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

December 18, 2020

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

ORDER ON MOTIONS

This case is pending before this Court pursuant to 8 U.S.C. § 1324b. In the course of discovery, Complainant's deposition was taken. After the conclusion of the deposition, Complainant submitted errata sheets revising portions of her testimony significantly and materially, primarily by adding new information. Arguing that these alterations constitute an abuse of Federal Rule of Civil Procedure 30(e), Respondent Law Resources Inc., along with Arnold & Porter, which joined the motion, now move to strike the errata sheets.

In Complainant's Response Requesting the Court Deny Respondents' Motion to Strike (Opposition), Complainant argues that a motion to strike under Federal Rule of Civil Procedure 12(f) is improper when used to strike anything other than a pleading, which the transcript errata sheet is not. Opp'n at 4. In addition, Complainant argues that the deposition is not part of the record, may not be used in any event because some of the changes related to a portion of the case that has been dismissed, and "is a back door appeal of the Court's finding of unlawful discrimination, and an order striking Complainant's errata sheet could be tantamount to reversing the Court's liability finding." *Id.* at 5.

OCAHO's regulations regarding depositions provide that the witness shall review the deposition transcript, and indicate in writing "any changes in form or substance. . . ." 28 C.F.R. § 68.22(b)(2). *See also* Fed. R. Civ. P. 30(e)(1)(B). There is no mechanism in OCAHO's regulations regarding how and when disputes regarding the errata sheets are to be resolved. In *Jackson v. Teamsters Local Union 922*, 310 F.R.D. 179, 180 (D.D.C. 2015), the court considered whether the dispute on a motion to strike should be resolved before summary judgment motions are filed, or in the course of resolving summary judgment motions. The court noted different treatment by different circuits, but emphasized that no court held that revisions automatically

replace and erase the original responses from the record. *Id.* at 181. After considering the different approaches, the Court ultimately found that disputes regarding errata should be resolved before summary decision motions. *Id.* at 185. The Court found not only that "material revisions should not be accepted absent convincing explanations[,]" but that no revisions other than typographical or clerical in nature may be made. *Id.* at 183, 186.

This decision has subsequently been followed in the United States District Court for the District of Columbia, with an emphasis on the quality of the explanations: "terse offerings do little but state the obvious; the Court presumes that Plaintiffs would not submit errata sheets but for some type of mistake or error. What is missing is any thoughtful or clear articulation of the basis for what constitute significant alterations in sworn testimony." *Senatore v. Lynch*, No. 13-CV-00856 (CRC), 2016 WL 1611578, at *2 (D.D.C. Apr. 22, 2016) (citing *Jackson*, 310 F.R.D. at 185). *Accord Moore v. Carson*, 322 F. Supp. 3d 163, 169 (D.D.C. 2018), *aff'd*, 775 F. App'x 2 (D.C. Cir. 2019).

Complainant states that this case is not good law, citing instead to a *McFadden* v. *Wash. Metro. Area Transit Auth.*, 204 F. Supp. 3d 134 (2016). Opp'n 7. In that case, however, the motion at issue was a motion to strike the defendant's entire memorandum in support of the motion for summary decision, as well as any deposition transcript. *McFadden*, 204 F. Supp. 3d at 140. The errata sheet was not at issue in that case. This case points to the weakness in Complainant's argument. A Rule 12(f) motion to strike is indeed limited to pleadings; however, Respondents are not seeking to strike the errata sheet under Rule 12(f). While not specifically addressing this argument, the *Johnson* courts and its ilk essentially treated the motions to strike under an umbrella of discovery disputes.

As this case arises under the jurisdiction of the District of Columbia, the Court will consider the Complainant's errata sheet pursuant to the *Johnson* case.

A review of Complainant's errata shows that, with few exceptions, she provided the following three explanations: "To conform with the facts"; "To clarify the record cut off from completing the answer"; and "To correct stenographic error." Opp'n Ex. 2.

The last reason is entirely appropriate for an errata sheet. However, the other two reasons are insufficient in their lack of thoughtful or clear articulation and, moreover, are made for more than typographical or clerical reasons. Further, the first reason is inappropriate in any event, as these changes could be considered to be a prohibited "sham affidavit", or a contradictory post-deposition affidavit. *See Johnson*, 310 F.R.D. at 181. As to the second reason, to the extent that Complainant argues that she was not able to testify fully and seeks to put facts in the record, the errata sheet is not the place to do so. Complainant will have the opportunity to do so in her motion for summary decision through the presentation of competent evidence.

Accordingly, Respondents' motion to strike Complainant's errata is granted as to all errata with the sole exception of those seeking "[t]o correct stenographic error."

Lastly, Complainant filed a motion to clarify the record on November 20, 2020. The motion is denied. The Complainant filed a motion to correct a scrivener's error on November 12, 2020. The motion is granted.

SO ORDERED.

Dated and entered on December 18, 2020.

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Jean C. King
Chief Administrative Law Judge