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

March 23, 2018

BIENVENIDO ANTONIO THOMPSON, Complainant	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 17B00036
PRESTIGE TOWING SERVICES[1] Respondent	)	

FINAL ORDER OF DISMISSAL

This is an action arising under the anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2017). The undersigned has been assigned this case for adjudication. The complaint will be **DISMISSED** because the charge was submitted more than 180-days after the alleged discriminatory act, and thus not in compliance with 8 U.S.C. § 1324b(d)(3). There is also no discretionary basis for equitably tolling the statute of limitations.

I. THE CHARGE

On July 29, 2016, Bienvenido Antonio Thompson, a citizen and native from the Dominican Republic and a United States lawful permanent resident (LPR), filed a discrimination charge with the Department of Justice's Immigrant and Employee Rights Section (IER) against Prestige Towing Services (Prestige). The charge alleged that on March 26, 2013,[2] Rafael Garcia from

[1] In his OCAHO complaint, Mr. Thompson referred to Prestige as "Prestige Mercedes Auto Body and Sales, LLC." *See* OCAHO Complaint at 6. During a July 25, 2017 conference call, the parties agreed that Respondent's correct name is "Prestige Towing Services." The case title and caption has been amended to reflect this change.

[2] During the telephonic prehearing conference call held on July 25, 2017, Thompson stated that Prestige terminated him on April 18, 2013. The difference in dates is immaterial in light of my disposition herein.

Prestige terminated Thompson because of his national origin and in retaliation for Thompson's opposition to the system of pay allegedly used by Prestige, which is also allegedly used in the Dominican Republic. Both Thompson and Prestige appear pro se.[3]

By letter dated October 17, 2016, IER dismissed the charge as time barred under the 180-day statute of limitations set forth in 8 U.S.C. § 1324b(d)(3). *See* IER, Letter of Determination (Oct. 17, 2016) (citing 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 44.301(d)(1)).[4] Section 1324b(d)(3) of title 8 U.S.C. states, in part: "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 [IER]." 28 C.F.R. § 44.301(g) requires that IER "dismiss a charge or inadequate submission that is filed more than 180 days after the alleged occurrence of an unfair immigration-related employment practice, unless [IER] determines that the principles of waiver, estoppel, or equitable tolling apply." IER further informed Thompson that he could file his own complaint against Prestige with the Office of the Chief Administrative Hearing Officer (OCAHO).

On July 27, 2017, the undersigned issued an order directing Complainant to show cause by August 15, 2017, why his complaint should not be dismissed pursuant to the 180-day statutory filing requirement of 8 U.S.C. §1324b(d)(3). On September 7, 2017, Complainant filed an untimely response. The entirety of Thompson's response consists of the following:

> The present letter, is destined to respond the question made by the Honorable Judge Thomas P. McCarthy in our preliminary conference, on the date July 25, 2017, but before anything to thank the great gesture of this great human being who took the time to respond to me in my language, to make my life more simple and easy going in my current state of health. My response will reach you a bit passed the date of response, (August 15, 2017) but due to precisely my lack of money to pay for the appropriate translation service to the English language. Moving forward with the response requested by the Honorable Judge McCarthy in the conference mentioned above, my answer is that I did not wait three

[3] On January 18, 2017, the Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section (IER). *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91768-01 (Dec. 19, 2016); *see* 28 C.F.R. § 0.53. This Order refers to IER according to the new name as established by 28 C.F.R. § 0.53.

[4] IER's regulations at 28 C.F.R. pt. 44 were amended in January 2017, and the regulation cited to in IER's letter of determination is now found at 28 C.F.R. § 44.301(g).

> (3) years to file my complaint with the office of OCAHO, what I did was utilize the opportunity offered to me by the signed agreement of the Department of Justice with some consulates of the area, in the hands of the leader the civil rights division of the Department of Justice Vanita Gusta [sic], said agreement is listed in the web page of the Department of Justice, without anything further I say goodbye with honor who honor deserves.

Complainant's September 7, 2017 Response to Show Cause Order (Complainant's Response).

II. 180-DAY LIMIT TO FILE CLAIM

On December 22, 2016, Thompson filed a complaint with OCAHO, alleging that Prestige discriminated against him because of his citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1), retaliated against him for asserting his rights under 8 U.S.C. § 1324b in violation of 8 U.S.C. § 1324b(a)(5), and committed document abuse in violation of 8 U.S.C. § 1324b(a)(6). In support of these allegations, Thompson alleges that Prestige terminated him on March 26, 2013 because Thompson opposed Prestige's system of pay, which is used in the Dominican Republic. *See* OCAHO Complaint at 9-11.

Mr. Thompson's September 7, 2017 Response to Show Cause Order offers no argument that he filed the charge within the 180-day statute of limitations established by 8 U.S.C. §1324b(d)(3). *See generally, Sodhi v. Maricopa County Special Health Care Dist.*, 9 OCAHO no. 1124, 6 (2007) (discussion of 180-day statutory bar to consideration).[5] Accordingly, the July 29, 2016 charge, filed with IER against Prestige Towing Services, is untimely because it was filed more than 180 days after the alleged discrimination on March 26 or April 18, 2013.

III. EQUITABLE TOLLING

[5] The OCAHO Rules of Practice and Procedure are set forth at 28 C.F.R. part 68 (2017). Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

Mr. Thompson's late-filed pro se response to the order to show cause is insufficient to toll the 180-day statute of limitations. Thompson's argument that he "utilize[d] the opportunity offered to me by the signed agreement of the Department of Justice" is generously construed as a request to equitably toll the statute of limitations. Complainant's Response at 1. To equitably toll the 180-day limit in the statute, Complainant must show a record of "[d]ue diligence [a]s the sine qua non for equitable relief." *Ndzerre v. Washington Metr. Area Transit Auth.*, 13 OCAHO no. 1306, 9, n.8 (2017) (quoting *Sabol v. N. Mich. Univ.*, 9 OCAHO no. 1107, 5 (2004)). The statute of limitations may also be tolled if the Equal Employment Opportunity Commission (EEOC) receives a charge meant for IER; in turn the EEOC can refer a mistakenly received charge to IER pursuant to a Memorandum of Understanding (MOU) published in the Federal Register. Office of Special Counsel for Immigration Related Unfair Employment Practices; Coordination of Functions; Memorandum of Understanding, 63 Fed Reg. 5518-5521 (Feb. 3 1998); *Caspi v. Trigild Corp*., 6 OCAHO no. 907, 957, 964 (1997).

As an initial matter, the complainant has the burden to show due diligence. *Ndzerre*, 13 OCAHO no 1306 at 10 (citing *Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013)). There is no OCAHO case law that speaks specifically to whether a MOU between the IER and a foreign embassy can be the basis for equitably tolling of the 180-day time limit under 8 U.S.C. §1324b. *Cf. Caspi*, 6 OCAHO no. 907 at 960-61 (referring to MOU signed between IER and EEOC, but making no mention of MOU signed with a foreign embassy). Equitable tolling is nonetheless an "extraordinary remedy appropriate only in a narrow class of fact situations." *Halim v. Accu-Labs Research, Inc.* 3 OCAHO no. 474, 765, 779, (1992).

On August 14, 2017, Mr. Thompson submitted evidence of a MOU signed by the Department of Justice and El Salvador to combat employment discrimination. The MOU states that "[t[he embassy will establish a system for referring discrimination claims from the embassy and consulates to [IER]." Complainant's August 14, 2017 filing at 6. Mr. Thompson provides no explanation how his activity triggers the MOU with El Salvador. The Complainant's September 7, 2017 Response to Show Cause Order acknowledges the MOU, but does not argue that the El Salvadorian or Dominican Republic embassy officials referred the charge to IER.[6] Complainant's Response at 1. Mr. Thompson also does not clarify when or where he consulted with embassy or consulate officials. More to the point, the MOU was signed by DOJ and El Salvador, not by the Dominican Republic. Thompson was a Dominican Republic national at the

[6] Mr. Thompson is pro se and English is not his native language. These facts weigh in favor of generously construing his allegations. *Lundy v. OOCL (USA) Inc.*, 1 OCAHO 215, 1438, 1447-48 (1990). However, "neither his pro se status nor the fact that English was a second language is sufficient to automatically invoke equitable tolling of the [] limitations period." *Id*. (citing *Cruz v. Triangle Affiliates, Inc*., 571 F. Supp. 1218 (E.D.N.Y.1983).

time of the alleged discrimination, OCAHO Compl. at 4. Accordingly, he is unable to utilize the MOU between the Department of Justice and El Salvador to toll the statute of limitations.

In sum, on this record, Mr. Thompson has failed to establish that he is entitled to the extraordinary remedy of equitable tolling. *Halim*, 3 OCAHO no. 474 at 779. Accordingly the OCAHO complaint is **DISMISSED** as untimely pursuant to 8 U.S.C. §1324b(d)(3).

SO ORDERED.

Dated and entered on March 23, 2018.

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Thomas P. McCarthy
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for 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. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.