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

February 23, 1998

SARA CASPI, Complainant, v. TRIGILD CORPORATION, Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 95B00159)))

FINAL DECISION AND ORDER OF DISMISSAL

Procedural Background

This is an action arising under the provisions of the Immigration Reform and Control Act of 1986 (IRCA), an amendment to the Immigration and Nationality Act, as amended, 8 U.S.C. §1324b (INA), in which Sara (Dina) Caspi is the complainant and the Trigild Corporation is the respondent. Caspi filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Trigild discriminated against her on the basis of her citizenship and national origin by terminating her employment at the Huntington Hotel, and that Trigild also engaged in prohibited acts of retaliation and document abuse. Trigild filed an answer denying the material allegations of the complaint and raising a timeliness defense, and subsequently moved to dismiss the complaint on the grounds that this action is time barred; first, because the underlying charge was not filed with the OSC within 180 days of the alleged unfair immigration-related employment practices as required by 8 U.S.C. §1324b(d)(3), 28 C.F.R. §44.300(b), and second, because the complaint was not filed with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety days of the OSC letter as required by 8 U.S.C. §1324b(d)(3), 28 C.F.R. §44.303.

After an initial order of inquiry, 6 OCAHO 838 (1996), and responses thereto, I issued an order of partial dismissal and second order of inquiry dismissing the allegations of citizenship discrimination because Caspi is not a protected individual within the meaning of the statute. (unpub.) Based upon responses to the second order of inquiry and to a subsequent request to the Office of Special Counsel for Immigration-Related Unfair Employment Practices, 6 OCAHO 907 (1997), I issued a second order of partial dismissal directed to the allegations of national origin discrimination on the grounds that the number of Trigild's employees exceeded OCAHO's jurisdictional limitations and that EEOC had appropriately exercised its own jurisdiction over those allegations. (unpub.) The only remaining allegations are thus those of document abuse.

IRCA provides that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face appear to be genuine, for the purpose of satisfying the requirements of the employment verification system. Because claims of document abuse are not within the coverage of Title VII or the jurisdiction of the EEOC, these claims are not subject to the numerical limitation on the number of employees or the no overlap provision. Caspi asserts that Trigild made repeated demands for proof of her authorization to work in the United States but rejected the proffer of her original green card and requested other documents.

In the first order of inquiry, I advised the parties that I might treat the motion to dismiss as a motion for summary decision because of the submission of additional factual information and documents outside the pleadings. I now do so, and dismiss the remaining allegation for failure to exhaust administrative remedies in that no timely charge was filed alleging acts of document abuse.

Discussion

Here the complaint and accompanying documents show that the underlying charge is dated April 17, 1995 and that the employment relationship had ceased on May 18, 1994, 334 days before that. It also appears that the complaint was filed with OCAHO 132 days after the date of the letter authorizing Caspi to file a complaint within 90 days. The facts alleged clearly show limitations issues both as to the charge and as to the complaint. Assessing the timeliness of the charge, however, initially requires examination of other

preliminary questions: when did the time period actually begin to run, and when was the charge actually filed.

A. *When Did The Filing Period Begin to Run*

Determining when a filing period begins to run requires precise identification of the alleged unlawful act. As case law makes clear, the act takes place at the time when the specific employment decision is made and unequivocally communicated to the individual. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). In this case, there is some ambiguity as to when, precisely, the alleged unlawful acts occurred.

Caspi indicated that the demand for documents other than her green card was a repeated demand which began when Trigild became the receiver for the Huntington Hotel, and continued as long as she worked there. Because it was repeated, and construing the factual allegations in the light most favorable to Caspi, she alleged a series of continuing violations with respect to the demand for documents which began as early as November 1993, and continued throughout the remainder of her employment with the hotel. The date of her discharge would mark the cessation date because ordinarily the severing of the employment relationship puts an end to other employment-related practices as well. *Brown v. City of New York*, 869 F. Supp. 158, 168–69 (S.D.N.Y. 1994).

The record is not entirely clear as to either the exact date of Caspi's actual termination or the date when she was actually notified that she was discharged. Although Caspi indicated that she was fired on May 18, 1994, she also alleged that her employment status was not discussed with her until at least June 7, 1994, when she was handed a notice advising her that she had been replaced. She stated that even then she was not told that this was a termination. While other documents attached to the complaint indicate that she visited the unemployment office and picked up an unemployment package as early as June 1, 1994, she did not file her claim for unemployment benefits until June 30, 1994, after she had contacted both the labor department and a legal services office for information. Her claim for unemployment benefits had initially been denied for the six week period prior to June 25, 1994 for lack of timely filing, but on appeal the claim was approved retroactively, precisely because the employer had not provided definite and coherent information to her about her employment status. While the findings of the state unemployment

compensation proceedings are not entitled to collateral estoppel effect, *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1284 (9th Cir. 1986), I do give them some evidentiary weight. In her chronology of events, Caspi also indicated that it was not until July 18 or 19, 1994 when she reviewed her file in the office, that she discovered company records showed she was terminated effective March 16, 1994. It would appear probable that she knew by June 7, 1994 that she was no longer employed. She had not worked since May 8, 1994 and she was told on June 7, 1994 that she had been replaced. She then consulted legal services and sought advice. She finally applied for unemployment compensation benefits on June 30, 1994.

Viewing these facts in the light most favorable to Caspi, as I must for purposes of this motion, and accepting the findings of the unemployment compensation board, she knew to a certainty by June 30 that she was not employed because the very act of applying for unemployment compensation unequivocally demonstrates knowledge that one is not employed. I credit that she did not know until July 18 or 19, 1994 that the effective date of her termination according to the Respondent's records was shown as March 16, 1994, not May 18, 1994. Under these circumstances I find that the limitations period began to run on June 30 at the latest. The 180 day charge filing period thus would have expired on December 27, 1994.

B. *When Was The Charge Actually Filed*

Although Caspi's OSC charge is dated April 17, 1995, her complaint states that she filed it on January 14, 1995. This statement is further elaborated by a note stating that she attempted to send the charge that day by UPS, but that it was returned to her because it had no street address and UPS does not deliver to a post office box address. She subsequently sent it by U.S. mail. Regulations provide that a charge mailed to OSC shall be deemed filed on the date it is postmarked. 28 C.F.R. §44.300(b). *See Jia Xian Pan v. Jude Eng'g, Inc.*, 4 OCAHO 648, at 507 (1994).[1] Information received from OSC in response to my request for information indicates that the charge was postmarked February 7, 1995, fully 275 days after her last day

[1]Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

of work, and 222 days after June 30, 1994, the date by which she must have known she was discharged. Included in Caspi's response to the first order of inquiry were, *inter alia*, copies of a letter from OSC dated March 8, 1995, and her letter to OSC dated March 10, 1995 informing OSC that she had also filed a charge with the California Department of Fair Employment and Housing (DFEH) which had transferred the charge to EEOC, but that the California agency had refused to include her allegations of national origin discrimination in the charge.

The DFEH charge is dated March 7, 1995. Her OSC charge is dated April 17, 1995 and was dismissed as not timely filed. However, OSC now suggests in response to my request for information and comment that Caspi may have constructively filed with the California DFEH by completing a questionnaire there on November 9, 1994, copies of which it provided for the record.

1. *Whether The Memorandum of Understanding Operates to Render the DFEH Questionnaire the Equivalent of a Timely Charge*

In *Yefremov v. NYC Dep't of Transp.*, 3 OCAHO 562, at 1562 (1993), it was observed,

> OSC and EEOC have adopted a Memorandum of Understanding (MOU). 54 Fed. Reg. 32499 (1989). Each agency appointed the other as its agent to accept charges, thereby tolling the time limits for filing national origin and citizenship discrimination charges. The effect of the MOU is that a filing with OSC is understood to be a constructive simultaneous filing with EEOC and vice versa. *Curuta v. U.S. Water Conservation Lab*, 2 (sic)[2] OCAHO 459 (9/24/92). A timely EEOC filing cures the tardiness of a subsequent OSC filing.

The Memorandum of Understanding instructs a receiving agency to refer charges to the other agency when it becomes apparent during the processing of the charge that the other agency has jurisdiction. It ensures that a charging party will not be penalized for selecting the wrong forum in which to file. It does not necessarily operate to render allegations timely which were never made to the first agency at all.

[2]The correct citation is 3 OCAHO 459 (1992).

OSC cites *Casavantes v. California State Univ.*, 732 F.2d 1441 (9th Cir. 1984), in support of the proposition that the completion of the DFEH questionnaire may operate to satisfy the charge filing requirement. In *Casavantes* the court found that where the charging party had completed and filed EEOC Form 238 (the so-called "Intake Questionnaire") 248 days after receipt of his notice of termination but still within the 300 day statutory period, the charge was timely even though the technical requirements of signature and verification were not satisfied until the charge was amended at a later date when EEOC sent Casavantes a formal charge document on day 313, which he signed and mailed back on day 316. *Casavantes*, 732 F.2d at 1441–42. The court specifically found that Casavantes' completed Intake Questionnaire satisfied EEOC's definition of a charge because it was sufficiently precise to identify the parties and to describe the action or practices complained of. *Casavantes*, 732 F.2d at 1443, citing 29 C.F.R. §1601.12(b).

To the extent that OSC reads *Casavantes* to stand for the proposition that any completion of a questionnaire, regardless of its contents, can always be equated with the filing of a charge I reject such a broad reading. As Judge Posner has pointed out, "To treat Intake Questionnaires willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant, since that is a requirement only of the charge and not of the questionnaire." *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 80 (7th Cir. 1992). Equating the completion of a questionnaire with a charge not only ignores the issue of notice, but equally importantly ignores the issue of whether a fair reading of the information contained in the questionnaire even touches on the issue subsequently sought to be raised. In this instance, it does not.

Casavantes did not involve an amendment to add new and previously unmentioned issues; it involved formal deficiencies of signature and verification which were cured by amendment when the formal charge document was later amended. Examination of Caspi's questionnaire responses, in contrast, discloses no allegations which are recognizable as raising any issue about document abuse. The materials provided by OSC in support of its suggestion include A) a Pre-Complaint Questionnaire-Employment, consisting of two pages and B) two Supplements to the Pre-Complaint Questionnaire, one captioned "Selection" and one captioned "Harassment". The bases for discrimination alleged in Caspi's completed questionnaire include race, sex, age, national origin, immigration status, and because of op-

position to a violation of law. The specific treatment she alleged was "not scheduled back on the job, not promoted and harassed in many ways." In the "Selection" supplement, she added religious beliefs as another basis, and complained of the fact that another employee was promoted. The acts she alleged in the "Harassment" supplement are described as the filing of unlawful detainer actions,[3] and allowing a coworker to call her names, spread rumors about her and threaten her. No mention is made in the questionnaire or either of the supplements of any demand for proof of work authorization documents or any refusal of documents which she tendered. There is simply no language which could conceivably be read to state facts which would raise a document abuse issue.

Because nothing in the materials submitted bears any suggestion that Caspi complained about document abuse, I am unable to read the questionnaire as raising issues of document abuse. While it appears from the record that DFEH may have erroneously refused to include Caspi's allegations of national origin in the charge it eventually completed and sent to EEOC, nothing in the material Caspi submitted to DFEH alleged any facts from which an allegation of document abuse could reasonably be inferred.

Equitable modification has occasionally been found appropriate under circumstances when an agency makes an error affecting the rights of a complainant. In one of the leading cases establishing this principle, *Albano v. Schering-Plough Corp.*, 912 F.2d 384 (9th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991), where EEOC repeatedly refused the charging party's attempts to amend a timely charge of failure to promote to add an allegation of constructive discharge, the court held that administrative remedies had been exhausted because the charging party had done all that he could do to effect the amendment. Finding the logic of *Albano* persuasive, the court in *Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651, 657 (S.D.N.Y. 1996) similarly held that EEOC's refusal to include the charging party's claims of retaliation in her charge could not bar her claim where her Intake Questionnaire reflected that she had specifically included retaliation allegations among her enumerated complaints. The facts here, however, are wholly unlike the facts in those cases.

The DFEH did not mislead Caspi, nor did it or the EEOC err in not referring to OSC allegations which were never made to either of

those agencies at all. As was observed in *United States v. Auburn Univ.*, 4 OCAHO 617, at 280 (1994):

> The purpose of the MOU to prevent injustice arising out of a *mistake* in forum selection provides no assistance here where the complainant failed to implicate any allegation cognizable under 8 U.S.C. §1324b in her EEOC filing. There is no indication in the record that EEOC referred or thought to refer the Balazs ACA allegations to OSC. Nor, upon inspection of the EEOC ACA filing is there reason to suppose that EEOC would have done so. I find nothing in the text of the MOU to suggest that EEOC should have made such a reference in context of the EEOC ACA allegations. I find and conclude that the MOU is unavailing to Balazs.

Similarly I cannot find that completion of the questionnaires at DFEH constituted a timely charge of document abuse where there is no hint of any such allegation in the completed questionnaires.[4]

2. *Whether There are Any Other Grounds for Equitable Tolling*

A finding that the charge is untimely does not end the inquiry, however, because the time limits in a §1324b claim, like those for filing a charge under Title VII, 42 U.S.C. §2000e et seq., are not a jurisdictional prerequisite but a requirement, like a statute of limitations, that is subject to waiver, estoppel, and equitable tolling. *Auburn Univ.*, 4 OCAHO 617, at 274. *Cf. Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). The question is whether there are any other facts and circumstances which could give rise to equitable tolling.

In the first order of inquiry, I asked Caspi to provide details about the circumstances surrounding the delay in mailing her charge. She replied as follows:

> I went to the legal aid and received a booklet with a sample of the form of the charge, and instructions how to fill it in. So in January 1995 I started to prepare my draft of charge. . . . . when I finished typing and making copies,

[4]Recent authority in this forum has held that because the 1989 Memorandum of Understanding predates the 1990 amendment which enacted the document abuse provision and refers only to national origin and citizenship status discrimination, the Memorandum of Understanding cannot render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline. *Toussaint v. Tekwood Assocs., Inc.*,6 OCAHO 892, at 11 (1996), *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 879, at 11 (1996). In view of the fact that document abuse was never even alleged here, I do not reach this question and hence express no view as to the reasoning of those cases outside their own particular facts.

> there was no near by post office open so I went to the U.P.S. branch near by. At that time Los Angeles, and the area experienced lots of rain that flooded streets in many neighborhoods, and cars on the streets were covered with water to their top, and I don't know how to swim. It was very dangerous to go far into the mud and floods. So the only alternative was to use a delivery service as fast as possible. I left them my address and phone number with my room number. At that time I still had phone connection to my room. I did not get any message that the U.P.S. called me to find a street address in Washington D.C. so that they could deliver. They returned it soon, but I was not aware of it immediately when I actually got it back and I mailed it back by post office but still without the form itself. From the correspondence it is clear that I was waiting for the form to come to be completed, and during the meantime, I believe I prepared "chronology of events" for your agencies and the state and EEOC.

As to why she waited until the filing period had already expired even to begin her charge, Caspi indicated in response to an order of inquiry that she was preoccupied with the series of unlawful detainer actions seeking to evict her from the hotel, which kept her very busy and "under tremendous stress."

Equitable considerations permit tolling of the statute of limitations when the complainant can demonstrate an excusable reason for not complying with the timeliness requirements; however, "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Ninth Circuit "has applied equitable tolling in only a few limited circumstances, such as senility or mental incompetence, tricks or inducements by the opposing party, or a 'unique ... lack of clarity in our circuit's law.'" *Zeier v. IRS*, 80 F.3d 1360, 1365 (9th Cir. 1996) (citations omitted).[5] The Ninth Circuit has also reversed timeliness dismissals where factual questions related to equitable tolling are not clearly resolved in the pleadings. *Cervantes v. City of San Diego*, 5 F.3d 1273, 1277 (9th Cir. 1993) (applying California equitable tolling law); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) (applying California equitable tolling law).

Equitable tolling is generally not available when a late filing is due to a claimant's failure to exercise due diligence. *Scholar v. Pacific Bell*, 963 F.2d 264, 268 (9th Cir.), *cert. denied*, 506 U.S. 868

[5]The case cited to support the application of equitable tolling in cases of senility or mental incompetence, *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995), was subsequently overruled on the grounds that the statutory periods set out in the Internal Revenue Code, 26 U.S.C. §6511, are not susceptible to equitable tolling. __ U.S.__, 117 S. Ct. 849 (1997).

(1992). *See also Irwin*, 498 U.S. at 96. The United States Supreme Court has stated that one "who fails to act diligently cannot invoke [equitable tolling] to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). *See also Rusk v. Northrop Corp.*, 4 OCAHO 607 at 172 (1994). "[T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96. As the Seventh Circuit has explained, "Rather than giving the plaintiff an automatic extension of indefinite duration . . . the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, *despite all due diligence on his part*, to file his claim. There must be diligence and the diligence must continue up to the time of the suit. . . ." *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993), *aff'd on other grounds*, 512 U.S. 477 (1994) (emphasis in original) (citations omitted). *Cf. Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 385 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 158 (1997). By waiting until the filing period had already expired to begin the preparation of the charge, Caspi showed a lack of diligence. Even with a liberal reading of the complaint, this is "at best a garden variety claim of excusable neglect" for which equitable tolling is not available. *Irwin*, 498 U.S. at 96. *Pro se* status, without more, does not justify equitable relief. *Grodsky v OOCL (USA) Inc.*, 1 OCAHO 295, at 1955 (1991).

Findings and Conclusions

I have considered the pleadings and supporting documents and submissions by both parties and by OSC, on the basis of which I find and conclude:

1. Caspi failed to file a charge with OSC within 180 days of the alleged acts of document abuse complained of as required by 8 U.S.C. §1324b;

2. no facts are shown which would support equitable tolling of the charge filing period; and

3. the filing of a different charge with the California DFEH did not operate as a timely filing of a document abuse charge with OSC.

The complaint is therefore dismissed.

SO ORDERED

Dated and entered this 23rd day of February, 1998.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks timely review of that 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, and does so no later than 60 days after the entry of such Order.