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

July 21, 2017

M.S.,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 17B00060
	)	
DAVE S.B. HOON – JOHN WAYNE CANCER INSTITUTE,	)	
Respondent.	)	
	)	

ORDER DISCHARGING SHOW CAUSE ORDER TO RESPONDENT,
VACATING ENTRY OF DEFAULT, AND
DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

I. BACKGROUND AND PROCEDURAL HISTORY

Complainant M.S. filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent Dave S.B. Hoon-John Wayne Cancer Institute on March 17, 2017. M.S. alleges that Respondent discriminated against her because of her citizenship status and national origin, retaliated against her, and committed document abuse, thereby violating the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012).

On March 22, 2017, this office had sent Respondent a Notice of Case Assignment for Complaint Alleging Unfair Immigration-Related Employment Practices and a copy of the complaint via certified mail through the United States Postal Service (USPS). The Notice of Case Assignment directed Respondent to file an answer within thirty (30) days of receipt of the complaint and informed Respondent that failure to answer could lead to default. The Notice of Case Assignment also identified that proceedings would be governed by OCAHO's Rules of Practice and Procedure set forth at 28 C.F.R. part 68 (2017). According to the USPS website, service was completed on March 27, 2017, making Respondent's answer due no later than April 26, 2017.

Respondent filed an answer with this office by facsimile on April 28, 2017,[1] thereby failing to file a timely answer.

On May 5, 2017, Administrative Law Judge (ALJ) James McHenry III, who previously presided over this matter, issued an Order to Show Cause to Respondent to show good cause on or before June 2, 2017, why it failed to file a timely answer and to file an answer that comports with the pertinent OCAHO regulations. Specifically, 28 C.F.R. § 68.6(c) instructs, in part, that a party who files by facsimile must identify in the certificate of service that service on the opposing party was also made by facsimile or same-day hand delivery, or if neither of these two can be made, service by overnight delivery. According to the certificate of service, Respondent did not serve M.S. with the untimely answer by any of these means; service was made by regular mail with the USPS. Furthermore, Judge McHenry's Order advised Respondent that pursuant to 28 C.F.R. § 68.9(b), failure to file an answer within the time provided may be deemed a waiver of its right to appear and contest the allegations of the complaint and could lead to entry of a default judgment against Respondent.

On May 25, 2017, Respondent timely filed a "Declaration of Jibraun Riaz Re May 5, 2017 Order to Show Cause to Respondents" (Respondent's Response). The response includes the following attachments: Ex. A) a copy of Judge McHenry's Order to Show Cause; Ex. B) a copy of M.S.'s OCAHO complaint; and Ex. C) a May 25, 2017 email from Respondent's attorney, Jibraun Riaz (Mr. Riaz), to M.S. concerning transmittal of the answer, which is attached. Mr. Riaz avers that Respondent informed him that it received M.S.'s complaint on March 30, 2017, which would have made a timely response due May 1, 2017.[2] *See* Respondent's Response at 2. Accordingly, Respondent avers that when it filed an answer on April 28, 2017, it was operating under the presumption that the answer was indeed timely. *Id.*

In addition, Respondent explains that it did not serve M.S. with the answer by facsimile because Respondent did not have a fax number for M.S. According to Respondent, service of the answer by same-day hand delivery or overnight delivery was "impractical" because M.S. resides in India. *Id.* Email correspondence between the parties reveals that Mr. Riaz served M.S. with the first answer by regular mail and also emailed her the answer on May 25, 2017. *Id.*, Ex. C. As

[1] OCAHO rule 28 C.F.R. § 68.6(c) allows parties to file pleadings and briefs by facsimile only to toll the running of a time limit.

[2] OCAHO rules provide that when the last day of a filing deadline falls on a Saturday, Sunday, or legal holiday observed by the Federal Government, the time period is extended until the next business day. *See* 28 C.F.R. § 68.8(a). Thirty days after March 30, 2017, was Saturday, April 29; accordingly, the period to file a timely answer to a complaint filed on March 30 would have been May 1, 2017.

Respondent claims that its answer was inadvertently, but in good faith, filed two days late, it requests that the undersigned[3] accept the answer.

On May 29, 2017, M.S. filed a Response to the Order to Show Cause. The undersigned initially notes that Judge McHenry's Order to Show Cause only directed Respondent, and not M.S., to file a response.[4] However, because her response includes a request for default judgment pursuant to 28 C.F.R. § 68.9(b), I construe the filing as a motion for default judgment (Complainant's Motion).

M.S. attached to her Motion the May 25, 2017 email from Mr. Riaz with Respondent's answer and her response, as well as additional email correspondence with Mr. Riaz (Ex. A) and a copy of her response to the Order to Show Cause (Ex. B).[5] Based on the correspondence, Mr. Riaz actually served her with the original answer by certified mail; however, she responded that she had not yet received the hard copy as of that date. *See* Complainant's Motion, Ex. A at 2. The Motion further contends that Respondent is "making excuses about not receiving mailed documents on time" and that Respondent's explanation for its untimely answer "seems unsatisfactory." *Id.* at 1. M.S. also raises other matters that are not relevant to the instant proceedings.[6]

For the reasons provided below, I conclude that Respondent has demonstrated good cause for its untimely answer and I will, therefore, discharge the Order to Show Cause and remove the entry of default against Respondent. Moreover, M.S.'s motion for default judgment is denied.

II. DISCUSSION

1. Rules Governing Default and Default Judgment

[3] This case was reassigned to me on June 1, 2017.

[4] The parties are reminded that unless they are filing a response to a motion, replies to a response, counter-responses to a reply, or any other responsive document shall not be filed without leave of the undersigned. *See* 28 C.F.R. § 68.11(b).

[5] The undersigned assigned the exhibit notations for clarity.

[6] M.S.'s other complaints include the costs of Dave Hoon's legal representation and allegations of an investigation by a United States Attorney's Office of Respondent's parent organization. *See* Complainant's Motion at 2-3.

A party that fails to answer a complaint within the time specified is in default, whether or not that fact is officially noted. *See United States v. Quickstuff, LLC*, 11 OCAHO no. 1265, 4 (2015) (citing *Monda v. Staryhab, Inc.*, 8 OCAHO no. 1002, 86, 90 (1998)).[7] Therefore, before a late answer may be accepted, the default must be excused. *Monda*, 8 OCAHO no. 1002 at 90 (citing 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2692, at 85 (3d ed. 1998)). Further, OCAHO rules provide that a failure to file an answer within the time provided may be deemed to constitute a waiver of the right to appear and contest the allegations, and that the Administrative Law Judge may thereafter enter a judgment by default. 28 C.F.R. § 68.9(b).

A "showing of good cause is . . . a condition precedent to permitting a late answer, and where that showing is not made, a late answer may not be accepted." *Quickstuff*, 11 OCAHO no. 1265 at 4 (citing *United States v. Medina*, 3 OCAHO no. 485, 882, 889 (1993)); *see also Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1106, 2-3 (2004). OCAHO's rules themselves do not address the standards that should be used in determining if good cause exists to excuse a party's failure to file a timely answer. The Federal Rules of Civil Procedure, however, "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. I may therefore rely on the Federal Rules for guidance in deciding whether Respondent demonstrated good cause for its untimely answer and for whether a default judgment against Respondent is warranted. As the alleged discrimination occurred in California, precedent from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) interpreting the relevant Federal Rules is controlling. *See* 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57.

Federal Rule of Civil Procedure 55(c) states, "The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)." The court has "especially broad discretion" in setting aside an entry of default. *Nickman*, 9 OCAHO no. 1106 at 2 (citing *Hart v. Parks*, No. CV00–07428ABC(RNBX), 2001 WL 636444, at *3 (C.D. Cal. 2001)). The factors that a court must consider in determining whether good cause exists to set aside an entry of default are: (1) whether the defaulting party engaged in culpable or willful conduct that led to the default; (2) whether setting the default aside would prejudice the adversary; or (3) whether the defaulting party has a meritorious defense to the action. *Franchise*

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

Holding II, LLC v. Huntington Rests. Grp., Inc., 375 F.3d 922, 925-26 (9th Cir. 2004); *Nickman*, 9 OCAHO no. 1106 at 2-3 (citing *Kanti v. Patel*, 8 OCAHO no. 1007, 166, 168 (1998)). The defaulting party has the burden of showing that any of these factors justify setting aside the default. *Franchise Holding*, 375 F.3d at 926 (citing *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001), *overruled on other grounds by Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001)).

The "good cause" factors that apply in vacating an entry of default are the same factors applied in vacating a default judgment under Federal Rule of Civil Procedure 60(b). *Id.* at 925 (citing *TCI Grp.*, 244 F.3d at 696). However, when assessing a motion to set aside a default judgment under Rule 60(b), a court must consider the "good cause" factors of Rule 55 and find that one of the specific grounds of Rule 60(b) is met. *Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 433 (9th Cir. 1996) (citing *Manufacturers' Indus. Relations Assoc. v. E. Akron Casting Co.*, 58 F.3d 204, 209 (6th Cir. 1995); *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)). A default judgment was not entered against Respondent, so consideration of the good cause factors governs.

Default judgments are not favored in this forum. *Quickstuff*, 11 OCAHO no. 1265 at 4 (citing *United States v. Vilardo Vineyards*, 11 OCAHO no. 1248, 5 (2015)). The federal courts have consistently affirmed that "any doubts are to be resolved in favor of a trial on the merits." *United States v. Zoeb Enters., Inc.*, 2 OCAHO no. 356, 419, 420 (1991) (citing *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990); *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983)); *see also United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) ("'[J]udgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits.'") (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). OCAHO abides by this principle. *Zoeb Enters.*, 2 OCAHO no. 356 at 420-21 (citations omitted). Entry of a default judgment also falls within the discretion of the trial court. *D'Amico, Jr. v. Erie Cmty. Coll.*, 7 OCAHO no. 927, 61, 63 (1997) (citations omitted). Moreover, when a respondent fails to file a timely answer, a default judgment will not be entered unless good cause is shown. *Zoeb Enters.*, 2 OCAHO no. 356 at 421. As mentioned above, the good cause factors relied on are the same in the context of both default and default judgments.

2. Application

There must be a showing of good cause for Respondent's failure to file a timely answer before the untimeliness may be excused and the late answer may be accepted. Respondent has met this burden. First, Respondent demonstrated that it did not engage in culpable or willful conduct. Although M.S. considers Respondent's Response "unsatisfactory," she does not elaborate on this position. *See* Complainant's Motion at 1. Moreover, although Mr. Riaz's explanation that he relied on his client's assertion that March 30, 2017, was the date the complaint was received, is not entirely compelling, the conduct is nevertheless suggestive of inadvertence rather than willful

or culpable conduct. Respondent overall acted promptly in responding to the Order to Show Cause, suggesting further that its untimely answer was not willful or culpable.

In addition, the undersigned finds Respondent's explanations for its failure to send M.S. the answer by facsimile, same-day hand delivery, or overnight delivery reasonable, as Respondent did not have a fax number for M.S. and because her residence in India renders same-day hand delivery or overnight delivery unfeasible. *See* 28 C.F.R. § 68.6(c). Respondent's failure here to comply with the OCAHO rule governing service of documents filed by facsimile is thus excused. As Respondent also served M.S. with the answer on May 25, 2017, by email, in an effort to satisfy the requirements of 28 C.F.R. § 68.6(c) that an answer filed by facsimile be served on the opposing party by facsimile, I further conclude that Respondent filed an appropriate answer.

With respect to the second factor, I also conclude that setting aside the default would not prejudice M.S. To be considered prejudicial, "it must result in more than delay. Rather, the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." *Thompson*, 95 F.3d at 433-34 (citing *INVST Fin. Grp., Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 398 (6th Cir. 1987)). Although M.S. is *pro se* and, therefore, some additional safeguards should be afforded to her, I am not inclined, based on the parties' pleadings, to conclude that vacating the entry of default would cause a "tangible harm" to her. Although M.S. overall reproves Respondent for its actions thus far, she does not articulate how accepting the late answer would prejudice her, aside from the delay itself. *See* Complainant's Motion at 2-3. Accepting an answer that was two days late, without more, does not prejudice her, "[for] had there been no default, [M.S.] would of course have had to litigate the merits of the case, incurring the costs of doing so." *TCI Grp.*, 244 F.3d at 701. While the undersigned does not condone Respondent's failure to review and abide by OCAHO's rules, the fact that the delay in filing the answer was slight—only two days after the deadline—weighs strongly in favor of vacating the default and underscores the lack of prejudice to M.S.

Finally, having reviewed the pleadings of the record thus far, I conclude that Respondent has also satisfied the third good cause factor because Respondent has presented a meritorious defense to the complaint. "A respondent adequately presents a defense by clearly stating in the answer the precise contested allegations and indicating the existence of disputed issues." *Nickman*, 9 OCAHO no. 1106 at 4 (citing *Kanti*, 8 OCAHO no. 1007 at 171-72). Similarly, in the Ninth Circuit, a defendant "must present specific facts that would constitute a defense," although this burden is not considered "extraordinarily heavy." *TCI Grp.*, 244 F.3d at 700.

Respondent denied each allegation of the complaint and raised fourteen affirmative defenses. *See* Answer at 2-7. Notably, one of the apparently viable affirmative defenses that Respondent asserted is failure to state a claim upon which relief may be granted. On May 5, 2017, Judge McHenry issued an Order to Complainant to Show Cause why her complaint should not be dismissed pursuant to 28 C.F.R. § 68.10 for failure to state a claim. Specifically, Judge McHenry addressed each of the allegations in M.S.'s OCAHO complaint—national origin and

citizenship status-based discrimination in hiring and termination, document abuse on account of national origin and citizenship status, and retaliation—and explained why dismissal of the claims was being contemplated, in light of her apparent failure to plead sufficient facts in support of these claims. Moreover, the Order also clarified that the scope of proceedings under 8 U.S.C. § 1324b is limited by the statutory language to claims involving the hiring, recruitment or discharge of an employee, retaliation for protected conduct, and document abuse. *See* 8 U.S.C. § 1324b. M.S. was accordingly also directed to clarify the employment discrimination alleged in the OCAHO complaint because she complains primarily of the terms and conditions of her previous employment with Respondent, which fall outside the scope of 8 U.S.C. § 1324b proceedings. Her response to the Order was due July 14, 2017. To date, this office has not received any response.

Having reviewed the allegations of the complaint, the undersigned agrees that the deficiencies of M.S.'s pleadings as set forth in Judge McHenry's Order are grounds for potential dismissal, as it appears she has failed to state a claim upon which relief may be granted under 8 U.S.C. § 1324b. Accordingly, Respondent has presented a meritorious defense to M.S.'s complaint.

For all these reasons, the entry of default will be vacated, Respondent's late answer will be accepted, and M.S.'s request for default judgment will be denied.

Finally, I address two pending concerns. First, I deny M.S.'s request that I "inquire Hoon Lab facility for Form I-9 errors," presumably referring to violations of the employment verification system at 8 U.S.C. § 1324a(b). The governing employer sanctions statute, 8 U.S.C. § 1324a, and accompanying regulations do not authorize a private individual to file a complaint directly with the Administrative Law Judge alleging violations in completion of the Employment Eligibility Verification Form I-9, which is unlawful pursuant to § 1324a(a)(1)(B). *See de Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 9 (2013) ("The enforcement procedures provided in 8 C.F.R. § 274a.9 do not include a private right of action for individuals to enforce the provisions of § 1324a(a)(1) . . . ."). Moreover, under these circumstances, I will not disturb the prosecutorial discretion of the Department of Homeland Security, Immigration and Customs Enforcement, the federal agency responsible for enforcement of 8 U.S.C. § 1324a's provisions. *See, e.g., United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 21 (2016) (citations omitted); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015) ("The executive branch has an array of enforcement options, and it is not [the judiciary's] role to second-guess how the executive branch exercises its discretion to enforce administrative regulations.") (citing *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)).

Second, the parties are reminded that they are expected to act professionally, "with integrity, and in an ethical manner." 28 C.F.R. § 68.35(a). The undersigned certainly finds M.S.'s *ad hominem* attacks against Dave S.B. Hoon and Respondent troublesome. *See* Complainant's Motion at 2 (referring to Respondent's alleged "ignorant attitude" and to Mr. Hoon as "corrupting the morality of healthcare in [the] field of Cancer research/Oncology"). This kind of

personal vilification and any other behavior that falls below OCAHO's expected standards of conduct by either party or any individual appearing in these proceedings will not be tolerated.

III. CONCLUSION

Respondent has demonstrated good cause for its failure to file a timely answer, as Respondent sufficiently demonstrated that it did not act with willful or culpable conduct causing the two-day delay, that M.S. would not be prejudiced by setting aside the default and accepting the late answer, and that it has a meritorious defense to the complaint. Moreover, for these reasons, M.S.'s Motion for Default Judgment against Respondent will be denied.

SO ORDERED.

Dated and entered on July 21, 2017.

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Robert J. Lesnick
United States Administrative Law Judge