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

January 22, 2021

ROBERT HEATH, Complainant, v. OPTNATION AND AN ANONYMOUS EMPLOYER, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00062

ORDER ON RECONSIDERATION

I. BACKGROUND

On March 26, 2020, Complainant Robert Heath filed a complaint against Optnation (Respondent), and its "client employers." The complaint alleges that Respondent discriminated against him based on his national origin and citizenship status in violation of 8 U.S.C. § 1324b. Respondent filed an answer on May 4, 2020. The parties filed prehearing statements. On July 7, 2020, Respondent filed a motion to dismiss. Complainant did not respond to the motion to dismiss, and on October 1, 2020, this Court dismissed the Complaint. *Order Dismissing Compl.*

Respondent argued in its motion that it does not employ anyone, and therefore the Office of the Chief Administrative Hearing Officer (OCAHO) does not have subject matter jurisdiction both because OCAHO lacks jurisdiction over claims of national origin and citizenship discrimination where the employer employs less than three people, and because Optnation is not an employer, but is merely a website owned by RAGNS Inc. Mot. Dismiss 1, 3. Respondent stated that Complainant did not allege that Optnation employed more than three employees and Complainant did not, and factually cannot, allege that Optnation was an employer within the meaning of § 1324b. *Id.* at 5–6. Respondent included a declaration from its corporate representative and owner of RAGNS Inc. averring to the same. *See* Mot. Dismiss, Ex. D.

In its October 1, 2020 Order, this Court found that since Complainant had not alleged sufficient facts to determine whether OCAHO has jurisdiction to hear claims against Optnation, Complainant had not stated a claim upon which relief can be granted. Order Dismissing Compl. 3. Because the complaint is deficient on its face, the Court dismissed the complaint as to

Optnation. *Id.* The undersigned did not consider the declaration as its decision was based solely upon the complaint. Further, as Complainant had not identified the relevant companies in the six months since the complaint was filed, the complaint as to the unknown employers was also dismissed. *Id.* at 4.

On October 13, 2020, Complainant filed an appeal of this Court's decision. It does not appear that Complainant filed the appeal with the appropriate United States Court of Appeals, *see* 28 C.F.R. § 68.57, but instead filed with this Court. Pleadings filed by pro se litigants must be liberally construed. *Li v. Recellular, Inc.*, No. 09-cv-11363, 2010 WL 1526379, at *4, n. 4 (E.D. Mich. Apr. 16, 2010) (noting that Plaintiff's pro se motion to set aside voluntary dismissal of her case cited no authority, but that the court would still consider it as seeking relief from the stipulation of dismissal under Federal Rule of Civil Procedure 60(b)); *see also M.S. v. Dave S.B. Hoon – John Wayne Cancer Institute*, 12 OCAHO no. 1305b, 5 (2018) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).[1]

As it appears that Complainant is seeking relief from this Court's decision, the Court will construe the filing as a motion for reconsideration.

II. COMPLAINANT'S FILING

Complainant asserts that the Court erred in finding that Optnation was not an employer, asserting a number of facts to demonstrate that Optnation is an employer, including the fact that Optnation was the employer in the job posting at issue in this case, a posting that was included with the complaint. In addition, Complainant cites a number of new facts, including: 1) when he called the telephone number listed for Optnation, someone answered, 2) Optnation has a physical address, which is the same as a number of other businesses, 3) a search of the website LinkedIn reveals that more than 10 people identify themselves as working for Optnation, and 4) Optnation offers several other services.

[1] 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 OCAHO website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders.

III. LEGAL STANDARDS

While the OCAHO rules do not specifically address a motion for reconsideration, OCAHO caselaw has permitted reconsideration requests in 274b cases. *United States v. Four Star Knitting*, 5 OCAHO no. 815, 711, 716 (1995); *M.S. v. Dave S.B. Hoon – John Wayne Cancer Inst.*, 12 OCAHO no. 1305b, 3–4 (2018). *But see United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1098, 2 (2003) ("[i]t is not necessarily apparent and I am not necessarily persuaded that the amendment of the rule was intended to permit the parties to file unsolicited pleadings subsequent to the issuance of a final decision[.]")

OCAHO's regulations allow for using the Federal Rules of Civil Procedure "as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. Federal Rule of Civil Procedure 59(e) allows a litigant to file a "motion to alter or amend a judgment . . . no later than 28 days after the entry of the judgment."[2] The rule gives a trial court "the chance 'to rectify its own mistakes in the period immediately following' its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020), (citing *White v. New Hampshire Dep't of Emp. Sec.*, 455 U.S. 445, 450 (1982)). "In keeping with that corrective function, 'federal courts generally have [used] Rule 59(e) only' to 'reconsider[ ] matters properly encompassed in a decision on the merits." *Banister*, 140 S. Ct. at 1703 (citing *White*, 455 U.S. at 451). "In particular, courts will not address new arguments or evidence that the moving party could have raised before the decision issued." *Banister*, 140 U.S. at 1703 (first citing 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2810.1, pp. 163–164 (3d ed. 2012) (Wright & Miller); and then citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485–486, n. 5(2008) (quoting prior edition)).[2]

The Eleventh Circuit Court of Appeals has stated that "[t]he only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (citing *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur*, 500 F.3d at 1343 (citing *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

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[2] The appeal could also be construed as a motion under Federal Rule of Civil Procedure 60(b)(2), where reconsideration is appropriate if there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time." Relief under this rule is only employed '"sparingly' and only where necessary 'to prevent manifest injustice.'" *United States v. Wilson*, 27 F. App'x 852, 853 (9th Cir. 2001) (quoting *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir.1997)). The Court finds that the evidence could have been discovered in a timely manner.

IV. ANALYSIS

As an initial matter, Complainant filed the pleading twelve days after the Court issued its order dismissing the case without prejudice, and accordingly, it will be treated as a timely motion under Rule 59(e).

As noted above, this Court did not rule on Respondent's evidence; this Court found that Complainant had not pled enough facts to demonstrate that this Court had jurisdiction. § 1324b(a)(2)(A). Complainant now appears to be asserting that Respondent does employ more than three employees. However, Complainant does not explain why he did not seek to amend his Complaint or present this evidence in response to Respondent's motion to dismiss. *See* Fed. R. Civ. P. 60(b)(2).

The two situations where a court will reopen under Rule 59 are newly discovered evidence where the evidence could not have been presented previously, and manifest errors of law or fact. *Arthur*, 500 F.3d at 1343 (citations omitted). As to new evidence, Complainant called the company's number on the website, and conducted a search on LinkedIn. There is no argument or apparent reason that Complainant could not have obtained this evidence in response to the motion to dismiss, or in the subsequent months while the motion was pending.

In terms of manifest error, Complainant argues that the advertisement attached to the complaint showed that Respondent was an employer. When considering a motion to dismiss, a court "limit[s] its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The court may, however, consider documents incorporated into the complaint by reference . . . ." *Id.* at 113–14. Therefore, "documents attached to a motion to dismiss may be considered without converting the motion to one for summary decision if the documents are referred to in the complaint and are central to the claim." *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 8 (2016) (citing first *Rosenblum v. Travelbyus.com Ltd*., 299 F.3d 657, 661 (7th Cir. 2002); and then citing *Jarvis*, 7 OCAHO no. 930 at 113–14). Additionally, "a copy of a document attached to a pleading is a part of the pleading for all purposes." *Id.* (citing Fed. R. Civ. P. 10(c)).

The attachments to the complaint include a narrative by Complainant, which indicates that he applied for positions with five different companies, which he described as, "all clients and advertisers with Optnation." Compl. 11. The advertisements attached provide a section for company, and the companies listed are Jobrino, ITjobslists, Precision Technologies Corp. and Optnation. The Optnation advertisement does not contain any particularized job information other than a city, San Francisco, which is not the same city as the address listed in the complaint. It would appear that at least two of the companies are other websites that list jobs, though it is difficult to ascertain whether the positions are with those companies or are listed on those company list servers. It is therefore unclear whether Optnation is listed as an employer or a list

server. Further, this one advertisement does not serve as a pleading indicating that Optnation employs more than three employees. Accordingly, the undersigned does not find that this Court's October 1, 2020, decision contained a manifest error of fact.

Additionally, Complainant has not demonstrated why this extraordinary remedy should be invoked as a matter of equity. Complainant did not respond to the motion to dismiss in the approximately three months in which it was pending. Further, he has not sought to amend the Complaint, and offers evidence that was readily available. While the Court appreciates Complainant's pro se status, motions for reconsideration should not be used to relitigate old matters nor should they allow complainants a second bite of the apple in spite of the failure of due diligence. Therefore, Complainant's motion is DENIED as to the portion regarding Optnation.

Complainant has not addressed the dismissal of his claim as to anonymous employers and according, the motion is DENIED as to that aspect of his claim as well.

V. CONCLUSION

Complainant's motion for reconsideration is DENIED.

SO ORDERED.

Dated and entered on January 22, 2021.

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Jean C. King
Chief Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in 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, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.