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

November 13, 2003

ASHWANI K. GOEL, Complainant, v. INDOTRONIX INTERNATIONAL CORPORATION, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 02B00035

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA) in which Ashwani K. Goel (Goel) is the complainant and Indotronix International Corp. (Indrotronix, IIC or the company) is the respondent. Goel is an attorney who is acting pro se in this matter. He filed a complaint in which he alleged that IIC harassed him and then fired him in retaliation for his opposition to unfair immigration-related employment practices, and that the company refused to accept documents he presented to show that he could work in the United States. Indotronix filed an answer denying the material allegations of the complaint and asserting twelve affirmative defenses, including the defense that the complaint is barred by limitations. Indotronix simultaneously filed a motion to dismiss accompanied by the affidavit of Laura Sack and exhibits. Goel responded with a memorandum of law and exhibits.

Because the motion to dismiss referred to matters outside the pleadings, the parties were notified that it would be converted to a motion for summary decision as to the question of a time bar, and an additional period of time was provided to both for the submission of any further evidence bearing on that issue. *See generally Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154-55 (2d Cir. 2002); *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000) (necessity of converting motion if extra-pleading matters are to be considered).

Goel filed a response to the converted motion, with exhibits. In addition to the converted motion, there are three other motions currently at issue: 1) Goel filed a separate motion for

equitable tolling with an accompanying affidavit and exhibits, in response to which IIC filed a memorandum in opposition. This motion is in essence another response to the converted motion. 2) Goel also filed a motion seeking leave to amend his complaint, to which IIC responded with a brief and the affidavit of Lynn Hanig. 3) IIC filed a motion seeking to strike Goel's third affidavit[1] as untimely filed, to which Goel submitted a response.

All four motions are ripe for decision.

II. EVIDENCE TO BE CONSIDERED

IIC's initial motion to dismiss was accompanied by the affidavit of Laura Sack and respondent's exhibits (RX) A-D as follows: RXA) a letter to Sack from OSC dated April 6, 2001; RXB) a letter to Sack from OSC dated July 6, 2001; RXC) a decision dated April 22, 2002 by the Appellate Division of the Supreme Court of New York captioned *Goel v. Indotronix International Corp.*; and RXD) a charge filed with the New York State Division of Human Rights (NYDHR) dated September 4, 2001 and signed by Goel.

Goel's motion for equitable tolling was accompanied by an affidavit dated November 21, 2002 (Goel's first affidavit) and complainant's exhibits (CX) A-D as follows: CXA) an e-mail from Goel to himself dated October 26, 2001 captioned with the subject line: "Fwd: Re INS Investigation against Babu Mandava led to my termination." The heading is followed on the same page by three other e-mail communications, including e-mails: 1) from Gregg I. Minkow to Ashwani Goel dated November 21, 2000, 2) from Ashwani Goel to "babu" dated February 9, 2000 with the subject line: "Transfer of H-1B employee - Neelabhar Haldar," 3) from Srinivas Pisipati to Goel and Scott Lebowitz dated February 28, 2000 with the subject line: "Transfer of H-1B employee - Neelabhar Haldar," CXB) a Final Determination from the Department of Labor, Employment Training Administration dated September 24, 1998 for Srinivasa Pisipati; CXC) three e-mail communications, including e-mails: 1) from "Ashwani" to "subba" and "donna," with the subject line: "Sanghamitra Sahoo" dated November 14, 2000, 2) to "Ashwani" from Subba Rao Badeti with the subject line: "Sanghamitra Sahoo" dated July 27, 2000, and 3) from "Ashwani" to "subba" with the subject line: "Sanghamitra Sahoo" dated July 27, 2000, and CXD) a letter on Indotronix's letterhead from Donna Mandava to Goel dated February 7, 2000.

Goel filed a second affidavit dated December 23, 2002 with his response to the converted motion, and set of exhibits, which will be identified, in order to distinguish them from complainant's similarly identified CXA-CXD supporting Goel's motion for equitable tolling, as

[1] Goel filed four separate affidavits during the course of briefing the various motions.

CXA2, CXB2, CXC2, CXD2 and CXE-CXS. These exhibits include: CXA2) a duplicate of CXA; CXB2) a business card for Midlantis Corp. of Raleigh, N.C. with the handwritten notation "Don Rao;" CXC2) a letter dated April 9, 2001 from Laura Sack to Michael Sussman, Esq.; CXD2) a letter to Goel dated April 6, 2001 from Anthony Archeval; CXE) a letter to Goel dated July 6, 2001 from Anthony Archeval; CXF) a letter to Goel dated September 12, 2001 from Margaret Gormley King of New York State Division of Human Rights (NYSDHR); CXG) a letter to Goel dated September 12, 2001 from EEOC, together with a Notice of Appeal dated July 16, 2001 to the Supreme Court of the State of New York; CXH) a letter to Goel dated December 27, 1999 from OSC signed by Lydia B. Rivero for Robin Stutman; CXI) a letter to Goel dated March 8, 2000 from OSC signed by Rosemary Dettling; CXJ) a United States passport dated May 20, 2002, together with an air ticket and boarding pass for an Air India flight from Delhi to Chicago on June 4, 2002; CXK) a passenger receipt for a round trip flight via Air India from New York to Delhi with various boarding passes dated September 18 and October 16, 2002; CXL) a United States passport bearing stamps dated June 4, 2002, September 19, 2002 and October 16, 2002; CXM) IIC's newsletter Vol. 96, Issue 1 March 1996; CXN) a Final Determination from the Department of Labor, Employment Training Administration dated September 24, 1998 for Srinivasa Pisipati (a duplicate of CXB); CXO) an e-mail communication dated February 9, 2000 from Goel to Babu Rao Mandava; CXP) IIC's newsletter Vol. 97, Issue 1 March, 1997 (2 pp.), together with an H-1B visa petition for Sivaram Tadepalli as an account Executive dated August 20, 1996 (4 pp.), a letter from the Vermont Service Center dated January 15, 1997 denying the visa petition, a visa petition for Sivaram Tadepelli as programmer analyst dated May 12, 1997 and an approval notice for the visa petition from the Vermont Service Center dated May 19, 1997; CXQ) an e-mail communication dated July 22, 1999 from Goel to Ramana Tadepalli, together with an e-mail from Goel to "Babu" dated August 25, 2000 and an e-mail from Goel to "Babu" dated July 12, 1999; CXR) a letter on Indotronix's letterhead dated February 7, 2000 addressed to Goel from Donna Mandava (a duplicate of the original CXD); CXS) three e-mail communications, including e-mails: 1) from "Ashwani" to "subba" and "donna," with the subject line: "Sanghamitra Sahoo" dated November 14, 2000 2) to "Ashwani" from Subba Rao Badeti with the subject line "Sanghamitra Sahoo" dated July 27, 2000, and 3) from "Ashwani" to "subba" with the subject line: "Sanghamitra Sahoo" dated July 27, 2000 (a duplicate of the original CXC).

Goel's third and fourth affidavits are dated January 29, 2003 and February 21, 2003, respectively. Indotronix filed three affidavits; two are those of Laura Sack dated October 7, 2002 and February 14, 2003, and the third is that of Lynn Hanig dated January 6, 2003.

III. CHRONOLOGY REFLECTED IN THE RECORD

A. Events Prior to Goel's Termination

According to documents filed with the former INS (CXP), Indotronix was established in 1986 and is engaged in the business of providing consulting and software development services. At the time of Goel's termination, the company employed in excess of 400 employees (Affidavit of Lynn Hanig). The record reflects that Goel, a United States citizen and a lawyer, was hired in August 1994 as IIC's in-house immigration counsel, and that he worked for the company continuously for more than six years until he was fired on November 20, 2000. The duties of his job included drafting, preparing, processing, and filing nonimmigrant and immigrant visa petitions, including alien labor certification applications and labor condition applications for foreign workers (CXD). Although Indotronix was unaware of it at the time, Goel's license to practice law had been suspended for the entire period of his employment there (RXC).

Both during and after his tenure at IIC, Goel made a number of allegations and charges against the company in a variety of fora starting at least by December of 1999. Some of his filings are part of the record and some are not. His various allegations and the specific matters he complained about need to be identified with particularity insofar as the record permits in order to facilitate an understanding of Goel's contentions as to why his complaint was delayed as long as it was.

Goel evidently sent at least two letters to the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) in 1999 and 2000 while he was still employed at IIC. Neither has been made a part of the record. The only documentation of these contacts consists therefore of the letters OSC sent to Goel in response (CXH and CXI), which are dated December 27, 1999 and March 8, 2000, respectively. While Goel repeatedly refers to his own letters to OSC as "charges," it does not appear that OSC either docketed them or treated them as such. Rather, OSC wrote back to Goel both times referring him to other agencies it thought better suited to address the specific matters he had raised in his correspondence.

The first OSC letter (CXH) is dated December 27, 1999 (the Stutman letter) and advises Goel that his letter would be forwarded to Jim Norris, the Chief of the Division of Foreign Labor Certification at the United States Department of Labor (DOL), for the department to explore Goel's allegations that Indotronix had violated various labor certification application rules and regulations. The second letter (CXI), dated March 8, 2000 (the Dettling letter), says that OSC had received Goel's correspondence detailing "various instances of alleged labor condition application, visa and tax fraud abuses" by Indotronix and related entities, and also his concerns regarding "retaliation . . . for opposing such practices." The letter advised Goel that OSC had reviewed his allegations and determined that they were not within its jurisdiction, and explained further that the Equal Employment Opportunity Commission (EEOC) was the agency which has jurisdiction over allegations of national origin discrimination by employers of more than fourteen employees. It said further that DOL and the Immigration and Naturalization Service (INS) were the agencies having jurisdiction over Goel's other allegations. The letter ended by providing

Goel with the address of the INS office in New York.[2]

The record next reflects that on June 27, 2000 Goel sent an e-mail (CXQ p.2) to Babu Rao Mandava, the President of Indotronix, captioned "Complaint against Naresh Ayyala and Ramana Tadepalli."[3] It states,

> Babu: I file this complaint in writing against Naresh Ayyala and Ramana Tadepalli for making continuous threats to my life, liberty and right to work for my refusal to meet their unlawful demands. It has been going on for the past several years and I have brought to your attention several times. You have not taken any action to stop it. Continuous threats, harassment and retaliation have significantly deteriorated my health. I am left with only two options for the protection of my life, liberty and health: (1) I should quit my job. That is what Naresh Ayyala and Ramana are putting pressure on me to do. Second option is that I should go for remedy (remidies) (sic) available under the law under these circumstances. I have worked hard for over six years for the growth of OUR company. I need to make a decision to survive before these people kill me. I considered it appropriate to inform you. I respect you because you have given me an opportunity to work here. I assure you IF and WHATEVER decision I may take, it will be lawful and right for you, me and our company. If you have intent, you can still fix it. Thank you. Ashwani.

A subsequent e-mail (CXQ p.2), also addressed to "babu" from Goel dated August 25, 2000 and captioned "Request for review of decision," said,

> Since I made my complaint against Naresh and Ramana, one part

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[2] At the time of the events in question, INS was a component of the Department of Justice. The agency has since been dissolved and its functions transferred to the Department of Homeland Security (DHS) as of March 1, 2003. President's Homeland Security Reorganization Plan of November 25, 2002, as modified January 30, 2003.

[3] Although Goel elsewhere referred to Ayyela and Tadepalli as "agents" of IIC (RXD), no factual basis was provided which would permit a finding of agency. The individuals are evidently employees of Indotronix. They are described in Goel's response to the motion to dismiss as being among a group of aliens Indotronix allegedly brought into the United States "by filing false LCAs and H-1B petitions for phony positions."

> of my earnings is put on hold. It has been over seven weeks I am not getting it paid and it is put on hold. You have made significant reductions in remuneration arrangement because of this complaint. It is unfortunate. I expressed my concerns to you because you are the president of the company. I acted within the framework of the IIC employee handbook by bringing it to your attention. I took it as a family matter. In a family, when one brother harass another, recourse is to go to the head of the household. Your recent decision reducing my earnings and job duties is not right. I request you to reconsider your decision. If you have time, I can explain to you why this decision is not right. Thank you. Ashwani Goel.

Goel was terminated on November 20, 2000.

B. Events Subsequent to Goel's Termination

On November 21, 2000, the day after he was terminated, Goel received an e-mail (CXA) from Gregg I. Minkow, an attorney. It stated:

> Dear Ashwani, As I stated yesterday I cannot give you legal advice but would appreciate a chance to communicate with any attorney you may select to represent you. The Board members I represent take very seriously the concerns you have raised and believe it may well be to the mutual benefit of the corporation and yourself for us to seek your reinstatement. Obviously, any effort on the part of my clients or I (sic) to seek your reinstatement is, from our standpoint, on behalf of the corporation and my clients as shareholders and Board members; therefore, as discussed yesterday, a conflict of interest could arise between your interests and theirs, and you should continue to obtain separate and independent legal representation of your own. I am told you have been in contact with your own attorney, but I do not have his or her name; could you please supply it to me?

Copies of this e-mail were sent to other e-mail recipients with the screen names "chitturi,"

"drao," "rchintapalli" and "polepalle."[4]

Goel thereafter filed a timely charge with OSC on December 5, 2000 (attachment to the complaint) alleging that he had been the subject of "continuous retaliation since August 1997," and that,

> I have been continuously harassed, retaliated and threatened by my employer for opposing immigration related unlawful practices such as bringing foreign workers on H-1B visas as programmers but employing them as recruiters and marketing reps; filing their green card applications for phony positions; hiring foreign workers for positions for which U.S. workers are available. I was fired from my job on 11/20/2000 for opposing such practices.

Goel's OSC charge stated that he had also filed a charge with the Office of the Assistant Attorney General for Civil Rights on November 17, 2000, but there is otherwise no information in the record about this latter alleged charge.

Goel next filed a contract action in New York in February of 2001, which was dismissed on June 22, 2001. The dismissal was affirmed on appeal on April 22, 2002, *Goel v. Indotronix Int'l Corp.*, 293 A.D. 2d 648, 740 N.Y.S. 2d 648 (2002) (RXC), noting that the documentary evidence demonstrated that Goel had been suspended from the practice of law for the entire period of his employment with Indotronix.

Goel evidently also filed charges with INS, DOL and possibly other agencies, but the record does not reflect the exact dates of those filings and the texts of those charges or complaints are not part of the record. Goel's memoranda make conflicting assertions as to the timing of the INS charge.[5]

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[4] The record reflects references to IIC Board members named Ratnam Chitturi, Dodla Rao, Rchintapalli and Polepalle.

[5] One of Goel's memoranda says that he filed a charge with INS shortly after OSC's letter of July, 2001 (CXE). He has probably confused the date of the INS filing with the date he filed his NYSDHR charge because he also says elsewhere that he filed with INS on the advice of Rosemary Dettling, referring to the OSC letter dated March 8, 2000 (CXI). This appears more likely to be accurate inasmuch as Goel's third affidavit says he was fired, inter alia, for "having participated in the INS federal investigation against the company." Both his response to the motion for summary decision and his e-mail of October 26, 2001 (CXA) assert that he was fired for filing the INS charge. Since Goel was fired on November 20, 2000, the INS charge would have to have been filed prior to

On April 6, 2001 OSC issued Goel a letter advising him of his right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of his receipt of the letter. (CXD2). The record does not reflect when Goel actually received that letter. OSC issued a follow-up letter on July 6, 2001 advising Goel that its investigation was terminated and that his file had been closed (CXE).

Goel next filed a charge with NYSDHR on September 4, 2001 (RXD), in which he alleged that IIC discriminated against him on the basis of his age, his national origin and his race, as well as asserting that the company retaliated against him for his opposition to its fraudulent practices. The charge said, in relevant part, During the course of my employment, Indotronix President Babu Rao Mandava instructed me to prepare immigration petitions containing misrepresentations and false information. I refused to do. I raised concerns to President Babu Rao Mandava about improprieties and illegalities in the Indotronix business operations. Indotronix harassed and intimidated me in retaliation. Indotronix hired a young (age about 29 years old), white male immigration counsel Mr. Paul Valenti. Indotronix assigned some of my job duties of processing green card applications and immigrant visa petitions to him. This decision reduced my earnings. Indotronix again put pressure on me for filing alien permanent labor certification applications and H-1B visa petitions containing false and misleading information. Indotronix thru its agents Naresh Ayyala and Ramana Tadepalli threatened my life. I filed a written complaint with the U.S. Department of Justice for violation of my civil rights. I had complained to the Indotronix President Babu Rao Mandava around June 27th, 2000. President Mandava insisted upon me to withdraw my complaint. In retaliation, President Mandava took away my job duties of processing green card applications. His decision reduced my earnings. Indotronix hired one more young white male immigration counsel Mr. Ted Rothman, age around twenty eight years old. President Mandava fired me from my job on 11/20/2000.

The NYSDHR charge was accepted for EEOC as well (CXG). At some unknown point after he filed that charge, Goel traveled to India. There is no specific information in the record as to exactly when Goel left the United States or how long he stayed in India on that trip. He returned to the United States on June 4, 2002 (CXJ).

Goel's OCAHO complaint was filed on September 4, 2002, more than 400 days after OSC issued

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November 20, 2000, not in 2001. His "Response under Rule 68.11(b) for dismissal of Respondent's Motion" asserts, on the other hand, that INS Special Agent Donna Roethel was already conducting a federal investigation against Indotronix "in the beginning part of 2000."

him the letter authorizing him to file it, and 92 days after his return from India. The complaint says,

> I opposed immigration related unfair practices such as bringing recruiters and marketing managers on H-1B petitions filed for phony programmer analyst positions and displacing U.S. workers holding such support staff positions. I was fired in retaliation. By way of explanation, the complaint stated further,
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> I filed complaint with the U.S. Department of Justice[6] for consistent harassment, intimidation, retaliation and threats to me by employer for opposing immigration related misrepresentations, fraud and improprities (sic); my employer fired me in retaliation while the investigation was in progress against the employer.

Goel also checked a box on the form complaint indicating that IIC had refused to accept documents he presented to show he could work in the United States. He said his social security card and New York driver's license were refused, so he presented his United States passport.[7] Goel went to India again after his OCAHO complaint was filed. He left the United States in mid-September and returned on October 16, 2002 (CXK, CXL).

IV. THE CONVERTED MOTION

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[6] Some confusion results from the fact that Goel refers to different agencies within the Department as "the Department of Justice," without otherwise specifying the particular component. Clearly the reference here could not be to the OSC charge, which was not even filed until after Goel was terminated. The reference appears to be to the INS charge.

[7] Indotronix moved to dismiss the allegation respecting rejection of documents on the ground that administrative remedies were not exhausted because this claim was not asserted in Goel's underlying OSC charge. It also noted that the allegation pertains to events surrounding Goel's original hire in 1994, more than six years prior to the date he filed his charge. Section 1324b(d)(3) prohibits complaints respecting employment practices occurring more than 180 days prior to the filing of a charge with OSC.

IIC's motion argued that Goel's complaint is untimely because OSC sent him a letter on April 6, 2001 (CXD2) notifying him that he had 90 days from his receipt of that letter in which to file a complaint. When OSC does not file its own complaint within 120 days after the filing of a charge, it so notifies the charging party, who may then file his or her own complaint within 90 days after receipt of the notice. 8 U.S.C. § 1324b(d)(2). IIC says that Goel must have received OSC's letter on or about April 10, 2001 so that his complaint would have been due on or about July 9, 2001, but it was not filed until September 4, 2002, approximately 422 days late.

Goel did not suggest that his complaint was timely filed. Rather, he asserted four reasons why he believes equitable modification of the filing deadline is appropriate: first, he said that he was required to travel to India; second, he said he was discouraged and misled by his previous experience with OSC; third, he asserted that IIC had deceived him by representing that he would be reinstated to his position; and fourth, he said that an OSC attorney misinformed him as to the date the filing period began.

After the parties had completed their briefing, I issued an Order of Inquiry to OSC asking for copies of any receipt cards, correspondence or written material in that office's possession which would reflect the date Goel signed for the letter of April 6, 2001. OSC reported that its file did not contain a return receipt card, but that it had entered the receipt number in the "Track and Confirm" portion of the Postal Service's website which in turn referred OSC to the local Post Office, which would charge a fee for any information. OSC was informed that a formal request had to be made, but that because the letter was more than two years old the trafficking history might have been deleted.

It does not appear that either party requested the trafficking history from the Post Office. However on October 16, 2003 a letter from Goel was received in this office in which he contended that "OSC has failed to meet the burden of proof by not establishing if its April 6, 2001 Notice was timely received or not giving 90 days time period." The letter alleged further that Goel had moved "in the first half of the year 2001," that he called OSC "around April/May of 2001" and that when he learned about the letter he told OSC he hadn't received it and requested a duplicate copy.

V. APPLICABLE LAW

A. Standards Governing Summary Decision

A party seeking summary disposition customarily has the initial burden of demonstrating the absence of a material factual issue. *Thompson v. Gjivoje*, 896 F. 2d 716, 720 (2d Cir. 1990). Because limitations is an affirmative defense, the party asserting it has the initial burden of establishing that there is no genuine issue as to whether the limitations period expired prior to the filing of the complaint, *Overall v. Estate of Klotz*, 52 F.3d 398, 403 (2d Cir. 1995). The burden

then shifts to the opposing party to demonstrate that equitable modification is warranted. *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000).

When a motion for summary decision is made and supported as provided in the rules,[8] 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). If the issue is one upon which the nonmoving party bears the burden of proof, summary resolution is mandated when the evidence is insufficient to support the nonmoving party's case. *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998).

B. The Availability of Equitable Relief

It is well settled that the 90 day time limit for filing a complaint is not a jurisdictional prerequisite, but is rather, like a statute of limitations, subject to waiver, estoppel and equitable tolling. *Mikhailine v. Web Sci. Tech.*, 8 OCAHO no. 1033, 513, 519 (1999).[9] Failure to meet a deadline is thus not necessarily dispositive. This result is in accord with other case law in the federal courts finding that employment discrimination filing periods are generally subject to equitable doctrines. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). OCAHO jurisprudence governing equitable modification is generally consistent with and influenced by the approach taken by the federal courts under analogous statutes. That case law makes clear that equitable remedies are sparingly applied. *Morgan*, 536 U.S. at 113; *Irwin v. Veterans Admin.*, 498 U.S. 89, 96 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). The same is true in the Second Circuit, in which this case arises.

1. Equitable Tolling

Equitable tolling is a doctrine which, when invoked as a defense to a claim of limitations,

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[8] Rules of Practice and Procedure, 28 C.F.R. Part 68 (2003).

[9] 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.

permits the extension of the filing period on a case-by-case basis to prevent inequity. *Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir.), *cert. denied*, 531 U.S. 968 (2000). It is available only when "extraordinary circumstances" prevent a timely filing, and the party must have acted with reasonable diligence throughout the period he seeks to toll. *Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001), citing *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir.), *cert. denied*, 531 U.S. 840 (2000).

In order to show that the extraordinary circumstances actually prevented a timely filing, the party must demonstrate a causal relationship between the alleged extraordinary circumstances on which the claim rests and the lateness of the filing. *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000). That demonstration cannot be made if a person acting with reasonable diligence could have filed on time notwithstanding the extraordinary circumstances. *Id.* A party's failure to act diligently is consequently never a basis for invoking equitable tolling.

When equitable tolling is permitted, the limitations period is interrupted; when the condition causing tolling has ended, the claimant has the remainder of the period in which to file. *Haekel v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999). The period does not begin all over again. *Tristar Corp. v. Freitas*, 84 F.3d 550, 553 (2d Cir. 1996) (citing cases). OCAHO cases make clear that neither pro se status nor ignorance of the filing requirements is sufficient in itself to warrant equitable relief. *Grodzki v. OOCL*, 1 OCAHO no. 295, 1948, 1955-56 (1991) (complaint one day late).

2. Equitable Estoppel

Equitable tolling is distinct from the doctrine of equitable estoppel, which may be invoked where it is the defendant's conduct which causes a plaintiff to delay filing. *Bennett v. United States Lines, Inc.*, 64 F.3d 62, 66 (2d Cir. 1995). Equitable estoppel is grounded on notions of fair dealing and good conscience. *In re Vebeliunas*, 332 F.3d 85, 94 (2d Cir. 2003). Whether or not it applies to particular circumstances is a question of fact. *Bennett*, 64 F.3d at 65; *Petrelli v. City of Mount Vernon*, 9 F.3d 250, 256 (2d Cir. 1993).

The elements necessary to support the application of equitable estoppel are: 1) a party makes a material misrepresentation of fact to the other party, with reason to believe that the other will rely on it, 2) the other party reasonably relies on the misrepresentation, 3) to his detriment. *Kosakow v. New Rochelle Radiology Assoc.*, 274 F.3d 706, 725 (2d Cir. 2001). A misrepresentation may not be relied upon unless it is made by responsible agents of the party to be estopped. *Glus v. Brooklyn E. Dist. Term*., 359 U.S. 231, 235 (1959)
(petitioner must prove that misrepresentation was made by responsible agents having some authority in the particular matter); *Buttry v. General Signal Corp.,* 68 F.3d 1488, 1493-94 (2d Cir. 1995), citing *Boss v. International Bhd. of Boilermakers*, 567 F. Supp. 845, 847-48 (N.D.N.Y) (local union chapter is not an agent authorized to speak for international union where

local chapter is autonomous), *aff'd* 742 F.2d 1446 (2d Cir. 1983).

False assurances of reinstatement may under some circumstances qualify as grounds for invoking equitable estoppel. *Dillman v. Combustion Eng'g., Inc.*, 784 F.2d 57, 61 (2d Cir. 1986) (equitable estoppel may be appropriate when an employer "falsely has assured the employee that it will settle the claim by reinstatement, the employee relies on the representation and the employee then delays filing his claim"), citing *Cerbone v. ILGWU*, 768 F.2d 45, 50 (2d Cir. 1985).

3. Effect of Actions by an Administrative Agency

The Second Circuit has expressed skepticism as to whether the actions of a nonparty, including a government agency, can ever trigger equitable modification of a deadline. *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 891 (2d Cir. 1995) (questioning whether actions of EEOC could have any effect on limitations period where the federal government is not a defendant). *But see Harris v. City of New York*, 186 F.3d 243, 248 n.3 (2d Cir. 1999) (stating generally that litigants are not penalized for EEOC's mistakes and misinformation). Even when the government agency is a party however, estoppel is rarely permitted. The showing required is that there was "affirmative misconduct on the government's part, aimed at causing [the party] to forgo his legal rights." *Long v. Frank*, 22 F.3d 54, 58-59 (2d Cir. 1994) (ambiguity in right-to-sue letter did not amount to affirmative misconduct on EEOC's part), *cert. denied sub nom*. *Long v. Runyon*, 513 U.S. 1128 (1995).

Lower courts in the circuit have taken divergent views as to when, if ever, the acts of a government agency which is not a party can affect a limitations period. *Cf. Grinnel v. General Elec.* Co., 907 F. Supp. 544, 546-47 (N.D.N.Y. 1995) (actions of EEOC as nonparty have no effect on limitations period); *Hesson v. Fireman's Fund Ins. Co.*, 897 F. Supp. 78, 82 (W.D.N.Y. 1995) (no equitable relief where EEOC was not a party and did not benefit from any confusion caused by ambiguous notice); *contra*, *Jacobs v. SUNY at Buffalo Sch. of Med.*, 204 F. Supp. 586, 592 (W.D.N.Y. 2002) (tolling permissible but only so long as the plaintiff has exercised reasonable care and diligence); *Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651, 656-58 (S.D.N.Y. 1996) (although strictly speaking neither equitable tolling nor equitable estoppel applies, there is nevertheless at least a potential for application of equitable considerations springing from misleading conduct by EEOC). OCAHO case law has similarly suggested that under limited circumstances an agency error which materially affects the rights of a complainant might give rise to equitable modification of a filing deadline. *Caspi v. Trigild Corp.*, 7 OCAHO no. 991, 1064, 1070 (1998).

VI. DISCUSSION AND ANALYSIS

Where the record does not disclose the date of receipt of a letter, the Second Circuit has applied a

rebuttable presumption that a mailed document is received three days after it is mailed. *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996). The circuit assumes as well that a notice provided by a government agency was mailed on the date shown on it. *Id.* at 526. These presumptions are rebuttable, but only by competent evidence. *Id.*

Absent any admissible evidence to the contrary, I find that Goel would have received the OSC notice on April 9, 2001 and that his complaint would accordingly have been timely had it been filed on or before July 9, 2001. Goel's belated letter of October 16, 2003 is not sufficient to rebut the *Sherlock* presumptions for three reasons. First, the presumptions can be rebutted only by competent evidence, *Sherlock*, 84 F.3d at 526, and the letter is not of such character. Goel's unwillingness to state under oath that he did not receive the letter in a timely manner precludes my considering the assertion. *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984); *United States v. China Wok Rest., Inc.*, 4 OCAHO no. 608, 178, 192 (1994). Mere conclusory allegations are not to be treated as evidence, and cannot create a genuine issue of fact where one does not otherwise exist. *Lipton v. The Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995), *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995). Second, Goel's assertion that OSC has any burden of proof in this case is simply wrong; although Goel has sought to amend his complaint to add OSC as a respondent, OSC is not currently a party to this proceeding. Third, even had Goel put the assertions in his letter in the form of an affidavit, these assertions are framed only in generalities and are wholly lacking in the type of specificity required to establish facts. The letter does not, for example, state exactly when Goel actually moved or when he surrendered his Post Office Box in Poughkeepsie; it does not address the question of when (or if) Goel ever filed a change of address form with the Poughkeepsie Post Office or whether he ever provided OSC with notice of a change of address;[10] and it does not disclose, even approximately, when he received the duplicate of the letter.

In any event, once Goel learned about the letter "around April/May of 2001," he had constructive knowledge that the period had begun. Notwithstanding Goel's belated assertion about the

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Both the April 6, 2001 letter (CXD2) and the July 6, 2001 letter (CXE) are addressed to Goel at P.O. Box 4, Poughkeepsie, N.Y. 12602. Despite the suggestion in October, 2003 that he called OSC in "April/May of 2001" telling them he had moved, OSC was still using the Post Office Box address in July 2001. Goel has not suggested that he did not receive the July letter; in fact his previous filings state that he called and had conversations with Anthony Archeval at OSC upon his receipt of the April letter and again upon his receipt of the July letter. See discussion at Sections D 1 and 2, infra.

timeliness of the letter, it is clear that the initial burden of demonstrating an untimely filing has been satisfied by a showing that the complaint was not filed until fourteen months after he had such knowledge, and the burden is thus shifted to Goel to demonstrate that the filing deadline should be modified.

Goel's explanations for his delay in filing evolved over time. He initially asserted in a letter accompanying his complaint that modification of the deadline was warranted because he traveled to India and was delayed by events there. He also said that his prior experience with OSC discouraged him from filing with OCAHO because OSC had referred his allegations to INS. In response to the motion to dismiss, Goel elaborated upon the latter assertion and said that OSC had denied him due process of law and equal protection by referring his previous complaints in 1999 and 2000 to other agencies, and that it was this experience which discouraged him from filing his OCAHO complaint on time. In his motion for equitable tolling, Goel said that the filing period should be tolled because he was "tricked" over the phone by promises to reinstate him made by two Indotronix board members and their attorney. His reply brief and third affidavit asserted for the first time that an OSC attorney misled him over the phone by advising him that the filing period ran from the close of OSC's investigation rather than from his receipt of the notice letter, and by telling him that he might have "better luck" at EEOC.

The difficulties of assessing Goel's arguments are compounded by the fact that his claims rest for the most part on facts and conclusions asserted in briefs and memoranda without extrinsic evidentiary support, notwithstanding his submission of four separate affidavits and multiple exhibits. Dates of key events are, moreover, inconsistently reported. Each of Goel's arguments is separately addressed in the interests of clarity, and to the extent there is admissible evidence supporting his allegations that evidence is so identified.

A. Goel's Travel to India

Goel's letter accompanying his complaint asked that his late filing be excused because he had to go to India "soon after OSC determination" to take care of his mother, and that he got stuck there "because all american airlines cancelled flights to and from India under fear of India-Pakistan nuclear war." He said further that his passport expired on May 19, 2002 and that it took two weeks to renew it. The letter states, "I reached here recently after getting new passport and flights resumption."

A plaintiff's absence from the United States ordinarily does not excuse his failure to make a timely filing. As explained in *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 781 (1992), a complainant's personal travel schedule is not beyond his control, and is thus not the type of "extraordinary circumstance" which gives rise to equitable tolling. *Cf. Netzer v.*

Continuity Graphic Assocs. Inc., 963 F. Supp. 1308, 1317 (S.D.N.Y. 1997) (while a *defendant*'s absence from the jurisdiction might toll a limitations period, a *plaintiff*'s absence does not excuse failure to file suit in a timely fashion). Goel has been notably reluctant, moreover, to provide any specific information as to precisely when his trip to India began or how long he stayed there; he has yet to specify the month or even the year in which he actually left the United States.

While Goel's memoranda describe in general terms a concatenation of untoward events in India - his mother's illness, cancellations of certain flights because of fears of war between India and Pakistan, the expiration of his passport and the need to obtain a new one - the specific dates of these events and the duration of their effects are notably absent from any of his four affidavits. Neither are his assertions supported by other admissible evidence establishing the exact timing or duration of his trip to India. He offered generalities, but no specifics, as to how long the flights by American carriers were suspended. Neither did he explain why cancellation of certain flights by American carriers would have affected him when he returned in any event via Air India (CXI), not by an American carrier.

More importantly, Goel made no showing that he was confined in any way while he was in India, or that he was otherwise out of reach of communication services such as the mail, the telephone, or the facsimile machine to assist him in his efforts to file a complaint. *Cf. Wilson v. Secretary, Dep't of Veterans Affairs*, 65 F.3d 402, 405 (5th Cir. 1995) (overseas mailing delays do not warrant extension of filing period), citing *Rao v. Baker*, 898 F.2d 191, 197-98 (D.C. Cir. 1990) (plaintiff's travel to the Philippines and mailing delays have no effect on running of limitations period). Indeed it does not affirmatively appear that Goel actually made any effort at all to file a complaint during this period. *Cf. South v. Saab Cars USA, Inc.*, 28 F.3d 9, 12 (2d Cir. 1994) (no ground for tolling where there was no attempt made to file the complaint until five days after the period expired).

While the record is somewhat barren as to Goel's whereabouts and activities between his presumptive receipt of the OSC letter on April 9, 2001 and the date the complaint was actually filed, the record nevertheless clearly does reflect that Goel was still present in the United States in early September, 2001 when he appeared in person before a notary public in the state of Ohio to execute the charge he filed with NYSDHR (RXD). His reply to the motion for summary decision states only that he left the United States "soon after" he filed that charge.

The fact that Goel was still in the United States until at least September 4, 2001, almost two months after the 90 day filing period had already expired, precludes any finding of a causal connection between his travel to India and his failure to file a timely complaint. In order to support equitable tolling, circuit law requires a causal connection between the alleged extraordinary circumstances and the party's delay, *Hizbullahankhamon*, 255 F.3d at 75;

Valverde, 224 F.3d at 134. No such causal connection can be shown when it is crystal clear that Goel's travel to India could not have "prevented" him from timely filing because the filing period was already over before he even left the United States.

The word "prevent," moreover, requires a demonstration that cannot be made if a person acting with reasonable diligence could have filed on time. *Vavszegi v. Bove*, 2002 WL 553458 *3 (D. Conn. 2002). Notwithstanding Goel's representation in the letter of August 28, 2002 that he had arrived back "recently" from India, the record clearly reflects that he arrived back in the United States on June 4, 2002. Thus, Goel's complaint was not even filed within 90 days after his return from India;
even had he been given an entirely new 90 day period after his return his complaint would still have been late. That fact too precludes a finding that it was his travel to India which "prevented" a timely filing.

B. Promises Allegedly Made by IIC

Goel also alleged that the delay in filing his OCAHO complaint was attributable to false promises made on behalf of IIC. To succeed in this claim, he must show that a conscious misrepresentation was made to him with reason to believe that he would rely on it. *Tadros v. Coleman*, 898 F.2d 10, 12 (2d Cir. 1987). He must also show that the misrepresentation was made by responsible agents of Indotronix and that he actually did rely on it; whether a party's representations could or could not be relied upon depends on who made them and the circumstances under which they were made. *Glus*, 359 U.S. at 235.

Goel says first that he relied on an e-mail from Gregg Minkow (CXA), which his second affidavit characterized as "promising my reinstatement in the job." The e-mail was sent on November 21, 2000, while the INS investigation was still in progress, but well before Goel even filed his OSC charge. It therefore requires a considerable stretch of the imagination to infer that the e-mail was sent in anticipation of the fact that Goel might file an OSC charge and subsequently follow it up by filing an OCAHO complaint. What the e-mail actually says, moreover, is,

> As I stated yesterday I cannot give you legal advice but would appreciate a chance to communicate with any attorney you may select to represent you. The Board members I represent take very seriously the concerns you have raised and believe it may well be to the mutual benefit of the corporation and yourself for us to seek your reinstatement. Obviously, any effort on the part of my clients or I (sic) to seek your reinstatement is, from our standpoint, on behalf of the corporation and my clients as shareholders and Board members; therefore, as discussed yesterday, a conflict of interest could arise between your interests and theirs, and you should

> continue to obtain separate and independent legal representation of your own. I am told you have been in contact with your own attorney, but I do not have his or her name; could you please supply it to me?

There is no showing of how anything in the e-mail could qualify as "a definite misrepresentation of fact" as required by *Buttry* and *Tadros*, or that Minkow intended or would have expected Goel to rely on the e-mail for any particular purpose. The e-mail cannot reasonably be construed to "promise" anything more than making an effort to seek Goel's reinstatement.
It seeks the identity of Goel's attorney and says it "may well be" to Goel's benefit and that of the company for the board members Minkow represents to seek his reinstatement. The e-mail expressly warns of a possible conflict of interest and encourages Goel to maintain independent representation. It represents that "from our standpoint" Minkow regards his efforts as being made on behalf of the corporation and his clients as shareholders and board members, but the e-mail does not represent that Minkow had been authorized to act on behalf of the corporation itself. The e-mail did not condition Minkow's efforts on any conduct of Goel's, and obviously did not deter Goel from filing his OSC charge only two weeks later.

There is no indication in the record that Goel ever responded to the e-mail or provided Minkow with the name of his attorney as requested. If he did so, that information has not been made part of the record. As of April 9, 2001, when Laura Sack sent Goel's lawyer a letter (CXC2) demanding the return of certain IIC documents then in Goel's possession, Goel was represented by Michael Sussman, Esq., of Goshen, New York. Nothing in the record suggests that contact was ever established between Sussman and Minkow or that there was any further contact between Goel and Minkow after the e-mail.

Goel makes no argument as to why he, as a company lawyer, would think that an attorney acting for some unnamed shareholder/board members would have had the authority to overrule the company's management with respect to personnel issues, or that Minkow had been authorized to act as an agent for the company itself. An alleged "agent" cannot confer authority or apparent authority on himself absent some affirmative act on the part of the principal. *Green Door Realty Corp. v. TIG Ins. Co.*, 329 F.3d 282, 289 (2d Cir. 2003), *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 744 (2d Cir. 2000), *Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989) (rejecting notion that an "agent" can create apparent authority by his own actions or representations). *Cf.* Restatement (Second) of Agency § 1, comment b (1958).
Neither has Goel furnished any evidence suggesting that Minkow was not acting in good faith. Absent evidence of bad faith or deliberate misconduct on the part of the party to be estopped, there can be no estoppel. *Tadros*, 898 F.2d at 12. It is in any event well established that the mere possibility that a decision might be reversed is not enough to alter a time bar. *Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) *cert. denied*, 474 U.S. 851 (1985). *See generally Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). There must be more.

Goel says, however, that in addition to the e-mail there were subsequent personal contacts and telephone calls by Dodla Rao and Ratnam Chitturi, both IIC board members, who "called me several times to inform that board members are working on getting me reinstated back to my job" (Goel's second affidavit). Goel's motion for equitable tolling argues that the e-mail coupled with the phone calls amounted to "a trick by the respondent to discourage me from filing appeal in the proper forum."

Goel's third affidavit alleges that he was "continuously" promised reinstatement, and also alleges for the first time that Dodla Rao visited Goel "around April 2001" to tell him that a Vice-President's position was being held for him that required approval by the board. That affidavit also stated,

> Dodla Rao further said that Indotronix board will reinstate me only if I do not testify against the company nor do I file complaint against the company with the U.S. Department of Justice in the future because U.S. attorney office[11] conducting investigation may use any information that I may provide to the U.S. Department of Justice in my complaint. Defendant's fraudulent inducement and misconduct prohibited me from filing timely OCAHO complaint.

Goel does not suggest, and I find no basis to conclude, that either Rao or Chitturi was actually authorized by the company to act in its behalf or that Goel, as an attorney, had any reason to believe that they did. Nevertheless, for purposes of considering this motion I take it as true that Dodla Rao, a board member, made the statement Goel attributed to him, and that Goel may have believed on the basis of that statement that he might be reinstated to his job. The most recent such representation Goel reported was made in the spring of 2001. His memorandum in support of his motion for equitable tolling says that Goel was assured in April 2001 that the vote on his reinstatement would be taken "at the next board meeting."

The rest is silence. The record does not suggest that Goel ever inquired as to when the next board meeting would take place. There is no suggestion that Goel ever sought to obtain the schedule of meetings or the minutes of any particular board meeting. Neither does Goel suggest that he or his attorney ever contacted Minkow, Rao or Chitturi at any time after the April 2001 representation to ask any of them what was happening or why he had not yet been reinstated. Goel does not suggest at what point during the ensuing seventeen months he first began to suspect that he was not going to be reinstated.

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[11] The reference is unclear. There is no evidence reflecting that there was ever any investigation conducted by a U.S. Attorney's Office. Goel may be referring to another component of the Department of Justice. The status of the INS investigation as of spring of 2001 is not reported. The OSC investigation concluded on July 6, 2001 (CXE).

That equitable considerations may operate to delay or interrupt the running of a statutory time period does not mean that equitable estoppel extends a limitations period indefinitely. In *Buttry*, for example, the plaintiff's cause of action accrued on February 19, 1992. The alleged misrepresentation to her occurred in June, 1992, but Buttry did not file her complaint until October 30, 1993, some eleven months after the court thought a reasonable person should have become aware of the misrepresentation. Similarly in *Dillman*, the plaintiff was fired on January 12, 1982. The charge was filed on March 4, 1983 and the complaint on July 20, 1983. Because the last mention of reinstatement had been made to Dillman on January 27, 1982, the court found the intervening delay of more than a year in filing the charge to be simply excessive.

Assuming that Goel relied on statements allegedly made to him by Dodla Rao in April 2001, he was still obliged to bring his action by the time a reasonable person would have gained actual or constructive knowledge of the misrepresentation. *Cf. Buttry*, 68 F.3d at 1494. A party is obliged to act within a reasonable time, and the reasonableness of any delay must be evaluated on a case by case basis in light of the particular facts and circumstances in the case. *Id.* It surely must have become apparent to Goel at some point after more than a year had gone by that his reinstatement was not happening.

As stated in *Cerbone*, 768 F.2d at 49, an employee may delay for a reasonable period to see if the employer intends to honor a promise of reinstatement. But due diligence in preserving one's legal rights is still the sine qua non for equitable relief, *Baldwin County*, 466 U.S. at 151. If, as the record here reflects, Goel continued passively to rely for a period of seventeen months on representations made to him in the spring of 2001, without himself making any further inquiry of Minkow, Rao or anyone else, I find as a matter of law that any such alleged reliance went well beyond any reasonable time and accordingly, without more, cannot furnish the basis for equitable estoppel. Even when viewed in the light most favorable to Goel, the delay here, like that in *Dillman* and *Buttry*, was patently unreasonable. A party seeking equitable relief is obliged to pass with reasonable diligence throughout the entire period he seeks to have extended. *Iavorski v. INS*, 232 F.3d 124, 135 (2d Cir. 2000), citing *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996). A failure to act diligently is not a basis for invoking equitable remedies. *South*, 28 F.3d at 12.

C. Goel's Previous Experience with OSC

Despite the skepticism expressed in *Cassadegha* as to whether equitable modification is ever available because of acts of an administrative agency, some lower courts have nevertheless on occasion said that misconduct on the part of an agency may give rise to equitable relief. *Spira v. Ethical Culture Sch.*, 888 F. Supp. 601, 602 (S.D.N.Y. 1995) (relief may be available for "affirmative conduct on the government's part on which the plaintiff . . . demonstrated that he had relied to his detriment").

Goel represents that OSC's "misleading conduct in the past" denied him due process and equal protection because Robin Stutman and Rosemary Dettling misled him by referring him to other agencies and consistently refusing to investigate his allegations of national origin-based discriminatory practices and accompanying retaliation. It does not, however, affirmatively appear that Goel's letters to OSC in 1999 and 2000, which are not part of the record, or his 2001 OSC charge, which is attached to his complaint, actually made any allegations of national origin-based discrimination. The OSC charge alleges only retaliation. No allegation of national origin discrimination is made in the OCAHO complaint either;[12] presently pending in fact, is Goel's motion to amend his complaint in order to add, inter alia, an allegation that Goel was fired because of his national origin.

As IIC pointed out in response to Goel's motion to amend, adding allegations of discrimination on the basis of national origin to the instant complaint would be futile because those allegations would not survive a motion to dismiss. There are three separate reasons why this is so: 1) national origin discrimination was not asserted in the underlying OSC charge, thus administrative remedies were not exhausted as to that claim, 2) any allegations of national origin discrimination would have to be dismissed under 8 U.S.C. § 1324b(a)(2)(B) because Indotronix has more than 14 employees, and 3) such allegations would also have to be dismissed pursuant to the no overlap provision of 8 U.S.C. § 1324b(b)(2) because they overlap Goel's EEOC charge.

Section 1324b(a)(2)(B) expressly exempts from the coverage of § 1324a(1),

> a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-2].

As the Dettling letter (CXI) explained to Goel, OSC's jurisdiction over allegations of national origin discrimination is limited to employers of fewer than fifteen and more than three employees; it thus had no jurisdiction then and has no jurisdiction now over national origin claims against employers of more than fourteen employees. It is undisputed that at the time of Goel's discharge IIC had in excess of 400 employees (Affidavit of Lynn Hanig). As pointed out in *Guzman v. Yakima Fruit & Cold Storage*, 9 OCAHO no. 1066, 8 (2001), cases are legion to the effect that OCAHO's jurisdiction over claims of national origin discrimination, like OSC's, is limited to employers of fewer than fifteen and more than three employees. Goel appears to

[12] The OCAHO complaint form contains various questions as to the basis for the complaint. Goel checked "No" in response to a question as to whether he was discriminated against based on his citizenship status. He did not respond at all to the question about national origin, checking neither "Yes" nor "No."

misconstrue the scope of OSC's statutory authority and to insist, although advised to the contrary, that OSC was obligated to treat his previous letters as charges and to investigate all of his allegations.

Although Stutman and Dettling referred Goel's previous correspondence to other agencies, Goel has not established that there was anything incorrect or inappropriate about their doing so. Unlike *Angotti* and the cases cited therein, this is not a case in which the administrative agency erroneously refused to accept allegations over which it actually had jurisdiction. Here OSC did not investigate allegations of national origin discrimination for two reasons: 1) it does not affirmatively appear that such allegations were actually made, and 2) even had they been made, such allegations would not have been within OSC's jurisdiction and they are not within OCAHO's jurisdiction either. Goel's unwillingness to accept that OSC had no jurisdiction, no matter how urgently or how frequently voiced, does not operate to confer jurisdiction on OSC where jurisdiction is otherwise lacking.

OSC is similarly without primary jurisdiction over Goel's assertions of immigration fraud, visa fraud, racketeering, defrauding the government of FICA taxes by employing H-1B workers as independent contractors, violations of labor certification application rules and regulations, abuse of H-1B visas, filing perjured green card applications for phony positions, or other similar matters. These are the matters OSC referred to other agencies. Although Goel insists that he was "tricked" into filing in the wrong forum, there is no showing that either INS or DOL was the "wrong forum" for the assertions referred to those agencies, and it is crystal clear that EEOC is the only correct forum for complaints of national origin discrimination by employers of more than 14 employees. Goel has accordingly made no showing of affirmative misconduct by Stutman or Dettling which caused him to forgo his legal rights.

D. Representations by Anthony Archeval

Goel's motion for equitable tolling also argues that representations made to him over the phone by an OSC attorney contributed to his delay in filing. His memorandum describes two phone calls he allegedly made to OSC in response to the letters OSC sent him on April 6 and July 6, 2001.[13]

1. Goel's Call after the April 6, 2001 Letter

OSC's letter of April 6, 2001 (CXD2) advised Goel that the investigation of his charge was not complete, but that it would be completed within 90 days. The letter said further,

> . . . you may now file your own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). <u>If you choose to</u>

[13] Goel's account of these phone calls makes no suggestion that he might not have received the OSC notice in a timely manner as his recent letter alleged.

> file a complaint with OCAHO, you must do so within 90 days of your receipt of this letter. During this additional 90-day period, the Special Counsel may also file his own complaint with OCAHO or seek to intervene in any proceedings that may result from your complaint (emphasis added).

Notwithstanding this unequivocal language, Goel's motion asserts that Anthony Archeval misled him over the phone by telling him when he called in response to the letter that he did not need to follow those instructions. He contends the letter itself misled him by "vague and misleading wording" because it said that OSC had not yet completed its investigation. Goel said that he called OSC after receiving the letter to ask whether he had to file within 90 days or if he could wait until OSC completed its investigation. He said Anthony Archeval told him that he could wait until the final determination, and that he waited based on that advice. Goel's third affidavit asserts,

> In response to my question, OSC attorney Anthony Archeval had informed me that I can file complaint with the OCAHO within 90 days of the OSC final determination after conclusion of the investigation.

Because the statement is made in an affidavit, I take it as true and assume therefore for purposes of this motion that Archeval told Goel, contrary to the explicit and unequivocal written instructions in the letter of April 6, 2001, that the filing period could nevertheless be counted from the close of the OSC investigation.

Goel does not assert and nothing in the record suggests that he made any attempt to reconcile the conflict between the written instructions and the oral advice to the contrary. In *Spira*, where an EEOC employee allegedly told the charging party that the filing period was measured in working days, not calendar days, the court held that there was no affirmative misconduct even though advice itself was wrong. 888 F. Supp. at 602. The court noted that a reasonable person in that situation would likely either have sought a reconciliation of the conflicting information or would have filed within the shorter of the two time periods (citing cases).

Accord, *Smith v. Henderson*, 137 F. Supp. 2d 313, 319 (S.D.N.Y. 2001), where plaintiff said she relied on the telephonic statement of an EEO counselor that she would be given additional time, there was no affirmative misconduct; where oral advice conflicts with a written notice the party is expected to make efforts to reconcile the conflicting information. Equitable relief was held to be inappropriate there because the plaintiff had either actual or constructive knowledge of the time limitation. *Id. But see Tsai v. Rockefeller Univ.*, 137 F. Supp. 2d 276, 283 (S.D.N.Y. 2001) (where EEOC told the charging party that the statute of limitations was three years, this was flat out wrong and amounted to affirmative misconduct).

I need not resolve this apparent conflict in the case law because a party cannot claim equitable modification of a deadline when in view of the facts he claimed to rely on his filing was still untimely. *Martin v. Reno*, 1999 WL 527932 *8 (S.D.N.Y.). At most the misinformation described could have extended the period to encompass another 90 days after the close of the OSC investigation: had Goel actually relied on the representation that July 6, 2001 was the starting date for his 90 day filing period, he would then have filed his complaint on or before October 4, 2001. Instead, Goel did not file his complaint until September 4, 2002, some eleven months after that. Clearly Archeval did not tell Goel, and Goel did not claim that he did, that the filing period would run for 90 days after the close of OSC's investigation, and then for another gratuitous eleven months in addition after that. Because Goel clearly did not rely on the erroneous advice, that advice was not the cause of his delay in filing.

2. Goel's Call after the July 6, 2001 Letter

Goel's motion said he called Archeval again after he received the letter of July 6, 2001 and was then told that Archeval had misunderstood his earlier question and that he might have better luck with the EEOC. His first affidavit says,

> "In pursuance to OSC trial attorney Anthony Archeval's disclosure and advice that he was earlier employed with EEOC agency that investigates national origin based discrimination charges, I filed verified complaint with the New York State Human Rights Division on September 4, 2001. Anthony Archevel made determination on July 6th, 2001. I filed verified charge with the New York State Human Rights Division within 58 days of OSC determination."

His third affidavit avers in addition that he was misled because Archeval told him that his charge might "have better luck at EEOC because it contains retaliation for opposing improprieties not limited to citizenship or national origin such as bringing in recruiters and marketing reps by filing false petitions for programmer analyst positions." It also alleges that Archeval "disclosed to me that he was previously employed by EEOC and both the agencies have work sharing arrangement."

There is no showing that Archeval's prior employment was misrepresented or that it has any relevance to the issues in this case. Neither is there any suggestion that remarking on the existence of a work sharing agreement between the agencies was a misrepresentation or was itself otherwise misleading. While it is patently incorrect to suggest that EEOC has any authority per se to address issues of false visa petitions for programmer analyst positions, it would have been entirely correct for OSC to refer any allegations of national origin discrimination and accompanying retaliation to EEOC.

That Goel filed a timely charge with the state agency and EEOC has no bearing on the question of whether he exercised due diligence in filing his OCAHO complaint. *Cf. Curtis v. Radioshack Corp.*, 190 F. Supp. 2d 587, 590 (S.D.N.Y. 2002) (filing with county human rights commission did not toll period for filing with EEOC). The record as a whole reflects that Goel did not exercise such diligence and, no reasonable factfinder could conclude on the basis of this record that he did.

VII. CONCLUSION

Although Goel has been treated as a pro se litigant for purposes of this case, he is nevertheless, like the plaintiff in *Miller*, 755 F.2d at 26 "not an uneducated person unfamiliar with the law," but rather, like the plaintiff in *Pfister v. Allied Corp.*, 539 F. Supp. 224, 227 (S.D.N.Y. 1982) " an experienced attorney who may be expected to know of the perils of untimely filing." He may also be expected to know of the perils of failing to provide specific facts in response to a motion for summary decision and of failing to provide such facts in the form of an affidavit or other admissible evidence. No factual basis has been shown on this record which would support the application of equitable modification to the filing deadline.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Ashwani K. Goel is a lawyer and a citizen of the United States.

2. Indotronix International Corp. is a corporate entity having its principal place of business in Poughkeepsie, New York, where it is engaged in the business of providing consulting and software development services.

3. Goel was employed as in-house immigration counsel for Indotronix from August 1994 until he was fired on November 20, 2000.

4. At all times pertinent to this proceeding Indotronix employed in excess of 400 employees.

5. On December 5, 2000, Goel filed a charge with the OSC alleging that Indotronix retaliated against him for engaging in protected conduct.

6. OSC sent Goel a letter on April 6, 2001 advising him that he could file his own OCAHO complaint within 90 days of his receipt of the letter.

7. Goel presumptively received the OSC letter of April 6, 2001 within three days after it was

mailed.

8. On September 4, 2002, Goel filed the instant complaint.

9. Goel's OCAHO complaint was filed 17 months after his presumptive receipt of the OSC notice.

10. No extraordinary circumstances prevented Goel from filing his complaint in a timely manner.

B. Conclusions of Law

1. Ashwani K. Goel is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. Indotronix International Corp. is an entity within the meaning of 8 U.S.C. § 1324b(a).

3. All conditions precedent to the institution of this action have been satisfied.

4. OSC lacks jurisdiction over claims of national origin-based discrimination if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-2].

5. Section 703 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-2] generally encompasses claims of national origin-based discrimination by employers of 15 or more employees for 20 or more calendar weeks in a year.

6. Indotronix is entitled to judgment as a matter of law that Goel's complaint was untimely filed.

7. Goel presented no triable issue of fact sufficient to warrant a hearing as to the application of equitable remedies to excuse his untimely filing.

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

ORDER

The complaint is dismissed. All other motions not otherwise resolved are denied.

SO ORDERED.

Dated and entered this 13th day of November, 2003.

_____
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), 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.