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

November 19, 1999

Jorge M. Ipina,	)
Complainant,	)
	)
	) 8 U.S.C. § 1324b Proceeding
v.	) OCAHO Case No. 98B00083
	)
Michigan Jobs Commission,	)
Respondent.	)
_____	)

FINAL DECISION AND ORDER

Appearances: Jorge Mario Ipina, *pro se*
Complainant

Thomas F. Schimpf, Esquire
Assistant Attorney General, for respondent

Before: Honorable Ellen K. Thomas

I. *PROCEDURAL HISTORY*

Jorge M. Ipina filed a complaint (with several accompanying attachments) with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 5, 1998, in which he alleged that the Michigan Jobs Commission (MJC or the Commission) discriminated against him on the basis of his national origin and his citizenship status by failing to hire him as its Director of Strategic Planning, and also that MJC retaliated against him because he filed or planned to file a complaint. The Michigan Attorney General filed a timely answer on behalf of the Commission[1] (also with multiple attachments) denying the material allegations of Ipina's

[1] MJC did not raise and consequently I do not address the question of whether the doctrine of sovereign immunity would bar this action. *See generally Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381 (1998); *Detroit Edison Co. v. Michigan Dep't of Envtl. Quality,* 29 F. Supp. 2d 786, 790–91 (E.D. Mich. 1998).

complaint and pleading two affirmative defenses: first that Ipina failed to file a timely charge with the Office of Special Counsel (OSC) within 180 days after the date of the act of alleged discrimination, and second that the allegations in Ipina's OSC charge overlapped those in another charge he filed with the Equal Employment Opportunity Commission (EEOC). This action arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b.

MJC filed a motion to dismiss Ipina's complaint on the same two grounds alleged in its answer as affirmative defenses. With respect to the second of these grounds, I issued an order (unpub.) dismissing the allegations of national origin discrimination as beyond the jurisdictional authority of this office because MJC had more than 100 employees, and § 1324b(a)(2) on its face limits its national origin jurisdiction to claims of discrimination against employers of between four and fourteen persons. EEOC was thus the appropriate forum for Ipina's allegations of national origin discrimination.

I also made an inquiry to the Special Counsel as to certain facts potentially affecting the question of the timeliness of the underlying charge. OSC's response to the inquiry showed that its "deemed" filing date of June 1, 1996 is the date of the postmark on Ipina's initial mailing to that office; OSC asserts, however, that Ipina's charge was not made complete until January 5, 1998 (sic).[2] OSC subsequently sent Ipina a letter dated May 5, 1998 advising him of his right to file a complaint within 90 days of its receipt, which he did.

After the receipt of the information from the Special Counsel, I issued a Notice of Intent to Convert Motion and Inquiry (unpub.) putting the parties on notice that because each had submitted extensive materials outside the pleadings, I would treat the Motion to Dismiss as one for Summary Decision. That notice also made narrowly focused factual inquiries to both parties. In addition, because the record showed that Ipina was and had been an employee of the state of Michigan for more than 20 years, the parties were invited to supplement the evidence and brief the question of whether Ipina's nonselection for either position was in fact a failure to promote him rather than to hire him.

[2] Neither of the parties has challenged the propriety or effect of the procedures used by OSC in processing Ipina's charge, and I therefore do not address them.

Both parties filed answers to the inquiry together with additional documents, and the converted motion is ripe for decision.

II. *BACKGROUND FACTS*

The Michigan Civil Service Commission is a constitutionally created body administratively located within the Department of Civil Service (MDCS), which the Commission oversees. The Constitution provides that the Commission is responsible for making rules and regulations covering all personnel transactions and conditions of employment in the state classified service. Mich. Const. art. XI § 5. With a few exceptions not applicable to this case, the classified service includes positions in the state service regardless of the agency or component in which they are located. In addition to the rules and regulations promulgated by the Commission, the procedures used for specific personnel selections above Civil Service Level 12 are also subject to review and approval by the Michigan Equal Employment and Business Opportunity Council (MEEBOC) located in the Office of the Governor.[3]

Jorge M. Ipina is a native of Bolivia, who came to the United States in 1962, at the age of 22. He was naturalized as a United States citizen in November of 1974. According to his resume, Ipina's career in the Michigan state government began in 1976 when he left the private sector to become an economic affairs specialist for the Department of Management and Budget, Office of Intergovernmental Relations. He managed research and data standardization, then moved to a job where he was in charge of grants, contracts, and support for Bureau of Community Services in the Department of Labor, followed by a position in the same Department as a contract officer, in which capacity he was employed from 1979 until March 1992. At that time, certain functions of the Departments of Labor and Commerce were transferred by Executive Order to the Michigan Jobs Commission (MJC). From March of 1992 until April of 1995, Ipina was the state coordinator for MJC's Office of Workforce Development. In March of 1995, a number of employees, including Ipina, were transferred to the Michigan Family Independence Agency, one of 19 principal departments of the Michigan State Government. Ipina's resume reflects

[3] MEEBOC (formerly MEEOC) was most recently reestablished by Executive Order. *See* Michigan Equal Employment and Business Opportunity Council, Exec. Order No. 1994–16 (1994) (available at http://www.state.mi.us/migov/gov/ExecutiveOrders/index.htm). *Victorson v. Dep't of Treasury*, 482 N.W. 2d 685, 689 n.9 (Mich. 1992) sets out its history.

that he has been employed since April of 1995 in the Michigan Department of Social Services, Office of Financial Assistance Programs, Energy, Housing, and Emergency Programs Division, as a Procurement Officer. According to MJC, this job is classified at the Civil Service 9 level.

The Michigan Jobs Commission (MJC) is another of the 19 principal departments of the Michigan state government. On November 25, 1995, MJC appointed a new Director of Strategic Planning, a position classified by the Department of Civil Service as State Office Administrator 17, for which Jorge M. Ipina had been one of the applicants. Ipina was notified by letter dated November 13, 1995 that he was not among the candidates selected to be interviewed for this job. On or about January 30, 1996, MJC selected a new Director of Policy Development, another position classified at the State Office Administrator 17 level, for which Ipina had also been one of the applicants. Ipina was notified by letter dated January 7, 1996 that he was not selected for interview for this job either. The final selectee for the Strategic Planning directorship was a white male, and the final selectee for the Policy Development directorship was a black female.[4]

Ipina thereafter filed a charge with the Michigan Department of Civil Rights dated May 20, 1996, in which he alleged that MJC discriminated against him in hiring based on his age, his national origin and his handicap. He also filed the OSC charge "deemed" filed on June 1, 1996 and completed on January 5, 1998, alleging that he was not hired by MJC on the basis of his citizenship and national origin and that he was retaliated against. On June 13, 1996, he filed a third charge, this one with EEOC, alleging that MJC discriminated against him because of his age and his disability.

It appears undisputed that Ipina initially filed his OSC charge more than 180 days after MJC selected a different candidate as its new Director of Strategic Planning and that, absent grounds for waiver, estoppel or equitable tolling, a complaint based on that selection is time barred. INA expressly provides that "no complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C.

[4] Although one of the documents submitted identified the selectee for this position as a white female, this is an error.

§ 1324b(d)(3). However, Ipina's charge *was* filed within 180 days after MJC selected the new Director of Policy Development, another position for which he had applied.

III. *THE INQUIRIES AND RESPONSES*

A. *Inquiry to MJC*

I made an inquiry to MJC about the specific steps it took and procedures it used in filling the Policy Development job because most of the information already in the record related to the selection of the Director for Strategic Planning, an event which occurred more than 180 days prior to the filing of Ipina's charge, and there was little information about the second job. MJC submitted documents setting out the selection plan and selection criteria for the Policy Development directorship, a job description, a work force utilization analysis, candidate comparisons, and the resume of the person selected, as well as other documents.

According to MJC, the Policy Development position was classified as State Office Administrator 17, and 74 persons on the state employment lists were initially contacted about the opening, 16 of whom indicated interest. An initial screening process selected eight of the candidates to be interviewed, but two withdrew before the interviews so that only six candidates were actually interviewed by the three member interview panel. The panel then made its recommendation for the selection of a particular applicant. Final approval of the panel's recommended selection was made by both the Civil Service Commission and by MEEBOC.

The screening process consisted of identification of five areas of work experience related to the job, and analysis of the work history of each of the 16 applicants in each of those five areas. MJC stated that applicants were selected for interview only if they had experience in three or more of the five areas. According to the scoring matrix submitted, Ipina's work history showed he had experience in only two of the five categories; thus he was not among the candidates selected for an interview. The candidate ultimately selected had experience in each of the five categories.

B. *Inquiries to Ipina*

The inquiry to Ipina posed two separate questions: the first as to the specific way in which he believed his citizenship status

was a factor in his nonselection for either directorship, and second, what specific conduct of his gave rise to what specific acts of retaliation. Ipina's response stated that he had previously filed a charge with OSC in August of 1988 against the Local Development Services Bureau,[5] an entity which was at that time part of the Department of Commerce, but which was later transferred to MJC. In that charge, Ipina complained of his nonselection as Director of the Center of Local Economic Competitiveness (Economic/Community Development Manager). He said that the charge was later dismissed as untimely filed, so the merits were not addressed. Ipina stated further that since filing the charge, he has been discriminated against and retaliated against numerous times by being rejected for a series of subsequent appointments: in 1993 he applied but was not selected for the position of Director of Operations for MJC; from 1993 to 1995 he sought opportunities on numerous occasions to become an Account Manager but was not selected although others with less experience were selected; in March of 1995 he was involuntarily transferred to the Family Independence Agency while others were kept at MJC; in October of 1997 he was rejected for jobs as Economic Development Manager 15 and Departmental Manager, all in addition to his not being considered seriously for the Strategic Planning and Policy Development directorships.

C. *Inquiry to Both Parties*

Both parties were requested to address the question of whether Ipina was seeking to be hired or to be promoted because jurisdiction of administrative law judges over allegations of immigration-related unfair employment practices is specifically limited by the terms of the governing statute to acts related to the hiring, recruitment, referral or discharge of employees. 8 U.S.C. § 1324b(a)(1). Unlike Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e –2(a)(1), the INA does not encompass acts of discrimination with respect to promotions or other terms, conditions, or privileges of employment such as compensation, transfers, shift assignments, discipline, and the like. Administrative bodies, like courts created by statute, can have no jurisdiction but such

[5] His letter to OSC dated October 7, 1996 appears to state that he filed this charge in 1987. Ipina also filed at least one other OSC charge, dated May 10, 1990, alleging that the Michigan Employment Security Commission (MESC) failed to hire him as its treasurer because of his citizenship status. This charge was the basis for a prior OCAHO complaint. *See Ipina v. Michigan Dep't of Labor*, 2 OCAHO 386 (1991) (Ipina I).

as the governing statute confers. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). Therefore, if Ipina's complaint is really about the denial of a promotion, his complaint should be dismissed for want of jurisdiction. MJC argued in response to this inquiry that because the Michigan Civil Service Commission has broad plenary powers over all aspects of state classified employment, the definitions contained in its rules and regulations provide the appropriate measure of whether the employment practice complained of was a failure to hire or a failure to promote. These rules provide that the term "hire" means "the initial appointment of an applicant to a position in the state classified service," while the term "promotion" is defined as "the appointment of an employee to a different position at a higher level." Civil Service Rules 3–1.1 *et sequitur*. MJC pointed out that Ipina has been employed in the state classified service for more than 20 years. His current job is classified at the Civil Service 9 Level, and he was applying for appointment to a different position at Civil Service Level 17, a higher level, thus satisfying the rule's definition of "promotion." It notes further that the paperwork for both directorships shows the appointment of individuals already in civil service status for "permanent promotion." These individuals were not, in other words, treated as new hires, and the same would have been true for Ipina had he been selected.

Ipina argued that while all appointments are subject to civil service rules, Michigan state departments are otherwise autonomous in making personnel decisions and that if selected he would have been newly hired into MJC because he is not currently an employee of that department. Since both of the individuals selected for the directorships were already employees of MJC, the fact that their paperwork indicates they were promoted is not necessarily dispositive of whether Ipina's selection would have been a new hire or a promotion. Ipina says the Michigan Department of Civil Rights treated the selection as a hire, citing to his attached exhibits.

Although OCAHO jurisprudence has rarely addressed the issue, the distinction was recognized in an earlier case in which Ipina was also the complainant, this time against another agency of Michigan's state government. *See* Ipina I, 2 OCAHO 386, at 719.[6]

[6] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* and Volumes 3 through 7, *Administrative Decisions Under*

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Ipina's complaint against the Employment Security Commission (MESC), a component of the Department of Labor, alleged that MESC discriminated against him on the basis of his citizenship and national origin when it failed to hire him for a position as its temporary treasurer in 1989. As was observed in that case,

> It could be argued that, as an employee of the State of Michigan since 1976, complainant should more properly have charged respondent with having failed to promote him to the position of MESC treasurer, rather than having alleged that respondent failed to hire him for that position per se.

2 OCAHO 386, at 720.

The complaint was nevertheless treated as one presenting a hiring case "in order to allow complainant the widest measure of administrative review," *id.*, so the issue was not specifically resolved. Similarly, in *Fayyaz v. Sheraton Corp.*, 1 OCAHO 152, at 1083 (1990), the distinction was recognized and the question raised as to whether the facts complained of constituted a failure to hire or a failure to promote or transfer the complainant, but the case was ultimately resolved on other grounds.

IV. *APPLICABLE LAW*

A. *Standards for Summary Decision*

OCAHO rules[7] set forth the relative burdens of production for ruling on a motion for summary decision, 28 C.F.R. § 68.38(c), and case law applying those rules has generally been consistent with that in the federal district courts. An administrative law judge may enter a summary decision in favor of either party if the pleadings, affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. *See Id.* OCAHO jurisprudence looks to federal case law for guidance in determining when a summary decision is appropriate. *United States v. Candlelight Inn*, 4 OCAHO 611, at 222 (1994).

Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

[7] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. § 68 (1999).

A party seeking summary disposition of a case has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When a motion for summary decision is made and supported as provided in the rules, the opposing party may not rest upon mere allegations or denials in a pleading, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b). An issue of fact is genuine only if it has a real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

In order to withstand a motion for summary decision a non-moving party is thus required to produce some evidence, direct or inferential, respecting every element necessary to that party's case upon which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. While all reasonable inferences are to be drawn in favor of the nonmoving party, summary judgment will nevertheless issue where there are no specific facts shown which raise a contested material factual issue. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment is appropriate. *Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992).

B. *Standards for a Prima Facie Showing of Discrimination or Retaliation*

Disparate or differential treatment is the essence of a discrimination claim. In the words of the Supreme Court, referring to the discrimination prohibited by Title VII: "The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Where citizenship status is the forbidden criterion, as Ipina says it was here, there must be some factual basis to believe that the individual is being treated less favorably than others because of his citizenship status.

As in any lawsuit, a complainant may prove his case either by direct or circumstantial evidence. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). A *prima facie* case of employment discrimination or retaliation may be made either by direct evidence, or by the use of a paradigm developed in a long line of cases beginning with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in which the Supreme Court has

set out the framework for disparate treatment analysis. Because an employer's state of mind is seldom susceptible to direct proof, circumstantial evidence is the customary way of creating inferences of a discriminatory motive.

As set forth by the Sixth Circuit, in which Ipina's claim arises, all a job applicant must do to present a *prima facie* case of hiring discrimination is to show that 1) he is a member of a protected class, 2) he was qualified for the job, 3) he suffered an adverse decision, and 4) he was treated differently than similarly situated individuals outside the protected class. *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1166, *amended on other grounds*, 97 F.3d 833 (6th Cir. 1996). Only if a *prima facie* case has been set out does the burden of production shift to the employer to articulate a legitimate nondiscriminatory reason for the employment decision. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once the employer does articulate such a reason, the complainant must, in order to prevail, prove that the employer's reason is a pretext for prohibited discrimination. *Tinker v. Sears, Roebuck & Co,*, 127 F.3d 519, 523 (6th Cir. 1997). The ultimate burden of proving that the defendant intentionally discriminated against the plaintiff remains at all times on the plaintiff. *Burdine*, 450 U.S. at 253. In addition to prohibiting discrimination in hiring, referring, recruiting and firing employees, INA also directs that an employer may not retaliate against any person because that individual has filed a charge or a complaint of discrimination. 8 U.S.C. § 1324b(a)(5). In order to establish a *prima facie* retaliation case under § 1324b, OCAHO cases have utilized a four-prong test: an individual must show facts which reflect 1) participation in some protected conduct, 2) the employer's awareness of the conduct, 3) adverse treatment of the individual after the protected conduct, and 4) a causal connection between the protected conduct and the adverse action. *United States v. Hotel Martha Washington Corp.*, 5 OCAHO 786, at 537 (1995); *Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO 624, at 323 (1994). *See also Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 343 (6th Cir. 1998) (citing *Johnson v. United States Dep't of Health and Human Servs.*, 30 F.3d 45, 47 (6th Cir. 1994))[8]. The same shifting of burdens as in any

[8] Applicable circuit law has sometimes described the burden in a retaliation case as involving three prongs: 1) the employee engaged in producted conduct, 2) an adverse employment decision occured, and 3) there was a casual connection between the protected act and the adverse employment decision. *Williams v. The Nashville Network*, 132 F.3d 1123, 1131 (6th Cir. 1997) (evidently treating the element of the employer's knowledge of the prior charge as component of the element of causation).

discrimination case applies as well to a case of alleged retaliation. *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1986). Thus it is only when a *prima facie* case is shown that the burden of production shifts to the employer to produce a nondiscriminatory reason for the adverse action. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). If the employer does so, the complainant must then show that the reason is pretextual and that the real motive was retaliation. As with any other discrimination case, the burden of proof on the ultimate issue remains at all times on the complaining party.

In contrast to the typical hiring case, a retaliation case ordinarily begins with an existing employment relationship. *See generally* Lex K. Larson, Employment Discrimination, 2nd ed. 1997, § 35.02. Typical acts by an employer which give rise to claims of retaliation have thus included reprimands, surveillance, interrogation, harassment, denial of overtime, layoff, denial of promotion, or other acts which customarily take place in the context of an employment relationship. *See, e.g., Coleman v.Wayne State University*, 664 F.Supp. 1082 (E.D. Mich. 1987). A retaliatory refusal to hire is exceptional because a prospective employee does not in the ordinary course have any previous relationship with the new employer. Nevertheless, refusal to hire may be found retaliatory where the parties have had some previous relationship, or where the facts otherwise support such a finding. *See, e.g., Story v. City of Sparta Police Dep't*, 667 F.Supp. 1164, 1172 (M.D.Tenn. 1987).

V. *DISCUSSION*

A. *Temporal Scope of Acts Considered*

A discriminatory act which is not made the basis for a timely charge is merely an "unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Absent some grounds for equitable tolling there is no basis for relieving Ipina from the obligation of filing a timely charge with OSC. Although Ipina did not raise an argument for equitable tolling, I have nevertheless reviewed the circumstances in which the Sixth Circuit found such tolling appropriate and am satisfied that they have no application to this case. Case law in the circuit has identified five factors to consider in assessing the appropriateness of equitable tolling. They are not present here. Those factors are: 1) lack of actual notice of the filing requirement, 2) lack of constructive knowledge of the filing

requirement, 3) diligence in pursuing one's rights, 4) the absence of prejudice to the defendant, and 5) a plaintiff's reasonableness in remaining ignorant of the notice (sic) requirement. *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1094 (6th Cir.), *cert. denied*, 519 U.S. 963 (1996).

Because the record demonstrates that Ipina was promptly notified on November 13, 1995 that he would not be interviewed for the directorship of Strategic Planning and the selection was made shortly thereafter, he had to have been aware that the decision against him had been made, yet he waited until June 1, 1996 to file his charge with OSC. There is no showing that any part of OSC's delay until January 5, 1998 in completing his charge was attributable to Ipina, and I do not consider this delay for purposes of assessing the degree of his diligence. The record reflects that Ipina has filed other charges with OSC on at least two prior occasions, one in 1988 (or 1987)[9] against the Local Development Services Bureau and one in 1990 against MESC. Each of these charges was ultimately dismissed as untimely filed. In light of this history, there is no way Ipina can claim ignorance of OSC's existence or its filing requirements.

Equitable tolling is not appropriate where an individual has actual or constructive notice of his rights. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 579–80 (6th Cir. 1992). Because Ipina failed to exercise reasonable diligence in pursuing his claim with OSC in a timely manner after he knew of the final selection of a Director of Strategic Planning, consideration of his allegations will be limited to those events which occurred within the 180 day period prior to the filing of his OSC charge. The Sixth Circuit has made abundantly clear that an aggrieved individual aware of his general rights will not be permitted to sit on those rights until he leisurely decides to take action, *id.* at 580, and that lack of diligence defeats equitable tolling. *Cantrell v. Knoxville Community Dev. Corp.*, 60 F.3d 1177, 1180 (6th Cir. 1995). This result is not altered by Ipina's *pro se* status. *See. e.g., Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991); *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *Brock v. Hendershott*, 840 F.2d 339, 342–43 (6th Cir. 1988).

There is another narrow and limited circumstance under which a complainant may sometimes escape the strictures of the general

[9] *See supra* note 5.

rule that the statutory limitation is triggered when the alleged discriminatory act occurs. The Sixth Circuit has recognized two narrow categories of so-called continuing violations. *See, e.g.*, *EEOC v. Penton Indus. Pub. Co.*, 851 F.2d 835, 837–38 (6th Cir. 1988); *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982). The first consists of presently ongoing actions, where, for example, an employer continues to give unequal pay for equal work, or to impose disparate work assignments between otherwise similarly situated groups of employees. The second involves the maintenance of a system of hiring or placement which incorporates a "longstanding and demonstrable policy of discrimination." *Dixon v. Anderson*, 928 F.2d 212, 217 (6th Cir. 1991). For example, in *Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 827 (6th Cir. 1981), the defendant company maintained a stated policy of hiring only men, not women, at a particular plant, and it refused to give employment applications to women. The company's failure to consider Mrs. Roberts for employment or to respond to her repeated inquiries was held to constitute a continuing violation based on an "overarching policy." *Cf. Dixon* 928 F.2d at 217 (allegedly discriminatory policy at issue appeared in the Ohio Revised Code); *Conlin v. Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989) (policy appeared in Michigan's affirmative action plan).

Ordinarily a single discrete act, such as a discharge, a layoff, a failure to hire or to promote, or even a series of unrelated individual incidents, will not suffice to invoke the exception. *Haithcock v. Frank*, 958 F.2d 671, 677–78 (6th Cir. 1992); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 948 (6th Cir. 1987). Discrete acts of hiring or firing employees are single events, each of which is completed at the time it occurs. Because a refusal to hire is not normally an ongoing event, it will not ordinarily suffice to resurrect old and unrelated claims or to keep a limitations period open. *Kresnak v. City of Muskegon Heights*, 956 F.Supp. 1327, 1333 (W.D.Mich. 1997) (citing *Dixon* 928 F.2d at 212). Otherwise, no hiring complaint would ever be time barred, if it could be revived simply by applying for a different job.

Ipina's case is not of such character as to qualify under either theory of continuing violation. While his response to the inquiry appears superficially to claim an ongoing course of conduct by enumerating various acts over a period of years (some of which acts have already been the subject of other administrative proceedings), there has been no showing of a nexus between the selection of a Director of Policy Development and any of the other

events alleged because it was not shown that the selection of the Director was made by the same decisionmakers who made any of the other selections, or that MJC had any "overarching policy" pursuant to which the selection was made, or that the selection was otherwise so related to the other events complained of as to constitute a continuous course of conduct. Consideration of Ipina's allegations will accordingly be limited to the selection of the Director of Policy Development.

B. *Ipina's Allegations Considered*

The first inquiry to Ipina was made in order to ascertain the factual basis for his claims of citizenship status discrimination and retaliation because the complaint and accompanying materials nowhere showed specific facts from which a nexus between Ipina's United States citizenship and his nonselection for interview could be inferred, or which could support a claim of retaliation.

A party opposing summary decision may not rest on conclusory statements, but must set forth specific facts and present affirmative evidence to support its position. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989); *United States v. Alvand, Inc.*, 1 OCAHO 296, at 1959 (1991). Nowhere in any of the materials Ipina submitted in response to the inquiry were there facts shown from which any reasonable factfinder could draw an inference either that Ipina's United States citizenship was a factor in the selection process or that his nonselection was motivated by retaliation. Contrary to Ipina's view, the fact that he has filed a number of previous charges about other positions does not by itself establish either discrimination or retaliation on MJC's part.

1. *Citizenship Status Discrimination*

Instead of providing a more definite statement of specific facts in response to the question as to why he believed his citizenship status was related to his nonselection, Ipina simply listed a series of other previous complaints and charges he had made in the past against MJC and the Department of Labor, and asserted that all the employment decisions he identified were the result of discriminatory and retaliatory motives. No specific facts were put forth which related to MJC's selection of a director of Policy Development. In fact, Ipina's response to the inquiry did not even mention the citizenship status of the person who was selected for this position. Exhibits accompanying MJC's response indicate,

however, that the new Director of Policy Development was, like Ipina, a United States citizen. To avoid a summary decision, Ipina was obligated to demonstrate with "concrete evidence" that there is a genuine factual issue, *Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir. 1993), because a nonmoving party is not entitled to a trial merely on the basis of his allegations. *Damron v. Yellow Freight Sys., Inc.*, 18 F.Supp. 2d 812, 817 (E.D. Tenn. 1998). Ipina's evidence failed to show that a person having a citizenship status different from his own was treated more favorably than he was, and was therefore insufficient to establish the fourth prong of his *prima facie* case because there is simply no evidence whatever that Ipina was treated differently from any nonmember of his protected class.

Attachments to Ipina's complaint indicate that he had told OSC in a letter dated October 7, 1996 in response to their inquiry as to why he believed his citizenship was a factor in his nonselection, that he had a foreign accent so others could tell that he is foreign born, and that he had been told in 1987 that he was a poor communicator. The latter assertion is further elaborated in a memorandum dated August 21, 1989 (attached as Exhibit I to Ipina's response to the inquiry). The document reflects that a hearing was held on March 14, 1989 regarding a grievance Ipina, then employed by the Department of Labor, had filed against the Department of Commerce (Case No. SPD 003–89), evidently based on the fact that he was not interviewed for a position in the Commerce Department.[10] The document is on the letterhead of the Civil Service Commission's Bureau of Labor Relations and states, inter alia,

> He claimed that in February, 1988, the Department of Commerce labor relations representative told him that he was not selected because he was "a poor communicator; rebellious and insubordinate; did not have enough knowledge of economics; did not possess enough area expertise for a (sic) X level position." The Department's representative denies having made such statements to the grievant.

Assuming, *arguendo*, that the statement described was actually made, there is no showing either that the labor relations representative for the Commerce Department was connected to or communicated with anyone at MJC, or for that matter, that the statement has any demonstrable connection to Ipina's United States citizenship status. Being a poor communicator or having an insubordinate

[10] For reasons which are unexplained, only pages 1, 3 and 5 of the memo were included. The particular job at issue was not identified on any of these pages.

attitude is unrelated to a person's citizenship status. Similarly, while a "foreign" accent may be suggestive of a person's national origin, Ipina has suggested no reason why it would bear any necessary relation to his citizenship status.

In a brief Ipina filed with OSC he alleged that he was discriminated against because he was a naturalized rather than a native born citizen, an argument he has not specifically raised in this forum. If Ipina intends to suggest that he was not considered because of his own or his ancestors' country of origin, or because he has physical, cultural or linguistic characteristics related to a particular national origin, such a view does not state a claim based on citizenship status but rather on national origin. *See generally Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (explaining the distinction between citizenship and national origin). In the absence of facts to support Ipina's assertion that his citizenship was a factor, that assertion amounts to no more than his speculative conclusion about MJC's motives and cannot serve to overcome a motion for summary decision.

With respect to the selection of the Director of Policy Development, moreover, MJC produced evidence demonstrating a legitimate, objective, nondiscriminatory reason for Ipina's nonselection for interview and showing why he did not pass the initial screening. Ipina did not present a scintilla of evidence which remotely suggested that MJC's proffered reason was pretextual or unworthy of credence. In order to challenge MJC's explanation successfully, Ipina would have to present some evidence from which it reasonably could be inferred that 1) MJC's proffered reason has no basis in fact, 2) MJC's proffered reason did not actually motivate MJC, or 3) MJC's proffered reason was insufficient to motivate the adverse decision. *Tinker*, 127 F.3d at 523; *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 834 (6th Cir. 1997). Ipina's evidence shows nothing of the kind.

Exhibit II accompanying Ipina's response to the inquiry consists of a request dated March 4, 1999 addressed to the state Department of Civil Rights, asking for reconsideration in Case No. 150828-EM09, evidently related to the charge Ipina filed claiming that his nonselection for both the Strategic Planning and the Policy Development directorships was motivated by his national origin, his age, and the fact that he had a physical handicap. The request challenges the adequacy of the Department's investigation and its findings of nondiscrimination. The challenged analysis included a

statement that "In regards (sic) to the Director of Policy Development and Planning, claimant had an opportunity to review the resume and qualifications of the selected applicant and although he still believes he was more qualified than she for the position, he failed to express in what areas he was more qualified." The investigator's analysis further noted that "The Investigator compared the successful applicant's experience with that of the claimant's (sic) and she appeared more qualified for the position."

There, as here, Ipina furnished no basis for his belief that he was better qualified than the person selected. The screening criteria appear to be objective and the agency was free to decide what qualifications were necessary. Like the investigator, I reviewed the resume of the candidate selected, and find, notwithstanding Ipina's view of the relative qualifications, that her credentials are outstanding, including degrees from Princeton University, University of Michigan, Michigan State University and Thomas Cooley School of Law as well as an impressive employment history with the Michigan state government.

The point, however, is not the investigator's opinion, or my opinion, or Ipina's opinion about the relative qualifications of the candidates, but the judgment of the employer. Federal antidiscrimination laws were not intended to diminish traditional management prerogatives to select freely among qualified candidates for a position. *See, e.g., McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). *Cf. United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979) (federal employment discrimination laws designed not to impinge on employer free choice); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (same). This is especially true with respect to the selection of management level employees. *See Wrenn*, 808 F.2d at 502 (citing cases). No evidence was presented which cast doubt on MJC's explanation of its decision. MJC appears in fact to have selected the best qualified candidate, and Ipina failed to produce any evidence from which it could be inferred that MJC's explanation for the selection of another candidate was pretextual or otherwise unworthy of credence.

2. *Retaliation*

Ipina also asserted without more that his nonselection for various positions since 1993 was attributable to his filing the 1988 OSC charge against MJC's predecessor agency. It is beyond cavil that the filing of a charge with OSC is a quintessentially protected

activity under § 1324b and that Ipina thus satisfied the first prong of his burden of proof for a retaliation claim. Nowhere, however, did Ipina suggest or assert that any of the individuals involved in the events complained of in his 1988 charge were the same people who were involved in the selection process for the Director of Policy Development or for any of the other positions he was not appointed to. None of the decisionmakers for the other challenged selections was identified by name,[11] and the only allegedly discriminatory statement he referred to was one he claimed was actually made by an unidentified representative of the Department of Commerce. There is thus no evidence whatever that any of the individuals involved in the selection of the Director of Policy Development even knew about Ipina's 1988 OSC charge. It is Ipina's burden to show at a minimum that the decisionmaker(s) knew of his protected conduct. *Bartlik v. United States Dep't of Labor*, 73 F.3d 100, 102 (6th Cir. 1996); *Anthony v. TRW, Inc.*, 726 F. Supp. 175, 179 (N.D. Ohio 1989). He made no such showing.

MJC, like any other artificial person, can act or have knowledge and motivation only through its authorized agents. *United States v. Paccione*, 949 F.2d 1183, 1200 (2nd Cir. 1991) *cert. denied* 505 U.S. 1220 (1992); *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 99 (2nd Cir.), *cert. denied*, 462 U.S. 1131 (1983). It is thus not meaningful to assert that "MJC" knew of Ipina's charge. Beyond Ipina's bare assertion of retaliatory motivation, there is nothing in the record to suggest that the persons who did the screening for or made the final selection of the Director of Policy Development were aware of Ipina's 1988 charge, or that they considered it in the selection process. In *Patterson v. City of Dyersburg*, 39 F.E.P. Cases 256 (W.D. Tenn. 1985), 1985 WL 56682, at *9 (W.D. Tenn. Sept. 24, 1985), where the Acting Mayor and some other city officials knew of the plaintiff's prior charge but there was no showing that the person who actually made the challenged employment decision to eliminate the plaintiff's job was aware of it, it was found that the plaintiff failed to carry her burden of proof with respect to showing the second prong of a claim of retaliation. The motivation or comments of persons who neither made nor contributed to a challenged personnel decision are not relevant to the question of discrimination. *Allen v. Inger-*

[11] Although MJC provided the names of the three member interview panel for the Policy Development job, the name(s) of the person or persons who performed the initial screening did not appear in any of the documents submitted. The interview panel may also have done the screening, but that fact does not affirmatively appear in the record.

soll-Rand Company, No. 1:96-CV-G-M, 1997 WL 579140, at *10 (W.D. Ky. June 17, 1997). The question is not whether some person employed somewhere in the Michigan state government knew about Ipina's earlier charge, it is whether the relevant individuals who made the challenged employment decision had that knowledge.

More importantly, there has been in any event no sufficient evidentiary showing under any ordinary principles of proof to raise an inference of a causal relationship between Ipina's 1988 charge against a predecessor agency and his nonselection by MJC for the position of Director of Policy Development. Ipina has presented no circumstantial or other evidence of sufficient probative force to raise a genuine factual issue as to causation, the fourth element of his *prima facie* case.

A causal connection may be inferred from a variety of factual demonstrations. One of the most significant circumstances giving rise to such an inference is the degree of proximity in time of the adverse action to the protected act. *See Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986). The longer the interval between the protected conduct and the alleged retaliatory act, the more attenuated any possible causal link becomes. Where months or years go by between the protected conduct and the alleged retaliatory act, no causal link can readily be established. *Reeves v. Digital Equip. Corp.*, 710 F.Supp. 675, 677 (N.D. Ohio 1989). Identity of the decisionmakers, as noted previously, is another factor for consideration. A third circumstance which may lend support to an inference of retaliation is a significant difference in the treatment of the individual as to the terms and conditions of employment before and after the filing of the charge, for example, the person is fired, or downgraded, or transferred to another less desirable shift. *See, e.g.*, *Williams*, 132 F.3d at 1132 (before his EEOC complaint was filed, the plaintiff's applications for promotion were always forwarded for further consideration; after the charge his new application was not forwarded). Where there is no difference in the employer's treatment of the person after the charge is filed, the opposite inference arises. Thus in *Cooper*, where the discharged employee had been cited for rules violations on nine occasions in the four months following the filing of his charge, but was also cited six times in the seven months *before* he filed the charge, no significant difference in his treatment was shown before and after the charge, and thus no inference of retaliation could be drawn. 795 F.2d at 1272.

The record here reflects no discernable change in Ipina's employment status after he filed the 1988 charge, and no difference between the conduct of the parties before and after the filing of the charge. Ipina's employment status evidently remained the same; nothing in the record suggests that he was downgraded, disciplined, laid off or otherwise adversely affected, notwithstanding that he seems to have been, since at least 1982,[12] a particularly litigious employee. The record reflects that Ipina has been filing complaints and charges with a variety of agencies including EEOC, the state Civil Service Commission, the state Department of Civil Rights, and OSC about his nonselection by unidentified individuals for a variety of jobs in different components of the Michigan state government. These charges have attributed the same employment decisions to a variety of different motives, including discrimination based on handicap status, age, national origin, citizenship and retaliation. None of Ipina's charges appears to have been sustained, and there is no apparent reason to single out his 1988 OSC charge, any more than one of the others, as a basis for the claimed retaliation.

Ultimately, in order to find that retaliation occurred, there must be some reason to believe that but for the protected activity, the adverse employment decision would not have taken place. In this case, that means there must be some basis to believe that but for Ipina's 1988 OSC charge, he would have been interviewed for and/or selected as the new Director of Policy Development. There is simply no basis in this record for such a conclusion.

Because Ipina failed to establish a *prima facie* case of either citizenship status discrimination or retaliation, it is unnecessary to resolve the issue of whether he was seeking to be hired or to be promoted.

FINDINGS AND CONCLUSIONS

I have considered the pleadings, motions, evidence, memoranda, briefs and arguments submitted by the parties on the basis of

[12] The earliest of Ipina's charges appearing in the record dates from 1982 when a settlement was entered under the auspices of the Equal Employment Opportunity Commission (EEOC) resolving a charge Ipina had filed against the Department of Labor. In a brief filed with the complaint in the instant case, Ipina acknowledged that he had earlier signed at least two grievance settlements with the Department of Labor.

which I make the findings and conclusions which follow. All motions and requests not previously disposed of are denied.

I find that:

1. Jorge M. Ipina is a native of Bolivia.

2. Jorge M. Ipina was naturalized as a United States citizen in November of 1974.

3. At all times relevant to this action, Jorge M. Ipina has been an employee of the Michigan state government.

4. Respondent Michigan Jobs Commission (MJC) is one of 19 principal departments of the Michigan state government.

5. In 1995, MJC announced openings and solicited applications for a Director of Strategic Planning and a Director of Policy Development.

6. Jorge M. Ipina applied for MJC's Directorships of Strategic Planning and of Policy Development.

7. Jorge M. Ipina was qualified for the positions of Director of Strategic Planning and Director of Policy Development.

8. MJC selected a new Director of Strategic Planning on November 25, 1995.

9. MJC selected a new Director of Policy Development on or about January 30, 1996.

10. The person selected as MJC's Director of Policy Development was a citizen of the United States.

11. Jorge M. Ipina filed a discrimination charge against the Michigan Jobs Commission with the Office of Special Counsel for Immigration-Related Unfair Employment Practices complaining of his nonselection as MJC's Director of Strategic Planning.

12. Ipina's charge was deemed filed on June 1, 1996, the date of the postmark on his initial mailing to that office.

13. Ipina's charge was filed more than 180 days after MJC's selection of a Director of Strategic Planning, but fewer than 180 days after MJC selected its Director of Policy Development.

14. OSC sent Ipina a letter dated May 5, 1998, advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days of his receipt of the letter.

15. Ipina's complaint was filed on August 5, 1998.

16. Neither Ipina's citizenship status nor the citizenship status of the selectee was a factor in the selection of MJC's new Director of Policy Development.

17. MJC's reason for the selection of another person as its Director of Policy Development was its belief that the selectee was the best qualified candidate for the position.

18. Ipina filed a previous charge of discrimination with OSC against another component of the Michigan state government in 1987 or 1988.

19. There was no showing that the individual[s] who selected MJC's Director of Policy Development knew about Ipina's previous OSC charge.

20. No causal relationship was established between the filing of Ipina's prior OSC charge and his nonselection as MJC's Director of Policy Development.

I conclude:

1. Jorge M. Ipina is a protected individual within the meaning of § 1324b.

2. All conditions precedent to the commencement of this action have been satisfied.

3. Ipina failed to file a timely charge with OSC with respect to MJC's selection of a Director of Strategic Planning.

4. No facts have been stated which warrant the application of waiver, estoppel or equitable tolling of the OSC filing deadline.

5. Ipina's charge was timely filed with respect to the position of Director of Policy Development.

6. Ipina failed to establish facts sufficient to raise a genuine issue of material fact as to the fourth element of his *prima facie* case based on citizenship discrimination in the selection of a Director of Policy Development.

7. Ipina failed to establish facts sufficient to raise a genuine issue of material fact as to the second and fourth elements of a *prima facie* case based on retaliation.

8. MJC proffered a legitimate nondiscriminatory reason for its selection of another individual as its Director of Policy Development.

9. Ipina made no showing that MJC engaged in any violations of 8 U.S.C. § 1324b in its selection of a new Director of Policy Development.

10. To the extent any statement of material fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of material fact, the same is so denominated as if set forth herein as such.

ORDER

Ipina's complaint should be, and it hereby is, dismissed.

SO ORDERED.

Dated and entered this 19th day of November, 1999.

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)(1), 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.