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

ELIZABETH A. KALIL, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00036
UTICA CITY SCHOOL DISTRICT, Respondent	)	Judge Robert L. Barton, Jr.

ORDER DISMISSING COMPLAINT WITH PREJUDICE

(*October 16, 2003*)

I. INTRODUCTION

On September 12, 2003, Utica City School District (Respondent) filed a Motion for Enforcement of the Court's Discovery Orders and Prehearing Conference Report (Motion for Enforcement). When Complainant did not file a response to this Motion, on September 23, 2003, this Court notified the parties by telephone and by a written Notice of Telephone Prehearing Conference (NOTPC), that a telephone prehearing conference would take place on September 25, 2003, to discuss Respondent's Motion for Enforcement. The NOTPC specifically informed the parties that the primary purpose of the telephone conference was to discuss Respondent's Motion for Enforcement and the possible dismissal of Complainant's Complaint. Moreover, the NOTPC stated that if a party failed to appear for the telephone conference, sanctions could be imposed, including dismissal of the Complaint. After receiving notice of the telephone conference, only then did Complainant file a response to the motion, which was untimely and, in any event, did not address the substance of Respondent's Motion; namely, her failure to comply with my discovery orders. Complainant did not appear for the September 25, 2003, telephone conference. For the reasons discussed in this Order, I grant Respondent's request to dismiss the Complaint with prejudice.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On February 6, 2002, Complainant filed a Charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), alleging retaliation in violation 8 U.S.C. § 1324b. Charge at 1-3. In a letter to Complainant dated June 6, 2002, OSC stated that its investigation

had uncovered insufficient evidence of reasonable cause to believe that Complainant was discriminated against as prohibited by 8 U.S.C. § 1324b, and therefore they would not file a complaint on her behalf. The June 6 letter further advised her that she could file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety days of her receipt of their letter. Although it was not mentioned in the June 6 letter, according to a memorandum prepared by Carol J. Mackela, an attorney with the OSC, addressed to the Special Counsel, Complainant's charge had been untimely filed. See p. 5 of May 30, 2002, Memorandum from Carol J. Mackela to the Special Counsel, attached to OSC's Response to Order Regarding Complainant's Application for a Subpoena Ad Testificandum to Carol J. Mackela, filed August 22, 2003.

On September 6, 2002, Complainant filed a Complaint with OCAHO alleging that Respondent fired her and refused to rehire her on the basis of national origin discrimination, citizenship status discrimination, and retaliation in violation of 8 U.S.C. § 1324b. Complaint, Part I ¶¶ 5-6, Part II ¶¶ 1-7, Part III ¶¶ 1-6, Part IV ¶¶ 1 and 3. On September 26, 2002, Respondent filed its Answer, in which it denied that Complainant was terminated due to citizenship status discrimination, national origin discrimination, or retaliation. Answer at 1-2. Respondent claimed that it did not rehire Complainant because she was uncertified to teach in New York State, and because Complainant's prior employment with Respondent was pursuant to a temporary teaching license that expired on August 31, 2002. Id. at 2-3 (citing N.Y.S. Education Law §§ 3001, 3009, 3010, and N.Y.C.R.R. 80.18(a)(b)). Respondent further asserted that it lacked the need for an additional Teacher of Spanish due to decreasing enrollments in Spanish for the 2001-2002 School Year, that Complainant had failed to exhaust her remedies under her Collective Bargaining Agreement, and that Complainant's employment with Respondent was in a temporary position subject to modification or termination at any time. Id. at 3-4.

On October 7, 2002, Complainant filed her first Motion to Compel, in which she asked this Court to order Respondent to serve her with a copy of its Answer and to issue a procedural order requiring Respondent to effectuate service of all pleadings and motions by way of certified mail, return receipt requested. In a separate Motion to Amend filed on the same day, Complainant sought to amend her Complaint to request relief under 8 U.S.C. §§ 1324a and 1324c.

This Court held a telephone prehearing conference on October 10, 2002, to discuss the allegations in the Complaint, the Answer to the Complaint, the issues in the case, the need for discovery, Complainant's pending motions, and possible settlement. Prehearing Conference Report, Oct. 16, 2002, at 1. I denied Complainant's Motion to Compel because Complainant had already obtained a copy of Respondent's Answer to the Complaint and because the OCAHO rules of practice do not require service by certified mail, except for certain specified types of pleadings, such as complaints. Id.; see generally Service and filing of documents, 28 C.F.R. § 68.6 (2002). I denied her motion to amend because Complainant had no standing to bring an action under either Sections 1324a or 1324c. "Complainant" was defined as the Immigration and Naturalization Service in cases arising under §§ 1324a and 1324c, the

governing rules provide that an individual who has filed a charge may be a complainant only under § 1324b, and case law clearly holds that an individual has no private right of action under §§ 1324a and 1324c. Prehearing Conference Report, Oct. 16, 2002, at 1-2. Before the telephone conference ended, Complainant also agreed to submit a written settlement proposal to Respondent prior to October 18, 2002, and Respondent agreed to respond in writing. Id. at 2.

On October 17, 2002, Complainant appeared at the offices of Respondent's counsel and served Respondent by hand delivery with her first Request for Discovery, **in which she demanded access to the requested documents that same day or the next day**. Complainant's Motion to Compel Discovery Through Inspection and Copying, Oct. 21, 2002, at Exhibits A-B. Respondent served Complainant with a Response, dated October 18, 2003. Id. at Exhibits. D-E.

On October 21, 2002, Complainant filed her second Motion to Compel, asserting that Respondent's October 18, 2002, Response was evasive, incomplete, and "slanderous," and requesting that I issue a subpoena, ordering Respondent to make available to Complainant for inspection and copying all documentation and evidence supporting Respondent's affirmative defenses raised in its Answer. Motion to Compel at 2. I noted that Complainant is entitled to examine information in Respondent's possession that evidences and supports its affirmative defenses. Order Denying Complainant's Motion to Compel Discovery, Nov. 5, 2002. However, I denied Complainant's Motion to Compel because her first Request for Discovery failed to designate with requisite specificity the description of the items to be inspected and a reasonable time, place, and manner for the inspection as required under 28 C.F.R. § 68.20 (2002). Id. It also was unreasonable for Complainant to give Respondent just one day of notice, given that the OCAHO rules of practice provide that a party has thirty days to respond to any discovery request. Id.; see 28 C.F.R. § 68.20(d) (2002).

In a separate order, I adopted most of Complainant's proposed deadlines for the parties to complete discovery and the filing of exhibits, stipulations, dispositive motions, and a proposed Final Prehearing Order. Order Governing Prehearing Procedures, Nov. 5, 2002. All discovery was to be completed by March 28, 2003.

On November 8, 2002, I entered an order regarding ex parte communications. The Administrative Procedure Act, 5 U.S.C. § 557, and the OCAHO Rules of Practice, 28 C.F.R. § 68.36 (2002), prohibit ex parte communications with an Administrative Law Judge (ALJ) on any matter of substance. Within the constraints of these rules, it has generally been my practice to allow the parties to contact my office, ex parte, by telephone, concerning procedural questions. However, in this case the parties, particularly Complainant, made many ex parte telephone calls to my staff. Because I was concerned about the number of such calls, and the danger that they would not be limited to procedural issues, I ruled that, except for the purpose of scheduling conferences or hearings, this office would no longer initiate or accept a telephone call from a party, unless both parties were on the telephone.

On November 7, 2002, Respondent filed a Settlement Status Report, alleging that **Complainant did not submit a written settlement offer to Respondent prior to October 18, as she had agreed to do** during the telephone conference on October 10, 2002. **Complainant filed no response to this Settlement Status Report**.

On December 11, 2002, Complainant filed three applications for subpoenas duces tecum directed respectively to OSC, the Utica Teachers Association, and the law firm of Hester, Saunders, Kahler & Locke, L.L.P. (Hester Saunders). I granted Complainant's application with respect to the Utica Teachers Association and Hester Saunders, because Complainant presented correspondence showing that she tried to obtain the information voluntarily. Order Ruling on Complainant's Applications for Subpoenas, Dec. 12, 2002, at 1. In contrast, I denied the application with respect to OSC, because Complainant failed to provide the Court with detailed description of the documents that she had already received from OSC through Freedom of Information Act requests. Id. at 2-3.

In her applications for subpoenas, Complainant also asked for an extension of time to submit her exhibit and witness lists, claiming that Respondent's counsel Donald Gerace (Mr. Gerace) had resisted discovery, and represented or coached the President of the Utica Teacher's Association during a deposition. Respondent filed a response to Complainant's Motion, consisting of an affidavit by Mr. Gerace, in which he denied the assertions made by Complainant. However, Mr. Gerace did not object to an extension of time for Complainant to serve her witness and exhibit lists. **Thus, I granted Complainant's Motion for a four-week extension until January 10, 2003**. Order Granting Complainant's Motion for an Extension of Time to File Exhibit and Witness Lists, Dec. 18, 2002. Complainant filed her preliminary witness and exhibit lists by facsimile on January 9, 2003.

On January 22, 2003, Complainant filed a Motion seeking enforcement of the Hester Saunders subpoena and an application for a subpoena directed to Chad R. DeFina, of Hester Saunders, for production of documents and for oral testimony. I denied the application for the DeFina subpoena without prejudice because Complainant had not allowed sufficient time to serve Mr. DeFina at least ten days before the date of the deposition, as contemplated by the OCAHO rules of practice. Order Regarding Complainant's Motion for Enforcement of a Subpoena and Application for the Issuance of a Subpoena to Take a Deposition, Jan. 22, 2003, at 1-2.; see 28 C.F.R. § 68.25(c) (2003) (a party has ten days after service to challenge the subpoena). I also stated that I would not require Mr. DeFina to bring documents to the deposition that already had been previously produced to Complainant.

As for the Hester Saunders subpoena, Complainant did not identify which documents the firm had already produced, and did not explain the relevance and necessity for the subpoena. Id. I thus required her to submit a copy of the entire 124-page Hester Saunders subpoena return, so that I could determine whether there were any apparent deficiencies before ruling on the Motion for Enforcement. Id. at 2.

On January 28, 2003, Complainant resubmitted her Motion for Enforcement with the requested return. I denied this Motion because Gregory J. Amoroso of Hester Saunders, swore that the firm had provided all responsive documents and that it had not withheld any documents based on privilege, or for any other reason. Order Denying Complainant's Resubmission of Jan. 20, 2003, Motion for Enforcement of Subpoena, Feb. 4, 2003, at 2.

On February 4, 2003, Respondent served Complainant with a notice to take her deposition on March 12, 2003, at Mr. Gerace's office. Complainant then filed on February 20, 2003, an application seeking permission to bring an attorney to the deposition to "protect herself from Respondent's oppression, acrimony, and unfounded accusations of impropriety made against her." Complainant's Application to the Court to Bring an Attorney to Respondent's Deposition of Complainant at 1. I allowed Complainant to have an attorney appear for the deposition without filing a notice of appearance. Order Regarding Complainant's Application to the Court to Bring an Attorney to Respondent's Deposition of Complainant, Feb. 11, 2003, at 1. **I also admonished Complainant that a party should not make blanket accusations of "oppression, acrimony, and unfounded accusations of impropriety," unless they are supported and contained in a motion in which the party is seeking some relief, such as a protective order**. Id. at 1-2.

On March 12, 2003, **Complainant filed her third Motion to Compel Response to Discovery,** contending that Respondent had failed to respond to thirty requests in her First Set of Requests for Admissions, dated February 3, 2003. In response, Respondent filed an affidavit on March 19, 2003, stating that all of its answers included a written statement admitting and/or denying and/or objecting to the specific request for admissions, in conformity with 28 C.F.R. § 68.21. I granted Complainant's Motion with respect to Request Nos. 13, 20, 34, 39, and 40, because these answers were incomplete and/or evasive, and I denied the Motion in all other respects. Order Granting in Part and Denying in Part Complainant's Motion to Compel Discovery, April 10, 2003, at 2-3. I also concluded that Respondent's denials without explanation or recitation of facts conformed with the requirements of 28 C.F.R. § 68.21. Id. at 2.

On March 26, 2003, Respondent moved to substitute the firm of Ferrara, Fiorenza, Larrison, Barrett & Reit (Ferrara firm) as counsel for Respondent in this case. In an affidavit, Mr. Gerace stated that he would be unavailable for extended periods of time due to both professional and personal reasons, and that he expected to be a witness in this case. In response, Complainant filed a Motion in Opposition to Respondent's Motion on March 31, 2003, in which she opposed the withdrawal of Mr. Gerace as counsel to Respondent. In view of Complainant's opposition, on April 16, 2003, I conducted a telephone conference with the parties. Mr. Gerace provided persuasive professional and personal reasons as to why he needed to withdraw, which Complainant did not refute. Order Granting Respondent's Motion to Substitute New Counsel, April 17, 2003. Complainant also opposed the substitution of the Ferrara firm, mainly because of its representation of the Oneida-Herkimer-Madison Board of Cooperative Educational

Services. However, during the telephone conference I specifically asked Complainant to explain why this other representation posed a conflict, and she provided no satisfactory answer. Id. Accordingly, I granted Respondent's Motion to substitute new counsel.

On April 17, 2003, I vacated the prehearing procedural schedule because of difficulties that had occurred between the parties in completing discovery. Order Vacating Procedural Schedule, April 17, 2003, at 2. Complainant stated that she had retained Kevin Martin, Esq., of Utica, New York, to represent her solely for Respondent's deposition of Complainant. Id. at 1. I established April 30, 2003, as the date for Respondent to serve responses to Complainant's outstanding interrogatories and requests for production. Id. I also advised the parties that they should attempt to work cooperatively to schedule depositions, but should they be unable to do so, a party could file a motion with me or file a written request for an oral conference with the Court to resolve the dispute. Id. at 2.

On April 29, 2003, Respondent filed a Motion for an Extension of Time to Respond to Complainant's Third Set of Requests for Production of Documents. Respondent stated that it was unable to respond by the April 30, 2003, deadline set by this Court, because Complainant had amended her outstanding interrogatories on April 25, 2003. Motion for of Extension of Time at 2 (Affidavit of Respondent's counsel). Complainant then filed a Motion on May 2, 2003, in which she objected to this extension of time.

On May 7, 2003, I notified the parties by telephone and by written notice that a telephone prehearing conference would take place on May 8, 2003, to discuss the outstanding discovery requests and pending motions filed by both parties. During the telephone conference, Respondent requested, and was granted, **over Complainant's objection**, an extension of time until May 16, 2003, to respond to Complainant's Third Request for Production of Documents. Prehearing Conference Order, May 9, 2003. I again extended the deadline for the completion of discovery to August 15, 2003. Id.

On May 16, 2003, **Complainant filed her Fourth Motion to Compel Discovery**. In this Motion, Complainant objected to my Order granting Respondent an extension of time until May 16, 2003, to respond to Complainant's Third Request for Production of Documents. Complainant then filed, on May 20, 2003, a notice of withdrawal of her Fourth Motion to Compel, because she had received Respondent's response to the discovery.

On June 16, 2003, Complainant filed a Verified Motion and Offer of Proof of Respondent's and its Counsel's Bad Faith Conduct. Attached to the Motion were several documents, including correspondence between Complainant and Respondent's counsel and a lengthy Preliminary Report of the State of New York Commission of Investigation (Commission Report) dated May 2003, concerning an ongoing investigation by the Commission of the Utica City School District's management of a $8.85 million capital improvement bond for construction projects in the Utica City School District. The

twelve-page Motion requested that I take judicial notice of the attached Commission Report and find that Respondent and its counsel have engaged in a pattern of bad faith conduct. **I concluded that the Motion was not well founded and impugned the veracity and integrity of Respondent and its former counsel, Mr. Gerace, based on a collateral matter having nothing to do with the issues in this case**. Order Denying Complainant's Motion and Offer of Proof of Respondent's and Counsels' Bad Faith Conduct, July 1, 2003. I stated that it seemed that Complainant filed the Commission Report to show that Respondent, its employees, and counsel are bad actors; they engaged in misconduct with respect to the school construction project, and consequently, they must be doing so in this case as well. Id. at 2. In denying this Motion, I warned Complainant that if she files any further pleadings accusing Respondent or its counsel of bad faith or misconduct, it "must be supported by specific facts supporting the accusation or I will impose sanctions upon her, either upon application by Respondent or sua sponte." Id.

On June 16, 2003, **Complainant also filed her Fifth Motion to Compel Discovery**, this time regarding Respondent's responses to Complainant's First Set of Interrogatories. On June 20, 2003, Respondent filed a response, asserting that Complainant's Motion to Compel was procedurally deficient. Although it was somewhat unclear from Complainant's Motion to Compel, it seems she was requesting that the Court rule on four different issues: (1) whether a representative from Respondent must sign the interrogatory responses, (2) whether the signature on the interrogatory responses must be under oath, (3) whether Respondent must produce documents responsive to the interrogatories, and (4) whether all of Respondent's interrogatory responses were sufficient. I partially granted Complainant's Motion to Compel because Respondent did not sign the interrogatory answers under oath, as is required under 28 C.F.R. § 68.19(b) and Federal Rule of Civil Procedure 33(b)(1). Order Partially Granting Complainant's Motion to Compel Discovery, July 8, 2003. I also granted the Motion to Compel with respect to Respondent's answer to Interrogatory No. 15, which was non-responsive. Id. However, Complainant's objections to the other interrogatory responses were without merit. Id. at 5. I cautioned Complainant that it was not sufficient for her to object to Respondent's answers as "evasive" or "non-responsive" without further support. Id. at 5-6. I further instructed Complainant that her objections to Respondent's use of terminology, and her disagreement with the factual content of Respondent's answers, were not a proper basis for challenging interrogatory answers. Id. at 5-6.

On June 28, 2003, Complainant served her Fourth Request for Production of Documents on Respondent. This fifty-four page Request consisted of sixty-three numbered requests, with many requests containing subparts, and many subparts containing subparts. Transcript of September 25, 2003, Prehearing Conference (PHC Tr.) 12. As an example, Request No. 36 alone was four pages in length and consisted of twenty-five subparts, A through Y, and many of those subparts had subparts. PHC Tr. 12. Respondent served on Complainant its responses and objections to this Request for Production on July 28, 2003.

On July 11, 2003, Respondent filed a Motion to Compel, requesting that Complainant be directed

to (1) provide responses to Respondent's First Set of Interrogatories, which was served on Complainant on May 13, 2003, (2) provide documents responsive to Respondent's Demand for Production of Documents, which also was served on Complainant on May 13, 2003, and (3) attend her deposition at some date fixed by the Court. Complainant filed a response to this Motion to Compel on July 22, 2003, in which she posed various objections to the interrogatories, including objecting to the fact that the interrogatories exceeded 25 in number, and also accused Respondent's counsel of "retaliation" against her and misrepresentation of her pleadings.

On August 11, 2003, this Court held a telephone prehearing conference to discuss the status of the outstanding discovery requests, pending depositions, pending motions, and the procedural schedule set in my May 9, 2003, Order. Unlike the Federal Rules of Civil Procedure, the OCAHO rules of practice do not limit a party to serving 25 interrogatories. However, exercising my authority to limit discovery pursuant to 28 C.F.R. § 68.18(b) (2003), I sustained Complainant's objection to Respondent's First Set of Interrogatories and required Respondent to redraft them in accordance with the Federal Rules of Civil Procedure. Prehearing Conference Report, Aug. 12, 2003 at 2. Regarding the production of documents, the parties had not been able to agree on the method of production. Id. I granted, in part, Respondent's Motion to Compel and required Complainant to make copies of the requested documents and mail the copies to Respondent by first class mail not later than August 19, 2003. Id. I also required Respondent to reimburse Complainant for the reasonable costs of copying and mailing the documents. Respondent also had moved to compel the appearance of Complainant for her deposition. Respondent's counsel stated that he would prefer to schedule Complainant's deposition after he received Complainant's responses to the production request and redrafted interrogatories. Id. During the conference I ordered the parties to schedule Complainant's deposition for a date after the discovery responses and ruled that if Complainant did not arrange for a suitable location in Utica, then the deposition could take place at the offices of Respondent's counsel in East Syracuse. I also vacated the August 15, 2003, date set in the May 9, 2003, Order for the completion of discovery, and set the new date of October 17, 2003. Id.

On September 8, 2003, **Complainant filed her Sixth Motion to Compel, taking issue with every one of Respondent's responses** to her sixty-three Requests in her Fourth Request for Production of Documents, even when Respondent produced responsive documents without objection. In response, Respondent filed, on September 12, 2003, a Memorandum in Opposition, claiming that the vast majority of Complainant's Requests sought documents with no arguable relevance to this case, and that Complainant has been using discovery to harass the Respondent and increase its defense costs. Respondent's Memorandum in Opposition to Complainant's Motion to Compel, and Cross-Motion for a Protective Order at 18.

On September 12, 2003, Respondent filed a Motion for Enforcement (Motion for Enforcement) of the Court's Discovery Orders and Prehearing Conference Report. Respondent's counsel stated that Complainant had not responded to Respondent's Requests for Production, even though she had been

ordered to provide such documents not later than August 19, 2003. See Prehearing Conference Report Order, dated August 12, 2003; Motion for Enforcement at 5 (Attorney Affidavit); PHC Tr. 7. After the deadline passed, Respondent's counsel wrote a letter to Complainant, dated August 22, 2003, inquiring as to her intentions with respect to the discovery requests. Id. at Ex. B; PHC Tr. 8. Respondent's counsel wrote another letter to Complainant, also dated August 22, 2003, asking whether she wished to hold her deposition at her father's law offices or at another suitable location in Utica. Id. at Ex. C; PHC Tr. 8. In response, on August 25, 2003, **Complainant faxed to Respondent's attorneys correspondence wherein she indicated that she would not be complying with the Court's directives, citing a Motion she had filed with the Court on August 18, 2003**. Id. at Ex. D; PHC Tr. 8. By letter dated August 26, 2003, Respondent's counsel reminded Complainant of the August 19, 2003, deadline set by this Court and that her recent filing of pleadings did not serve to stay my orders. Id. at Ex. E (citing Prehearing Conference Report, Aug. 12, 2003); PHC Tr. 8. These letters constituted the entire set of written communications between the parties regarding this matter. PHC Tr. 5. I conclude that Complainant received this correspondence because she responded to the August 22, 2003, letter, none of the letters were returned undelivered, and Respondent also faxed the letters and received confirmation of their receipt. PHC Tr. 8. In its Motion for Enforcement, Respondent asked this Court, *inter alia*, to dismiss the Complaint in light of Complainant's failure to comply with this Court's directives pertaining to document production.

Since Respondent's Motion for Enforcement was served on Complainant by overnight mail on September 11, 2003, as provided by the OCAHO rules of practice, the response was due within ten days or, in this case, by September 22, 2003. 28 C.F.R. § 68.11(b); PHC Tr. 14. On September 23, not having received any response to the Motion for Enforcement, this Court notified both parties that a telephone prehearing conference would take place on September 25, 2003. PHC Tr. 3. My office notified the parties by telephone, and by a written NOTPC, served on September 23, 2003, that the primary purpose of this telephone conference was to discuss Respondent's Motion for Enforcement, and that dismissal of Complainant's Complaint was a possible sanction. PHC Tr. 4. The NOTPC specifically stated that Respondent's motion asserted that Complainant had not complied with my Order to produce the documents by August 19, 2003; that Respondent had reminded Complainant of this requirement in correspondence dated August 22, 2003, and August 26, 2003; that Complainant had refused to comply; and that Respondent was seeking various possible sanctions, including dismissing the Complaint. Because I had not received a written response from Complainant, the telephone prehearing conference was intended to give her an opportunity to refute Respondent's factual assertions, or, if the factual assertions were true and she had not complied with my Order, she could state why she had failed to do so, and offer reasons why sanctions should not be imposed. The NOTPC further advised both parties that failure to attend the telephone conference could result in sanctions, including rendering a judgment against the noncomplying party. I stated that a court reporter would be present to record the conference.

After she received oral notice of the conference, the following day, September 24, Complainant

filed her response to Respondent's Motion. Although her response was untimely, she did not seek permission to file out of time. PHC Tr. 14-15. Moreover, her response did not address the substance of Respondent's Motion; namely the failure to produce documents, and did not refute Respondent's contention that Complainant has deliberately refused to follow my orders. PHC Tr. 15.

At approximately 10:30 A.M., Eastern Time, on the morning of September 25, 2003, my office received a call from a person identifying herself as Elizabeth Kalil's mother (Judith Kalil), who stated that her daughter, Elizabeth Kalil, was in the emergency room and she did not know whether she was going to be admitted or not. PHC Tr. 3. She did not identify what hospital Complainant was in, or what her condition was, or any other details. PHC Tr. 3. My office informed Judith Kalil that we were going to proceed with the telephone conference, and it took place as scheduled at 1:00 P.M., Eastern Time. PHC Tr. 4. Shortly before the telephone conference began, my staff placed a telephone call to Complainant and left a message on her answering machine, informing her that the telephone conference was taking place. Miles Lawlor and Donald Budman of the Ferrara law firm appeared on behalf of Respondent, and Complainant did not appear. PHC Tr. 3. Respondent's counsel stated that they had not received any kind of communication from Complainant that she would be unable to attend the telephone conference. PHC Tr. 4. **Although she has filed several pleadings after September 25, 2003, Complainant has not provided me with any evidence (e.g., a doctor's note, medical bill, or affidavit) or any explanation as to why she failed to appear for this properly noticed telephone conference**. Thus, Complainant was afforded the opportunity to respond both in writing and at a telephone conference to Respondent's request to dismiss her Complaint.

In addition to Complainant's refusal to provide the documents responsive to Respondent's request for production, Complainant also has failed to comply with my discovery order requiring her to answer Respondent's Amended Interrogatories. On September 26, 2003, Respondent served a motion for sanctions against Complainant for having failed to respond to Respondent's Amended Interrogatories. Respondent attached a copy of the Amended Interrogatories, correspondence from Respondent's counsel to Complainant concerning the interrogatories, and an affidavit by Mr. Lawlor, Respondent's counsel. In the affidavit Mr. Lawlor averred that Complainant had neither answered, objected to or otherwise responded to Respondent's Amended Interrogatories, nor had she responded to the written correspondence. However, Respondent's counsel asserts that, during a deposition held on September 15, 2003, Complainant indicated that she would not be providing responses to any of Respondent's discovery requests. Lawlor Affidavit, ¶ 5; PHC Tr. 5-6. Considering these sworn assertions, on October 6, 2003, I issued an order requiring Complainant to serve and file her answers to the interrogatories by October 14, 2003. However, as of this date, Complainant still has not complied with my Order requiring her to serve and file answers to the Respondent's interrogatories.

Also, as of the date of the September 25 telephone prehearing conference, Complainant had not responded to any of the recent written correspondence from Respondent attempting to

schedule her deposition. PHC Tr. 10-11. Because Complainant has ignored its discovery requests for many months, Respondent's counsel asked this Court to dismiss Complainant's Complaint. PHC Tr. 10.

On October 7, 2003, I issued another Order Regarding Ex Parte Communications. In the week preceding October 7, 2003, Complainant had made several ex parte telephone calls to my office, and attempted to discuss pending motions, as well as other matters, with my law clerk and my paralegal. Order at 1. Moreover, Complainant had made ex parte communications to the Deputy Chief Administrative Hearing Officer concerning her case. Id. (citing Order Regarding Ex Parte Communications, Nov. 8, 2002). Accordingly, I ordered Complainant immediately to cease and desist from such conduct. Id.

Finally, on October 14, 2003, Complainant submitted a ten-page pleading, with several attachments, which purports to be a response to the Court's Order requiring her to file answers to Respondent's interrogatories and Respondent's request for production of documents. However, the pleading did not include answers to the interrogatories or the documents required by the request for production. Moreover, the pleading was submitted by facsimile and, with attachments, consists of seventy-five pages. This pleading was submitted in violation of my Procedural Order, which was served on the parties on September 30, 2002, with the First Prehearing Order, which prohibits a party, without advance approval from the ALJ, from filing a pleading by facsimile exceeding twenty-five pages in length. Complainant's pleading does acknowledge that she received both the October 6, 2003, Order Regarding Ex Parte Communications and the October 6, 2003, Order Requiring Complainant to File Answers to Respondent's Interrogatories. Moreover, Complainant's pleading clearly demonstrates that she does not intend to furnish answers to Respondent's interrogatories, that she has no intention of complying with the orders of this tribunal, and that she has received ample warning that such failure may result in the dismissal of her Complaint.

III. ANALYSIS

A. Abuse of Process

The above detailed description of the procedural history demonstrates that Complainant is a lawless litigant who has abused the litigation process, including discovery, for the improper purpose of harassing Respondent. Complainant has opposed virtually every motion and request made by Respondent, even motions for extensions of time and a motion to substitute counsel. By contrast, Respondent has not opposed her requests for extensions of time. Complainant also has made numerous unfounded accusations of bad faith and misconduct against Respondent and its counsel. She has promulgated numerous discovery requests and filed several motions to compel discovery, while at the same time she has refused to answer Respondent's discovery requests and has refused to cooperate with Respondent in scheduling her deposition. Her conduct has persisted even after I ordered her to provide answers to Respondent's

interrogatories and documents in response to Respondent's discovery requests. The purpose of pretrial discovery is to enable a party to prepare for trial; it is not meant to allow one party to harass another party with unnecessary, irrelevant, and unduly burdensome requests. Moreover, discovery is not meant to allow one party to indulge itself in asking every possible question it can think of and include those in a discovery request, either out of morbid curiosity or to burden the other side.

Complainant's fourth request for production served on June 28, 2003, is a good example of the above. On September 12, 2003, Respondent moved for a protective order, asserting that the vast majority of these requests sought documents with no arguable relevance to this case, and that Complainant had been using discovery to harass Respondent and increase its defense costs. Complainant's fourth request for production is fifty-four pages long and consists of sixty-three numbered requests, with many requests containing subparts, and many subparts containing subparts. PHC Tr. 12. As an example, Request No. 36 alone is four pages in length and consists of twenty-five subparts, A through Y, and many of those subparts have subparts. PHC Tr. 12. While some of the discovery requests appear to be relevant and reasonable in scope, the document request as a whole seeks irrelevant information and is unduly burdensome. Various other requests seek information regarding Complainant's mother, Oliver-Alleyne's sister and brother-in-law, the identities of persons who filed immigration and employment documents for Respondent, the costs of filing these documents, and the Oaths of Office subscribed to by various Utica City School District Board Members and employees of Respondent. **Complainant has made no showing as to how this information could possibly be relevant, and I conclude that she designed these requests to harass the opposing party**.

Throughout this case, Complainant has conducted depositions of Respondent's employees and has served numerous other discovery requests, including interrogatories and four requests for production of documents. See § II. of this Order. Complainant has filed several motions to compel, objecting to discovery responses even when Respondent produced documents or stated that no documents responsive to the request exist.

In addition to discovery directed to Respondent, Complainant has requested several subpoenas directed to non-parties on her behalf. At her request, on July 15, 2003, I also issued an Order granting Complainant's motion to enforce a subpoena directed to the American Arbitration Association (AAA). On her behalf, the United States Attorney's office brought an enforcement action in the United States district court to enforce the subpoena, and it is my understanding that the AAA has now fully complied with the subpoena. Despite having availed herself of all these discovery options, Complainant has refused to provide Respondent with responses to its discovery requests, even when ordered to do so. See PHC Tr. 7-8. Discovery is not a one way street; both parties are entitled to conduct legitimate discovery to enable them to prepare for trial. Moreover, litigation cannot be conducted in an orderly fashion when one party unilaterally decides it will not follow the judge's orders.

Complainant has taken an obstructionist posture since the onset of this case. Complainant has opposed nearly every motion filed by Respondent, including matters as simple as requests for extension of time. Although Complainant accused Respondent's original counsel, Mr. Gerace, of unethical practices, she opposed his motion to withdraw as Respondent's counsel. Moreover, when she objected to Respondent's substitution of new counsel, Complainant was unable to offer any support for her claim that the Ferrara firm had a conflict of interest. Order Granting Respondent's Motion to Substitute New Counsel, April 17, 2003.

Complainant's accusations have not been limited to Respondent's counsel. Throughout the course of this case, Complainant has questioned the integrity of both the OSC and Carol Mackela, the staff attorney who handled the investigation of her charge. After receiving OSC's determination letter, on September 27, 2002, she sent a six-page single-spaced memorandum to Ms. Mackela questioning the integrity of the investigation. See Exhibit A to Complainant's October 7, 2002, motion to amend the Complaint. These accusations became more strident as the case progressed. In a December 9, 2002, motion seeking an extension of time to file her exhibit and witness lists, Complainant again challenged the integrity of OSC's investigation and attacked Ms. Mackela by name for having conducted interviews of Respondent's employees with Respondent's counsel present:

> Complainant advised the Court in October 2002 of serious concerns with respect to the integrity of the OSC findings in this matter, due in large part to what Complainant believed at the time was solely the actions of the Respondent. However, Complainant has recently obtained additional documentation further challenging the integrity of the OSC's investigation per se, including but not limited to OSC Attorney Mackela's conducting interviews in May 2002 with individual Respondent employees who were summoned to Respondent's Administration Building where they were interviewed via speaker phone with Respondent's Attorney Gerace and Director of Personnel James Salamy there present.

Motion at 4. Apparently, Complainant does not understand that it would have been an ethical violation for an OSC attorney to interview Respondent's employees without allowing Respondent's counsel to be present!

Complainant continued to make accusations against OSC in further pleadings. See Complainant's June 11, 2003, Motion at page 8; Complainant's August 6, 2003, application for a subpoena for the deposition of Carol Mackela. Thus, Complainant's charges of impropriety have not been limited to Respondent or Respondent's counsel.

After a year of overseeing this litigation, and having been somewhat lenient with Complainant

because of her pro se status, I now conclude that she has used discovery to vex and harass Respondent and its counsel. Federal courts have observed that severe sanctions may be imposed for abusing the discovery process. See Internet Law Library Inc. v. Southridge Capital Management LLC, 55 Fed. R. Serv. 3d 1138 (S.D. N.Y. 2003); ACLI v. Government Securities, Inc. v. Rhoades, 989 F. Supp. 462 (S.D. N.Y. 1997). Nevertheless, although this conduct is serious, I am not dismissing her Complaint on that basis. Rather, as discussed in the following section, it is her failure to obey my Orders which justly occasions the dismissal, with prejudice, of her lawsuit.

B. Deliberate Failure to Comply With Orders

Pursuant to the OCAHO rules of practice, a complaint may be dismissed if a party fails to obey orders issued by an ALJ. 28 C.F.R. § 68.37(b)(1). Additionally, under Section 68.23(c)(5), if a party fails to comply with an order for the taking of a deposition, the production of documents, the answering of interrogatories, or any other order of the ALJ, the ALJ may rule that a decision be rendered against the non-complying party. OCAHO precedent supports the dismissal of a pro se complainant's complaint with prejudice when he or she fails to obey orders issued by an ALJ. Palma v. Farley Foods, 5 OCAHO 283, 286 (1995) ("this is another case of an individual invoking protection under § 1324b without accepting the responsibility to abide reasonably by established procedures as required by the presiding judge."); Chavez v. Nat'l By-Prod., 4 OCAHO 293, 295 (1994); Gallegos v. Magna-View, Inc., 4 OCAHO 359, 361-362 (1994).

In addition, the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for by the OCAHO rules of practice, the Administrative Procedure Act, or any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1 (2003). In relevant part, the Federal Rules of Civil Procedure provide that if a party fails to obey an order granting a motion to compel discovery, the court in which the action is pending may make such orders in regard to the failure as are just, including an order dismissing the action. Fed. R. Civ. P. 37(b)(2). Likewise, if a party fails to attend his or her own deposition or to serve answers to interrogatories, the court may impose these same sanctions. Fed. R. Civ. P. 37(d).

Since both parties are located in the state of New York, circuit court case law from the United States Court of Appeals for the Second Circuit is pertinent. Case law from that Court supports the dismissal of a pro se party's complaint with prejudice when he or she fails to comply with orders issued by a judge. Although dismissal with prejudice is a "severe sanction," it will be upheld against a plaintiff who is proceeding pro se, so long as the court has warned the plaintiff that noncompliance can result in dismissal. Complainant's behavior in this case mirrors that of the plaintiffs in Baba v. Japan Travel Bureau International, 111 F.3d 2, 5 (2d Cir. 1997) (upholding the dismissal with prejudice of a pro se plaintiff's complaint) and Valentine v. Museum of Modern Art, 29 F.3d 47, 49 (2d Cir. 1994), who also refused to provide discovery or to obey the judge's orders. Baba, the pro se plaintiff, repeatedly gave inadequate

and evasive answers to interrogatories and deposition questions; refused to furnish requested documents; and ignored warnings by the court concerning the possible imposition of discovery sanctions, including two warnings explicitly notifying plaintiff that her continued failure to comply with the court's discovery orders could result in dismissal of her action with prejudice. On appeal, the Court stated that "Baba's stubborn failure to comply with the court's discovery orders justified the district court's decision to dismiss Baba's claims. . ." Id. at 5. In other cases, the Second Circuit Court of Appeals has stated that it "does not hesitate to affirm the dismissal of claims as a sanction for 'willfulness, bad faith, or any fault' on the part of the sanctioned party." Id. (citing Jones v. Niagara Frontier Transp. Auth. (NFTA), 836 F.2d 731, 734 (2d Cir. 1987); Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 764 (2d Cir. 1990). As the Court has stated, "all litigants, including pro ses, have an obligation to comply with court orders. When they flout that obligation they, like all litigants, must suffer the consequences of their actions." McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988)).

I dismiss Complainant's Complaint with prejudice because she deliberately and willfully failed to comply with my Orders, she has been warned repeatedly that such behavior could result in dismissal, and despite such warnings she has persisted in her misconduct. During the August 11, 2003, telephone prehearing conference, I granted, in part, Respondent's Motion to Compel Production of Documents and ordered Complainant to make copies of the requested documents and mail them, not later than August 19, 2003, to Respondent by first class mail. Prehearing Conference Report, Aug. 12, 2003 at 2. I further ordered Respondent to reimburse Complainant for the reasonable costs of copying and mailing the documents so that she would not suffer any expense in complying with the order. Id. When Respondent received no documents from Complainant, Respondent's counsel reminded Complainant of the order's requirements in letters dated August 22, 2003, and August 26, 2003. See Respondent's Motion for Enforcement, Exhibits B-C; PHC Tr. 8-9. In response, on or about August 25, 2003, Complainant faxed to Respondent's attorneys correspondence wherein she indicated that she would not be complying with the Court's directives, citing a Motion she had filed with the Court on August 18, 2003. Id. at Ex. D; PHC Tr. 8. In addition, at Complainant's deposition of David Bruno on September 15, 2003, Complainant told Respondent's counsel that she would not be responding to their interrogatories or any discovery requests. PHC Tr. 5-6. When the telephone prehearing conference took place on September 25, 2003, Complainant still had not provided the documents to Respondent. Moreover, she refused to do so even after Respondent correctly informed her that the motions that Complainant filed with this Court did not operate to stay my August 11, 2003, Order. Complainant did not seek or obtain a stay of my discovery order. **Complainant disobeyed my Order by failing to provide documents to Respondent**. **Moreover, it is clear that such disobedience was both deliberate and wilful**. Indeed, to this date, she has not complied with the Order and has not expressed any intention to do so.

The document request is not the only discovery obligation that Complainant has ignored. I sustained Complainant's objection to Respondent's First Set of Interrogatories and required Respondent to redraft them in conformance with the Federal Rules of Civil Procedure. Prehearing Conference Report,

Aug. 12, 2003. I further ordered the parties to schedule the deposition of Complainant after Respondent received her responses to its interrogatories and requests for production, and ruled that if Complainant did not arrange for a suitable location in Utica, then the deposition could take place at the offices of Respondent's counsel in East Syracuse. Id. On August 22, 2003, in accordance with my August 12, 2002 Order, Respondent served its Amended Interrogatories on Complainant. PHC Tr. 6. Under the OCAHO rules of practice, Complainant's responses to these interrogatories were due on September 22, 2003, thirty days after they were served. 28 C.F.R. § 68.19(b) (2003). Yet, Complainant told Respondent's counsel at Complainant's deposition of David Bruno on September 15, 2003, that she would not be responding to Respondent's discovery requests. PHC Tr. 5-6. Respondent's counsel also sent Complainant a letter on September 22, 2003, asking whether she planned to answer the interrogatories, PHC Tr. 6-7, but Complainant did not respond. At the time of the telephone prehearing conference on September 25, 2003, Complainant still had not answered Respondent's interrogatories. PHC Tr. 7. On October 6, 2003, I ordered Complainant to serve and file her answers to the interrogatories not later than October 14, 2003, and I warned her that if she did not do so, I might grant Respondent's motion for sanctions. However, as with Respondent's Request for Production, to this date Complainant has neither answered the interrogatories, nor indicated that she has any intention of doing so. **Thus, Complainant also willfully disobeyed my order that she answer Respondent's interrogatories**.

Moreover, Complainant also has disobeyed my instructions to cooperate with Respondent in scheduling her deposition. For over six months, starting in March 2003, Respondent's Counsel has been trying, without success, to take Complainant's deposition. On February 4, 2003, Respondent served Complainant with a notice to take her deposition on March 12, 2003, at Mr. Gerace's office. See Complainant's Application to the Court to Bring an Attorney to Respondent's Deposition of Complainant at 1. At Complainant's request, I allowed Complainant to have an attorney appear for her deposition without even filing a notice of appearance, and I provided that the deposition would be held in Utica, where Complainant lived, rather than in East Syracuse, where Respondent's counsel was located. See Order Vacating Procedural Schedule, April 17, 2003. Despite these favorable rulings in her favor, however, Complainant did not appear for her deposition. Furthermore, Respondent's counsel has not been able to schedule Complainant's deposition, as mandated by my August 12, 2003, order, because it needed the responses to the written discovery before it conducted the deposition, and Complainant has not answered the Respondent's interrogatories or produced the documents required by the request for production. PHC Tr. 10-11. **I conclude that Complainant has willfully failed to comply with my orders that she cooperate with Respondent in arranging for her deposition**.

Complainant also disobeyed my orders regarding ex parte communications. In the week preceding October 7, 2003, Complainant made several ex parte telephone calls to my office, and attempted to discuss pending motions, as well as other matters, with my law clerk and my paralegal. See Order Regarding Ex Parte Communications, Oct. 6, 2003. Complainant also engaged in ex parte communications with the Deputy Chief Administrative Hearing Officer concerning her case. Id.

Complainant's communications are in direct contravention of my prior Order Regarding Ex Parte Communications, dated November 8, 2002, in which I directed the parties not to contact my office except for scheduling purposes.

I further note that, as required by Second Circuit law, see Baba, supra, Complainant received ample notice that dismissal with prejudice was a possible sanction for failure to comply with my orders. Complainant was informed in writing, on several occasions, that failure to comply with my orders might result in sanctions, including the dismissal with prejudice of her case. The Procedural Order, which was served with the First Prehearing Order on September 30, 2002, at the outset of the case, warned the parties of such sanctions if a party failed to comply with my discovery orders. See Procedural Order at p. 5. With respect to the specific discovery requests, **Respondent served Complainant by overnight mail on September 11, 2003, with its Motion for Enforcement, in which Respondent asked, inter alia, that Complainant's action be dismissed**. Complainant's response to Respondent's Motion for Enforcement was not only untimely, but also failed to address the substance of Respondent's Motion; namely the failure to produce documents. In her response, Complainant did not refute Respondent's contention that Complainant had deliberately refused to follow my orders, and she did not state that she intended to comply. See PHC Tr. 14-15. However, **Complainant's response demonstrated her awareness that Respondent was asking this Court to dismiss her Complaint**. Complainant's Verified Offer of Proof of Respondent's Counsels' Obstructive, Prejudicial Conduct in this Forum; and Request of This Court to Take Official Judicial Notice of Same; and Specific Requests for Relief, Including but Not Limited to Removal of Respondent's Representatives From this Matter [sic] at 5.

Additionally, my law clerk called Complainant twice on September 23, 2003, to notify her that a telephone prehearing conference would take place on September 25, 2003. My law clerk left a message on Complainant's answering machine stating that the purpose of the telephone conference was to discuss Respondent's Motion to Dismiss and that if Complainant did not appear, her case could be dismissed. **Complainant confirmed her receipt of this message in a memorandum, addressed to my law clerk, which Complainant faxed to my office on September 23, 2003**.

Also, on that same day, my office notified Complainant in writing that the telephone conference would take place on September 25, 2003. See Notice of Telephone Prehearing Conference, Sept. 23, 2003. The NOTPC explicitly stated that "[t]he primary purpose of the conference is to consider Respondent's motion for enforcement of the Court's Discovery Orders and Prehearing Conference Report," and that a party's failure to obey this order could result in sanctions, including "dismissing the complaint, with or without prejudice." Id.

I dismiss Complainant's Complaint with prejudice, not because she failed to attend the prehearing conference, but because she repeatedly and willfully has refused to respond to or comply with my Orders. The filing of a motion does not stay an order, and does not toll the deadline for responding to discovery

requests. Complainant not only has refused to comply with my orders, but there is no indication that she intends to comply in the future. Even after she failed to appear for the September 25 telephone conference, if she had immediately complied with the discovery order and indicated her intention to comply with my orders in the future, I probably would not have dismissed her case. However, her latest pleading, sent by facsimile on October 14, 2003, shows that she has no intention of providing the discovery or obeying the orders of this tribunal. As the Second Circuit Court of Appeals has stated, "all litigants, including pro ses, have an obligation to comply with court orders." McDonald v. Head Criminal Court Supervisor Officer, supra at 124; Baba v. Japan Travel Bureau International, Inc., supra at 5. Because Complainant has persisted in failing to obey orders and has been warned of the consequences, the Complaint is dismissed with prejudice.

C. Attorney's Fees

Once a case involving allegations of unfair immigration-related employment practices has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact. 8 U.S.C. § 1324b(h) (1994). An award of attorney's fees will not be granted if the ALJ concludes that the complainant's position was "substantially justified" or "special circumstances make the award unjust." 28 C.F.R. § 68.52(c)(iii)(9) (2003). Any application for attorney's fees must be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed. Id. In this case, if Respondent wishes to move for attorney's fees, it must file an application for fees, supported by the itemized statement and a memorandum of law discussing the applicable legal principles (i.e., relevant OCAHO and federal court case law), **by November 12, 2003**. The memorandum of law shall be double-spaced and shall not exceed twenty-five pages in length. I expect that Respondent will cite and discuss the pertinent OCAHO case law, as well as the leading Title VII case on attorney fees, such as Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), as well as cases from the United States Court of Appeals for the Second Circuit. Complainant shall serve and file a response to the application **within twenty days from the date Respondent's application is served**. Complainant's response also shall be double-spaced and shall not exceed twenty-five pages in length.

IV. CONCLUSION

Because Complainant has failed to comply with my orders, the Complaint is dismissed with prejudice. I retain jurisdiction of this case to consider an application for attorneys' fees.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This order constitutes the final agency decision. As provided by statute, no later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).