BEFORE THE UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

MALISSA HARMON,	:	
Complainant,	:	
v.	:	**Case No. 2021-SOX-00007**
INTELLIGRATED, INC. D/B/A HONEYWELL INTELLIGRATED	:	
Respondent.	:	

RESPONDENT'S MOTION TO SET ASIDE DEFAULT

COMES NOW, Respondent, Intelligrated, Inc. d/b/a Honeywell Intelligrated ("Respondent" or "Honeywell"), by and through undersigned counsel, and moves this Administrative Court to set aside the default entered in this case on March 3, 2021, on the following grounds:

I. STATEMENT OF THE FACTS

A. Harmon's OCRO Complaint and SDO Complaint

Harmon commenced employment with Respondent on September 27, 2010 as an Administrative Assistant. On September 27, 2017, Harmon filed a complaint against Respondent with the Ohio Civil Rights Commission ("OCRC"), alleging hostile work environment and unlawful discrimination and retaliation based on her race and age. (*See* **Exhibit 1.**) The complaint was investigated and defended by Respondent's outside labor and employment counsel, Ogletree Deakins Nash Smoak & Stewart, P.C. ("Ogletree Deakins"). On February 13, 2018, Harmon began her long-term disability leave.

On May 24, 2019, after 180 days passed since the filing of her charge, Harmon requested and EEOC issued a Notice of Right to Sue. On August 27, 2019, while still employed by Respondent, Harmon filed a 107-page long complaint, in the United States District Court for the Southern District of Ohio, asserting fourteen (14) causes of action in more than 500 numbered paragraphs against Respondent ("the SDO Complaint"): (1) race discrimination and racial harassment under Title VII, 42 U.S.C. § 2000e, and Ohio Rev. Code §4112.02; (2) age discrimination under Title VII and Ohio Rev. Code § 4112.02; (3) pregnancy discrimination under Title VII and Ohio Rev. Code §§ 4112.5.05 (G)(5), 4112.02 (A); (4) wage discrimination under Ohio Rev. Code § 4111.17; (5) pattern or practice of retaliatory harassment under Ohio Rev. Code § 4112.02; (6) disparate treatment discrimination under Ohio Rev. Code § 4112.02; (7) aiding and abetting discrimination in violation of Ohio Rev. Code § 4112.02(J); (8) breach of an implied contract under Ohio Rev. Code §§ 2305.07, 2305.06; (9) promissory estoppel; (10) wrongful discharge in violation of public policy under Ohio Rev. Code § 4112.99; (11) misrepresentation and fraud; (12) intentional infliction of emotional distress; (13) Family Medical Leave Act (FMLA) interference and FMLA retaliation under 29 U.S.C. §§ 2615(a)(1), 2615(a)(2); and (14) defamation: slander and libel under Ohio Rev. Code § 2739.01. (*See* **Exhibit 2.**)

The SDO Complaint did not allege any claims or facts plausibly giving rise to claims under the Sarbanes-Oxley Act ("SOX"). On the same day Harmon filed the SDO Complaint, August 27, 2019, Harmon advised Respondent that she was unable to return to work upon the expiration of her eighteen months of long-term disability leave. On October 1, 2019, attorney Monica L. Lacks from Ogletree Deakins ("Ms. Lacks") entered an appearance in the SDO case on behalf of Respondent. *See* Declaration of Monica L. Lacks, attached as Ex. A[1], ¶3.

[1] Testimonial evidence in the form of declarations is attached as Exhibits A, B and C.

B. Sarbanes-Oxley Complaint and SDO Second Amended Complaint

On September 9, 2019, unbeknownst to Respondent, Harmon filed a Complaint with the U.S. Department of Labor, Occupational Safety and Health Administration, Regional Whistleblower Office, purportedly asserting claims under the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. §1514A ("SOX Complaint") (*See* **Exhibit 3.**) Neither Harmon nor DOL/OSHA made Respondent aware of the filed SOX Complaint during the course of the ensuing investigation. Notably, the timeline of events Harmon set forth in the SOX Complaint focused heavily on Harmon's allegations related to Respondent's alleged wrongful acts which gave rise to Harmon's causes of action in federal court, but was entirely devoid of any claims alleging violations of the Sarbanes-Oxley Act.

On September 27, 2019, Harmon amended her SDO Complaint ("Amended Complaint"), but did not add Sarbanes-Oxley allegations. (*See* **Exhibit 4.**) On October 3, 2019, Harmon's employment with Respondent was terminated due to her failure to return to work after her medical leave of absence of 18 months concluded. (*See* **Exhibit 5.**) On November 8, 2019, Plaintiff's Amended Complaint was dismissed without prejudice. Harmon was directed to file a second amended complaint not to exceed 20 pages in length. Harmon filed her Second Amended Complaint ("SAC") on November 19, 2019. (*See* **Exhibit 6.**) Although the SAC was filed over two months after the SOX Complaint, and although many of the factual allegations in the SAC are nearly identical to those included in the SOX Complaint, the SAC did not reference Harmon's complaint with DOL/OSHA.

C. Dismissal of Harmon's SOX Complaint and Harmon's Request for Reconsideration Filed With the OALJ

On December 11, 2020, the OSHA Regional Whistleblower Investigator informed Harmon that DOL/OSHA had completed its investigation of Harmon's complaint against Respondent, and

that it did not have reasonable cause to believe that a violation of the Sarbanes-Oxley Act had occurred, thereby dismissing the complaint. (*See* **Exhibit 7.**) Specifically, DOL/OSHA determined that Complainant's allegations of retaliation for reporting alleged violations under SOX in 2017 were untimely as filed outside of the 180-day statutory filing limitations period, whereas the 2019 adverse actions alleged by Complainant were unrelated to Complainant's alleged reporting of SOX violations. *See id*.

On January 20, 2021, Harmon filed a 25-page "formal request for reconsideration to vacate the dismissal of OSHA's determination and findings" ("Request for Reconsideration.") with the Office of Administrative Law Judges of the U.S. Department of Labor ("OALJ"). (*See* **Exhibit 8.**) Despite the fact that Harmon had communicated with Ms. Lacks many times during the course of the S.D. Ohio litigation (*see* Lacks Dec. at ¶4-5), Harmon indicated at the end of her Request for Reconsideration that she had copied Ms. Lacks, and incorrectly identified her as associated with the "Honeywell Human Resources Department." (*See* **Exhibit** 8 at 25.) However, Ms. Lacks never received the objections from Harmon. *See* Lacks Dec. at ¶9.

On January 26, 2021, this Court entered an Initial Order requiring Harmon to notify Respondent that she had filed a case with the OALJ and to provide Respondent with the copy of the DOL/OSHA Complaint, her termination letter and of the Initial Order, by February 8, 2021. (*See* **Exhibit 9**). On February 9, 2021, Harmon notified this Court that she had mailed the documents to Respondent via certified mail. On March 1, 2021, at the Court's request, Harmon filed copies of certified mail "green cards," showing that one certified package was delivered on January 28, 2021, and a second on February 3, 2021. (*See* **Exhibit 10**.)

On March 3, 2021, this Court entered an Order Scheduling Hearing on Complainant's Damages, notifying the parties that Respondent is considered to be in default of its obligation to

have counsel enter an appearance in the case, thereby forfeiting its right to assert a defense to the claims which have been asserted by Complainant, and scheduling a hearing on Complainant's damages for April 5, 2021 at 11:00 a.m. ("Default Order") (*See* **Exhibit 11.**) This Default Order was forwarded to Respondent via UPS. *See id*. at 2.

D. Respondent First Learns of the SOX Whistleblower Case

On April 5, 2021, the day the damages hearing was scheduled before this Court, Ms. Lacks was contacted by a reporter for the National Law Journal inquiring as to whether Respondent had representation in the DOL/SOX matter for the hearing. *See* Lacks Dec. at ¶6. **This was the first time Ms. Lacks was made aware of the instant matter**. *Id.* Ms. Lacks promptly contacted Respondent and thereafter immediately contacted this Court to explain the company's non-appearance. *Id.* The Court set a call with the parties for April 13, 2021. *Id*.

On April 13, 2021, during the course of the parties' call with the Court, Harmon advised the Court and Ms. Lacks that she had sent an email to Marilia Vidal-Clarisey ("Ms. Vidal-Clarisey"), former Senior Human Resources Generalist with Respondent, to which she had attached a copy of the Request for Reconsideration, that she had also sent to Respondent's Mason, Ohio location by certified mail. *See* Lacks Dec. at ¶7. Harmon forwarded Ms. Lacks a copy of her email to Ms. Vidal-Clarisey shortly after the call on April 13, 2021. *Id*; Ex. B and B-1 to Lacks Decl.

The email to Ms. Vidal-Clarisey is dated February 3, 2021 and contains Harmon's Request for Reconsideration of the dismissal of her OSHA/SOX whistleblower complaint filed with this Court on January 20, 2021. *See* Ex. B and B-1 to Lacks Decl. As explained above, the bottom portion of page 25 of the attachment states that it is "cc'd" to various individuals, including "Honeywell Human Resources/Monica L. Lacks;" however, prior to April 13, 2021, when Harmon

forwarded Ms. Lacks her email to Ms. Vidal-Clarisey at her request, along with the attachment, Ms. Lacks had never seen Harmon's Request for Reconsideration. Lacks Dec. at ¶9. Ms. Lacks has never received a copy of that document, either by regular mail or by email, (*see id*) since she was outside counsel and not a member of Respondent's Human Resources Department.

E. Investigation Into The Circumstances Surrounding the Entry of the Default

Immediately after the call with the Court on April 13, 2021, Ms. Lacks and Respondent investigated why Harmon's Request for Reconsideration and the subsequent pleadings and orders in this action, including documents sent by Harmon *via* certified mail on January 28 and February 3, 2021, as well as this Court's Order entered on March 3, 2021, were not immediately acted upon by Respondent. The investigation revealed a series of inadvertent internal communication lapses caused by a combination of (1) severe staffing reductions due to the COVID-19 global pandemic, (2) miscommunication amongst the internal staff of the Respondent, whose day-to-day communication was severely challenged by the pandemic, and (3) Harmon's failure to provide the relevant documentation to Respondent's outside counsel who had been defending her federal lawsuit for well over a year. These factors, in combination, contributed to Respondent's and its counsel's lack of awareness of the existence of the instant action initiated against it by Harmon.

1. Impact of COVID-19 On Respondent's Policies and Procedures For The Receipt and Processing Of Mail

From March 2020, until approximately March 2021, Respondent – like the majority of other business establishments across the country – closed its doors at its Mason, Ohio headquarters and was neither fully staffed, nor open for business, for more than a year.[2] (*See* Declaration of

[2] Respondent's manufacturing locations, which are not at the Mason, Ohio headquarters, remained operational during the pandemic.

Jennifer Carpenter, attached as Ex. B, at ¶3)). Even when the location reopened in March, 2021, it was only with a limited number of employees. *Id*. During the pandemic, Respondent, including the Mason, Ohio location, maintained and continues to maintain modified policies and procedures for the receipt and processing of mail received. (Carpenter Dec. at ¶4). For mail or deliveries requiring signature, a shipping and receiving clerk is designated to sign for the mail on an intermittent basis. *Id*. That individual is not responsible for opening or processing mail or other deliveries. *Id*. The shipping and receiving clerk assigned to the Mason, Ohio location is Randy Mills ("Mr. Mills"). Mr. Mills works on a contract basis in the mailroom at the Mason, Ohio location and has worked in that position since August 2018. (Mills Dec., attached as Ex. C, at ¶2). Mr. Mills is the only person who regularly works in the mailroom, and he signs for all certified mail or other deliveries requiring signature. *Id*.

Brenda Payne, Executive Assistant to the CFO and President in the Mason, Ohio location ("Ms. Payne"), was the person tasked with retrieving and processing the mail received at the Mason location. (Carpenter Dec. at ¶5). During the relevant timeframe, from January through March 2021, she did so on a weekly basis, generally on Friday of each week. (*Id*.). When Ms. Payne collected the mail, she brought it home, then allowed it to sit for 48 hours before opening it, to minimize the risk of contracting Covid-19. (*Id.*). Ms. Payne would then open the mail, giving priority to certified mail, checks, and other items that appeared to be of an important nature, and then she would scan the mail and forward it to the appropriate person working for Respondent. (*Id.*).

2. <u>January 28 and February 3 Certified Mail From Harmon</u>

On February 9, 2021, Ms. Payne scanned and forwarded the mail received from Harmon to Jennifer Carpenter, the Vice President of Human Resources ("Ms. Carpenter") in the Mason,

Ohio location. (Carpenter Dec. at ¶6). Ms. Carpenter assessed the documents and determined that they were related to Harmon, a former employee, and as such she forwarded them to Ms. Vidal-Clarisey, who had previously provided support for employment related issues concerning Harmon. (Carpenter Dec. at ¶6). Although Ms. Vidal-Clarisey had already tendered a letter of resignation by then, she nevertheless responded to Ms. Carpenter's email that same evening. (Carpenter Dec. at ¶7). Ms. Vidal-Clarisey had interpreted the correspondence to concern a pending litigation in the United States District Court involving Ms. Harmon, which was being handled by outside counsel, Ogletree Deakins, and advised Ms. Carpenter of same. *Id*. Based on that response, Ms. Carpenter determined that the documents need not be acted upon internally since all documents related to the pending litigation received by the Company in the past had also been simultaneously sent to Ogletree for appropriate responses. *Id*. Ms. Carpenter likewise brought the documents to Respondent's legal department's attention, advising them of Ms. Vidal-Clarisey's statement that it concerned pending litigation being handled by outside counsel. (Carpenter Dec. at ¶8). Ms. Vidal-Clarisey's last day of work was on February 18, 2021. (Carpenter Dec. at ¶9). Unfortunately, as explained in the preceding sections, Ms. Lacks was unaware of the correspondence from Harmon at that time. (Lacks Dec. at ¶9).

3. March 3, 2021 Order Scheduling Hearing on Complainant's Damages

The Scheduling Order was sent to Mason, Ohio by UPS, not certified mail. Upon checking the UPS tracking number online, Respondent learned that the tracking receipt reflected that the March 3 correspondence from the Court was received by "CV" and left at "dock." (*See* **Exhibit 12**.) Upon further investigation, Respondent learned that during Covid-19, UPS and FedEx have implemented "contactless signature." (Mills Dec. at ¶6). In particular, UPS uses a default signature, coded "CV". UPS's Covid-19 protocol requires the driver to enter the code "CV" when

delivering a package, rather than getting a signature from the recipient, in order to minimize contact with the recipient. *Id*. Thus, during the Covid-19 period, UPS drivers drop packages (marked "CV") on the floor inside the door of the delivery dock at Respondent's Mason, Ohio facility. (Mills Dec. at ¶7). Mr. Mills then retrieves the packages, checks the identity of the person to whom it is addressed, and emails the recipient to let him or her know there was a package delivered for them. *Id*. If Mr. Mills is unable to determine the name of the individual recipient from the address or based on the vendor, he is not permitted to open the package to determine that information. (Mills Dec. at ¶9). In that case, Mr. Mills keeps the package in his locked desk (for which only he has the key) until someone inquires about the package and provides him with a tracking number to verify that he/she is in fact the intended recipient. *Id*.

Mr. Mills worked at Respondent's Mason, Ohio location on March 3, 2021, but he does not recall receiving a UPS package from the United States Department of Labor or any other agency of the United States government on that date, for which he had to determine a recipient. (Mills Dec. at ¶10). Mr. Mills has searched his desk and the mailroom and has not found a package with the UPS tracking number 1ZW0Y2110191042359 remaining in the mailroom. *Id*. Further, UPS packages are normally delivered between 8 – 8:30 a.m. and again between 11 a.m. and noon; however, the delivery receipt for that tracking number, in addition to being coded with the default signature "CV", reflects that it was delivered at 10 a.m. on March 3, 2021. *Id*.

Accordingly, Respondent is unaware as to what happened to the Default Order sent by this Court via UPS to Respondent on March 3, 2021.

II.
CHRONOLOGY

Date	Event
8/21/2017	Harmon files a complaint with the Ohio Civil Rights Commission alleging hostile work environment (putting her on a PIP and moving her to a less desirable position), retaliation and discrimination on the basis of race and age. **Exhibit 1**
2/13/2018	Harmon begins her long term disability leave
8/27/2019	Harmon files 107 page, 515 paragraph complaint in the U.S. District Court, S.D. Ohio against Honeywell Intelligrated, Case No. 1:19-cv-00670-MRB-KLL. Company represented at all times by Monica Lacks and Leah Freed, Ogletree Deakins. **Exhibit 2**
8/27/2019	Harmon advises Honeywell that she is unable to return to work upon the expiration of her 18 months of long term disability leave. She is advised by Honeywell that she could return to work and apply for a new position, if her prior position is not available
9/9/2019	Harmon files initial SOX Complaint with DOL/OSHA.
9/11/2019	Timeline of events submitted by Harmon to "Mr. Stewart," Regional Whistleblower Investigator. This appears to be the initial Sox Whistleblower Complaint, which largely replicates the allegations in her federal lawsuit. **Exhibit 3**
9/27/2019	Harmon files Amended Complaint in U.S. District Court. **Exhibit 4**
10/3/2019	Harmon terminated for failure to return to work after LTD expires Exhibit 5
10/11/2019	Harmon files second SOX complaint with DOL/OSHA
11/19/2019	Harmon files Second Amended Complaint in U.S. District Court. Exhibit 6
12/11/2020	US DOL/OSHA Regional Whistleblower Investigator dismissed Harmon's SOX complaint, finding no cause to believe the allegations amount violations of SOX. **Exhibit 7**
1/20/2021	Harmon submits a Request for Reconsideration of DOL/OSHA's Dismissal, treated as the objections to the dismissal. **Exhibit 8**
1/26/2021	Initial Order issued by ALJ. **Exhibit 9**

1/28/2021	First green card showing service of certain SOX related documents on company by certified mail. **Exhibit 10**
2/3/2021	Second green card showing service of certain SOX related documents on company by certified mail. **Exhibit 10**
2/3/2021	Harmon claims she emailed her HR Generalist at Mason, Ohio facility, Marilia Vidal-Clarisey
2/9/2021	Harmon Submits Certified Mail Green Cards To ALJ
2/18/2012	Marilia Vidal-Clarisey's last day of work at Mason, Ohio facility
3/2/2021	ALJ's Order Scheduling Hearing on Damages and entering default against Honeywell. **Exhibit 11**
3/3/2021	ALJ's default delivered to Honeywell by UPS without name on package. **Exhibit 12**
4/5/2021	Damages hearing before ALJ
4/5/2021	Scarcella (a writer/reporter for the National Law Journal) emails Freed & Lacks with info re damages hearing at 8:26 am, inquiring as to why Honeywell was not represented. **Exhibit 13**
4/5/2021	Monica Lacks emails the Department of Labor at Honeywell's request, advising that Honeywell had no knowledge of the proceedings. In response to that email, the ALJ sets a teleconference for 4/13/21
4/13/2021	Teleconference with ALJ, Monica Lacks and Malissa Harmon at 11:30. ALJ orders company to enter a notice of appearance, which they did on the same day.
4/15/2021	Honeywell's filed a Motion for Leave to File Motion to Vacate Default. **Exhibit 14**
4/15/2021	ALJ entered an Order Granting Motion for Leave to File Motion to Set Aside Default with an April 30, 2021 deadline. **Exhibit 15**

III.
ARGUMENT

A. The Default Order Should Be Set Aside Under Rule 55(c).

Because the Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges ("OALJ Rules") do not address requests to set aside defaults, OALJs must look to the Federal Rules of Civil Procedure for guidance. *See* 29 C.F.R. § 18.1(a) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."). Federal Rule of Civil Procedure 55(c) provides that a court "may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c). In evaluating whether the movant has sufficiently established good cause, the Sixth Circuit instructs that courts must "assess 'whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.'" *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 838–39 (6th Cir. 2011) (*quoting United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844 (6th Cir. 1983).

Fed.R.Civ.P. 55(c) leaves the decision whether to set aside an entry of default to the discretion of the trial judge. *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 193 (6th Cir. 1986). However, "judgment by default is a drastic step which should be resorted to only in the most extreme cases." *United Coin Meter Co.*, 705 F.2d at 845. In addition "any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits." *Id*. at 846 (*quoting Rooks v. American Brass Co*., 263 F.2d 166, 169 (6th Cir.1959) (citations omitted)). All three factors must be considered in ruling on a motion to set aside entry of default, and all three factors weigh in favor of vacating the default in the matter at hand.

1. Respondent's Conduct Was Not Willful

"To be treated as culpable, the conduct of a [respondent] must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *Dassault Systemes*, 663 F.3d. at 841 (6th Cir. 2011) (*quoting Shepard Claims Serv., Inc. v. William Darrah & Assocs*., 796 F.2d 190, 194 (6th Cir. 1986)). Negligent conduct does not establish that Respondent engaged in the necessary willful conduct. *See, e.g., Shepard Claims Serv., Inc*., 796 F.2d at 194–95; *Krowtoh II LLC v. ExCetsius Int'l Ltd*., 330 Fed.Appx. 530, 536 (6th Cir. May 19, 2009) (citations omitted). "'[C]arelessness is not enough to establish "culpable conduct' but rather [respondent's] actions must have been taken in bad faith or to willfully delay the court proceedings." *Evers Welding Co. v. Westchester Surplus Lines Ins. Co*., No. 1:09-CV-00945, 2010 WL 2900405, at *3 (S.D. Ohio July 22, 2010) (*quoting Tri–C Constr. Co. v. Bluegrass Steel Erectors, LLC*, 2007 U.S. Dist. LEXIS 81402, 2007 WL 3232568 (E.D.Ky. Nov. 1, 2007)).

In discussing this factor, the district courts across the country have acknowledged that "the exigencies of the COVID-19 pandemic may excuse a party's default under the right circumstances." *Wildflower + Co. v. Mood Apparel, Ltd.*, No. 20CIV4577VSBGWG, 2021 WL 922291, at *4 (S.D.N.Y. Mar. 11, 2021); *see also Oppenheimer v. City of Madeira, Ohio*, 336 F.R.D. 559, 565 (S.D. Ohio 2020) (holding that Defendant's default was not willful but a result of "unprecedented circumstances rising from the COVID-19 pandemic"); *Scalia v. APS Market and Grill, LLC*, 2020 WL 4284943, at *3 (D. Del. July 27, 2020) ("While Defendants neglected their duty to respond, their excuse of preoccupation with the COVID-19 pandemic is plausible.")"; *Dearborn Life Ins. Co. v. Curtis*, No. 1:20-CV-316-RP, 2020 WL 6875274, at *4 (W.D. Tex. Nov. 9, 2020), *report and recommendation adopted*, No. 1:20-CV-316-RP, 2020 WL 9216374

(W.D. Tex. Dec. 4, 2020) (holding defaulting party's conduct did not appear to be willful where the counsel "has provided an affidavit asserting that his error in not timely filing a responsive pleading was a product of complications related to his and his staff's health as well as the COVID-19 pandemic.").

Here, Respondent's failure to timely enter an appearance and file a response to Harmon's Request for Reconsideration was in substantial part a result of "the unprecedented circumstances rising from the COVID-19 pandemic." *Oppenheimer*, 336 F.R.D. at 565. Once Respondent and its counsel first became aware of the instant matter, they took immediate action to remedy the default by contacting the Court, diligently investigating the reasons behind its inadvertence, and filing a motion for leave to file a motion to set aside the default. The record in this instance does not support a finding that Respondent displayed either an intent to thwart judicial proceedings or a reckless disregard for the effect of their conduct on those proceedings. There is no evidence that Respondent was intentionally avoiding the system. Accordingly, this factor weighs in favor of vacating the entry of the default.

2. <u>Harmon Will Not Be Prejudiced</u>

Next, the Court must consider whether Harmon will be prejudiced if the entry of default is set aside. To establish prejudice, a complainant must show that "delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.' " *Invst Fin. Grp., Inc. v. Chem–Nuclear Sys., Inc*., 815 F.2d 391, 398 (6th Cir. 1987) (*quoting Davis v. Musler*, 713 F.2d 907, 916 (2d Cir. 1983)). "Mere delay in satisfying a [complainant's] claim, if it should succeed at trial, is not sufficient prejudice to require denial of a motion to set aside a default judgment." *United Coin Meter Co*., 705 F.2d at 845.

In the matter at hand, Harmon cannot demonstrate that she will be prejudiced by setting aside the default and allowing the case to proceed on its merits. Harmon's parallel litigation pending in the Southern District of Ohio is based on the same claims Harmon has asserted in the instant action, thereby precluding any plausible argument of prejudice. Harmon cannot argue that any evidence will be lost, or that there will be any increased difficulties in conducting discovery. Indeed, were the Court to decline to vacate the default, that decision would severely prejudice Respondent, against whom the US DOL/OSHA Regional Whistleblower Investigator found no viable SOX claim in its December 11, 2020 Letter of Determination. Therefore, this factor weighs in favor of vacating the entry of the default as well.

3. Respondent Has a Meritorious Defense

Finally, the Court must consider whether Respondent has a meritorious defense to Harmon's claims. A defense is meritorious if it is " 'good at law[.]' " *United States v. $22,050.00 U.S. Currency*, 595 F.3d 318, 326 (6th Cir. 2010) (*quoting Williams v. Meyer*, 346 F.3d 607, 614 (6th Cir. 2003)). This standard does not require "that a defense be supported by detailed factual allegations to be deemed meritorious." *Id*. "Instead, all that is needed is 'a hint of a suggestion' which, proven at trial, would constitute a complete defense." *Id*. (*quoting Invst Fin. Grp., Inc*., 815 F.2d at 399). The test is not whether a defense is likely to succeed on the merits; rather, the criterion is merely whether "there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default." *$22,050*, 595 F.3d at 326 (*quoting Burrell v. Henderson*, 434 F.3d 826, 834 (6th Cir. 2006)). "Thus, even conclusory assertions may be sufficient to establish the "hint of a suggestion" needed to present a meritorious defense." *Id*. (internal quotation marks omitted).

Here, the main defense Respondent will assert in response to Harmon's Request for Reconsideration is that the OSHA Regional Whistleblower Investigator who issued the Dismissal of Harmon's SOX whistleblower complaint was correct in his finding that many of her allegations giving rise to the claim under SOX are untimely as they were filed outside the 180 day statutory filing deadline, and the remaining allegations, which parallel the 107 pages of the Amended Federal Complaint, assert claims of race and age discrimination, retaliation under § 704(a) of Title VII, benefits-related claims, and violations of the FMLA. These are the same claims she has raised in her Request for Reconsideration filed with the OALJ. Nowhere is there a scintilla of a SOX allegation. Accordingly, on the facts of her complaint, it is lacking in merit. This defense alone is clearly sufficiently meritorious to satisfy the third prong of Rule 55(c) test.

4. Conclusion

Because all three factors strongly favor Respondent's position, and the record reflects good cause to set aside an entry of default under Rule 55(c), Respondent respectfully requests that Harmon's default be vacated in order to permit Respondent to respond to Claimant's Request for Reconsideration.

B. The Default Order Should Be Set Aside Because Respondent, Through No Fault Of Its Own, Was Not Effectively Notified Of The Existence Of This Case

In addition to finding that Respondent has met the applicable criteria to vacate the Court's default entry under Rule 55(c), the Court should vacate the default order because Harmon failed to serve Respondent's counsel with her Request for Reconsideration – despite being aware of Respondent's counsel's representation in the related Southern District of Ohio lawsuit between the identical parties, and despite communicating regularly with Respondent's counsel regarding the same allegations raised in her SOX Complaint.

The OALJ Rules expressly require service on counsel in the event a party is represented. See 29 C.F.R. § 18.30, "Service and Filing":

> (a) Service on parties—
>
> > (1) In general. Unless these rules provide otherwise, all papers filed with OALJ or with the judge **must** be served on every party.
> >
> > (2) Service: how made—
> >
> > > Serving a party's representative. **If a party is represented, service under this section must be made on the representative.** The judge **also may** order service on the party.

(Emphasis added).

Since September 2019 – precisely the same timeframe within which Harmon submitted her Complaint to DOL/OSHA – she served pleadings on, and regularly communicated with, Honeywell's counsel, Monica Lacks and Leah Freed, regarding all matters subsumed by her lawsuit currently pending in the Southern District of Ohio. She knows counsels' email addresses, firm name and street addresses, and has used them routinely. Indeed, in July 2020, Complainant emailed undersigned counsel to provide her updated phone number, to ensure the parties could maintain proper and ongoing communication. See Lacks Dec. at ¶ 5; Ex. A. Significantly, as explained in detail above, the substance of Harmon's allegations in that lawsuit mirror those contained in her SOX Complaint and neither reference the Sarbanes-Oxley Act or financial fraud.

Further, Harmon was and is obligated to comply with the applicable rules of civil procedure, notwithstanding her *pro se* status. *Pro se* parties are entitled to some indulgences. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). However, "the lenient treatment generally accorded to *pro se* litigants has limits," *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996), and "*pro se* parties must follow the same rules of procedure that govern other litigants," *Aug. v. Caruso*, 2015 WL 1299888, at *6 (E.D. Mich. Mar. 23, 2015). *See also, Looper v. Educ. Credit Mgmt.*

Corp., 2008 WL 2965887, at *8 (E.D. Tenn. July 30, 2008) (plaintiff's "*pro se* status does not exempt him from complying with the rules of procedure." *Greer v. Home Realty Co. of Memphis Inc.*, 2010 WL 6512339, at *2 (W.D. Tenn. July 12, 2010) ("Although district courts may liberally construe the federal and local rules for *pro se* litigants, even *pro se* litigants are obligated to follow these rules").

Despite being well aware that Honeywell was represented by counsel with regard to the very claims she sought to advance before the ALJ, Harmon failed to serve Honeywell's representative or even to advise the Court that Honeywell was represented by counsel in her related federal lawsuit, in which she has advanced the same allegations. It is telling that Harmon apparently believed it appropriate to "cc" undersigned counsel of her Request for Reconsideration of DOL/OSHA's Determination by including her on the "cc" line of that document. By doing so, Harmon effectively acknowledged undersigned counsel's interest in the SOX proceeding.[3]

In addition to the obligation to copy counsel for Honeywell on pleadings as soon as she filed them with the Court, the OALJ Rules expressly require it. Thus, Rule 18.30(a)(2) includes three key words the common meanings of which cannot be gainsaid:

(1) "Must" is the word describing the obligation of Harmon to serve Honeywell's representative. It leaves no room for discussion;

(2) "Also" is the word describing the secondary method of effective service. The clear meaning of "also" is "in addition to," not "instead of." Thus, Harmon had no choice but to serve counsel for Honeywell; and

(3) The word "may" in the third sentence provides the ALJ with a choice, not an obligation, to order service on a party. In this case, the ALJ availed himself of this choice but it

[3] As noted, *supra*, Ms. Lacks did not work for Honeywell as an employee, was not part of its Human Resources Department, and did not receive this document.

did not relieve Harmon of her obligation to serve Honeywell's representative, hence the word "must" appearing in the first part of this section.

Harmon's failure to serve undersigned counsel under the circumstances set forth above provides additional grounds for this Court to issue the requested order setting aside the entry of default.

V.
CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the default be vacated and Respondent be permitted to respond to Claimant's Request for Reconsideration.

Respectfully submitted this 30th day of April, 2021.

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