

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

Y.Y.,)	
)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	
)	OCAHO Case No. 2021B00013
ZUORA, INC.,)	
)	
Respondent.)	
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Appearances: Y.Y., pro se, for Complainant
Sean M. McCrory, Esq., and Shelby K. Taylor, Esq, for Respondent

ORDER DISCHARGING ORDER TO SHOW CAUSE

I. PROCEDURAL HISTORY

On January 1, 2021, Complainant, Y.Y., filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Zuora, Inc., fired him due to his citizenship status and national origin and retaliated against him in violation of the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a(a)(1)(B).

On January 13, 2021, the Chief Administrative Hearing Officer (CAHO) used United States certified mail to send Respondent the complaint and a Notice of Case Assignment for Complaint Alleging Unfair Immigration-Related Employment Practices (NOCA).¹ The CAHO informed Respondent that these proceedings would be governed by OCAHO's Rules of Practice and Procedure for Administrative Hearings located at 28 C.F.R. part 68 (2017) and applicable case law. A link to the rules was provided to Respondent, along with contact information for OCAHO. The CAHO directed Respondent to answer the complaint within thirty days in accord

¹ The Court's Order to Show Cause dated March 25, 2021, gave January 13, 2021, as the date of service, rather than the date of mailing, of the complaint and NOCA to Respondent.

with 28 C.F.R. § 68.9(a). The CAHO cautioned that failure to file an answer could lead the Court to enter a judgment by default and any and all appropriate relief pursuant to 28 C.F.R. § 68.9(b).

The United States Postal Service (USPS) website indicated that, as of January 19, 2021, the complaint and NOCA were being held at the Redwood City, California post office at the request of Respondent. Despite sending the complaint and NOCA via certified mail with a return receipt requested, the USPS did not provide OCAHO with a signed return receipt confirming when it delivered the complaint and NOCA to Respondent.

The Court received Respondent's answer to the complaint on February 26, 2021, by facsimile. In the attached certificate of service, Respondent represented that it served Complainant with its answer by electronic mail and Federal Express (FedEx) delivery service. Ans. 7. Its certificate of service failed to specify whether it accomplished the delivery service overnight. *Id.* Respondent likewise sent its answer by FedEx to the Court. Rather than arriving at the Court concurrently with the facsimile transmission, the answer arrived four days later on March 2, 2021.

On March 25, 2021, the Court issued an Order to Show Cause directing Respondent to file a response showing good cause for its failure to timely answer the complaint. The Court also directed Respondent to address what steps it took to comply with the service and filing requirements set forth in 28 C.F.R. § 68.6. The Court warned Respondent that if it failed to respond or could not show good cause for its untimely answer, the Court could enter a judgment by default against Respondent pursuant to 28 C.F.R. § 68.9(b).

On April 9, 2021, Respondent filed an answer and a response to the Order to Show Cause. Respondent explained in its response the steps it took to comply with OCAHO's service rules. Respondent indicated that its office manager is checking incoming mail to its headquarters once a week and that its legal department was notified of the receipt of the complaint and NOCA on January 29, 2021. According to Respondent, upon learning of the complaint and NOCA, its legal department immediately calendared a thirty-day deadline to answer, which fell on Monday, March 1, 2021. Respondent further stated that on Friday, February 26, 2021, it filed its answer by facsimile and contemporaneously sent Complainant an e-mail containing its answer. Finally, Respondent stated that on March 1, 2021, it mailed its answer and the requisite copies via FedEx standard overnight delivery. In sum, Respondent asserts that it timely filed its answer in accordance with OCAHO's rules.

II. LEGAL STANDARDS

A. Filing Requirements

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that each respondent shall file an answer "[w]ithin thirty (30) days after the service of a complaint." 28 C.F.R. § 68.9(a). Pursuant to 28 C.F.R. § 68.8(c)(1), "[s]ervice of all pleadings other than complaints is deemed effective at the time of mailing." In contrast, service of a complaint is deemed effective upon receipt. 28 C.F.R. § 68.8(c)(1). A respondent's failure to file a timely answer "may be deemed to constitute a waiver of his or her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default." 28 C.F.R. § 68.9.

OCAHO's rules allow parties to file pleadings and briefs by facsimile where a time limit is imposed by statute, regulation, or order, but they may do so "only to toll the running of a time limit." 28 C.F.R. § 68.6(c). However, in order to toll the running of a time limit, the filer must forward the original signed pleading concurrently with the transmission of the facsimile. *Id.* OCAHO's rules further require that the party filing by facsimile must certify in its certificate of service that the original pleading was served on the opposing party by facsimile or same-day hand delivery, or, if those methods are not feasible, by overnight delivery service. 28 C.F.R. § 68.6(c). Service by electronic mail is not listed among the acceptable concurrent filing methods. "Fa[csimile] transmissions which fail to comply with the rule will be treated as a nullity and the effective filing dates for such documents will be the date of receipt of the mailed original in this office." *In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, 728, 731 (2000).²

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

B. Good Cause

When a respondent fails to file a timely answer to a complaint, the Court may issue an order to show cause as to why a default judgment should not issue, and ask the respondent to justify its failure to file its answer on time. *United States v. Shine Auto Serv.*, 1 OCAHO no. 70, 444, 445-46 (1989) (Vacation by the CAHO of the Admin. Law Judge’s Order Denying Default Judgment). In deciding whether to accept a late-filed answer, the Court reviews a respondent’s response to its order and determines whether “the [r]espondent possessed the requisite good cause for failing to file a timely answer[.]” *Id.* at 446.

As a means of determining whether good cause exists in this case, the Court looks to the law of the controlling United States Court of Appeals, here the Fifth Circuit, where the violations occurred and where the parties are located,³ and will consider the following non-exhaustive factors: “(1) whether the failure to act was willful; (2) whether setting the [order to show cause] aside would prejudice the adversary; and (3) whether a meritorious claim has been presented.” *Effjohn Int’l Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 563 (5th Cir. 2003) (citation omitted); *see also Kanti v. Patel*, 8 OCAHO no. 1007, 166, 168 (1998) (applying factors). The Court also may consider whether the public interest was implicated, there was a significant financial loss to the party not in default, and if the party acted expeditiously to correct the default. *In re Dierschke*, 975 F.2d 181, 184 (5th Cir. 1992).

III. DISCUSSION

A. The Timeliness of Respondent’s Answer

The Court first addresses Respondent’s assertion that it timely filed its answer. Respondent states in its response to the Order to Show Cause that its legal department was notified of the receipt of the complaint and NOCA on January 29, 2021, sixteen days after the documents were sent from Virginia by certified mail and ten days from the date on which the USPS website listed the documents as

³ 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.”

being held at a post office at Respondent's request. *See* Resp't Resp. to Order to Show Good Cause 2. In support of its assertion as to the date of service, Respondent has provided a signed declaration from Jennifer Pileggi, its Senior Vice President, General Counsel, Chief Compliance Officer and Corporate Secretary. *See id.* Ex. 3. According to Ms. Pileggi, Respondent's headquarters in Redwood City, California, has been closed due to the pandemic since March 2020. *Id.* ¶ 3. Despite this closure, she explains that mail is still being delivered to headquarters where an office manager checks and sorts it once a week. *Id.* ¶ 4. On January 29, 2021, Ms. Pileggi's office manager informed her that the complaint and NOCA were delivered to Zuora's headquarters. *Id.* ¶ 6. Respondent thus asserts that the date of service was January 29, 2021.

Although it is unclear on what date the complaint and NOCA arrived at Respondent's headquarters—as opposed to the date on which Ms. Pileggi was notified of the delivery—the Court accepts Respondent's proffered date of January 29, 2021, as the operative date of service. *See* 28 C.F.R. § 68.3(b) (explaining that the service of a complaint is complete upon its receipt by the addressee). Given that an answer is due within 30 days of the service of the complaint, 28 C.F.R. § 68.9(a), Respondent's answer was due on March 1, 2021.⁴ For the reasons discussed below, Respondent's answer was untimely filed with the Court.

The Court received Respondent's answer to the complaint on February 26, 2021, by facsimile. This receipt would ordinarily toll the running of the deadline of March 1, 2021. However, facsimile transmissions must comply with 28 C.F.R. § 68.6(c) in order to be effective. In order to toll effectively the running of a time limit by facsimile, the filer must: (1) forward the original signed document “concurrently” with the transmission of the facsimile, and (2) include in its certificate of service a certification that the other party was also served by facsimile or same-day hand delivery, or, if those methods are not feasible, by overnight delivery service. *See id.*

Here, Respondent did not effectively toll the running of the 30-day time limit to file its answer. Respondent acknowledges that it transmitted its answer by

⁴ 28 C.F.R. § 68.8(a) provides that, “[i]n computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is Saturday, Sunday, or legal holiday observed by the Federal Government in which case the time period includes the next business day.” Therefore, the answer was due on Monday, March 1, 2021, rather than Sunday, February 28, 2021.

facsimile to the Court on Friday, February 26, 2021, and did not mail the original, signed answer until three days later on Monday, March 1, 2021. *See* Resp’t Resp. to Order to Show Good Cause 1. Respondent attached photocopies of the FedEx shipping labels likewise showing that it mailed its answer to Complainant and the Court on March 1, 2021. *See id.* Ex. 5. Even accounting for the weekend, the Court finds that a three-day span of time between the facsimile transmission and the mailing of the original, signed answer does not satisfy the requirement of concurrent transmission under 28 C.F.R. § 68.6(c). As OCAHO courts have explained, the purpose of requiring the concurrent transmission of the pleading by facsimile, hand delivery, or overnight delivery is “to ensure basic fairness and due process to an opposing party.” *In re Investigation of Conoco, Inc.*, 8 OCAHO no. 1048, at 731.

Moreover, the certificate of service attached to Respondent’s answer did not certify that “service on the opposing party has also been made by facsimile or by same-day hand delivery” or that “the document has been served instead by overnight delivery service.” 28 C.F.R. § 68.6(c). *See* Ans. 7. Respondent represented that it served Complainant by e-mail and FedEx delivery service. *Id.* Its certificate of service failed to specify that it accomplished that service overnight, *id.*, nor could Respondent make such a representation as it waited three days to mail the original answer. This does not suffice to toll the running of a time limit and nullifies the facsimile transmission.

Given that Respondent’s facsimile transmission to the Court on February 26, 2021, did not toll the running of the time limit, the Court’s filing deadline of March 1, 2021, remained in effect. And while service of Respondent’s answer on Complainant was effective at the time of mailing on March 1, 2021, its answer was not deemed filed with OCAHO until the Court received it. *See* 28 C.F.R. § 68.8(b) (“Pleadings are not deemed filed until received by the Office of the Chief Administrative Hearing Officer . . . or the Administrative Law Judge assigned to the case.”); *see also Kanti*, 8 OCAHO no. 1007, at 167 (“‘File’ means that the document must be received in my office by the given date, not that it merely must be postmarked by then.”) (citing § 68.8(b)). Here, the Court received Respondent’s answer on March 2, 2021. Therefore, it was filed one day late.

B. Good Cause

The Court now exercises its discretion and considers whether good cause exists to set aside the Order to Show Cause in this case. Construing good cause generously, the Court finds that the above-listed factors overwhelmingly weigh in

favor of accepting Respondent's untimely answer and discharging the Order to Show Cause so that this case can be decided on the merits. OCAHO case law provides that default judgments "should not be granted on the claim, without more, because the [respondent] failed to meet a procedural time requirement." *Nickman v. Mesa Air Group*, 9 OCAHO no. 1106, 2 (2004) (citations omitted). Here, Respondent failed to meet a procedural time requirement by only one day.

The record supports the conclusion that Respondent's late-filed answer was not the result of a willful disregard for the legal process or an intentional failure to respond to litigation. Respondent attempted to file its answer on time by transmitting a facsimile copy of the answer before the deadline passed but misunderstood the requirements of concurrent service under 28 C.F.R. § 68.6(c). Respondent has noted its willingness to comply with OCAHO's rules by ensuring that its certificates of service state when it accomplishes service by overnight delivery service. *See* Resp't Resp. to Order to Show Good Cause 5. Respondent also worked expeditiously to respond to the Court's Order to Show Cause and timely filed supporting evidence detailing the steps it took to comply with the service and filing requirements of 28 C.F.R. § 68.6. These actions strongly indicate that Respondent's failure to file its answer on time was not done willfully.

The Court further finds that there has been no showing that Complainant will be prejudiced by an answer filed with the Court one day late. Absent extraordinary circumstances, an answer filed one day after it is due does not result in the type of prejudice that counsels against a finding of good cause. OCAHO case law has made it clear that "[m]ere delay alone does not constitute prejudice without any resulting loss of evidence, increased difficulties in discovery, or increased opportunities for fraud and collusion." *Nickman v. Mesa Air Group*, 9 OCAHO no. 1106, 3 (2004). When the delay is as minor as one day, the prospect of these prejudicial results is less likely to occur. Moreover, the fact that Complainant did not move for an entry of default and has not alleged that it would suffer any harm, financial or otherwise, if the Court accepts the late-filed answer counsels against a finding of prejudice. *See United States v. Sanchez*, 13 OCAHO no. 1331, 2 (2019). Indeed, the evidence before the Court reflects that Respondent emailed its answer to Complainant by e-mail on, and in advance of, the filing deadline.⁵ *See* Resp't

⁵ To the extent the parties are interested in electronically all filings in this case and accepting electronic service of case-related documents from OCAHO and the opposing party, they should review the applicable rules of OCAHO's Electronic Filing Pilot Program available on the United States Department of Justice website at <https://www.justice.gov/eoir/electronic-filing>. OCAHO will send the parties the

Resp. to Order to Show Good Cause Ex. 4 (copy of e-mails from Respondent to Complainant dated February 26, 2021, and March 1, 2021). Therefore, no fairness or due process concerns are evident here.

Lastly, the Court finds that, with respect to the issue of good cause, Respondent's answer presents a meritorious claim or defense to the complaint. The purpose of looking at this factor is to "determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default." *See Sinha v. Infosys*, 14 OCAHO no. 1373a, 5 (2021) (citing 10A Charles Alan Wright, Arthur R. Miller, & Mary May Kane, *Federal Practice & Procedure* § 2697 (4th ed. Oct. 2020)). An answer containing "meritorious defenses" is one that clearly lays out both the specific contested allegations and issues in dispute. *See id.* (citing *Nickman*, 9 OCAHO no. 1106, at 4). Here, Respondent's answer specifically identifies each factual allegation of the complaint that it admits or denies. *See* Ans. 1-4. Respondent also provides eight affirmative defenses in its answer. *Id.* at 4-5. In sum, the Court finds that this factor weighs in favor of discharging the Order to Show Cause.

IV. ORDER

Accordingly, having found that good cause exists for Respondent's untimely answer to the complaint in this matter,

IT IS SO ORDERED that Respondent's answer to the complaint is ACCEPTED and the Order to Show Cause is DISCHARGED.

ENTERED:

Honorable Carol A. Bell
Administrative Law Judge

DATE: December 10, 2021

applicable participant registration and certification forms, also available on the Department of Justice website. Both parties must elect to become electronic filers or the parties will continue to file case documents by the means set forth in 28 C.F.R. part 68 for the duration of the case.