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

June 1, 1998

YADIRA AZUCENA OCAMPO SOTO, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 98B00038
TOP INDUSTRIAL, INC., Respondent.	)

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Appearances: *Daniel T. Streeter, Esq.,* for Complainant
Michael A. Gutenplan, Esq., for Respondent

I. *Issue*

This case poses the issue:

- **May a represented party who fails to file an OCAHO Complaint within the statutory 90-day limit revive an OSC Charge, and thereby extend the 90-day time limit, by initiating a gratuitous, one-sided correspondence with OSC?**

II. *Statutory and Regulatory Background*

This case arises under §102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, codified at 8 U.S.C. §1324b. Section 1324b prohibits national origin discrimination by employers of between four and fourteen employees against any individual, other than an unauthorized alien. Section 1324b also prohibits citizenship status discrimination against a "protected individual," in-

cluding United States citizens and lawfully admitted resident aliens. 8 U.S.C. §1324b(a)(3).

However, a lawfully admitted resident alien "who fails to apply for naturalization within six months of the date on which the alien first becomes eligible (by period of lawful permanent residence) . . . or, if later, within six months after November 6, 1986," or "an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of application, unless the alien can establish that the alien is actively pursuing naturalization," are not "protected individuals," and therefore have no standing to pursue §1324b claims. 8 U.S.C. §1324b(a)(3)(B). Because of these exceptions, an alien alleging discrimination must establish his or her standing. An illegal alien has no standing to bring a §1324b complaint. A lawfully admitted resident who fails to demonstrate that he or she sought naturalization within the requisite time frame is also beyond §1324's protective reach.

If protected, an individual alleging national origin or citizenship discrimination must file his or her charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). OSC is authorized to file complaints on behalf of the individual before an administrative law judge (ALJ) assigned to the Office of the Chief Administrative Hearing Officer (OCAHO). 8 U.S.C. §1324b(e)(2); 28 C.F.R. §68.4(b)(1). If OSC elects not to file an OCAHO complaint on the individual's behalf within 120 days, the individual may file a private action before OCAHO. 8 U.S.C. §1324b(d)(2); 28 C.F.R. §68.4(c). An individual who wishes to exercise this option must file the complaint with OCAHO within 90 days of receipt of OSC's notice that it will not prosecute the case. *Id.*

III. *Procedural and Factual History*

On an OSC form subscribed to on April 8, 1997, Yadira Azucena Ocampo Soto (Soto or Complainant), through her attorney, Daniel T. Streeter, Jr. (Streeter), filed a Charge with OSC. Soto alleges that she suffered citizenship status and national origin discrimination because her employer, Top Industrial (Top or Respondent), escorted her from its premises on January 16, 1997, after she refused to provide proof of her work-authorization status other than that already in Top's file. Soto characterizes her ejection as discriminatory and retaliatory, and Top's demand for proof of her work-authorized status as document abuse. Soto describes Top, a California corporation

doing business in Van Nuys, as employing less than fifteen (15), but more than five (5) employees**.** Soto identifies herself as an "Otherwise Authorized to Work" alien, Registration No. A072237877, born on September 6, 1969, who has ***not*** applied for naturalization.

After investigating Soto's charge, OSC, by letter dated August 26, 1997, informed her that:

> **[T]he Special Counsel has determined that Ms. Ocampo was not a protected individual under the statute on the date of the alleged discrimination.**

OSC advised Soto that its investigation was over, and that Soto had the right to file a complaint with OCAHO within 90 days of receipt of OSC's letter. Soto admits that she received OSC's letter on **August 30, 1997**.

Some 121 days after OSC sent its August 27, 1997 determination letter, and 115 days after Soto received OSC's letter, on December 24, 1997, Soto filed an OCAHO Complaint. The Complaint claims that Soto, born in Guatemala, obtained "work status" on March 1, 1996. The Complaint alleges citizenship discrimination, and states that Soto was constructively discharged when she did not provide supplemental proof of work authorization. Soto does not seek to be reemployed, but demands back pay from January 16, 1997, the date of the putative wrongful discharge.

OCAHO issued a Notice of Hearing on January 8, 1998.

On February 10, 1998, Top filed its Answer through Michael Alan Gutenplan, Esq. (Gutenplan). Top denies all charges, requests a "judgment of dismissal," and raises the following affirmative defenses:

- failure to state a claim upon which relief can be granted;
- unclean hands — *i.e.*, Soto's alleged immigration document fraud and appropriation of others' social security numbers were themselves the cause of her purported injury;
- failure to mitigate damages;
- estoppel, Soto herself having instigated the injury of which she now complains;

- duplicate actions, Soto's Complaint echoing that in *Ocampo v. Top Industrial* (Los Angeles County Superior Court Case No. LC043802).

Top contends that:

> Ocampo had taken a vacation and was scheduled to return to work on Monday, January 13, 1997. On Friday, January 10 . . . [her] brother Jaime . . . indicated that [she] . . . would not be returning to work as scheduled, because she was having trouble getting back into the country from Guatemala . . . [on] the 14th . . . [she] was at the American Embassy in Guatemala, still trying to get back into the country. . . .
>
> Spurred by the telephone calls from Ms. Ocampo's brother . . . [Top] felt it appropriate to review Ms. Ocampo's personnel file, in an attempt to confirm that . . . [she] possesses [sic] the proper documentation necessary to legally work. . . .
>
> When Top Industrial's personnel director reviewed the file, she found a copy of an older Alien Registration Card ("green card") and numerous social security numbers which . . . [Ocampo] had utilized.
>
> [Ocampo on January 30, 1997] admitted that the [green] card in her Top Industrial personnel file was a forgery.

Answer, Appendix 1, February 10, 1997 Letter, pp. 1, 2.

> Top Industrial, Inc. [also] discovered that one or more of the social security numbers belonged to individuals who were no longer living.

Answer, Appendix 3, May 27, 1997 Letter, p. 4, ¶2.

According to Top, a month after the allegedly discriminatory incident of January 16, 1997, Soto presented a ***photocopied*** employment authorization card purportedly valid from 3/11/96 to 3/10/97. Answer, Appendix 2, February 26, 1997 Letter, p. 1, ¶3; Appendix 3, May 27, 1997 Letter, p. 4, ¶4. Because of Soto's apparent appropriation of multiple social security numbers, and her allegedly admitted use of forged documents in the past, Top did not credit the photocopy.

Top requests a "judgment of dismissal." Answer at p. 3.

IV. *Discussion*

By February 12, 1998 Order of Inquiry, I requested that the parties file submissions relating to the following threshold issues:

- **Was Soto's Complaint timely filed?**
- **Was Soto a "protected individual" within the meaning of 8 U.S.C. §1324b?**

Soto was ordered to provide proof of:

- the date on which she ***received*** OSC's determination letter,
- the date on which she ***filed*** her OCAHO Complaint, and
- standing to bring an OCAHO Complaint under 8 U.S.C. §1324b.

On March 24, 1998, Soto filed her Response to Order of Inquiry (Response). Soto stated that:

- she received OSC's determination letter on **August 30, 1997**;
- she **filed** her Complaint **on December 23, 1997**, **115 days after receipt** of OSC's determination letter.

While acknowledging the 115-day hiatus between OSC's determination letter and her OCAHO filing, Soto argues that 8 U.S.C. §1324b(d)(2), which requires a party to file a complaint within 90 days, is inapplicable to the present action, because Soto unilaterally continued to dispute her immigration status with OSC and to query OSC about the progress of the suit. As proof of this colloquy, Soto attaches to her Response a September 29, 1997 letter from Soto's Counsel to OSC, to which OSC did not respond. Response at ¶19. Soto observes that OSC never informed Soto "that the 90 day period continued to run irrespective of the communications between the parties respecting further investigation" of Soto's legal status. Response at ¶18. As discussed below, in contrast to Soto's invocation of a non-existent duty, OSC has no statutory obligation to respond to communications filed after its final determination. This is so be-

cause 8 U.S.C. §1324b provides an aggrieved individual with a procedural remedy— *i.e.*, the timely filing of a private OCAHO complaint.

Soto is silent regarding her immigration status in the United States, which she allegedly entered as a student in 1984, and invokes her rights and privileges under the Fifth Amendment to the United States Constitution, although she appends to her Response a copy of her work authorization, purportedly valid from 3/11/96 to 3/10/97, and a copy of a Resident Alien card.

On March 25, 1998, Top amended its Response to state that it first hired Soto (who, allegedly, claimed to be "Argentina Soto") in or around November 1990, and that Soto at that time presented as proof of work authorization a California Driver's License and Social Security card. Top contends that in 1991 Soto divulged her "real" name, Yadira Ocampo, and that Top then modified its employment records to show that "Argentina Soto" was no longer employed, and that "Yadiro [sic?] Ocampo Soto's formal date of hiring was August 7, 1991." Amendment at ¶1. Top attaches an alien registration card which, according to Top, Soto admitted was "counterfeit."

A. *The Fifth Amendment Issue Is Not Material to Outcome*

It may appear that Soto's assertion of Fifth Amendment rights precludes a determination of her standing to bring §1324b suit. However, "[t]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence against them." *United States v. Garza*, 4 OCAHO 644, at 480 (1994), *available in* 1994 WL 479265, at *7 (O.C.A.H.O.). *See Baxter v. Palmigiano,* 425 U.S. 308, 318–320 (1976); *SEC v. Colello*, *to be published in* 139 F.3d 674 (9th Cir. 1998), *available in* 1998 WL 117863, at *3 (O.C.A.H.O.); *United States v. Widow Brown's Inn*, 3 OCAHO 1, at 18 (1992), *available in* 1992 WL 535540, at *13 (O.C.A.H.O.). Because I dismiss this Complaint on the ground that it is untimely, I do not reach the question of whether Soto's silence connotes lack of §1324b standing, nor do I speculate or inquire further so as to resolve the ambiguities of her immigration history and status.

B. *Soto's Complaint Is Untimely and Not Subject to Equitable Tolling*

1. *Title 8 U.S.C. §1324b(d)(2) and 28 C.F.R. §68.4 Require That a Complaint Be Filed Within 90 Days After Receipt of OSC's Determination Letter*

Section 1324b(d)(2) provides in pertinent part:

> If the Special Counsel, after receiving . . . a charge respecting an unfair immigration-related employment practice . . . has not filed a complaint before an administrative law judge with respect to such charge within [120 days of the date OSC received the charge], the Special Counsel shall notify the person making the charge of the determination not to file such complaint during such period and the person making the Charge may . . . file a complaint directly before such a judge within 90 days after the date of receipt of the notice.

8 U.S.C. §1324b(d)(2); 28 C.F.R. §§44.303(c) and 68.4(c).

The express language of §1324b requires Soto to file her OCAHO complaint within 90 days after receipt of notice from the OSC that the 120-day investigatory and exclusive complaint-filing period had lapsed.

Soto received the OSC August 26, 1997, determination letter on August 30, 1997. ***The OSC letter clearly and unambiguously notified Soto of the filing deadline: "Your complaint must be received by OCAHO within 90 days after your receipt of this letter."***[1] Soto was therefore on notice that she was required to file her complaint with OCAHO by ***November 28, 1997. Instead, Soto filed her Complaint on December 23, 1997, 25 days after the statutory deadline.***

---

[1]Pleadings are not deemed filed until OCAHO receives them. 28 C.F.R. §68.8(a). With regard to time computations, 28 C.F.R. §68.8(a) instructs that:

> 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. . . .

Nothing in the OCAHO rules of practice and procedure contemplates a delay of the magnitude found here.

2. *Equitable Tolling Is Inapplicable*

Soto admits that she failed to file her Complaint within 90 days after receipt of OSC's determination letter. Nevertheless, she argues that the deadline "does not fully apply . . . due to the facts and circumstances surrounding the investigation of her claim by the Special Counsel's Office." Soto's Response to Order of Inquiry, at 1. Soto's counsel claims on her behalf that he "reasonably believed that the 90-day period was tolled" because counsel contacted OSC "sometime in September, so as to determine whether the Special Counsel's office was going to re-open the investigation, on the basis of [a gratuitous] document forwarded to it by Complainant which clearly refuted the non-protected status designation." Soto's Response to Order of Inquiry, at 3.

The 90-day deadline for filing a §1324b complaint is not jurisdictional, but is rather in the nature of a statute of limitations, subject to waiver, estoppel and equitable tolling.[2] Soto requests that her failure to file be excused by the doctrine of equitable tolling. Equitable tolling is available, however, only where the putative victim of discrimination asserts rights in the wrong forum, was actively misled by the employer, or "was prevented in some extraordinary way from exercising his or her rights." *Udala v. New York State Dep't of Education*, 4 OCAHO 633, at 396 (1994), *available in* 1994 WL 386847 at *5 (O.C.A.H.O.). *See also United States v. Weld County School Dist.*, 2 OCAHO 326, at 17 (1991), *available in* 1991 WL 531749 at *13 (O.C.A.H.O.).[3]

The Supreme Court instructs that the doctrine of equitable tolling does not extend to "garden variety" claims of "excusable neglect." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). In *Irwin*, the

[2]*Horne v. Town of Hampstead*, 6 OCAHO 906, at 11 (1997), *available in* 1997 WL 386827, at *10 (O.C.A.H.O.); *Briceno-Briceno v. Farmco*, 4 OCAHO 629, at 379 (1994), *available in* 1994 WL 386827, at *9 (O.C.A.H.O.). *See also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1982) (addressing time period for filing an EEOC charge); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1173 (9th Cir. 1986), *amended by* 815 F.2d 570 (9th Cir. 1987) (addressing parallel 90-day requirement for filing suit after receipt of an EEOC right-to-sue notice).

[3]Citations to OCAHO precedent in bound Volumes I–V, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, *seriatim*. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume V, however, are to pages within the original issuances.

petitioner argued that his failure to file in a timely[4] manner be excused because his attorney was out of the country when his office received a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC).

Holding the doctrine of equitable tolling not to extend to "garden variety claim(s) of excusable neglect," the Court observed that:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period . . . or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. . . . We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. . . .
>
> Petitioner urges that his failure to file in a timely manner should be excused because his lawyer was absent from his office at the time that the EEOC notice was received, and that he thereafter filed within 30 days of the day on which he personally received notice. But the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect.

Irwin, 498 U.S. at 96 (footnotes and citations omitted).

The circumstances surrounding Soto's untimely filing amount to nothing more than another example of "garden variety excusable neglect" which the Supreme Court rejected in *Irwin*.

Furthermore, statutory time limits are strictly construed:

> [G]eneral 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. To determine this intent, a 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).

[4]Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq*., provides that an employment discrimination complaint against the Federal Government must be filed "[w]ithin thirty days of receipt of notice of final action taken" by the EEOC.

Both the statutory language and the OSC communication advising Soto of the strict time limit for filing are clear and unambiguous. The statute unequivocally commands a complainant to "file a complaint . . . within 90 days after the date of receipt of the [OSC] notice." 8 U.S.C. §1324b(d)(2). Soto admits that on August 30, 1997 she received the OSC determination letter which emphasized that OCAHO ***must*** receive a Complaint within 90 days from receipt of OSC's determination letter. While Soto maintains that OCS's failure to respond to her counsel's post-determination query misled her to believe the filing deadline had been tolled, I find it unreasonable for counsel to claim that a one-sided gratuitous monologue extends the explicit 90-day statutory deadline. OSC's August 26, 1997 letter in unmistakable terms advised that it had determined Soto was not a protected individual. Once OSC informed Soto of its determination, and notified her that she had 90 days to file her own Complaint with OCAHO, its duty ceased.

The practical effect of extending the doctrine of equitable tolling as Soto wishes would afford potential complainants unlimited unilateral opportunity to extend statutory deadlines indefinitely. This cannot be congressional will.

Absent a credible basis for equitable tolling, even a one day delay in filing can defeat administrative law judge jurisdiction. *Grodzki v. OOCL (USA), Inc.*, 1 OCAHO 295, at 1951–56 (1991). The rationale behind the adoption of statutory filing deadlines is to prevent "stale claims from springing up at great distances of time and surprising defendants when all proper evidence is lost or removal of witnesses." 54 C.J.S. Limitations of Actions §3 (1987). "Statutes of limitations are intended to exact diligence in the prosecution of litigants' claims." *Id*.

Furthermore, OCAHO precedent, consistent with federal court caselaw, defeats equitable tolling where, as here, the individual seeking relief is ***represented.***[5] *See Hay v. Wells Cargo, Inc.*, 596 F. Supp. 635, 640 (D.Nev. 1984), *aff'd*, 796 F.2d 478 (9th Cir. 1986) (Table). In *Lundy v. OOCL (USA) Inc.*, 1 OCAHO 215, at 1448 (1990), *available*

[5]OCAHO case law does not even 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 University*, 4 OCAHO 617, at 275 (1994), *available in* 1994 WL 269758, at *6 (O.C.A.H.O.); *Lundy v. OOCL (USA)*, 1 OCAHO 215, at 1447 (1990), 1990 WL 512146, at *7 (O.C.A.H.O.).

in 1990 WL 512146, at *6 (O.C.A.H.O.), the Complainant retained counsel at the time of his OSC Charge, although he appeared *pro se* on his subsequent OCAHO Complaint. *Lundy* rejected equitable tolling as an excuse for failure to file within the statutory time period "where counsel is available to a party," and where the complainant "was represented by counsel during the substantial part of the statutory period." *Id.* at 1448, 1453. *See also Morse v. Daily Press, Inc.*, 826 F.2d 1351, 1353 (4th Cir. 1987), *cert. denied*, 108 U.S. 455 (1987) ("Retaining an attorney extinguishes the equitable reasons for tolling . . ."); *Salcido v. New-Way Pork Co.*, 3 OCAHO 425, at 13–14 (1992), *available in* 1992 WL 535564, at *8 (O.C.A.H.O.).

Even assuming Soto's counsel could have believed that OSC would reopen its investigation upon receiving his letter of inquiry, *Irwin* does not warrant equitable tolling. Here, neither Top nor OSC induced Soto by trickery to miss the filing deadline! OSC simply chose not to respond to a gratuitous communication tendered to it after its final disposition. "Equitable tolling is denied even when an attorney's advice is inadequate. A client represented by a lawyer is presumed to have actual or constructive information regarding his potential causes of action, regardless of the competence of the lawyer or misinformation provided by the filing agency . . ." *Lundy*, 1 OCAHO 215, at 1448, 1990 WL 512146, at *8. Soto's Complaint was filed 25 days ***after*** the statutory deadline. Under the American system of representative litigation, a party is bound by the acts of his lawyer-agent, and must accept the consequences as well as the benefits of such representation. *See Irwin*, 498 U.S. at 92.

V. *Ultimate Findings, Conclusion and Order*

I have considered the Complaint, Answer, pleadings, and other supporting documents filed by each party. As more fully explained above, I find and conclude that Soto's §1324b Complaint is untimely, and the circumstances surrounding the untimely filing do not warrant equitably tolling the statute of limitations. Accordingly, the Complaint is dismissed.

Pursuant to 8 U.S.C. §1324b(g)(1), this Decision and Order is the final administrative order 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 1st day of June, 1998.

MARVIN H. MORSE
Administrative Law Judge