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

December 12, 2019

TEMITOPE OGUNRINU Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 19B00032
LAW RESOURCES, Respondent.	)	

ORDER ON REQUEST FOR REVIEW AND MOTION TO AMEND ORDER

I. BACKGROUND

Temitope Ogunrinu (Complainant) filed a charge with the Immigrant and Employee Rights Section of the Department of Justice (IER) against Law Resources, Inc. (Respondent) alleging citizenship status discrimination, document abuse, and retaliation in violation of 8 U.S.C. § 1324b. On June 5, 2019, after receiving a right to sue letter from IER, Complainant filed a Complaint with OCAHO against Respondent. Complainant, an attorney, appears pro se.

On August 26, 2019, Complainant filed a Motion for Leave to File Amended Complaint and Memorandum of Law in Support seeking to amend the claim of retaliation and add a party, the Law Firm of Arnold & Porter Kaye Scholer LLP (Arnold & Porter). Respondent filed a response indicating that it took no position on the motion. On September 10, 2019, Arnold & Porter filed a request to submit a statement of position opposing the addition of the firm as a Respondent. On October 7, 2019, Complainant filed a reply to Arnold & Porter's position statement. Arnold & Porter filed a letter on October 14, 2019, responding to Complainant's reply.

On October 31, 2019, the undersigned issued an Order on Motion to Amend Complaint. *Ogunrinu v. Law Resources,* 13 OCAHO no. 1332 (2019). The undersigned found that Complainant's reply to Arnold & Porter's position statement was filed in derogation of the OCAHO rules and did not consider it. *Id.* at 1–2. The undersigned granted Complainant's motion to amend the complaint as it related to her retaliation claim. *Id.* at 3–4. However, the undersigned denied Complainant's motion to amend the complaint to add Arnold & Porter as a party based on the futility of the amendment. *Id.* at 8. The Court reasoned that prior to filing an OCAHO complaint, a complainant must file an IER charge. *Id.* at 4, 7. The Court found that

Complainant filed a charge against Respondent, but did not file a charge against Arnold & Porter or name Arnold & Porter in her charge against Respondent, and she did not assert any facts to warrant equitable tolling. *Id.* at 8.

On November 7, 2019, Complainant filed a Motion Requesting Review of Order and Motion to Amend Order (Request for Review) and attached her affidavit. Complainant asks the Court to reconsider its Order on Motion to Amend Complaint as it relates to the consideration of her reply to Arnold & Porter's position statement and seeks reconsideration of the denial of the amended complaint regarding adding Arnold & Porter as a party. Complainant also asks the Court to amend the Order as it relates to several facts. Neither Respondent nor Arnold & Porter filed a response to the motion.

On November 18, 2019, Respondent filed a motion to strike Complainant's affidavit attached to her request for review. On November 19, 2019, the undersigned held a prehearing conference in this matter and set Complainant's deadline for filing a response to the motion to strike. Complainant filed a timely response on November 27, 2019.

II. DISCUSSION

A. Motion to Strike Complainant's Affidavit

Respondent seeks to strike Complainant's affidavit attached to her Request for Review. Respondent argues that Complainant's affidavit includes the parties' confidential settlement discussions, so it is inadmissible under Rule 408 of the Federal Rules of Evidence (FRE). However, the "FRE do not automatically apply to cases before federal agencies governed by the Administrative Procedure Act (APA), 5 U.S.C. § 556 et. seq." *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1093, 8 (2003) (citing 5 U.S.C. § 556(d) (2002)). The OCAHO rules state that the FRE are "a general guide to all proceedings held pursuant to these rules." 28 C.F.R. § 68.40(a). Further, the OCAHO rules state that "all relevant material and reliable evidence is admissible[.]" § 68.40(b). "It is proper for a party to cite the FRE as persuasive authority, and evidence that would be admissible under the FRE clearly will be accepted in an OCAHO case. However, the converse is not necessarily true; i.e. evidence will not necessarily be excluded in an OCAHO proceeding simply because it does not meet the standards established by the FRE." *Hsieh*, 9 OCAHO no. 1093 at 8.

Rule 408 of the FRE provides, in relevant part:

> (a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and

> (2) conduct or a statement made during compromise negotiations about the claim . . . .
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

Complainant argues that the "other purpose" exception in Rule 408(b) applies to her use of the settlement discussions at issue. Specifically, Complainant argues that she uses the settlement discussions to show that Arnold & Porter had notice of her IER charge and its potential involvement. In support, Complainant cites *Barnes v. Dist. of Columbia*, 924 F. Supp. 2d 74 (D. D.C. 2013), and the Court finds this case persuasive. In *Barnes*, the plaintiffs sought to mention a settlement agreement in a separate case in which the defendant was a party and involved a virtually identical issue as in *Barnes*. *Id.* at 85. The *Barnes* court stated it must determine whether the "settlement is being offered 'either to prove or disprove the validity . . . of a disputed claim or to impeach by a prior inconsistent statement or a contradiction,' or whether this evidence is being 'admit[ted] for another purpose.'" *Id.* at 87 (quoting FED. R. EVID. 408). The *Barnes* court found that the plaintiffs offered the settlement to show that the defendants had notice of an issue, and therefore, held that Rule 408 did not bar the plaintiffs from mentioning the settlement agreement. *Id.* at 88–89.

Additionally, Complainant alleges that she is using the settlement discussions to show Respondent's representations about its support for adding Arnold & Porter as a party, in order to show why she did not provide this evidence previously. In *C & E Services, Inc. v. Ashland, Inc.*, 539 F. Supp. 2d 316 (D. D.C. 2008), the court permitted a party to use settlement discussions in a case involving another party because the party was seeking to introduce the discussions under the "other purposes" exception of Rule 408(b). *Id.* at 320. The *Ashland* court found that the plaintiffs were not using the settlement discussion "to establish the validity of the underlying claims extinguished by the [s]ettlement, but rather for the 'other purpose' of establishing [the defendant's] misrepresentations upon which plaintiffs[ ] allegedly relied." *Id.* at 321.
We are persuaded by Complainant's argument that she is not seeking to introduce the parties' settlement discussions to establish the underlying validity of her discrimination claims. Instead, Complainant is seeking to introduce the settlement discussions to show that Arnold & Porter had notice of her IER charge against Law Resources. Additionally, she is using the settlement discussions to show that Respondent represented that it would enter a consent agreement to add Arnold & Porter as a party or file a motion stating no objections, and Complainant relied on those representations when she filed her motion to amend her complaint. The Court understands Respondent's concerns that the introduction of settlement negotiations may have a chilling effect on future discussions. However, Complainant's affidavit does not contain specific statements about an offer of settlement or its terms. As such, Respondent's Motion to Strike is DENIED.

B. Request for Review of Order

Complainant asks the Court to amend its Order on Motion to Amend to add additional facts, requests that the Court reconsider its decision regarding her reply to Arnold & Porter's position statement, and reconsider the denial of leave to amend the complaint to add Arnold & Porter as a party. In support, Complainant cites 28 C.F.R. § 68.52(f), which provides that the ALJ can correct certain errors in a final order. Section 68.52(f) does not apply to Complainant's request for reconsideration because the Order on Motion to Amend was not a final order.

Neither the OCAHO rules nor the Federal Rules of Civil Procedure specifically address motions to reconsider interlocutory orders. *See* 28 C.F.R. pt. 68; *United States v. All Assets Held at Bank, Julius, Bar & Co., Ltd.*, 308 F. Supp. 3d 186, 192 (D. D.C. 2018). Under Federal Rule of Civil Procedure 54(b), a court may revise its own interlocutory decision "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." FED. R. CIV. P. 54(b); *see also Williams v. Savage*, 569 F. Supp. 2d 99, 108 (D. D.C. 2008); *Childers v. Slater*, 197 F.R.D. 185, 190 (D. D.C. 2000). "The standard for review for interlocutory decisions differs from the standards applied to final judgments under Federal Rules of Civil Procedure 59(e) and 60(b)." *Williams*, 569 F. Supp. 2d at 108. "Reconsideration of an interlocutory decision is available under the standard, 'as justice requires.'" *Williams*, 569 F. Supp. 2d at 108 (quoting *Childers*, 197 F.R.D. at 190).

Courts have more flexibility in applying the "as justice requires" standard in Rule 54(b), than when determining a motion under Rules 59(e) or 60(b). *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D. D.C. 2005)). To determine whether justice requires reconsideration of an interlocutory decision, courts consider whether the moving party has shown "(1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." *Klayman v. Judicial Watch, Inc.*, 296 F. Supp. 3d 208, 213 (D. D.C. 2018). Even if these three factors are not present, courts can grant motions to reconsider if there are other good reasons. *Cobell*, 355 F. Supp. 2d. at 540. Nonetheless, there must be a good reason to reconsider an issue that the parties have already litigated in motions to reconsider. *See Julius*, 308 F. Supp. 3d at 193. The moving party has the burden to show that "reconsideration is appropriate and that harm or injustice would result if reconsideration were denied." *FBME Bank Ltd. v. Mnuchin*, 249 F. Supp. 3d 215, 222 (D. D.C. 2017) (citations omitted).

1. Additional and "Omitted" Facts

First, Complainant asks the Court to amend the order to include allegations and issues in Complainant's Prehearing Statement, add additional facts, and add "significant and material facts that form the basis and rationale for Complainant filing her charges[.]" Request for Review at 2. In the Order on Motion to Amend Complaint, the Court decided the issue of whether Complainant should be granted leave to amend her complaint. While Complainant is concerned that the order "omitted material facts," the Court did not find any facts. The Court considered whether Complainant's amended complaint would be futile, i.e. whether the amendment would survive a motion to dismiss. *Ogunrinu*, 13 OCAHO no. 1332 at 3. When considering a motion to dismiss, the Court does not make factual findings; instead, the Court only considers the facts that a complainant has pled. *See* 28 C.F.R. § 68.10. The Court summarized the Complainant's

claim briefly, and only discussed allegations relevant to the issue presented in the motion. Thus, the Court declines to amend the order to add additional or "omitted" facts. Complainant has the opportunity to establish facts to support her claims at the summary decision stage of the case.

2. Reply to Arnold & Porter's Position Statement

Regarding her reply to Arnold & Porter's Position Statement, Arnold & Porter filed its position statement on September 9, 2019, and included Complainant on the Certificate of Service. Complainant filed her reply on October 7, 2019. In her affidavit, Complainant states that she did not receive the position statement and was not aware of it until October 4, 2019, when Respondent's counsel provided her a courtesy copy. Complainant's Aff. at 3. She states that in her reply, she did not inform the Court that she did not receive the position statement until October 4 because she interpreted the position statement to be an answer, so she believed she was still within the permissible timeframe to file a reply to an answer. *Id.* It is unclear why Complainant considered the position statement to be an answer, and her reply is not in the nature of a reply to an answer, but presents arguments in further support of her motion. As such the Request for Review as it relates to reconsideration of Complainant's reply to the position statement is DENIED.

3. Adding Arnold & Porter as a Party

Complainant also asks the Court to reconsider its denial of her Motion to Amend Complaint as it relates to adding Arnold & Porter as a party. Generally, there must be a good reason to reconsider an issue that the parties have already litigated and motions to reconsider "cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Julius*, 308 F. Supp. 3d at 193 (citations omitted). Complainant's affidavit explains that Respondent's counsel said he would draft a consent motion to add Arnold & Porter as a party, and when she did not hear from Respondent's counsel, she drafted the motion to amend the complaint. Complainant's Aff. at 2. It appears that due to her discussions with Respondent's counsel, Complainant understood that Respondent would file a motion stating Respondent does not object to the motion to amend complaint. *Id.* at 1–2. Based on counsel's representations, Complainant filed her motion to amend complaint and did not include arguments more properly made by Respondent regarding whether and when Arnold & Porter had notice. Therefore, justice requires the Court to consider the facts asserted in Complainant's affidavit, even though she could have asserted these facts earlier.

In the Order on Motion to Amend Complaint, the Court explained that generally, a complainant may not add a party to a complaint under § 1324b if that party was not named in the IER charge. *Ogunrinu*, 13 OCAHO no. 1332 at 4, 7. The Court considered equitable tolling, as well as two exceptions to the general rule commonly considered in Title VII cases: (1) the identity of interest exception as set out in *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d. Cir. 1977) and (2) the actual notice exception set forth in *Eggleston v. Chicago Journeyman Plumbers' Local Union No. 130, U.A.*, 657 F.2d 890, 905 (7th Cir. 1981). *Id.* at 7. The Court found that Complainant did not plead facts to show that either exception applied to permit her to file a complaint against

a party not named in her IER charge. *Id.* at 8. Considering Complainant's Request for Review, Complainant did not allege any facts to show that the identity of interest exception applies. Under the actual notice exception, an unnamed party may be added to a later complaint if it had actual notice of the charge and an opportunity to participate in the initial administrative proceedings. *Ogunrinu,* 13 OCAHO no. 1332 at 6 (citing *Eggleston,* 657 F.2d at 905). In her affidavit, Complainant states that Respondent's counsel told her that "they were already in discussions with Arnold & Porter concerning this case, and had been from the very beginning when Respondent received [her] charge from [IER.]" Complainant's Aff. at 1. Complainant also states that Respondent's counsel asked her for permission to include Arnold & Porter in the settlement discussions, and she gave her permission based on Respondent's answer and the discussions Respondent stated it was already having with Arnold & Porter to resolve the suit[.]" Complainant's Aff. at 2. Complainant alleges facts to show that Arnold & Porter had actual notice of her charge against Law Resources, as well as its potential involvement in this case. Courts have dismissed Title VII claims against parties not named in the charge when the unnamed party had notice of the charge, but did not have notice of the claim against *it. See Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013); *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008); *Adorno-Rosado v. Wackenhut, P.R.*, 98 F. Supp. 2d 181 (D. P.R. 2000). The additional information in the affidavit distinguishes those cases from the one at issue here. According to Complainant's affidavit, Arnold & Porter heard from Law Resources from the beginning. This, coupled with IER's investigation opened nineteen days after Complainant filed her IER charge, leads this Court to reconsider its decision. In the absence of any apparent or declared reason, such as futility of amendment, leave to amend "should, as the rules require, be freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quotation marks omitted); *see* FED. R. CIV. P. 15(a)(3), ("The court should freely give leave when justice so requires."). Complainant has alleged facts to show that Arnold & Porter had actual notice of the charge and its potential involvement and therefore had an opportunity to represent its interests.

As such, Complainant's motion to reconsider is GRANTED. The Order on Motion to Amend Complaint as it relates to adding Arnold & Porter as a party is REVERSED. Arnold & Porter is added as a respondent in this case.

III. CONCLUSION

Respondent's Motion to Strike Complainant's affidavit is DENIED. Complainant's Request for Review and Motion to Amend Order is GRANTED IN PART. Complainant's motion to amend order as it relates to adding facts is DENIED. Complainant's request for review as it relates to consideration of her reply to Arnold & Porter's position statement is DENIED. Complainant's request for review as it relates to her motion to amend complaint to add Arnold & Porter as a party is GRANTED. Arnold & Porter is added as a respondent in this case.

Within ten days of this order, Complainant shall file a consolidated amended complaint identifying both Law Resources and Arnold & Porter as respondents.

OCAHO will then serve the consolidated amended complaint and the Notice of Case Assignment on Arnold & Porter pursuant to 28 C.F.R. § 68.3. Finally, the parties shall ensure that all future filings in the case are properly served on Arnold & Porter.

SO ORDERED.

Dated and entered on December 12, 2019.

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Jean C. King
Chief Administrative Law Judge