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 GRANTING IN PART RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES

(*December 18, 2003*)

I. INTRODUCTION

On November 12, 2003, Utica City School District (Respondent) filed an Application for Attorney's Fees (Application) and on November, 17, 2003, filed a Supplemental Application for Attorney's Fees (Supplemental Application). Respondent seeks $54,454.40 in attorney's fees at the rate of $136 per hour for 400.40 billable hours. In response, Elizabeth A. Kalil (Complainant), acting pro se, filed a Verified Response in Opposition to Respondent's Application for Attorney's Fees (Response) on December 1, 2003. For the reasons discussed in this Order, I grant Respondent's Application in part and award attorney's fees in the amount of $52,958.40.

II. BACKGROUND

By Order dated October 16, 2003, I granted Respondent's request to dismiss with prejudice Complainant's Complaint, in which she alleged 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. Order Dismissing Complaint With Prejudice, 9 OCAHO Ref. No. 1101, 2003 WL 22519503. Although this Order assumes familiarity with the background and procedural history of this case, which is recounted in detail in the Order Dismissing Complaint With Prejudice, the following is a summary of my findings that are most relevant to the Application currently sub judice.

In the Order Dismissing Complaint With Prejudice, I concluded that Complainant wilfully and deliberately abused the litigation process and defied my Orders. In that Order, I concluded that Complainant's disobedience was both deliberate and willful. Id. at 14, *14. I also concluded that "Complainant is a lawless litigant who has abused the litigation process, including discovery, for the improper purpose of harassing Respondent." Id. at 11, *10. I further concluded that "Complainant has taken an obstructionist posture since the onset of this case" by opposing nearly every motion filed by Respondent, including routine matters such as requests for extension of time. Id. at 12, *11. "After a year of overseeing this litigation, and having been somewhat lenient with Complainant because of her pro se status," I determined that she "used discovery to vex and harass Respondent and its counsel." Id. at 13, *12. I also found that Complainant "deliberately and willfully failed to comply with my Orders," despite repeated warnings that such behavior could result in dismissal. Id. at 14, *14. In particular, Complainant failed to comply with my Orders to provide documents to Respondent, to answer Respondent's interrogatories, and to cooperate with Respondent in scheduling her deposition. Id. at 15-16, *14-15. I also concluded that she had failed to obey my Orders to refrain from making ex parte telephone calls to my office except to discuss routine scheduling matters. Id. at 16, *14-15. Accordingly, I dismissed Complainant's Complaint with prejudice because she repeatedly and deliberately refused to respond to or comply with my Orders and instructions. Id. at 17, *16.

The Order further provided that if Respondent wished to move for attorney's fees, it must file, by November 12, 2003, an application for fees, supported by an itemized statement and a memorandum of law discussing the applicable legal principles (i.e., relevant OCAHO and federal court case law). Id. Complainant, in turn, could serve and file a response within twenty days from the date Respondent's application was served. Id.

On November 12, 2003, Respondent filed the Application that is the subject of this Order, including an itemized statement setting forth the legal services performed on behalf of Respondent and the amount of fees incurred. Also, on that date, I issued an Order stating that because Respondent's Application was served on Complainant by Federal Express on November 10, 2003, and the twenty-day period of time for filing a response would expire on Sunday, November 30, 2003, Complainant's response had to be served and filed not later than December 1, 2003. Respondent then filed a Supplemental Application on November 17, 2003, in which it slightly modified its computation of fees. Complainant filed and served a timely Response on December 1, 2003.

III. OCAHO STANDARDS FOR AWARDING ATTORNEY'S FEES

Once a case involving allegations of unfair immigration-related employment practices has been adjudicated, the "prevailing party" may recover reasonable attorney's fees if the losing party's argument was "without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h) (1994); 28 C.F.R. § 68.52(d)(6) (2002). 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. 28 C.F.R. § 68.52(d)(6) (2002). The burden is on the prevailing respondent to substantiate the two-prong test of § 1324b(h), and that burden is especially heavy where the complainant has proceeded pro se. Toussaint v. Tekwood Associates, Inc., 6 OCAHO 784, 808-809, 1996 WL 670179 at *17-18. The prevailing respondent also bears the burden of showing that the requested attorneys fees are reasonable in amount. Id. at 809, *18.

The Office of the Chief Administrative Hearing Officer (OCAHO) precedent clearly establishes that a respondent who receives a dispositive ruling in his or her favor is a "prevailing party" under § 1324b(h), even in cases that terminated before an adjudication on the merits. See, e.g., Morales-Delgado v. Weld County School District, 2 OCAHO 653, 654-655, 1991 WL 531890 at *1. By way of illustration, one relevant case held that the respondent was the "prevailing party" where the Court dismissed the complaint of a pro se complainant for failure to comply with an order to file a pleading to clarify omissions and contradictions in the complaint. Gallegos v. Magna-View, Inc., 4 OCAHO 359, 361-362, 1994 WL 386824 at *2-3. Similarly, another case held that the respondent was the "prevailing party" where the Court dismissed the pro se complainant's complaint for bad faith, failure to comply with discovery requests, and failure to comply with orders, even though there was never an adjudication on the merits. Palancz v. Cedars Medical Center, 3 OCAHO 503, 516-517, 1992 WL 535580 at *10.

In determining whether the losing party's argument was "without reasonable foundation in law and fact" under § 1324b(h), OCAHO judges have looked by analogy to Title VII jurisprudence. Monda v. Staryhab, 8 OCAHO 86, 100, 1998 WL 745960 at *10. The Supreme Court has held that a court may "in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)). Moreover, "if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." Christiansburg at 422 (emphasis in the original). "[T]he fact that a case is resolved without having reached the confrontational evidentiary phase of the hearing process does not preclude a finding that a party's argument is without reasonable foundation in fact or in law." Palancz at 517, *10.

Respondent has not cited any OCAHO cases actually awarding fees on the basis that a party's argument was without "reasonable foundation in law and fact" in the absence of a hearing on the merits or a ruling upon a dispositive motion, such as a motion for summary decision. For example, the judge in Gallegos declined to hold that the complainant's complaint lacked "reasonable foundation in law and fact" where the Court dismissed the action because of the complainant's failure to comply with an order to redraft the complaint. Gallegos, supra, at 362-363, *3. Although the complaint was unclear on its face, the judge reasoned that it could be speculated that the pro se complainant possessed standing to allege a prima facie case of liability under 8 U.S.C. § 1324b(h). Id. at 362, *3. Thus, the respondent failed to

meet its burden of showing that the complaint lacked a "reasonable basis in law and fact." See id. The judge in Palancz suggested the complainant's argument was without "reasonable foundation in fact or in law," but withheld an award of fees as a matter of discretion, recognizing the relative resources and communication skills of the parties. Palancz, supra, at 517-518, *10.

IV. ANALYSIS OF THE MERITS OF COMPLAINANT'S CASE

In seeking an award of attorney's fees against Complainant under 8 U.S.C. § 1324b(h), Respondent bears the burden of showing that it was the "prevailing party." See Morales-Delgado, supra. Respondent argues that it is the "prevailing party" because Complainant's Complaint was dismissed with prejudice, Application at 6, and Complainant does not refute this claim in her Response. As noted previously, there are a number of cases holding that a respondent is the "prevailing party" when the complainant's case is dismissed before an adjudication on the merits. See, e.g., Morales-Delgado; Palancz; Gallegos, supra. In this case, I dismissed Complainant's Complaint with prejudice before reaching a hearing on the merits because she engaged in abusive motion and discovery practices and repeatedly refused to respond to or comply with my Orders and instructions. Order Dismissing Complaint With Prejudice, supra, at 17, *16. **Therefore, I find that Respondent is the "prevailing party" in this case.**

Respondent further asks me to find that the Complaint lacks "reasonable foundation in law and fact." In evaluating the merits of the Complaint, it is first necessary to outline the elements that Complainant would have had to prove to establish a prima facie case of liability with respect to her failure to hire, discriminatory discharge, and retaliation claims. 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 governs. See 28 C.F.R. § 68.52 (2002). OCAHO judges have looked to Title VII jurisprudence for guidance in ruling upon claims of discrimination filed under 8 U.S.C. § 1324b. See, e.g., Walker, et al. v. United Airlines, Inc., 4 OCAHO 791, 1994 WL 661279.

Complainant's burden of establishing a prima facie case of liability is a "minimal" one. Graham v. Long Island Railroad, 230 F.3d 34, 38 (2d Cir. 2000) (citing Saint Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)); see also Ste. Marie v. Eastern Railroad Association, 650 F.2d 395 (2d Cir. 1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). With respect to her failure to hire claim, Complainant would have had to show that (1) she belongs to a protected group; (2) she applied for a position for which she was qualified; (3) despite her qualifications, she was rejected; and (4) after her rejection the position remained open and the employer continued to seek applicants with her qualifications. McDonnell Douglas Corp. at 802; Byrnie v. Town of Cromwell, Board of Education, 243 F.3d 93, 101

(2d Cir. 2001). With respect to her discriminatory discharge claim, Complainant would have had to prove that (1) she is a member of a protected class; (2) she was performing her duties satisfactorily; (3) she was discharged; and (4) that her discharge occurred under circumstances giving rise to an inference of discrimination on the basis of her membership in the protected class. Graham (citing McDonnell Douglas Corp.). Finally, with respect to her retaliation claim, she would have had to show that (1) she was engaged in a statutorily protected activity; (2) the employer was aware of her participation in the protected activity; (3) the employer took adverse action against her; and (4) a causal connection existed between her protected activity and the adverse action taken by the employer. Raniola v. Bratton, 243 F.3d 610, 624 (2d Cir. 2001); Cruz v. Able Service Contractors, Inc., 6 OCAHO 144, 150-151, 1996 WL 229220 at *5. Courts consistently have liberally construed remedial anti-retaliation provisions to encompass a broad range of conduct. Cruz at 155, *8.

Respondent argues that Complainant's action lacked "reasonable foundation in law and fact" because Complainant could not possibly have established a prima facie case of liability with respect to any of the three claims in her Complaint. See Application at 6-17. As to the failure to hire claim, Respondent claims that it only employed Complainant as a substitute teacher and a temporary teacher of Spanish, and that her active employment with Respondent ended shortly before her Temporary Teaching Licence expired by its terms on August 31, 2001. Id. at Exhibit A (Affidavit of James R. Salamy, Director of Personnel for Respondent). Respondent also states that Complainant never applied for or made inquiry about the full-time Spanish language teacher position in question. Id. Respondent further states that Complainant was unqualified for the full-time position because she lacked the requisite permanent teaching certification from the New York State Education Department, and moreover, she has never obtained such certification. Id. Lastly, Respondent avers that it never hired anyone, regardless of their immigration or nationality status, to fill the full-time position. Id. Complainant does not dispute or address these sworn statements by Mr. Salamy.

Complainant offers little in her Response to demonstrate that her Complaint does indeed have a "reasonable basis in law and fact." The Response contains numerous unsupported attacks against the integrity of Respondent and its counsel, and also makes some irrelevant and unsupported arguments. First, Complainant suggests that Respondent and its counsel have wrongfully withheld documents that she requested through discovery and pursuant to the Freedom of Information Act (FOIA). See Response at 2-3. Presumably, Complainant believes that if she engages in even more discovery and document production, she will eventually uncover facts that prove her case to be well-founded in law and fact. Yet, she ignores the fact that she was allowed to conduct substantial discovery. In dismissing her Complaint, I noted that she willfully and deliberately abused the discovery process by inundating Respondent with discovery requests, to which they invariably responded, while at the same time she failed to respond to Respondent's own discovery requests! Order Dismissing Complaint With Prejudice, supra, at 11, *10. Therefore, I reject any suggestion that Complainant is now unable to articulate a "reasonable basis in law and fact" with respect to her Complaint because Respondent somehow impeded her discovery efforts.

Complainant further claims that her action is well-founded because unspecified "documentation" shows that Respondent knew that Mrs. Lila Oliver-Alleyne was unauthorized to work in the United States when it appointed her to the full-time Spanish language teaching position in question. Response at 3-5. However, her assertions regarding the alleged illegal hiring of Mrs. Oliver-Alleyne are irrelevant to the instant fee petition issue; the issue is whether Respondent unlawfully discriminated against Complainant, not whether Respondent illegally hired an unauthorized alien. For this reason, the case law cited by Complainant concerning actions brought under 8 U.S.C. § 1324a, which establishes a process for sanctioning employers who unlawfully hire aliens who are unauthorized to work in the United States, is inapposite. See id. at 2, 4-5 (citing United States of America v. Jonel, 8 OCAHO 175, 1998 WL 804705; New El Ray Sausage Co., Inc. v. INS, 925 F.2d 1153 (9th Cir. 1991); United States of America v. Café Camino Real, Inc., 2 OCAHO 29, 1991 WL 531736).

Complainant also argues that the Office of Special Counsel for Immigration-Related Unfair Employment Practices's (OSC) issuance of a right-to-sue-letter, OCAHO's issuance of a notice of hearing, and this Court's administration of the case demonstrate that her Complaint is well-founded in law and fact. See id. at 7-9. However, this position reflects a fundamental misunderstanding about the functions of OSC, the Chief Administrative Hearing Officer (CAHO), and this administrative tribunal. Once OSC determines it will not prosecute a case, it is required by law to issue a right-to-sue letter within the statutory time period, 8 U.S.C. § 1324b(d)(2) (emphasis added), and the CAHO must accept any complaint which colorably alleges a discrimination claim over which we have jurisdiction. Moreover, the presiding judge can only rule upon the merits of the case in a final order or when one of the parties files a dispositive motion, such as a motion for summary decision. Since no adjudicative hearing was held and no dispositive motion was filed in this case, I find that the right-to-sue letter, the notice of hearing, and my administration of the case have no bearing on whether Complainant's action has a "reasonable basis in law and fact."

Complainant further asserts that she has been prejudiced in bringing her case because the telephone prehearing conference of September 25, 2003, was improperly noticed or unreasonably convened. Response at 6. Yet, Complainant received adequate notice, by telephone and in writing, that the prehearing conference would take place at 1 p.m. on September 25, 2003, and that dismissal of her Complaint was a possible sanction should she fail to appear. See Notice of Telephone Prehearing Conference, served on September 23, 2003, by facsimile and first class mail; Order Dismissing Complaint With Prejudice, supra, at 9, *8-9. Although Complainant maintains that "she was being treated in a hospital emergency room" on the morning of September 25, 2003, Response at 6, to this date she has not provided me with a scintilla of evidence that she was treated in a hospital on the morning of the conference, and if she were, how long she was there, whether she was admitted as a patient, when she left the hospital, and why her unidentified malady prevented her from attending the conference in the afternoon. If she were treated at a hospital, there would be written records of the same, but she has not provided any written evidence to me. Also, she has not provided the name of the hospital or physician, or stated for what

malady she was treated. Therefore, I reject Complainant's claims that the September 25, 2003, conference was improperly convened.

Complainant also takes the position that I dismissed her Complaint during the September 25, 2003, conference. See id. at 6, 16. Yet, I did not dismiss her Complaint until I issued the Order Dismissing Complaint With Prejudice on October 16, 2003. During the conference, I stated that Complainant might be able to convince me to reconsider my decision to dismiss. PHC Tr. 19. In an Order issued on October 6, 2003, eleven days after the conference took place, I ordered Complainant to serve and file her answers to Respondent's 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. After Complainant disobeyed this Order, I then noted in dismissing her Complaint that if she had immediately filed her answers and indicated her intention to comply with my orders in the future, I probably would not have granted Respondent's motion. Order Dismissing Complaint With Prejudice, supra, at 17, *16. However, if it is truly Complainant's position that I did dismiss her Complaint on September 25, 2003, I note that any petition for appeal of my Order Dismissing Complaint With Prejudice would have had to have been filed in the Second Circuit on or before November 24, 2003, which is 60 days from September 25, rather than December 15, 2003, which is 60 days from October 16. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).

Finally, Complainant asserts that if Respondent believed that her Complaint lacked "reasonable foundation in law and fact," it had an obligation to file a dispositive motion that would swiftly end this case and stop the accrual of legal fees. Response at 10-11. However, Complainant fails to acknowledge that she may have impeded such efforts by refusing to respond to Respondent's discovery requests and by failing to comply with my Orders to do so. Therefore, I reject her argument that Respondent's failure to file a dispositive motion precludes a finding that her Complaint lacks "reasonable basis in law and fact."

In summary, Complainant has promulgated no facts in her Response suggesting that Respondent ever discriminated against her in any way. Moreover, in her Response Complainant has not refuted Mr. Salamy's statement that Complainant never applied for the position of full-time Spanish language teacher with Respondent, that she was and is uncertified to be a full-time teacher in New York State, and that Respondent never hired Mrs. Oliver-Alleyne or anyone else to fill the position. Thus, Complainant could not possibly establish a prima facie case of liability with respect to her failure to hire claim, because she never applied for a position for which she was qualified, and attendantly, she was never subject to any adverse employment decision, much less one occurring under circumstances giving rise to an inference of discrimination. See Byrnie, supra. Likewise, she cannot prove a prima facie case of liability for a discriminatory discharge from a job that Respondent never hired her to fill. See Graham, supra. Finally, even under the broad construction traditionally afforded to anti-retaliation provisions, it seems unlikely that Complainant's retaliation claim would be successful. See Raniola, supra, at 624; Cruz, supra, at 155, *8. Complainant was not an employee of Respondent when she filed her Charge with OSC and her Complaint with OCAHO, she never applied for the full-time position of teacher with Respondent, and she has

nowhere alleged that Respondent impeded her attempts to gain subsequent employment with another school because she filed a Charge and a Complaint. Thus, nothing in the record suggests that Respondent retaliated against Complainant during or after her period of temporary employment Respondent. **Accordingly, I find that Complainant has not provided the Court with any evidence establishing that her Complaint has a "reasonable basis in law or in fact."**

Nevertheless, I am not prepared to assess attorney's fees against Complainant on this basis. The undisputed facts in Mr. Salamy's affidavit demonstrate that Respondent has made a strong showing that the Complaint lacked "reasonable foundation in law and fact." In addition, Complainant's abusive motion and discovery practices suggest that she filed this action in bad faith. See Christiansburg, supra ("if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense") (emphasis in the original). However, in prior OCAHO cases, judges have not awarded fees against a complainant on the ground that a complaint lacked "reasonable foundation in law and fact" in cases where the complainant's case was dismissed before an adjudication on the merits, see, e.g., Palancz; Gallegos, supra, and the burden on Complainant to establish a prima facie case of liability is a "minimal" one. See Graham, supra. Although these prior decisions by other judges are not binding precedent and Respondent makes a strong case that Complainant's Complaint lacked any "reasonable foundation in law and fact," I have not made a prior ruling on this issue. Without such a ruling, I will not presume that Complainant would have been unable to establish a prima facie case of liability with respect to at least one of the claims in her Complaint, even though she has failed to do so in her Response. **Therefore, because there was no prior finding that Complainant's Complaint lacked "reasonable foundation in law and fact," I do not award attorney's fees on this basis.**

V. SECOND CIRCUIT CASE LAW ON ATTORNEY'S FEES IN ACTIONS NOT DECIDED ON THE MERITS

As stated previously, because 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. See 28 C.F.R. § 68.52 (2002). Relevant case law establishes that when a party commits misconduct during the discovery process, a court may impose sanctions on the party under its inherent power to manage its own affairs. Residential Funding Corporation v. DeGeorge Financial Corp., 306 F.3d 99, 106-107 (2d Cir. 2002). When acting pursuant to this inherent power, the court has broad discretion in fashioning the appropriate sanction. Reilly v. Natwest Markets Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999). A number of courts have determined that an award of attorney's fees is the proper sanction in cases where the plaintiff's action was dismissed as a result of the plaintiff's bad faith, vexatious litigation conduct, or refusal to obey the orders of the tribunal. See Sterling Promotional Corp. v. General Accident Insurance Company of New York, 212 F.R.D. 464, 470 (S.D.N.Y. 2003); Fonar Corporation v. Magnetic Resonance Plus, Inc., 935 F.Supp. 443, 448 (S.D.N.Y. 1996) (assessment of attorney's fees when the opposing party has acted in bad faith,

vexatiously, or for oppressive reasons); Alvarado v. Manhattan Worker Career Center, 2003 WL 194203 (S.D.N.Y.) (Title VII case).

In addition, the OCAHO rules of practice specifically state that the Federal Rules of Civil Procedure (FRCP) 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 (2002). In pertinent part, the FRCP provide that when a party disobeys an order to be sworn for his deposition or to answer a deposition question, "the court *shall* require the party failing to obey the order . . . to pay the reasonable expenses, including attorney's fees caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Residential Funding Corporation, supra, at 106 (quoting Fed. R. Civ. P. 37(b)). This rule places the burden on the disobedient party to avoid expenses by demonstrating that the failure to comply is justified or that special circumstances make an award of expenses unjust. Selletti v. Carey, 173 F.3d 104, 110 (2d Cir. 1999) (quoting Rule 37(b) advisory committee note (1970 amendment)). Likewise, the judge may assess these same sanctions against a party who fails to attend his own deposition or to serve answers to interrogatories. Fed. R. Civ. P. 37(d). The judge has broad discretion to order sanctions under Rule 37, and may consider (1) the wilfulness of the non-compliant party or the reason for the noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of non-compliance; and (4) whether the non-compliant party had been warned of the consequences of his non-compliance. Nieves v. City of New York, 208 F.R.D. 531, 535 (S.D.N.Y. 2002) (citing Bambu Sales, Inc. v. Ozak Trading, Inc., 58 F.3d 849 (2d Cir. 1995)). Non-compliance may be considered willful, as here, "when the court's orders have been clear, when the party has understood them, and when the party's non-compliance is not due to factors beyond the party's control." Id. at 536 (quoting Bambu Sales, Inc. at 852-853). Moreover, it is not necessary to file a formal application to obtain relief under Rule 37, and a court may treat a request for dismissal as its equivalent. Alvarado v. Manhattan Worker Career Center, 2002 WL 31760208 (S.D.N.Y.) at *6 (citing Gilpin v. Philip Morris International, Inc., 2002 WL 1461433 (S.D.N.Y.)).

Complainant's behavior in this case mirrors that of the plaintiffs in Sterling and Alvarado, who also refused to provide discovery or to obey the judges' orders. In Sterling, the plaintiff, who was the president and "probably the only possible witness" of Sterling Promotional Corporation "repeatedly and deliberately evaded any effective discovery sought by defendant Travelers" over a period of two years. Sterling, supra, at 465. Even after the Court issued an order compelling the plaintiff to attend his deposition, the plaintiff failed to comply. Id. Consequently, the Court then granted the defendant's motion to dismiss, noting that "parties and counsel have no absolute right to be warned that they disobey court orders at their peril." Id. at 469 (citing Reilly v. Natwest Markets Group, Inc., 181 F.3d 253 (2d Cir. 1999) (internal quotations omitted)). The Court further emphasized that the plaintiff's ongoing efforts to avoid his deposition had prejudiced the defendant's ability to defend against the claim. Id. Even though the case never reached an adjudicative hearing on the merits, the Court awarded attorney's fees to the defendant under its inherent

power and Rule 37 because the plaintiff "acted in bad faith and vexatiously with regard to not appearing at Court-ordered depositions." Id. at 470.

In Alvarado, the Court assessed attorney's fees against a Title VII plaintiff who failed to respond to the defendant's discovery requests and various orders of the Court requiring him to do so. Alvarado v. Manhattan Worker Career Center, 2003 WL 194203 (S.D.N.Y.) (Order Granting Attorney's Fees). Although this case was decided on summary judgment, it is analogous to a decision not on the merits for the following reasons. In a hearing on the defendant's Rule 37 application, the Court found that sanctions against the plaintiff were appropriate because he had failed to produce documents to the defendant, had failed to comply with two orders requiring him to do so, and thus had prevented the parties from abiding by the deposition schedule established in an earlier order. Alvarado v. Manhattan Worker Career Center, 2002 WL 31760208 (S.D.N.Y.) (Order Granting Summary Judgment) at *4-7. Yet, the Court declined to dismiss the plaintiff's action because he had not received clear notice that dismissal was a possible sanction for his misconduct, as required by relevant Second Circuit precedent. Id. at *7 (citing Nieves, supra, at 535). Instead, the Court ordered that the evidence sought by the defendant through its discovery requests be precluded and invited the defendant to file a motion for summary judgment, id., which it then granted. Id. at *15. In adjudicating the defendant's subsequent application for fees, the Court found that the plaintiff's failure to comply with the three Orders was willful and in bad faith. Alvarado v. Manhattan Worker Career Center, 2003 WL 194203 (S.D.N.Y.) at *1. The Court further noted that the plaintiff had engaged in "egregious conduct" and numerous "dilatory tactics [that] significantly prolonged and substantially increased the cost of this litigation." Id. Therefore, the Court granted the defendant's application for attorney's fees under its inherent power to manage its own affairs and under Rule 37. Id. at *1-2 (citing Residential Funding Corp., supra).

Complainant in this case also engaged in egregious conduct. See Order Dismissing Complaint With Prejudice, supra, at 11-17, *10-16. Complainant has "wilfully and deliberately" ignored my Orders to provide documents to Respondent, to answer Respondent's interrogatories, and to cooperate with Respondent in scheduling her deposition, as well as another Order not to contact my office by telephone except to discuss routine scheduling matters. Id. at 14, *14-15. At the same time, even though Respondent responded to most of her pleadings and invariably responded to her numerous discovery requests, Complainant failed to answer Respondent's own discovery requests, including Respondent's First Set of Interrogatories and Respondent's Demand for Production of Documents, which were served on Complainant on May 13, 2003, and has failed to cooperate with Respondent in scheduling her deposition. In summary, Complainant has behaved as "a lawless litigant who has abused the litigation process, including discovery, for the improper purpose of harassing Respondent," id. at 11, *10, and has "used discovery to vex and harass Respondent and its counsel." Id. at 13, *12. Under relevant Second Circuit case law, this willful misconduct alone would justify granting Respondent's Application. See Sterling; Alvarado (Order Granting Attorney's Fees); Nieves, supra.

Moreover, certain additional factors have further convinced me that I should grant the Application. First, I note that Complainant is not an unsophisticated litigant. She is a schoolteacher with a college education. Her father is an attorney in Utica, New York, and he has had some contacts with Respondent's attorneys. See Prehearing Conference Report, Aug. 12, 2003, at 2 (the Respondent was "amenable to having the [Complainant's] deposition in Utica at Complainant's father's law office"); Appendix of Supplemental Application (describing conversations and correspondence with W. Kalil, Esq., Complainant's father, regarding the scheduling of Complainant's deposition). Thus, although she acted pro se, Complainant received some counsel from her attorney father and should have been familiar with the American justice system. In other words, the misconduct in this case was not the result of innocent missteps by an unsophisticated pro se litigant; it was the result of Complainant's deliberate and protracted willful behavior. Also, during the lawsuit she learned, from an OSC Memorandum that she received in response to a FOIA request, that her Complaint may not have been filed in a timely manner. See Complainant's Notice to Take Deposition of Carol J. Mackela, Esq. Upon Oral Examination (August 7, 2003) at Exhibit F1 (letter from Complainant to OSC in which she refers several times to the OSC Memorandum). Moreover, Complainant should have been on notice from the onset of these proceedings as to the questionable merits of her case because Complainant never applied for the position and because Respondent never hired anyone to fill the full-time Spanish language teacher position on which she has based her entire Complaint. See Application at Exhibit A (Affidavit of James R. Salamy). These factors reenforce my conclusion in the Order Dismissing Complaint With Prejudice that she brought this case in bad faith for the sole purpose of vexing and harassing Respondent, and I further find that it would frustrate the interests of justice to require Respondent to bear the cost of defending

such a baseless action. **For these reasons, I exercise my inherent power to manage litigation and my discretion under Rule 37 to grant Respondent's Application for Attorney's Fees.**

VI. DETERMINATION OF FEES

In its Application and Supplemental Application, Respondent has listed the attorneys who worked for it on this case, the date on which their legal services were provided, the nature of their services, the amount of hours they billed, and the hourly rate they charged. In-house counsel Donald R. Gerace, Esq., represented Respondent in this matter for over a year, between February of 2002 (when Complainant filed her Charge Form for Unfair Immigration-Related Employment Practices with OSC) and March of 2003, but Respondent has elected not to seek attorney's fees for Mr. Gerace's services. Application at 19. Respondent seeks attorney's fees for legal services rendered by the law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. (Ferrara firm), which has represented Respondent in this matter from March of 2003 until the present. Id. The Ferrara firm charged Respondent **$136 per hour** for legal services rendered by Henry F. Sobota, Esq., and Donald E. Budmen, Esq., who are partners, and Miles G. Lawlor, Esq., who is an associate with over twelve years of employment discrimination-related experience. Id. In total, Respondent requests attorney's fees in the amount of **$54,454.40**, reflecting **400.40** billable hours.

Appendix of Supplemental Application.

Complainant contests the Application for Attorney's Fees on several grounds. First, Complainant avers that she is a school teacher with limited financial resources, although she does not ask me to mitigate any award of attorney's fees against her on the basis of inability to pay. See Response at iii. Nevertheless, the Second Circuit has stated that "fee awards are at bottom an equitable matter," and courts should consider the relative wealth of the parties in assessing the size of an award. Faraci v. Hickey-Freeman Company, Inc., 607 F.2d 1025, 1028 (2d Cir. 1979) (Title VII case); see also Toliver v. Sullivan, 957 F.2d 47, 49 (2d Cir. 1992). Along these lines, the court should ascertain whether in light of the plaintiff's ability to pay, a lesser sum would fulfill the deterrent purpose of the pertinent fee-shifting provision. Faraci at 1029.

The plaintiff's "degree of good faith in prosecuting the action" is a key part of this analysis. Id. Here, Complainant has provided no documentation supporting her claim that she has limited financial resources or that she would be unable to pay the attorney's fees. Moreover, her behavior in this case does not comport with such a claim. Of her fifty-one filings in this case, each of which had to be served on opposing counsel and this Court, Complainant paid extra money for expedited mail service (e.g., United States Postal Service (USPS) Express Mail, USPS Overnight Mail, and certified mail) thirty-five times. Neither my Orders nor the rules of practice required such expedited service. Further, such expedited service was unnecessary to meet a deadline because Complainant was aware that the OCAHO rules of practice permit the service of a pleading by facsimile to toll the running of a filing deadline, provided that the pleading is sent at the same time by ordinary mail to all parties entitled to service. See 28 C.F.R. § 68.6(c) (2002). Complainant also paid for the professional videotaping of the deposition of David F. Bruno, which she conducted on September 17, 2003. Complainant's Verified Submission of Deposition Video Tape (With Exhibits) of David F. Bruno; [New York State Freedom of Information Law Records Access officer; and Clerk of the Board of Education of the Utica City School District and Utica City School District Clerk] and Request of This Court to Take Official Judicial Notice of Same [sic], Sept. 24, 2003, at 1-2.

Even were Complainant able to show financial hardship, I still would be inclined to award the requested amount of attorney's fees because she litigated this case in bad faith. See Faraci, supra, at 1028. Even if a litigant were destitute, he or she must be held fully accountable for behaving as a lawless litigant who runs up the opposing party's legal bills by abusing the discovery process, by refusing to obey the orders of the tribunal, and by filing unnecessary motions. Because Complainant behaved in this manner and has not proven financial hardship, I decline to mitigate the award of attorney's fees against her because of her alleged financial status.

Complainant also alleges that the Ferrara firm double-billed for its services in this case because it also represents the Oneida-Herkimer Board of Cooperative Educational Services (BOCES). See

Response at 16. Yet, Complainant has not established any nexus between Respondent and the BOCES, and has not shown that the Ferrara firm billed the BOCES for the services performed in the lawsuit. Complainant has adduced no proof that the BOCES, which is not a party to this suit, has incurred any legal fees as a result of her filing of a Charge with OSC or a Complaint with OCAHO. Accordingly, I reject Complainant's argument that the Ferrara firm double-billed for its services in this matter.

Complainant also contests the reasonableness of specific fee requests of Respondent. First, Complainant argues that it was unreasonable for Respondent's counsel to bill for telephone conferences with my law clerk, because such conversations constituted ex parte communications in violation of my Orders prohibiting such communications. Id. In my past Orders, I stated that ex parte communications by telephone with my office were prohibited, except for the purpose of scheduling conferences or hearings. See Order Regarding Ex Parte Communications, Nov. 8, 2002 (emphasis in the original); Order Regarding Ex Parte Communications, Oct. 6, 2003 (emphasis added). On September 15, 2003, and September 23, 2003, my law clerk initiated contact with Mr. Lawlor by telephone to schedule a telephone prehearing conference for September 25, 2003, at 1:00 p.m, Eastern Standard Time. No substantive matters were discussed during these calls. In fact, my law clerk had similar telephone conversations with Complainant on those same dates for the sole purpose of scheduling the conference, but she nonetheless failed to appear when the conference took place. Thus, since no improper ex parte communications occurred during the conversations between my law clerk and Mr. Lawlor, I reject Complainant's argument that it was unreasonable for Respondent's counsel to bill for the time spent on these telephone calls.

Next, Complainant contends that her Complaint was dismissed during the telephonic conference of September 25, 2003, and therefore, any billable hours incurred after that date are unreasonable. Response at 16. Yet, as discussed above in the section of this Order entitled "Analysis of the Merits of Complainant's Complaint," this assertion is patently wrong. Her Complaint was not dismissed until I issued the Order Dismissing Complaint With Prejudice on

October 16, 2003. Accordingly, I reject her assertion that any time billed by Respondent's counsel after September 25, 2003, is unreasonable.

In contrast, Complainant's objection to fees related to defense of a possible appeal by Complainant to the Second Circuit is well taken. See Response at 16. Fees incurred as to a possible appeal have no relation to the basis for dismissal of this administrative action. Moreover, I do not have jurisdiction over appellate matters, and any application for fees incurred in defending an appeal must be directly presented to the court of appeals.

Respondent has included time spent on appellate matters as follows: (a) on September 25, 2003, Mr. Lawlor researched the appeal process; (b) on September 26, 2003, Mr. Budmen held a telephone conference with Mr. Salamy regarding appeal rights; (c) on September 26, 2003, Mr. Lawlor researched

a possible Second Circuit appeal; and (d) on September 29, 2003, Mr. Lawlor researched appeal standards. Appendix of Supplemental Application. Each of these items appears in a separate paragraph in the Appendix alongside other billing items that would have been reasonable standing alone. See id. In these paragraphs, Respondent has not designated exactly how much time was expended on appellate matters, but has instead requested a total of eleven hours in attorney's fees for the entire set of activities. Id. Since the prevailing party bears the burden of showing that the requested attorneys fees are reasonable, Toussaint, supra, at 809, *18; Pino v. Locascio, 101 F.3d 235, 237 (2d Cir. 1996), I am not at liberty to estimate how much time was devoted to the appeal process, as opposed to reasonable billing matters. Therefore, I find that the entire eleven hours ($1,496.00) requested in the four sections of the Appendix including appeal-related matters should be rejected. Thus, after deducting the $1,496.00 from the $54,454.40 sought by Respondent, the amount remaining is $52,958.40.

Except for the above-mentioned items, Complainant has nowhere in her Response disputed the nature of the services rendered by the Ferrara firm, the number of hours submitted by Respondent, or the hourly fee. After reviewing the remaining entries in Respondent's itemized statement of fees, I find that the nature of the services rendered and the time expended is reasonable. I further note that a reasonable fee should be awarded for the preparation and defense of an application for fees. Weyant v. Okst, 198 F.3d 311, 316 (2d Cir. 1999); Bonner v. Guccione, 2000 WL 12152 (S.D.N.Y.) (Title VII case). A culpable party should not be permitted to cause the erosion of fees awarded to the prevailing party for time spent in obtaining the favorable judgment by requiring additional, uncompensated time to be spent afterwards. Weyant at 316. Accordingly, Respondent is entitled to compensation in the amount of $6,813.60, reflecting 50.10 hours spent in preparing its Application and Supplemental Application at the hourly rate of $136.

Complainant also has not contested the reasonableness of the hourly rate. The current prevailing hourly rates generally applied in the region in which the parties are located are "$175.00 for civil rights attorneys with significant experience and numerous years of practice, $125 for associates with four or more years of experience, $100 for newly admitted attorneys, and $65 for paralegals." Gatti v. Community Action Agency of Green County, Inc., 263 F.Supp.2d 496, 515 (N.D.N.Y. 2003) (age discrimination case). In this case, the Ferrara firm charged $136 per hour for the services of Mr. Sobota and Mr. Budmen, who are partners, and Mr. Lawlor, an associate who has been practicing employment discrimination law for more than twelve years. Application at 19. Considering that two of these attorneys are partners and the other one has twelve years of experience in the field of employment discrimination, I find that an hourly rate of $136 is reasonable. I further note that while the Sterling and Alvarado cases arose in the Southern District of New York, the judges' approval of an hourly rate of $200, Sterling, supra, at 469-470, and $255, Alvarado, supra, 2003 WL 194203 at *2, in those cases underscores the reasonableness of the $136 rate currently sought.

For these reasons, I order Complainant to pay $52,958.40 in attorney's fees, reflecting

389.40 hours of legal services rendered by attorneys of the Ferrara firm in defense of this action at the hourly rate of $136. While this is a large fee to impose on a pro se litigant, it is not unprecedented. See, e.g., Wije v. Barton Springs/Edwards Aquifer Conservation District, 5 OCAHO 499, 531; 1995 WL 626204 at *25-26 (awarding attorney's fees against a pro se complainant in the amount of $51,530.34). More importantly, this fee is justified in light of Complainant's bad faith, willful and deliberate abuse of the discovery process, and refusal to obey my Orders. It would subvert the interests of justice to require Respondent substantially to bear the cost of defending against a suit that was brought for the sole purpose of harassment.

VII. CONCLUSION

Pursuant to Rule 37 of the FRCP and my inherent powers under the Administrative Procedures Act and the OCAHO rules of practice, I order Complainant to pay Respondent $52,958.40 in attorney's fees.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This Order constitutes a 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).