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

September 10, 2020

TEMITOPE OGUNRINU, Complainant, v. LAW RESOURCES & ARNOLD & PORTER KAYE SCHOLER LLP, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00032

ORDER ON MOTIONS TO COMPEL AND MOTION FOR PROTECTIVE ORDER

I. BACKGROUND

This case arises under the antidiscrimination provisions of 8 U.S.C. § 1324b. Pending before the Court are Law Resources' Motion to Compel Complainant's Deposition, Law Resources' Motion to Compel Complainant's Responses to Discovery Requests, and Arnold & Porter's Motion to Compel Complainant's Deposition.

On December 3, 2019, Law Resources served Complainant with its First Set of Discovery Requests. On January 2, 2020, Complainant served responses and objections to the requests. On January 16, 2020, Law Resources and Complainant unsuccessfully met and conferred regarding Law Resources' discovery requests. That same day, Complainant sought an extension to produce documents pursuant to the discovery requests. On January 17, 2020, Law Resources filed a partial opposition to Complainant's motion for extension and a letter with its positions regarding the discovery disputes at issue.

On February 4, 2020, the undersigned issued an order on Law Resources' discovery requests. In the Order, the undersigned ruled on issues related to responses to Law Resources' Requests for Production of Documents. Regarding Request for Production number 3, the undersigned required Complainant to provide a privilege log if she was withholding documents based on a privilege or protection, or if she did not have responsive documents to supplement her responses by February 10, 2020.

On February 14, 2020, pursuant to the parties' requests, the undersigned stayed discovery for sixty days so the parties could engage in settlement discussions. On April 16, 2020, pursuant to

the parties' request, the undersigned extended the stay for an additional sixty days. On April 30, 2020, Complainant filed a motion to lift the stay. On May 14, 2020, the undersigned held a telephonic conference with the parties, and the following day, issued an order referring the case to the Chief Administrative Hearing Officer as a settlement judge and extended the stay an additional sixty days. The parties did not reach a settlement and the stay lifted on July 13, 2020. On August 4, 2020, the undersigned issued an order resetting the deadlines in the case. Pursuant to the order, discovery is limited to Complainant's retaliation claim and damages for all claims and the discovery closure deadline is September 22, 2020.

On August 24, 2020, Law Resources filed a motion to enforce the February 4, 2020, discovery order, or in the alternative, to compel Complainant's responses to discovery requests. On August 26, 2020, Law Resources served a notice of deposition on Complainant seeking to depose her on September 14, 2020. On August 27, 2020, Law Resources filed a motion to compel Complainant's deposition. That same day, Arnold & Porter served a separate notice of deposition on Complainant stating that to avoid duplicating efforts, it does not seek a separate deposition, but instead seeks to preserve its rights to ask additional questions of Complainant at the same time and through the same means as Law Resources. Arnold & Porter also filed a motion to compel Complainant's deposition, joining Law Resources' motion, on August 27, 2020.

On September 4, 2020, Complainant filed a Motion for Protective Order seeking a protective order against the respondents because responding to the discovery requests and being deposed will be duplicative and oppressive. Arnold & Porter filed a response to the motion on September 9, 2020. Law Resources filed a response on September 10, 2020.

II. STANDARDS

An OCAHO Administrative Law Judge (ALJ) has the authority to compel the production of documents, to compel responses to discovery requests, and to compel the taking of a deposition pursuant to 28 C.F.R. § 68.23 and § 68.28. *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 2 (2016). The OCAHO rules permit parties to file motions to compel responses to discovery if the responding party fails to adequately respond or objects to the request. 28 C.F.R. § 68.23(a). A party who "has served interrogatories may move to determine the sufficiency of the answers or objections thereto." *Id.* "Unless the objecting party sustains his or her burden of showing that the objection is justified, the Administrative Law Judge may order that an answer be served." *Id.* Further, if the ALJ determines that an answer does not comply with the requirements of the OCAHO rules, she may order that an amended answer be served. *Id.*

Under the OCAHO rules, upon a party's request and if the party has shown good cause, the Administrative Law Judge (ALJ) may enter a protective order to protect a party from "annoyance, harassment, embarrassment, oppression, or undue burden or expense[.]" 8 U.S.C. § 68.18(c). "The party seeking the protective order has the burden of showing that good cause actually exists." *United States v. Employer Staffing Group II, LLC*, 11 OCAHO no. 1234, 4 (2014). To show good cause, the moving party must present particular and specific facts as to why it needs a protective order, and "[b]road allegations of harm, unsubstantiated by specific

examples or articulated reasoning, do not support a good cause showing." *Tingling v. City of Richmond*, 13 OCAHO no. 1324, 2 (2019) (quoting *Webb v. Green Tree Servicing, LLC*, 283 F.R.D. 276, 278 (D. Md. 2012)). "[T]he standard for issuance of a protective order is high." *Id.* (quoting *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009)).

III. DISCUSSION

A. Motion for Protective Order

On September 4, 2020, Complainant filed a Motion for Protective Order seeking a protective order against the Respondents. Complainant argues that it is duplicative and oppressive to require Complainant to be deposed and to respond to Respondents' discovery requests regarding damages. The majority of Complainant's motion presents arguments against Respondents' motions to compel her deposition, and she also responds to Law Resources' motion to compel her February 2020 discovery responses. Thus, the Court will construe portions of Complainant's motion for protective order as a response to the motions to compel.

Complainant argues that Arnold & Porter served discovery requests on August 19, 2020, and Law Resources served discovery requests on August 20, 2020. She contends that Law Resources' discovery requests are related to the issue of damages, the same issue about which it seeks to depose her. Complainant asserts only that it would be duplicative and oppressive to require her to respond to the discovery requests and be deposed on the same issue.

Arnold & Porter responded to the motion and stated that it was not clear if Complainant's motion is a standalone motion or if it is solely her response to the motions to compel. Nonetheless, Arnold & Porter argues that the motion should be denied because Complainant's argument that a deposition will be duplicative and oppressive is without merit. Arnold & Porter contends that Complainant's argument assumes that the deposition will be limited to questions regarding damages, but Respondents may ask questions about her outstanding retaliation and document abuse claims as well.

Law Resources opposed Complainant's motion for a protective order and argues that requiring Complainant to respond to outstanding discovery requests and be deposed is not duplicative or oppressive. Rather, Law Resources cites 28 C.F.R. § 68.18 and argues that under this rule, it is its right to seek both written discovery and a deposition upon oral examination.

As discussed above, "the standard for issuance of a protective order is high." *Tingling*, 13 OCAHO no. 1324 at 2. The burden is on the moving party to show good cause for issuing a protective order. *Employer Staffing Group II, LLC*, 11 OCAHO no. 1234 at 4. Further, "[it] is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Tingling*, 13 OCAHO no. 1324 at 3 (quoting *Medlin v. Andrew*, 113 F.R.D. 650, 652–53 (M.D. N.C. 1987)). Other than contending that Respondents served discovery requests on the issue of damages and Respondents seek to depose her regarding the same issue, Complainant has not presented particular and specific facts supporting her need for a protective order. This broad allegation does not meet the standard for a

protective order. As such, Complainant has not shown good cause for issuing a protective order. Complainant's Motion for a protective order is DENIED.

B. Motion to Compel Complainant's Deposition

Law Resources and Arnold & Porter seek to compel Complainant's deposition. On August 26, 2020, Law Resources served a Notice of Deposition on Complainant for September 14, 2020. Mot. Compel Depo. Ex A. Law Resources informed Complainant it was willing to conduct the deposition in person or remotely, and invited Complainant to select an alternative date for the deposition if she was unavailable on that date. *Id.*

Arnold & Porter also seeks to depose Complainant and served its Notice of Deposition on August 28, 2020. Arnold & Porter makes it clear that it does not seek a separate deposition, and instead, wishes to preserve its rights to ask additional questions at the same time, location, and means as Law Resources. Arnold & Porter joins Law Resources' motion to compel the deposition.

Complainant argues that Law Resources and Arnold & Porter did not confer with her prior to filing the motion to compel. She also contends that Law Resources improperly served the Notice of Deposition. Finally, as discussed above, she alleges that Law Resources and Arnold & Porter served discovery requests in August seeking discovery on damages, and it would be duplicative and oppressive for her to have to respond to those requests and be deposed.

Regarding her allegation that Respondents did not meet and confer with her prior to filing the motion to compel, both Law Resources and Complainant have attached the email correspondence between Law Resources' counsel and Complainant when Law Resources served the Notice of Deposition. Mot. Compel Depo., Ex. B; Mot. Protective Order, Ex 7b. The email exchange Law Resources provided shows that prior to filing the motion to compel, Law Resources attempted to work with Complainant regarding the date of the deposition and the platform for the deposition. Mot. Compel Depo., Ex. B. On August 16, 2020, Complainant finally stated that because she believed that Law Resources improperly noticed the deposition, "I do not agree to a deposition." *Id*. Complainant's exhibit contains a portion of the same email exchange, but it omits her statement quoted above. Mot. Protective Order, Ex. 7b. Based on the parties' exhibits, the Court finds that Law Resources conferred with Complainant regarding her deposition prior to filing the motion to compel.

There is no evidence that Arnold & Porter conferred with Complainant prior to filing its motion to compel, but as Arnold & Porter explained in its motion, it does not seek a separate deposition and it wants to preserve its right to ask additional questions during the deposition. Arnold & Porter served the Notice of Deposition and filed the motion to compel after Law Resources filed the motion to compel Complainant's deposition. It would have been futile for Arnold & Porter to meet and confer with Complainant because Complainant already told Law Resources that she did not agree to a deposition. Thus, the Court will not deny Arnold & Porter's motion to compel Complainant's deposition based on the argument that it did not meet and confer with Complainant prior to filing the motion.

Next, the email exchange between Complainant and Law Resources shows that after receiving the Notice of Deposition, Complainant first responded that she was available for a remote deposition or suggested a written deposition. Later that same day, she claimed that the Notice was "improperly noticed." Mot. Comp. Depo. Ex. B. In the email, Complainant cited 28 C.F.R. § 68.22(b) and appears to argue that the parties have thirty days after the deposition to review and make changes to the transcript, so a "deposition in ten days plus the 30 days goes outside the deadline to file a motion to compel and definitely past the discovery deadline in the court['s] order." Law Resources' Mot. Compel Depo., Ex. B. She said that based on that argument, she does not agree to a deposition. *Id.* She also stated that since Law Resources already served separate discovery requests, "a deposition would be duplicative, unnecessary, burdensome, and oppressive." *Id.*

First, to the extent that Complainant argues that the deposition was improperly noticed because it should have been served at least forty days before the discovery closure date, Complainant is mistaken. Section 68.22(a) expressly states that a party must serve a notice of the deposition on the person to be deposed at least ten days before the deposition. Law Resources served the notice of deposition on August 26, 2020, and Arnold & Porter served its notice on August 27, 2020. The deposition is currently set for September 14, 2020. Thus, Respondents served the notices of deposition more than ten days before the deposition. Further, section 68.22(b)(2) states that the witness shall review the deposition transcript within thirty days of notification that the transcript is available. Section 68.22(b)(2) does not alter the time for noticing a deposition. *See* § 68.22. Further, the discovery closure deadline is in place to ensure that the parties complete discovery prior to that deadline, so the deposition must take place prior to that deadline, but that does not mean that the transcript of the deposition must be completed and reviewed prior to the discovery closure deadline. *See id.* The Court finds that Respondents served Complainant with the Notices of Deposition more than ten days prior to the deposition date of September 14, 2020. Discovery closes on September 22, 2020. The Notices were timely served and the deposition is set to take place before discovery closes.

Finally, as noted above, Complainant has not presented specific examples or reasoning to meet her burden of showing good cause for a protective order. *Tingling v. City of Richmond*, 13 OCAHO no. 1324, 3 (2020) (citations omitted). As such, Law Resources' and Arnold & Porter's motions to compel Complainant's deposition are GRANTED. Complainant's motion for protective order regarding her deposition is DENIED. Complainant shall make herself available for a deposition either in-person or virtually on the date and time in the Notice of Deposition. Since the deposition is set to begin on Monday, September 14, 2020, the parties may reschedule the deposition, but it must take place prior to the close of discovery on September 22, 2020. Finally, as both Respondents have noted, the deposition is not limited to the issue of damages.

C. Motion to Compel Discovery Responses

In its Motion to Compel discovery responses, Law Resources identifies several discovery responses that were subject to a previous order and telephonic conference, to which Complainant has not definitively or substantively responded. Complainant argues that she has fulfilled all discovery obligations related to Law Resources' December 3, 2019, discovery requests.

1. Request for Production number 3

Law Resources identifies Request for Production (RFP) number 3, which requested, "Any communications between you, on the one hand, and any third party, on the other hand, that evidence, relate or refer to your allegations against Law Resources." In the February 4, 2020 order, the undersigned explained that Complainant's boilerplate objections were improper unless based on particularized facts. Feb. 4, 2020 Order at 4. Further, the undersigned required a party to provide a privilege log if a party withholds documents based on privilege or a protection. *Id.* Thus, the undersigned ordered that if Complainant seeks to withhold documents based on privilege, she must provide a privilege log, and if she does not have responsive documents, she must supplement her response and state that she is not withholding any responsive materials. *Id.*

Law Resources argues that Complainant supplemented her response after the February 4, 2020, order, but, based on her response, it is not clear whether Complainant has documents that are responsive to this request because her response "materially differs from the other responses where she clearly indicated that she does not have responsive documents." Mot. Compel Resps. at 5. Law Resources requests that to the extent that Complainant has responsive documents and did not produce them as required, the undersigned should order her to produce them or sanction Complainant pursuant to 28 C.F.R. § 68.23(c).

In her supplemental response to RFP number 3, Complainant stated:

> No responsive materials are being withheld on the basis of the aforementioned objection. Specifically, no responsive privileged materials or documents are being withheld on the basis of the objections stated in my initial January 2, 2020 response to this request. If I receive additional responsive privileged and/or non-privileged documents, I will supplement this request.

Mot. Compel Resps. Ex. 4 at 1. In comparison, in her supplemental response to RFP numbers 2, 4, and 5, Complainant stated:

> I am not in possession of any responsive materials or documents, and neither are any materials or documents, and neither are any materials or documents being withheld on the basis of the objections stated in my initial January 2, 2020 response to this request. If I receive additional documents, I will supplement this request.

Id.

The Court agrees with Law Resources that Complainant's supplemental response to RFP number 3 materially differs from her supplemental responses to other RFPs that state she does not have any responsive documents. It is not clear from her supplemental response whether she has responsive documents or whether she is withholding responsive documents. As such, Complainant is required to supplement her response to RFP number 3. If she does not have responsive documents, she must definitively state that she does not have any responsive

documents. If she does have responsive documents and she is withholding them based on a privilege or protection, she must provide a privilege log.

2. Interrogatory numbers 4 & 5

Law Resources also claims that Complainant did not provide substantive responses to any of Law Resources' interrogatories concerning damages. Law Resources specifically points to Interrogatory numbers 4 and 5.

a. Interrogatory number 4

In Interrogatory number 4, Law Resources asked:

> List all document review or other legal project(s) you worked on in 2018. As part of your answer, please indicate the staffing agency you were employed by, the name of the law firm the document review project was with, the dates you worked on the document review projects, the number or hours you worked including overtime, the total amount you were paid for this work, and without revealing any commercially sensitive or confidential information, describe the nature of the project.

Mot. Compel Resps., Ex. 5 at 3.

In response, Complainant stated:

> See Complainant's 2018 W-2's which identify the staffing agency, the dates Complainant worked on the document review projects for those staffing agencies, and the number or hours Complainant worked which includes overtime wages, and the total amount Complainant was paid. Complainant objects to the request for the name of the law firm the document review project were with because that information is confidential, and is not relevant or likely to lead to admissible evidence since that fact has no bearing on Law Resources own liability for unlawful discriminatory conduct.

Id.

Law Resources asserts that despite her response, Complainant's tax returns and W-2 forms do not provide the information requested in this interrogatory because they do not set forth the dates she worked or the number of hours she worked. Law Resources also contends that she refused to describe the nature of the project because it is "confidential." Law Resources contends that the December 12, 2019, Protective Order should allay concerns about confidentiality.

Complainant objects to the request for the name of the law firm for whom she conducted the document review because it is confidential, not relevant, or likely to lead to admissible evidence. Law Resources has not articulated the relevance of this portion of the request, unless the law firm is a party to this case.

Law Resources provided the tax returns and W-2s that Complainant provided in her response. Mot. Compel Resp., Ex. 4. Those documents only show the name of the staffing agency for whom Complainant worked, and the total wages paid during the applicable taxable year. *See id.* The documents do not provide the number of hours Complainant worked, they do not provide the dates she worked for each employer, the hourly wage she was paid including overtime or the nature of the project. *See id.* As such, Complainant's response to Interrogatory number 4 does not fully respond to the request. *See also supra* Part III.C.2.b. Thus, Complainant is required to supplement her response to Interrogatory number 4 and provide the number of hours she worked for each employer, the dates she worked for each employer, and the hourly wages including overtime she was paid by each employer and the nature of the project. Finally, if Complainant was employed through a staffing agency, Complainant is not required to disclose the law firm for whom she worked unless Complainant worked on a project for Arnold & Porter during the relevant time period. If Complainant worked on a project for Arnold & Porter, Complainant must include that information in her supplemental response.

b. Interrogatory number 5

Interrogatory number 5 asks, "Provide a computation of the damages you allege." Mot. Compel Resp., Ex. 5 at 4. In her supplemental response, Complainant stated in part:

> Information requested is confidential due to the ongoing settlement discussions between all parties and the fact that the Department of Justice is representing Complainant's interests in this respect. No privilege log is needed since all parties are part to the same ongoing settlement discussions.

Id.

Law Resources contends that Complainant has not provided a computation of damages to-date, the February 4, 2020 Order required Complainant to supplement her responses, and settlement discussions do not obviate her discovery obligations. In response to Law Resources' August 20, 2020, email to Complainant asking if she intended to supplement her responses, Complainant stated that Law Resources received "exactly what was requested," she already supplemented her responses and provided all the information requested, and she "did state that [her] damages would rely on information produced from both the Respondents and [she] would also supplement any responses if necessary. The hourly rate [she] earned elsewhere is not relevant since back pay, front pay, and lost wages in a refusal to hire case like this, would be based on what Arnold & Porter paid its clients for contract services." Mot. Compel Resps., Ex. 6 at 1.

First, Complainant's contention that the information requested is confidential and a privilege log is not needed because all parties are parties to the same settlement discussions is not a proper objection. Settlement discussions have ended in this case. Additionally, there is nothing in the OCAHO rules that provides that information responsive to discovery requests is confidential when settlement negotiations are ongoing, or waives the privilege log requirement because of settlement discussions. *See* 28 C.F.R. part 68.

Additionally, the OCAHO rules provide that unless otherwise limited by the ALJ, "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject

matters involved in the proceeding[.]" 28 C.F.R. § 68.18(b). OCAHO case law states that the following "elements must be considered when making an award of back pay: the appropriate time period, the items to be included in the gross award, and the amounts by which an award may be reduced." *Iron Workers Local 455, et al. v. Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 969 (1997). "Case law makes clear that an aggrieved individual has a duty to mitigate damages by exercising reasonable diligence in seeking similar employment." *Id.*; *Jones v. De Witt Nursing Home*, 1 OCAHO no. 189, 1235, 1257 (1990). Information about Complainant's other employment including the hourly rate, the employer, the total amount of wages, and dates that she was employed is relevant to determining damages in this case. Thus, Complainant is mistaken that the hourly rate she earned elsewhere is not relevant. As such, Complainant's relevance objection to providing the hourly wages she earned through other employment is not justified.

Furthermore, in *Armenian Assembly of America, Inc. v. Cafesjian*, 746 F.Supp.2d 55, 71 (D. D.C. 2010), the court precluded the plaintiffs from seeking a category of damages because the plaintiffs never disclosed a computation or quantification of damages and did not explain the nature of the theory of the damages until the court ordered them to do so in pretrial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(iii). *Id.* at 71. The court found that the category of damages was extremely broad and the plaintiffs had "an obligation to disclose a computation for this category of damages so as to put [the d]efendants on notice as to precisely what damages they were claiming." *Id.* at 70. The court further explained that "[w]ithout the required disclosure, [the d]efendants had no meaningful way of preparing to rebut the testimony [ ] proffered by [the p]laintiffs to support this theory." *Id.*

Similar to *Cafesijan*, Complainant has not provided any computation or quantification of damages in this case. Instead, she stated in her responses, and again in an email on August 20, 2020, that her damages would rely on information provided from Respondents and she would supplement if necessary. The Court finds that Complainant must provide a computation or quantification of the damages she seeks in this matter. As such, Complainant must supplement her response Interrogatory number 5 prior to the commencement of her deposition.

IV. CONCLUSION

Complainant's Motion for Protective Order is DENIED. Complainant did not show good cause for granting a protective order.

Law Resources' and Arnold & Porter's Motions to Compel Complainant's Deposition are GRANTED. Complainant must make herself available for an in-person or virtual deposition. The parties may reschedule the deposition currently set for September 14, 2020, but the deposition must be scheduled prior to the close of discovery on September 22, 2020. Arnold & Porter is permitted to ask questions as necessary. Finally, the deposition is not limited to the issue of damages.

Law Resources' Motion to Compel Discovery Responses is GRANTED IN PART. Complainant shall supplement her response to Request for Production number 3. If she does not have

responsive documents, she must definitively state that she does not have any responsive documents. If she does have responsive documents and she is withholding them based on a privilege or protection, she must provide a privilege log. Complainant is required to supplement her response to Interrogatory number 4 and provide the number of hours she worked for each employer, the dates she worked for each employer, the hourly wages including overtime she was paid by each employer, and the nature of the project. If Complainant was employed through a staffing agency, Complainant is not required to disclose the law firm for whom she worked unless Complainant worked on a project for Arnold & Porter during the relevant time period. If Complainant worked on a project for Arnold & Porter, Complainant must include that information in her supplemental response. Finally, Complainant shall supplement her response to Interrogatory number 5 and provide a computation or quantification of the damages she seeks in this matter. Complainant must serve her supplemental responses on both Respondents **prior to the commencement of her deposition.** If the deposition takes place on September 14, 2020, Complainant must serve her supplemental responses before the deposition begins. If the deposition is rescheduled, Complainant must serve her supplemental responses by 3:00 p.m. the day before the deposition is set to begin.

The parties should note that failure to comply with this Order may result in sanctions pursuant to 28 C.F.R. § 68.23(c).

SO ORDERED.

Dated and entered on September 10, 2020.

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Jean C. King
Chief Administrative Law Judge