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

October 24, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00005
EMPLOYER SOLUTIONS STAFFING GROUP II, LLC, Respondent.	)	

ORDER GRANTING ICE'S MOTION TO COMPEL AND DENYING EMPLOYER SOLUTIONS' MOTION FOR PROTECTIVE ORDER

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a four-count complaint alleging that Employer Solutions Staffing Group II, LLC (Employer Solutions, ESSG II, or the company) engaged in 243 violations of 8 U.S.C. § 1324a(a)(1)(B). Employer Solutions filed a timely answer, prehearing procedures were undertaken, and a schedule was set out calling for discovery to close on August 15, 2014, dispositive motions to be filed on or before September 15, 2014, and responses to be filed by October 15, 2014.

Shortly after the close of discovery, the government filed a motion to compel, and Employer Solutions requested and was granted an extension of time to file a response. The company's response was filed on September 24, 2014, and was accompanied by a motion for protective order. ICE filed a reply and both motions are ready for resolution.

II. ICE'S MOTION AND EMPLOYER SOLUTIONS' RESPONSE

ICE's motion reflects that the government served the company with interrogatories and requests for production of documents on June 26, 2014. Pursuant to 28 C.F.R §§ 68.19(b), 68.20(d), the company's responses were due on or before July 28, 2014. Employer Solutions sent an email to the government on July 16, 2014 stating that the company was "working on responses" and that "several of [the government's] requests are generally excessive, overbroad, unduly burdensome and not reasonably related to the matters at issue in this litigation." The email requested a thirty-day extension of time for responding to the discovery requests.

The government responded by fax on July 23, 2014 observing that the company's email did not identify which of its discovery requests the company found objectionable, and declining to extend the period. ICE asked the company to identify the particular requests it found objectionable. ICE then sent the company another faxed letter on July 30, 2014 stating that it still had not received a description of which discovery requests the company found objectionable, and requesting that the company respond to the requests in accordance with OCAHO rules. Employer Solutions responded by fax on July 31, stating that the company "should have thorough responses along with objections to [ICE] within the next two weeks." The letter also requested an extension of the previously established deadlines for responses, discovery, and dispositive motions.[1] When more than three weeks had passed without any further response the government filed its motion to compel. The motion was accompanied by exhibits consisting of A) the discovery requests (20 pp.); B) respondent's email dated July 16, 2012; C) fax letter from ICE to respondent dated July 23, 2014 (2 pp.); D) fax letter from ICE to respondent dated July 30, 2014 (2 pp.); and E) fax from respondent to ICE dated July 31, 2014.

ESSG II's response to the motion still did not answer any of the interrogatories or produce any documents. The response denied that the government had conferred in good faith, and reiterated the company's assertions that the requests were excessive, overbroad, unduly burdensome, and not reasonably related to the matters at issue in this litigation. The company requested an order relieving it from having to respond to ICE's requests, or, in the alternative, limiting discovery to twenty-five interrogatories and ten requests for production, and to "documents, information, and time periods relevant to the subject matter of this proceeding." The company's response said that "what is good enough for federal court litigation should be good enough for OCAHO cases" and that Fed. R. Civ. P. 33(a)(1) should control. The response incorporated a motion for a protective order based on the same arguments. No affidavits or exhibits accompanied the company's filing.

[1] The schedule in question was established by a judicial order dated April 17, 2014; this order is not susceptible to alteration or amendment by the parties, even were they to mutually consent.

III. STANDARDS APPLIED

The scope of discovery under OCAHO rules[2] extends to any relevant information that is not privileged. 28 C.F.R. § 68.18. A party receiving discovery requests must either answer the requests or state the reasons for objection within thirty days of receipt. See 28 C.F.R. §§ 68.19(b), 68.20(d). The objecting party must articulate its objections in specific terms and has the burden to demonstrate that its objections are justified. *United States v. Allen Holdings, Inc.*, 9 OCAHO no. 1059, 5 (2000).[3] Generalized or conclusory recitations of the familiar litany that discovery requests are overbroad, unduly burdensome, and irrelevant are not sufficient to constitute proper objections, *id.*, *citing McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990), and an evasive or incomplete response to discovery may be treated as a failure to respond. 28 C.F.R. § 68.23(d).

The party resisting discovery has the burden of demonstrating that an objection is justified, *see United States v. Westheimer Wash Corp*., 7 OCAHO no. 989, 1042, 1045 (1998), and a failure to make timely objection or to adequately state the reason therefor constitutes a waiver of the objection. *Id*. *See also In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989) (stating general rule that when a party fails to object timely to discovery requests, objections thereto are waived). *See also* Fed. R. Civ. P. 33(b)(4) (any ground not stated in a timely objection is waived unless excused for good cause shown).[4]

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[2] See Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2013).

[3] 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.

[4] While Fed. R. Civ. P. 34 does not explicitly state that objections to document requests are similarly waived if not timely asserted, many courts hold the waiver implied. *See, e.g.*, *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 685 (S.D. Fla. 2012); *Horace Mann Ins. Co. v. Nationwide Mutual Ins. Co*., 238 F.R.D. 536, 538 (D. Conn. 2006). Courts are divided, however, as to whether objections based on privilege may be waived. *See Ayers v. Cont'l Cas. Co*., 240 F.R.D. 216, 222-23 (N.D. W. Va. 2007)

OCAHO rules provide further that upon motion by a party from whom discovery is sought and a showing of good cause, an administrative law judge may issue an order protecting a party from annoyance, harassment, embarrassment, oppression, or undue burden and expense. 28 C.F.R. § 68.18(c). *See In re Investigation of Conoco, Inc*., 8 OCAHO no. 1049, 738, 743 (2000). The party seeking a protective order has the burden of showing that good cause actually exists. *In re Terra Int'l, Inc*., 134 F.3d 302, 306 (5th Cir. 1998). That showing must be based on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. *Id*.

A party seeking to compel a response to discovery must include in its motion the nature of the request, the objections of the responding party, arguments in support of its motion, and a certification of good faith attempts to resolve the dispute without action by the Administrative Law Judge. 28 C.F.R. § 68.23(b).

IV. DISCUSSION

The government's motion to compel is timely because it was filed promptly within a matter of days of the close of discovery. The motion is procedurally inadequate, however, because it lacks the certification required by 28 C.F.R. § 68.23(b). Ordinarily the absence of such a certification would call for a pause in the proceedings to permit the parties to confer, *see United States v. Durable, Inc*., 11 OCAHO no. 1221, 4 (2014), but here review of the record makes clear that under the circumstances of this case any such an effort would be an exercise in futility, and would serve only to cause further unproductive delay when there has already been an excess of unproductive delay.

I granted the company's motion for an extension of time to respond to the motion to compel based on ESSG II's representation that it was "diligently working" to provide a detailed response to the government. Nevertheless and despite the extension the company has still failed to answer a single interrogatory or produce a single document, and declines even to answer such a simple question as to whether it employed certain named individuals after February 18, 2008. Remarkably, the response simply elaborates further on the company's formulaic conclusions that all the requests are voluminous, unduly burdensome, and irrelevant, and that it should not be required to respond at all.

While ESSG II is correct in stating that the government's discovery requests are voluminous, there are 243 separate violations alleged in this case and the inquiry as to whether each of these individuals worked for the company accounted for 243 of the subparts. As explained in *Casson Constr. Co. v. Armco Steel Corp*., 91 F.R.D. 376, 382 (D. Kan. 1980), the more events or

individuals that are involved in a case, the more burdensome the discovery will be. Contrary to ESSG II's generalized conclusions, moreover, whether and for what periods these individuals were employed by the company is information patently relevant to the issues involved in this case because the hiring and termination dates of former employees are necessary in order to establish whether the employer still had a duty to retain I-9s forms for them.

Because the company's initial response to the government's discovery was so broad as to be meaningless, ESSG II failed to comply with OCAHO rules requiring specific answers and documents or proper objections within thirty days of service. 28 C.F.R. § 68.19(b). Employer Solutions' generic boilerplate response was tantamount to no response at all, and ESSG II has accordingly waived its objections. I decline to consider any matters raised for the first time in response to the motion to compel because a party is not at liberty to withhold its objections until it is required to respond to a motion to compel. *United States v. Autobuses Ejecutivos, LLC*, 11 OCAHO no. 1220, 4 (2014).

Contrary to ESSG II's suggestion, Fed. R. Civ. P. 33(a)(1) has no controlling effect in this forum, although the federal rules may be used "as a general guideline in any situation not provided for or controlled by [OCAHO] rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. *See Avila v. Select Temporaries, Inc.*, 9 OCAHO no. 1078, 3 (2002). A motion for a protective order was overruled for precisely this reason in *United States v. Ojeil and Ishk*, 7 OCAHO no. 976, 904, 907-908 (1997), because OCAHO's rules do not impose numerical limits on number of interrogatories that may be propounded. *See also United States v. Ulysses, Inc.*, 2 OCAHO no. 390, 732, 735-36 (1991) (stating that reference to the federal rules is not in order when the matter is covered by OCAHO rules, citing *United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 274, 1771, 1780 (1990) (action by CAHO vacating ALJ order purporting to follow federal rules). No affidavits, exhibits, or documentary evidence accompanied ESSG II's motion for a protective order, which was based on stereotyped and conclusory statements rather than a particular and specific demonstration of fact. *Cf. Scruggs v. Int'l Paper Co.*, 278 F.R.D. 698, 702 n.6 (S.D. Ga. 2012). Argument of counsel or sweeping unsupported allegations in a brief or memorandum are not evidence and do not serve to demonstrate facts. *Cormia v. Home Care Giver Servs.*, 10 OCAHO no. 1160, 4 (2012).

The company has in any event waived the right to move for a protective order by failing to make timely and specific objections to ICE's interrogatories and requests for production. Although ESSG II purports to rely on the protective order issued in *Durable*, 11 OCAHO no. 1221 at 4, the company neglects to mention that the employer in that case did answer the interrogatories and request for production, and did make specific objections to interrogatories and document requests related to nonparties and to periods beyond the temporal scope of the events in question. Employer Solutions is in no way similarly situated to the company in that case.

While Employer Solutions may well be correct that some of the government's interrogatories and document requests are excessive, overbroad, unduly burdensome, or irrelevant, we will never know which those are, because the company still failed to explain adequately and I decline to undertake the task of combing through the discovery requests in order to determine independently which of them are and which are not. *Cf. Essex Ins. Co. v. Neely*, 236 F.R.D. 287, 291 n.2 (N.D. W. Va. 2006) (compelling responses to discovery requests that were unrelated to issues in the case where objections had been waived); *Cephas v. Busch*, 47 F.R.D. 371, 372-73 (E.D. Pa. 1969) (finding objections waived even though information sought was irrelevant and some interrogatories were harassing and vexatious). *See also Safeco Ins. Co. of America v. Rawstrom*, 183 F.R.D. 668, 669 (C.D. Cal. 1998) (stating that"[e]ven if some or all of defendant's objections were meritorious, it would make no difference because defendant's objections were waived").

ORDER

The government's motion to compel is granted and Employer Solutions is hereby ordered to provide responses to ICE's interrogatories and requests for production within fifteen days of the date of this order. The company's motion for a protective order is denied.

The schedule previously issued is vacated. Dispositive motions may be filed on or before December 12, 2014. Responses will be timely if filed on or before January 12, 2014. No extensions will be granted.

SO ORDERED.

Dated and entered this 24th day of October, 2014.

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Ellen K. Thomas
Administrative Law Judge