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

JENLIH JOHN HSIEH,	)	
Complainant,	)	8 U.S.C. § 1324b Proceeding
	)	
v.	)	OCAHO Case No. 02B00005
	)	
PMC - SIERRA, INC.,	)	Judge Robert L. Barton, Jr.
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTIONS FOR ATTORNEY'S FEES AND DENYING RESPONDENT'S MOTION TO STRIKE COMPLAINANT'S SUPPLEMENTAL MEMORANDUM

(*February 4, 2003*)

I. INTRODUCTION

On November 15, 2002, Complainant filed two motions with the Court: (1) a Motion to Compel Production of Documents or in the Alternative a Court Order to Enforce the Subpoena and Request for Attorney's Fees, and (2) a Motion to Compel Further Production of Documents and Request for Attorney's Fees. I ruled on these motions to compel at a prehearing conference on December 11, 2002, as well as in a written Order on December 24, 2002, but deferred ruling on the request for attorney's fees until Complainant provided time records or receipts for all fees. Complainant provided the Court with supplemental information supporting his request for attorney's fees on December 23, 2002, and January 9, 2003.

On January 15, 2003, Respondent filed a Motion to Strike Complainant's Supplemental Memorandum of Points and Authorities Supporting an Award of Fees Incurred in Obtaining Order to Produce Requested Documents.

The Court rules on the two Motions discussed in this Order as follows:

Complainant's request for attorney's fees in connection with the two discovery motions is denied because this Court is without authority to grant attorney's fees based on the authorities cited by Complainant.

Respondent's motion to strike the supplemental information provided by Complainant is denied because Complainant was complying with Court orders when he filed supplemental memorandum supporting his motion for attorney's fees.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Complainant is alleging that he was terminated by Respondent due to his United States citizenship in violation of 8 U.S.C. section 1324b. Complaint at 2. Complainant contends that Respondent saved jobs for H1B visa holders and replaced United States citizen employees with H1B visa holders. Id. at 4. Respondent denies these allegations and asserts that Complainant was fired because of a Company-wide layoff. Answer at 3-4.

Complainant filed two motions to compel discovery on November 15, 2002: (1) a Motion to Compel Production of Documents or in the Alternative a Court Order to Enforce the Subpoena and Request for Attorney's Fees, and (2) a Motion to Compel Further Production of Documents and Request for Attorney's Fees. Respondent's briefs in opposition to the motions to compel were filed on November 25, 2002.

A Prehearing Conference was held on December 11, 2002, to discuss Complainant's motions to compel. At the conference, I ordered Respondent to turn over thirty documents listed on its privilege log as communications between paralegals and non-attorneys for an in camera review, so that I could make an informed decision on Complainant's Motion to Compel Further Production of Documents. I also told the parties that I was deferring a ruling on attorney's fees until Complainant provided documentation supporting his request.

On December 12, 2003, Respondent turned over thirty documents listed on its privilege log as communications between paralegals and nonattorneys for an in camera inspection.

In my Order Ruling on Complainant's Motions to Compel Discovery of December 24, 2002, I granted Complainant's motion to compel with respect to the documents responsive to the subpoena because Respondent failed to establish that these documents were protected under the attorney-client privilege and, moreover, the attorney-client privilege had been waived due to Respondent's failure to produce a privilege log and failure to make a timely objection to the subpoena. Order Ruling on Complainant's Motions to Compel Discovery, Dec. 24, 2002, at 2-6.

After reviewing the thirty documents I ordered Respondent to turn over in camera, I found that nineteen sentences in three documents were potentially privileged communications and may be redacted, but the remainder of the thirty documents must be turned over to Complainant. Id. at 10. I again deferred ruling on the attorney's fees until Complainant provided an itemized statement and briefing supporting the award of such fees. Id. at 11. Due to the very small amount of privileged material in these thirty documents, my Order required Respondent to turn over the remaining documents on the privilege log for an in camera review.

On December 23, 2002, in response to my oral ruling at the prehearing conference on December 11, 2002, Complainant filed a Supplemental Memorandum of Points and Authorities Supporting an Award of Fees Incurred in Obtaining Order to Produce Subpoenaed Documents (C's 1st Supplement) with the Declaration of Margaret Clayton attached (Clayton 1st Affidavit). In this Memoranda, Complainant argued that the Court could grant attorney's fees for three reasons: (1) 28 C.F.R. section 68.1 allows the Federal Rules of Civil Procedure (FRCP) to be used as a guideline in this case, and Respondent should be assessed monetary sanctions under FRCP 37(a)(4)(A), (2) Respondent is liable for sanctions under 28 U.S.C. section 1927, and (3) the Court has inherent powers to sanction a party who acts in bad faith and obstructs discovery. C's 1st Supplement at 2-3. Ms. Clayton's Declaration stated that she is the office manager and secretary of Respondent's counsel's law office and responsible for producing the billing statement for clients each month. Clayton 1st Affidavit at 1. She provided the breakdown of time billed on the two discovery motions and the hourly rate of the attorney who did the work. Id. at 1-3.

On December 30, 2002, Respondent turned the remainder of the documents listed on the privilege log over to the Court for an in camera review.

On January 7, 2003, I issued an Order ruling on the documents remaining on the privilege log that had not been produced to Respondent. Because several of the documents listed on the privilege log had been previously produced pursuant to the motion to compel regarding the subpoena, there were only ten documents on which I had not already ruled. Order Ruling on Complainant's Motion to Compel, Jan. 7, 2003. With respect to these remaining ten documents, I ruled that eight documents in their entirety and a portion of a ninth document were not protected by the attorney-client privilege and had to be produced. Id.

Also on January 7, 2003, Respondent filed its Opposition to Complainant's Supplemental Memorandum of Points and Authorities Supporting an Award of Fees Incurred in Obtaining Order to Produce Subpoenaed Documents (R's Opposition). Respondent responds to Complainant's arguments for attorney's fees and asserts that FRCP 37(a)(4)(A) does not support granting attorney's fees against Respondent, and that Respondent is not liable under 28. U.S.C. section 1927. R's Opposition at 2-5.

On January 9, 2003, in response to my written Order of December 24, 2003, Complainant filed another Supplemental Memorandum of Points and Authorities Supporting an Award of Fees Incurred in Obtaining Order to Produce Requested Documents (C's 2nd Supplement) with the declaration of Margaret Clayton attached (Clayton 2nd Affidavit). The memoranda and the affidavit were very similar to the previous submission by Complainant.

On January 16, 2003, Respondent filed a Motion to Strike Complainant's Second Supplemental Memorandum (Motion to Strike). Respondent argued that Complainant's Second Supplemental Memorandum was "no more than a reply brief addressing the points raised by Respondent in its Opposition...." R's Motion to Strike at 1.

Complainant filed an Opposition to Respondent's Motion to Strike Supplemental Memorandum of Points and Authorities for Award of Attorney's Fees (C's Opposition) on January 22, 2003. Complainant states that he filed the supplemental memorandum of points and authorities for attorney's fees "because the court ordered him to on December 11, 2002 and again on December 24...." C's Opposition at 1.

III. COMPLAINANT'S MOTION REQUESTING ATTORNEY'S FEES INCURRED IN THE COURSE OF FILING TWO MOTIONS TO COMPEL DISCOVERY

Complainant's motions requesting attorney's fees incurred in the course of filing two motions to compel discovery is denied because this Court is without authority to award attorney's fees at this case's current posture based on the authorities cited by Complainant.

Complainant supports his request for attorney's fees with three legal arguments. First, Complainant argues that under 28 C.F.R. section 68.1, the FRCP can be used as a general guideline in this case, and Respondent is liable for sanctions under FRCP 37(a)(4)(A). C's 1st Supplement at 2. Second, Complainant asserts that Respondent's counsel is liable for sanctions under 28 U.S.C. section 1927. Id. Finally, Complainant contends that Respondent should be sanctioned pursuant to this Court's inherent powers to sanction a party for obstructing discovery. Id. at 3.

A. Respondent's Liability for Attorney's Fees Under FRCP 37(a)(4(A)

Complainant argues that the FRCP can be used as a general guideline in this case pursuant to 28 C.F.R. section 68.1, and Respondent should be liable for sanctions under FRCP 37(a)(4)(A). Id. at 2.

Respondent argues that FRCP 37(a)(4)(A) is not applicable to the subpoenaed materials because the Rule only pertains to a failure to respond to a request for inspection under FRCP 34. R's Opposition at 2. Additionally, Respondent argues that it was "substantially justified" in withholding the documents requested in Complainant's two motions to compel, thus not liable for sanctions under FRCP 37(a)(4)(A). Id. at 2-4. Respondent contends that it was "acting in good faith." Id. at 4.

The FRCP may be used as a general guideline "in any situation not provided for or controlled by" the OCAHO rules of practice. 28 C.F.R. § 68.1 (2002).

FRCP 37(a)(4)(A) provides that if a motion to compel discovery is granted,

> "the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party of attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust."

Fed. R. Civ. P. 37(a)(4)(A).

Under section 68.1, the FRCP are to be used as a general guideline to complement the OCAHO rules of practice. 28 C.F.R. § 68.1 (2002). The FRCP are to be consulted "in any situation not provided for or controlled by" the OCAHO rules of practice. Id. The OCAHO rules of practice provide for discovery sanctions. 28 C.F.R. §§ 68.23 (listing several sanctions within the authority of an administrative law judge (ALJ) for discovery violations), 68.28 (providing an ALJ with the ability to exercise powers necessary to regulate the proceeding), 68.35 (providing an ALJ with the power to exclude parties, witnesses, and representatives from proceedings for failure to comply with standards of conduct).

Because the OCAHO rules of practice provide for discovery sanctions, and the authority to award attorney's fees in an on-going case is not listed as a discovery sanction, there is no need to turn to the FRCP as a general guideline because discovery sanctions are provided for and controlled by the OCAHO rules of practice. Although the FRCP may be consulted as a general guideline for situations not provided for or controlled by the OCAHO rules of practice, section 68.1 was not intended to create power and authority that statutes and regulations have not vested in an ALJ. Accord United States v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 1771, 1780 (1990) ("[s]ection 68.1 only invokes the FRCP for use 'as a general guideline' to supplement the procedural Rules as needed, it does not purport to clothe

ALJs with substantive power, such as those granted U.S. District Court judges....")
(Chief Administrative Hearing Officer (CAHO) reversing an ALJ and holding that an ALJ adjudicating a case under 8 U.S.C. § 1324a does not have the authority to award monetary sanctions for attorney misconduct). But cf. United States v. Arnold, 1 OCHAO 781, 793-98 (1989) (deriving power to assess monetary sanctions at the conclusion of the case from 28 C.F.R. §§ 68.1 and 68.23(c) when adjudicating an 8 U.S.C. § 1324a proceeding) (not reviewed by the CAHO).

Although monetary sanctions for discovery abuses are not mentioned in the OCAHO rules of practice, other sanctions, including sanctions more severe than monetary sanctions (such as rendering judgment against a party) are available under 28 C.F.R. sections 68.23, 68.28, and/or 68.35. Additionally, the prevailing party may seek attorney's fees at the conclusion of the case pursuant to 8 U.S.C. section 1324b(h).

B. Respondent's Liability for Attorney's Fees Under 28 U.S.C. Section 1927

Complainant argues that Respondent is liable for sanctions under 28 U.S.C. section 1927, which states, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (2002).

Respondent contends that it did not violate 28 U.S.C. section 1927 because it did not act unreasonably or vexatiously when it withheld privileged documents. R's Opposition at 5. Respondent states that "it was acting with due diligence." Id. Respondent also argues that Complainant must make a clear showing of bad faith to recover attorney's fees under this statute. Id.

I specifically reject Respondent's argument that it did not act unreasonably or vexatiously in withholding the documents pertaining to Complainant's two motions to compel under a claim of privilege or that it was acting with "due diligence" when it claimed attorney-client privilege as to the documents that are the subject of these motions. In fact, as I stated in the Order of December 24, 2002, I am extremely troubled by the behavior of Respondent's counsel with respect to the assertion of the attorney-client privilege in this case. In the Addendum to the Order of December 24, 2002, I addressed the privilege claim with respect to each of the documents. Not only did I reject the claim with respect to almost all of the documents, in several instances I concluded that the assertion of the privilege was particularly frivolous. With respect to most of the documents listed on the privilege log, no competent counsel could conclude that these documents could be withheld pursuant to a claim of attorney-client privilege. Thus, I find that Respondent and its counsel have behaved egregiously and in bad faith.

However, I conclude that Section 1927 does not apply to this case. The pertinent statute applies to attorneys or others conducting cases in any "court of the United States." 28 U.S.C. § 1927. The Tenth Circuit, along with some federal district courts, have held that federal bankruptcy courts are not "courts of the United States" for purposes of 28 U.S.C. section 1927. Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1086 (10th Cir.1994) (relying on In re Perroton, 958 F.2d 889 (9th Cir. 1992) (construing the statutory language of "court of the United States"), holding that "court of the United States" in U.S.C. Title 28 means Article III courts), In re Westin Capital Markets, Inc., 184 B.R. 109, 117-18 (Bankr. D. Or. 1995) (relying on In re Perroton), In re Burt, 179 B.R. 297, 301 (Bankr. M.D. Fla. 1995) (holding that the federal bankruptcy courts are a "unit" of the District Court and not an independent court of the United States).

OCAHO is not an Article III court, but a creation of Congress and is an administrative court or tribunal. It is part of the Executive Branch, not the Judicial Branch of government. If a federal bankruptcy court is not considered a "court of the United States" under 28 U.S.C. section 1927, surely OCAHO would not be considered a "court of the United States" within the meaning of section 1927. Thus, 28 U.S.C. section 1927 is inapplicable to this case and does not grant me the power to award attorney's fees to Complainant.

C. Respondent's Liability for Attorney's Fees Based Upon the Court's Inherent Powers to Deter a Party from Obstructing Discovery

Complainant argues that this Court has "the inherent powers to sanction a party who acts in bad faith and obstructs discovery." C's 1st Supplement at 3 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980)).

Respondent does not directly respond to Complainant's contention that this Court possesses the inherent power to sanction parties who obstruct discovery.

The only case Complainant cites to support his contention that this Court has inherent power to sanction a party who obstructs discovery is Railway Express (cited above). Railway Express involved a race discrimination case in which a federal district court judge assessed attorney's fees and court costs against plaintiff's attorneys for violating a court order to answer interrogatories, as well as deliberate inaction during the litigation. Railway Express, 447 U.S. at 755. The Supreme Court remanded the case to the district court and admonished that attorney's fees "should not be assessed lightly." Id. at 767.

Railway Express does not support Complainant's request for attorney's fees. First, the party in Railway Express violated explicit court orders to answer interrogatories. Second, the federal district court levied the attorney's fees at the conclusion of the case; after the case had been dismissed. Id. at 755. Third, Railway Express took place in a United States Federal District Court, not an administrative law proceeding.

The present situation is different because the sanctions in Railway Express were entered at the end of the case, whereas here this case has not yet concluded, and litigation is on-going. Further, an OCAHO ALJ does not possess the same inherent powers that federal district court judges possess. Although federal judges and ALJs are functionally comparable, Butz v. Economou, 478 U.S. 478, 513 (1978), their authority and power are derived from different sources. Railway Express discusses the inherent power a federal district court judge has to issue the sanction of contempt. Id. at 764. Further, in Railway Express the party had violated a court order. Here, although Respondent did not act in good faith in asserting the attorney-client privilege, Respondent has not violated an express court order. As mentioned previously, an OCAHO ALJ has ample powers under the rules of practice to sanction a party or party's counsel that fails to comply with a judge's order. See 28 C.F.R. § 68.23 (2002).

Railway Express does not support Complainant's motion for attorney's fees because the case involved a party who violated a court order, attorney's fees were given at the end of the case, and the case occurred before a federal district court judge.

Complainant's Motion for Attorney's Fees is denied at this time.

IV. RESPONDENT'S MOTION TO STRIKE COMPLAINANT'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES FOR AWARD OF ATTORNEY'S FEES

Respondent argues that Complainant's Second Supplemental Memorandum is "no more than a reply brief addressing the points raised by Respondent in its Opposition...." R's Motion to Strike at 1. Respondent states that Complainant did not seek permission to file a reply brief pursuant to 28 C.F.R. section 68.11(b), thus the Court should disregard the brief and strike it from the record. Id. at 2.

Complainant states that he filed the second supplemental memorandum of points and authorities because the Court ordered him to do so on December 11, 2002, and December 24, 2002. C's Opposition at 1.

Complainant's first supplemental memorandum to his motion for attorney's fees in response to my oral order at the prehearing conference was received by this Court on December 23, 2002. On December 24, 2002, I issued a written Order detailing the information required in Complainant's supplemental documentation. Order Ruling on Complainant's Motions to Compel, Dec. 24, 2002. On January 7, 2003, the Court received Respondent's opposition to Complainant's first supplemental memorandum. On January 9, 2003, Complainant filed another supplemental memorandum of points and authorities supporting his motion for attorneys fees in response to my written Order of December 24, 2002.

Although Complainant make some new legal arguments and introduces additional testimony about his fees in his second supplemental memorandum, complying with Court orders is not grounds for striking a pleading.

Respondent's Motion to Strike Complainant's Supplemental Memorandum of Points and Authorities for Award of Attorney's Fees is denied.

V. CONCLUSION

Complainant's Motion for Attorney's Fees is denied at this time. If Complainant is the prevailing party at this case's conclusion, Complainant may move for attorney's fees pursuant to 8 U.S.C. section 1324b(h).

Respondent's Motion to Strike Complainant's Supplemental Memorandum is denied because Complainant was complying with my orders.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE