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

ALEXANDRE T. MIKHAILINE, Complainant,	)
v.	) 8 U.S.C. § 1324b Proceeding) OCAHO Case No. 99B00059
WEB SCI TECHNOLOGIES, INC., Respondent.	) MARVIN H. MORSE) Administrative Law Judge

FINAL ORDER, DISMISSING *SUA SPONTE* THE NATIONAL ORIGIN CLAIM FOR LACK OF JURISDICTION, AND DISMISSING THE RETALIATION CLAIM FOR LACK OF TIMELY FILING

(November 29, 1999)

This Final Order issues pursuant to Respondent's Motion to Dismiss filed November 16, 1999, and Complainant's Opposition to the Motion to Dismiss filed November 22, 1999. This Final Order renders moot all other questions raised by previous motions and pleadings, including, e.g., requests for subpoenas.

On August 20, 1999, Complainant, *pro se*, filed a Complaint against Respondent in the Office of the Chief Administrative Hearing Officer (OCAHO).

Complainant alleges that he was fired on or about May 14, 1998, for two reasons:

1) "Retaliation for criticizing and refusing to implement unfair employment practices of discrimination related to immigration," and

2) "National Origin (looking "too Russian," having Russian accent, speaking Russian with Russian consultants and so on)." *Complainant/Questionnaire Regarding Immigration Related Employment Practices at Part II (7).*

Previously, his Charge dated September 14, 1998, filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) alleged the same violations.

Complainant's OSC Charge conceded that R.S. Tare Web Sci Technologies, Inc. has 15 or more employees.

I. *NATIONAL ORIGIN CLAIM*

Title 8 U.S.C. § 1324b(a)(1) provides that: "It is an unfair immigration- related employment practice for a person or other entity to discriminate against an individual . . . with respect to the hiring . . . of the individual for employment . . . (A) because of such individual's national origin, or (B) . . . because of such individual's citizenship status." There is no § 1324b liability, however, where the employer employs fewer than four employees or where the alleged national origin discrimination is covered under section 2000e–2 of Title 42. Title 42 U.S.C. § 2000e–2(a)(1) (the Civil Rights Act of 1964, as amended) confers national origin[1] discrimination jurisdiction on the EEOC where an employer has "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (1998) (defining "employer"). Accordingly, as confirmed by numerous administrative law judge (ALJ) decisions, OCAHO national origin discrimination jurisdiction is limited to employers who employ between four and fourteen employees. See, e.g., *Hammoudah v. Rush-Presbyterian-St. Luke's Medical Center*, 8 OCAHO 1015 (Sept. 28, 1998), *available in* 1998 WL 1085948, at *2–3 (O.C.A.H.O.).

Generally stated, a national origin claim cognizable under Title VII [of the Civil Rights Act of 1964, as amended, codified at Title 42 of the United States Code,] cannot also be the subject of an IRCA national origin discrimination claim.[2] Exceptions to this limitation on ALJ jurisdiction are created by statute, not by judicial discretion or consent of the parties.[3]

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[1] "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or **national origin**. . . ." 42 U.S.C. S 2000e–2(a)(1), emphasis added.

[2] *Pioterek v. Anderson Cleaning System, Inc.*, 3 OCAHO 590, at 1921 (1993), *available in* 1993 WL 723364, at *2 (OCAHO) (citations omitted).

[3] See, e.g., 42 U.S.C. § 2000e–2(g) (delineating exception for national security reasons); *Naginsky v. Department of Defense*, 6 OCAHO 891, at 753 (1996), *available*

Accordingly, I do not have the discretion to create an exception to the subject matter jurisdictional limits of either Title VII or 8 U.S.C. § 1324b. Lacking subject matter jurisdiction, I am compelled to dismiss an action on jurisdictional grounds.[4] "Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power." *Boyd v. Sherling, 6 OCAHO 916, at 1119 (1997), available in* 1997 WL 176910, at *5 (O.C.A.H.O.) (quoting 5A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1350 (2d ed. Supp.1995)).

Complainant acknowledges that the Respondent has 15 or more employees. Respondent confirms this in its Motion to Dismiss. Complainant having conceded that there are more than 14 employees, the national origin discrimination claim is, therefore, subject to dismissal for lack of subject matter jurisdiction. Accordingly, I dismiss *sua sponte* Complainant's national origin discrimination claim, and do not reach the merits of that claim.

II. *RETALIATION CLAIM*

Dismissing Complainant's national origin discrimination claim, I retain jurisdiction over his retaliation claim for the purpose of resolving the question of timeliness.

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in 1996 WL 670177, at *3 (OCAHO) ("while § 1324b national origin discrimination generally is actionable only against employers of more than three but fewer than fifteen individuals, ALJ national origin jurisdiction may arise also as to employers of more than fourteen, by virtue of the national security exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C. S 2000e–2(g).") (citations omitted); *Boyd v. Sherling,* 6 OCAHO 916, at 1119 (1997), *available in* 1997 WL 176910, at *5 (O.C.A.H.O.) (citing *Willy v. Coastal Corp.,* 503 U.S. 131, 135 (1992) (explaining that the forum is "not free to extend or restrict the jurisdiction conferred by statute."); *Beers v. North American Van Lines, Inc.,* 836 F.2d 910, 912 (5th Cir.1988) ("the parties cannot create federal subject matter jurisdiction either by agreement or consent.")).

[4] The pertinent Rules of Practice and Procedure, 28 C.F.R. pt. 68 (Rules), which govern this proceeding authorize the ALJ at 28 C.F.R. § 68.10 to dispose of issues and cases, as appropriate, for failure to state a claim upon which relief may be granted, but they contain no specific provision for dismissal based on lack of subject matter jurisdiction. The Rules, however, provide that the Federal Rules of Civil Procedure (FED. R .CIV. P.) "may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1. In this case, FED. R. CIV. P. 12(h)(3), compelling dismissal of actions where a court lacks subject matter jurisdiction, is used for guidance. *Caspi v. Trigild Corp.,* 6 OCAHO 907, at 960 (1997), *available in* 1997 WL 131354, at * 2–3 (OCAHO).

A. *Procedural History*

1) Complainant's Charge was filed with OSC on September 19, 1998, alleging that an unfair immigration-related employment practice occurred on May 14, 1998.

2) OSC mailed Complainant a letter dated January 15, 1999 notifying him that OSC's 120-day investigatory period was completed, that it would conclude its investigation in another 90 days, and advising that he had 90 days from receipt of the letter to file a complaint at OCAHO as a private action.

3) OSC mailed Complainant a letter dated May 19, 1999 notifying him it had concluded their investigation.

4) Complainant mailed a letter dated June 2, 1999, to John D. Trasvina, Special Counsel, with a copy to OCAHO which states, in pertinent part:

> "[C]an I still file my own complaint with the Office of the Chief Administrative Hearing OFFICER (OCAHO)? According to your letter dated January 15, 1999: 'If I choose to file a complaint with OCAHO, I must do so within 90 days of my receipt of the above mentioned letter.' However, the same letter specifies that 'We (Office of Special Counsel) will complete our investigation within 90 days of your (my) receipt of this letter.' (See Annex). Trying to act cooperatively I waited for your investigation to be completed but received your last letter more than 120 days instead of 90 days after the receipt of the previous letter." (Attachment to Complaint.)

5) On August 20, 1999, the Complaint was filed.

6) On October 1, 1999, Respondent timely filed its Answer to the Complaint. Respondent asserted, as the first of three affirmative defenses, that the complaint is barred because it was filed out of time. Specifically, it asserts:

> On January 15, 1999, the OSC sent the complainant a letter notifying him that the 120-day investigation period had elapsed and he was permitted to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days if he wanted to do so. The complainant failed to file a complaint with the Office of the Chief Administrative Hearing Officer.

7) On October 26, 1999, Complainant filed his Reply to Affirmative Defense Asserted. On the timeliness issue, Complainant argues that he filed his complaint on the basis of authorization by OCAHO, referencing and relying on an OCAHO letter dated June 8, 1999. That letter states:

> On June 8, 1999, this Office forwarded to you by certified mail, a complaint/ questionnaire form and correspondence relating to the procedure to be followed by you to enable this Office to process your complaint and assign it to an Administrative Law Judge. We asked you to please return the amended complaint/ questionnaire to this office by August 22, 1999. As of this date we have not received the completed complaint/questionnaire from you.
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> Please be advised that if we do not receive the requested complaint from you by August 22, 1999, it will be necessary to administratively dismiss this matter.

8) On November 16, 1999, Respondent filed its Motion to Dismiss the Complaint, arguing that Complainant failed to file within the requisite time.

9) On November 22, 1999, Complainant filed his Opposition to the Motion to Dismiss, reasserting the argument of his October 26, 1999 Reply that his Complaint was timely filed per the "provisions" of OCAHO, as reflected in the June 8, 1999 letter to him from OCAHO. Attached to Complainant's Opposition to the Motion is a copy of an OSC letter acknowledging completed receipt of a new Charge as of September 24, 1999.

B. *Discussion*

Patently, the new OSC Charge is independent of the Complaint which this Final Order addresses; the only dates of concern here are the filing date of the first Charge (September 14, 1998), and the subsequent filing of this Complaint on August 20, 1999.

1. *Summary Decision*

The pertinent Rules of Practice and Procedure, 28 C.F.R. pt. 68.38, which govern this proceeding authorize the Administrative Law Judge (ALJ) at 28 C.F.R. § 68.38(c) to dispose of cases, as appropriate, upon motions for summary decision:

The 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 a party is entitled to summary decision. A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Upon motion for summary decision, the moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material

fact." *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 932 (1994), *available in* 1994 WL 721954, at *6 (O.C.A.H.O.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1985)). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. *Id.* The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. It may make its showing by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. *Celotex*, 477 U.S. at 324.

Title 28 C.F.R. § 68.38(c) is similar to and based upon Federal Rule of Civil Procedure 56(c), which provides for summary judgment in federal court cases. Under Rule 56(c), the court may consider any admissions on file as part of the basis for summary judgment. *United States v. Tri Component Product Corp.*, 5 OCAHO 821, at 768 (1995), *available in* 1995 WL 813122, at *3 (O.C.A.H.O.) (referencing FED.R.CIV.P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." Id. (citing *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 261 (1994), *available in* 1994 WL 269753, at *2 (O.C.A.H.O.); *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 165 (1991), *available in* 1991 WL 531744, at *3 (O.C.A.H.O.)).

This case is appropriate for summary decision because there are no genuine issues of material fact.

2. *The Issue of Timeliness*

There are two filing deadlines to insure timely filing of a § 1324b complaint.

1) The charge must be filed within 180 days of the alleged unfair immigration-related employment practice. 8 U.S.C. § 1324b(d)(3). As the alleged unfair practice, the termination of Complainant's employment, took place on May 14, 1998, and the Charge was filed September 14, 1998, the 180-day requirement was satisfied.

2) A complaint to maintain a private cause of action is timely if filed within 90 days after receipt of a notice from OSC that the 120-day investigatory period has expired. 8 U.S.C. § 1324b(d)(2). Complainant received the notice from OSC not later

than January of 1999, and filed his Complaint August 20, 1999, more than 180 days after the receipt of the notice.

ALJ decisions make clear that neither deadline is jurisdictional; each is rather in the nature of a statute of limitations, subject to waiver, estoppel and equitable tolling. See *Horne, Jr. v. Town of Hampstead*, 6 OCAHO 906, at (1997) *available in* 1997 WL 131346, at *10 (180-day charge filing deadline is one of limitations, and not jurisdiction, and susceptible to equitable tolling of the limitations period; OCAHO caselaw suggests also that the 90 day filing deadline is subject to equitable tolling); *Briceno-Briceno v. Farmco Farms*, 4 OCAHO 629, at 15–16 (1994), *available in* 1994 WL 386827, at *9 (90-day requirement not jurisdictional, but more like a statute of limitations); *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO 474 at 12–15 (1992), *available in* 1992 WL 535632 at *9 ("Agency filing periods are parallel to statutes of limitations and distinct from jurisdictional bars"); *Lundy v. OOCL (USA) Inc.*, 1 OCAHO 215, at 1445–46 (1990), *available in* 1990 WL 512146 at *7 ("Time limits on agency filings, like statutes of limitations, are subject to waiver, estoppel, and . . .equitable tolling"); *United States v. Mesa Airlines*, 1 OCAHO 74, at (1989), *available in* 1989 WL 433896, at *21–22, appeal dismissed, *Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991) ("[T]he time limitation for filing a charge of discrimination under 8 U.S.C. § 1324b(d)(3) is susceptible to equitable modification on a case by case basis.").

In determining whether to apply the judicially established doctrine of equitable tolling, ALJs look to federal court rulings regarding similar filing limitation periods under Title VII of the Civil Rights Act of 1964, as amended, supra, and under the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 et seq. See, e.g., *Rusk v. Northrop Corp.*, 4 OCAHO 607, at (1994), *available in* 1994 WL 269365, at *12; *Halim*, 3 OCAHO at 12–15 (1992), *available in* 1992 WL 535632 at *9–10; *Lundy*, 1 OCAHO 215, at 1445–46 (1990), *available in* 1990 WL 512146 at *6. The United States Court of Appeals for the Third Circuit, the circuit in which this case arises, instructs that, "In this circuit there are three principal, though not exclusive, situations where equitable tolling may be appropriate [in employment discrimination cases]: (1) [if] the defendant actively misled the plaintiff, (2) if the plaintiff has "in some extraordinary way" been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 845 (1992).

In an ADEA decision by the First Circuit, the court noted, "courts have often cited to five equitable factors that should be weighed when considering whether to allow equitable tolling in a given case. These factors are: (1) lack of actual notice of filing requirements; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." *Kale v. Combined Ins. Co. of America,* 861 F.2d 746, 752 (1st Cir. 1988).

Regarding filing limitations, the Second Circuit has noted, "Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act." *Egelston v. State University College at Genesco,* 535 F.2d 752, 755 n.4 (1976). In *Seitzinger v. Reading Hosp. & Med. Ctr.,* the Third Circuit recently held that "equitable tolling may be appropriate [in a Title VII action] when a claimant received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her." *Seitzinger,* 165 F.3d 236, 240 (1999).

The Supreme Court of the United States has set forth four situations where a Title VII filing period may be equitably modified: (1) when a claimant has received inadequate notice; (2) where a motion for appointment of counsel is pending; (3) where the court has misled the plaintiff to believe that he or she complied with the court's requirements or (4) where affirmative misconduct on the part of the defendant lulled the plaintiff into inaction. See *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 151 (1984). Additionally, the Court has ruled that equitable tolling can be extended to 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 legal rights . . ." *Irwin v. Dept. of Veterans Affairs,* 498 U.S. 89, 96 (1990).

OCAHO caselaw holds that equitable tolling is available in a limited number of circumstances—where the putative victim of discrimination asserts rights in the wrong forum, for instance, or has been actively misled by the employer. *Ocampo Soto v. Top Industrial, Inc.*, *available in* 1998 WL 746020 at *5 (citing *Udala v. New York State Dept. of Education,* 4 OCAHO 633, at 396 (1994), *available in* 1994 WL 386847 at *5 (O.C.A.H.O.).) Equitable tolling is almost never available, however, where counsel is available to a party, even when an attorney's advice is inadequate. *Salcido v. New-Way Pork*, 3 OCAHO 425, at (1992), *available in* 1992 WL 535564, at *8 (citing *Lundy*, at 11–12).

In the instant case, the Complaint was filed August 20, 1999. The OSC notice to Complainant that the 120-day investigatory period had expired was dated January 15, 1999. Although there is no indication in the record of the date on which Complainant received the letter, Complainant concedes in his letter dated June 2, 1999 that he received OSC's May 19, 1999 letter more than 120 days after he received the January 15, 1999 letter. By calculating on June 2, 1999, that 120 days had elapsed since receipt of the January 15, 1999 letter, Complainant unmistakably acknowledges that the Complaint was filed significantly more than 90 days after receipt of the OSC notification.

It is undisputed that Complainant received notice of the filing deadline. Complainant did not mistakenly file in the wrong forum, nor was he misled by the Respondent and thus lulled into inaction. Complainant is not represented by counsel.

The doctrine of equitable tolling developed as a means to prevent the shielding from redress of acts of illegal discrimination against those who diligently seek to protect their rights because of failure to satisfy procedural requirements. It is axiomatic that a complainant "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Brown*, 446 U.S. at 151. The question of Complainant's due diligence merits close scrutiny, as does the question of whether the agency or tribunal i.e., OSC and/or OCAHO, misled in notification/ correspondence to Complainant. Significantly, the Third Circuit has cautioned that "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." *Jones v. Morton, available in* 1999 WL 970797 at *5 (3rd Cir. July 27, 1999), *quoting United States v. Midgley,* 142 F.3d 174, 179 (3rd Cir. 1999).

I find insufficient basis for concluding that Complainant exercised due diligence. Far from being misled by any act or omission by OSC and/or OCAHO, Complainant waited by his own volition too long before filing his complaint. His inquiries to, and communications from, OCAHO on which Complainant relies are "after the fact"—occurring more than 30 days beyond the deadline for filing. Indeed, Complainant's pleadings and attachments provide no explanation as to why he did not comply with the 90-day statutory period, other than mention of intentions of "cooperation" with OSC's investigation. "Even coupled with pro se status, lack of knowledge of proper filing procedures does not entitle a complainant to an extension of time." *Rusk v. Northrop Corp.*, 4 OCAHO 607, at (1994), *available in* 1994 WL 269365, at *13 (citing *Cruz v. Triangle Affiliates, Inc.*, 571 F. Supp. 1218 (E.D.N.Y. 1983) "(neither pro se status nor the fact that English was a second language was sufficient to automatically invoke equitable tolling of the EEOC limitation period)").

Complainant does not assert, and nothing in the record suggests, that he was misled into his delayed filing of the complaint by either OSC or OCAHO. By his own admission he simply waited out the OSC investigation. His contacts with OCAHO as evidenced by his own statements and by the OCAHO letter of June 8, 1999, were subsequent to the conclusion of the 90 day complaint filing period of which he candidly acknowledges he received notice from OSC not later than January, 1999.

The Supreme Court instructs that the doctrine of equitable tolling does not extend to "garden variety" claims of "excusable neglect." Irwin, 498 U.S. at 96. Such is the case here.

III. *OTHER PLEADINGS*

Pleadings filed subsequent to the Complaint, the Answer, and the Reply, and not directly related to the issues of jurisdiction and the timeliness of the Complaint are as follows:

a) Letter pleading from Complainant dated October 19, 1999, containing four requests for subpoenas for production of information.

b) Letter pleading from Respondent dated October 29, 1999, objecting to Complainant's subpoena requests.

c) Letter pleading from Complainant dated November 8, 1999, in support of subpoena request.

d) Letter pleading from Respondent dated November 23, 1999 discussing documents at issue in respect of subpoena practice.

Because the retaliation claim is time barred, neither the subpoena requests nor the merits of the retaliation claim (which Complainant argues in some detail throughout his pleadings, with substantial supporting documentation) are addressed in this Final Order.

IV. *ORDER*

For the reasons discussed and set forth in this Final Order:

(1) The national origin discrimination claim is dismissed for lack of jurisdiction. Even if there were a jurisdictional basis for this claim, it would be time-barred.

(2) The retaliation claim is time-barred, and, therefore, is dismissed.

(3) All motions and other requests not disposed of above by this Final Order are dismissed.

V. *APPEAL PROCESS*

This Final Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(1). Not later than 60 days after entry, Complainant may appeal this Final Order to 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. See Title 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated and entered this 29th day of November, 1999.

Marvin H. Morse
Administrative Law Judge