it is key to note that discovery began in earnest in April 2021.

Timing issues aside, Respondent did receive the executed Protective Order on August 9, 2021, and thus should be poised to produce whatever it previously collected, and should be positioned to produce documents and information with the enhanced efficiencies cited in Respondent's Motion for Entry of a Joint Stipulated Protective Order.

Balancing equities, efficiencies and the considerations referenced above, the Court now extends Respondent's deadline to supplement its responses to Complainant's First Set of Interrogatories and First Set of Requests for Admission sixty (60) days from the date the protective order was executed; therefore, Respondent's supplemental responses to the aforementioned discovery are due by October 8, 2021.

Pursuant to Complainant's request, the Court scheduled a prehearing conference on October 18, 2021, at 9:00 a.m. PST (12:00 p.m. EST).

After the Court's oral decision on Respondent's deadline to supplement responses to Complainant's First Set of Interrogatories and First set of Requests for Admission, Complainant orally moved for the Court to set a deadline for Respondent's supplemental responses to the outstanding requests for production of documents. 28 C.F.R. § 68.11(a) requires "any application for an order or any other request shall be made by motion which shall be made in writing unless the Administrative Law Judge in the course of an oral hearing consents to accept such motion orally."

On the issue of receipt of an oral motion, the Court exercised its discretion and chose not to accept the motion orally. Additionally, the Court noted that the prior motions and orders only pertained to requests for admission and interrogatories, not requests for production of documents.⁵ Thus, any requests for judicial intervention regarding responses to requests for production of documents must be made by separate, written motion to ensure a complete and thoroughly developed record.⁶ Additionally, the Court commented that absent an extension, 28

recognizes Complainant likely takes a different view of whether such an order is a requirement in advance of production.

⁵ For the first time, Respondent commented at the prehearing conference that the requests for production of documents were interrelated to the requests for admission and/or interrogatories; thus, delays and extensions for all discovery were interrelated.

⁶ Further, insofar as Complainant seeks to file a motion to compel responses regarding Respondent's responses (or lack thereof) to requests for production of documents, 28 C.F.R. §

C.F.R. § 68.20(d) required responses to requests for production of documents be submitted within thirty days of the request.⁷

IV. CONCLUSION

A revised joint discovery plan may be submitted on or before October 1, 2021.

Based upon 28 C.F.R. § 68.33(g), the Court GRANTS Motion of Jasmin Lott to Withdraw as Counsel.

The Court GRANTS Respondent's Motion for Extension to Supplement Discovery Responses and Opposition. Its supplemental responses to Complainant's First Set of Interrogatories and Requests for Admission are due October 8, 2021.

A prehearing conference will be held on October 18, 2021, at 9:00 a.m. PST (12:00 p.m. EST).

SO ORDERED.

ENTERED:

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

DATE: August 30, 2021

68.23(b)(4) requires the parties to meet and confer. The Court was also concerned that Complainant would not be able to satisfy this requirement via oral motion.

⁷ Respondent previously argued that efficiency contributed to the good cause necessary for the protective order. Mot. Entry Joint Stip. Protective Order 6. Thus, the Stipulated Protective Order presumably would decrease the time required to produce the requested documents.