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

STEVEN BROWN, BERNARDO GARCIA, JOAQUIN HERNANDEZ, NICOLAS MARTINEZ, AND MARSHALL PITTMAN Complainants,	)	
v.	)	8 U.S.C. § 1324b Proceeding
PILGRIM'S PRIDE CORPORATION, Respondent.	)	OCAHO Case No. 2020B00077

ORDER ON MOTION TO RECONSIDER AND
MOTION TO ALTER OR AMEND SUMMARY DECISION

I. PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. On June 27, 2020, Complainants Steven Brown, Bernardo Garcia, Joaquin Hernandez, Nicolas Martinez, and Marshall Pittman filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent Pilgrim's Pride Corporation ("Pilgrim"). Complainants allege that Respondent discharged Complainants based on their citizenship status in violation of 8 U.S.C. § 1324b.

On February 5, 2021, Respondent filed a Motion for Partial Summary Decision. Resp't Mem. in Support of Mot. for Summ. Dec. 3-4. Per 28 C.F.R. § 68.38(a),[1] responses were due within 10 days of the motion. On February 15, 2021, Complainants filed a motion seeking an extension of the deadline until 30 days after the conclusion of discovery. *See generally* Complainants' Mot. Extension.

On March 18, 2021, the Court granted in part Complainants' motion for an extension, providing that Complainants may submit any response to the Respondent's Motion for Partial Summary Decision by April 9, 2021. *See* Order Memorializing Prehr'g Conf. 1.

[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

On April 9, 2021, Complainants filed another motion to further extend time to respond to the motion for partial summary decision. Complainants sought a 24-hour extension; Complainants cited illness with counsel's family in support of the motion. The Court granted the motion for extension. Complainants filed their opposition to the motion on April 10, 2021.

On April 14, 2021, Complainants filed a Notice of Filing of Complainants' Amended Response in Opposition to Respondent's Motion for Summary Decision. The amended opposition included legal arguments and evidence which were not present in the timely-filed opposition. The amended opposition also included a copy of Complainant Brown's declaration, which was cited to but not included in the timely filed submission. The amended opposition did not include a motion seeking to amend the deadline for the opposition, or another request to make the otherwise untimely motion timely.

On April 14, 2021, Respondent moved to strike the amended opposition as untimely. The Court granted Respondent's motion on April 23, 2021. On April 26, 2021, Respondent filed its reply in support of its partial motion for summary decision.

On April 27, 2021, Complainants moved for the Court to reconsider its Order striking Complainants' amended opposition. In the alternative, Respondent sought for the Court to reconsider the order striking Complainant Brown's declaration. Respondent opposed the motion for reconsideration, filing its opposition on April 27, 2021.

On March 11, 2022, the Court issued an order granting Respondent's motion for partial summary decision. *See* Brown v. Pilgrim's Pride Corp., 14 OCAHO no. 1379a (2022).[2] Since Complainant Brown's affidavit was stricken from the record, and Complainants presented no other evidence in response to the motion, the Court found that Complainants did not cite to any facts in the record to support their opposition. Id. at 4. The Court further rejected Complainants' argument that Respondent's declarant, whose testimony Respondent principally relies upon for its motion, is incompetent to testify. Id. at 4-6. The Court reasoned that Respondent's declarant's affidavit complies with the Federal Rules of Evidence 601-602, since she provided personal knowledge and testified that her bases of the knowledge arose from her employment as "Live Operations Manager" during the relevant time period of the complaint. Id. The Court noted that her position provides indicia of competency to speak about the activities of the business. Id.

[2] 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 specific entire volume. Pinpoint citations to OCAHO precedents after volume eight, 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 through the Westlaw database "FIM OCAHO," the LexisNexis database "OCAHO," and on the United States Department of Justice's website: https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

Next, the Court rejected Complainants' argument that consideration of the motion should be delayed until Complainants have had further opportunity to develop the record through discovery. Id. at 6-9. The Court explained that Complainants have not made a proper motion under Federal Rule of Civil Procedure 56(d) to delay consideration of the motion. Id. The Court explained that Complainants did not provide an affidavit supporting its Rule 56(d) motion, and did not specifically demonstrate how postponing consideration of the motion will enable them, by discovery or other means, to rebut Complainants' showing of the absence of a genuine issue of material fact. Id. Rather, Complainants relied on vague assertions that additional discovery will produce necessary facts to survive the motion. Id.

The Court next considered Complainants' primary challenge to the merits of Respondent's motion – that Respondent was a joint employer of its contractor's employees who functionally replaced Complainants' in their positions. Id. at 15-17. After evaluating several relevant factors, as articulated by the Eleventh Circuit (the controlling circuit law in this case), the Court found that the balance of the factors, and the overarching factor of control, firmly resolve against a finding of a joint employer relationship. Id.

Finally, the Court considered Respondent's argument that Complainants cannot demonstrate the fourth prong of the prima facie case – that Complainants were each replaced by a person not in their protected class, or more generally that there is indicia of a nexus between Complainants' citizenship status and the adverse employment actions. Id. at 17-19. The Court held that Complainants have not provided any admissible evidence to suggest that there is a material question of fact on this issue. Id. The Court lastly directed the parties to advise the Court on whether, having granted the motion for partial summary decision, there are any remaining issues for the Court to consider in this matter. Id. at 19.

In response to the Order on Motion for Partial Summary Decision, both parties filed status reports on March 31, 2022.

On April 8, 2022, Complainants filed a Motion to Alter, Amend, and/or Reconsider Order Granting Respondent's Motion for Summary Decision ("Mot. to Alter or Amend Summ. Dec."). On April 18, 2022, Respondent filed an Opposition to the Motion. Further, on May 2, 2022, Complainants' filed a motion for leave to file a reply in support of their motion. The Court granted Complainants' motion for leave to file a reply on July 29, 2022. *See* Brown v. Pilgrim's Pride Corp., 14 OCAHO no. 1379b (2022).

Due to the questions raised in Unite States v. Arthrex concerning the authority of Administrative Law Judges to issue final orders on non administrative matters, the court delayed issuing a ruling on this present matter and several other cases which were subject to a formal stay of proceedings. United States v. Arthrex, Inc., 594 U.S. 1 (2021) (holding that unreviewable authority by an Administrative Patent Judge is incompatible with that Judge's status as an inferior

officer); *see also* Rodriguez Garcia v. Farm Stores, 17 OCAHO no. 1449, 1 (2022) (citation omitted). On October 12, 2023, the Department of Justice issued an interim final rule providing that cases arising under 8 U.S.C. § 1324b are subject to administrative review by the Attorney General, resolving the concerns raised in Arthrex, Inc. *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). As a result, this Court may address questions raised in the motion for reconsideration.

II. LEGAL STANDARDS

A. Motion for Reconsideration of Interlocutory Order Under Rule 54(b)

"OCAHO's Rules of Practice and Procedure do not contemplate motions for reconsideration of interlocutory orders."[3] *see* A.S. v. Amazon Webservices Inc., 14 OCAHO no. 1381b, 2 (2021) (citing Ogunrinu v. Law Resources, 13 OCAHO no. 1332b, 4 (2019)). Nevertheless, OCAHO case law has long recognized its authority to entertain motions for reconsideration of interlocutory orders pursuant to the Federal Rule of Civil Procedure 54(b). *See, e.g.*, Griffin v. All Desert Appliances, 14 OCAHO no. 1370b, 10 (2021) (citing United States v. Rose Acre Farms, Inc., 12 OCAHO no. 1285a, 1 n.1 (2018)); Amazon Webservices Inc., 14 OCAHO no. 1381b, at 2; United States v. Diversified Tech. & Servs. of Va. Inc., 9 OCAHO no. 1098, 1 (2003); United States v. WSC Plumbing, Inc., 9 OCAHO no. 1071, 7-8 (2001). *See also* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by [OCAHO's] rules . . . ."). The Federal Rule of Civil Procedure 54(b) provides that "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

The Court has broad discretion in determining whether reconsideration is warranted in a particular matter. *See* Griffin, 14 OCAHO no. 1370b, at 11; *accord* Amazon Webservices Inc., 14 OCAHO no. 1381b, at 2. Relief upon reconsideration pursuant to Rule 54(b) is available "as justice requires." *See* DL v. District of Columbia, 274 F.R.D. 320, 324 (D.D.C. 2011); *see also* Amazon Webservices Inc., 14 OCAHO no. 1381b, at 2; Ogunrinu, 13 OCAHO no. 1332b, at 4.

Federal Courts generally consider the following as grounds for reconsideration: 1) intervening change in controlling law; 2) new evidence previously unavailable; and 3) need to correct clear error or prevent manifest injustice. *See, e.g.*, Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P., 590 F.3d 381, 389 (6th Cir. 2009) (citation omitted); Off. Comm. of

[3] Under 28 C.F.R. § 68.2, "[i]nterlocutory order means an order that decides some point or matter, but is not a final order or a final decision of the whole controversy; it decides some intervening matter pertaining to the cause of action and requires further steps to be taken in order for the Administrative Law Judge to adjudicate the cause on the full merits."

Unsecured Creditors of Color Tile, Inc., v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003); Adams v. Boeneman, 335 F.R.D. 452, 454 (M.D. Fla. 2020); *see also* Carlson v. Boston Sci. Corp., 856 F.3d 320, 325 (4th Cir. 2017) (similarly listing the factors as: "(1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice.").

B. Motion to Alter or Amend a Judgment Under Rule 59(e) and Rule 60(b)

While OCAHO's Rules of Practice and Procedure also do not specifically provide for motions analogous to Federal Rules of Civil Procedure 59(e) or 60(b), this forum has by practice entertained motions for reconsideration following the federal rules.[4] *See* Zajradhara v. Gig Partners, 14 OCAHO no. 1363d, 2 (2021); *see also* 28 C.F.R. § 68.1.

Federal Rule of Civil Procedure 59(e) provides for "[a] motion to alter or amend a judgment." Discretionary relief under Rule 59(e) is strictly limited to situations involving "newly-discovered evidence or manifest errors of law or fact." *See* Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)). "[C]ourts will not address new arguments or evidence that the moving party could have raised before the decision issued." Banister v. Davis, 590 U.S. 504, 508 (2020).

Federal Rule of Civil Procedure 60(b) permits "a party to seek relief from a final judgment, and request reopening of [its] case, under a limited set of circumstances." Kemp v. United States, 596 U.S. 528, 533 (2022) (quoting Gonzales v. Crosby, 545 U.S. 524, 528 (2005)). Under Rule 60(b)(1), a party may seek relief based on "mistake, inadvertence, surprise, or excusable neglect." Rules 60(b)(2) through (b)(5) provide other specific grounds for reopening judgment; however, none of these grounds apply in this matter. Grounds for reconsideration under Rule 60(b)(1) also includes "mistakes of law" made by a judge. Kemp, 596 U.S. at 533-34.

A Rule 59(e) motion "must be filed no later than 28 days after the entry of judgment[,]" and a Rule 60(b) motion "must be made within a reasonable time . . . after the entry of the judgment. . . ."

III. MOTION TO RECONSIDER ORDER TO STRIKE

The Court DENIES Complainants' motion to reconsider the Court's April 23, 2021 interlocutory order striking Complainants' "amended opposition" to the motion for summary

[4] Complainants also cite to Northern District of Georgia Local Rule 7.2(E). Since this rule is consistent with Federal Rule of Civil Procedure 59(e), and OCAHO's rules specifically provide for the Federal Rules of Civil Procedure to be used as a general guideline in situations not covered internally by OCAHO's rules, the Court will not cite to the local rule in its decision.

decision. Complainants have not presented sufficient grounds warranting reconsideration of the Court's prior order. The Court finds that there is no intervening change in controlling law, no new evidence previously unavailable, and no need to correct clear error nor prevent manifest injustice.

Complainants argue that the Federal Rule of Civil Procedure 12(f) only permits the Court to strike an "insufficient defense" or any "redundant, immaterial, impertinent, or scandalous matter." According to Complainants, since none of these grounds were presented in Respondent's motion to strike, the motion should have been denied. The Court disagrees. Federal Rule of Civil Procedure 12(f) permits the Court to strike "*from a pleading* an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (emphasis added). An opposition to a motion is not a "pleading" as defined under Federal Rule of Civil Procedure 7(a). *See, e.g.*, Jeter v. Montgomery Cnty., 480 F. Supp. 2d 1293, 1295-96 (M.D. Ala. 2007); Hall v. United of Omaha Lift Ins. Co., No. 10-cv-0012-MJR, 2011 WL 1256836, *1 (S.D. Ill. Apr. 3, 2011). Even OCAHO's more expansive definition of "pleadings," which includes "any motions, any supplements or amendments to any motions or amendments, and any reply that may be permitted to any answer, supplement, or amendment submitted to the Administrative Law Judge . . .", does not include an "opposition" to a motion as a pleading. *See* 28 C.F.R. § 68.2; *see also* United States v. Walmart Inc. (Bethlehem), 17 OCAHO no. 1475d, 4 (2023) (noting that "[g]iven that the Federal Rules treat the matter narrowly, the enumerated list defining pleadings in OCAHO's regulations which does not include opposition briefs to motions, and the general disfavor related to motions to strike, this Court is reluctant to stretch the reach of Rule 12(f) in this forum" to opposition briefs). Since Respondent moved to strike an untimely the opposition to a motion for summary decision, the type of "motion to strike" identified in Rule 12(f) is not applicable in this circumstance. Accordingly, Respondent did not need to present any of these grounds in its motion.

Moreover, the court's ability to strike a filing that fails to comport with its rules is part of the inherent power of the court to govern its proceedings. "The decision of the trial court to modify or enforce a pre-trial order will not be disturbed on appeal absent an abuse of discretion." Santiago v. Lykes Bros. S.S. Co., Inc., 986 F.2d 423, 427 (11th Cir. 1993). The court's scheduling orders "'control the subsequent course of the action unless modified by a subsequent order' Fed. R. Civ. P. 16(e), and may be modified only 'upon a showing of good cause.'" Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 (11th Cir. 1998). The normal remedy for a party which submits an untimely filing where the party fails to demonstrate good cause for amendment to a scheduling order is to strike the filing. Rogers v. Hartford Life & Accident Ins. Co., Civil Action 12-0019-WS-B, 2012 WL 2395194, *1 (S.D. Ala. June 22, 2012) (striking an untimely filed amended complaint); Will-Burn Recording & Pub. Co. v. Universal Music Grp. Records, Civil Action 08-0387-WS-C, 2009 WL 1118944 (S.D. Ala. April 27, 2009) (same).

Complainants argue that the original response was not deemed untimely, and the purpose of their subsequent filing was to amend the original response. Implicit in Complainants' argument is that they did not need to request leave to file their "amended opposition." The Court disagrees. Rule 28 C.F.R. § 68.1 et seq. invest the Administrative Law Judges with the responsibility to

manage the cases before them, including setting reasonable deadlines for the submission of dispositive motions and for their responses. These deadlines would be meaningless, and the court would be unable to maintain the efficacious administration of the proceedings before it, if a party could ignore a court-imposed deadline by tardily submitting an "amended filing" without leave of court.

To state it plainly: the Court will not accept a late-filed submission, filed without leave of court, under the grounds that it is an amended filing pursuant to 28 C.F.R. § 68.9(e). The Court is unaware of any precedent in this forum allowing for such a result, and Complainants have not identified such precedent. In this forum, a party must request leave of court to change the contents of a previously filed document, other than a complaint or other pleading. Moreover, if an Administrative Law Judge permits a party to change the contents of a previously filed document after the date upon which the document is due, the result is not an amended document; rather, the result is a new filing entirely.

Complainants also argue that the amended opposition should be accepted because Respondent previously filed an amendment to a motion which the Court did not strike from the record (i.e. "Pilgrim's Corrected Response to Complainants' Motion to Extend Time to Respond to Respondent's Motion for Summary Decision and Motion for Protective Order" and "Corrected Declaration of Sylvia Bokyung St. Clair). Complainants further argue that the Court has considered a "letter motion" submitted by Respondent in a form that violates 28 C.F.R. § 68.7(a). Accordingly, Complainants argue that the Court should afford the same leeway to Complainants as a matter of fairness.

Complainants' arguments fail to account for the fact that Respondent's motion was timely filed, and that Complainants did not object to Respondent's "letter motion" either by form or substance. By contrast, when Complainant filed its amended opposition Respondent filed a timely objection and motion to strike Complainants' submission the very same day that the document was filed. Complainants' failure to assert a timely objection does not entitle it to "extra leeway" with regards to its own procedural defects.

Complainants further assert that the amendments in the "amended opposition" were minor and did not change the substance of Complainants' arguments. Reviewing the submission, the Court finds that the alterations were lengthy and significant, including new legal arguments and new factual claims — belying the suggestion that the alterations were to correct a scrivener's error or a minor inconsistency.

Complainants' amended response included significant additions and changes to the initial response, including: (a) Complainant Brown's declaration, which was cited to in the initial response but not attached, (b) additional statements from Mr. Brown, (c) additional legal arguments not asserted in the original response, and (d) a citation to Verbraeken v. Westinghouse

Elec. Corp., 881 F.2d 1041, 1045-46 (11th Cir. 1989). These many alterations to the "original opposition," including new legal arguments and new evidence, were untimely filed.

Next, Complainants argue that they demonstrated good cause for their untimely "amended opposition" and it contains "new evidence previously unavailable." In the context of responding to a motion for summary decision, "absent an affirmative showing by the non-moving party of excusable neglect according to Rule 6(b) [of the Federal Rules of Civil Procedure] a court does not abuse its discretion when it refuses to accept out-of-time affidavits." Farina v. Mission Inv. Trust, 615 F.2d 1068, 1076 (5th Cir. 1980) (internal citation omitted). Complainants cite to their statement in the Notice of Filing at ¶ 3, "Mr. Brown's Declaration is being submitted late because counsel was unable to contact him despite diligent efforts. Counsel was finally able to contact him on April 12th and able to meet with him on April 13th so that he could execute the Declaration." Respondent argues that "[i]f the declaration did not comply with Section 68.38(b), Complainants should have sought leave to extend the time to file their response once Mr. Brown executed his declaration, but they chose instead to submit their April 10 Response, all the while knowing that they were submitting a filing to this Court that had no evidentiary support." Resp. to Mot. to Reconsider ¶ 3.

The Court agrees with Respondent that Complainants did not demonstrate excusable neglect, or good cause, because they should have sought a sufficient extension on April 10, 2021, if the declaration did not comply with 28 C.F.R. § 68.38(b). A determination of whether a party's neglect of a deadline is excusable is an "equitable decision turning on 'all relevant circumstances surrounding the party's omission.'" Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993)). Such relevant circumstances include the "danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id.

Complainants' motion for summary decision heavily cites to Mr. Brown's declaration and relies upon it for factual support. If this evidence was unavailable by the twice-extended deadline for responding to a dispositive motion, Complainants should have sought an extension of time necessary to obtain this declaration. However, Complainants' motion for an extension, filed on April 13, 2021,[5] merely sought a one-day extension to file the response. Moreover, it appears to the Court that Complainants' counsel sought to obtain Mr. Brown's declaration on the day that the response in opposition to the motion for summary decision was due. *See* Mot. to Reconsider *2 ("Mr. Brown works long hours in a blue-collar job in a rural part of north Georgia and *was working on April 10, 2021*. []Counsel just became aware of the fact that Mr. Brown was working on the 10th.[] Also, Mr. Brown is not the most technologically savvy individual."). Complainants'

[5] This motion was submitted on April 10, 2021, and received by the Court on April 13, 2021.

counsel represented in this motion that it has had "difficulty contacting some of the Complainants to present evidence responsive to the [motion for summary decision]," and "[t]his has also hindered counsel's ability to timely file an of Complainants' responsive materials." Thus, it is clear that Complainants' counsel was aware of this issue prior to filing the response, but nevertheless filed the response without providing the affidavit upon which it is factually predicated. The Court does not find that this constitutes excusable neglect for Complainants' late-filing.

Complainants also argue that Respondent was not prejudiced by Complainants' April 14, 2021, filing because Respondent had 12 days after April 14, 2021, to file a reply brief. Complainants contend that Respondent was given a chance to file a brief that is not normally permitted by OCAHO's rules and had more time to respond than is typically afforded under those rules. The Court agrees in part with Complainants that Respondent has not demonstrated that it would be prejudiced by the late-filed opposition. However, the Court still finds that this is insufficient to constitute "excusable neglect" for their failure to comply with the deadlines. Although prejudice is relevant to whether there was excusable neglect, "the primary focus is on the [late-filing party's] reasons for not complying with the time limit in the first place." *See* MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1097 (3d Cir. 1995).

Lastly, Complainants argue that, even if the Court does not grant the motion to reconsider in its entirety, it should reconsider its order by accepting Mr. Brown's declaration into the record. Complainants assert that Mr. Brown's declaration was not untimely filed because it was served at least 7 days before the May 6, 2021, hearing. This planned hearing was set in the Court's Order Memorializing Prehearing Conference filed on March 25, 2021. However, the Court cancelled this planned hearing in an order dated May 4, 2021. Complainants assert that, under Federal Rule of Civil Procedure 6(c)(2), "[a]ny affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the Court permits service at another time." Thus, Complainants argue that not considering Mr. Brown's signed declaration would constitute clear legal error.

Respondent counters that Complainants' reliance on Federal Rule of Civil Procedure 6(c)(2) is misplaced, as it is not the appropriate rule for a motion for summary decision or summary judgment. The Court agrees. Rule 56 of the Federal Rules and Section 68.38 of the Code of Federal Regulations are the applicable rules for these circumstances, not the rules addressing the timeframe for the submission of an affidavit at a trial on the merits of a claim.

IV. MOTION TO ALTER OR AMEND ORDER ON PARTIAL SUMMARY DECISION

The Court also DENIES Complainants' motion to alter or amend the Court's Order on Partial Summary Decision. Complainants have not presented sufficient grounds warranting an alteration, amendment, or reconsideration of the Court's prior order. The Court finds that there is

no intervening change in controlling law, no new evidence previously unavailable, and no need to correct a mistake in law.

A motion under Rule 59(e) cannot be used "to relitigate old matters, raise argument[s] or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v. Vill. of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005). Complainants' motion is largely composed of arguments it failed to present prior to the entry of partial summary decision or arguments that were properly rejected by the Court.

Complainants first argue that the Court "committed plain error by finding that Ashley Hall's affidavit demonstrated that she had personal knowledge about what went on 'on the ground' with Pizano's Catchers." Mot. to Reconsider Summ. Dec. 2-6. Complainants assert that Ms. Hall did not affirmatively show that she was competent to testify about the "on the ground" activities of Pizano's Catchers. Id. at 3. Specifically, Complainants contest the Court's findings that she had personal knowledge because "(1) the Catching and Loading Agreement ("Agreement") told her what happened on the ground, and she was permitted to essentially read the Agreement into the record by virtue of the business records exception to the hearsay rule, . . . (2) her knowledge about what happened on the ground could be "readily inferred" from her title and number of years she had held that title, . . . and (3) Complainants didn't present any evidence that Hall didn't have personal knowledge about what happened on the ground." Id.

The Court disagrees that it misapplied the law in finding that Ms. Hall's affidavit demonstrated that she had personal knowledge about the "on the ground" activities with Pizano's Catchers. First, the Court did not find that the Agreement told Ms. Hall what happened on the ground, and it did not permit her to read the Agreement into the record by virtue of the business records exception to the hearsay rule. Ms. Hall's statements in paragraph 10 of her affidavit was not considered in assessing the joint employment inquiry. *See* Brown, 14 OCAHO no. 1379a, at 13-15. The Court specified that paragraphs 11 through 13, in which Hall does not reference the contract, are the only statements that describe retroactive events, and therefore only those statements were considered in the joint employment inquiry. Id. at 13.

Second, the Court did not commit plain error by finding that Ms. Hall's knowledge about what happened on the ground could be "readily inferred" from her title and number of years she held that title. Complainants assert that her knowledge "cannot be 'readily inferred'" because it was presumably "not within her sphere of observation." Mot. to Reconsider Summ. Dec. 5. Complainants argues that a management or executive-level employee's competency to speak about corporate policies does not extend to the live "on-the-ground" operations. Id. Complainants further likens the relationship between Ms. Hall, a "Live Operations Manager," and a "chicken catcher," to a Delta Airlines CEO and Delta security officer. Id. As an initial matter, Complainants are asserting new arguments here that could have been, but were not, presented prior to the entry of partial summary decision. Nevertheless, the Court finds the analogy unconvincing. The title of a "Live Operations Manager," on its face, readily appears to be a position that would have

responsibility, and an implied awareness, of the live operations and actions of its employees at a chicken house. This is not the same as a CEO and a security officer. To the third point, it was Complainants burden to present evidence that Ms. Hall's position did not entail an awareness of the live operations of the factory she manages. Complainants failed to offer evidence which created a triable question of fact. Further it is simply not a reasonable inference that a "Live Operations Manager" would not know about the live operations of the factory she manages.

The Court also rejects Complainants' argument that the Court "committed plain error by inferring that Paragraphs 11-13 of Hall's affidavit applied to the period before August 15, 2019." Mot. to Reconsider Summ. Dec. 6-8. Complainants assert that the Court "inexplicably" found that Paragraphs 11-13 apply to the whole of Respondent's work experiences with Pizano's catchers, as to do so, the Court had to infer that the use of the present tense in these paragraphs also applied to the past, and such an inference should be made in favor of the nonmoving party. Id. at 7 (citing, inter alia, United States v. Allen, 842 F.2d 1265, 1266 (11th Cir. 1988) (reversing district court's grant of motion for acquittal notwithstanding jury verdict of guilty, finding a reasonable inference existed that an examiner's investigation covered not only the present, but a past date)). Complainant argues that an inference that Paragraphs 11-13 applied only from August 15, 2019 forward, and that the separation from Paragraphs 9 and 10 is "simply for the sake of readability and not because its content applied to a time before the Agreement," is a reasonable one. Id. at 8. Complainant argues that the Court's reliance on Michael Swan's *Practical English Usage* was misplaced, as it is the only decision on the LexisNexis database citing to this source. Id.

The Court does not find that Complainants have shown the Court committed plain error: as the Court explained in its decision, unlike in Paragraph 10, in Paragraphs 11-13, Hall provides no words of limitation linking the conditions she describes to a particular time. Brown, 14 OCAHO no. 1379a, at 13-14. Therefore, to conclude that it only applied to the time period after August 15, 2019 would be mere speculation, rather than a reasonable inference in favor of the non-moving party.[6] As to the Court's citation to *Practical English Usage*, Complainants have not argued that the source is incorrect or unreliable, and in any event, other sources likewise support the proposition that the present tense often refers to habitual activities beginning in the past. *See, e.g.*, Present Tense, Oxford English Dictionary, (2023) ("A tense expressing an action now going on or habitually performed, or a condition now existing or considered generally without limitation to any particular time.").

[6] The Court does not find Complainants' cite to United States v. Allen, 842 F.2d 1265, 1266 (11th Cir. 1988) persuasive that the Court should make the inference that the Paragraphs 11-13 applied only after August 2019. In that case, the Eleventh Circuit found that it was a reasonable inference exists that a Bureau of Alcohol, Tobacco, and Firearms (BATF) examiner's investigation covered not only the "date of issue of the BATF certificate," but also a past date, as "[i]n effect, the certificate states that there has been no registration . . . of a weapon of that description at any time" and "[c]ommon sense indicates that if the device were registered in the past, that device would still appear as of February 15, 1985, on the record as registered with the Bureau." Id. at 1266. Here, in contrast, an assumption that the Hall affidavit only covered the period after August 2019 would be speculation, not a reasonable inference.

Complainants further contend that the Court "committed plain error by finding that Pilgrim didn't jointly employ Pizano's Catchers before August 15, 2019." Mot. to Reconsider Summ. Dec. 8-9. Complainants argue that the Hall affidavit contains no admissible evidence regarding Respondent's control over Pizano's catchers for the period before August 15, 2019, and therefore, it was plain error for the Court to rely on Paragraphs 11-13 to find that Respondent did not jointly employ Pizano's catchers before that date. Id. Given that the Court rejects Complainants' argument that it made an error of law by finding that Paragraphs 11-13 applied to the period before August 15, 2019, the Court likewise rejects this argument.

Next, Complainants assert that the Court "committed plain error by finding that Pilgrim had argued that 'there is no other evidence which might link Complainants' termination to their citizenship status.'" Mot. to Reconsider Summ. Dec. 9. Complainants argue that they had no obligation to offer admissible evidence on this issue, and there has not been adequate time for discovery. Id. The Court rejects this argument. As discussed in the Order on Motion for Partial Summary Decision, the Court found that Respondent's evidence showed that Respondent and Pizano were not joint employers during the relevant time frame, and therefore Respondent's abolition of the employee catcher positions did not itself create an inference of discrimination to satisfy the fourth element of a prima facie case. Accordingly, Complainants' Rule 56(d) request was deficient. Brown, 14 OCAHO no. 1379a, at 16-18. Therefore, there was no question of material fact as to the final element of the prima facie case. Id. In doing so, the Court acknowledged that Complainants need not show that they were replaced by individuals outside of their protected class, but "must at the very least provide circumstantial evidence that permits a logical inference of discrimination." Id. at 18.

Complainants next argue that the Court committed plain error by disregarding Complainant Brown's declaration in its analysis of the joint employment inquiry, and assert that the Court committed plain error or manifest injustice by not granting Complainants' request for relief under the Federal Rule of Civil Procedure 56(d). Mot. to Reconsider Summ. Dec. 9-13. These arguments are rejected for the same reasons as Complainants' motion to reconsider the Court's April 23, 2021, interlocutory order striking Complainants' "amended opposition" to the motion for summary decision.

V. CONCLUSION

Complainants' motion for reconsideration of the Court's April 23, 2021, interlocutory order striking Complainants' "amended opposition" to the motion for summary decision is DENIED. Complainants' April 8, 2022 Motion to Alter, Amend, and/or Reconsider Order Granting Respondent's Motion for Summary Decision is DENIED.

After the Court granted Respondent's Motion for Partial Summary Decision, the Court ordered both parties to file status reports on whether there were any remaining issues for the Court

to consider. Respondent informed the Court that there were not, and Complainants asked the Court to rule on their two motions to reconsider. Now that the Court has ruled on the two pending motions, and given the parties' representations in their status reports that there are no remaining issues in this case, the Complaint is hereby DISMISSED. This is an appealable Final Order.

SO ORDERED.

Dated and entered July 11, 2024.

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John A. Henderson
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. *See* 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.