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 DISMISSING FOR LACK OF JURISDICTION RESPONDENT'S REQUEST FOR ATTORNEY'S FEES AND OTHER EXPENSES UNDER EQUAL ACCESS TO JUSTICE ACT, AND DENYING AS MOOT, WITHOUT PREJUDICE, COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S REQUEST TO AMEND SUCH REQUEST

Statement

1. The complaint herein, dated February 9, 1989, alleged unlawful employment and paperwork violations by respondent of 8 U.S.C. § 1324a(a)(1) and (2), which constitute portions of the Immigration and Nationality Act (``the INA''), and requested civil penalties totalling $1,500. By order dated May 16, 1989, I accepted for filing an answer by respondent which denied material portions of the complaint.

2. Over date of January 23, 1990, complainant filed a motion to dismiss the complaint and cancel the hearing date. Over date of February 17, 1990, respondent filed a motion to dismiss the complaint with prejudice, and agreed that the hearing date should be cancelled. On February 23, 1990, I issued an order to complainant to show cause why respondent's motion to dismiss with prejudice and cancel hearing date should not be granted. Failure to reply was to be deemed to constitute consent. No reply having been received, by order dated March 15, 1990, I dismissed the complaint with prejudice, and cancelled the hearing date.

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

4. On May 14, 1990, my office received from respondent, by Federal Express, a request for attorney's fees and other expenses in the amount of $9,124.90 (see rhetorical paragraph 5, infra) under

the Equal Access to Justice Act, 5 U.S.C. § 504(a). An attached certificate of service states that a copy of this request had been ``sent'' to complainant's counsel ``on this day, May 12, 1990;'' the request is otherwise undated.

5. On June 19, 1990, I received a fax copy of complainant's motion, dated June 18, 1990, to deny respondent's EAJA claim.[1] This opposition made no claim that the EAJA request had been submitted late.[2] Over date of July 16, 1990, respondent filed a response to complainant's June 18 motion, which response failed to address any timeliness issue. However, the July 16 response did seek to adjust upward the request for attorney's fees and other expenses from $9,124.90 to $12,087.00 to reflect an increase in the attorney's hourly rate from $75.00 to $100.00. Over date of July 30, 1990, complainant filed a motion to strike respondent's request for this upward adjustment or, in the alternative, for an extension of time to reply thereto. In this document, complainant failed to raise any timeliness issue.

6. Over date of August 10, 1990, I issued an order to the parties to show cause why respondent's request for attorney's fees should not be dismissed on the ground that it was untimely submitted and, therefore, I have no jurisdiction to entertain it.

7. Responses were filed by complainant over date of August 28, 1990, and by respondent over date of September 8, 1990. While not disputing that the timeliness of the request for attorney's fees and other expenses presented a jurisdictional issue, respondent's response contended that the request was in fact timely and, on the basis of activities in connection with that response and calculating attorney's fees at $100 an hour (cf. rhetorical paragraph 5, supra), increased the request for fees and other expenses to $14,120.00. Complainant's response stated that complainant had ``researched and is unable to find legal authority contrary to this Honorable Court's position wanting to dismiss respondent's application for attorney's fees under the EAJA and therefore does not oppose dismissal on this basis.'' Complainant's counsel further stated that he had not raised the timeliness issue because of the Administrative Law Judge's decision in U.S. v. Mester Manufacturing Co., OCAHO Case No. 87100001 (January 25, 1989), pp. 5-7, vacated on other grounds by CAHO (February 23, 1989), affd. 879 F.2d 561 (9th Cir. 1989).

[1]By order dated May 18, 1990, I had granted complainant's motion for an extension of time until June 18, 1990, to submit a written response to respondent's EAJA claim.

[2]Nor was any such claim made in complainant's revised version, dated June 21, 1990, of complainant's June 18 memorandum of law.

II. Analysis and Conclusions

The Equal Access to Justice Act, 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.

The overwhelming weight of authority holds that compliance with this 30-day period is a jurisdictional prerequisite to the awarding of fees and other expenses under the EAJA. 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; Howitt v. U.S. Department of Commerce, 897 F.2d 583, 584 (1st Cir. 1990), and cases cited; Lord Jim's v. N.L.R.B., 772 F.2d 1446 (9th Cir. 1985), and case cited; see also, U.S. v. J.H.T., Inc., 872 F.2d 373 (11th Cir. 1989). In accordance with such authority, I conclude that the timeliness issue is jurisdictional and, therefore, must be considered by me notwithstanding complainant's at least arguable belatedness in raising it.

28 CFR § 68.51 provides, in part (emphasis supplied):

> (a) Review of the final order and decision of an Administrative Law Judge in unlawful employment . . . cases arising under Section 274 of the INA. Any party may file with the Chief Administrative Hearing Officer, an official having no review authority over immigration-related matters, within five (5) days of the date of the decision, a written request for review of the decision together with supporting arguments. After such a request is made, and within thirty (30) days from the date of decision, the Chief Administrative Hearing Officer shall issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.
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> (1) The order of the Chief Administrative Hearing Officer shall become the final order of the Attorney General. If no review is requested under § 68.51(a), the order of the Administrative Law Judge becomes the final order of the Attorney General.

If the foregoing rules are given full play, respondent's application for attorney's fees_``submitted'' no earlier than May 12, 1990_was unquestionably filed beyond the period allowed by the EAJA. Under Section 68.51(a)(1) of the Rules, the date of the ``final disposition'' of this case was no later than March 29 (that is, a total of 10 weekdays following my dismissal order of March 15, 1990; see 28 CFR § 68.7). J.M.T. Machine, supra, 826 F.2d at 1048; Columbia Manufacturing Corp. v. N.L.R.B., 715 F.2d 1409 (9th Cir. 1983), affirming 265 NLRB 109 (1982); see also, J.H.T., supra, 872 F.2d 374. Indeed, Columbia Manufacturing indicates that the date of the ``final disposition'' may have been the date of my March 15, 1990, order of dismissal. This result is perhaps suggested by the Administrative Procedure Act, of which the relevant provision of the EAJA

are a constituent part. The APA provides (5 U.S.C. § 557(b), emphasis supplied):

> . . . When the presiding employee makes an initial decision, the decision then becomes the decision of the agency unless there was an appeal to, or review on motion of, the agency within time permitted by rule.

Respondent admits that under 28 CFR § 68.51(a)(1), ``the agency decision becomes final if the parties do not petition the Attorney General within five days.'' However, respondent seemingly contends that this does not require me to read the agency rules as stating that if no petition is filed within 5 days as calculated under 28 CFR § 68.7, ``the decision becomes final''_which respondent implicitly equates to the EAJA language ``a final disposition''_no later than the expiration of the 5-day period as so calculated. Even standing along, respondent's construction is somewhat strained. Moreover, this construction, even if accepted, leaves unanswered the question of how to determine the date of the ``final disposition.''

Respondent seems to be contending that what would appear to be the natural reading of 28 CFR § 68.51(a)(1) in light of existing precedent_that is, that the date of the ``final disposition'' for EAJA purposes was, at the latest, the last date on which a petition could have been filed_is unacceptable because inconsistent with the INA. More specifically, respondent appears to contend that ⌊8 U.S.C. § 1324a(e)(7) fixes the date of the ``final disposition'' as 30 days after the issuance of the Administrative Law Judge's decision and order; and that to the extent the agency rules purport to change this result by requiring (and, perhaps, permitting) review by the Attorney General only on the filing of a timely petition, such rules conflict with the statute itself. However, in contending that the rule is plainly inconsistent with the purpose of the INA, respondent has shouldered a difficult burden. State of Florida v. Mathews, 526 F.2d 319, 323-324 (5th Cir. 1976); U.S. v. St. Bernard Parish, 756 F.2d 1116, 1124 (5th Cir. 1985). This burden has not been met by respondent. Thus, respondent cannot and does not claim that the Attorney General acted inconsistently with the statute by attempting to improve administrative efficiency, his stated reason for making the relevant changes in the provisions for administrative review. 54 F.R. 48596 (November 24, 1989). Neither does respondent question the Attorney General's statement (ibid.) that the INA ``clearly does not provide for mandatory administrative review'' in unlawful employment cases. Nor does respondent claim that relevant revisions improperly limit respondent's rights

to defend itself against any allegation of INA violations.[3] Accordingly, respondent's claim that the revision as so interpreted is plainly inconsistent with the INA boils down to the claim that the Attorney General acted in derogation of the INA by adopting a rule which at least ordinarily will render unnecessary a review by him of a decision by an Administrative Law Judge about which none of the parties complained to him. Any such claim is rejected. Indeed, 8 U.S.C. § 1324a(e)(7) itself seeks to forward administrative efficiency by providing (emphasis supplied) that the Administrative Law Judge's decision and order ``shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates'' the Judge's decision and order.

Even standing alone, the foregoing statutory provisions undercut respondent's position that 28 CFR § 68.51 should be read to provide ``a date certain (30 days after the ALJ's decision) by which time requests for submitting EAJA requests may be measured. Thus an EAJA request is timely if received within 30 days after the 30 day period within which the Attorney General may act, i.e., within 60 days of the ALJ's decision'' (see the last page of counsel's September 8, 1990, ``Response to OSC''). The reading thus urged by counsel leads to an unreasonable result in that the EAJA limitations period would remain at 60 days after the Administrative Law Judge's decision even if that decision were adopted, affirmed, vacated, or modified by the Attorney General as early as a week after its issuance (cf. infra fn. 5). Further, the EAJA does not contemplate the predictability advocated by counsel; rather, the 30-day EAJA limit is applicable to final dispositions by agencies even where their enabling statutes, unlike the INA, contain no time limits on the agency's powers with respect to timely appealed decisions of Administrative Law Judges and under which, therefore, the parties have no way of anticipating the date when the final disposition will be made. Cf. Lord Jim's supra, 772 F.2d at 1448-1449; Monark Boat Co. v. N.L.R.B., 708, F.2d 1322 (8th Cir. 1983) (both involving agency decisions issued pursuant to 29 U.S.C. § 160(c)).

As respondent correctly points out, Mester, supra, is of little use in deciding the instant case. When Mester was decided, the rules with respect to administrative review did not contain the language, or its substantial equivalent, which is contained in the existing

[3]Cf. Mester Manufacturing, supra, 879 F.2d at 566 fn. 6, citing Reid v. Engen, 756 F.2d 1457, 1460 (9th Cir. 1985). Respondent can hardly claim any prejudice from the Attorney General's failure to review the instant order of dismissal, because that order was issued pursuant to a motion by respondent itself.

rules: ``If no review is requested under § 68.51(c) [which permits such requests within 5 days of the date of the Administrative Law Judge's decision], the order of the Administrative Law Judge becomes the final order of the Attorney General.''[4] As the Administrative Law Judge pointed out in Mester, under the then-existing rules, where the Attorney General failed to modify or vacate the Judge's decision the parties could not know, until after the expiration of the 30-day period within which he was empowered to take such action, whether the Judge's decision had fixed the outcome of the litigation.[5] Cf. Columbia Manufacturing, supra.

For the foregoing reasons, I conclude that I have no jurisdiction to entertain respondent's EAJA request because that request was submitted more than 30 days after the final disposition in this case. I need not and do not consider whether the date of that final disposition was (a) the latest date on which a written request for review could have been filed of my order dismissing the complaint with prejudice, or (b) the date of that order. Nor need I consider whether respondent's request was ``submit[ted], ``within the meaning of the EAJA, on May 12, 1990, when respondent presumably gave the document in question to Federal Express (not the United States Postal Service), or on May 14, 1990, when my office received it.[6] Respond-

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[4]The then 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.

[5]The Judge in Mester, did state that the date of any modification or vacation by the Attorney General would ``presumably'' trigger the running of the 30-day period within which an EAJA application could be filed. In short, even the rules in effect when Mester was decided would ``presumably'' fall short of effectuating respondent's proposed predictability as to the due date for an EAJA application.

[6]Cf. Lord Jim's, supra, 772 F. 2d at 1449; Sonicraft, Inc. v. N.L.R.B., 814 F.2d 385, 386-387 (7th Cir. 1987); Columbia Manufacturing, supra, 715 F.2d at 1410. Section 68.7 of the Rules provides, in part (emphasis supplied):

(b) Computation of time for filing by mail. Pleadings are not deemed filed until received by the . . . 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. . . .

Section 68.2(m) defines ``Pleadings'' to include ``motions.''

ent's EAJA request was late even if all such issues are resolved most favorably to respondent.

My jurisdiction to entertain respondent's EAJA request cannot, of course, be affected by the equities of respondent's procedural posture. However, it might be appropriate to note that although respondent's counsel takes the position that his EAJA request would have been timely if filed early (see page 5 of respondent's September 8, 1990, ``Response to OSC''), he did not file that request until more than 3 months after complainant's January 23, 1990, motion to dismiss had advised him that almost certainly I would dismiss the complaint and complainant would not seek review of such dismissal.

In view of my action in dismissing for lack of jurisdiction respondent's EAJA request, complainant's motion to strike respondent's June 19, 1990, request to amend its EAJA request or for an extension of time to reply thereto is denied as moot and without prejudice.

Pursuant to 8 U.S.C. § 1324a(e)(7) and as provided in 28 CFR § 68.51, this shall become the final order of the Attorney General unless within 30 days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

Dated: November 20, 1990.

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