

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

UNITED STATES OF AMERICA,	)	
	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	
	)	OCAHO Case No. 2021A00009
AMA REPIPING, LLC,	)	
	)	
Respondent.	)	

ORDER FINDING GOOD CAUSE

I. PROCEDURAL BACKGROUND

On December 9, 2020, the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, AMA Repiping, LLC, alleging violations of the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, Title 8, United States Code, Section 1324a. The complaint reflects that DHS served Respondent with a Notice of Intent to Fine on October 6, 2020, and Respondent thereafter made a timely request for hearing. Respondent filed an answer to the complaint on January 11, 2021.

On January 29, 2021, the Court issued an Order for Prehearing Statements and Initial Disclosures directing Complainant to file a prehearing statement with the Court by March 1, 2021, and Respondent to file a prehearing statement by March 31, 2021. The Court placed this Order in the United States Department of Justice mail system for processing by ordinary mail and service on both parties of record. Complainant did not file a prehearing statement with the Court by March 1, 2021. Respondent timely filed its prehearing statement on March 31, 2021.

On April 2, 2021, the Court issued an Order to Show Cause directing Complainant to file a response showing good cause for its failure to file a prehearing statement. The Court also directed Complainant to file a prehearing statement that comported with Title 28, Code of Federal Regulations, Section 68.12 and complied with this Court's Order for Prehearing Statements and Initial Disclosures dated January 29, 2021. The Court informed Complainant that if it did not respond to the

Order to Show Cause, the Court could find that Complainant had abandoned its complaint and would, accordingly, dismiss the complaint. This Order was served upon both parties through OCAHO's electronic filing pilot program in which the parties began voluntarily participating, pursuant to the Court's Order dated March 5, 2021.

On April 9, 2021, Complainant filed a prehearing statement and a response to the Order to Show Cause. Complainant asserts in its response that it was unaware of the Court's Order for Prehearing Statements and Initial Disclosures until it was served electronically with the Order to Show Cause on April 2, 2021. Complainant represents in its filing that, after learning of the Court's Order for Prehearing Statements and Initial Disclosure, office staff searched for, but were unable to locate, the Court's Order. Complainant notes that, as a result of the global pandemic, the United States Postal Service has experienced significant delays in the delivery and receipt of mail. In support of its assertion, Complainant attached a new article discussing the pandemic's effect on mail processing nationwide due to unprecedented volume increases and limited employee availability. *See* Quinn Klinefelter, "*There's No End in Sight: Mail Delivery Delays Continue Across the Country*," Nat'l Pub. Radio, Jan. 22, 2021, <https://www.npr.org/2021/01/22/959273022/theres-no-end-in-sight-mail-delivery-delays-continue-across-the-country>.

Complainant asks the Court to find good cause for its failure to timely file its prehearing statement due to circumstances beyond its control. It also notes that mail service should not be an issue going forward because the parties are enrolled in OCAHO's electronic filing pilot program through which they electronically file and accept electronic service of case-related documents from OCAHO and the opposing party.

## II. LEGAL STANDARDS

OCAHO's Rules of Practice and Procedure for Administrative Hearings provide that "[a] complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a complaint or a request for hearing if: A party or his or her representative fails to respond to orders issued by the Administrative Law Judge." 28 C.F.R. § 68.37(b)(1). A final decision of abandonment equates to a judgment by default under OCAHO case law. *See United States v. Arctic Air Conditioning and Heating, Inc.*, 13 OCAHO no. 1341, 2 (2020); *United States v. Vilardo Vineyards*, 11

OCAHO no. 1248, 4 (2015) (citing *United States v. Greif*, 10 OCAHO no. 1183, 6 (2013)).<sup>1</sup>

Although OCAHO's Rules of Practice and Procedure for Administrative Hearings do not specifically address the standard to be applied in assessing the adequacy of a party's explanation for its failure to respond to an order or prehearing procedures, they do provide that the Court can be guided by the Federal Rules of Civil Procedure, which "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." 28 C.F.R. § 68.1; see *United States v. Quickstuff, LLC*, 11 OCAHO no. 1265, 5 (2015). Under Federal Rule of Civil Procedure 55(c), courts may set aside an entry of default for good cause. OCAHO courts have applied a good cause standard where a party has failed to respond to orders, including an order for the filing of prehearing statements, and faces dismissal of its complaint for abandonment. See, e.g., *United States v. Ferrantino Fuel Corp.*, 13 OCAHO 1335 (2019); *KR v. Western Digital*, 10 OCAHO no. 1159, 2 (2012).

Since the allegations at issue in this case occurred in Arizona and the parties are located in Arizona and Nevada, the Court also looks to the case law of the relevant United States Court of Appeals, here the Ninth Circuit. See 28 C.F.R. § 68.57 (designating 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."). As such, in its good cause analysis, this Court will consider the following five factors in determining whether to dismiss this case for failure to comply with an order or pretrial procedures: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [respondent(s)]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives." *Ferdik v.*

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<sup>1</sup> Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision, followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the relevant volume. Pinpoint citations to OCAHO precedents after volume eight, 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," the LexisNexis database "OCAHO," and on the United States Department of Justice website: <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

*Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (quoting *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986) and citing *Henderson v. Duncan*, 779 F.2d 1421, 1423-24 (9th Cir. 1986)).

### III. DISCUSSION

The Court has considered the above-stated five dismissal factors and finds that Complainant has demonstrated good cause for its failure to respond to the Court's Order for Prehearing Statements and Initial Disclosures. Dismissal is not warranted in this case.

First, the Court finds that the delay occasioned by Complainant's late-filed prehearing statement was not so great as to subvert the public's interest in expeditious resolution of this litigation involving a government agency's allegations that an employer violated the INA's employment provisions. This was Complainant's first failure to meet a filing deadline in this case, and the Court finds credible Complainant's statements regarding its unintentional failure to respond to the Order for Prehearing Statements and Initial Disclosures due to difficulties in mail processing caused by the COVID-19 pandemic. The Court has recognized the pandemic's effect on the timely delivery and receipt of mail sent using the United States Postal Service, and has found good cause for a party's failure to timely comply with court orders. *See, e.g., Sinha v. Infosys*, 14 OCAHO no. 1373a, 4-5 (2021); *Woods v. Philips North America, LLC*, 14 OCAHO no. 1371, 2-3 (2020). Complainant's conduct does not suggest a willful disregard for the legal process or an intentional failure to participate in this litigation. When put on notice of its failure by the Court and warned of the potential dismissal of its complaint, Complainant acted expeditiously to correct its failure to file its prehearing statement. This correction has minimized delay and also allowed the Court to manage its docket and timely move this case forward.

The Court next finds little risk of prejudice to Respondent from the delayed filing of Complainant's prehearing statement, and none has been alleged. 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). The Court has seen no evidence that Complainant's delay in filing its prehearing statement would result in these enumerated circumstances. Moreover, Respondent has not moved the Court to dismiss Complainant's complaint for its late filing of its prehearing statement.

The Court further finds that the public policy favoring disposition of cases on their merits weighs against dismissal of this action. This is consistent with OCAHO's case law. Dismissals based on abandonment, like default judgments, are a disfavored means of resolving lawsuits. *See D'Amico, Jr., v. Erie Community College*, 7 OCAHO no. 927, 61, 63 (1997). OCAHO courts favor resolving cases based on their merits, rather than through default judgments or dismissals based on abandonment. *See Sinha*, 14 OCAHO no. 1373a at 2-3 (citations omitted); *Vilardo Vineyards*, 11 OCAHO no. 1248 at 4-5. Because these are disfavored means of resolving lawsuits, OCAHO courts have construed good cause generously as the Court has done in this matter. *See, e.g., Sinha*, 14 OCAHO no. 1373a at 3 (citing *D'Amico, Jr.*, 7 OCAHO no. 927 at 63).

Finally, the Court has considered, and previously employed, less drastic alternatives to the extreme sanction of dismissal. As a general matter, complaints or requests for hearing before OCAHO typically are not dismissed on the grounds of abandonment if the party who failed to file an answer or respond to a prior order thereafter timely responds to the court's order to show cause. *See, e.g., United States v. Ferrantino Fuel Corp.*, 13 OCAHO no. 1335, 1-2 (2019). OCAHO's case law reflects that a default judgment or a dismissal based on abandonment generally results from a party's failure to respond to the order to show cause. *See, e.g., United States v. Cordin Co.*, 10 OCAHO no. 1162, 3 (2012); *United States v. Columbia Sportswear Mfrs., Inc.*, 5 OCAHO no. 808, 669, 672 (1995); *United States v. Hosung Cleaning Corp.*, 4 OCAHO no. 681, 776, 777-78 (1994). That is not the case here. Rather, the Court's issuance of the Order to Show Cause in this case has resulted in Complainant's filing of a prehearing statement and response containing good cause. As such, the Court need not consider further the sanction of dismissal or any less drastic alternatives. This case shall proceed to a determination on its merits.

#### IV. CONCLUSION

Accordingly, the Court having found that Complainant, DHS, has demonstrated good cause for its failure to respond to the Court's Order for Prehearing Statements and Initial Disclosures dated January 29, 2021,

IT IS SO ORDERED that Complainant's Prehearing Statement shall be considered filed in this case; and

IT IS FURTHER ORDERED that, within ten days of the date of this Order, the parties shall consult with each other and provide the Court in writing with a minimum of three mutually-agreeable dates and times for a telephonic prehearing conference with the Court.

ENTERED:

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Honorable Carol A. Bell  
Acting Chief Administrative Law Judge

DATE: May 24, 2021