Patrician Assisted Living Facility *and* Synthia Marshall. Case 10–CA–33505

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent has failed to file a timely answer to the complaint. Upon a charge filed by Synthia Marshall on January 22, 2002,[2] the General Counsel of the National Labor Relations Board issued a complaint on April 30 against Patrician Assisted Living Facility, the Respondent, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act. Although properly served copies of the charge and the complaint, the Respondent failed to file an answer.

By letter dated May 20 that was both faxed and mailed, the General Counsel offered the Respondent an extension of time to file an answer by May 28. That letter also warned that, unless an answer was received by May 28, a Motion for Default Judgment would be filed and all allegations would be deemed admitted. The Respondent again failed to file an answer.

On May 31, the General Counsel filed a Motion for Summary Judgment with the Board. On June 6, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 20, the Respondent filed a response to the Notice to Show Cause, with affidavits attached.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint, served by certified mail on the Respondent on April 30, affirmatively states that unless an answer is filed within 14 days of service (i.e., by May 14), all the allegations in the complaint will be considered admitted.

The Respondent, despite having received a letter from the General Counsel warning that unless an answer was filed, a Motion for Default Judgment would be filed, neither filed an answer to the complaint nor made a request for an additional extension of time to do so before the extended May 28 deadline had expired.

Following the General Counsel's May 31 Motion for Default Judgment and the Board's June 6 Notice to Show Cause, the Respondent, pro se, sent a response to the Motion for Default Judgment with an affidavit in support and an answer to the complaint. The Respondent contends that its failure to file an answer was due to its inability to retain legal counsel within the required time frame and that, because of a lack of legal training, the Respondent's owner was unaware of the gravity of a failure to file a timely answer in the matter. The Respondent also argues that principles of fairness and equity mandate that its answer to the complaint be accepted by the Board, and not be considered as untimely, because there are genuine issues of disputed fact.

For the following reasons, we reject the Respondent's arguments.

The Respondent is apparently proceeding without legal representation.[3] We recognize that, when determining whether to grant a Motion for Summary Judgment, the Board has shown some leniency toward respondents who proceed without benefit of counsel. *Kenco Electric & Signs*, 325 NLRB 1118 (1998). Thus, the Board will generally not preclude a determination on the merits of a complaint if it finds that a pro se respondent has filed a timely answer, which can reasonably be construed as denying the substance of the complaint allegations. *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998); *Harborview Electric Construction Co*., 315 NLRB 301 (1994). Similarly, where a pro se respondent fails to file a timely answer, but provides a "good cause" explanation for such failure, default judgment will not be entered against it on procedural grounds.

However, merely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer. *Newark Symphony Hall*, 323 NLRB 1297 (1997). In addition, under Board law, a failure to promptly request an extension of time to file an answer, in turn, is a factor demonstrating lack of good cause. *Lockhart Concrete*, 336 NLRB 965, 957 fn. 3 (2001); *Day & Zimmerman* Services, 325 NLRB 1046, 1047 (1998). Therefore, where a pro se respondent fails to respond at all to the complaint allegations until after the Notice to Show Cause has issued—despite having

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file a timely answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

[2] All dates are 2002 unless indicated otherwise.

[3] The Respondent, an assisted living facility, satisfies the Board's jurisdictional standards, and it employs about 30 individuals. The unfair labor practice charge in this case was filed on January 22, 2002, the complaint issued on April 30, and the General Counsel ultimately gave the Respondent until May 28 to file an answer. In the circumstances, we conclude that the Respondent had ample time and ability to retain legal counsel.

been notified in writing that it must—and has provided an insufficient explanation for its failure to do so, subsequent attempts to answer the complaint will be denied as untimely. *Kenco Electric & Signs*, supra. Such a pattern of repeatedly ignoring the Board's procedures and warnings is incompatible with a showing of good cause. *Odaly's Management Corp.*, 292 NLRB 1283, 1284 (1989).

Here, there is no dispute that the Respondent did not respond to the complaint allegations until after the Notice to Show Cause issued on June 6, despite the explicit directions to do so in both the April 30 complaint and the May 20 reminder letter. We also find that the Respondent has not provided an explanation sufficient to constitute good cause for its failure to file a timely answer even after it was granted an extension of time.

Other than its failure to obtain counsel, the Respondent's only other proffered explanation is that, because of the owner's lack of legal training, she was unaware of the gravity of her failure to file an answer. Because the Respondent was repeatedly warned in formal government documents that the failure to file an answer would result in the allegations in the complaint being deemed admitted and that a Motion for Default Judgment would result, the owner's lack of legal sophistication does not provide good cause for the Respondent's failure to file an answer between its receipt of the complaint on April 30 and the extended deadline of May 28. *Associated Supermarket*, 338 NLRB 780 (2003). Finally, regarding the Respondent's claim that there exists material facts warranting a hearing, the Board has stated that it will not address a respondent's assertion that it has a meritorious defense unless good cause has been shown for the late response. *Dong-A Daily North America, Inc.*, 332 NLRB 15, 16 (2000).

The dissent describes the Respondent's conduct here as merely a "procedural peccadillo." Respectfully, we disagree. The failure to respond to a legal action, especially one initiated by the government, is a more consequential matter. In plain language, the General Counsel advised the Respondent of its obligations, yet it deliberately disregarded them. It is undisputed that the Respondent received a series of explicit warnings from the General Counsel, as well as an extension of time.[4] In the end, its answer was extracted only as a consequence of the General Counsel's filing of a summary judgment motion and the Board's issuance of a show cause notice. For reasons already explained, that was too late. "Life is full of deadlines." *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116 (7th Cir. 1996).

Our dissenting colleague acknowledges that our decision here is "[c]onsistent with past Board precedent" and with the Board's longstanding interpretation of its own rules. The dissent cites no judicial criticism of the Board's approach. Nevertheless, our colleague argues that, as applied by the Board, the "good cause" standard of Section 102.20 of the Board's Rules and Regulations is meaningless. But it is the dissent's proposed solution that would undermine the standard, by finding "good cause" even when a respondent deliberately disregards the timely-answer requirement. Under our rules, it is the complaint—not a summary judgment motion—that triggers this requirement. The dissent's approach would inevitably lead to unwarranted delay and a waste of administrative resources. That result does not "effectuate the purposes and provisions of the Act," as Section 102.121 (cited by the dissent) contemplates in endorsing a liberal construction of the rules.

The dissent points to the Federal Rules of Civil Procedure as a model for the Board. But there are important differences between Federal civil litigation and Board administrative process, as the Board has explained. See *Morgan's Holiday Markets*, 333 NLRB 837, 839 (2001).

In Federal civil litigation, service of the complaint is the defendant's first notice of a legal claim against it. In contrast, the Board's process begins with the filing of an unfair labor practice charge, by a private party. See id. The General Counsel, a neutral government official, investigates that charge, which necessarily brings him into contact with the respondent. Only if and when the General Counsel determines that there is reasonable cause to believe that the Act has been violated does he issue a complaint. Thus, by the time a respondent is served with the complaint, it has long been given the opportunity to present its position to the General Counsel. Accordingly, when the respondent fails to file a timely answer to the complaint, despite repeated warnings of the consequences, the situation is not analogous to that of a defendant in civil litigation. The administrative process has been under way for a significant period. In this case, for

[4] We endorse the General Counsel's practice of giving respondents full warning of the consequences of failing to file an answer. Indeed, the record here shows the special care taken by the General Counsel to ensure that the pro se respondent understood its rights and obligations under the Board's Rules. We encourage that practice as well. To that extent, then, we share the dissent's general concern about any avoidable use of "legalese" in the General Counsel's communications with pro se respondents. Here, however, there is no basis for concluding that the General Counsel lay in wait for an unsuspecting victim. Although our colleague claims he has no intention of countenancing willful disregard of the Board's Rules, he would find that a respondent who ignored repeated, specific notices that it must file an answer was engaged in mere excusable neglect when it failed to file any answer at all. We remain uncertain as to what more would be required for our colleague to conclude that willful disregard of the Board's Rules had occurred.

example, the unfair labor practice charge was served on the Respondent on about January 22, over 4 months before the deadline for filing an answer to the compliant. In the circumstances, we view the imposition of default judgment as reasonable and just.[5]

In sum, we find that the Respondent's answer to the complaint attached to its response to the Notice to Show Cause is untimely. See *Kenco Electric*, supra. Accordingly, in the absence of good cause shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Birmingham, Alabama, has been engaged in the business of providing personal care services to the elderly. During the 12-month period preceding issuance of the complaint, a representative period, the Respondent in conducting its business operations derived gross revenues in excess of $250,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors within the meaning of Section 2(11) of the Act or agents of the Respondent within the meaning of Section 2(13) of the Act.

Patricia Sargent	Owner
Priscilla Barksdale	RN
Cynthia Willoughby	LPN

On or about January 6, Respondent discharged employees Synthia Marshall and Wykeithia Williams because they engaged in protected concerted activities and in order to discourage other employees from engaging in these activities.

CONCLUSION OF LAW

By the acts and conduct described above the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by discharging employees Synthia Marshall and Wykeithia Williams, we shall order the Respondent to offer the discharged employees full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the unlawful conduct against them. Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges and to notify the discharged employees in writing that this has been done and that the discharges will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Patrician Assisted Living Facility, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees or otherwise discriminating against its employees because they engage in protected concerted activities, and to discourage employees from engaging in those activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Synthia Marshall and Wykeithia Williams full reinstatement to their former jobs or, if those jobs no longer exist,

[5] Our colleague overstates Board precedent by declaring that the interaction between the General Counsel and a respondent during the period prior to the complaint has "led the Board to . . . accept precomplaint position statements as answers in certain cases." In both *Central States Xpress*, 324 NLRB 442 (1997), and *Mid-Wilshire Health Care Center*, 331 NLRB 1032 (2000), relied on by the dissent, the respondent had separately responded to the complaint and in that response had either attached or incorporated by reference the content of an earlier position statement. The Board's acceptance of each of those position statements was based on its inclusion in an actual, albeit informal answer to a complaint. In the present case, of course, there was no timely answer, and, in any event, there is no indication that the Respondent ever filed a precomplaint position statement. A fortiori, and contrary to the suggestion of our dissenting colleague, there is no indication here that, by virtue of having filed a precomplaint position statement, the Respondent might have thought it had already answered the charges against it.

to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Synthia Marshall and Wykeithia Williams whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Birmingham, Alabama, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since January 6, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to the Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER SCHAUMBER, dissenting.

Section 102.20 of the Board's Rules and Regulations permits a late answer upon a showing of "good cause," but the Board has unfortunately interpreted the "good cause" proviso in such a way as to render it almost meaningless. Plainly stated, it is all but impossible to show "good cause" as the Board construes that phrase. This harsh interpretation of Section 102.20 is inconsistent with Section 102.121, which provides that the Board's Rules and Regulations "shall be liberally construed"; with the Board's own stated policy preference for decisions on the merits; and, as I will show, with the literal meaning of Section 102.20 itself. Moreover, the Board has never articulated its policy reasons for interpreting "good cause" so narrowly. In an analogous case, *NLRB v. Washington Star*, 732 F.2d 974 (D.C. Cir. 1984), which involved the late filing of exceptions, the D.C. Circuit declined to defer to the Board's application of its filing deadline in part for that reason.[1]

Consistent with past Board precedent, the Board today grants the General Counsel's motion for default judgment because Respondent's answer to the complaint was untimely. The complaint alleged that the Respondent discharged employees Synthia Marshall and Wykethia Williams for their protected concerted activities. The Respondent, acting pro se, filed an answer just over 3 weeks late, in which it denied that Marshall and Williams were fired and asserted that they "abandoned their employment." The Respondent also filed the affidavit of its owner, Patricia Sargent, in which Sargent explains under oath her version of the relevant events. If credited, Sargent's testimony would compel the dismissal of the complaint. However, the Respondent is being denied the opportunity to present its side of the story at a Board hearing because its answer was untimely, and its "good cause" showing—that Sargent is not a lawyer and did not realize the gravity of untimeliness—is deemed by my colleagues inadequate.[2] In sum, for its procedural pecca-

[1] In *Washington Star*, the Board rejected the respondent's late-filed exceptions to the decision of an administrative law judge. Although invited to do so by the court of appeals, the Board failed to explain the policies underlying its strict construction of its filing rules. 732 F.2d at 976–977. For that reason, and because it also found the Board's application of its filing deadline to have been inconsistent, the court declined to defer to the Board. 732 F.2d at 977. Responding solely to the D.C. Circuit's charge of inconsistency, the Board revised its filing and service date rules. See 51 FR 23744 (1986). The Board continues to point to that revision instead of explaining its policy reasons for narrowly construing Sec. 102.20's "good cause" proviso. See *Rick's Painting & Drywall*, 338 NLRB 1091 (2003).

[2] Actually, being a lawyer might not have made the difference Sargent thinks it would have. Courts are far more tolerant of missed answer deadlines than is the Board. Thus, lawyers familiar with the courts but new to Board practice would have good reason to think the

dillo, Respondent will be required to reinstate two former employees whom it claims abandoned their jobs, pay them backpay with interest, and post a notice declaring itself in violation of the Act—all without a hearing.

In my view, the majority's decision exemplifies and perpetuates the harshness that has long characterized the Board's decision making in cases before us on what until recently was misleadingly called a motion for "summary judgment." Having changed the name, appropriately, to a Motion for Default Judgment,[3] we should change our approach to match. I would draw upon federal judicial precedent in this area, which interprets "good cause" for setting aside a default so as to emphasize the interests of justice over rigid adherence to technical deadlines. In short, I would give effect to the Board's own stated preference for deciding cases on the merits.[4]

For these reasons and for the reasons more fully set forth below, I respectfully dissent.[5]

The Board's Default Judgment Practice in Late-Answer Cases

The applicable rule here is Section 102.20 of the Board's Rules and Regulations. Under Section 102.20, when a respondent has failed to file a timely answer, all allegations in the complaint shall be deemed admitted to be true, and shall be so found by the Board, "unless good cause to the contrary is shown." To the contrary of what? Plainly, "to the contrary" of the consequences just stated. A late-answering respondent, therefore, must show good cause why the complaint's allegations should *not* be deemed admitted and found to be true.

Section 102.20 does not specify what factors might be material to a "good cause" showing. As the Board construes Section 102.20, however, the *only* material consideration is the reason the answer was late.[6] That is, the Board misreads Section 102.20's "good cause" proviso to mean good cause *for missing the deadline*, instead of its literal meaning of good cause not to deem the complaint's allegations admitted. Accordingly, the Board refuses even to consider the merits of a tardily asserted defense unless the respondent first shows good cause for its tardiness.[7] Lack of prejudice to the other parties is also deemed irrelevant.[8] Moreover, having circumscribed "good cause" in this way, the Board virtually never finds that standard met.[9] By contrast, Board decisions rejecting various reasons for untimeliness are too numerous to catalog. Simply by way of a sampling, the Board has rejected all of the following as good cause for missing an answer deadline: pro se status;[10] inability to afford counsel;[11] counsel's unfamiliarity with Board procedure;[12] business turmoil and crisis;[13] inadvertence;[14] illness;[15] death.[16] In sum, the narrow construction the

Respondent's situation far from grave. See, e.g., *Jones Truck Lines, Inc.*, 63 F.3d 685, 687 (8th Cir. 1995) (affirming denial of default judgment where answer was 5 weeks late); *American States Ins. Corp. v. Technical Surfacing, Inc.*, 178 F.R.D. 518, 522 (D. Minn. 1998) (denying default judgment where answer was 10 weeks late); *Dizzley v. Friends Rehabilitation Program, Inc.*, 202 F.R.D. 146, 147–148 (E.D. Pa. 2001) (denying default judgment where answer was 3 months late); *Citadel Management, Inc. v. Telesis Trust, Inc.*, 123 F.Supp.2d 133, 142–143 (S.D.N.Y. 2000) (same); *U.S. v. Schofield*, 197 F.R.D. 6, 7–8 (D.D.C. 2000) (denying default judgment where answer was nearly 14 months late).

[3] *Malik Roofing Corp.*, 338 NLRB 930 fn. 1 (2003).

[4] *Paolicelli*, 335 NLRB 881, 882 (2001); *M. J. McNally, Inc.*, 302 NLRB 120 (1991).

[5] I acknowledge that the view expressed here is contrary to the rationale expressed in *Associated Supermarket*, 338 NLRB 780 (2003), and *Sage Professional Painting Co.*, 338 NLRB 1068 (2003). Although I participated in the panels deciding those cases, I would apply a different analysis if I were deciding them today.

[6] See, e.g., *Unlimited Security, Inc.*, 338 NLRB 500, 500–501 (2002) ("[T]he Board will not accept [a response to a Notice to Show Cause] as the answer to the complaint absent a showing of *good cause for the failure to timely answer the complaint initially*") (emphasis added); *Dong-A Daily North America*, 332 NLRB 15, 15–6 (2000) (rejecting closing of respondent's office, company turmoil, and departure of key employees as constituting "*good cause for the failure to file a timely answer*") (emphasis added); *L. E. Beck & Son, Inc.*, 159 NLRB 1564, 1565 (1966) (finding respondent "has not shown *good cause for its failure to file a timely answer*").

[7] See, e.g., *Lockhart Concrete*, 336 NLRB 956, 957 (2001); *Dong-A Daily North America*, supra, 332 NLRB at 16; *Printing Methods, Inc.*, 289 NLRB 1231, 1232 fn. 4 (1988).

[8] See, e.g., *Calyer Architectural Woodworking Corp.*, 338 NLRB 315, 316 fn. 9 (2002) ("Under the Board's Rules, whether to excuse the failure to file a timely answer depends not on prejudice to a party or an alleged discriminatee, but on whether a respondent has demonstrated good cause.").

[9] In published default judgment cases decided since 1975, I have found only two in which the Board has found good cause for the failure to file a timely answer: *Stage Employees (Crossing Guard Productions)*, 316 NLRB 808 (1995), and *B. N. Beard Co.*, 231 NLRB 191 (1977). In the former case, the Board was implicated in the respondent's delay because of a miscommunication between the respondent and counsel for the General Counsel. The latter case was an anomaly: for reasons of its own, the Board wanted the case decided on a complete record, and thus, accepted an untimely answer because the respondent was previously without counsel and no party would be prejudiced—reasons that plainly do not constitute "good cause" under more recent precedent. See, e.g., *Calyer Architectural Woodworking*, supra, 338 NLRB 315–316 fn. 9.

[10] See, e.g., *Rick's Painting & Drywall*, supra, 338 NLRB at 1092; *Lockhart Concrete*, supra, 336 NLRB 956, 957.

[11] See, e.g., *National Transit*, 299 NLRB 453 (1990); *Lai Gong*, 264 NLRB 1083, 1084 (1982).

[12] *South Atlantic Trucking*, 327 NLRB 534, 535 (1999).

[13] *Dong-A Daily North America*, supra, 332 NLRB at 15–16; *Central Apex Reproductions*, 330 NLRB 1163, 1163–1164 (2000).

[14] See, e.g., *Windward Roofing & Construction Co.*, 333 NLRB 658 (2001); *Bricklayers Local 31*, 309 NLRB 970 (1992), enfd. mem. 992 F.2d 1217 (6th Cir. 1993).

[15] See, e.g., *Carmody, Inc.*, 327 NLRB 1230, 1230–1231 (1999); *U.S. Telefactors Corp.*, 293 NLRB 567 (1989); *D. V. Copying & Printing*, 250 NLRB 45, 45–46 (1980); *Ancorp National Services*, 202 NLRB 513, 513–514 (1973).

Board has given Section 102.20's "good cause" proviso has all but erased it from the rule. This is contrary not only to the literal meaning of Section 102.20, but also to Section 102.121 of the Board's Rules and Regulations, which provides that "[t]he rules and regulations in [Part 102] shall be liberally construed to effectuate the purposes and provisions of the Act." Surely one such purpose is to decide cases on their merits whenever possible. If we are to give substance to our stated preference for merits determinations, we need a more flexible default judgment standard.

The Federal Courts' Default Judgment Practice

The policy and practice of the Federal courts with respect to defaults contrast sharply with the Board's. Most Federal courts regard default judgments with a degree of suspicion that borders on outright disapproval. It is not just that default judgments are disfavored, although the circuit courts are all but uniformly of that view.[17] Searching for stronger language, Federal courts have characterized default judgments as "drastic" and "harsh."[18] A default judgment should be reserved for "extreme" circumstances,[19] "rare occasions,"[20] a "totally unresponsive" party,[21] or cases demonstrating "a clear record of delay or contumacious conduct."[22] "Further, concerns regarding the protection of a litigant's rights are heightened when the party held in default appears pro se," and an entry of default against a pro se party should be "freely" set aside.[23] Where the responsive pleading is only marginally untimely, granting a default judgment is like "deploy[ing] a howitzer to deter a gnat."[24]

In the Federal judicial system, defaults are governed by Federal Rule of Civil Procedure 55. Rule 55 sets forth a two-step process. When a party has failed to plead or otherwise defend "as provided by these rules"—such as by missing the deadline for filing an answer—an entry of default may be obtained from the clerk of court. Having obtained an entry of default, the nondefaulting party may then move for a default judgment. An entry of default may be set aside "for good cause shown," and a default judgment "in accordance with Rule 60(b)."[25] Rule 60(b), in turn, sets forth a number of grounds for vacating any final judgment or order, including inadvertence and excusable neglect.

Once a default judgment has been entered, the public policy favoring finality of judgments comes into play.[26] Accordingly, an entry of default is more easily set aside than is a default judgment.[27] In deciding whether good cause exists to set aside an entry of default, most courts consider three factors: the merits of the defaulting party's defense, that party's culpability in failing to timely plead, and whether any party would suffer prejudice were the default set aside.[28] Ultimately, however, the "good cause" standard for setting aside an entry of default authorizes the courts to consider "a panoply of relevant equitable factors . . . in a practical, commonsense manner, without rigid adherence to, or undue reliance upon, a mechanical formula."[29]

In evaluating whether the defaulting party has asserted a meritorious defense, "[t]he underlying concern is to determine 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."[30] Accordingly, the de-

[16] *Frank E. Laviero Co.*, 305 NLRB 94 (1991).

[17] See *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001); *TCI Group Life Insurance Plan v. Knoebber*, 244 F.3d 691, 693 (9th Cir. 2001); *Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000); *Jones Truck Lines, Inc.*, 63 F.3d 685, 688 (8th Cir. 1995); *Rains*, 946 F.2d 731, 733 (10th Cir. 1991); *Tazco, Inc. v. Director, Office of Workers' Compensation Program*, 895 F.2d 949, 950 (4th Cir. 1990); *Walton v. Rogers*, enfd. mem. 860 F.2d 1081 (6th Cir. 1988); *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 420 (3d Cir. 1987); *Varnes v. Glass Bottle Blowers Local 91*, 674 F.2d 1365, 1369 (11th Cir. 1982); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980); *Affanato v. Merrill Bros.*, 547 F.2d 138, 140 (1st Cir. 1977); but see *Dimmitt & Owens Financial, Inc. v. U.S.*, 787 F.2d 1186, 1192–1193 (7th Cir. 1986) (stating that Seventh Circuit has moved away from its traditional position of disfavoring default judgments because overworked condition of that circuit's district courts "makes us reluctant to insist on the resurrection of deceased lawsuits").

[18] See, e.g., *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1316–1317 (11th Cir 2002); *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001) (per curiam); *Coyante v. Puerto Rico Ports Authority*, 105 F.3d 17, 23 (1st Cir. 1997); *Cody v. Mello*, 59 F.3d 13, 15 (2d Cir. 1995); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam); *United Coin Meter Co., Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983).

[19] *Mitchell*, supra, 294 F.3d at 1316–1317; *Lewis*, supra, 236 F.3d at 767; *Rogers v. Hartford Life & Accident Insurance Co.*, 167 F.3d 933, 936 (5th Cir. 1999); *Coyante*, supra, 105 F.3d at 23; *Cody*, supra, 59 F.3d at 15; *Falk*, supra, 739 F.2d at 463; *United Coin Meter*, supra, 705 F.2d at 845.

[20] *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993).

[21] *Jackson*, supra, 636 F.2d at 836.

[22] *American States Insurance*, supra, 178 F.R.D. at 521.

[23] *Enron Oil Corp.*, supra, 10 F.3d at 96.

[24] *American States Insurance*, supra, 178 F.R.D. at 522.

[25] Fed.R.Civ.P. 55(c).

[26] See, e.g., *Weiss v. St. Paul Fire & Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002), cert. denied 537 U.S. 883 (2002); *Nationwide Mutual Fire Insurance Co. v. Rankin*, 199 F.R.D. 498, 503 (W.D.N.Y. 2001).

[27] See 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2694 (3d ed. 1998).

[28] 10 James Wm. Moore et al., *Moore's Federal Practice* ¶¶ 55.50(1)(b)(ii), (iii) (3d ed. 2003); 10A *Federal Practice & Procedure* § 2696, at 145–149.

[29] *KPS & Associates, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 12 (1st Cir. 2003); see 10A *Federal Practice & Procedure* § 2696, at 143 ("[A] motion under Rule 55(c) is addressed to the trial court's discretion, which is exercised in light of all the circumstances of the individual situation.").

[30] 10A *Federal Practice & Procedure* § 2697, at 163.

faulting party must do more than merely assert that it has a defense; rather, it must allege facts that, if proved, would make out a cognizable defense.[31]

As to culpability, the issue is whether the default was the result of inadvertence or excusable neglect,[32] on the one hand, or gross negligence or willfulness on the other.[33] As the Supreme Court has explained, "excusable neglect" does not mean a total absence of culpability, since the word *neglect* "encompasses . . . omissions caused by carelessness."[34] Thus, "excusable neglect" is not limited solely to situations where a party fails to take a required action due to circumstances beyond its control.[35] The determination of whether any particular instance of neglect is "excusable" "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[36] A marginal failure to comply with time requirements may be properly excused,[37] and a vigorous defense cuts strongly against finding the previous delay willful.[38] Even where a defendant's conduct has been found culpable, an entry of default has been set aside based on the remaining factors of a meritorious defense and absence of prejudice to the plaintiff.[39]

With regard to the third factor, prejudice to the moving party, the issue is not one of mere delay, "but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion."[40] There is no prejudice where the denial of a default judgment merely requires the moving party to prove its case.[41] Finally, where the government is the plaintiff, equity compels a particularly close examination of the relevant factors.[42]

[31] 10 *Moore's Federal Practice* ¶ 55.50(1)(b)(ii).

[32] Fed.R.Civ.P. 60(b)(1).

[33] 10A *Federal Practice & Procedure* § 2696, at 149–150.

[34] *Pioneer Investment Servs. Co. v. Brunswick Assocs. Limited Partnership*, 507 U.S. 380, 388 (1993).

[35] Id.

[36] Id. at 395.

[37] 10A *Federal Practice & Procedure* § 2695, at 127–128; *American States Ins.*, supra, 178 F.R.D. at 521–522.

[38] *Schofield*, supra, 197 F.R.D. at 8.

[39] See *Berthelsen v. Kane*, 907 F.2d 617, 622 (6th Cir. 1990) (setting aside entry of default despite defendant's culpability in evading service of process).

[40] *FDIC v. Francisco Investment Corp.*, 873 F.2d 474, 479 (1st Cir. 1989); accord: e.g., *Johnson v. Dayton Electric Mfg. Co.*, 140 F.3d 781, 785 (8th Cir. 1998) (citing *Berthelsen*, supra, 907 F.2d at 621); see also *Powerserve International, Inc. v. Lavi*, 239 F.3d 508 (2d Cir. 2001) (motion to set aside entry of default denied because record showed risk that defendants might collude to place their assets beyond reach, and defendants failed to post required bond to secure plaintiff's interests).

[41] *Lacy*, supra, 227 F.3d at 293.

[42] *Francisco Investment Corp.*, supra, 873 F.2d at 478–479.

Discussion and Analysis

"The interests of a litigant in an administrative proceeding are as worthy of protection as those in a district court."[43] In my view, the interests of litigants, and of justice itself, call for a far more flexible approach to adjudicating defaults. The Board's approach has been defended as necessary because of our heavy caseload.[44] With respect, due process and fundamental fairness should trump administrative efficiency. Again, we have expressed, as a matter of policy, our preference for merits determinations.[45] Our decisions should not be to the contrary.

As previously stated, the Federal rules provide for the setting aside of both an entry of default and a default judgment. The same factors apply in either context, but the former is more readily reopened than the latter. In Board practice, a respondent's posture on a Motion for Default Judgment is similar to that of a court defendant against whom a default has been entered but not yet adjudged. Having failed to file an answer in conformity with the requirements of Section 102.20, the respondent does not immediately suffer a default judgment, but rather is put on notice by the Board that it must show "good cause" why default judgment should not be entered against it. This is the same standard for setting aside an entry of default under Rule 55(c). Moreover, because judgment has not yet been entered, the policy in favor of finality does not apply. In assessing a respondent's "good cause" showing, therefore, I would apply the "good cause" standard as interpreted by the courts in deciding whether to set aside an entry of default.[46]

In applying that standard, three factors typically will be material: the reason or reasons the answer was untimely, the merits of the respondent's defense, and whether any party would suffer prejudice were the default set aside. Where appropriate, however, my analysis will take into consideration other relevant factors "in a practical, commonsense manner, without rigid adherence to, or undue reliance upon, a mechanical formula."[47]

[43] *Livingston Powdered Metal*, supra, 669 F.2d at 136.

[44] *National Book Consolidators, Inc. v. NLRB*, 672 F.2d 323, 330 (3d Cir. 1982) (Rosenn, J., dissenting).

[45] *Paolicelli*, supra, 335 NLRB 881, 882; *M.J. McNally, Inc.*, supra, 302 NLRB at 120.

[46] For a similar analysis, see *Odaly's Management Corp.*, 292 NLRB 1283, 1286 fn. 3 (1989) (then-Chairman Stephens, concurring). By the same token, where a respondent makes no appearance until after a default has been adjudged, finality interests would counsel a somewhat closer scrutiny of the respondent's showing on a motion for reconsideration. Again, however, the same factors would apply: the merits of the respondent's defense, the reasons for untimeliness, and prejudice to the other parties.

[47] *KPS & Associates*, supra, 318 F.3d at 12. Ideally, a late-answering respondent will set forth the merits of its defense in its re-

Turning first to the reasons for the answer's untimeliness, I take note of the following. The Respondent is unrepresented by counsel and did not fully appreciate the draconian consequences of missing an answering deadline in Board proceedings.[48] This is not surprising for a pro se litigant. The General Counsel's complaints are typically couched in legalese and meant for lawyers, not the persons on whom they are generally served. Further, the answer was only marginally late; and the vigor with which the Respondent now contests the allegations against it, and the evident care with which it prepared its response to our Notice to Show Cause, make it plain that the default was not willful.

The next consideration is whether the Respondent has articulated a meritorious defense. According to the charge filed by. Marshall, the Respondent discharged Marshall and Williams for protesting the Respondent's failure to provide employees with proper protective clothing for handling patients' bodily fluids. Sargent's affidavit is to the contrary. According to that affidavit, the relevant events began when Sargent accepted a patient infected with Hepatitis C and wearing a colostomy bag. After employees expressed concerns about dealing with this patient, they were advised that adequate protective clothing was available, consisting of double rubber gloves, goggles, and plastic aprons. Nevertheless, Marshall and Williams refused to provide care to this patient, which resulted in his colostomy bag overflowing. Sargent left voicemail messages for these employees directing them to see her before reporting back to work. According to Sargent, she wanted to meet with Marshall and Williams in order to explain once again the procedures available for their protection. However, neither employee ever reported to work again. If credited, Sargent's representations would compel dismissal of the instant 8(a)(1) allegation against the Respondent. Thus, the Respondent has presented a facially meritorious defense.

Finally, no party would be prejudiced were the General Counsel's motion for default judgment denied. There is no showing that relevant evidence has been lost or that the General Counsel's witnesses have become unavailable. Neither would Marshall or Williams suffer prejudice. Should the General Counsel prevail after a hearing, the Board would order the Respondent to reinstate them and make them whole. The mere fact that a hearing would delay this remedy does not constitute prejudice.

My colleagues note that I cite no judicial criticism of the Board's approach to its interpretation of Section 120.20. The majority can take little comfort from this fact. The Board has been criticized for its harsh application of other procedural rules, such as those dealing with the late filing of exceptions to decisions of an administrative law judge. See *NLRB v. Washington Star*, supra; *NLRB v. Central Mercedita, Inc*. 273 F.2d 370 (1st Cir. 1959). The absence of judicial criticism of the Board's interpretation of Section 102.20 is not judicial approval, but more likely than not the result of few no-answer cases being taken on appeal to the circuit courts. In cases involving the late filing of exceptions, such as those cited above, the respondent is generally represented by counsel and has the financial wherewithal to file an appeal. In no-answer cases, as here, the late-filing party is often pro se or at least does not have counsel at the time the Board complaint is served.

My colleagues further assert that my approach would "undermine" Section 102.20's "good cause" standard because it would result in "finding 'good cause' even when a respondent deliberately disregards the timely-answer requirement." Perhaps I have not made myself sufficiently clear. I have no intention of countenancing willful disregard of the Board's Rules. However, there is a difference between willful disregard and excusable neglect. Here, I find the latter. My colleagues also say that my approach will lead to "unwarranted delay and a waste of administrative resources." It probably will result in some delay, but such delay is warranted—particularly where, as here, the Respondent has asserted facts that, if proved, would constitute a complete defense. Contrary to my colleagues, giving the Respondent the opportunity to prove those facts at a hearing would hardly be a waste of the Board's resources, since the Board has stated that it *prefers* deciding cases on their merits.

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sponse to the Notice to Show Cause, or in an affidavit attached thereto, as the Respondent has done here. However, it would be both unrealistic and unfair to insist on such a showing in every case. Nothing in the Board's applicable controlling precedent or in the boilerplate language of its Notice to Show Cause puts a late-answering respondent on notice of the need to explain its defense, as opposed to simply admitting or denying the several allegations of the complaint without further comment. By contrast, an abundance of precedent puts a Federal-court defendant on notice that it must set forth the merits of its defense in order to obtain relief from a default. Accordingly, unless and until controlling Board precedent furnishes similar notice to late-answering respondents in Board cases, and the Notice to Show Cause is revised accordingly, I will overlook a respondent's failure to explain the merits of its defense in its response to the Notice to Show Cause where other relevant factors favor denying the Motion for Default Judgment.

[48] My colleagues conclude that the Respondent had "ample time" to retain counsel. In fact, however, less than a month elapsed between the service of the complaint and the answer-filing deadline. My colleagues also conclude that the Respondent had "ample . . . ability" to retain counsel. However, the record discloses nothing about the availability at the relevant time, on short notice, and within the Respondent's market and means, of the diminishing supply of traditional labor lawyers—that is, attorneys who have developed an expertise in both the Act and the Board's practices and procedures.

My colleagues also point to certain differences between Board and court procedure as a reason for declining to follow the approach I endorse. I acknowledge the difference, but I think it argues in favor of my approach. As my colleagues point out, unlike a complaint in a court action, a Board complaint is preceded by an official government investigation, which "brings [the General Counsel] into contact with the respondent," and during which the respondent is "given the opportunity to present its position to the General Counsel." Because of its precomplaint communications with the General Counsel, however, the respondent reasonably may think that it has already answered the charges against it before the complaint ever issues. Indeed, this very misunderstanding is a recurring feature of the Board's default judgment case law.[49] It has even led the Board to carve out an exception to its typically inflexible stance and *accept* precomplaint position statements as answers in certain cases.[50] Thus, while my colleagues rely on the Board's precomplaint investigative process as a reason for rejecting my approach, the Board has evidently found in that same process reasons for greater flexibility.

But it is not just the Respondent's perspective that matters here; it is the General Counsel's as well. While a respondent may reasonably think that it has already answered the charges against it well before the complaint ever issues, so also the General Counsel often knows what a respondent's position is before he receives the formal answer. Indeed, where the respondent has told its side of the story in a precomplaint position statement, and then, in its answer, simply denied the operative allegations of the complaint, the General Counsel is actually better informed of a respondent's defense by the precomplaint statement than by the answer. I am not suggesting that the answer is unimportant. I am, however, suggesting that there is a certain "rule for rule's sake" formalism to the Board's rigid enforcement of its answer deadline where the General Counsel may well already know, *before* the answer is filed, what a respondent's defense will be. As my colleagues point out, this state of affairs is unlike court litigation, where the answer comes first and fact investigation follows by way of discovery. Unlike my colleagues, however, I think this difference should prompt the Board to be more tolerant of missed answer deadlines than are the courts. Instead, it is the other way around.

Accordingly, I would deny the General Counsel's Motion for Default Judgment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge our employees and fail to reinstate them because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Synthia Marshall and Wykeithia Williams full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Synthia Marshall and Wykeithia Williams whole for any loss of earnings and other benefits resulting from their unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Synthia Marshall and Wykeithia Williams, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discharge will not be used against them in any way.

PATRICIAN ASSISTED LIVING FACILITY

[49] See, e.g., *Associated Interior Contractors*, 339 NLRB 18 (2003); *Mail Handlers Local 329 (Postal Service)*, 319 NLRB 847 (1995); *Wheeler Mfg. Corp.*, 296 NLRB 6 (1989); *Printing Methods, Inc.*, 289 NLRB 1231 (1988).

[50] See *Central States Xpress*, 324 NLRB 442, 444 (1997); *Mid-Wilshire Health Care Center*, 331 NLRB 1032, 1033–1034 (2000). My colleagues point out that the Board's willingness to accept precomplaint position statements as sufficient answers in these cases hinged on the fact that they were either attached to, or incorporated by reference in, a timely answer. That is true. The Board has been nothing if not consistent in its inflexible insistence that its answer deadline be met. That is the very problem I am addressing here.