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

October 31, 2019

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

ORDER ON MOTION TO AMEND COMPLAINT

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), signed November 1, 2018, alleging citizenship status discrimination, document abuse, and retaliation in violation of 8 U.S.C. § 1324b. On March 8, 2019, IER sent Complainant a letter informing her that while IER had not completed its investigation into the charge against Respondent, she may file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety days of receipt of the letter. On June 5, 2019, Complainant filed a Complaint with OCAHO against Respondent. Respondent filed an answer on July 12, 2019. 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 charge 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. The request is GRANTED.

On October 7, 2019, Complainant filed a reply to Arnold & Porter's position statement. Under the OCAHO rule regarding motions or requests, "[u]nless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive document shall be filed." 28 C.F.R. § 68.11(b). Complainant did not seek leave to file a reply.

Thus, Complainant's reply was filed in derogation of the OCAHO rules and is accordingly not considered. *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 1–2 (2012).[1] In contrast, on September 9, 2019, Complainant filed a Motion for Leave to Reply to Respondent's Answer. The OCAHO rules permit a complainant to file a reply to each affirmative defense asserted and the rules do not require a complainant to seek leave to file a reply to the Answer. 28 C.F.R. § 68.9(d). Complainant's Motion for Leave to File a Reply to Respondent's Answer is MOOT.

II. POSITION OF THE PARTIES

Complainant alleges that she contacted Respondent, a legal services staffing agency about temporary staffing opportunities, and Respondent informed her about a position with the law firm handling discovery matters. The law firm offered her a position with the exception that she reconfirm that she is a U.S. citizen and does not have dual citizenship with any other country. IER Charge Form at 3. Complainant asserts that when she did not respond to the question, she was not hired for the job. Complainant further asserts she was retaliated against because Respondent has not contacted her for future opportunities. Compl. at 11.

Complainant argues that Respondent's answer states that the law firm, Arnold & Porter, gave it the directive to inquire into citizenship and imposed the requirements that only U.S. citizens with no dual citizenship could be hired. Mot. Leave to Am. at 3–4. Complainant also asserts Respondent stated as an affirmative defense that it relied on Arnold & Porter in good faith when it carried out the unlawful policy. *Id.* at 4. Complainant argues the undersigned should grant leave to amend because the case is in its early stages, it would serve the interests of justice and judicial economy to include Arnold & Porter as a respondent, and neither Respondent nor Arnold & Porter would suffer undue prejudice. *Id.*

Arnold & Porter states that IER commenced an independent investigation against it, which is ongoing. Arnold & Porter argues that Complainant has failed to satisfy the procedural requirements under 8 U.S.C. § 1324b(d) for initiating a claim against it, and permitting her to circumvent these procedures would unduly prejudice the firm. Arnold & Porter argues that nothing in the statute permits an individual complainant to file a private action before OCAHO when he/she has not filed an IER charge, and when such entity is otherwise the subject of a pending IER investigation. Position Statement of Arnold & Porter at 3. Lastly, Arnold & Porter

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

argues that Complainant has not provided any basis for her failure to comply with the requirements under the statute, and has not alleged that she was somehow deprived of the information necessary to comply with these requirements. *Id.* at 2.

III. STANDARDS

The OCAHO Rules of Practice and Procedure permit a complainant to amend a complaint "[if] a determination of a controversy on the merits will be facilitated thereby" and "upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties[.]" 28 C.F.R. § 68.9(e) (2018).[2] This rule is analogous to and is modeled after the Federal Rule of Civil Procedure 15(a), and accordingly, it is appropriate to look for guidance in federal case law to determine whether to permit requested amendments under Rule 15(a). 28 C.F.R. § 68.1. *See United States v. Valenzuela*, 8 OCAHO no. 1004, 3 (1998); *United States v. Mr. Z Enters.*, 1 OCAHO no. 162, 1128, 1129 (1990). Rule 15(a) provides that a party may amend his or her complaint once "as a matter of course" before a responsive pleading is served; after a responsive pleading is served, the "party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." FED. R. CIV. P. 15(a).

The D.C. Circuit, the jurisdiction in which this case arises, has held that a trial court abuses its discretion if it denies leave to amend without a sufficiently compelling reason, "such as undue delay, bad faith or dilatory motive, . . . repeated failure to cure deficiencies by [previous] amendments [or] futility of amendment." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also City of Williams v. Dombeck*, 203 F.R.D. 10, 11 (D. D.C. 2001). A court may also deny leave to amend the complaint if it would cause the opposing party undue prejudice. *Foman*, 371 U.S. at 182. Further, a court may deny as futile a motion to amend a complaint when the proposed complaint would not survive a motion to dismiss. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (citations omitted).

IV. DISCUSSION

Complainant filed the Motion for Leave to Amend Complaint after Respondent submitted its Answer. Moreover, Arnold & Porter has not consented to the amendment to add it as a respondent. Consequently, any amendment of the Complaint must be made "by leave of court." *United States v. WSC Plumbing*, 8 OCAHO no. 1045, 696, 702 (2000).

A. Motion to Amend to Add Claim

As to the amendment concerning the retaliation claim, the original Complaint includes a retaliation claim. Respondent does not argue that these allegations would be subject to a motion

[2] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2018).

to dismiss, and the retaliation allegations in the Amended Complaint are not new allegations. Rather, Complainant recasts some of her original allegations as retaliatory. For these reasons, the Motion for Leave to Amend the Complaint as it relates to the retaliation allegations is GRANTED.

B. Motion to Amend to Add Arnold & Porter

As to Complainant's motion to amend her complaint to add a respondent, Arnold & Porter, Complainant did not name Arnold & Porter in her IER charge. Arnold & Porter essentially argues that the amendment would not survive a motion to dismiss because Respondent did not follow the procedural requirements required by statute.

Filing a charge with IER alleging that a person or entity has committed or is committing an unfair immigration-related employment practice is a prerequisite to filing a private action with OCAHO. 8 U.S.C. §§ 1324b(b)(1) and (d)(2); *Bozoghlanian v. Magnovox Advanced Prods. & Sys. Co.*, 4 OCAHO no. 695, 950, 953 (1994) ("complainant cannot amend a private action to assert claims against individuals who were not named in a charge filed previously with [IER]"). *See also George v. Bridgeport Jai-Alai*, 3 OCAHO no. 537, 1361, 1367 (1993); *but see United States v. Creation & Innovation, Inc.*, 3 OCAHO no. 527 (1993). "Filing a timely IER charge is thus a condition precedent to the filing of a private action with OCAHO." *Ndzerre v. Wash. Metro. Area Transit Auth.*, 13 OCAHO no. 1306, 8 (2017). IER's regulations define a "charge" and provide the specific information that a charging party must provide to constitute a charge. 28 C.F.R. § 44.101(a). The charging party must provide a written statement that "[i]dentifies the name and address of the person or other entity against whom the charge is being made[.]" § 44.101(a)(4).

The statutory requirement to exhaust administrative remedies is not an empty formality. Its purpose is to put a respondent on notice and to afford an opportunity within a reasonable time to resolve the matter at the initial administrative stage. *McCaffrey v. LSI Logic Corp.*, 6 OCAHO no. 867, 481, 489 (1996) (denying motion to amend complaint adding allegations of pattern and practice and document fraud).

However, where the exhaustion of remedies includes a failure to timely file the charge, OCAHO has found that the untimeliness does not end the inquiry, "because the time limits in a § 1324b claim, like those for filing a charge under Title VII, 42 U.S.C. § 2000e *et seq.*, are not a jurisdictional prerequisite but a requirement, like a statute of limitations, that is subject to waiver, estoppel, and equitable tolling." *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1071 (1998). Here, Complainant's failure to file with IER as to Arnold & Porter violates a statutory requirement. This requirement is sufficiently similar to the timeliness requirement that this court finds that the requirement is subject to waiver, estoppel, and equitable tolling.

1. Equitable Tolling

First, the question is whether there are any other facts and circumstances which could give rise to equitable tolling. The charging party bears the burden of demonstrating that equitable modification is appropriate. *Bozoghlanian*, 4 OCAHO no. 695 at 956.

The court's power to equitably excuse noncompliance with administrative filing deadlines, however, "will be exercised only in extraordinary and carefully circumscribed instances." *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057 (D.C. Cir.1988). A "petitioner is entitled to equitable tolling only if [s]he shows (1) that [s]he has been pursuing [her] rights diligently, and (2) that some extraordinary circumstance stood in [her] way and prevented timely filing." *Holland v. Fla.*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also, Dyson v. D.C.*, 710 F.3d 415, 421 (D.C. Cir. 2013).

The Supreme Court has characterized equitable tolling's two components as "elements." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016) (citing *DiGuglielmo*, 544 U.S. at 418). The Supreme Court further clarified that the diligence prong covers those affairs within the litigant's control; the extraordinary-circumstances prong, by contrast, is meant to cover matters that are both extraordinary and outside the litigant's control. *Id*.; *Ekemezie v. CVS Pharmacy, Inc*., 316 F. Supp. 3d 489, 497 (D. D.C. 2018).

In this case, the respondent has not demonstrated extraordinary circumstances to allow for equitable tolling. According to Complainant, she seeks to add Arnold & Porter because Respondent's Answer indicated that Respondent relied on its client in imposing the requirements of U.S. citizenship and no dual citizenship. These are not new facts, however, that were unavailable at the time Complainant filed her Charge and Complaint. In the Charge, Complainant states, "The law firm offered me the position with the exception that I re-confirm I am a US citizen and do not have dual citizenship with any other country." IER Charge Form at 3. In her Prehearing Statement, Complainant attached a number of emails from September 2018 in which Respondent states that the requirements were those of the law firm, and the firm name was noted. Complainant's Prehearing Statement Ex. C-2 at 3 ("Due to the nature of the case, the firm requires all that are working on the case to be a US citizen only."); Ex C-6 (Complainant's Arnold & Porter Conflicts Questionnaire). Complainant's only explanation is that she did not realize that Respondent would assert a defense. She does not otherwise explain why she did not name the law firm in her Complaint or Charge, and does not allege that there were any factors beyond her control. Thus, Complainant's motion does not meet the requirements for equitable tolling.

2. Exceptions to Named Party Requirement

Even if a complainant fails to establish equitable tolling, in Title VII cases, courts have permitted plaintiffs to amend their complaints to add an unnamed party if an exception to the named party requirement applies. Both § 1324b and Title VII contain a condition precedent which requires a party to file a charge prior to bringing an action under § 1324b or Title VII. *See Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995). "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e *et seq*." *Chellouf v. Inter American Univ. of P.R.*, 12 OCAHO no. 1269, 5 (2016) (citing *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 154–55 (1996)).

Generally, under Title VII, before a charging party can file a complaint against a respondent, the charging party must name that respondent in the charge. *EEOC v. Metzger*, 824 F.Supp.1, 4 (D. D.C. 1993) (citing *Eggleston v. Chi. Journeymen Plumbers Local Union No. 130, U.A.*, 657 F.2d 890, 905 (7th Cir. 1981)). However, courts have considered two exceptions to this rule. A complainant may not bring a complaint against a party not named in the charge, "unless [the unnamed party has] been given actual notice of the [agency] proceedings or ha[s] an identity of interest with the party [named in the charge]." *Id*; *see Eggleston*, 657 F.2d. at 905 (adequate notice exception); *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977) (identity of interest exception). *See e.g.*, *Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991); *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 482–84 (5th Cir. 2014); *Romain v. Kurek*, 836 F.2d 241, 245–46 (6th Cir. 1987); *Greenwood v. Ross*, 778 F.2d 448, 451 (8th Cir. 1985); *Virgo v. Riveria Beach Assoc., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994).

The *Eggleston* court held that a plaintiff may bring an action against a party not named in the charge if the "unnamed party has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in [administrative proceedings] aimed at voluntary compliance[.]" *Eggleston*, 657 F.2d at 905. Courts have dismissed claims against unnamed parties when the unnamed party was a separate entity from the party named in the charge. *See Hammel v. Marsh USA, Inc.*, 79 F.Supp.3d 234, 244 (D. D.C. 2015) (dismissing Title VII claims against a parent company because it was not named in the charge against its subsidiary and it did not have notice of the charge); *Alam v. Miller Brewing Co.*, 709 F.3d 662, 667 (7th Cir. 2013) (considering a charge that named a joint venture and a complaint that also included a party to the joint venture, the court found "the fact that one entity had notice of the charges against it is insufficient to satisfy the *Eggleston* exception as to a related entity that did not have notice of a charge against it or an opportunity to conciliate the charge."); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1089 (7th Cir. 2008) (affirming dismissal of Title VII charge against a party not named in the charge where the complaint did not allege that the party had notice that a charge "had been filed against *it*[,]" only that a charge had been filed against someone); *Adorno-Rosado v. Wackenhut P.R.*, 98 F.Supp.2d 181 (D. P.R. 2000) (dismissing Title VII charge against a party not named in the charge when the unnamed party was mentioned in the charge only as the place of employment).

Here, Complainant's charge against Respondent is dated November 1, 2018. Arnold & Porter states that on November 20, 2018, IER sent Arnold & Porter a letter stating that IER was commencing an independent investigation of Arnold & Porter. IER has not filed a complaint with OCAHO at this time. As discussed above, Complainant did not name Arnold & Porter in the charge and only stated that "[t]he law firm offered [her] the position with the exception that [she] re-confirm [she is] a U.S. citizen and [does] not have dual citizenship with any other country." IER Charge Form at 3. As such, Complainant has not alleged any facts to show that Arnold & Porter had actual notice of her charge against Respondent or an opportunity to participate in the initial administrative proceedings related to her charge. IER's initiation of an investigation is not equivalent to notice of a charge by an individual. Among other things, there

is no evidence as to what IER is investigating and whether the firm had notice of Complainant's allegations in that context.

The identity of interest exception focuses on whether the respondent named in the charge adequately represented the unnamed party's interests in the agency proceedings. *Simbaki*, 767 F.3d at 482 (discussing *Glus*, 562 F.2d 880). To determine whether an identity of interest exists, the *Glus* court set out a four-factor test. *Glus*, 767 F.3d at 888. The test looks at the relationship between the named and unnamed parties at the time the charge is filed. *Romain*, 836 F.2d at 246. The four factors are as follows:

> (1) [W]hether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the [charge];
>
> (2) [W]hether under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the [agency] proceedings;
>
> (3) [W]hether its absence from the [agency] proceedings resulted in actual prejudice to the interests of the unnamed party;
>
> (4) [W]hether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Glus, 562 F.2d at 888; *Romain*, 836 F.2d at 246.

First, prior to filing the charge, Complainant knew that Arnold & Porter was the law firm at issue. Complainant's Prehearing Statement Exs. C-1, C-6. Second, Complainant does not assert any facts to show that Arnold & Porter and Respondent share such similar interests that for the purpose of participation in the IER proceedings, it was unnecessary include Arnold & Porter in the IER charge. Instead, Complainant now seeks to add Arnold & Porter because Respondent asserts that it relied and acted on the instruction of Arnold & Porter, which indicates that Respondent and Arnold & Porter are separate entities with separate interests.

While Arnold & Porter argues that it would suffer prejudice if it were included, and Complainant asserts that it would not, neither party argues that Arnold & Porter would suffer prejudice if it were not included in these proceedings.

Finally, Respondent is a staffing agency and Complainant is an attorney who Respondent hired for temporary positions to work on projects for Respondent's clients. Arnold & Porter was Respondent's client who was seeking individuals to work on a project. Complainant attached communications she had with Respondent regarding the position, including a conflicts questionnaire and the citizenship status question. Complainant does not allege that she directly communicated with Arnold & Porter and the documents provided show that Complainant communicated with Respondent as it related to Arnold & Porter. Complainant has alleged enough to show that Arnold & Porter, in some way, represented that its relationship with

Complainant was to be through Respondent. Nonetheless, Complainant has not alleged facts to show that the other three *Glus* factors weigh in her favor.

As such, Complainant has not asserted facts to show that the *Eggleston* or *Glus* exceptions apply. Therefore, the general rule that a complainant name a respondent applies and Complainant did not name Arnold & Porter in her IER charge. Complainant did not assert any facts to warrant equitable tolling. Thus, Complainant's Motion for Leave to Amend the Complaint as it relates to the addition of Arnold & Porter is DENIED.

V. CONCLUSION

Arnold & Porter's permission to file a response to the Motion to Amend is GRANTED. Complainant's Motion for Leave to File a Reply to the Answer is MOOT. Complainant's Motion to Amend the Complaint is GRANTED IN PART and DENIED IN PART. Complainant's Motion to Amend the Complaint as it relates to her retaliation claim is GRANTED. Complainant's Motion to Amend the Complaint as it relates to adding Arnold & Porter as a party is DENIED.

SO ORDERED.

Dated and entered on October 31, 2019.

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Jean C. King
Chief Administrative Law Judge