

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

United States of America, Complainant vs. G.L.C. Restaurant, Inc.
d/b/a Capriccio Restaurant, Respondent; 8 U.S.C. § 1324a Proceeding; Case
No. 89100063

ORDER TO SHOW CAUSE WHY RESPONDENT'S REQUEST FOR ATTORNEY FEES UNDER
EQUAL ACCESS TO JUSTICE ACT SHOULD NOT BE DISMISSED FOR LACK OF
JURISDICTION

1. By order dated and mailed to the parties on Thursday, March 15, 1990, I dismissed with prejudice the instant complaint, which alleged unlawful employment under Section 274A of the Immigration and Naturalization Act, 8 U.S.C. § 1324a(a)(1)(2). Respondent's request for attorney fees shows that respondent received this order no later than March 18, 1990; see the next to last entry on page 5 of Exhibit A attached to that request.

2. 8 U.S.C. § 1324a(e)(7) provides:

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

3. The Administrative Procedure act provides, in part (5 U.S.C. § 557(b)):

. . . When the presiding employees makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule.

4. Section 68.51 of the Rules and Regulations, 54 F.R. 48607, provides, in part:

(a) Review of the final order and decision of an Administrative Law Judge in unlawful employment . . . cases arising under § 274A of the INA. Any party may file with the Chief Administrative Hearing Officer, an official having no review authority over other immigration-related matters, within five (5) days of the date

of decision, a written request for review of the decision together with supporting arguments. . .

(1) . . . If no review is requested under § 68.51(a), the order of the Administrative Law Judge becomes the final order of the Attorney General.¹

5. No written request for review of my order of March 15, 1990, has been filed.

6. Respondent has filed a request for attorney fees under the Equal Access to Justice Act, 5 U.S.C. § 504. This request was date-stamped by my office on May 14, 1990. This request was not sent to me by mail, but, rather, was sent to me by Federal Express. An attached certificate of service states that a copy of the request has been ``sent'' to complainant's counsel ``on this day, May 12, 1990''; the request is otherwise undated.

7. Section 68.7 of the Rules and Regulations, 54 FR 48598, provides, in part:

Time Computations.

(a) Generally: In computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is Saturday, Sunday, or legal holiday observed by the Federal Government in which case the time period includes the next business day. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) Computation of time for filing by mail. Pleadings are not deemed filed until received by the Office of the Chief Administrative Hearing Officer or Administrative Law Judge assigned to the case.

(c) Computation of time for service by mail.

(1) Service of all pleadings other than complaints is deemed effective at the time of mailing.

(2) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice, or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

¹ This last sentence was added to the rules effective on November 24, 1989. No such sentence was included in 28 CFR 68.52, the previously effective rule with respect to administrative review. That previously effective rule provided, in part:

(a) . . . Any party may file with the Chief Administrative Hearing Officer within five (5) days of the date of the [Administrative Law Judge's] decision a written request for review of any issue of law together with supporting arguments. Within thirty (30) days from date of decision, the Chief Administrative Hearing Officer may issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.

(1) If the Chief Administrative Hearing Officer issues no order, the Administrative Law Judge's order becomes the final order of the Attorney General. If the Chief Administrative Hearing Officer modifies or vacates the order, the order of the Chief Administrative Hearing Officer becomes the final order.

8. 5 U.S.C. § 504(a)(2) states, in part (emphasis supplied):

A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought . . .

9. Compliance with this 30-day period has been held to be a jurisdictional prerequisite to the awarding of an attorney fee. J.M.T. Machine Co., Inc. v. U.S., 826 F.2d 1042, 1047 (Fed. Cir. 1987), and cases cited; Long Island Radio Co. v. N.L.R.B., 841 F.2d 474, 477-479 (2nd Cir. 1988), and cases cited.

Wherefore, the parties are hereby ordered to show cause, on or before 21 days from the date of this order, why respondent's request for attorney fees should not be dismissed on the ground that it was untimely submitted and, therefore, I have no jurisdiction to entertain it.² Failure to reply will be deemed to constitute consent.³

Dated: August 10, 1990.

NANCY M. SHERMAN
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²It is tentatively suggested that in the instant case, the issue may boil down to whether my dismissal order of March 15, 1990, became a ``final disposition`` within the meaning of 5 U.S.C. § 504(a)(2), upon the expiration of the time within which a written request for review could have been filed under the Rules and Regulations. Even if the quoted portions of Section 68.7 are all read most favorably to respondent, the time within which such a request could have been filed expired about April 1, 1990-that is, more than 30 days before May 12, 1990, the earliest date on which respondent even arguably ``submit [ted]`` its application for attorney fees.

³ Disposition of complainant's motion to strike respondent's request to amend application for attorney's fees, which motion is dated July 30, 1990, will await my action in connection with this order to show cause.