

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

JACOB ROGINSKY,	)
Complainant,	)
	)
UNITED STATES	)
DEPARTMENT OF JUSTICE	)
OFFICE OF SPECIAL COUNSEL	)
FOR IMMIGRATION RELATED	)
UNFAIR EMPLOYMENT	)
PRACTICES	)
Intervenor,	)
	)
v.	) 8 U.S.C. §1324b Proceeding
	) Case No. 90200168
DEPARTMENT OF DEFENSE,	)
Respondent.	)
_____	)

ORDER ON TIMELINESS  
(June 25, 1991)

The Immigration Reform and Control Act (IRCA) of 1986, as amended, 8 U.S.C. §1324b requires that a complaint alleging an unfair immigration-related employment practice be filed with the Office of Special Counsel (OSC) within 180 days of the alleged discriminatory event. 8 U.S.C. §1324b(d)(3). Respondent, Department of Defense (DoD), asserts that three of Complainant Jacob Roginsky's charges must be dismissed as having occurred more than 180 days prior to the filing of the charges.\* The parties and bench agreed to conduct an evidentiary hearing on this limited issue of timeliness. See Third Prehearing Conference Report and Order, May 6, 1991.

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\* This order confirms that on June 17, 1991, no party objecting, I granted Complainant's motion to voluntarily dismiss with prejudice Respondent Center for Naval Analyses (CNA).

The limited evidentiary hearing conducted on June 17 and 25, 1991 consisted of the testimony of Complainant and of Allan S. Danoff. Mr. Danoff testified as to the complaint procedures of the Equal Employment Opportunity Commission (EEOC) and of the Equal Employment Opportunity (EEO) offices within the various federal agencies. Fifty documentary and audio-tape exhibits were offered into evidence by Complainant and OSC; forty-nine were admitted.

At the close of the evidentiary hearing, I entertained oral arguments by counsel for Complainant, Respondent, and OSC. This order confirms my bench ruling that based on the documentary evidence and oral testimony to date, I will not dismiss the charges against the DoD Naval Research Laboratory (NRL), Naval Ocean Research and Development Activity, now the Naval Oceanographic and Atmospheric Research Laboratory (NORDA/NOARL), or any of the other contractors or components of DoD named in the Complaint. I hold that if the DoD policy at issue is found upon the hearing on the merits to be a discriminatory policy on the basis of which Complainant was denied employment, it demonstrates a continuing violation of citizenship-based discrimination. See, e.g., U.S. v. Mesa Airlines, OCAHO Case Nos. 88200001-2 at 30-34 (July 24, 1989), appeal docketed, No. 89-9552 (10th Cir. Sept. 25, 1989).

I also found controlling the Interim Agreement, 53 Fed. Reg. 15904 (May 4, 1988), between OSC and EEOC in effect at the time Complainant made his filings with the NRL EEO office in April and November, 1988 and with the NORDA/NOARL office in January, 1989. I am satisfied that Complainant's EEO filings are charges within the contemplation and scope of the Interim Agreement. Although the agreement does not in terms refer to complaints filed with the EEO offices of federal agencies, filings such as those by Complainant whether denominated complaints or charges are reasonably embraced by the Agreement. To hold otherwise would vitiate its stated purpose, i.e., to preserve the timeliness of a complainant's charge if filed in the wrong forum. A timely filing with the federal agency EEO office is a timely filing with OSC. The charges against NRL and NORDA/NOARL appear to have been timely filed with the DoD EEO offices, and therefore, by application of that Agreement, are deemed timely filed with OSC.

Although both Complainant and OSC are more disposed than I am to assume a basis for equitable tolling on the record compiled to date, I am not prepared to foreclose that claim without further analysis of the record, the transcript of which has not yet been received.

In summary, for the purpose of trial preparation I find for Complainant on DoD's affirmative defense as to the timeliness of Complainant's charges. Although certain of the charges brought against Respondent allege discriminatory acts occurring outside the 180 day statutory period, they are nevertheless deemed to be timely.

As announced at the hearing, Respondent's motion for an enlargement of time to June 26, 1991 in which to respond to the June 10, 1991 Order is granted, and Complainant's time to respond to DoD's filing is extended to July 16, 1991.

A prehearing conference is scheduled for July 25, 1991 at 9:30 a.m. in the Hearing Room of the Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041. The conference will focus on the identification of witnesses, possible documentary stipulations, and other prehearing matters. The hearing is scheduled to begin on August 13, 1991 at 12:30 p.m. at the same location.

**SO ORDERED.**

Dated this 25th day of June, 1991.

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MARVIN H. MORSE  
Administrative Law Judge