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

IN RE CHARGE OF	)	
ALEJANDRO ROMERO	)	
	)	
UNITED STATES OF AMERICA	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 94B00198
WORKRITE UNIFORM	)	Case No. 94B00206
COMPANY, INC.,	)	
Respondent.[1]	)	
	)	

FINAL DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS
(March 2, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: David J. Palmer, Esq., for Complainant
Mary E. Schroeder, Esq., for Respondent

I. *Procedural History*

On April 11, 1994, Alejandro Romero (Romero) filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment

[1] The caption is corrected to reflect (1) Respondent's name as stated in its Answers to the Complaints, and (2) the Office of Special Counsel's Motion to Amend its Complaint to include Romero's allegations, thereby effectively consolidating the two Complaints. See infra.

Practices (OSC). The charge alleged that Workrite Uniform Company, Inc. (Workrite or Respondent) engaged in unfair immigration-related employment practices prohibited by § 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

On or about March 28, 1994, Romero applied for employment with Workrite. Romero, a resident alien of Mexican origin, alleges that, during the employment application process, he was asked to produce specific INS-issued work authorization; applicants who were United States citizens were not asked to present specific documents in order to establish employment eligibility under 8 U.S.C. § 1324a. Title 8 U.S.C. § 1324b(a)(6) prohibits an employer from requesting specific documents in order to satisfy the requirements of § 1324a. An employer is likewise prohibited from refusing to honor tendered documents which on their face reasonably appear to be genuine. Upon presenting his Alien Registration Card, Romero alleges that he was required to take a "sewing test" and, before even beginning to sew, was told that he had failed the exam and was denied employment with Respondent.

On August 19, 1994, OSC addressed a letter to Romero, stating that it had "not made a determination as to your allegations of unfair immigration-related employment practices against Workrite" but that OSC would continue its investigation of his charge. Romero was informed that, because the 120-day investigatory period specified in 8 U.S.C. § 1324b(d)(2) had ended and OSC had not yet filed a complaint on his behalf, he could file his own complaint before an administrative law judge (ALJ) within 90 days of receiving OSC's letter.

On November 21, 1994, OSC filed a Complaint on behalf of Romero in the Office of the Chief Administrative Hearing Officer (OCAHO). Count I of the Complaint alleges that "Workrite's demand that Mr. Romero present an INS-issued work authorization to prove his employment eligibility, violated 8 U.S.C. § 1324b(a)(6) and constitutes an unfair immigration-related employment practice against Mr. Romero." Complaint at 3. Count II of the Complaint alleges that "Workrite's requirement that all aliens present INS-issued work authorization documents to prove their employment eligibility constitutes a pattern or practice of discrimination in violation of 8 U.S.C. § 1324b(a)(6)." Id. at 4.

On November 28, 1994, Romero filed his own Complaint against Workrite, alleging that Workrite discriminated and retaliated against him based on his citizenship status and national origin.

On December 6, 1994, OCAHO issued its Notice of Hearing (NOH) for each Complaint which transmitted copies of the Complaints to Respondent.

On January 20, 1995, a notice of appearance was filed in response to both Complaints by England, Whitfield, Schroeder & Tredway, as counsel for Respondent.

On January 20, 1995, Respondent filed Answers to each of the Complaints, denying the allegations. Respondent asserts the following affirmative defenses to Romero's Complaint: (1) Romero is barred by the limitations period of 28 C.F.R. § 68.4(c);[2] (2) Complainant fails to state a cause of action against Respondent; (3) "the sole and proximate cause of Complainant's damages, if any, and Respondent's failure to hire Complainant was Complainant's lack of experience with and ability to competently operate an industrial sewing machine as required for the position." Answer to Romero's Complaint at 6; (4) Respondent has complied with all requirements set forth in IRCA; and (5) Complainant has violated 28 C.F.R. § 68.7 which requires that "all documents presented by a party in a proceeding must be in the English language, or if in a foreign language, accompanied by a certified translation."[3]

Respondent asserts the following affirmative defenses to OSC's Complaint: (1) OSC is barred from filing the Complaint by the limitations period of 28 C.F.R. § 68.4(c); (2) Respondent's failure to hire Romero was due to his lack of experience with and ability to competently operate a sewing machine; (3) Respondent has acted in full compliance of IRCA; and (4) OSC is barred from prosecuting this claim because it failed to give Romero notice of its decision or lack of decision

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[2] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68]. Respondent cites to the limitations period set forth in the Code of Federal Rules which is identical to the limitations period in 8 U.S.C. § 1324b(d)(2). My analysis of the limitations period will, however, use the statutory citation.

[3] Respondent refers to the OSC charge form and a letter written by OSC to Romero, both of which are written in Spanish. While Respondent is correct that 28 C.F.R. § 68.7(e) requires that all documents presented by a party in a proceeding be in English, it is not correct that Romero violated § 68.7(e). The OSC charge form is a necessary attachment to the Complaint which is in English. The OSC letter attached is also a necessary requirement and is accompanied by an English translation.

to file a complaint within the 120-day period as provided in 28 C.F.R. § 68.4.

On January 20, 1995, Respondent filed a Motion to Dismiss in each of the cases. On February 2, 1995, OSC filed a response to the Motion pertaining to its case which included a plea that Romero's Complaint be treated as an attempt to amend OSC's Complaint rather than as a separate complaint. In addition, OSC filed a Motion to Correct the Caption of its case to reflect Workrite's correct name[4] and Romero's inclusion as a party to OSC's Complaint.

II. *Discussion*

A. Romero's Complaint is Untimely

Upon receiving a charge alleging § 1324b discrimination, OSC is required to inform the charging party of its determination to file -- or not to file -- a complaint on his or her behalf within 120 days. 8 U.S.C. § 1324b(d)(2). A private cause of action may be maintained under 8 U.S.C. § 1324b provided it is filed "within 90 days after the date of receipt of the notice [from OSC that the 120-day investigatory period has expired]." Id. The parties disagree as to the date Romero received the 90-day notice. OSC states it was August 22, 1994; Respondent states it was August 19, 1994. Resolving the Motion to Dismiss in a light most favorable to the non-moving party,[5] I accept the later date for purposes of this Final Decision and Order. The deadline for filing his Complaint would therefore have been November 21, 1994. Romero filed his Complaint on November 28, 1994, one week after the 90-day limitations period expired. There is no suggestion of a claim of equitable tolling. Accordingly, his Complaint is untimely filed and must be dismissed.

B. Motion to Amend Complaint

Although Romero's Complaint was untimely filed, OSC's Complaint, filed on November 21, 1994, was filed within the 90-day period set out in § 1324b(d)(2). OSC argues that, because its Complaint is based in

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[4] OSC's Complaint listed Respondent's name as Workrite Uniform Incorporated. Respondent's Answer, however, noted that its correct name is Workrite Uniform Company, Inc.

[5] See infra, at 5 for a discussion on standards for granting/denying motions for summary decision.

part on Romero's charge, he is a party to its Complaint. See 8 U.S.C. § 1324b(e)(3). Furthermore, his November 28, 1994 filing should be treated as a motion to amend OSC's Complaint since OSC did not allege citizenship status and national origin discrimination or retaliation in its filing.

I agree that as an automatic party to the Complaint filed by OSC, 8 U.S.C. § 1324b(e)(1), Romero was free to file subsequent pleadings. However, for reasons which will be discussed below, whether OSC's Complaint can be amended to include additional causes of action not alleged by OSC in its Complaint is moot.

C. 120-Day Investigatory Period

Respondent argues that, although OSC complied with the requirement of § 1324b(d)(2) that a Complaint be filed within 90 days after a charging party receives a determination letter, the Complaint filed by OSC is untimely because OSC failed to comply with the 120-day notification period stipulated in 8 U.S.C. § 1324b(d)(2). Section 1324b(d)(2) requires that OSC notify the charging party of its decision to file or not file a complaint on the person's behalf within 120 days of receiving the charge. A decision not to file a complaint within the 120-day period does not, however, affect OSC's right to file a complaint during the subsequent 90-day period in which the individual also must file his or her complaint in order to be considered timely. 8 U.S.C. § 1324b(d)(2).

In the case at hand, OSC received Romero's charge on April 11, 1994. The 120-day notification period therefore expired on August 9, 1994. OSC, however, did not send its determination letter to Romero until August 19, 1994, ten days late. The issue of whether OSC must abide by the 120-day limitation period as a condition precedent to prosecuting a § 1324b complaint appears to be one of first impression.

OCAHO rules of practice and procedure authorize the ALJ to dispose of cases upon motions to dismiss for failure to state a claim upon which relief can be granted. 28 C.F.R. § 68.10. Ordinarily, such a motion to dismiss is filed by the opposing party and is treated as tantamount to a motion for summary decision. See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment of the pleadings, matters outside the pleadings are

presented to and not excluded by the court, the motion shall be treated as one for summary judgment").[6]

An ALJ may "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Any uncertainty as to a material fact must be considered in a light most favorable to the non-moving party. Matsushita v. Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

OSC argues that notwithstanding the fact that its determination letter was mailed after the 120-day notice period, its Complaint was timely because it complied with the requirement of § 1324b(d)(2) that its Complaint be filed within 90 days after the charging party receives OSC's determination letter. Since Romero received the determination letter on August 22, 1994, OSC's Complaint was timely filed on November 21, 1994, the last day on which a complaint could have been filed.

I find OSC's argument unavailing. If the time-frame which OSC suggests controls, i.e., that as long as OSC's complaint falls within the 90-day limitation, the 120-day notification period is immaterial, then the limitations period contemplated by § 1324b(d)(1) and (2) becomes irrelevant. As such, OSC would be free to tarry before notifying a charging party of its intent to file (or not to file) a complaint, thereby indefinitely and ambiguously tolling the 90-day limitation period in perpetuity.

It cannot be supposed Congress had in mind such imprecise boundaries when it specified time limits on both the investigation/ notification period and the period in which an individual and OSC, if it so chooses, may file a complaint. A construction of § 1324b(d)(2) as OSC suggests is inconsistent with the rationale for time limits, i.e., to prevent "stale claims from springing up at great distances of time and surprising defendants when all proper evidence is lost or the facts have become obscure from lapse of time, or the defective memory, death or removal of witnesses." 54 C.J.S Limitations of Actions § 3 (1987).

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[6] The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of OCAHO cases. 28 C.F.R. § 68.1.

"Statutes of limitation are intended to exact diligence in the prosecution of litigants' claims." Id.

Furthermore, general rules on construing limitations periods state that

> [i]f the language of a statute of limitations is ambiguous or is not clear, so that construction by the courts is called for, the function of a court construing the statute is to determine the legislative intent, primarily from the language of the statute. In determining this intent the court may invoke the aid of established canons of statutory construction, such as . . . that the language used should be construed, if possible, according to the usual or ordinary meaning of the words used, and . . . should be construed so as to . . . arrive at a reasonable result, and sustain the validity of the statute.

51 Am. Jur. 2d, Limitation of Actions, § 48 (1970) (emphasis added).

The express language of § 1324b(d)(2) provides that "the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during . . . [the 120-day] period. . . ." (Emphasis added). This text suggests that Congress meant the 120-day requirement as more than merely a guideline for OSC to follow during the course of its investigation of an unfair immigration-related employment practice. In fact, OCAHO case law has held that time limitations are "akin to statutes of limitation. . . ." United States v. Weld County School Dist. 2 OCAHO 326, at 17 (1991) (quoting Dartt v.Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976).[7] Therefore, like

[7] It should be noted that OCAHO jurisprudence has held that the 10-day notification rule, requiring OSC to notify an employer of charges filed by an individual within 10 days, is not jurisdictional. See 8 U.S.C. § 1324b(b)(1). Therefore, when OSC failed to notify Respondent of a charge against it within 10 days, there was no bar to proceeding under § 1324b. See United States v. Frank's Meat Co., 4 OCAHO 513 (1993). Frank's Meat can, however, be distinguished from the case at hand. Because no OCAHO case law dealing with the 10-day rule existed, the Administrative Law Judge (ALJ) in Frank's Meat analogized to Title VII cases. First, the ALJ stated that in order for the 10-day rule to be taken literally, Respondent must be able to prove some prejudicial effect from receiving late notification. However, where no such prejudicial effect exists and "OSC's failure to deliver the notice within the 10 days . . . was inadvertent and was not foreseeable[,] . . ." no breach of § 1324b had occurred. Id. at 8. In contrast, late notification of OSC's determination to file a complaint within the 120-day investigatory period can have extremely prejudicial effects on an employer. Not the least of these effects is uncertainty in determining the end of respondent's period of liability, one of the main reasons for implementing a statute of limitations. 54 C.J.S. Limitations of Actions § 3 (1987). Furthermore, OSC's failure to notify the respondent in Frank's Meat was inadvertent and unforeseeable in that the notification letter was mismailed. Here, it does not appear that OSC made an effort to timely notify Complainant that the 120-day (continued...)

statutes of limitation, a notification requirement limiting the timing of a complaint must be strictly construed and given the plain meaning of the words written by Congress; a "court may not substitute language of its own in place of that used by the lawmaking body nor may it arbitrarily subtract from or add to general words used in a . . ." limitations period. 51 Am. Jur. 2d Limitation of Actions § 49 (1970).

Furthermore, "[t]he courts will not strain either the facts or the law in favor of a statute of limitations, nor should such a statute be extended by the courts or be applied to cases not clearly within the statutory provision" as is the case with OSC not meeting the 120-day notification period in this proceeding. 51 Am. Jur. 2d Limitation of Actions § 50 (1970).

The principles previously discussed have been recognized by the Supreme Court which has stated that "because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity." Felder v. Casey, 487 U.S. 131, 140 (1988) (quoted in Bozoghlanian v. Lockheed-Advanced Development Co., 4 OCAHO 711, at 9 (1994)). This axiom can be applied to the express provision of § 1324b requiring OSC to notify a charging party within 120 days of its determination to file a complaint.

In addition, OCAHO case law does not allow an exception for pro se complainants who fail to file § 1324b charges within the limitation periods set out in §§ 1324b(d)(2) and (d)(3) absent a showing which supports equitable tolling. See e.g., United States v. Auburn, 4 OCAHO 617 (1994); Lundy v. OOCL (USA), 1 OCAHO 215 (1990). Likewise, OSC does not deserve respite from the express filing requirements of § 1324b(d)(2). As the agency with exclusive authority to investigate a § 1324b charge, OSC should be held to an even higher standard when confronted by express requirements set out in § 1324b. In construing the 120-day requirement strictly, I follow the general rule on limitation periods that "a particular construction will be favored when it appears to be the only one which will afford a fixed, permanent, and certain rule by which to ascertain whether a particular case is included within or

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[7](...continued)
investigatory period had passed and no facts are alleged to explain the delay as was the case in Frank's Meat.

excluded from the operation of the . . ." limitation period. 51 Am. Jur. 2d Limitations of Actions § 52 (1970).

The principle stipulated by the 90-day time-frame for filing complaints would be eviscerated if the 120-day stricture could be avoided with impunity. I find that OSC failed to comply with the 120-day limitation period imposed by § 1324b(d)(2), the result of which is that its Complaint is ineffective, i.e., it is out of time per se.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaints, Answers, Motions and other supporting documents filed by each party. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. OCAHO lacks jurisdiction over Complainant's § 1324b claims where the § 1324b(d)(2) requirement that OSC notify the charging party (of its determination whether to file a complaint on his or her behalf within 120 days of receiving the charge) is breached;

2. Respondent's Motions to Dismiss are granted;

3. The Complaints are dismissed.

All motions and other requests not specifically ruled upon are denied.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 2nd day of March, 1995.

MARVIN H. MORSE
Administrative Law Judge