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

April 2, 2021

ALVIN J. GRIFFIN, III, Complainant, v. ALL DESERT APPLIANCES DBA, ADA REPAIR, INC., Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00068

ORDER DENYING MOTIONS AND GRANTING PERIOD TO FILE RESPONSES REGARDING SUMMARY DECISION

I. BACKGROUND AND PROCEDURAL POSTURE

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Complainant, Alvin J. Griffin, III, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on April 21, 2020, alleging that Respondent, All Desert Appliances, discriminated against him based on his citizenship status, engaged in document abuse, and retaliated against him.

On June 12, 2020, Complainant filed a Motion to Amend Complainant's Complaint and Motion for Protective Order (Motion to Amend Complaint).

On August 21, 2020, the Court issued an Order on Motions and Dismissing Complaint in Part (Order on Motions) in which it granted, in part, Complainant's Motion to Amend Complaint, and dismissed the untimely portions of the Complaint, specifically the untimely discrimination and document abuse claims and allegations of retaliation arising from actions in 2016 and 2018. Order Mots. 6–8. The surviving allegation in the Complaint relates to alleged retaliatory acts (Nevada state court filings) transpiring in June 2020.[1] Order Mots. 8.

[1] On June 15, 2020, Respondent's agent, filed an emergency protective order in Nevada state court. Order Mots. 3, 7. On June 16, 2020, Complainant "was served with Respondent's agent's petition to declare him a vexatious litigant filed in Nevada state court." Order Mots. 7.

On September 21, 2020, Respondent timely filed its Answer to Complainant's Amended Complaint.

On October 5, 2020, Respondent filed a Substitution of Counsel. The Court construed this filing as a motion and granted the substitution of counsel. Am. Order Mot. Recons. 2 n.1.

After the substitution of counsel, Complainant and Respondent filed various motions and responses, which will be further identified and discussed below.

On February 22, 2021 and March 2, 2021, the Court received subpoena requests from Complainant. The Court declined to exercise its discretionary subpoena power absent a showing of relevance. Accordingly, the Court issued an Order to Show Cause Regarding Subpoena (OTSC Subpoena) requesting Complainant demonstrate the relevance of the information sought to the surviving retaliation allegations.

On March 22, 2021, the Court received documents from the subpoenaed party that appeared to be responsive to the unexecuted subpoenas.[2] These documents lack a certificate of service so it is unclear whether Respondent received a copy of them.[3]

II. THE PARTIES' SUBMISSIONS

As an initial matter, 28 C.F.R. § 68.11(b) requires responses to motions to be filed within ten days after service of the motion. An additional five days is provided when filings are served via ordinary mail. 28 C.F.R. § 68.8(c)(2). The Court will only consider timely responses.

Additionally, OCAHO's regulations do not permit replies to responses, counter-responses to replies, or any further responsive documents, unless the Administrative Law Judge (ALJ) permits such. 28 C.F.R. § 68.11(b). Parties filed sur-replies on multiple occasions in this case, and at no point did parties receive leave of the Court to file sur-replies. As these sur-replies were filed in derogation of OCAHO's rules, they will not be considered. *See Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 1–2 (2019).[4]

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[2] These documents will be referred to as Subpoenaed Party's Response and Records to Unexecuted Subpoenas.

[3] Given the dubious nature in which the subpoenas were inappropriately served, the Court will not consider the records produced in response to the subpoenas.

[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

Finally, "requests for relief must be submitted in the form of a motion, not a letter." *Hsieh v. PMC – Sierra, Inc.*, 9 OCAHO no. 1089, 1 (2003); *e.g., United States v. Facebook, Inc.*, 14 OCAHO no. 1386, 1–2 (2021) (citing 28 C.F.R. §§ 68.2, 68.7(a)). Any requests made in the form of a letter will also not be considered.

1. Pending Motions

There are multiple motions pending before the Court. Each will be identified in turn below.

1. On November 2, 2020, the Court received a letter from Respondent's counsel requesting the Court admonish Complainant for not serving his motions on Respondent's counsel. This request for relief was not made in the form of a motion so the Court will not consider the contents of the letter.

2. On November 2, 2020, Respondent filed a Motion for Relief from Order Granting Motion for Leave to Amend Complaint (Motion for Relief). This motion was properly filed and will be considered.

3. On November 19, 2020, Complainant filed his opposition to this Motion for Relief contained in a filing entitled Motions for Judgment by Default and Summary Decision and Opposition to Respondent's Motion for Relief (Motions for Default and Summary Decision). The portion of this filing related to the Respondent's Motion for Relief is untimely and will not be considered. The portion related to Judgement by Default and Summary Decision is discussed below.

4. On December 9, 2020, Respondent filed a Reply in Support of Motion for Relief from Order Granting Motion for Leave to Amend Complaint (Reply to Motion for Relief). This sur-reply filing will not be considered for the reasons explained above.

5. On November 5, 2020, Complainant filed an Opposition to Respondent's Notification of Substitution of Attorney (Opposition to Substitution of Attorney). Given that the Substitution of Attorney was filed a month earlier, Complainant's filing is untimely and will not be considered.

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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.

6. On November 19, 2020, Complainant filed Motions for Default and Summary Decision, as mentioned above.

7. On November 27, 2020, Respondent filed Respondent's Opposition to Complainant's Motions for Judgment by Default and Summary Decision (Opposition to Motions for Default and Summary Decision). Neither Respondent nor Complainant are e-filers. Respondent mailed his filing on November 23, 2020.[5]

8. On November 24, 2020, Complainant filed an Affidavit/Affirmation of Evidence (Affidavit of Evidence) in support of his Motions for Default and Summary Decision and his Opposition to Respondent's Motion for Relief. This filing was mailed to Respondent who did not receive it prior to filing its own Opposition to Motion for Default and Summary Decision. Obj. and Mot. Strike Aff. 2.

9. On December 4, 2020, Respondent filed its opposition to Complainant's Affidavit/ Affirmation of Evidence, entitled Respondent's Objection and Motion to Strike Complainant's Untimely Affidavit Evidence (Objection and Motion to Strike Affidavit).

10. On December 29, 2020 Complainant filed a reply to Respondent's Objection and Motion to Strike Affidavit, entitled Motion to Strike and Reply to Respondent's Opposition to Complainant's Motions for Judgment by Default and Summary Decision (Complainant's Motion to Strike). This filing is ultimately a sur-reply as it was Complainant who filed the Motion for Default and Summary Decision and follow-on Affidavit/ Affirmation of Evidence. Both of which generated separate response filings by Respondent. For the reasons explained above, this filing will not be considered.

11. On January 12, 2021, Respondent filed an opposition entitled Respondent's Opposition to Complainant's Motion to Strike. This appears to be a reply to the sur-reply. For the reasons explained above, this filing will not be considered.

12. On March 19, 2021, Complainant filed "Motion to Admit Evidence Pursuant to Rule 15(C), Withdraw Subpoena Request," (Motion to Admit Evidence) which included two attachments.

A. Submissions Properly Before the Court.

After the full universe of filings is reduced down to those properly before the Court, there remain several issues requiring the Court's attention: the Motion for Relief of the Order on Motions

[5] Pursuant to 28 C.F.R. § 68.8(b), submissions "are not deemed filed until received by [OCAHO.]"

following the Amended Complaint, and the Motion for Judgement by Default and related response and Summary Decision (and follow-on Affidavit filing) from Complainant and the responsive filings from Respondent.

1. Motion for Relief from Order Granting Motion for Leave to Amend Complaint

In its Motion for Relief, Respondent argues that pursuant to Federal Rule of Civil Procedure 60(b), the Court should reconsider its Order on Motions, which granted Complainant's Motion to Amend the Complaint. Mot. Relief 5. Respondent asserts that its former counsel's mistake in reading the order to show cause as granting Griffin leave to file a motion for leave to amend complaint constitutes excusable neglect. Mot. Relief 6.

2. Complainant's Motion for Judgment by Default

In his Motion for Judgment by Default, Complainant argues that he is entitled to default judgment based on his determination that Respondent's Answer (following the amendment of the Complaint) was not timely filed. Complainant based his calculations from the date of service of the original complainant. Complainant asserts that Respondent filed its answer over ninety days late. Mots. Default and Summ. Decision 3.

3. Complainant's Motion for Summary Decision and Affidavit of Evidence

In the portion of his filing addressing summary decision, Complainant moves for a decision in his favor citing a lack of material facts at issue. Mots. Default and Summ. Decision 10.

Complainant identifies his protected activity as his charge filed with the Immigrant and Employee Rights Section (IER) in March 2020 and his Complaint filed with OCAHO (i.e. the present case) in April 2020. Mots. Default and Summ. Decision 11.

Complainant also identifies discrete actions taken by Respondent in June 2020, Mots. Default and Summ. Decision 12, which the Court also previously noted in its Order on Motions.[6]

Complainant explained that the two June 2020 court actions were related, namely a Respondent employee sought a renewed protective order (i.e. restraining order) against Complainant and the Respondent sought and ultimately obtained an order declaring Complainant a vexatious litigant in state court. Mots. Default and Summ. Decision 13.

[6] As a reminder, on June 15, 2020, Macinkiewich filed an emergency protective order in Nevada state court. Order Mots. 3, 7. On June 16, 2020, Complainant "was served with Macinkiewich's petition to declare him a vexatious litigant filed in Nevada state court." Order Mots. 7.

Complainant states that these June 2020 actions occurred after he filed his OCAHO complaint. Mots. Default and Summ Decision 13. Complainant also asserts that Respondent pursued action in state court to declare Complainant a "vexatious litigant" "because of [his] OCAHO complaint."[7] Mots. Default and Summ. Decision 13. Complainant acknowledges that he was, in fact, determined to be a vexatious litigant on October 23, 2020 by the state court. Mots. Default and Summ. Decision 14.

On the point of causation, Complainant summarizes his argument by stating "the timing of filing the petition came after the OCAHO complaint, [Complainant] had not initiated any new filings against Respondent since April 2018;[8] [Complainant] had appealed the wrongful termination case legally or in defense of [Respondent Employee's] protection orders[.]" Mots. Default and Summ. Decision 21.

Complainant provides new allegations of retaliation for incidents transpiring in October 2020. Mots. Default and Summ. Decision 16. These incidents fall outside the scope of the Complaint and Amended Complaint. They will be neither discussed nor considered. *See generally Griffin v. All Desert Appliances*, 14 OCAHO no. 1370, 2 (2020).

Finally, Complainant also raises concerns of ethical issues associated with Respondent's counsel's conduct. Mots. Default and Summ. Decision 20–21. The record does not support this allegation and it will not be discussed further.

4. Respondent's Response to Motion for Judgement by Default

Respondent notes that the Court provided Respondent thirty days to file an Amended Answer in its August 21, 2020 Order on Motions. Opp'n Mots. Default and Summ. Decision 5–6. Respondent asserts that it timely filed its Answer to the Amended Complaint and only responded to the surviving claims. Opp'n Mots. Default and Summ. Decision 7.

5. Respondent's Opposition to Motion for Summary Decision and Opposition to Affidavit of Evidence

Respondent notes that the analysis of summary decision first turns on whether there is a genuine issue of material fact. Opp'n Mots. Default and Summ. Decision 5.

By way of evidence of material facts, Respondent provides evidence that it pursued and was ultimately successful in obtaining a judgment deeming Complainant a vexatious litigant. Opp'n

[7] Complainant characterizes the proceedings declaring him a vexatious as "frivolous and baseless[.]" Aff. Evid. 2.
[8] *See* footnote 9.

Mots. Default and Summ. Decision Ex. 4. Respondent's Exhibit 4 is an official copy of the Clark County District Court Order declaring Complainant "a vexatious litigant pursuant to SCR 9.5[.]" Opp'n Mots. Default and Summ. Decision Ex. 4, p. 5. This document appears to be complete and reliable.

The Nevada district court judge considered legal briefs, evidence, and oral argument from both parties. *Id.* at 1. The district court found that Complainant "initiated twenty separate actions, most of which were either dismissed, summary judgment was entered, he lost or was found guilty[.]" *Id.* The district court described Complainant's litigation against Respondent in various other fora as "improper, frivolous, and/or baseless." *Id.* at 3. The district court also noted in a 2019 case[9] filed by Complainant in which Respondent filed "a Rule 11 motion due to [Complainant] having subpoenas issued in a closed case, but it was taken off calendar since the case was closed, but the subpoenas were quashed and deemed improper[.]" *Id.* at 4.

As to the protective order (i.e. restraining order), Respondent provided an official copy of a 2018 – 2019 Protective Order issued by Clark County notifying Complainant he is to have no contact with Respondent's employee. Opp'n Mots. Default and Summ. Decision Ex. 5. Respondent also provided a police report memorializing the fact that Complainant violated the protective order mere hours after its issuance. *Id.* at 7. In her statement to the police, Respondent's employee states she is "scared for [her] life" of Complainant who harasses and "threatens" her via email. *Id.* at 9. Both documents provided by Respondent appear complete and reliable.

Respondent also provided two unsigned affidavits stating that the employee is fearful of Complainant and it was her fear that motivated her to file for an extension of the protective order in June 2020. Opp'n Mots. Default and Summ. Decision Exs. 6–7. The affidavits are unsigned, which significantly diminish their reliability and the weight afforded to them in the Court's evidentiary analysis. They are, however, factually consistent with the complete and reliable evidence referenced above.

In its Objection and Motion to Strike Affidavit, Respondent objected to the Court's consideration of Complainant's Affidavit of Evidence. Respondent contends that the Affidavit of Evidence was filed after Respondent had already submitted his Response to the Motion for Summary Judgment. Obj. and Mot. Strike Aff. 2. However, as evidenced by its Objection and Motion to Strike Affidavit, Respondent did have an opportunity to review and respond to the additional information. The Respondent's Motion to Strike Affidavit is DENIED because the Court will consider the Complainant's two filings as his Motion for Summary Decision. The Court will consider the Respondent's two filings as his Response to the Motion for Summary Decision.

[9] The existence in the record of litigation in 2019 undercuts Complainant's assertion that no litigation occurred after 2018. An assertion he makes in support of the causation element of his prima facie case.

6. Complainant's Motion to Admit Evidence

In his Motion to Admit Evidence, Complainant states that he withdraws his subpoena requests and "reserves his rights to withdraw the requests for all subpoenas issued at this time." Mot. Admit Evid. 2. He resurrects argument related to the principle of equitable tolling and his retaliation claims from 2019.[10] Mot. Admit Evid. 2. Additionally, he provides a detailed accounting of his assessment of the civil proceedings in other fora in which he is involved. Mot. Admit Evid. 3–15. Complainant also requests Respondent's affirmative defenses "be stricken from the record." Mot. Admit Evid. 15–18.

As to the issue of subpoenas, on February 22, 2021, the Court received a subpoena request from Complainant wherein he sought "redacted copies of the following items: books, papers, documents, police report, etc." "relating to [Respondent Employee] concerning Case Nos. §18PO0774 filed on May 15, 2018 and #19PO0874, filed on June 03, 2019" from the Las Vegas Justice Court. OTSC Subpoena 1. On March 2, 2020, the Court received Complainant's second subpoena request in which he sought a "copy of transcript #A-19-787128-A, Judge Richard Scotti., Department 2, Macinkiewich v. Griffin – Date: 01/31/2019." OTSC Subpoena 1.

Based on the nature of the information requested (predating the accepted allegation in the Amended Complaint, among other issues), the Court issued Complainant an Order to Show Cause requiring Complainant to demonstrate the relevance of the information sought prior to a discretionary exercise of the Court's subpoena authority. OTSC Subpoena 2. The Order to Show Cause was issued on March 5, 2021 and provided Complainant fourteen days to respond; Complainant's response was due on March 19, 2021. OTSC Subpoena 3.

On the same day the Court issued its Order to Show Cause, Complainant served unsigned and unexecuted subpoenas "electronically via email" on "lvjccriminal@clarkcountynv.gov." Subpoenaed Party's Resp. and Rs. Unexecuted Subpoenas. These subpoenas include: externally created and unauthorized Department of Justice letterhead; an externally created signature block for the undersigned; the Form EOIR 30 (OCAHO Subpoena Form) with the undersigned's information populated and Complainant's signature. *Id.* Notably missing from all forms and letters is the signature of the undersigned. *Id.* It appears as though, based on the documents the Clark County Clerk of Courts provided to the Court, that the Clark County Clerk honored these unauthorized subpoenas and provided the information described therein.

OCAHO's rules clearly require an ALJ's signature for issuance of a subpoena. 28 C.F.R. § 68.25 ("An ALJ . . . may issue subpoenas[.]"). Moreover, all parties, including pro se litigants, "are presumed to know the rules of practice and procedure that govern OCAHO cases[.]" *United*

[10] The Court previously considered Complainant's arguments for equitable tolling and held that equitable tolling is inapplicable. Order Mots. 5–7.

States v. Horno MSJ, Ltd. Co., 11 OCAHO no. 1247a, 3 (2015). Complainant's decision to serve the unexecuted subpoenas is in direct violation of OCAHO's rules.

Furthermore, Complainant attempted to conceal his improper service of the unexecuted subpoenas by informing the Court that he is withdrawing his subpoena requests after he served them.[11] Complainant's actions demonstrate a lack of integrity and suggest bad faith. As noted,[12] Complainant has used subpoenas in prior, unrelated litigation, and has a fundamental understanding of how the subpoena process generally works. His decision to send unexecuted and unauthorized subpoenas wasted time and resources of the Clark County judicial system and this Court.

"All persons appearing in proceedings before an [ALJ] are expected to act with integrity, and in an ethical manner." 28 C.F.R. § 68.35(a). Complainant's actions have fallen far below this standard. Complainant's unethical behavior directly calls into question the Complainant's integrity and will cause the Court to draw an adverse inference with respect to the credibility of evidence put forth by Complainant. Furthermore, Complainant is hereby ADMONISHED for issuing the subpoenas under the auspices of the Court's authority. Complainant should also take note that further deviation from the ethical standards of this forum may lead to a dismissal of the Complaint in its entirety. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); Fed. R. Civ. P. 11.

As to the other matters referenced in the Motion to Admit Evidence, the Court notes that Complainant already filed a dispositive motion in which he seeks summary decision. Argument related to the legal propriety of the Answer to the Amended Complaint are moot in light of his request that the Court issue a decision on the merits. Additionally, Complainant provided no facts or argument demonstrating the evidence in this filing was unavailable at the time he filed his dispositive motion.

Furthermore, to the extent Complainant seeks to utilize evidence obtained by way of an unauthorized subpoena, the minimum appropriate sanction for such bad-faith activity is preclusion of that evidence from consideration.

Complainant's Motion to Admit Evidence is DENIED as MOOT based on his previously filed dispositive motion. In the alternative, the Court DENIES this motion as an appropriate sanction for Complainant's unauthorized use of this Court's authority to issue subpoenas.

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[11] It appears Complainant attempted to deceive the Court by withdrawing his subpoena requests; however, he did not anticipate the Clark County Clerk forwarding the subpoenaed records to the undersigned.

[12] Respondent describes Complainant's use of subpoenas in other, unrelated litigation. Opp'n Mots. Default and Summ. Decision 4.

7. Respondent Request for Attorney's Fees

Respondent's counsel sought attorney's fees related to its response to Complainant's Motion to Strike referenced above. Opp'n Complainant's Mot. Strike 7. Neither OCAHO regulations nor OCAHO case law support an award of attorney's fees for a "frivolous filing." *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332c, 2 (2020). Attorney's fees are available in this forum; however 28 C.F.R. § 68.52(d)(6) only permits an award of reasonable attorney's fees to the prevailing party "if the losing party's arguments is without reasonable foundation in law and fact."

An award of such attorney's fees is premature at this stage as neither party is yet a "prevailing party." Should the Respondent ultimately prevail, Respondent is not precluded from filing a motion seeking attorney's fees. The Respondent's request for attorney's fees specific to the opposition of Complainant's Motion to Strike is DENIED.

III. DISCUSSION AND ANALYSIS

A. Motion for Relief from Order Granting Motion for Leave to Amend Complaint (Motion for Relief)

Respondent filed its Motion for Relief from the August, 21, 2020 Order on Motions pursuant to Federal Rule of Civil Procedure 60(b). Mot. Relief 5. Federal Rule of Civil Procedure 60(b) provides grounds for relief from a *final* judgment.[13] However, the Order on Motions is not a final order, it is an interlocutory order. *See* 28 C.F.R. § 68.2.[14] As such, Federal Rule of Civil Procedure 60(b) is inapplicable. Rather the "power to modify an interlocutory order is authorized by . . . Federal Rule 54(b)." *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285a, 1 n.1 (2018) (citations omitted); *e.g., A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381b (2021).

1. Legal Standard for a Motion for Reconsideration

[13] 28 C.F.R. § 68.1 provides that "[t]he Federal Rules of Civil Procedure may be used 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."

[14] A final order is defined as an order "that disposes of a particular proceeding or a distinct portion of a proceeding, thereby concluding the jurisdiction of the [ALJ] over that proceeding or portion thereof;" while an interlocutory order is defined as "an order that decides . . . some intervening matter pertaining to the cause of action and requires further steps to be taken in order for the [ALJ] to adjudicate the cause on the full merits[.]" 28 C.F.R. § 68.2.

The Court has broad discretion in considering a motion for reconsideration of an interlocutory order. *See Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (first citing *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir.1994); and then citing *United States v. Nutri–cology, Inc.*, 982 F.2d 394, 396 (9th Cir.1992); *accord Amazon Webservices Inc.*, 14 OCAHO no. 1381b at 2. "Motions for reconsideration are disfavored, however, and are not the place for parties to make new arguments not raised in their original briefs." *Motorola, Inc.*, 215 F.R.D. at 582 (citing *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925–26 (9th Cir.1988)). Grounds for motions for reconsideration include:

> (1) There are material differences in fact or law from that presented to the Court and, at the time of the Court's decision, the party moving for reconsideration could not have known of the factual or legal differences through reasonable diligence;
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> (2) There are new material facts that happened after the Court's decision;
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> (3) There has been a change in the law that was decided or enacted after the Court's decision; or
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> (4) The movant makes a convincing showing that the Court failed to consider material facts that were presented to the Court before the Court's decision.
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> No motion for reconsideration shall repeat in any manner any oral or written argument made in support of or in opposition to the original motion.

Motorola, Inc., 215 F.R.D. at 586.

2. Denial of Motion for Relief

In support of its Motion for Relief, Respondent asserts that its former counsel "read the order to show cause mistakenly (excusable neglect) as granting Griffin leave to file a motion for leave to amend complaint." Mot. Relief 6. It is unclear what portion of the Order to Show Cause Respondent's former counsel misread as the order unequivocally required Complainant "to show good cause . . . why his complaint should not be dismissed for failure to file a timely charge before IER." Order Show Cause 2. Moreover, even if former counsel misread the order as granting Complainant leave to file a motion for leave to amend his complaint, Respondent was not foreclosed from filing an opposition. 28 C.F.R. § 68.11(b) specifically grants the nonmoving party ten days to file a response to a written motion. Former counsel's mistake does not satisfy any of the grounds for a motion for reconsideration listed above. While the Court declines to apply the inapposite standards of Rule 60(b), it notes that the above-referenced "mistake" also does not constitute excusable neglect, the standard for Rule 60b. *See Engleson v. Burlington N. R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992) (citations omitted) ("Neither ignorance nor

carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1).”). Therefore, Respondent’s Motion for Relief is DENIED.[15]

B. Motions for Judgment by Default and Summary Decision and Opposition to Respondent’s Motion for Relief (Motions for Default and Summary. Decision)

1. Motion for Default Judgement is DENIED.

28 C.F.R. § 68.9(b) provides that the ALJ may enter a judgement by default when the respondent fails to timely file its answer. “Default judgments are generally disfavored in the law and thus should not be granted on the claim, without more, that the defendant had failed to meet a procedural time requirement.” *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1106, 2 (2004) (citations omitted).

Complainant’s calculation that Respondent’s answer was filed ninety days beyond the due date, Mots. Default and Summ. Decision 3, is mistaken. Complainant erroneously calculated the deadline based off of service of the original complaint. On May 26, 2020, Respondent timely filed its Answer to the original Complaint. Pursuant to the Order on Motions, Respondent had thirty days from August 21, 2020 to files its answer to the *Amended* Complaint. Order Mots. 8. Respondent’s filing of its Answer to Complainant’s Amended Complaint on September 21, 2020, was timely.[16] In addition to Respondent timely filing its Answer to the Amended Complaint, Complainant failed to demonstrate any other reason warranting a default judgment. Thus, default judgment is inappropriate. Complainant’s Motion for Default Judgment is DENIED.

2. Motion for Summary Decision

Under OCAHO’s rules, the ALJ “shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 28 C.F.R. § 68.38(c). “An issue of material fact is genuine only if it has a real basis in the record” and “[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit.” *Sepahpour v. Unisys, Inc.*, 3

[15] Respondent argued that Complainant should not have been granted leave to file an amendment because his claims are meritless as he is a U.S. citizen. Mot. Relief 7. The Court did not reach the merits of these arguments because Respondent failed to satisfy the standard for a motion for reconsideration. The Court would, however, be remiss if it did not mention that as a U.S. citizen, Complainant is a protected individual under 8 U.S.C. § 1324b(a)(3), contrary to Respondent’s assertion that Complainant has no standing.

[16] It should be noted that the operative complaint and answer are the Amended Complaint and Answer to the Amended Complaint.

OCAHO no. 500, 1012, 1014 (1993) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc*., 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3679 Com. Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

As noted in the regulations governing procedure in this forum, the Federal Rules of Civil Procedure "may be used as a general guideline[.]" 28 C.F.R. § 68.1. Relevant to the analysis, Federal Rule of Civil Procedure 56(f) states that "[a]fter giving notice and a reasonable time to respond, the court may grant summary judgment for a nonmovant." To reach such a conclusion, the Court must first determine that there is no genuine issue of material fact and that the non-moving party is entitled to judgment as a matter of law.

a. No Material Facts in Dispute

Pursuant to the Court's Order on Motions, the remaining allegations from the Amended Complaint relate to alleged retaliatory acts that occurred in June 2020. Order Mots. 8.

Both parties provide evidence and argument in support of the proposition that Complainant had engaged in protected activity when he filed his charge with IER on March 25, 2020 and filed his complaint with OCAHO on April 21, 2020.

Additionally, both parties provide evidence and argument that both June 2020 court filings occurred, specifically that Respondent's employee filed for a renewed protective order (i.e. restraining order) against Complainant, and that Respondent's filed submissions with the district court requesting that Complainant be deemed a vexatious litigant.

At the heart of this litigation is the causal link or rationale for Respondent's June 2020 filings.

Complainant asserts it was "because of" his protected activity. The record does not support Complainant's theory of causation.

The record, as developed by the parties' filings, demonstrates that Respondent filed a renewed request for a protective order because of Complainant's concerning behavior. According to the record, this behavior began in or around 2018 when the first protective order was filed. Opp'n Mots. Judgment Default and Summ. Decision Ex. 5. The protective order was renewed in 2019. Aff. Evid. Ex. C93h. The protective order appears to have been violated in the past by Complainant who, according to police reports, generated fake email addresses to threaten and harass Respondent. Opp'n Mots. Judgment Default and Summ. Decision Ex. 5. Respondent provided evidence that the employee feared Complainant. Opp'n Mots. Judgment Default and Summ. Decision Ex. 5. This fear appears to be credible and validated as evidenced by the continuing grant of a protective order. Aff. Evid. Ex. C93h.

As to the June filing related to deeming Complainant a vexatious litigant, the record indicates that Complainant was deemed a vexatious litigant by the state court. In that matter, the state court considered evidence and argument from both Complainant and Respondent. Opp'n Mots. Judgment Default and Summ. Decision Ex. 4. The state court appears to have come to this conclusion after finding that Complainant had filed over 20 matters against mostly Respondent, only one of which is the case in this forum. Opp'n Mots. Judgment Default and Summ. Decision Ex. 4. Complainant's unethical actions related to subpoenas in this forum are in conformity with the actions outlined in the state court's written decision.

b. Analysis of Entitlement of Judgement as a Matter of Law

To establish a prima facie case of retaliation, generally speaking, a complainant must present evidence that: "1) an individual engaged in conduct protected by § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse action, and 4) there was a causal connection between the protected activity and the adverse action." *R.O. v. Crossmark, Inc.*, 11 OCAHO no. 1236, 6 (2014) (citations omitted). Additionally, §l324b(a)(5), prohibits "a person or other entity" from "intimidat[ing], threaten[ing], coerc[ing], or retaliate[ing] against any individual/or *the purpose of interfering with any right or privilege secured under this section* or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section" (emphasis added).

As explained above, there does not appear to be material facts in dispute regarding the first element, the protected activity (contact with IER and the filing of the instant Complaint). As to the second element, there are no material facts in dispute - Respondent's had knowledge of the protected activity.

Regarding the third element, "OCAHO case law also has long recognized that litigation can be initiated in another forum with the intent or purpose of retaliating against individuals for engaging in statutorily protected conduct." *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 9 (2013); *see also Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64

(2006) (finding that anti-retaliation provision in Title VII is not limited to actions that affect the terms and conditions of employment). Thus, the actions of Respondent could constitute an actionable prohibited retaliatory activity.

As to the causal link between the protected activity and the employer's retaliation (the fourth element), the Court has previously held:

> The causal link between the protected activity and the respondent's employment decision or intimidating, threatening, or coercive behavior must rise to the level of "but for" causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *Rainwater v. Dr.'s Hospice of GA., Inc*., 12 OCAHO no. 1300, 17 (2017) (citations omitted); *R.O. v. Crossmark, Inc*., 11 OCAHO no. 1236, 16 (2014) (citations omitted); *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 6 (2014) (citations omitted). "[I]n order to find that retaliation occurred, there must be some reason to believe that but for the protected activity, the adverse employment decision would not have taken place." *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 578 (1999).

Zajradhara v. GIG Partners, 14 OCAHO no. 1363c, 8 (2021).

With this standard in mind, it seems quite clear that it is the nonmoving party (i.e. the Respondent) who would be entitled to judgment as a matter of law. There is no evidence that the June 2020 court filings were filed "because of" Complainant's OCAHO Complaint.

The protective order was initiated in 2018, predating the protected activity. The protective order was initiated and executed because of the Complainant's concerning behavior towards Respondent employee. The protective order was renewed in June 2019, again because a court determined that Respondent employee was entitled, as a matter of law, to this additional measure to protect her safety. The June 2020 filing was merely a request for an annual renewal of this protective order. The evidence in the record, including the protective order and police reports demonstrate the renewal was pursued because of Complainant's criminal behavior directed at Respondent's employee, not because Complainant filed an OCAHO Complaint.

The record also demonstrates that the vexatious litigant filing was not advanced because of Complainant's OCAHO-oriented activity, but rather, according to the district court judge, because Complainant engaged in a pattern of frivolous and baseless litigious activities. Opp'n Mots. Default and Summ. Decision Ex. 4, p. 5. According to the record, Complainant had the opportunity to present evidence in that forum, Opp'n Mots. Default and Summ. Decision Ex. 4, p. 5, and the Court here sees no reason to disturb or question the conclusions reached by the state district court judge. Indeed, the OCAHO filing accounts for only 5% of the litigation in which Complainant appears to be involved with Respondent, rendering it mathematically impossible to rise to the level of "but for" causation, with 95% of the litigation apparently predating Complainant's OCAHO case.

Ultimately, it is the Respondent who appears entitled to judgment in its favor as a matter of law, which would result in a complete dismissal of the Complaint.

c. Provision of Notice and an Opportunity to Respond

In light of the procedural due process safeguards annotated in Federal Rule of Civil Procedure 56(f), this Order provides notice to Complainant of the pending entry of a final order in favor of Respondent. Consistent with Federal Rule of Civil Procedure 56(f), the Court gives Complainant an opportunity to respond before the Court enters an Order dismissing the Complaint in its entirety.

Complainant has fourteen calendar days from the date on the Certificate of Service for this order to provide a responsive filing, which must also be served on Respondent. If Complainant declines to submit a timely filing in response to this Order, the Court will enter a judgment in favor of Respondent and will dismiss the Complaint in its entirety.

Respondent shall have ten calendar days from the date of service of Complainant's filing to submit a response.

No sur-replies shall be permitted.

IV. CONCLUSION

Respondent's Motion for Relief is DENIED.

Complainant's Motions for Default and Summary Decision are DENIED. An Order Granting Summary Decision in favor of Respondent is DEFERRED consistent with Federal Rule of Civil Procedure 56(f). Complainant has fourteen calendar days from the date on the Certificate of Service for this Order to provide the Court a responsive filing, which must also be served on Respondent.

Respondent's Opposition and Motion to Strike Affidavit is DENIED.

Respondent's request for attorney's fees following Complainant's Motion to Strike is DENIED.

Complainant's Motion to Admit Evidence is DENIED. Complainant is ADMONISHED for issuing subpoenas under the auspices of the Court's authority.

Respondent shall have ten calendar days from the date of service of Complainant's filing to submit a response.

SO ORDERED.

Dated and entered on April 2, 2021.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge