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

September 18, 2019

UNITED STATES OF AMERICA, Complainant, v. CHANCERY STAFFING SOLUTIONS, LLC AKA TRANSPERFECT STAFFING SOLUTIONS AKA TRANSPERFECT LEGAL SOLUTIONS, INDIVIDUALLY AND AS SUCCESSOR TO TRANSPERFECT STAFFING SOLUTIONS. LLC AKA TRANSPERFECT LEGAL SOLUTIONS, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00023

ORDER DENYING MOTION FOR ENTRY OF DISCOVERY ORDER

I. INTRODUCTION

This matter is before the Court on Respondent's Motion for Entry of a Discovery Order. Respondent's Motion for Entry of a Discovery Order is DENIED.

II. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(1)(B) (2017). The United States of America, through the Department of Justice's Immigrant and Employee Rights Section (IER) (Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 9, 2019, alleging that Chancery Staffing Solutions (Respondent) discriminated against two individuals based on their citizenship status and engaged in a pattern or practice of citizenship status discrimination in violation of 8 U.S.C. § 1324b.

Pending before the Court is Respondent's "Motion for Entry of a Discovery Order." Respondent filed the motion in response to an email communication ("communication")[1] sent by IER to 958 individuals who were recipients of the recruitment effort at issue in this case. Respondent seeks an order requiring IER to, among other things, 1) refrain from sending similar emails to any current or former employees, contractors or vendors; 2) provide Respondent with all continuing third-party correspondence; 3) cease suggesting to individuals that they may financially benefit from speaking with IER in connection with the matter; 4) cease suggesting that the individuals may be victims of citizenship status discrimination; and 5) send a curative email to the persons who received the first communication.

On August 15, 2019, Complainant filed a response to the motion. On August 27, 2019, Respondent filed a letter pleading requesting permission to supplement its Motion for Entry of Discovery Order with exhibits. On September 5, 2019, a Sur-Reply to Motion for Protective Order, or in the Alternative, Opposition to Respondent's Letter. Both parties seek leave to file their respective reply and sur-reply. The undersigned finds Respondent's request for leave to supplement its motion and Complainant's request for leave to file a sur-reply are GRANTED.

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[1] The following is the text of the email communication:

> I am writing to you because you received a recruitment email from TransPerfect in 2017 regarding a legal temp project. As a result, you may have relevant information related to the above-referenced lawsuit, and may be entitled to back pay in the event that the United States prevails or settles the case.
>
> My office, the Immigrant and Employee Rights Section (IER) in the Department of Justices' Civil Rights Division, enforces a law, 8 U.S.C. § 1324b, which prohibits companies from, among other things, committing citizenship status discrimination in hiring, firing, or recruiting, and from retaliating against individuals who assist or participate in IER enforcement actions. You can learn more about my office's work on our website at: www.justice.gov/ier.
>
> On May 9, 2019, IER filed a lawsuit against Chancery Staffing Solutions, LLC 9also known as Transperfect Staffing Solutions), alleging that the company engaged in citizenship status discrimination when staffing a project between March 2017 through July 2017. You can find more information about the complaint here: https://www.justice.gov/opa/pr/justice-department-files-lawsit-alleging-transperfect-staffing-solutionsdiscriminated.
>
> Please call me directly …. To discuss this matter. If I am not available, please leave a message with your name, telephone number, and the best time that I can reach you. Thank you for your cooperation.

Resp. to Mot. Discov. Order at 14.

III. STANDARDS

OCAHO has broad authority to control discovery. 28 C.F.R. Part 68 (2001). Rule 68.18(a) provides that the frequency or extent of the methods of discovery may be limited by the Administrative Law Judge (ALJ) upon motion or her own initiative. 28 C.F.R. § 68.18(a). Under the OCAHO rules, upon a party's request and if the party has shown good cause, the 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." *U.S. 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." *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." *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009).

IV. DISCUSSION

A. Protective Order

Respondent argues that the communication could bias the views of potential witnesses, has unnecessarily disrupted Respondent's business operations and working relationships of employees, was misleading and violated the spirit of the American Bar Association's Model Rules of Professional Conduct 7.3.

Complainant argues that Respondent has not met the rigorous burden for limiting a parties' ability to engage in discovery. Complainant argues that the email is factually correct, and Respondent fails to specify the harm or disruption that the email caused. Lastly, Complainant argues that Respondent cites the incorrect professional rules and, in any event, they do not apply to IER as IER and its attorneys do not solicit professional employment for pecuniary gain.

The first issue is whether Respondent is seeking a protective order, and therefore, whether the good cause standard applies. OCAHO's regulations describe the scope of a protective order, providing that the ALJ can enter a protective order including that discovery not be had, that discovery may be had only on specified terms and conditions, or by a method different than that selected by the party. § 68.18(c). Here, Respondent is seeking an order barring any further communications with any current or former employees, and/or an order proscribing the contents of any such emails in the future, as well as a curative email. As the prayer for relief falls within the parameters of a protective order as described in § 68.18, Respondent must demonstrate good cause.

Respondent argues that the solicitation is deficient in that it did not inform individuals that they had an obligation to cooperate with IER, did not make clear that Respondent denied the allegations, and improperly promises financial benefits. Respondent states that the email has the

potential to severely disrupt its business relationships and discourage individuals from working with Respondent.

As both parties note, OCAHO has recognized that a party may contact or interview *ex parte* non-party witnesses without leave of the court. *Avila v. Select Temporaries*, 9 OCAHO no. 1079, 6 (2002). OCAHO has taken differing approaches to similar types of communications. *Id*; *United States v. Agripac.* 8 OCAHO no. 1012 (1998). In *Avila*, a disparate treatment case, the ALJ entered an order similar to the type of order that Respondent seeks. *Avila*, 9 OCAHO no. 1079 at 11. The ALJ was concerned with potential violations of California Rules of Professional Conduct regarding contact with represented individuals, and the protective order primarily reflected those concerns. *Id.* at 9. The ALJ also found the communication to be confusing and possibly misleading as to whether the complainant was conducting an investigation or discovery, and recognized that the communication could be disruptive to the respondent's business. *Id.* Thus, the ALJ ordered that in future contacts with the respondent's employees, the complainant had to include notations regarding the right of the person to refuse to be interviewed, and that the persons could have an attorney, including the respondent's attorney. *Id.*

In *Agripac*, a pattern and practice case, the Office of Special Counsel[2] sought to advertise on the radio and through a written notice. *Agripac*, 8 OCAHO no. 1012 at 228. The proposed language was similar to the language here except the language in both the notice and radio broadcast indicated that a judge had not made a finding of liability. *Id.* The language regarding the award of money was similar in the radio broadcast ("[i]f the case is decided by a court against Agripac, it is possible that you may receive money"), but was more circumspect in the notice ("[i]f the case is decided by a judge against Agripac, it is possible that some people may be entitled to money. This would be in the form of back wages if an applicant was denied a job unfairly, and the denial resulted in a loss of income."). *Id*. The ALJ rejected the respondent's motion for a protective order, finding, among other things, that "there has been no showing of precisely how the publication of the allegations of OSC's complaint, which are already a matter of public record, will harm Agripac. Beyond the bare assertion, there is no showing of any impact on reputational interests or employee relations." *Id.* at 233. The ALJ also noted, however, that the people most likely to respond to the notice are not current employees, but those whom *Agripac* refused to consider for employment. *Id.* (citing *Hoffman v. United Telecommunications, Inc*, 111 F.R.D.332, 336 (D. Kan. 1986)). *Hoffman* involved a mass mailing from the Equal Employment Opportunity Commission (EEOC) to all of the defendants' current, former, and prospective employees. *Hoffman*, 111 F.R.D. at 334. The *Hoffman* court disallowed the EEOC's proposed mass communication, citing the risk of confusion and disruption, but did not prohibit the EEOC from communicating with the employees. *Id.* at 336.

Here, Respondent submitted a number of responses from the email recipients that either Respondent or IER received. The responses expressed a range of opinions, from concern about the propriety of the email, to praise for the company, to no response. Decl. of Matthew Graves,

[2] On January 18, 2017, the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) was renamed the Immigrant and Employee Rights Section. See Standards & P. for the Enforcement of the INA, 81 Fed. Reg. 91768-01, 91787 (Dec. 19, 2016).

Exs. D, E, F. In its supplemental filing, Respondent submitted more recipients' responses, most of which indicated that the recipient did not have information and/or was a United States citizen. Some questioned IER and what they were doing (Supp. Resp. at USCSS-0013593), or offered to assist in civil rights work (Supp. Resp. at USCSS_0013572). One criticized how companies such as Respondent select attorneys generally (Supp. Resp. at USCSS_0013600). Respondent argues that the responses show that virtually none of those who received the communication would be entitled to back pay, the communication produced no admissible evidence, and it had the potential to cause confusion and bias.

Respondent failed to demonstrate good cause for a protective order. The persons who received the email are attorneys and, presumably, understand the difference between an allegation and a finding, understand the role of discovery and their rights to have an attorney. None of the responses that Respondent submitted indicated that the communication reflected poorly on Respondent, nor indicated that the potential recruits would be confused regarding Respondent's business. Respondent has not articulated how the communication would disrupt its operations. Furthermore, the recipients are not full-time employees of the company, but are recruited to work on projects as they arise, and the solicitation was not indiscriminate, which distinguishes this case from *Hoffman*. There is no allegation that IER is contacting employees who could be said to be represented, as was the concern in *Avila*, or that the case is in an investigative posture. This case is more similar to *Agripac* than *Avila*, particularly in that the concerns of potential disruption, confusion and bias remain just that, potential concerns. Recognizing that *Hoffman* and *Avila* assumed, without more, that such communications could cause these problems, the facts here do not show that this rises to the high bar required for a protective order.

B. Disciplinary Rules

Respondent's arguments regarding improper solicitation in violation of the professionalism rules were put to rest in *Agripac*: "as a governmental agency charged by law with the implementation of public policy as defined by the United States Congress, OSC is obviously not on the same footing as an attorney soliciting clients for commercial purposes. There is no suggestion that OSC will be seeking attorney's fees or that it has any pecuniary interest in this litigation." *Agripac*, 8 OCAHO no. 1012 at 231; *see In re Primus*, 436 U.S. 412, 426–31 (1978).

Furthermore, Justice Department attorneys are bound by the ethical rules of the locality where their practice takes them. 28 U.S.C. § 530B. As the events occurred in Washington, D.C., the Rules of Professional Conduct for the District of Columbia apply. Respondent has not presented any arguments relating to those rules. In any event, as noted in *Agripac*, Model Rule of Professional Responsibility 7.3 does not apply as it relates to soliciting professional employment for pecuniary gain. *See Agripac*, 8 OCAHO no. 1012 at 231–32.

Additionally, the Model Rule of Professional Responsibility 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. The communication at issue does not address the relationship between IER and any services it might render to the recipient, and the Rule is likewise not implicated.

To be sure the manner in which IER phrased the potential receipt of back pay was viewed negatively by a few of the recipients of the email, and could have been written in a more circumspect manner like the *Agripac* email. The undersigned strongly encourages IER to moderate the tone of any future communications of this nature in this respect. However, given the facts presented here, Respondent has not shown good cause for a protective order.

V. CONCLUSION

Respondent's Motion for Entry of Discovery Order is DENIED.

SO ORDERED.

Dated and entered on September 18, 2019.

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Jean C. King
Chief Administrative Law Judge