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

IN RE CHARGE OF	)	
KATALIN BALAZS-KILGORE	)	
	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 93B00109
AUBURN UNIVERSITY,	)	
Respondent.	)	
______________________________	)	

ORDER

(March 10, 1994)

This order addresses the issue whether the charging party, Dr. Katalin Balazs-Kilgore (Balazs) timely filed her charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Complainant or OSC). The complaint before me alleges failure by Auburn University (Respondent or Auburn) to hire her in violation of the prohibition of 8 U.S.C. §1324b against discrimination arising out of citizenship status. More specifically, OSC alleges that Auburn preferred to hire foreign workers on temporary visas. The complaint alleges that Balazs was an applicant for teaching positions in two mathematical disciplines at Auburn, i.e., the departments of Foundations, Analysis, and Topology [FAT], and of Algebra, Combinatorics, and Analysis [ACA]. Auburn asserts in its answer, inter alia, that Balazs was not qualified for the specialized positions for which she applied which were outside her specialization of approximation theory, that the individuals hired were the most qualified and that hiring decisions were made without regard to citizenship status.

Timely filing of the charge with OSC is a condition precedent to jurisdiction of the administrative law judge. 8 U.S.C. §1324b(d). Facts

and argument on which to resolve Auburn's motion to dismiss for failure of Balazs to timely file her charge with OSC have been the subject of deposition evidence and extensive briefing by OSC and Auburn. On the basis of those submissions, I reach the conclusions set out below.

Balazs is a mathematics Ph.D. who at various times between 1991 and 1992 applied for teaching positions at Auburn. A native of Hungary and now a citizen of the United States, she was at the time of those applications a permanent resident alien. As such, she was at all relevant times an individual protected against citizenship status discrimination. 8 U.S.C. §1324b(a)(3)(B). See, in this docket, Order on Motion to Dismiss and First Prehearing Conference Report and Order, 3 OCAHO 564 (9/23/93), citing Nguyen v. ADT Engineering, 3 OCAHO 489 (2/18/93).

Although denominated as a single charge filed with OSC and contained in a single complaint filed in the Office of the Chief Administrative Hearing Officer (OCAHO), the Balazs discrimination allegations implicate two separate and distinct applications for employment and hiring procedures. While each of the two employment applications is separately discussed, analysis which may be pertinent to both will not be repeated, i.e., as to claims of equitable tolling and applicability of the Memorandum of Understanding (MOU) between OSC and the Equal Employment Opportunity Commission (EEOC), 54 Fed. Reg. 32499 (8/8/89).

In November 1991, Auburn advertised ACA and FAT faculty position vacancies beginning the following fall. FAT's advertisement anticipated two or more tenure-track positions. ACA's announcement sought applicants for a tenure track appointment and anticipated "some" temporary one-year appointments.

The ACA application

Balazs' husband, Dr. Theodore Kilgore (Kilgore), an ACA faculty member, presented her updated curriculum vitae (c.v.) to Dr. James Wall (Wall), ACA Department head during the 1991-92 academic year. Based on her c.v., Wall determined Balazs was not qualified for the permanent ACA position but considered her an appropriate candidate for one of the temporary positions. Wall did not inquire as to which position she had applied for. By letter dated February 10, 1992, Balazs was notified that all temporary ACA positions were subject to a hiring freeze. By the third week in February, by memorandum to ACA

faculty, including Kilgore, ACA announced that Dr. Alfred Menezes (Menezes) had been offered and accepted ACA's tenure-track position. Although ACA's practice was to send out rejection letters, Wall did not send one to Balazs as she had not been placed in the pool of applicants under consideration for the tenure-track position. As conceded by OSC,

> Through her husband, Dr. Balazs-Kilgore knew by February 20, 1992, that the Department of ACA had selected Dr. Menezes for the permanent position, and that she would not be hired by the Department of ACA for this position.

U.S. Memo on Timeliness (US Memo) at 3.

On April 7, 1992, following consultation by Balazs with an attorney, Gene Fuquay (Fuquay), a charge was filed by Balazs against ACA with the EEOC. Fuquay filed on her behalf. OSC characterizes the facts alleged in the April 7, 1992 EEOC filing as implicating citizenship status discrimination "as one of the reasons she was not considered" for the ACA tenure-track position. US Memo at 4.

The FAT application

In November 1991, Balazs responded to the FAT advertisement by personally delivering her c.v. to Dr. J.P. Holmes (Holmes), who headed FAT's 1991-92 hiring committee. Holmes told her that, as FAT had her dossier and letters of recommendation from prior year applications for employment, her application was complete. On January 22, 1992, a member of the FAT hiring committee, Dr. Jo Heath (Heath), told Kilgore that two individuals, Drs. Yongsheng Han and Andras Bezdek, were selected to fill two of the four FAT positions. Also, Heath told Kilgore that the Department head, Dr. George Kozlowski (Kozlowski), had disqualified the Balazs application on the basis that her research area was more properly in ACA than in FAT. When Kilgore immediately confronted him about it, Kozlowski acknowledged that he had disqualified Balazs.

Kilgore so informed his wife. On February 5, 1992, Balazs met with J. Ivan Legg (Legg), Dean of the College of Sciences and Mathematics. Legg, later that day telephoned Balazs to advise her that her application, and those of ten others, was being reinstated. As the result, there were now seventeen candidates for the two remaining FAT positions. That evening, Holmes telephoned and told Kilgore that the Balazs application was reinstated (and a faculty ballot which had selected three candidates for the two positions was canceled).

On March 16, 1992, Kozlowski told Balazs that she would be notified when FAT has anything to tell her about the hiring process, although Kozlowski and Holmes agree that FAT does not send rejection letters. Before April 24, 1992, Kilgore asked Holmes about the status of the Balazs application. Holmes declined to discuss it with him, but agreed to talk to her if she would make an appointment with him. On April 24, 1992, in his role as FAT hiring committee head, Holmes told Balazs that Drs. Wenxian Shen and Piotr Koszmider (Koszmider) had been selected for the two remaining positions.

On April 25, 1992, Balazs filed a charge against FAT with the EEOC. Thereafter, as described by OSC,

> On October 21, 1992, exactly 180 days after learning from Dr. Holmes that selections had been made for the two remaining positions, Dr. Balazs-Kilgore filed a charge of citizenship status discrimination with the Office of Special Counsel.

US Memo at 9.

In contrast to the claim that Balazs learned on April 24 that the FAT positions had been filled, OSC acknowledges that,

> Dr. Balazs-Kilgore's April 25 EEOC Charge states that she had been told that the hiring procedures were completed sometime in early April with the acceptance of the offers made by the department. (See Dr. Balazs-Kilgore's April 25 EEOC Charge, attachment B). However, according to her testimony, Dr. Balazs-Kilgore learned of this information on April 24 during her conversation with Dr. Holmes. (Balazs-Kilgore Tr. at 60-62).

US Memo at 9, n.9.

OSC contends that subsequent events in effect justify the conclusion that Balazs reasonably could have believed she still would be considered for a FAT position in 1992. Those events were the request by Koszmider that his appointment be deferred for two years, that a fifth position might be available and that more candidates were being interviewed. As noted by OSC:

> According to a memorandum dated April 10, 1992, the Department of FAT voted to delay Dr. Koszmider's appointment for two years. In addition, the Department also voted to interview Dr. Mike Kelly for a visiting position and to seek a commitment from the administration to give the Department an additional tenure-track position in which to place him. (See attachment D). By letter dated April 20, 1992, the Department sought, and received, approval from the Vice President of Academic Affairs to delay Dr. Koszmider's appointment. (See attachment E).

US Memo at 10, n.10.

The exhibits attached to OSC's memorandum confirm the delay in Koszmider's arrival and request for authority to hire a temporary substitute for him, but are silent as to an additional tenure-track position.

In approximately mid-May 1992, Balazs received informational materials from EEOC which included information about OSC. On May 25, 1992, following inquiry of OSC by Kilgore, Balazs and Kilgore received an OSC charge form in the mail. The next day, Balazs and Kilgore left for Europe, returning on September 1, 1992. Balazs claims she delayed filling out the charge form because the Koszmider request for delay and reopening of the candidate search led her to believe the hiring process remained open.

Auburn's semester began on September 28, 1992. The previous day, Balazs concluded she was not going to be hired. Nevertheless, she did not learn until October 12, 1992, that Koszmider had been granted his deferred arrival on condition of which he had accepted the FAT appointment by letter dated August 10, 1992. OSC contends that only by learning on October 12 of the Koszmider acceptance did Balazs become aware "that there was no chance of her being hired for Dr. Koszmider position." US Memo at 12.

The legal issues discussed and applied

It is axiomatic that the limitations period begins to run for filing charges alleging discrimination at the time the charging individual is notified of the adverse employment decision. Chardon v. Fernandez, 454 U.S. 6 (1981); Delaware State College v. Ricks, 449 U.S. 250 (1980). Absent notification by the putative employer, the limitations period begins to run when the "facts that would support a charge of discrimination," e.g., non-hire, would have been apparent to a reasonably prudent charging individual. Reeb v. Economic Opportunity Atlanta, Inc. 516 F.2d 924, 931 (5th Cir. 1975). See also Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977).

The FAT charge was filed within 180 days after April 24, 1992, the latest date Balazs is found to have known she was rejected by FAT

OSC claims that Balazs did not learn with certainty until October 12, 1992, that she had no chance for a 1992 appointment. Alternatively, OSC contends that Balazs should not be charged with reason to have understood prior to April 24, 1992 that she would not be considered for a FAT appointment.

OSC relies on U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991), for the proposition that limitations run only from the time the job applicant is told "with finality in a way that he should reasonably have understood that because he was not a U.S. citizen he would not be hired." Id. at 21. However, Mesa is clearly distinguishable and does not control the Auburn situation. Mesa held that only in August 1987 should the charging party reasonably have understood that the employer's policy of rejection "inexorably applied to him," although arguably in April 1987 he had been told that the employer had a policy of hiring only citizens of the United States. Id. OSC overlooks that in Mesa the judge found that it was reasonable for the charging party to believe he had been told that his application might still be considered even after he was told of the discriminatory policy. Moreover, the employer's personnel in Mesa dissembled as to whether the discriminatory policy or the applicant's "pushiness" was the real reason he was rejected. In contrast, even if Balazs might have thought circumstances kept her application alive, at least after April 24, 1992, no one on behalf of FAT did anything to encourage her to conclude that she had a chance of a FAT appointment.

I conclude that at least by April 24, 1992, Balazs knew or reasonably should have been aware that her application was no longer under active consideration. No Auburn representative led her to believe her application was still under consideration after that date. Auburn claims that Balazs knew or reasonably should have known even before April 24 that she was out of the running. Certainly, she had reason through her husband to doubt that she would be selected. I do not agree with Auburn, however, that her expectancy of an explicit rejection is immaterial. I am not persuaded by Auburn's argument that, because she was aware of FAT hiring practices and procedures as the result of unsuccessful application in prior years, she should be held to a pre-April 24 understanding that she was out of contention. Rather, I am satisfied that FAT failed to so advise her with sufficient clarity at least until her conversation that day with Holmes.

Accordingly, the 180 day period for Balazs to file her OSC charge against FAT began to run the day after April 24 and would expire on October 22, 1992, one day after she placed the charge in the mail addressed to OSC. It follows that, despite the erroneous date of October 26, 1992, specified as the charge filing date in OSC's complaint, filing of the charge was effected by mailing the charge to OSC on October 21, 1992, as evidenced by the mail wrapper and Postal Service

receipt filed by OSC on February 9, 1994. I hold that the FAT charge was timely filed. 28 C.F.R. §44.300(b); Order (2/15/94).

At the time Auburn filed its motion to dismiss for lack of a timely filed OSC charge by Balazs and when it filed its supplemental brief dated December 17, 1993, it was confronted with a complaint which alleged that her OSC charge had been filed on October 26, 1992. In that context, the charge would have been out of time had Balazs reason to conclude as of April 24, 1992 that she would not be hired. Auburn's filings have addressed at length efforts by OSC to maintain that it was reasonable for Balazs to believe the FAT hiring had not been completed as of April 24. In view, however, of the recent clarification by which the OSC charge is deemed to have been filed as of October 21, 1992, this order does not reach events subsequent to April 24. By substituting the October 21, 1992 charge filing date, events subsequent to April 24, 1992, have been rendered immaterial to the outcome of the timeliness issue as to the FAT charge.

Neither equitable tolling, the MOU, nor the continuing violation theory is available to cure untimely filing of the ACA charge

OSC concedes that but for intervention of equitable tolling, application of the MOU or of the continuing violation theory, the ACA charge is out of time.

I agree with OSC that the charge filing period is one of limitations, not jurisdictional and is, therefore, subject to equitable tolling. Zipes v. Transworld Airlines, 455 U.S. 385, 393 (1982); United Airlines v. Evans, 431 U.S. 553, 555 (1977). Early in its development, §1324b jurisprudence acknowledged the applicability of equitable tolling considerations to remedial litigation. U.S. v. Mesa Airlines, 1 OCAHO 74. Equitable tolling is unavailing here, however, to bridge the gap between the date she learned she was not to be hired by ACA and 180 days prior to filing her ACA charge with OSC. This is so because neither Auburn nor any governmental entity misled Balazs to her detriment or otherwise, and she consulted with counsel and made her EEOC filing against ACA with the assistance of counsel.

There is no suggestion that she was misled. Discussing cases which address equitable tolling principles the Eleventh Circuit, in a Title VII case, has noted that:

> The basic principle that runs through these cases seems to be that equitable tolling is based upon the actions of someone other than the claimant that are misleading or constituted fraudulent conduct. In this case, neither the E.E.O.C., nor the employer,

> nor any other person conducted themselves in a way to make it inequitable to apply the 180-day limitations period.

Smith v. McClammy, 740 F.2d 925, 927 (11th Cir. 1984). The Smith court's rejection of equitable tolling on behalf of a college instructor, characterized as a "reasonably prudent and intelligent person [who] knew she had a complaint," is pertinent here. Id.

Moreover, Balazs consulted with Fuquay, an attorney, four to six times between February 4, 1992, and his filing of her EEOC charge against ACA. She testified on deposition that:

> I had several conversations with him. And at the first time he made it clear that he would retire at the end of 1993, so he cannot represent me. But he is willing to consult with me and give me advice. So I talked to him several times in person and by phone.

Balazs Deposition at 137.

Although Fuquay did not assist in completing the forms, he told her they were "okay"; "he read and filed them for me." Balazs Deposition at 87-88. I conclude that for purposes of assessing availability of equitable tolling principles, Balazs was represented by Fuquay with respect to her allegations against ACA and the selection of EEOC as the forum in which to file her charge in April 1992. As aptly put in the case of a discharged railroad employee whose religious discrimination claim arising in Alabama was erroneously filed in the Florida Commission on Human Rights instead of the EEOC in Birmingham:

> As a general rule, "equitable tolling may be appropriate if (1) the defendant has 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." Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 753 (3rd Cir.), cert. denied, 464 U.S. 852, 104 S.Ct. 164, 78 L.Ed.2d 150 (1983). Accord Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2nd Cir. 1978). See also Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725-26. 80 L.Ed.2d 196 (1984). Equitable tolling should not, however, be liberally construed; rather, only under certain circumstances should the doctrine be applied. See Mohasco Corp. v. Silver, 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980) ("experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").

Freeman v. CSX Transportation Co., Inc., 730 F. Supp. 1084, 1086 (M.D. Ala. 1989). In Freeman, where counsel provided no justification for filing in the wrong agency, the court refused to grant equitable relief:

> Equitable tolling is particularly inappropriate when plaintiff has consulted counsel during the statutory period. Hay v. Wells Cargo, Inc., 596 F. Supp. 635, 640 (D. Nev. 1984), aff'd, 796 F.2d 478 (9th Cir. 1986) (table). When an employee has retained counsel, constructive knowledge of the procedures of how to proceed with a charge of discrimination is "attributed" to the employee. Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

Id. at 1086-87.

In rough parallel to the time frame in which Balazs consulted with Fuquay, "Freeman admits that he had obtained counsel who, with 179 days remaining in the time period for filing an EEOC charge, actively began pursuing his case," albeit in the wrong forum. Freeman 730 F. Supp. at 1087. Accord, Thompson v. Xerox Corp., 56 EPD ¶40,794 (MD. Fla. 1991). In Thompson, the plaintiff filed a handicap discrimination claim in the Jacksonville Equal Opportunity Commission (JEOC) but as a prerequisite to suit under the Florida law should have filed in the Florida Commission on Human Relations, the court rejected plaintiff's claim that she was not represented by counsel:

> In her deposition testimony, Thompson admits that she discussed her discrimination charges with at least two attorneys experienced in the field of employment discrimination prior to filing with the JEOC, and that one of those attorneys, R . . . E . . ., actually represented her in connection with her JEOC charges.

Thompson 56 EPD ¶40,794 at 67,236.

Nothing contained in the record before me qualifies for equitable tolling of the limitations period on the ACA charge. Nor does the MOU apply to fill the tardy OSC filing gap where, as here, timely filing in EEOC fails to implicate either national origin or citizenship status discrimination.

The filings before me include

> --an Employment Discrimination Complaint against ACA signed by Balazs and dated 4/7/92, identified as Complainant's EEOC charge against ACA to which is stapled a one-page typewritten document containing narrative under three subheads:
>
> WHAT ACTION WAS TAKEN AGAINST ME?
>
> * * *
>
> WHY DO I BELIEVE THAT THE ACTION WAS TAKEN BECAUSE OF MY SEX AND AGE?
>
> * * *

OTHER REMARKS

* * *

--an Employment Discrimination Complaint against FAT signed by Balazs and dated 4/25/92, identified as Complainant's EEOC charge against FAT to which is stapled a one-page typewritten document containing narrative under two subheads:

WHAT ACTION WAS TAKEN AGAINST ME?

* * *

WHY DO I BELIEVE THAT THE ACTION WAS TAKEN BECAUSE OF MY AGE AND MY SEX?

* * *

The 4/25/92 EEOC FAT complaint, but not the 4/7/92 EEOC ACA complaint bears an EEOC receipt, i.e., "RECEIVED MAY 06 1992 E.E.O.C. BIRMINGHAM DISTRICT."

As filed by OSC in OCAHO, the EEOC FAT complaint is stapled to a one-page "Respondent's Copy" of a "Charge of Discrimination," EEOC Test Form 5 (09/01/91). Obviously, that Charge, signed by Balazs and dated 4/25/92 addresses the ACA charge and can only be understood as having been attached erroneously by OSC to the EEOC FAT complaint. More curious than the bonding of the EEOC ACA "Charge of Discrimination" to the EEOC FAT complaint is the omission of a counterpart EEOC FAT "Charge" sheet.

The EEOC ACA Charge sheet contains these entries, inter alia:

For "Date Discrimination Took Place" "Earliest" to "Latest" 9/1/89 to 2/20/92, with an x-mark in the box captioned "Continuing Action."

For "Cause of Discrimination Based On (Check Appropriate Box(es))" the boxes for "Sex" and "Age" each have an x-mark. The boxes for "Race," "Color," "Religion," "National Origin," "Retaliation," "Disability," and "Other" are blank.

On the EEOC ACA Charge sheet, in the space comprising more than 1/3 of the 8'x10' page, captioned "The Particulars Are," Balazs recites as follows:

> I. On a continuing basis I have been denied a tenure-track position in the Department of Algebra, Combinatorics and Analysis, by the above named Respondent.

> I have been seeking such a position since September, 1989. Young males are continually being hired into these positions.
>
> II. J. Wall, Department Head, told me in 1990, that there was a hiring freeze and I was overqualified, because I had been an associate professor.
>
> III. I believe I have not been hired because of my age and my sex, female, in violation of the Age Discrimination in Employment Act of 1967, as amended. I was born August 13, 1949.

The failure to check off either "national origin" or "other" discrimination while checking "sex" and "age," appears to negate any implication that Balazs, assisted by her lawyer, may have intended to indict national origin or citizenship status discrimination. Nevertheless, arguing that the EEOC form provides no opportunity to specify citizenship status, OSC argues that a reference in her EEOC ACA complaint narrative to Menezes, the successful candidate, suffices to embrace alienage:

> I was not hired for an advertised vacancy in the Department of Algebra, Combinatorics and Analysis (ACA). A relatively unqualified man, A. Menezes, much younger than 40, was hired, who, is **also** not of American nationality and resides in Canada. The hiring process which ended with the hiring of Menezes on Feb 20, 1992, started when ACA advertised some tenure-track appointments beginning September 1989 . . .

(Emphasis supplied).

I categorically reject OSC's assertion that "[T]he description in the charge clearly includes allegations of citizenship status discrimination." US Memo at 16. OSC's assertion blinks the entries on the ACA Charge sheet. The logic of OSC's argument that the EEOC ACA filing embraced alienage cannot be reconciled with the Charge sheet. Moreover, the filing in its entirety fails to claim either national origin or citizenship status discrimination. The allegation that he resides in Canada is totally uninformative as to Menezes' national origin and citizenship. The allegation that he "is **also** not of American nationality" fails to imply discrimination. It can best be understood to isolate **age** as the critical factor distinguishing Menezes from Balazs by placing them both in an identical nationality posture, i.e., "not of American nationality."[1] Rather than finding that it implies a claim of

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[1] Balazs' charge filed with OSC in October 1992 states that she was a permanent resident alien, lawfully admitted to the United States on March 1, 1990. As correctly noted in the answer to the complaint, at fn. 1, she was not eligible for naturalization until March 1, 1993. 8 U.S.C. §§1427, 1430. At all times relevant to her Auburn employment applications at issue in this case, Balazs was a permanent resident alien. See Order on (continued...)

nationality and/or citizenship discrimination, I understand the EEOC ACA complaint as an effort to exclude such considerations. I find and conclude that the EEOC ACA filing alleges only age and gender discrimination.

So as to cure the lack of a timely filed OSC charge, OSC suggests I take an expansive view of the purpose of the MOU and credit any allegations in a filing with EEOC as tantamount to a filing with OSC. However, nothing contained in OCAHO precedents which have applied the MOU dictate that result. Referring to the convergence of discrimination charges under Title VII and IRCA, the preamble to the MOU recites that:

> The agreement makes each agency [EEOC and OSC] the agent of the other for the sole purpose of receiving discrimination charges under Title VII of the Civil Rights Act 1964 (42 U.S.C. 2000e et seq.) and section 102 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1324b), and provides for interagency coordination of charge processing activities. The purpose of this agreement is to promote efficiency in the administration and enforcement of the two statutes, and to prevent any loss of rights arising from the operation of a filing deadline against an individual or entity who has mistakenly filed a charge with the wrong agency.

(Emphasis supplied).

MOU, 54 Fed. Reg. 32499.

OCAHO precedent makes clear that the effect of the MOU is that a filing with OSC is understood to be a constructive simultaneous filing with EEOC and vice versa. The purpose of the MOU is to ameliorate "uncertainty as to the correct forum resulting from separate jurisdiction (EEOC on the one hand, and IRCA administrative law judges on the other). . . ." Yefremov v. NYC Dep't of Transportation, 3 OCAHO 466 (10/23/92) (Order Denying Respondent's Motion for Summary Decision, Miscellaneous Rulings) at 3; Curuta v. U.S. Water Conservation Lab, 3 OCAHO 459 (9/24/92), aff'd No. 92-70774 (9th Cir. 1994); Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (8/8/90) at 18.

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[1](...continued)
Motion to Dismiss and First Prehearing Conference Report and Order, 3 OCAHO 564 (9/23/93).

OSC's argument concerning Menezes ignores the reference in Balazs' EEOC ACA narrative to the 1990 tenure-track hiring of "Ming Lao, in probability theory, a full professor from China." As in the case of Menezes, Lao's citizenship status is unexplained, and I have no reason to take the reference to China as an allegation of alienage discrimination.

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

Urging as an alternative that the filing of the charge is timely under a continuing violation theory, OSC relies on U.S. v. Mesa Airlines, 1 OCAHO 74. In Mesa, however, where the charging party continued to inquire as to job prospects after the date the employer said he should have known he would not be hired, the judge held that he "was not told . . . with finality in a way that he should reasonably have understood that . . . he would not be hired." Id. at 21. In contrast, Balazs knew from ACA's letter of February 10, 1992 that because there was no funding for temporary appointments she would not be considered for a temporary position; Kilgore brought home to his wife a February 20, 1992 memorandum in which Wall announced that Menezes had accepted the offer of employment for the tenure-track position; Kilgore knew there was only one tenure-track position to be filled. The following colloquy, in which Kilgore responds to inquiry on deposition by counsel for Auburn defeats application of the continuing violation theory:

Q. So there is no doubt but by February 20th you and your wife knew that she would not be considered for any temporary positions and she was not going to be considered for the permanent position that as far as you knew was the only one allotted to ACA for that year; is that correct?

A. Yes.

Q. Okay.

A. I believe that that is correct at least.

Kilgore Deposition at 32.

I find and conclude that not later than February 20, 1992, Balazs knew she was not going to obtain a tenure track or temporary ACA appointment. Her application process had come to a close. There was no series of related acts. There was no continuing violation. See Berry

v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983); Stewart v. CPC Int., Inc., 679 F.2d 117 (7th Cir. 1982).

CONCLUSION

For the reasons discussed above, this order grants so much of Auburn's motion to dismiss as pertains to the ACA allegations of the complaint, but overrules the motion as it pertains to the FAT allegations of the complaint. This order recognizes that the timing and nature of OSC's response to outstanding discovery directions makes it reasonable to provide Auburn an opportunity to supplement its argument with respect to timeliness of the FAT charge. To the extent that newly provided materials so warrant, such an opportunity will be provided to Auburn. The telephonic prehearing conference scheduled for March 15, 1994 at 10:00 a.m. will consider that matter in context of OSC's February 28, 1994 Motion To Amend The Complaint (to reflect the correct charge filing date), and Auburn's March 1, 1994 Motion For Enlargement Of Time To File Responsive Pleadings.

SO ORDERED. Dated and entered this 10th day of March, 1994.

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MARVIN H. MORSE
Administrative Law Judge