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

March 6, 2020

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

ORDER ON MOTION TO DISMISS AND NOTICE OF CONFLICT OF INTEREST

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., 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 Law Resources, 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 Law Resources. Law Resources 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, Arnold & Porter Kaye Scholer LLP (Arnold & Porter). Complainant filed a request for reconsideration on November 7, 2019. On December 12, 2019, the Court granted the request in part and permitted Complainant to amend her complaint to add Arnold & Porter.

On January 9, 2020, Complainant filed a Good Faith Notice of Arnold & Porter's Positional Conflict (the Notice) (with a correction on January 10, 2020). On January 17, 2020, Arnold & Porter filed a response opposing the Notice and a Motion to Dismiss. On January 26, 2020, Complainant filed a Reply Memorandum Opposing Arnold & Porter's Motion to Dismiss. On February 14, 2020, the Court stayed discovery and vacated all pending deadlines in this matter, as Respondents stated they were in conciliation discussions with Complainant and IER.

II. NOTICE OF POSITIONAL CONFLICT OF INTEREST

Complainant asserts that Arnold & Porter is taking a legal position in a different pending litigation with a similar question of law that is directly contradictory to the position it is defending against in this matter in its personal capacity, citing to *Dep't of Commerce et al. v. New York et al*., 139 S. Ct. 2551 (2019) (deciding whether the Secretary of Commerce violated the Enumeration Clause, the Census Act, or otherwise abused his discretion when he decided to reinstate a citizenship question on the 2020 census). Complainant asserts this is in contravention of the District of Columbia's Rule of Professional Conduct Rule 1.7, and that notice to the party would not resolve the issue.

Arnold & Porter responds that the Notice is devoid of any argument or basis upon which the Court could find a conflict of interest and is frivolous. Arnold & Porter seeks costs or fees associated with responding to the motion, or the imposition of any other sanctions the Court deems appropriate.

The Court agrees that the Notice is entirely without legal basis. While Complainant is correct that the District of Columbia's Rules of Professional Conduct (the Rules) address conflicts of interest relating to positions taken by a law firm in its representation of different clients, here Arnold & Porter is not acting in a representative capacity, but *is* the client. The Rules simply do not apply. Complainant cites to District of Columbia Ethics Opinion 265, which further discusses the Rule as it relates to a lawyer *representing* two clients "where such representation creates a substantial risk that representation of one client will adversely affect the representation of the other." Furthermore, an action based upon a citizenship question in a job application under 8 U.S.C. § 1324b is both factually and legally distinct from an action based upon a citizenship question in the U.S. Census asserting violations of the Equal Protection Clause, the Enumeration Clause, and the Administrative Procedures Act. Complainant has not articulated how, even if Arnold & Porter were somehow acting as a lawyer in this case, its representation of one would adversely affect the representation of the other.

As to Arnold & Porter's request for sanctions, the weight of OCAHO precedent indicates that monetary sanctions akin to those found in the Federal Rules of Civil Procedure are not available for OCAHO Administrative Law Judges (ALJs). *Hsieh v. PMC-Sierra Inc.*, 9 OCAHO 1091 (2003). OCAHO rules of practice provide for sanctions in a number of circumstances at 28 C.F.R. §§ 68.23 (discovery), 68.28 (disobeying or resisting a lawful order), and 68.35 (standards of conduct). The prevailing party may seek attorney's fees at the conclusion of the case pursuant to 8 U.S.C. § 1324b(h). None of these provisions applies to a frivolous filing, however. Section 68.35(b) provides that the ALJ may exclude parties from proceedings for "continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct." This one filing does not rise to a violation of the standards in the regulation. Accordingly, Arnold & Porter's request for sanctions is DENIED.

III. MOTION TO DISMISS

A. Standards

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10. Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing Servs.*, 12 OCAHO no. 1291 at 8; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)).

B. Position of the Parties

Arnold & Porter seeks dismissal of the lawsuit because Complainant failed to follow the procedural requirements for bringing a claim before OCAHO. Arnold & Porter essentially asks the Court to reconsider its December 12, 2019 decision granting Complainant's motion to amend to add Arnold & Porter as a Respondent. *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332b (2019). In that decision, this Court found that while Complainant did not fulfill the prerequisite condition to filing a complaint with OCAHO when Complainant did not name Arnold & Porter in her Charge, several exceptions have been recognized, including an exception where "[the unnamed party has] been given actual notice of the [agency] proceedings." *Eggleston v. Chi. Journeymen Plumbers Local Union No*. 130, U.A., 657 F.2d 890, 905 (7th Cir. 1981); *see Ogunrinu*, 13 OCAHO no. 1332b at 6. The Court initially found that Complainant had not presented facts or arguments to meet her burden to show that this exception applied. *Ogunrinu*, 13 OCAHO no. 1332b at 6. On reconsideration, Complainant submitted an affidavit, and the undersigned found that she alleged sufficient facts in the affidavit to satisfy the conditions for the *Eggleston* exception. *Id.* Arnold & Porter argues that the Court erred, that the *Eggleston* test has not been met.

Complainant argues that the law of the case doctrine applies and these issues were previously decided by the Court, and that all parties are in conciliation talks to resolve the matter. Complainant also argues that the Court should deny the motion to dismiss as a matter of judicial efficiency because IER has apparently concluded its independent investigation of Arnold & Porter, so she would soon be able to refile an OCAHO complaint against Arnold & Porter based on that investigation.[1] Finally, she argues that in the interest of justice, a factual determination cannot be resolved if Arnold & Porter is not in the case.

[1] IER has independent authority to bring a cause of action before OCAHO. *See* § 1324b(d). Since Complainant never filed a charge with IER against Arnold & Porter, Complainant will not receive a letter of determination from IER and will consequently not be able to refile the Complaint. *See* 28 C.F.R. §§ 44.303, 44.304, 68.4.

C. Discussion

As has been repeatedly stated, 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]"). The requirement to exhaust administrative remedies is intended 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, the exhaustion requirements are subject to a number of exceptions, some of which apply in the situation where a charging party seeks to add another respondent. *Ogunrinu*, 13 OCAHO no. 1332 at 6. The *Eggleston* exception is one of those. *Id.* The *Eggleston* court found 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.

Arnold & Porter argues that neither prong is met, but in particular the second prong is not met because the firm did not have an opportunity to participate in administrative proceedings aimed at voluntary compliance. In support, Arnold & Porter included a declaration from Evandro Gigante, an attorney with the firm representing Arnold & Porter. Gigante Decl. Mr. Gigante stated that five months after IER informed Arnold & Porter that it was commencing its investigation into the document review project at issue, he contacted IER to request an opportunity to engage in discussions to resolve the investigation. Gigante Decl. at 2. IER responded that it would not engage in any discussions until its investigation is complete. *Id.* On January 16, 2020, IER notified the firm that IER had completed its investigation. *Id.* Arnold & Porter states that while Complainant may argue that Arnold & Porter could have engaged in discussions between Complainant and Law Resources in August 2019, that would not have resolved the underlying IER charge.

The *Eggleston* exception is articulated in the context of Title VII complaints in which the EEOC serves a similar function as IER. In that context, courts have noted that, "the purpose of requiring the complaint to match the EEOC charge is to 'give[ ] the employer some warning of the conduct about which the employee is aggrieved and afford[ ] the EEOC and the employer an opportunity to attempt conciliation without resort to the courts.'" *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) (citing *Ezell v. Potter,* 400 F.3d 1041, 1046 (7th Cir. 2005)).

In reconsidering its decision, this Court focused on the dual principles of notice and the ability to participate in administrative proceedings. *Ogunrinu*, 13 OCAHO no. 1332b at 6. It is undisputed that Arnold & Porter had notice of the IER investigation, and it had notice of the Respondent's charges against Law Resources and its potential involvement. The purpose of the administrative proceedings, in this case the IER investigation, is to facilitate both compliance

and conciliation. *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 6 (2019). The fact that IER was not willing to engage in discussions until the investigation is complete is of no moment, as it appears that would have been the circumstance regardless of whether Complainant had filed a charge against Arnold & Porter. Further, attempts at conciliation are now occurring. Arnold & Porter could, however, have taken any steps it believed appropriate for compliance purposes. Furthermore, neither Respondent has established prejudice by the delay in adding Arnold & Porter. Ultimately, Complainant has alleged facts that, at the least, show that the parties' interests are intertwined, and resolution of the dispute is best served by having both parties at the table, be that in conciliation talks or in a hearing. This Court declines to reconsider its decision, and Arnold & Porter's motion to dismiss is DENIED.

SO ORDERED.

Dated and entered on March 6, 2020.

_____

Jean C. King
Chief Administrative Law Judge