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

February 29, 2024

SOPHIE ACKERMANN, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2023B00004
MINDLANCE, INC., Respondent.	)	

Appearances: Sophie Ackermann, pro se Complainant
Kathryne Hemmings Pope, Esq. and Christopher J. Gilligan, Esq., for Respondent

ORDER ON RESPONDENT'S MOTION TO DISMISS

I. BACKGROUND

This matter arises under 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. On October 28, 2022, Complainant Sophie Ackermann filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) asserting claims of discrimination, retaliation, and unfair documentary practices arising under 8 U.S.C. § 1324b against Respondent Mindlance, Inc.

On June 27, 2023, this Court denied Respondent's motion to dismiss as to Complainant's claim of retaliation, and stayed Complainant's claims of discrimination based on national origin, citizenship, and unfair documentary practices. *See Ackermann v. Mindlance, Inc.*, 17 OCAHO no. 1462b (2023).[1] On July 25, 2023, the Court held a telephonic prehearing conference, and set

[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 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

a case schedule. Thereafter, the case was referred to the Settlement Officer Program, but the parties were not able to reach a settlement, and on September 19, 2023, the Court reset the case schedule, with discovery to close on January 5, 2024, and dispositive motions to be filed by March 4, 2024.

Complainant filed a motion for sanctions on November 30, 2023. On December 22, 2023, Respondent filed an opposition to the motion for sanctions and filed a motion to compel discovery responses. On January 11, 2024, this Court denied Complainant's Motion for Sanctions, and granted Respondent's Motion to Compel. *Ackermann v. Mindlance, Inc.*, 17 OCAHO no. 1462d (2024).

II. ORDER LIFTING STAY AND GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINANT'S CLAIMS BASED ON NATIONAL ORIGIN, CITIZNESHIP STATUS AND UNFAIR DOCUMENTARY PRACTICES

In its order on June 27, 2023, this Court discussed Respondent's motion to dismiss Complainant's complaint at length, but ultimately stayed Complainant's claims of discrimination based on national origin, citizenship, and unfair documentary practices because the Court was unable to execute a final case disposition, citing to *A.S. v. Amazon Web Services, Inc.*, 14 OCAHO no. 1381h, 2 n.4 (2021). *Mindlance, Inc.*, 17 OCAHO no. 1462b, at 9, 10. On October 12, 2023, the Department of Justice published an interim final rule providing for review by the Attorney General of OCAHO Administrative Law Judge final orders in cases arising under 8 U.S.C. § 1324b. *See* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68). The regulation resolved the issue identified in *A.S.* that led to the stay. As a result of this change to the regulation, this Court may proceed to a final case disposition in this matter. Accordingly, the stay is lifted.

The Court now grants Respondent's motion to dismiss Complainant's claims of discrimination based on national origin, citizenship status and unfair documentary practices. The Court incorporates the June 27, 2023, order into this order. Specifically, the Court found that Complainant did not plead the minimal factual allegations to state a claim to national origin discrimination. *Mindlance, Inc.*, 17 OCAHO no. 1462b, at 6–9. Similarly, the Court found that Complainant offered no facts that would permit a reasonable factfinder to infer that she was discriminated against on the basis of her United States citizenship in hiring, firing, or recruitment for a fee. *Id.* at 9–10. Lastly, the Court found that the Complainant did not plead sufficient facts to support a claim that the employer rejected her documents or requested more or different

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accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

documents than required, and the Court found that the facts did not support an inference of discrimination. *Id.* at 12–14.

The Court denied the motion to dismiss as to retaliation, however, and that claim remains.

III. RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

On February 6, 2024, Respondent filed a Motion to Dismiss the Complaint. Respondent urges the Court to dismiss the Complaint as abandoned because the Complainant stopped participating in the case and failed to comply with the Court's order to compel discovery. *See generally* Mot. Dismiss. The Respondent states that Complainant did not respond to its Request for Production of Documents, Interrogatories, and Request for Admission, which it served by email on October 20, 2023. *Id.* at 1–2. Thereafter, Respondent sent correspondence asking for the discovery, and when none was forthcoming, filed the Motion to Compel. *Id.* Complainant did not file an opposition to the motion to compel, and Complainant did not respond to the Court's order compelling Complainant to respond to the discovery as modified in the order by January 25, 2024. *Id.* Respondent submitted five exhibits, including its discovery requests, correspondence, its motion to compel, this Court's order, and a December 6, 2023 email from Complainant to Respondent stating, "there are no other emails, documents, and one of the conversations in question was already disclosed by your counsel." *Id.* Ex. E.

On February 7, 2024, Complainant sent an email to the Court detailing a number of difficult personal circumstances, and indicating Complainant "has little or no time to devote to anything" but handling those matters. Complainant's Resp. 1. Complainant states that she asked Respondent's counsel for the procedure to summon or subpoena a witness, but did not receive the information. *Id.* As to Respondent's discovery, Complainant states she told Respondent's counsel that "all the information regarding [Respondent's Chief of R&D] and other witnesses with names, addresses, and phone numbers were transparent in my Motion of last year March 18, 2023." *Id.* [2] The Court construes this as an opposition to the motion to dismiss.

IV. LEGAL STANDARDS

[2] Complainant also discusses an issue that came up in settlement talks. *Id.* at 2. As noted in this Court's previous order, any references to discussions occurring during settlement talks will not be considered, and will be stricken. *Mindlance, Inc.*, 17 OCAHO no. 1462d, at 4n.7. To the extent Complainant seeks to have her name redacted from any published decisions, she should either file a motion seeking redaction, or make such a request with the agency's privacy office at https://foia.eoir.justice.gov.

Discovery sanction authority is set forth in 28 C.F.R. § 68.23(c)(1)–(7), which allows the Administrative Law Judge (ALJ) to impose sanctions if a party,

> fails to comply with an order, including, but not limited to, an order for . . . the production of documents, the answering of interrogatories, a response to a request for admissions, or any other order of the Administrative Law Judge . . . for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay[.]

28 C.F.R. § 68.23(c)(1)–(7) permits a range of sanctions, including allowing the ALJ to "[i]nfer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party"; "[r]ule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party"; and "[r]ule . . . that a decision of the proceeding be rendered against the non-complying party . . ." 28 C.F.R. §§ 68.23(c)(1), (2), (5). The regulation also makes clear that "an evasive or incomplete response to discovery may be treated as a failure to respond." 28 C.F.R. § 68.23(d).

The sanctions listed in 28 C.F.R. § 68.23(c) are "intended not only for purposes of deterrence, but also to ensure that a party does not benefit from a failure to comply." *Iron Workers Loc. 455 v. Lake Constr. & Dev. Corp*., 7 OCAHO no. 964, 632, 674 (1997). The Court's goal in imposing discovery sanctions is "to put the parties in the same relative positions they would have been in but for the noncomplying party's failure." *Id.* at 675.

Section 68.23(c) "is patterned after Rule 37(b) of the Federal Rules of Civil Procedure." *Rodriguez v. Tyson Foods, Inc.,* 9 OCAHO 1109, 3 (2004). "Consequently, the case law interpreting Rule 37(b) is pertinent" to OCAHO discovery sanction determinations. *Id*. Rule 37(b)(2)(A) lists the sanctions available when a party fails to obey a discovery order, and is similar to 28 C.F.R. § 68.23(c).

The Court turns to the law of the controlling United States Court of Appeals, here the Third Circuit, for guidance.[3] The Third circuit Court of Appeals, instructs, "[f]irst, any sanction must be 'just'; second, the sanction must be *specifically related* to the particular 'claim' which was at issue in the order to provide discovery." *Clientron Corp. v. Devon IT, Inc*., 894 F.3d 568, 580 (3d Cir. 2018) (quoting *Harris v. City of Philadelphia*, 47 F.3d 1311, 1330 (3d Cir. 1995)).

[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." The alleged discrimination occurred, and the parties are located in New Jersey.

"[T]he sanction of dismissal is disfavored absent the most egregious circumstances." *United States v. $8,221,877.16 in U.S. Currency,* 330 F.3d 141, 161 (3d Cir. 2003). "Although [the Third Circuit has] held that dismissal is a harsh remedy and should be resorted to only in extreme cases," it has also recognized that "[d]istrict court judges, confronted with litigants who flagrantly violate or ignore court orders, often have no appropriate or efficacious recourse other than dismissal of the complaint with prejudice." *Shahin v. Delaware*, 345 F. App'x 815, 816 (3d Cir. 2009) (citing *Mindek v. Rigatti,* 964 F.2d 1369, 1373 (3d Cir. 1992)) (internal quotations omitted). The Third Circuit uses a five-part test to determine whether dismissal is appropriate: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Poulis v. State Farm Fire & Cas. Co.,* 747 F.2d 863, 868 (3d Cir. 1984).

V. ANALYSIS

It is undisputed that Complainant did not provide any documents, file any responses to the request to admit, or respond to any specific interrogatories, and did not respond to the Order to Compel. Complainant told Respondent on December 6, 2023, after Respondent filed the motion to compel, that she did not have any responsive documents. Mot. Dismiss Ex. E. Respondent propounded 25 interrogatories, 35 requests for admission, and 31 requests for production. *Id.* Ex. A. Complainant's statement that she does not have any responsive documents, that everything was disclosed previously, is woefully inadequate. For example, Complainant did not respond at all to the Requests for Admission, did not produce any documents or responses to the inquiry as to damages, communications with other persons about the claims, civil litigations to which she has been a party, etc. *Id.* Instead, Complainant states that she has been having personal difficulties, but she did not file a protective order, or a request to stay or to extend the case deadlines. Complainant's responses are evasive and incomplete, and thus are treated as a failure to respond. 28 C.F.R. § 68.23(d). Accordingly, sanctions are appropriate.

Respondent urges the Court to dismiss the action, citing to *Ravines de Schur v. Easter Seals-Godwill Northern Rocky Mountain, Inc.*, 15 OCAHO no. 1388g (2022). In that case, the ALJ deemed the complaint abandoned pursuant to 28 C.F.R. § 68.37(b)(1), which provides that a complainant "shall be deemed to have abandoned a complaint" if the party "fails to respond to orders issued by the Administrative Law Judge." *Id.* at 2*; see also Ravines de Schur v. Easter Seals-Godwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388h (2024). The complainant had entirely stopped participating in the case, ignoring the ALJ's order to compel, an order to show cause, and an order requiring the complainant to submit a filing clarifying whether she intended to pursue her case. *Ravines de Schur*, 15 OCAHO no. 1388g, at 1–2. Notably, however, in resolving whether dismissal was appropriate as a *discovery sanction* in a prior order, the ALJ

declined to dismiss the case, instead finding that deeming certain discovery requests to have been adverse to complainant is just as efficient in facilitating litigation. *Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388f, 6–7 (2022).

In this case, the Complainant has continued to participate in the case, however selectively. The Court does not find that she has abandoned the case within the meaning of 28 C.F.R. § 68.37(b)(1). The issue, then, is whether dismissal is an appropriate discovery sanction. The factors identified by the Third Circuit Court of Appeals provide a useful analytic framework. In terms of personal responsibility, Complainant is personally responsible for the lack of response as she is pro se. *See Shahin*, 345 F. App'x at 817. Respondent has been prejudiced in preparing its defense, in particular its motion for summary decision, by the utter lack of response by Complainant to its discovery requests. As to whether Complainant has been dilatory, Complainant has been selectively participating in the case, attending a settlement conference, and then filing a motion for sanctions in late November. Complainant did indicate that she thought she had previously provided everything, but this claim was provided months late and is simply not responsive to the discovery asked of her. The Court finds that she has been dilatory. As to good faith, as in the *Shahin* case, Complainant partly relies on other lawsuits to explain her lack of responsiveness. *Id.* However, she also relies on illness, and the circumstances of one of the lawsuits, which appears to be imminent eviction, thus her reasons are sympathetic. Yet, she was able to file a motion for sanctions. In balancing this factor, the Court does not find that she is acting in bad faith, given the seriousness of her predicament. Jumping to the last factor, Complainant's retaliation claim survived a motion to dismiss, thus the Court cannot say that the case is entirely without merit.

The last factor is whether other sanctions would be effective. Given that some factors do weigh in Complainant's favor, sanctions less than dismissal would seem to be more appropriate to facilitate litigation and put the parties in "the same relative positions they would have been in but for the noncomplying party's failure." *Iron Workers Loc. 455*, 7 OCAHO no. 964, at 675. This Court previously found that "[a]s Complainant did not respond to Respondent's requests for admission, they are admitted, and are 'conclusively established,'" citing to 28 C.F.R. § 68.20(b), (d). *See Ackermann*, 17 OCAHO no. 1462d, at 5. The Court invited Complainant to file a motion for withdrawal or amendment of these admissions, but none have been forthcoming. Thus, the Court finds that, as a discovery sanction, the requests for admission are deemed admitted. Should Respondent believe that any other sanctions short of dismissal are appropriate, the Court invites Respondent to so indicate in a subsequent motion, including in a motion for summary decision.

VI. ORDERS

Complainant's claims of discrimination based on national origin, citizenship status and unfair documentary practices are DISMISSED.

Respondent's requests for admission are deemed ADMITTED.

Respondent's Motion to Dismiss is otherwise DENIED.

SO ORDERED.

Dated and entered on February 29, 2024.

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Honorable Jean C. King
Chief Administrative Law Judge