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Issue Date: 03 May 2010

CASE NO.: 2010-TAE-00002

In the Matter of:

GLOBAL HORIZONS, INC. and
MORDECHAI ORIAN,
Respondents.

ORDER DENYING RECONSIDATION ON SUMMARY DECISION AS TO RESPONDENT ORIAN

On April 5, 2010, I granted Respondent Orian's motion for summary decision. I found that the Administrator had failed to offer any evidence to show that Mr. Orian individually was an employer within the meaning of the Act and had not advanced any other theory under which Mr. Orian could be liable. I rejected the Administrator's argument that he must be allowed additional time to take discovery prior to filing a substantive opposition.

On April 9, 2010, the Administrator moved for reconsideration. He explained that he had offered no evidence because he assumed that I would accept his argument that he needed more time. He argued, citing no authority: "It is reasonable for the Administrator to utilize the entire discovery period in order to prepare his case against Orian." He now offers evidence which he asserts would have been sufficient to resist summary decision had he offered it the first time around.

Orian opposes. He argues that the Administrator offers nothing newly discovered, that the evidence the Administrator offers fails to implicate Mr. Orian individually, that the Administrator had adequate time for discovery prior to filing an opposition, and that the Administrator concluded Mr. Orian's deposition on April 12, 2010 and has failed to supplement the record with any evidence discovered at that deposition.

I will deny the motion.

Legal standard.[1] Generally, motions for reconsideration are not aimed at providing a "second bite at the apple." *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3rd Cir. 1995)

[1] This Office has jurisdiction to reconsider an order granting summary decision where, as here, the motion to reconsider is filed within 10 days. An adjudicative body generally has inherent jurisdiction to reconsider its decisions, and the Administrative Review Board has found that such jurisdiction exists so long as the statute at issue and its implementing regulations do not limit it, and that reconsideration would not "'interfere with, delay or otherwise adversely affect accomplishment of the Act's . . . purposes and goals.'" *Henrich v Ecolabs*, ARB Case

(forum *non conveniens*). "Whatever other circumstances may justify reconsideration, mere presentation of arguments or evidence *seriatim* does not." *Id.* "Reargument 'should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided.'" *Id.* (citation omitted). "It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless." *Frietsch v. Refco. Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (Posner, C.J.).

Our procedural rules are silent about motions for reconsideration. As I noted in the Order Granting Summary Decision, where our procedural rules are silent, the Federal Rules of Civil Procedure for the U.S. District Courts apply. *See* 29 C.F.R. §18.1. Generally, under the Federal Rules, a motion for reconsideration of summary judgment filed, as this motion was, within 10 days of the initial decision is taken as a motion to alter or amend a judgment under Rule 59(e), F.R.Civ.P. *Zamani v. Carnes*, 491 F.3d 990 (9th Cir. 2007).

But the rule could differ where, as here, there are multiple defendants. This is because Rule 59(e) is addressed to judgments, and a "judgment" within the Federal Rules is an "order from which an appeal lies." F.R.Civ.P. 54(a). Under the Federal Rules, when there are multiple defendants, a final judgment may be entered as to some but fewer than all parties only "if the court expressly determines that there is no just reason for delay." F.R.Civ.P. 54(b). Otherwise, the order does not end the action "as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *Id.* That means that unless it contains an express determination of no just reason for delay, a judgment under the Federal Rules as to some but not all of the parties is not a final judgment; no appeal lies from it; and motions for reconsideration would not be proper under Rule 59(e).

The Office of Administrative Law Judges is not empowered to enter judgments as such. We enter orders, including orders granting or denying relief on the merits. But enforcement of those orders lies ultimately with the federal courts, which alone have the power to enter enforceable judgments. Thus, application of the Federal Rules to our administrative context requires some flexibility in construction.

In the present case, the Order on summary decision does not merely grant the motion: It dismisses Respondent Orian. But it does not expressly state that the dismissal reflects a determination that "there is no just reason for delay." It therefore is not entirely clear whether it is immediately appealable and thus that Rule 59(e) would apply.

No. 05-030 (5/30/2007) (Sarbanes-Oxley Act), *quoting Macktal v. Brown & Root, Inc.*, ARB Case Nos. 98-112 and 122A (11/20/1998).

I find nothing in the statute or its implementing regulations that would preclude reconsideration. There is no delay because the case remains pending against the corporate respondent in any event. If the Order Granting Summary Decision is immediately appealable, this Office will be deprived of jurisdiction at some point in time. But that time would not have run in the four days that ran between issuance of the Order and the Administrator's filing of the motion to reconsider. *See* Rules 59(e) and 60(b), F.R.Civ.P., and discussion in the text below.

If Rule 59(e) does not apply, then the motion is for relief from an order under Rule 60(b), F.R.Civ.P. To some extent the difference between the two rules is more apparent than real, for "A denial of a motion for reconsideration under Rule 59(e) is construed as one denying relief under Rule 60(b) and neither will be reversed absent an abuse of discretion." *Duarte v. Bardales,* 526 F.3d 563, 567 (9th Cir.2008) (citations omitted). And generally, "a motion for reconsideration of summary judgment is appropriately brought under either Rule 59(e) *or* Rule 60(b)." *Fuller v. MG Jewelry,* 950 F.2d 1437, 1442 (9th Cir. 1991) (emphasis added).[2]

But the analysis under the two Rules has some differences.

> Under Rule 59(e), it is appropriate to alter or amend a judgment if "(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law."

United National Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772 (9th Cir. 2009), *citing Zimmerman v. City of Oakland,* 255 F.3d 734, 740 (9th Cir.2001).[3] Rule 59(e) offers an "'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Carroll v. Nakatani,* 342 F.3d 934, 945 (9th Cir. 2003), *citing* 12 James Wm. Moore, *et al.*, MOORE'S FEDERAL PRACTICE § 59.30[4] (3d ed. 2000).

Somewhat different, relief under Rule 60(b) is appropriate on a showing of "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) . . .; or (6) any other reason that justifies relief." F.R.Civ.P. 60(b) (in pertinent part); *see United National Ins., supra*.

In the present case, I need not determine which of the two rules applies, for both rules lead to the same result. I will therefore address both.

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[2] If filed within 10 days of judgment, the motion generally will be taken as under Rule 59; otherwise, it will be taken as under Rule 60. *See Zamani v. Carnes*, 491 F.3d 990 (9th Cir. 2007), *citing Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir.2005). The moving party's labeling, whether under Rule 59 or 60 "is not dispositive. A motion filed within the ten-day period set by Federal Rule 59 may be construed as a Rule 59 motion though labeled according to another federal rule . . . ." *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989). Of course, if the motion does not address a "judgment" in the sense that no appeal lies from it, Rule 59(e) would not apply in any event. *See* text above.

[3] The Administrative Review Board has adopted a similar standard:

> In the absence of our own rule, we have adopted principles federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under similar limited circumstances, which include: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence; (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision; and (iv) failure to consider material facts presented to the court before its decision.

Knox v. U.S. Department of the Interior, ARB Case No. 07-105 (8/30/2007) at n. 58. As the Board has acknowledged, however, the relevant rules for this Office (OALJ) differ because they are controlled by 29 C.F.R. Part 18, including its incorporation by reference of the Federal Rules of Civil Procedure, as well as by the Administrative Procedures Act, none of which applies to the ARB.

No newly discovered evidence. Under Rule 60(b)(2), "A defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court." *Hopkins v. Andaya,* 958 F.2d 881, 887 (9th Cir. 1992) (collecting cases). A party's "failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence.'" *School District No. 1J v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993).

The analysis is the same under Rule 59(e). "A Rule 59(e) motion may not be used to raise arguments or present evidence that could reasonably have been presented earlier in the litigation." *Carroll v. Nakatani, supra,* 342 F.3d at 945 (rejecting appeal of denial of Rule 59(e) relief because party could have raised argument prior to the entry of summary judgment); *accord Exxon Shipping Co. v. Baker*, 544 U.S.__, 128 S.Ct. 2605, 2617 n. 5 (2008), *citing* 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §2810.1, pp. 127-28 (2d ed. 1995).

The Administrator here offers no newly discovered evidence. He offers: (1) an Application for Alien Employment Certification, dated September 28, 2004; (2) a certain Farm Labor Contract Agreement, dated June 17, 2004; (3) notes taken by a Department of Labor investigator on this case on May 16, 2005; (4) excerpts of a deposition of Mr. Orian that the Department of Labor took on July 9, 2009 in another matter; and (5) excerpts of another deposition of Mr. Orian, taken on June 2, 2006. Although the Administrator submits the declaration of counsel, counsel does not state that any of this evidence was newly discovered; certainly items (1), (3), and (4) were not. It is the Administrator's burden to establish that the evidence is newly discovered, and he has failed to do that.[4]

No mistake or excusable neglect.

> Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge that corrects the erroneous legal advice of counsel. For purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel. This includes not only an innocent, albeit careless or negligent, attorney mistake, but also intentional attorney misconduct.

Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1101 (9th Cir. 2006) (plaintiff accepting offer of judgment under attorney's advice, which advice was grounded on a mistake of law, not entitled to relief under Rule 60(b)(1)). A mistake of law, a "lawyer blunder," or a mistake based on advice of counsel is not a mistake within Rule 60(b)(1).[5]

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[4] Even evidence that reasonably *could have been discovered* is insufficient. *Hopkins v. Andaya,* 958 F.2d 881, 887 n. 5 (9th Cir. 1992).

[5] *Latshaw, supra,* at 1101, *citing Acevedo-Garcia v. Vera-Monroig,* 368 F.3d 49, 54 (1st Cir.2004); *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.,* 298 F.3d 586, 595 (6th Cir.2002); *Yapp v. Excel Corp.,* 186 F.3d 1222, 1231 (10th Cir.1999); *Cashner v. Freedom Stores, Inc.,* 98 F.3d 572, 577 (10th Cir.1996).

Here, the Administrator arguably relied on two attorney mistakes, neither of which are a basis for relief under Rule 60(b).[6] First, the Administrator's attorney failed to offer evidence in opposition to summary decision and instead decided to rely all but exclusively on an argument that the motion was premature. Attorneys are charged with knowledge that they must advance *all* arguments they choose to assert, not simply assume that their primary argument will be persuasive. If counsel had evidence to offer in opposition to summary decision, she should have submitted it timely as part of the opposition. Nothing about this distinguishes it from a routine mistake of counsel that does not fall within Rule 60(b).

Second, counsel now asserts that she made a mistake when she requested an extended deadline for filing the opposition: she should have asked for a due date later than the date she'd scheduled Mr. Orian's deposition, not before it.[7] The Administrator apparently asserts that this was excusable because counsel reasonably anticipated that she would have the entire discovery period – to the last possible day – before the Administrator would have to respond to a dispositive motion. Regardless of how confident counsel was in that argument, it does not excuse her failure to submit with the opposition the evidence that she did have – the same evidence that the Administrator advances now. But I reject this excuse in any event: It cannot be supported legally.

The time allowed a party to oppose summary decision is not all the time up to the discovery cut-off date; rather, it is simply the amount of time that is adequate. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). As the Supreme Court wrote:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after *adequate time* for discovery and upon motion, against a party who fails to make a

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[6] I find only that these *might possibly* have been mistakes. I have no way to know what counsel's strategic decisions were. Perhaps counsel offered no evidence in opposition to summary decision because, in her view, the Administrator did not have sufficient evidence, and she hoped some would develop. I simply assume that these were mistakes because, otherwise, they do not even arguably state a basis for relief under Rule 59 or 60.

[7] Respondent served the motion for summary decision on the Solicitor by mail on February 23, 2010. The opposition was due on March 10, 2010. *See* 29 C.F.R. §§ 18.4(c), 18.6(b). On March 3, 2010, the Solicitor moved to extend time. Counsel stated in a declaration that she was scheduling ten depositions within the next 30 days [*i.e.,* through April 2, 2010], was going to meet with potential witnesses "in the upcoming weeks," that Respondents were about to produce 17 banker boxes of documents for inspection and photocopying, and that Mr. Orian's deposition was set for March 31, 2010. Based on this, the Solicitor sought an extension of time *to March 26, 2010*. It was apparent that Mr. Orian's deposition and probably some of the other discovery would not be completed before the deadline counsel sought.

Granting the extension over Respondent's objection, I stated that I was granting the full time counsel sought because the pending motion was dispositive, and I wanted the Solicitor to have the time she needed to prepare a complete response. But, of course, that is not what she did; rather, she waited until the last day and filed a brief asserting that I should not decide the motion because she needed more time for the very discovery that she knew at the time she requested the extension that she would not complete even if granted the extension.

To explain, the Solicitor acknowledges that, "with hindsight" she realizes that she should have asked for a filing deadline *after* the scheduled deposition. Brief at 6. Were her conduct intentional, it would be sandbagging the court in an inexcusable manner. I do not believe that it was intentional, but still there's nothing on the record to suggest that this was anything more than a lawyer's mistake, or if seen as neglect, that the neglect is excusable. The requirements of Rules 59 and 60, F.R.Civ.P., apply regardless of whether counsel's error was intentional.

> showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. (emphasis added). Were I to accept the Administrator's argument, any party could resist summary decision simply by running out the clock, for the discovery cut-off is 14 days before trial, and our rules require that motions for summary decision be filed no later than 20 days before trial. *See* 29 C.F.R. §18.40(a).

If anything, our rules allow the non-moving party *less* leeway on time for discovery to oppose summary decision. As the applicable regulation provides: "The administrative law judge may deny the motion whenever the moving party *denies access to information* by means of discovery to a party opposing the motion." 29 C.F.R. §18.40(d) (emphasis added). The suggestion is that a party should be allowed additional time for discovery to oppose summary decision only if the moving party has obstructed discovery, something for which the present record offers no support.

Here, the Administrator offers no argument to show that, to be allowed adequate time, he had to be given until the discovery cut-off to file an opposition. He fails to respond to a central point in the initial ruling: the Administrator should have developed the evidence to implicate Mr. Orian in his individual capacity *before* he issued the notice of administrative determination and should not have needed *any* additional time to oppose summary decision on this narrow point. In addition to the pre-determination investigation, the Administrator had nearly five months for discovery after he referred the case to this Office. He was on notice that, if there were any discovery problems, he should promptly file a motion or just call the administrative law judge for a ruling. And when he requested an extension of time to file his opposition, he got all the time he asked for.

But I now find that the Administrator had significant other opportunity to investigate Mr. Orian's activities. In particular, I take official notice that beginning in 2002, the Wage and Hour Division and the Employment and Training Division have referred to this Office for adjudication thirty-two separate matters against Global Horizons, including the present action. Wage and Hour filed twelve of these. No fewer than thirty-one of them involve the employment of nonimmigrant workers.

In these other cases, the Administrator has had eight years to depose Mr. Orian repeatedly, take discovery, and investigate whether Mr. Orian acted as an employer in his individual capacity – as opposed to having acted as an officer or manager of Global Horizons. The evidence that the Administrator submitted on reconsideration shows that the Solicitor deposed Mr. Orian as recently as this past July 2009. I again conclude that the Administrator was afforded adequate time to make what should be a relatively simple showing that Mr. Orian acted as an individual, apart from his corporate role. I find that the Administrator shows no more than the routine attorney mistakes for which relief is unavailable on reconsideration.

Under Rule 59(e), no clear error or manifest injustice in the initial decision. While the Administrator might disagree with my decision that Respondent's motion was not premature, he points to no evidence on the record in the initial decision that I failed to consider, no error in my

factual findings, no authority that I failed to consider, and no authority that I misapplied. He offers nothing to suggest clear error or manifest injustice in the initial decision other than to reargue his contentions or present evidence that could have been raised prior to the order on summary decision and was not. That is not what Rule 59(e) was intended to address. *Id.*

Although I decide clear error or manifest injustice based on the record that was before me on the initial determination and look no further, in an abundance of caution I have considered the additional evidence now on the record and still find neither clear error nor manifest injustice. First, the Administrator has now concluded the deposition of Mr. Orian and has not supplemented the record with testimony from it. I can only infer that, had I allowed the Administrator time to take the deposition prior to filing his opposition, he would have offered no evidence from the deposition anyway.

Second, I find the Administrator's evidence offered for the first time on reconsideration to be insufficient to resist summary decision on the issue of Mr. Orian's liability for actions undertaken in his individual capacity.

To the extent that the Administrator's evidence directly addresses the capacity in which Mr. Orian acted, it consistently shows him acting as president of Global Horizons. When he signed documents, it was always as "President." When questioned about it directly at a deposition, Mr. Orian testified that he was acting as president of the company. Some of the evidence offers no basis from which to infer the capacity in which Mr. Orian was acting. But nothing about this evidence, without more, implies that he was acting for his separate, individual benefit, as opposed to that of Global Horizons, or that he was holding himself out as an individual and not as a corporate officer.

The Administrator brings this action against Mr. Orian in his individual capacity, not as an officer or manager of Global Horizons. He offers no argument that Mr. Orian is liable as an officer or manager. He has not asked to amend his pleadings to assert such a claim. Thus, even were I to consider the additional (not newly discovered and not excusably neglected) evidence, there is no indication of clear error or manifest injustice in the initial decision. And again, the Administrator has shown no grounds to have this evidence considered; the question of clear error or manifest injustice looks to the record at the time of the initial ruling, not *seriatim* post-decision offers. *Cf. Knox, supra* (relief is appropriate when the court failed to consider material facts that were "presented to the court *before* its decision," not for the first time on reconsideration – emphasis added).

No other grounds. Finally, the relief under Rule 60(b)(6), F.R.Civ.P., which is for "any other reason" that justifies relief "requires a finding of 'extraordinary circumstances.'" *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985), *citing McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir.1985); *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir.1981). Here, the Administrator offers nothing extraordinary that would allow relief under Rule 60(b)(6).

The other grounds for relief under Rules 59(e) and 60(b), F.R.Civ.P., are not even arguably applicable, and the Administrator offers nothing to the contrary.

Conclusion and Order

The Administrator has failed to show adequate grounds for reconsideration under the applicable standard. His motion is DENIED.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge