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

LINDA S. WALKER, SUSAN SUTHERLAND, JURIAN VREEBURG, HANNELORE HAINKE, HELENA FARQUHARSON, CAROLYN HARMAR AND CAROL VIEUX, Complainants,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	CASE NO. 93B00004
UNITED AIR LINES, INC., Respondent.	)	

AMENDED DECISION AND ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION AND GRANTING IN PART AND DENYING IN PART COMPLAINANTS' MOTION FOR JOINDER WITH THE COMPLAINANTS IN LARDY V. UNITED AIRLINES, OCAHO CASE NO. 92B00085

(September 13, 1994)

Appearances:

For the Complainants
Raymond C. Fay, Esquire
Susan J. King, Esquire
Bell, Boyd & Lloyd

For the Respondent
Michael A. Curley, Esquire
Kenneth A. Goldberg, Esquire
O'Melveny and Myers

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

TABLE OF CONTENTS

I. *Introduction*

The seven complainants in this case, Linda S. Walker, Susan Sutherland, Jurian Vreeburg, Hannelore Hainke, Helena Farquharson, Carolyn Harmar and Carol Vieux, each of whom is a U.S. citizen[1] and a former flight attendant with Pan American World Airways, Inc. ("Pan Am"), most recently at its London-Heathrow base in England, have filed a complaint of citizenship status discrimination, in violation of IRCA, 8 U.S.C. § 1324b(a)(1)(B), against United Air Lines, Inc. ("United"), based on United's decisions not to retain, transfer or hire them for flight attendant positions following United's purchase of Pan Am's London routes, air services and operations in 1991. Complainants also allege that United has retaliated against them in violation of 8 U.S.C. § 1324b(a)(5).

Complainants contend that prior to United's purchase of Pan Am's London-Heathrow operations, there were approximately 400 Pan Am flight attendants based in London, all of whom were either U.S. citizens or green card holders. Compl., Ex. 1 [Complainant's Position Statement Under 8 U.S.C. § 1324b] at 1. Complainants assert that "all or virtually all were protected individuals under 8 U.S.C. § 1324b" who were present in London pursuant to treaty arrangement and "were not required to have British working papers pursuant to arrangements approved by the Home Office, which regulated immigration in the United Kingdom." Id.

United has increased the number of London-based flight attendants to approximately 800 individuals. Compl., Ex. 2 [position statement attached to Charge Form, ¶ 9] at 1. Of the 800, approximately 227 were former Pan Am flight attendants and approximately 130 were United flight attendants who had transferred from other United bases. Id. More than 400 other London-based flight attendants are newly hired, and all or virtually all of them are not U.S. citizens or protected individuals. Id. Furthermore, many of them have no previous flight attendant experience. (Compl. ¶ 37.)

Complainants purport to bring a class action on behalf of themselves and the approximately 170 other former London-based Pan Am flight attendants who allegedly are "similarly situated" as "virtually all . . . were either United States [c]itizens or green-card holders," Compl. ¶ 5, who "were qualified to be retained by or transferred to United . . . for

[1] Vreeburg is a dual citizen of the United States and the Netherlands; Harmar is a dual citizen of the United States and Great Britain.

the flight attendant positions for which United was seeking applicants," Compl. ¶ 13, and whom United did not hire.[2] Complainants contend that United's intent was to maximize the number of foreign nationals at the London flight attendant base and to reduce or minimize the number of U.S. citizens and protected individuals.

Currently before me are (1) Respondent's motion to dismiss the complaint for lack of timeliness and (2) Complainants' Joint Motion to Consolidate and For Leave to Amend, in which Complainants request that I consolidate the instant case with Lardy, for all purposes and that I allow Complainants leave to file a consolidated amended complaint naming as complainants the three Lardy and seven Walker complainants as well as other former Pan American flight attendants, all of whom are "protected individuals" within the meaning of 8 U.S.C. § 1324b.

II. *Facts and Procedural History*[3]

Each of the Complainants is a U.S. citizen (Compl. ¶2) and former Pan Am flight attendant or flight purser whose work in 1991 was based out of Pan Am's base at London-Heathrow Airport and who worked flights between Europe and the United States. (Compl. ¶ 5.) Complain-

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[2] In Lardy v. United Airlines, Inc., OCAHO Case No. 92B00085, three other former London-based Pan Am flight attendants who had applied for flight attendant positions with United at its newly-acquired base at London-Heathrow similarly were refused employment in a letter dated March 13, 1991. See First Amended Complaint in Lardy, filed January 11, 1993, at ¶¶ 17, 19, 21. In Lardy, United stated that its records indicate that it declined to hire about 93 of 320 former Pan Am flight attendants who applied for positions at London-Heathrow, and of those 93, about 60 have already signed a settlement and general release agreement, releasing any and all claims against United--including discrimination claims brought under U.S. law--as a result of negotiations between United and counsel for their former union, the Independent Union of Flight Attendants ("IUFA"). Lardy Answer ¶ 9; George Decl. ¶ 5; Boyle Decl. ¶ 7. In this settlement and general release agreement, which arises out of complaints brought in the United Kingdom covering the application of the British Transfer of Undertakings (Protection of Employment) Regulations of 1981 to the former Pan Am flight attendants, United denied and made no admission of liability or wrongdoing. Id. In exchange, the flight attendants were offered an interview with United and a cash settlement of between $500 and $3500, depending on how long the flight attendant had worked for Pan Am. Complainants' Supplemental Brief in Support of Motion to Lift at 10 n.9 (citation omitted).

[3] Facts regarding the date Joan Lardy, the named-complainant in Lardy, received unequivocal notice that United had not selected her for a flight attendant position are included in this section because they are material to resolving Respondent's motion to dismiss, which I construe as a motion for summary decision.

ants began employment with Pan Am as follows: Walker on June 8, 1970, Sutherland on June 2, 1970, Vreeburg on March 3, 1986, Hainke on March 15, 1959, Farquharson on January 14, 1966, Harmar on April 25, 1968, and Vieux on March 13, 1978. (Compl. ¶¶ 6-12.) During the course of their careers with Pan Am, each complainant other than Vreeburg was based at between two and six cities in addition to London, including New York, Miami, Los Angeles, Honolulu, San Francisco, and Tokyo. (Id.) Each complainant speaks French and English, and all complainants but Vieux speak between one and four additional languages, including Spanish, Italian, Japanese, Dutch, and German. (Id.)

United, a Delaware corporation with its corporate headquarters and principal place of business located in Elk Grove Village, Illinois, is engaged in the business of transporting passengers and freight by air within the United States and overseas. (Compl. ¶ 3.) United has over 70,000 employees in the United States and abroad. (Id.) Central management and administrative decisions, including those relating to employment, are made at United's headquarters. (Id.)

On or about November 1, 1990, United announced that it had agreed to buy Pan Am's London routes, air services, and other assets. (Compl. ¶ 14.) In January 1991, United sent a management team to London to discuss employment of Pan Am's employees and to organize a flight-attendant base for United in London. (Compl. ¶ 16.) Between approximately February 1 and 11, 1991, United interviewed the London-based Pan Am flight attendants who had applied for flight attendant positions with United. (Compl. ¶ 18.) The Pan Am flight attendants were informed that if they were unavailable to interview in London, they could arrange to be interviewed in Washington. (Compl. ¶ 19).

Representatives from United's Chicago headquarters interviewed Complainants Walker, Sutherland, Vreeburg, Hainke, Farquharson, Harmar and Vieux (as well as the Lardy complainants) in London during February 1991. (Compl. ¶¶ 19, 24, 26, 27, 29, 32, 34.) As part of the interview process, each Complainant was required to fill out United's standard application form which asked the applicant if he or she was willing to relocate. (Id.).

Complainants Walker, Sutherland, Hainke, Farquharson, and Vieux completed the United pre-employment physical. (Compl. ¶¶ 19, 24, 27, 29, 34.) The doctor told Farquharson that she had passed the physical. (Compl. ¶ 29.) Complainants Vreeburg and Harmar did not complete the United pre-employment physical. (Compl. ¶¶ 26, 33.) During

Harmar's interview, she stated that she would be available to take her physical between February 4 and 8. (Compl. ¶ 33.) On February 8, United called her to schedule the examination. (Id.) On February 12, Helen Siu, one of the United coordinators suggested that Harmar go to United's Honolulu medical group for her examination and Harmar made an appointment to have her examination in Hawaii on February 13. (Id.) When Harmar arrived for her examination, she was told she could not have her medical interview because the appointment had not been confirmed by Martha Lane at United in Los Angeles. (Id.) Upon her return to London on February 24, Harmar immediately tried to arrange for her physical examination. (Id.) She wrote and telephoned Ray Boyle of United to arrange to take her medical examination with the second group of Pan Am interviewees. (Id.) Boyle never responded to her letters or phone calls. (Id.)

By letter dated February 11, 1991, United informed Farquharson that its interview team had recommended her for a flight attendant position at United, and that she would receive an offer of employment subject to certain conditions including: (1) that there would be flight attendant vacancies at the London base following the award of transfers to United flight attendants, and (2) that she satisfactorily completed the United pre-employment physical. (Compl. ¶ 30.) The letter also indicated that "[c]onsistent with the Railway Labor Act, your pay and benefits as a flight attendant will be based on the terms of our Agreement with the Association of Flight Attendants (AFA)." (Id.) By letter dated February 21, 1991, United welcomed Farquharson to flight training and provided her with information on where she was to stay while in the Chicago area for training. (Id.) On February 25, 1991, Mike Sullivan of United called Farquharson and told her that she had failed the physical and was not accepted for training. (Id.) By letter dated February 26, 1991, Farquharson requested that United inform her of the reason that she had failed the physical. (Id.) United declined to inform her of the reason. (Id.)

On February 14, 1991 and February 15, 1991, respectively, Pan Am and United each sent a letter to Joan Lardy indicating that she had passed the personal interview portion of her application process with United. Those letters also indicated that Lardy would receive a job offer from United, subject, among other items, to successful completion of United's pre-employment medical examination. See Goldberg Aff.3, ¶¶ 4-6. Exhs. A, B, and C at 120-21, 125-26; Lardy Decl. ¶ 4, Ex. A. During the week of February 14, 1991, Lardy completed United's pre-employment physical, conducted by Dr. Mooney, head of British Airways medical, at Heathrow Airport. Lardy Decl. ¶ 2. At the conclu-

sion of her physical, Dr. Mooney told Lardy that she had passed the physical. Id.

Following her physical, Lardy went to Pan Am's offices with Karolina Gantchar, another complainant in Lardy. Lardy Decl. ¶ 3. While Lardy waited in the car, Gantchar went into Pan Am's offices to see if there was any news as to whom United had selected. Id. When Gantchar returned to the car, she indicated to Lardy that a Pan Am employee had informed her that Lardy was on the list of people who had passed the interview. Id.

On February 20, 1991, Lardy sent a letter to Sara Fields, United's Vice President, Inflight Service and the person who had signed the earlier February 15, 1991 letter to Lardy. In that letter, Lardy asked Fields if United would reconsider the nonselection of several of her colleagues whom United had rejected based on their interviews, stating:

> Pan Am has recently secured a list from United Airlines, of Flight Attendants who may have a job offer from United at an entry level salary . . . .Some of our dearest friends and colleagues have been publicly (sic) told they are not on the United Airlines list . . . . Is there any way United and the AFA would reconsider and take all of us?

Goldberg Aff.3, Ex. E.

At some point between February 25, 1991 and March 12, 1991, Ann Ransley, a Pan Am supervisor (not Lardy's), informed Lardy that she was not on the list United had given Pan Am of individuals who had passed United's physical. Goldberg Aff.3, Ex. C at 171-72; Ex. F at 3. On March 12, 1991, Lardy sent a letter to United's Medical Director, Dr. Anthony Fernandez, to learn the reasons she was not on United's list of individuals scheduled for training. Id., Ex.C at 133-35; King Decl.1, Ex. B [copy of the July 14, 1992 Declaration of Joan A. Lardy, in Support of Complainants' Supplemental Brief in Support of their Motion to Lift the Discovery Stay, filed in Lardy ("Lardy July 14, 1992 Decl.")], ¶ 4. In her letter, Lardy stated that had been advised that she passed the United interview and medical examination and that she only had to wait for results of a urinalysis test. Id. at Ex. G. Lardy stated that she then was told that she was "not on the 'list'" of applicants scheduled for flight attendant training and was writing to Fernandez to find out the reasons why United had rejected her on medical grounds. Id.; Lardy Decl. ¶ 10; King Decl.1, Ex. B [Lardy July 14, 1992 Decl."], ¶ 4. Lardy did not receive a response to her letter. Lardy Decl. ¶ 10. She subsequently telephoned Dr. Fernandez's office

several times. Id. His office staff told her that the office had nothing to do with United's hiring and that it was all done in Chicago. Id.

In mid-March of 1991, Ransley telephoned Lardy and informed her that she was not on a second list she had in her possession of individuals who had passed their physical examinations. Ransley told Lardy that the list was confidential and that Lardy would not be allowed to see it.[4]

Between the end of February, 1991 and the beginning of April 1991, Pan Am's London flight attendant domicile was in a state of confusion and turmoil. Lardy Decl. ¶ 6. As Pan Am flight attendants who had been selected for training left to go to their training classes, the remaining flight attendants were flying constantly as Pan Am was short-staffed. Id. There was confusion because some Pan Am flight attendants who Lardy was told were not on either the first or second list left for training during this time frame. Id. They included (1) Cecilia Monitor and Janine Zyla; (2) junior Pan Am flight attendants who had been furloughed by Pan Am in February; and (3) Maria Confalionieria who went to training without having completed United's medical exam. Id.

Because Lardy had been told that Pan Am flight attendants who were not on the Pan Am "list" were going to training and because she had been told by Dr. Mooney that she had passed United's medical exam, on March 12, 1991, Lardy called United's Flight Attendant Employment office in Chicago to find out information regarding her training date. Lardy Decl. ¶ 3; see also Goldberg Aff.3, Ex. C at 136. Lardy states that she was told only that she was not on the list of individuals scheduled for training (Lardy Decl. ¶ 7) and when she asked why she was not on the list, she was told that the information was confidential. Id.; Goldberg Aff.3, Ex. C at 136. Respondent contends that Lardy was told that United had rejected her for a flight attendant position.

Following that conversation, Lardy wrote a letter to Fields, dated March 12, 1991, stating: "This is to advise you that regretfully, I will not be employed as a Flight Attendant by United Airlines. I learnt (sic) today by phoning Flight Attendant Employment, Chicago that I was not on the list for Flight Attendant training." Lardy Decl., Ex. 8. Also in that letter, Lardy suggested that United consider her for a security liaison position. See id.

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[4] There is no evidence in the record as to (1) whether that alleged "list" was prepared by United or Pan Am, (2) its purpose or (3) its contents.

United, in a form letter dated March 13, 1991, notified each of the Complainants (as well as each of the Lardy complainants) that it had not selected him or her for a flight attendant position, stating "we have reviewed your application and have concluded we have other candidates who more closely meet our selection criteria for the flight attendant position." (Compl. ¶¶ 20, 25, 28, 31, 35, 37; see, e.g., Vreeburg Decl., Ex. 1.)[5]

On September 25, 1991, the Lardy complainants filed pro se charges with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices ("OSC"), alleging that United had discriminated against them based on their status as U.S. citizens, in violation of IRCA. (See Lardy First Amended Complaint at ¶ 30.) Each charge form indicates the date the complainant began employment with Pan Am and states that the date of termination was April 3, 1991. See Lardy Complaint, Ex. 2. Each form then states: "She was terminated upon transfer of Pan Am route sale to United Airlines. Her position was replaced by a D-1 applicant."

It is undisputed that Complainant Harmar received her rejection letter from United at her residence in London, England on March 23, 1991. Compls.' Resp. to ALJ's Interrogs. at 3; Resp.'s Mem.2 at 4; see Goldberg Aff.1, ¶ 6, Ex. C. It is also undisputed that Walker received United's rejection letter to her at her residence in Paris, France between March 23 and 26, 1991. Compls.' Resp. to ALJ's Interrogs. at 3; Resp.'s Mem.2 at 4; see Goldberg Aff.1, ¶ 7, Ex. D. There is a dispute, as discussed below, as to the dates of receipt of United's rejection letter by Complainants Farquharson, Hainke, Sutherland, Vieux, and Vreeburg and as to the dates Farquharson, Hainke, Sutherland and Walker (as well as Joan Lardy in the Lardy case) received unequivocal notice of their nonselection for a flight attendant position by United.

Joan Lardy, who lived in London, England, received her rejection letter on March 30, 1991. Lardy Order, at 45. Mary Moore, who lived in Paris, France, received her rejection letter on March 29, 1991 (as corroborated by her notations on the mailing envelope attached to her declaration). Id. at 43-45. Each of the Lardy complainants filed her OSC charge on September 25, 1991, 179 or 180 days after the allegedly discriminatory act. Id. at 45.

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[5] In an interlocutory order in Lardy, I found that Respondent had mailed these rejection letters on March 14, 1991. See Lardy v. United Airlines, 63 Emp. Prac. Dec. (CCH) Cas. ¶ 42,891, 4 OCAHO 595, at 39 n.27 (Jan. 11, 1994) ("Lardy Order").

On April 1, 1991, Lardy wrote to Paul George, United's Senior Vice President of Human Resources, requesting specific reasons for her "medical disqualification" and advice as to United's appeal process. Lardy Decl. ¶ 12. In addition, Lardy asked "if the [March 13] letter from United Airlines is a denial, as I do not understand what it means." Id. By letter dated April 16, 1991, United confirmed that Lardy had not been selected and indicated that it would not inform her of the specific reasons for her nonselection. Id. at ¶ 13, Ex. F.

On or about April 3, 1991, United commenced its operations on the London route purchased from Pan Am. (Compl. ¶ 10.) On that date, each of the Complainants was furloughed from Pan Am's London operations center as a result of United's refusal to retain, transfer or hire him or her. (Compl. ¶¶ 6-12.) Complainant Walker transferred to Pan Am's Miami base on April 3, 1991. Her employment with Pan Am was terminated on December 4, 1991. On January 21, 1992, Walker went to the United desk in Paris where she saw and heard three United employees telling applicants for flight attendant positions that they needed EEC passports to be considered for employment with United. (Compl. ¶ 21.) When Walker asked one of the United employees, Deana Popowcer, if her French resident card would be acceptable for employment with United in Paris, Popowcer said "no." (Id.) Walker explained that even though she has a U.S. passport, the French resident card entitled her to work in France. (Id.) Popowcer replied that she had been instructed only to accept EEC passport holders. (Id.)

On October 4, 1991, nine days after the Lardy complainants filed their charges, Joan Lardy, a complainant in that case, sent a facsimile to Lawrence Mitchell, Assistant to the Special Counsel, and OSC attorneys, D. Palmer and L. White. See King Decl.1, Ex. F. The cover page of the six-page handwritten memorandum states "urgent--rush to L. Mitchell today on receipt of FAX." The memorandum states in relevant part:

> Ref: charge against United Airlines, Inc. (UAL) hiring illegal foreign workers for U.S. employment on U.S. airline into United States, and denying qualified U.S. worker in the job that same employ (United Airlines Inc. purchase of Pan Am's London operation and assets Nov '90-April 91.
>
> [United] sent a team of United management from Chicago to London UK, to discuss employment of Pan Am's London employees. . . . The Pan Am London employees comprised (sic) two groups:
>
> (1) all London ground staff on UK sterling payroll, (2) all flight attendant staff London based on U.S.A dollar payroll; the flight attendants being either U.S. citizens or green card holders--A special and exceptional agreement between Pan Am and the UK gov.

home office was made in 1972 for 600 U.S. workers to be based as crew at Heathrow London. This was a big economic advantage to the US airline Pan Am saving them $8 million per year in costs. The UK government agreed in March 1991 to transfer these 600 USA worker positions at Heathrow to United Airlines for the same economic advantages (documents available) . . . .

Feb 5, 1991
United management & interviewers were overheard saying they were placing newspaper ads in the UK newspapers to hire local foreign workers. They said they were pleased British Airways was having a flight attendant layoff due to the recession so United would get many foreign applicants from their ads (witnesses available) . . . .

Feb 15 - March 15, 1991
United denied employment to approx (sic) 150 of Pan Am's 395 U.S. London based qualified flight attendants and hired 300-400 foreign workers in Europe . . . .

April 3
United took over Pan Am's London operation. During April United started flying the London routes to the USA with foreign workers--having denied these jobs to U.S. flight attendants and causing furloughs of Pan Am flight attendants in Washington, New York and London. When [United] started putting ads and hiring in Europe from Feb '91 they did not have a confirmed purchased approval or agreement from the US D.O.T. or the UK D.O.T. which was not obtained until [ ]. By this time United had already denied qualified US workers a job and hired foreign workers.

Pan Am's USA flight attendant workers were furloughed and their jobs at Heathrow terminated April 3rd 1991. They had no means of transportation back to the United States after April 3, as Pan Am had no flights out of the UK then a request was made to United to allow the USA workers to return to the US on United. United gave a one way ticket . . . to those who requested . . . . United has approx 300-600 new hire foreign flight attendants working into the USA out of London. They intend to increase the London base to over 1000-1500 flight attendants. By basing flight attendants in the UK there is a considerable cost savings . . . .

We have been discriminated against as US workers, US citizens and green card holders, losing our jobs to foreign workers, becoming unemployed with no medical, insurance or travel benefits.

United has deliberately taken away our employment from qualified legal US workers to the detriment of the American people, the American gross national product and economy and in violation of IRCA law 1986 hiring undocumented foreign workers . . . . C. Bertram has filed individual claims against United Airlines, whose response was U.S. workers abroad do not have rights to sue them for their actions.

United Airlines should cease and desist these violations against fellow Americans and full compensation and damages returned to the unemployed U.S. workers they deliberately put out of work.

Id. at 2-8.

On October 7, 1991, OSC sent a letter to Respondent, stating that Karolina Gantchar, Mary Moore and Joan Lardy allege that "upon transfer of Pan American route sales to United Airlines, their positions were filled with D-1 applicants." King Decl.1, Ex. E. That letter further stated that "[t]he above named individuals believe that they have been discriminated against because of their citizenship status." Id.

On January 22, 1992, Walker attended a United group interview. (Id.) While waiting to enter the interview room, she heard United personnel tell another American applicant that United was taking only EEC passport holders. (Id.) At the beginning of Walker's group interview, conducted by Nancy Foster, Foster told the group to write down the type of passports they held. (Id.) One woman raised her hand and said that she an American passport, but that one of her parents was French and she could get a French passport. (Id.) Foster told that woman that if she did not have a French passport she would have to leave. (Id.) The woman replied that she had a French identity card. (Id.) Foster turned to one of the United European reservationists who spoke to the woman in French and then explained to Foster that the card was acceptable. (Id.) Foster permitted that woman to stay. (Id.)

On January 29, 1992, Walker contacted Foster at her hotel because she had not heard from her regarding a further interview. (Compl. ¶ 23.) Foster asked Walker what kind of passport she has. (Id.) Walker stated that she has a U.S. passport but also holds valid French working papers. (Id.) Foster told Walker that she had to have an EEC passport to work for United in Paris. (Id.)

By letter dated January 24, 1992, OSC notified the Lardy complainants that it had "no jurisdiction over . . . [c]omplainants' allegation of citizenship status discrimination" and therefore would not file a complaint on their behalf. Lardy Complaint, ¶ 30; see id. at Ex. 3 [OSC's determination letter to Lardy]. After receiving OSC's determination letters, the Lardy complainants obtained counsel. Lardy Order, at 6. On April 23, 1992, the Lardy complainants filed a complaint against United with OCAHO, and the case was assigned to me. On June 1, 1992, United filed a motion to dismiss in Lardy, based on three alternative grounds: (1) the complainants filed their charged with the Office of Special Counsel more than 180 days after the alleged discriminatory act occurred; (2) IRCA does not apply extraterritorially; and (3) complainants filed overlapping charges with the EEOC in violation of 8 U.S.C. § 1324b(b)(2).

Between December 3, 1991 and February 19, 1992, each of the Complainants in the instant case filed a charge of national origin discrimination with the Equal Opportunity Commission ("EEOC"). See Compl., Ex. 2. On June 22, 1992, approximately two months after the Lardy complainants filed their complaint, the law firm of Bell, Boyd & Lloyd, the same counsel that represents the Lardy complainants, initiated the proceedings in this case by filing seven charges of discrimination with OSC, one on behalf of each of the seven Complainants, alleging discriminatory failure to retain, transfer or hire based on citizenship status and retaliation for asserting rights protected under 8 U.S.C. § 1324b. Compl. ¶ 41; see id. at Ex. 2 [the seven charge forms].

Each charge form indicates that the alleged unfair practice occurred in Chicago, Illinois on "April 3, 1991 and continuing." Id. Each form further indicates that the seven Complainants have filed charges with the EEOC or other governmental offices and that "[a]ll have been consolidated in the Chicago office." See id. at ¶ 8.[6] Attached to each charge form are (1) an EEOC form alleging various other bases for discrimination, including national origin; and (2) a 6-page position statement describing the alleged unfair employment practice.[7]

On July 23, 1992, Complainant Walker, through her counsel, amended her earlier filed EEOC national origin charge to include the alleged discrimination which had occurred at the Paris base. See King

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[6] All of the Complainants except Harmar, who were pro se at the time, filed charges of discrimination with the New York district office of the EEOC between December 3, 1991 and February 10, 1992. Complainants' Memorandum Regarding Timeliness of their Charges at 8 n.10. According to Complainants, they requested that the charges also be filed with the New York State Human Rights Division. Id. at 8. As Illinois and not New York was the state in which United had its corporate headquarters and where the hiring decisions at issue were made, the Illinois Department of Human Services was the state agency with jurisdiction over Complainants' state charges of discrimination. Id. at n.9. Therefore, the New York district office transferred the six charges to the Chicago district office of the EEOC within days after receiving each charge. Id. at 8 n.10; see Compl., Ex. 2 [Complainants' charges]. Harmar filed a charge directly with the Chicago district office on February 19, 1992.

[7] In their position statement, Complainants assert that United discriminated against "certain former London-based Pan Am flight attendants and pursers on the basis of citizenship "by failing and refusing to transfer or hire them, on nondiscriminatory terms and conditions." (In contrast to Title VII of the Civil Rights Act of 1964, as amended, however, IRCA does not cover terms and conditions of employment.) Each position statement also states that "when hiring in Paris United at times has insisted on considering 'EEC [(European Economic Community)] passports only,' and has excluded U.S. citizens and protected individuals from the hiring and selection process." See Compl., Ex. 2.

Decl.1, Ex. K. Walker did not amend her IRCA charge to include that allegation.

After conducting an investigation of Complainants' charges, OSC notified Susan King, Complainants' counsel, in a letter dated October 21, 1992 that that it lacked jurisdiction over Complainants' IRCA charges and would therefore not file a complaint on their behalf before an administrative law judge ("ALJ"). See Compl. ¶ 41; id. at Ex. 3 [OSC's determination letter]. In addition, OSC stated that there was insufficient evidence of retaliation under 8 U.S.C. § 1324b(a)(5) to warrant issuance of a complaint.[8] Id. OSC also informed Susan King that she was entitled to file a private action on behalf of the seven Complainants. Id.

Pursuing their right to bring a private action under 8 U.S.C. § 1324b(d)(2), on January 11, 1993, Complainants, through their counsel, filed a complaint "for and on behalf of themselves and all those similarly situated" with the U.S. Department of Justice, Office of the Chief Administrative Hearing Officer ("OCAHO"). In their complaint, Complainants assert that United's decision not to hire them as flight attendants violated IRCA's prohibition against citizenship status discrimination, based on substantially the same facts as those in the Lardy case. On that same date, Complainants filed a Motion to Consolidate or in the Alternative to Assign this Complaint to Judge Schneider. That motion requested that the Chief Administrative Hearing Officer ("CAHO") consolidate this case with another case

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[8] Complainants have filed various charges. Each has filed a pro se charge of discrimination with the EEOC with respect to United's failure to transfer/hire him or her in early 1991. In those charges, each alleged discrimination based on national origin and some alleged discrimination based on age, sex, retaliation, medical condition and/or because the individual "opposed discrimination." Complainants' Response to ALJ's Interrogatories at 1, filed April 12, 1994.

Complainant Walker filed an additional pro se charge of discrimination with the EEOC following United's refusal to hire her for its Paris base in January 1992 (charge number 210922112 alleging discrimination on the basis of national origin and age). Walker, then represented by counsel, filed another charge (charge number 210931906 alleging discrimination on the basis of national origin, age and retaliation) following United's refusal to hire her for a position in the United States in June 1992. On July 23, 1992, Complainants, through counsel, amended their original EEOC national origin charges to include alleged discrimination against Walker at United's Paris base. See King Decl.1, Ex. K. Complainants did not amend their IRCA charges to include that allegation. Id. In addition, the Office of Federal Contract Compliance Programs of the Department of Labor ("OFCCP") is investigating charges of handicap discrimination on behalf of Complainants Sutherland, Farquharson, and Vreeburg. Id. That investigation arises out of a complaint filed by Joan Lardy with the OFCCP on January 7, 1992. Id.

assigned to me, Lardy v. United Airlines, Inc., OCAHO Case No. 92B00085. See supra n. 2. On January 12, 1993, the CAHO assigned the instant case to me and I subsequently granted a motion filed by Respondent to stay all proceedings in this case pending resolution of Respondent's Motion to Dismiss in Lardy.

On January 25, 1993, Respondent filed a motion to stay Complainants' motion to consolidate in the instant case, pending resolution of Respondent's motion to dismiss in Lardy. Then, on February 12, 1993, Respondent filed a motion to stay all proceedings in the instant case pending resolution of Respondent's motion to dismiss in Lardy ("Resp.'s Mot. to Stay All Proceedings"). Complainants did not file a response to either motion. On February 26, 1994, I granted both of Respondent's motions, staying all proceedings in this case.[9]

In the memorandum in support of its motion to stay all proceedings in this case, Respondent states that although this case mirrors Lardy with respect to the legal issues regarding IRCA's extraterritorial application and the filing of overlapping charges, the cases "differ with respect to the timeliness of the IRCA charges filed with the Office of Special Counsel." Resp.'s Mot. to Stay All Proceedings, at 5. More specifically, Respondent asserts that the Lardy complainants contend that they received United's March 13, 1991 rejection letters on March 29 or March 30, 1991, and that measured from that claimed date of receipt, their IRCA charges, filed September 25, 1991 are timely. Id. Respondent asserts that in contrast, the Complainants in the instant case filed their IRCA charges with OSC on June 22, 1992, more than eight months after the Lardy complainants filed their charges and more than a year after United denied the instant Complainants employment at its London domicile. Id. at 5-6.

On January 11, 1994, I issued an order in Lardy, in which, among other things, I denied Respondent's motion to dismiss for lack of jurisdiction and for lack of timeliness. In that order, I ruled that the 180-day statute of limitations for the filing of the Lardy complainant's IRCA charges began to run when each received a letter from United dated March 13, 1991 rejecting her employment application. See Lardy Order, at 44-45. On January 12, 1994, I informed the Walker parties that I construed Respondent's February 11, 1993 motion to stay all proceedings in the instant case to include a motion to dismiss for failure to file timely charges with OSC. I therefore directed Complainants to

[9] As this case was assigned to me, however, there was no outstanding motion to consolidate this case with Lardy.

file a response and Respondent to file a reply to Complainants' response. Order of January 12, 1994, at 2.

On January 31, 1994, Complainants filed a memorandum regarding timeliness of their charges ("Compls.' Mem.1") with the supporting declaration of one of Complainants' counsel, Susan J. King ("King Decl.1"). On that same date, Complainants filed a Joint Motion to Consolidate and For Leave to Amend ("Compls.' Joint Motion"), in which Complainants request that they be granted leave to file an amended, consolidated complaint which will include the Lardy and Walker complainants and other unnamed former Pan Am flight attendants, all of whom are "protected individuals" within the meaning of 8 U.S.C. § 1324b.[10]

On February 7, 1994, Respondent filed its opposition to Complainants' Joint Motion. On February 14, 1994, Respondent filed a Memorandum in Support of its Motion to Dismiss and in Response to Memorandum of Complainants Regarding Timeliness of their Charges ("Resp.'s Mem.1"). On March 30, 1994, I issued an order directing Complainants to file a response to five interrogatories, including the date that each of the seven Complainants received United's rejection letter. On April 12, 1994, Complainants filed a response to my interrogatories ("Compls.' Resp. to ALJ's Interrogs."). On April 13, 1994, I issued an order directing five of the seven Complainants to file affidavits regarding the exact date that he or she received United's rejection letter.[11] On April 25, 1994, declarations were filed by Complainants Farquharson ("Farquharson Decl.") along with an exhibit, Hainke ("Hainke Decl."), Sutherland ("Sutherland Decl.") along with an exhibit, Vieux ("Vieux Decl.") along with an exhibit and Vreeburg ("Vreeburg Decl.") along with an exhibit.

On May 5, 1994, I issued an Order Directing Respondent to File Evidence that Refutes Complainant's Evidence Regarding the Date Each Received United's Rejection Letter. On May 11, 1994, United

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[10] Complainants assert that they "do not know at this time the exact number of additional complainants, but their identity has been made known to United in connection with other proceedings. In all, the number of complainants is expected to be fewer than 36." Compls.' Joint Motion at 2.

[11] For purposes of responding to United's motion to dismiss the complaint for lack of timeliness, Complainants assumed that they received United's March 13, 1991 rejection letter on that same date, March 13, 1991. See Compls.' Mem.1 at 9. I concluded, however, that the date each Complainant had "actual notice" that United rejected him or her is determinative of whether he or she can piggyback on an earlier-filed charge.

filed a motion for an extension of time to file such evidence, in which it stated that Complainants may have received unequivocal notice before receiving United's rejection letter. That same day, I granted United's motion for an extension of time and allowed United until May 27, 1994 to submit (1) the facts it then had regarding any of the Complainants' unequivocal notice of non-selection by United prior to receipt of United's rejection letter; (2) its specific discovery requests regarding this issue; and (3) the approximate length of time it would take to obtain its evidence.

On May 23, 1994, United filed (1) a memorandum regarding the dates on which Complainants Farquharson, Hainke, Sutherland, Vreeburg and Vieux received United's rejection letters ("Resp.'s Mem.2"); and (2) an affidavit of one of Respondent's counsel, Kenneth A. Goldberg ("Goldberg Aff.1") with exhibits.[12] On May 27, 1994, United filed (1) a memorandum regarding the unequivocal notice of non-selection received by Complainants; (2) discovery requests concerning that issue; and (3) a statement that it anticipates that its proposed discovery can be completed within one month of an appropriate order ("Resp.'s Mem.3").

On May 31, 1994, I issued an order directing Complainants to file a factual and legal memorandum in response to Respondent's memorandum regarding unequivocal notice. On June 17, 1994, Complainants filed their memorandum and objections to Respondent's discovery requests ("Compls.' Mem.2"), along with the supporting June 16, 1994 declaration of one of Complainants' counsel, Susan J. King ("King Decl.2"). On June 23, 1994, I issued an order (1) directing Respondent to file a brief (a) containing all arguments and supporting law and all of its evidence regarding the date Joan Lardy received "unequivocal notice" that United had decided not to hire her for a flight attendant position; and (b) addressing the applicability of 52 Fed. Reg. 37402, 37402-37506 (October 6, 1987); and (2) directing Complaint to file a brief in response.

On July 5, 1994, Respondent filed its memorandum ("Resp.'s Mem.4") with the supporting July 4, 1994 affidavit of Respondent's counsel,

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[12] On June 13, 1994, Respondent submitted a correction of two inadvertent errors in these documents. Respondent filed a request for permission to file a memorandum in response to Complainants' supplemental memorandum. On July 15, 1994, Complainants filed an opposition to Respondent's request. That same day, I issued an order granting Respondent's request as to three of four issues it wanted to address. On July 22, 1994, Respondent filed a memorandum regarding those three issues ("Resp.'s Mem.5").

Kenneth A. Goldberg ("Goldberg Aff.2") and on July 12, 1994, Complainants filed their memorandum ("Compls.' Mem.3") with the supporting July 11, 1994 declaration of Joan Lardy ("Lardy Decl.") and the July 11, 1994 declaration of Complainants' counsel, Christopher G. Mackeronis ("Mackeronis Decl."). On July 14, 1994,

III. *Discussion*

United seeks to dismiss the complaint in this case on the grounds that the seven Complainants did not file their OSC charges within 180 days of the alleged discriminatory act.[13] Respondent maintains that because Complainants filed their IRCA charges over a year after each received United's rejection letter, Complainants' charges are time-barred and under 8 U.S.C. § 1324b(d)(3), the complaint must be dismissed. Resp.'s Mem.1 at 5.

A. Motion to Dismiss Construed as Motion For Summary Decision Where Go Beyond the Pleadings

As I have considered matters outside the pleadings, I will treat United's motion to dismiss as a motion for summary decision. See Fed R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"); Stewart v. RCA Corp., 790 F.2d 624, 628 (7th Cir. 1986) (stating that a motion to dismiss was the wrong way for the employer to raise as an issue the timeliness of the complaint).

The rules of practice and procedure for IRCA discrimination cases provide that the ALJ "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1993). OCAHO case law follows the standards set forth by the Supreme Court regarding the parties' respective burdens of production in a motion for summary judgment and in opposition to the motion. The moving party has the initial burden of identifying those portions of materials on file that it believes demonstrate the

[13] United also seeks to dismiss the IRCA claims of the approximately 26 unnamed individuals on whose behalf the charges and complaint were filed. I conclude, however, that unless and until those individuals make themselves known to me and move to intervene in a case, their claims are not before me. See 28 C.F.R § 68.15 (1993); see also Fed. R. Civ. P. 24(c) (1994).

absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party satisfies its burden by showing "that there is an absence of evidence" to support the nonmoving party's case. Id. at 325. The burden of production then shifts to the nonmoving party to set forth by affidavit or otherwise, "specific facts showing that there is a genuine issue for trial." Id. at 323-34.

In resolving a motion for summary decision, the record and all inferences drawn from it are viewed in the light most favorable to the nonmoving party. See Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Only reasonable inferences, however, need be drawn. See Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992).

As I stated previously in United States v. Lamont Street Grill, 3 OCAHO 441, at 3 (July 21, 1992):

> The Supreme Court has stated that Rule 56(c), nevertheless, requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).] The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement as to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Id. at 251-52.

Therefore, in order for summary decision to be granted, the record must reveal that "no reasonable jury could find for the nonmoving party." Dempsey v. Atchison, Topeka and Santa Fe Railway Co., 16 F.3d 832 (7th Cir. 1994) (quoting Anderson v. Stauffer Chemical Co., 965 F.2d 397, 400 (7th Cir. 1992).

B. Legal Standard for Filing a Timely IRCA Complaint

IRCA provides that "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C. § 1324b(d)(3); see 28 C.F.R. § 44.300(b) (1993). "The purpose of the 180-day limitations period is to protect against prosecution of stale claims, but that interest is balanced against the interest in protecting valid claims."

Hamilton v. First Source Bank, 895 F.2d 159, 164-65 (4th Cir. 1990) (citing Lorance v. AT&T Technologies, Inc., 109 S.Ct. 2261, 2269 (1989)). IRCA's time limitations are not jurisdictional; rather, they are akin to statutes of limitation subject to waiver, estoppel, and equitable tolling. See Lardy Order at 38 (and cases cited therein); see Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982).

For purposes of triggering the statute of limitations, an employment decision is made and communicated when the aggrieved party receives unequivocal notice of that decision, that is, when that party "knew, or reasonably should have known, that the adverse employment decision had been made" by the employer. Clark v. Resistoflex Co., 854 F.2d 762, 765 (5th Cir. 1988); Kuemmerlein v. Bd of Education of Madison Metrop. School Dist., 894 F.2d 257 (7th Cir. 1988); United States v. Mesa Airlines, 1 OCAHO 74, appeal dismissed, 951 F.2d 1186 (10th Cir. 1991). See also Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).

It is also well established that "[t]he statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. Ricks does not hold that the statute of limitations begins to run as soon as the handwriting is on the wall." Cada v. Baxter Healthcare Corp., 920 F.2d 446, 449 (7th Cir. 1990) (citation omitted). The relevant inquiry is not on the subjective state of mind of the plaintiff, but rather on the sufficiency of the notice plaintiff received. Clark, 854 F.2d at 765.

An aggrieved party can receive unequivocal notice through oral communication. Mull v. Arco Durethene Plastics, Inc., 784 F.2d 284, 288 (7th Cir. 1986).

C. The Issues

Respondent has not waived the statute of limitations. Nor do Complainants contend that Respondent should be estopped from arguing lack of timeliness or that Complainants are entitled to equitable tolling. Instead, Complainants argue that their claims should survive on several alternative theories. The parties' arguments, as set forth below, present the following issues: (1) whether Complainant Walker's OSC charge of citizenship status discrimination, filed on June 22, 1992, 145 days after United refused to hire her for its Paris base in January 1992 was timely; (2) whether under the Memorandum of Understanding between OSC and the EEOC, a national origin charge timely filed with the EEOC in a "deferral" state over 180 days after the allegedly

discriminatory act can be construed to be a timely OSC citizenship status charge; (3) whether the charge of any Walker complainant who filed a timely charge permits the other complainants to "piggyback" onto the timely-filed charge(s); (4) whether the "single filing rule," available to those who join as plaintiffs in class actions and in some circuits individual actions or who in some circuits are permitted to file their own lawsuit under Title VII and the ADEA, is available under IRCA; and (5) if so, whether the OSC charges of the Lardy complainants suffice to secure the benefit of the "single filing rule" for the seven Walker complainants.

1. Complainant Walker Has Not Filed a Timely Charge of Discrimination Under IRCA Based on United's Paris Hirings

Complainants argue that Walker's OSC charge, filed June 22, 1992, was timely because it was filed 145 days after United's refusal on January 29, 1992 to hire her for its Paris base, informing her that she would need a European Economic Community ("EEC") passport to work for United in Paris. Compls.' Mem.1 at 12; see King Decl. Ex. K at 6, ¶ A(14). Complainants further argue that because Walker amended her EEOC national origin charge (on July 23, 1992) to include the discrimination which had occurred at the Paris base within 176 days of the alleged discrimination, her OSC charge of citizenship status discrimination was timely filed within 180 days of the alleged discrimination. Id.

Respondent contends that Complainants' arguments fail because (1) Walker's IRCA charge does not state a cause of action in connection with United's Paris hirings, but only accuses United of refusing to hire her at its London domicile based on her citizenship status (Resp.'s Mem.1 at 19 (citing Complaint, Ex. 2)); and (2) because the amendments to her EEOC charge do not render her OSC charge timely (Resp.'s Mem.1 at 3).

Respondent acknowledges that Walker's six-page position statement attached to her charge makes a one-sentence reference to United's Paris hirings, as does the identical position statement of each of the other six Complainants. Respondent asserts, however, that the position statement does not accuse United of refusing to hire Walker at its Paris domicile based on her citizenship status and therefore cannot support an independent IRCA claim. Resp.'s Mem.1 at 19.

Complainant Walker's OSC charge alleges that:

> When . . . United . . . purchased [Pan Am's] London-Heathrow routes, air services and operations in 1991, it discriminated against certain former London-based Pan Am flight attendants and pursers on the basis of citizenship status . . . by failing and refusing to transfer or hire them, on nondiscriminatory terms and conditions. Charging party and others similarly situated . . . are the victims of that unlawful discrimination.
>
> A. Background
> . . .
>
> B. United's Discriminatory Intent and Impact
>
> United's intent and desired effect was to maximize the number of foreign national at the London flight attendant base and to reduce or minimize the number of U.S. citizens and protected individuals. . . .
>
> United's discriminatory intent . . . on the basis of citizenship is further evidenced by events occurring after the London-Heathrow transfer. United has continued to discriminate against U.S. citizens and protected individuals in favor of foreign nationals. For example, when hiring in Paris United at times has insisted on considering "EEC passports only," and has excluded U.S. citizens and protected individuals from the hiring and selection process.

Compl., Ex. 2, Walker's Position Statement at 1-2 (emphasis added).

a. The Continuing Violation Doctrine Does Not Apply to this Case

Complainants assert in their charges that the alleged unfair immigration-related employment practice occurred on "April 3, 1991 and continuing." Compl., Ex. 2 [Charges, ¶ 6]. See also Compl. ¶ 4; (asserting that their "[c]omplaint arises out of actions taken by United at the time it purchased [Pan Am's] London routes, air services and operations, and its continuing violations of [IRCA]."). The "continuing violation" doctrine "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period." Selan v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). To establish a continuing violation, a complainant "must allege that a discriminatory act occurred or that a discriminatory policy existed within the period prescribed by the statute." Johnson v. General Elec., 840 F.2d 132, 137 (1st Cir. 1988) (internal quotation omitted).

The Seventh Circuit, in Stewart v. CPC International, Inc.,679 F.2d 117 (7th Cir. 1982), set forth the following three viable continuing violation theories: (1) to equitably toll the statute in "cases, usually involving hiring or promotion practices, where the employer's decision-

making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred" (id. at 120); (2) where the employer has an express, openly espoused policy that is alleged to be discriminatory (id. at 121)--called a "systemic" continuing violation in other circuits; and (3) where "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." Id.

The first two continuing violation theories clearly do not apply to this case. The third theory, however, may apply. Under this theory, referred to as a "serial violation" or a "pattern of ongoing discrimination," (Stewart, 679 F.2d at 120) "the question is whether, in response to the defendant's motion for summary judgment, [the plaintiff] produced sufficient evidence to establish that there existed a genuine issue of fact whether the defendants' acts were 'related closely enough to constitute a continuing violation' or were 'merely discrete, isolated, and completed acts which must be regarded as individual violations.'" Selan, 969 F.2d at 565 (quoting Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983).

The Fifth Circuit has suggested that three factors be considered in making this determination:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate.

Id. The Seventh Circuit has stressed the significance of the third factor:

> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment.

Selan, 969 F.2d at 565-66 (quoting Malhotra v. Cotter & Co., 885 F.2d 1305, 1310 (7th Cir. 1989). See also Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554, 1561 n.5 (5th Cir. 1985) ("core idea"); Hendrix v. City of

Yazoo City, 911 F.2d 1102, 1104 (5th Cir. 1990) ("key to the inquiry"); Sabree v. United Bhd. of Carpenters & Joiners Local No. 33, 921 F.2d 396, 402 (1st Cir. 1990).

I find that Complainant Walker had reason to believe she was a victim of discrimination by United prior to being told that she needed an EEC passport to work at United's Paris base. I therefore consider the two alleged acts of discrimination, not as a continuing violation, but as separate violations. I thus conclude that it is not unreasonable to require Complainant Walker to have sued separately on each allegation of discrimination against United in this case.[14]

b. Walker's Amendment of her EEOC Charge To Include Allegations Regarding the Paris Base Has No Bearing on Her OSC Charge

Complainants argue that Complainant Linda Walker timely filed charges of discrimination resulting from United's refusal to hire her for its Paris base in January 1992 as she filed charges of citizenship discrimination with OSC on June 22, 1992, 145 days after that allegedly discriminatory act, the date that United informed her that she would need a European Economic Community ("EEC") passport to work for United in Paris.[15] Compls.' Mem.1 at 12; see King Decl. Ex. K at 6, ¶ A(14). Respondent argues that this argument fails (1) as Walker's IRCA charge does not allege an individual claim of discrimination based on United's Paris hirings and (2) because the amendments to her EEOC charge do not render her IRCA charge timely.

The amendment to Walker's EEOC charge states in relevant part:

> United has continued to discriminate against American born applicants on the basis of national origin. . . . For example, on January 21, 1992, charging party Linda S. Walker went to the United desk in Paris seeking employment as a flight attendant. Ms. Walker was informed that she would not be considered because United was considering only European Economic Community ("EEC") passport holders. The following day, Ms. Walker returned and waited in line for an employment application, during which time she observed United personnel instructing applicants that United was only accepting EEC passport holders. During her group interview that same day,

[14] In addition to amending her original EEOC charge, Walker filed a separate EEOC charge based on United's failure to hire her for its Paris base.

[15] Within 176 days of the alleged discriminatory act at the Paris base, Complainant Walker, on July 23, 1992, through her counsel, amended her national origin charge which had earlier been filed with the EEOC to include that alleged discrimination. Compls.' Mem.1 at 12; see King Decl. Ex. K at 6, ¶ A(14).

> Ms. Walker and others in attendance were instructed to write down the type of passports that they held. One individual was instructed to leave the group interview if she did not have a French passport. In a subsequent conversation with a United representative on January 29, 1992, Ms. Walker was told directly that she had to have an EEC passport in order to work for United in Paris, even though she had valid French working papers. This discrimination based on national origin by United is continuous and ongoing.

King Decl., Ex. K, ¶ A(14).

In contrast, Walker's OSC charge alleges in relevant part only that "United has continued to discriminate against U.S. citizens and protected individuals in favor of foreign nationals. For example, when hiring in Paris United at times has insisted on considering 'EEC passports only,' and has excluded U.S. citizens and protected individuals from the hiring and selection process."

Complainants argue that Walker's amendment of her EEOC charge--adding an allegation of national origin discrimination based on United's refusal to hire her for its Paris base--renders her OSC charge timely. I disagree, however, as an amendment to an EEOC charge cannot create a new and timely OSC charge. Furthermore, as Walker's OSC charge seeks relief only for United's failure to hire her for a London-based flight attendant position, I conclude that her allegation regarding United's failure to hire her for a Paris-based flight attendant position is neither like nor reasonably related to the allegations of her OSC charge and therefore may not be included as an independent cause of action in this case. See Taylor v. Western and Southern Life Insurance Co., 966 F.2d 1188, 1194 (7th Cir. 1992) (holding that a claim of discrimination is within the scope of an EEOC charge if it is like or reasonably related to the allegations of the charge and growing out of such allegations); Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., 538 F.2d 164 (7th Cir.) (en banc), cert. denied, 429 U.S. 986 (1976).

2. The MOU Between OSC and EEOC Does Not Alter the 180-Day Charge-Filing Period of 8 U.S.C. § 1324b(d)(3)

In the alternative, Complainants contend that their own charges of discrimination fulfill IRCA's administrative filing requirement. More specifically, Complainants assert that the citizenship status discrimination charges of four of the Walker Complainants, Hainke, Sutherland, Vieux and Vreeburg, were independently timely filed with OSC based on their timely national origin charges filed with the EEOC as viewed under the Memorandum of Understanding ("MOU") between the EEOC and OSC. In addition, Complainants assert that the other three Complainants, Farquharson, Harmar and Walker, "may rely on the

timely filed charges of their [four] colleagues" under the single filing rule as the charges of these three (1) arose out of the same course of action by United and in the same time frame and (2) the timely filed charges of their four colleagues provided United with notice of the class-wide nature of their claims. Compls.' Mem.1 at 11.

Respondent contends that Complainants' argument that some of their charges are timely under the MOU fails because "[u]nder the MOU, only an EEOC charge filed within 180 days of the alleged discriminatory act can cure an untimely IRCA charge or a charge that was mistakenly filed with the EEOC rather than the OSC." Resp.'s Mem.1 at 2.

The MOU states in relevant part:

> By this Memorandum of Understanding, the agencies hereby appoint each other to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits. To ensure that filing deadlines are satisfied, each agency will accurately record the date of receipt of charges and notify the other agency of the date of receipt when referring a charge.

54 Fed. Reg. 32500. Therefore, under the MOU, the filing of a charge of national origin discrimination with the EEOC is considered to be a simultaneous constructive filing of national origin and/or citizenship status discrimination charges with OSC. United States v. Auburn University, 4 OCAHO 617, at 12 (March 10, 1994) (Order); Yefremov v. New York City Dep't of Transportation, 3 OCAHO 466 (Oct. 10, 1992) (Order Denying Respondent's Motion for Summary Decision); Lundy v. OOCL, 1 OCAHO 215, at 18 (Aug. 8, 1990).

Complainants argue that under the MOU, a charge that is timely filed with the EEOC is timely filed with OSC. Complainants misinterpret the MOU, however, as IRCA and Title VII have different statutes of limitation. A charge is timely filed under IRCA if it is filed with OSC, or an agency with which OSC has a Memorandum of Understanding at the most, 180 days after the alleged discriminatory event. 8 U.S.C. § 1324b(d)(3); Reyes v. Pilgrim Psychiatric Ctr., 3 OCAHO 529, at 2 (June 21, 1993). In contrast, under section 706(e) of Title VII, a charge of national origin discrimination generally must be filed with the EEOC within 180 days of the alleged discrimination; if the charge is filed in a state where the state has created an agency to hear employment discrimination claims (a "deferral state"), however, the charge can be filed up to 300 days after the alleged discrimination. See 42 U.S.C. §

2000e-5(e) (1992).[16] Sofferin v. American Airlines, Inc., 923 F.2d 552, 554 (7th Cir. 1991).[17]

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[16] Section 7(d) of the ADEA also has a charge-filing time limitation of 180 days after the alleged unlawful practice occurred, or 300 days after such date in deferral states. See 29 U.S.C. §§ 626(d), 633(b).

[17] The Illinois Department of Human Resources ("IDHR") is "the agency responsible for overseeing employment discrimination complaints filed in Illinois." Kaimowitz v. Board of Trustees of the University of Illinois, 951 F.2d 765, 766 (7th Cir. 1992). "Under the ADEA and Title VII, plaintiffs in 'deferral' states such as Illinois . . . may not file a discrimination charge with the EEOC until the charge is first filed with the appropriate state agency and either (1) 60 days has elapsed or (2) the state agency terminates its proceedings." Id. (citing 29 U.S.C. § 633(b) and 42 U.S.C. § 2000e-5(c)).

The IDHR and the EEOC have a worksharing agreement, however, which "can alone effect both initiation and termination of the state proceedings and . . . as a result, plaintiffs may file with the EEOC without first filing with the IDHR." Hong v. Children's Memorial Hospital, 936 F.2d 967, 971 (7th Cir. 1991); see also Marlowe v. Bottarelli, 938 F.2d 807, 808, 814 (7th Cir. 1991) (workshare agreement between IDHR and EEOC is "self executing"--where IDHR waives exclusive right to process charges, filing of complaint with EEOC "work[s] instantaneous constructive termination of the state's jurisdiction over" the charges).

EEOC charges may be filed at the Commission headquarters or at any of the district or area EEOC offices. 29 C.F.R. § 1601.8. As the Commission has noted in its Compliance Manual, however,

> [c]harges of discrimination should . . . be filed at the Commission office with jurisdiction over the location where the unlawful practice occurred. Whether to apply the 180 day or 300 day time limitation depends on whether a state or local agency authorized to grant or seek relief exists in the state where the unlawful employment practice occurred. If the charge has been filed at an inappropriate office, it is the Commission's responsibility to transfer the charge to the appropriate office for investigation.

King Decl.1 Ex H [EEOC Compliance Manual, Vol 2, § 605.5].

Complainants, who were pro se at the time, filed charges of discrimination with the New York District Office of the EEOC and requested that the charges also be filed with the New York State Human Rights Division. As Illinois and not New York was the state in which United had its corporate headquarters and the decisions not to hire Complainants were made, the New York office transferred all the charges to the Chicago district office of the EEOC. Because the work-sharing agreement of the IDHR and the EEOC provides for direct filing with the EEOC and both initiation and termination of the state's interests pursuant to a prearranged waiver, Complainants were not required to physically file their charges with the IDHR. See Kaimowitz, 951 F.2d at 767.

Because Illinois is a deferral state, the 300-day filing period applies for the filing of Complainants' national origin charges under Title VII. Complainants Hainke, Sutherland, Vieux and Vreeburg each filed charges of discrimination within 300 days of the date upon which he or she received unequivocal notice of nonselection by United for a flight

(continued...)

The MOU "makes [OSC and the EEOC] the agent of the other for the sole purpose of receiving discrimination charges under Title VII . . . and [IRCA], and provides for interagency coordination of charge processing activities." Preamble to the MOU, 54 Fed. Reg. 32499. The MOU does not extend IRCA's 180-day charge-filing period to 300-days for deferral states.[18] I therefore conclude that some of the Complainants' filing of timely EEOC national origin charges within the 300-day period but beyond 180 days in Illinois, a deferral state, does not make their OSC citizenship status claim timely under the MOU.[19]

3. Aggrieved Individuals Can Piggyback Onto An Earlier-Filed OSC Charge Under Certain Circumstances

a. A Variation of the Single-Filing Rule Used in ADEA and Title VII Applies To IRCA

Complainants contend that under the "single filing rule" adopted in Title VII and ADEA cases, the timely-filed charges of the Lardy complainants satisfy the charge-filing requirements in this case, permitting the seven Walker complainants (and approximately 26 individuals on whose behalf the Walker complaint and charges were filed) to "piggyback" on them.[20] Compls.' Mem.1 at 2. Respondent, on the other hand, contends that the notion that individuals who never filed charges with OSC at all could nevertheless be entitled to relief has no support under IRCA. See Resp.'s Mem.1 at 14 n.6. Respondent further argues that even if the single-filing rule applies to IRCA, Complainants cannot rely on it in this case because the Lardy complainants' IRCA charges do not allege class-wide discrimination. The issue before me thus is whether the single filing rule applies to IRCA, and if it does, whether any of the

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[17](...continued)
attendant position. Compls.' Mem. 8-10.

[18] In order for IRCA's charge-filing period to parallel that of Title VII, Congress would have to amend the statute to provide for a 300-day limitations period in deferral states.

[19] Because I find that the MOU between OSC and the EEOC does not affect the 180-day statute of limitations of 8 U.S.C. § 1324b(d)(3), I need not reach the latter part of Complainants' argument.

[20] In my Order of January 11, 1994 in Lardy, I held that the three complainants in that case, each of whom I found to have received her rejection letter from United on March 29 or 30, 1991, had filed charges of citizenship status discrimination within IRCA's 180-day statutory filing period. See Lardy Order, at 45.

Complainants, all who filed untimely charges with OSC may piggyback onto the timely-filed OSC charges of the Lardy complainants.

i. The Single-Filing Rule Under Title VII and the ADEA

Title VII and the ADEA generally require a plaintiff to first file an administrative charge with the EEOC which provides notice to the charged party and affords both the EEOC and the charged party an opportunity to settle the dispute before the aggrieved employee is permitted to file a lawsuit. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d). See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). In certain circumstances, however, courts allow individuals who have not timely filed an administrative charge with the EEOC to "piggyback" on the timely-filed charge of another individual by applying the single-filing rule. See, e.g., Anson v. University of Tex. Health Science Ctr. at Houston, 962 F.2d 539, 541 (5th Cir. 1992) ("The federal courts now universally hold [in ADEA cases] that an individual who has not filed an adminis trative charge can opt-in to a suit filed by any similarly-situated plaintiff under certain conditions.").

Courts differ as to the requirements for determining whether an administrative charge alleging a Title VII or ADEA violation is sufficient to permit "piggybacking" on that charge by a subsequent plaintiff. "The broadest test requires only that the claims of the administrative claimant and the subsequent plaintiff arise out of the same circumstances and occur within the same general time frame." Tolliver v. Xerox Corp., 918 F.2d 1052, 1057 (2d Cir. 1990). See Calloway v. Partners National Health Plans, 986 F.2d 446, 449 (11th Cir. 1993); Snell v. Suffolk County, 782 F.2d 1094, 1100 (2d Cir. 1986). "A somewhat narrower test requires that the administrative claim give notice that the discrimination is 'class-wide,' i.e., that it alleges discrimination against a class of which subsequent plaintiff is a member." Tolliver, supra, 918 F.2d at 1058 (citing Kloos v. Carter-Day Co., 799 F.2d 397, 401 (8th Cir. 1986) (alternative standard)). "A still narrower test requires that the administrative claim not only allege discrimination against a class but also alleges that the claimant purports to represent the class or others similarly situated." Tolliver, supra, 918 F.2d at 1058 (citing Naton v. Bank of California, 649 F.2d 691, 697 (9th Cir. 1981)) (holding that the district court should not allow others to opt-in to a lawsuit filed by a plaintiff whose administrative charge "expressed no intention to sue on behalf of anyone other than himself.").

The single-filing rule has been invoked in a variety of contexts. In Title VII class actions maintained under Fed. R. Civ. P. 23, the timely filing of an administrative charge by a named plaintiff satisfies the charge-filing obligation of all members of the class. See United Airlines, Inc. v. McDonald, 432 U.S. 385, 389 n.6 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498-99 (5th Cir. 1968).[21]

Some courts have similarly held that in an ADEA representative action, opt-in plaintiffs need not personally comply with the filing requirement if at least one of the plaintiffs in the action has properly filed an administrative charge. See, e.g., Mistretta v. Sandia Corp., 639 F.2d 588, 593-94 (10th Cir. 1980); Bean v. Crocker National Bank, 600 F.2d 754, 759 (9th Cir. 1979); Russell v. Curtin Matheson Scientific, Inc., 17 Fair Empl. Prac. Dec. (BNA) 845, 848 (S.D. Tex.), modified, 18 Fair Empl. Prac. Dec. (BNA) 179 (S.D. Tex.), leave to appeal denied, 18 Fair Empl. Prac. Dec. (BNA) 866 (5th Cir.), cert. denied, 439 U.S. 972 (1978).[22]

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[21] In the leading case of Oatis, 398 F.2d at 498-99, Judge Bell explained that:

> [i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful. The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated.

[22] The Eighth Circuit has described the difference between class action procedures under the ADEA and Title VII as follows:

> Section 626(b) of the ADEA, 29 U.S.C. § 626(b) (1982) authorizes plaintiffs to bring class actions in accordance with section 216(b) [of the Fair Labor Standards Act of 1938 ("FLSA")], which allows actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1982). However, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. Id. This type of statutory class action is unlike the class action procedures of Rule 23, where parties are automatically included in the class action procedures of Rule 23, where parties are automatically included in the class unless they opt out.

Kloos v. Carter-Day Co., 799 F.2d 397, 399-400 (8th Cir. 1986).

The Seventh Circuit has elaborated:

> One of the chief purposes behind [the ADEA's requirement that all plaintiffs in a representative action must affirmatively opt-in to the suit] was to prevent the filing of
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> (continued...)

The single-filing rule also has been extended to permit intervenors who did not file EEOC charges to rely on the charge of one of the original plaintiffs. See, e.g., Wheeler v. American Home Products Corp., 582 F.2d 891, 897-98 (5th Cir. 1977). Furthermore, non-filing plaintiffs in multiple-plaintiff, non-class action lawsuits have been permitted to use the single-filing rule to rely on the charge filed by one or more of their similarly-situated co-plaintiffs. See, e.g., Crawford v. United States Steel Corp., 660 F.2d 663, 665-66 (5th Cir. Unit B 1981) ("[I]n an action involving claims of several persons arising out of similar discriminatory treatment, not all of them need to have filed EEOC charges as long as one or more of the plaintiffs has satisfied the requirement.").

Each of these applications of the single-filing rule has been grounded in the purpose of the EEOC charge requirement "that the settlement of grievances be first attempted through the office of the EEOC." Oatis, supra, 398 F.2d at 498.

ii. The Parties' Arguments as to Whether the Single-Filing Rule Applies to IRCA

A. United Argues that the Single-Filing Rule Does Not Apply to IRCA Because the Statute and Regulations Clearly Mandate that Each Aggrieved Party Must File a Charge in Order to Subsequently File a Complaint

United contends that the principal reason the single-filing rule has been applied under Title VII and the ADEA is because the statutes of limitation in those laws are unclear with respect to whether each aggrieved party must file a timely charge in order to bring a private action in federal court. Resp.'s Mem.1 at 6 (citing Anderson v.

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[22](...continued)

claims on behalf of a large group of unnamed and nonparticipating plaintiffs . . . . In light of this litigation procedure, we believe it is necessary that the defendant at least be apprised during the conciliation process of the possibility of a subsequent lawsuit with many plaintiffs. Therefore, in our view, the charge must, at the very least, contain an allegation of class-wide discrimination. This notification is necessary in order to satisfy desire that the defendant understand, during the Congress' express conciliation stage, the magnitude of his potential liability.

Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1016 (7th Cir. 1988) (citations omitted).

Montgomery Ward & Co., 852 F.2d 1008, 1015-16 (7th Cir. 1988)).[23] United asserts that because IRCA, in contrast, "requires each aggrieved person to file a charge in order to subsequently file a complaint, the single-filing rule does not apply to IRCA and Complainants' untimely charges should be dismissed." Id. at 7.

The ADEA language providing that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed . . . ." 29 U.S.C. § 626(d), while not identical to that of Title VII, 42 U.S.C. § 2000e-5, is similar. Anderson at 1015-16. In Anderson, the Seventh Circuit Court of Appeals concluded that although the charge-filing requirements of Title VII and ADEA are not identical, their similarity of purpose during the prelitigation stage warrants that similar standards be imposed. Anderson at 1016; see Stearns v. Consolidated Management, Inc., 747 F.2d 1105, 1111 (7th Cir. 1984). Thus, the court concluded that

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[23] Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) provides in pertinent part:

> A charge under this section shall be filed within [180] days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such chargeis made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within [300] days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 7(d) of the ADEA provides:

> No civil action may be commenced by an individual under this section [authorizing civil actions] until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]. Such a charge shall be filed--
> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies [arising in so-called "deferral states," which have a state statute prohibiting age discrimination], within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(d) (1988).

"Congress did not intend to require that every individual who files a suit under ADEA also must have filed an individual charge." Anderson at 1016. The court further concluded that Congress required all plaintiffs in an ADEA representative action to affirmatively opt-in to the suit under 29 U.S.C. § 216(b). Id.

IRCA discrimination cases generally follow Title VII and ADEA case law where the statutory provisions are similar. See, e.g., Lardy, 4 OCAHO 595, at 41 n.28 (Jan. 11, 1994). Cf. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 767, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609 (1979) (instructing that where the source of a section in the ADEA parallels Title VII, the two statutes are to be construed consistently).[24] United argues, however, that "the differences between IRCA's statute of limitations and the corresponding provisions under Title VII and the ADEA demonstrate that this agency should not apply the single-filing rule here." Resp.'s Mem.1 at 6. In support, United argues that the statutory language of Title VII and ADEA contrasts with that of IRCA:

> Specifically, Title VII merely provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ." 42 U.S.C. § 2000e-5 (emphasis added). Likewise, the ADEA provides that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." 29 U.S.C. § 626(d) emphasis added)
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> . . . .
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> By contrast, IRCA expressly requires that each aggrieved person timely file a charge with [OSC] in order to recover under the statute. See 8 U.S.C. § 1324b(b)(1) ("any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person's behalf) . . . may file a charge . . . with the Special Counsel."). If the Special Counsel decides not to prosecute that charge, "the person making the charge" is then permitted to bring a private action by filing a complaint before an [ALJ]. 8 U.S.C. § 1324b(d)(2) . . . .

Resp.'s Mem.1 at 6-7.[25]

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[24] The same basic standards are applied to both ADEA and Title VII cases. Albano v. Schering-Plough Corp., 912 F.2d 384, 386 n.1 (9th Cir. 1990).

[25] As originally enacted, section 7(d) of the ADEA provided that suit could not be commenced "by an individual under this section until the individual has given" at least 60 days notice to the Secretary of Labor, who was then charged with enforcement of the ADEA. Pub. L. No. 90-202, 81 Stat. 602, 605 (1967). In 1978, Congress amended section 7(d) to eliminate the requirement that "the individual" bringing suit must have given the administrative notice and provided instead that suit could not be brought until 60 days (continued...)

B. Complainants Argue that IRCA's Charge Filing Requirements Are Similar to Those of Title VII and the ADEA

Complainants assert that IRCA's charge-filing requirements are similar to those of the ADEA and Title VII. Compls.' Mem. at 2 n.1.

iii. The Parties' Arguments as to Which Application of the Single-Filing Rule is Appropriate in this Case

A. United Argues that if the Single-Filing Rle Applies to IRCA, I Should Adopt the Anderson Standard

United submits that if the single-filing rule applies to IRCA, I should adopt the requirements for applying that rule as set forth in Anderson v. Montgomery Ward & Co., 852 F.2d 1008 (7th Cir. 1988). In Ander-

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[25](...continued)
after "a charge alleging unlawful discrimination has been filed with the Secretary." Pub. L. No. 95-256, § 4(a), 92 Stat. 189, 190 (1978). That same year, the Secretary's ADEA responsibilities were transferred to the EEOC. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807, 92 Stat. 3781 (1978). See 29 U.S.C. 626(d) (providing that the charge is to be filed with the EEOC).

"In changing the statutory requirement from a charge-filing obligation of the individual bringing suit to the more general requirement that "a charge . . . has been filed," Congress pointed out that "[f]ailure to timely file the notice . . . [was] the most common basis for dismissal of ADEA lawsuits by private individuals and emphasized that the purpose of the amendment was "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals . . . ." S.Rep. No. 493, 95th Cong., 1st Sess. 12 (1977), U.S. Code Cong. & Admin. News 1978, pp. 504, 515.

Since the ADEA was amended in 1978, several circuit courts of appeal that have addressed the issue have held that individuals can rely on the named plaintiffs' timely charge if it gives notice of class-wide discrimination. See, e.g., Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1016 (7th Cir. 1988) (seven individuals who did not file EEOC charges were not required to amend the complaint in a representative action where similarly-situated employees filed allegations of class-wide discrimination); Kloos v. Carter-Day Co., 799 F.2d 397, 400 (8th Cir. 1986) (charge must allege class-wide age discrimination or claim to represent class in order to serve as basis for ADEA class action under section 216(b)); Naton v. Bank of California, 649 F.2d 691, 697 (9th Cir.1981) (notice inadequate because complainant expressed no intention to sue on behalf of anyone other than himself); Bean v. Crocker Nat'l Bank, 600 F.2d 754, 760 (9th Cir. 1979) (notice filed on behalf of named plaintiff and others similarly situated put Secretary and employer on notice that "discrimination charges encompassed a pattern of unlawful conduct transcending an isolated individual claim and that they should act accordingly"); Mistretta v. Sandia Corp., 639 F.2d 588, 593-94 (10th Cir. 1980) (charges alleging employer's "arbitrary action constitutes age discrimination against workers over 40") and notice to agencies that suit was intended to be class action gave agencies opportunity to investigate and act within statute of limitations).

son, the Seventh Circuit Court of Appeals expressly adopted the "single-filing rule" in the context of an action brought under the Age Discrimination in Employment Act ("ADEA").[26] The court held that a plaintiff can piggyback on the timely administrative charge of another plaintiff in a multiple plaintiff joint action (or a class action) where (1) the timely charge "at the very least, contain[s] an allegation of class-wide discrimination" and (2) the plaintiffs are "similarly situated." Id. at 1016.[27]

The court reconciled the policy considerations of the filing requirement (notice and conciliation) with the single-filing rule by demanding that the EEOC complaints of the filing plaintiffs "contain an allegation of class-wide discrimination." Anderson, supra, 852 F.2d at 1016. Satisfaction of this requirement places the employer on notice during the conciliation stage of the "magnitude of his potential liability." Id.[28]

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[26] The court acknowledged that the single-filing rule was not problematic in Title VII actions, but focused on whether the charge-filing requirements under the ADEA resembled Title VII or the Fair Labor Standards Act. Id. at 1017-18. The court, in adopting the single-filing rule for ADEA actions, reasoned that the "strong parallelism between the charge-filing requirements of ADEA and Title VII cannot be ignored." Id. at 1016.

[27] Prior to the court's decision in Anderson, several other circuit courts of appeal in the context of Title VII actions adopted the single-filing rule where non-filing plaintiffs (1) alleged facts demonstrating that they were similarly situated and (2) received similar discriminatory treatment as non-class action plaintiffs who filed EEOC complaints. See Snell at 1100-1101 (2d Cir. 1986); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 335 (4th Cir. 1983); Ezell at 1380-81 (11th Cir. 1983); Allen v. United States Steel Corp., 665 F.2d 689, 695 (5th Cir. Unit B 1982); Foster v. Gueory, 655 F.2d 1319, 1321-23 (D.C. Cir. 1981); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 882-83 (8th Cir.), cert. denied, 434 U.S. 891 (1977) (where two of the plaintiffs filed EEOC charges and the EEOC investigated the practice complained of, 13 other plaintiffs were not required to file); Wheeler v. American Home Products Corp., 563 F.2d 1233, 1239 (5th Cir. 1977).

[28] Prior to Anderson, some courts in the Seventh Circuit had held that a non-filing plaintiff seeking to invoke the single-filing rule must demonstrate the presence of two factors: (1) that at least one filing plaintiff is a party to the suit; and (2) that all of the plaintiffs' claims "must have arisen out of similar discriminatory treatment in the same time frame." Von Zuckerstein v. Argonne National Laboratory, 663 F. Supp. 569, 574 (N.D. Ill. 1987) (quoting Jackson v. Seaboard Coast R.R., 678 F.2d 992, 1012 (11th Cir. 1982)). The rationale was that requiring a multitude of employees to file substantially similar charges did little to satisfy Congress' underlying policy concerns regarding the charge-filing requirements. See id. (citing Crawford v. United States Steel Corp., 660 F.2d 663, 666 (5th Cir. Unit B 1981)). See also Locascio v. Teletype Corp., 74 F.R.D. 108, 112 (N.D. Ill. 1977) (where the factual claims of all plaintiffs were similar in that they were all laid off on or about the same date and the employer applied a uniform group of

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Respondent contends that the Seventh Circuit's requirement "that the the timely charge at issue at least allege class-wide discrimination is simply the better rule and 'is necessary in order to satisfy Congress' express desire that the defendant understand, during the conciliation stage, the magnitude of his potential liability.'" Resp.'s Mem.1 at 9 (quoting Anderson, 852 F.2d at 1016).

B. Complainants Argue that a More Liberal Application of the Single-Filing Rule is Appropriate

Complainants argue that I should apply a more liberal view of the single-filing rule which "permits aggrieved plaintiffs to join in a lawsuit brought by individuals who have filed a timely administrative charge provided the claims 'aris[e] out of similar discriminatory treatment in the same time frame.'" Snell v. Suffolk County, 782 F.2d 1094, 1100 (2d Cir. 1986) (quoting Ezell v. Mobile Housing Board, 709 F.2d 1376, 1381 (11th Cir. 1983)). See Tolliver v. Xerox Corp., 918 F.2d 1052 (2d Cir. 1990) (the single-filing rule applied so that the administrative charges filed by the named plaintiffs in an age discrimination class action which was decertified satisfied the claim-filing obligations of the plaintiffs, scattered throughout the defendant's domestic employment, in their individual actions against the same employer where the notices on which the plaintiffs sought to piggyback sufficed because they alerted the EEOC and Xerox to the broad scope of the grievance); De Medina v. Reinhardt, 686 F.2d 997, 1012-13 (D.C. Cir. 1982); Allen v. United States Steel Corp., 665 F.2d 689, 695 (5th Cir. Unit B 1982) ("[i]n a multiple-plaintiff non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement."). See also Ezell v. Mobile Housing Board, 709 F.2d 1376, 1381 (11th Cir. 1983) ("The precise inquiry is whether the claim of the non-filing plaintiff(s) is similar enough to that of the filing plaintiff(s), that 'the purpose of [the filing requirement] that the settlement of grievances be first attempted through the office of the EEOC' will not be frustrated by invoking the 'single filing rule.'") (quoting Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968)).

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[28](...continued)
rules in deciding which employees to lay off, a timely notice letter to the Department of Labor, referring to only some of the plaintiffs, satisfied the notice requirement for all employees who were laid off on or about the same date and who filed consent to participate as plaintiffs, although some filed late notice and some did not file any notice).

iv. Although the Statute and Regulations are Unclear, the Preamble to OSC's Regulations Provides for a Specific Application of the Single- Filing Rule

I reject United's suggestion that IRCA's plain language definitively requires every complainant to have filed a timely charge. IRCA provides that "any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person's behalf) . . . may file a charge . . . with the Special Counsel." 8 U.S.C. § 1324b(b)(1). If the Special Counsel decides not to prosecute that charge, "the person making the charge" is then permitted to bring a private action by filing a complaint before an [ALJ]. 8 U.S.C. § 1324b(d)(2). Furthermore, "[n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C. § 1324b(d)(3).

The statute clearly requires a charge to be filed within 180 days of the alleged discrimination, but does not specify whether every aggrieved individual (or a person on each aggrieved individual's behalf) must file a charge. Because I find IRCA's statutory language ambiguous, I may look outside the statute in order to determine Congress' intent. See Petrulis v. Commissioner of Internal Revenue, 938 F.2d 78, 80 (7th Cir. 1991) ("If . . . the statute is ambiguous, we must employ other, less satisfactory, means to ascertain the intent of Congress such as resorting to legislative history or deferring to a reasonable construction by executive agencies charged with administering the statute in question.")

OSC's regulations which prescribe standards and procedures for enforcing IRCA's antidiscrimination provisions, provide no further clarification as they merely state who may file a charge and the time frame in which the charge must be filed. See 28 C.F.R. § 44.300(a)(1) (1993) ("any individual who believes that he or she has been adversely affected directly by an unfair immigration-related employment practice, or any individual or private organization authorized to act on such person's behalf, may file a charge with the Special Counsel."); 28 C.F.R. § 44.300(b) (1993) ("[c]harges shall be filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice.").

The preamble to OSC'S regulation, however, published at 52 Fed. Reg. 37402 (October 6, 1987), discusses, among other things, who may

piggyback on an OSC charge which alleges that an employment practice discriminated against more than one individual:

> If a charging party is alleging the occurrence of an unfair immigration-related employment practice adversely affecting directly more than one person, only one injured person need be identified in the charge. As required by the statute, the regulation mandates that charges be filed within 180 days of the alleged discrimination. Thus, in the case of charges where more than one person has arguably been subjected to discrimination, only those persons who have been discriminated against within 180 days of the filing of the charge will be entitled to be protected by the anti-discrimination provisions.

52 Fed. Reg. at 37405-06 (emphasis added).[29]

The Office of Special Counsel ("OSC") is authorized by the Attorney General to promulgate regulations to effectuate and enforce IRCA's antidiscrimination provisions. See 8 U.S.C. § 1103(a). OSC thus has the power and duty to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). As Congress has not addressed whether every complainant in a § 1324b suit must have filed a timely charge with OSC, I conclude that based on the administrative interpretation of 8 U.S.C. § 1324b(d)(3) as set forth in the preamble to OSC's regulation, an aggrieved individual can "piggyback" on a timely-filed charge where based on the charge, more than one person has arguably been subjected to discrimination, and the aggrieved individual was discriminated against within 180 days of the filing of the timely-filed charge. See Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285-88 (1949) (the Court considered administrative interpretations along with statutory structure and legislative history to ascertain unexpressed congressional intent).

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[29] The Notice of Proposed Rulemaking, published by the Department of Justice on March 23, 1987, provided in pertinent part under the heading "Procedures" that:

> If a charging party is alleging the occurrence of an unfair immigration-related employment practice adversely affecting directly more than one person, only one injured person need be identified in the charge. As required by the statute, the regulation mandates that charges be filed within 180 days of the alleged discrimination.

52 Fed. Reg. 9274, 9275 (March 23, 1987).

The preamble to the final rule does not indicate any comments regarding these statements.

In Gilardi v. Schroeder, 822 F.2d 1226, 1232 (7th Cir. 1987), the Seventh Circuit Court of Appeals noted that it was "bound to give substantial weight to the EEOC's interpretation of the statute that it administers," a mandate stressed by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Applying that principle, OSC's regulation must be upheld if it constitutes a reasonable interpretation of the statute. See Philbin v. General Electric Capital Auto Lease, Inc., 929 F.2d 321, 324 (7th Cir. 1991).

OSC has not stated a basis for its interpretation of the charge-filing requirements of § 1324b. ADEA case law, however, supports OSC's interpretation as several district courts have limited the class permitted to piggyback on a timely-filed administrative age discrimination charge to those who could have filed their own administrative charges on or after the date the named plaintiff actually filed his or her charge. See, e.g., Church v. Consolidated Freightways, Inc., 137 F.R.D. 294 (N.D. Ca. 1991) (limiting the scope of the ADEA opt-in class by the date of the named plaintiffs' EEOC charges, in order to prevent resurrection of claims which could not be brought because they were not filed on time); Levine v. Bryant, 700 F. Supp. 949, 957 (N.D. Ill. 1988) (ADEA plaintiffs who had been discriminated against after the first EEOC charges had been filed could piggyback onto earlier charges, even though they could not have filed with the EEOC at the time of the earlier charges); Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 679 (S.D.N.Y. 1981) (individuals whose ADEA claims were time-barred, could not receive notice as they would not be permitted to opt-in to the class); Geller v. Markham, 19 Fair Empl. Prac. Cas. (BNA) 1622, 1623 (D. Conn. 1979) (class member may opt-in if he could have filed a timely charge at the time the representative filed a timely charge--class size limited to those not barred from filing own suit on date first notice filed), aff'd in part and rev'd in part on other grounds, 635 F.2d 1027 (2d Cir. 1980), cert. denied 451 U.S. 945 (1981); Russell v. Curtin Matheson Scientific, Inc., 17 Fair Empl. Prac. Cas. (BNA) 845, 848-49 (S.D. Tex.) (same), modified, 18 Fair Empl. Prac. Cas. (BNA) 179 (S.D. Tex.), leave to appeal denied, 18 Fair Empl Prac. Cas. (BNA) 866 (5th Cir.), cert. denied, 439 U.S. 972 (1978); Cavanaugh v. Texas Instruments, 440 F. Supp. 1124, 1128 (S.D. Tex. 1977) (same) (the representative plaintiff in an ADEA action may only represent those similarly-situated individuals who could have timely complied with section 626(d)'s notice requirement as of the date of the representative plaintiff's filing with the Department of Labor); Pandis v. Sikorsky Aircraft, 431 F. Supp. 793, 798-89 (D. Conn. 1977) (same); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3rd Cir.), cert. denied, 421 U.S. 1011 (1975) (an individual who did not file a charge can be included in

a class represented by a named plaintiff who meets all jurisdictional requirements if that individual could have filed a timely charge at or after the time of filing of the charge upon which the suit is based).

In addition, further support is found in Tolliver v. Xerox Corp., 918 F.2d 1052 (2d Cir. 1990), cert. denied, 111 S.Ct. 1641 (1991), in which the Second Circuit Court of Appeals stated that

> where the grievances are alleged to arise throughout a large group . . . [,] though we do not think the administrative claim in such circumstances need specify that the claimant purports to represent a class or others similarly situated, there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim. Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group.

918 F.2d at 1058 (footnote omitted).

I therefore conclude that OSC's interpretation of § 1324b, as set forth in the preamble to its implementing regulations, is a reasonable interpretive rule.[30] See Metroplitan School Dist. of Wayne Tp. v.

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[30] [R]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no power to make law through rules, the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power . . . .

Metroplitan School Dist. of Wayne Tp. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) (quoting Production Tool v. Employment & Training Administration, 688 F.2d 1161, 1166 (7th Cir. 1982) (quoting 2 Kenneth Culp Davis, Administrative Law Treatise § 7.10 at 54 (2d ed. 1979)). See General Motors Corp. v. Ruckleshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985) ("An interpretive rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule.")

The kind of power the agency is using determines the force and effect of the rule. Metropolitan School Dist., 969 F.2d at 490. "Legislative rules have the force and effect of law--they are as binding upon courts as congressional enactments." Id. (quoting Production Tool, 688 F.2d at 1165). Although interpretive rules are entitled to deference, they do not bind reviewing courts. Id. (citing Batterton v. Francis, 432 U.S. 416, 425-26 & n. 9, 97 S.Ct. 2399, 2405-06 n.9, 53 L.Ed.2d 448 (1977); Production Tool, 688 F.2d at 1165).

"All agencies charged with enforcing and administering a statute have 'inherent (continued...)

Davila, 969 F.2d 485, 490 (7th Cir. 1992) (the court "must determine whether the rule merely states what [the agency] thinks the statute means [(an interpretive rule)], or creates new law, rights, or duties [(a legislative rule)]."). I therefore give deference to OSC's interpretation. See United States v. Mesa Airlines, 1 OCAHO 74 (July 24, 1989), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991) ("[P]lacement in the preamble [to INS regulations of a grace period for filing a declaration of intent to become a citizen] in no way lessens the judicial deference which is its due."). Compare Dhillon v. Regents of the University of California, 3 OCAHO 497, at 15-16 (March 10, 1993) (holding that INS Operations Instruction 316.1(b) did not apply to the complainant in determining whether he was a "protected individual" under 8 U.S.C. § 1324b(a)(3)(B) where a plain reading of the statute indicated a different method of calculating the five-year continuous-residence period than the method INS set out in the operations instruction and the complainant was not aware of the INS interpretive rule).

Therefore, under IRCA, an individual can sue on behalf of herself and others similarly-situated where her charge arguably alleges that more than one person has been subjected to discrimination.[31] A non-filing or late-filing similarly-situated individual can piggyback onto the timely-filed charge only if the discrimination against the non-filer or late-filer occurred within 180 days of the timely-filed charge.

D. Case Analysis

1. Lardy's Charge is Sufficient for Non-Filers or Late Filers to "Piggyback" On It

a. Lardy's Charge Arguably Alleges that United Discriminated Against More than One Person

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[30](...continued)
authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion.'" Metropolitan School Dist., 969 F.2d at 490 (quoting Production Tool, 688 F.2d at 1166).

[31] In contrast to Title VII class actions, in which parties are automatically included in the class unless they opt out under Fed. R. Civ. P. 23(c)(2) and ADEA representative actions, in which "[n]o employee shall be a party to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought (29 U.S.C. § 216(b) (1982)) under an IRCA action such as this--where the charging party alleges a practice that discriminates directly against more than one person--there is no statutory or regulatory scheme by which an individual joins the action.

It is undisputed that none of of the Lardy complainants' underlying charges allege on their face that United discriminated against more than one individual.[32] Complainants argue, however, that they can piggyback on the timely-filed charges of all three Lardy complainants because "the Lardy complainants collectively alleged an unfair immigration related employment practice which adversely affected more than one person." Compls.' Mem.3 at 17. Specifically, Complainants assert that (1) while none of their charges indicate that they were being filed in a representative capacity, all have sworn under oath that they believed they were doing so; and (2) Lardy's follow-up letter to Mitchell, of OSC, specifically stated that United's actions affected a large group of individuals.

I construe IRCA's single-filing rule as permitting piggybacking on a charge (by those who have been discriminated within 180 days of the date it was filed) when that individual charge arguably indicates that more than one person has been subjected to discrimination. Therefore, that the Lardy complainants swore that they believed they were filing their charges in a representative capacity is irrelevant. Furthermore, that Lardy indicated in her follow-up letter that United's actions affected more than one person has no bearing on whether an individual can piggyback on the charges of Gantchar and Moore. Thus, only if Lardy's follow-up letter to Mitchell is an amendment to her charge, can any Complainant possibly piggyback on it.

i. Lardy's Follow-Up Letter to OSC Constitutes an Amendment to Her Charge

Complainants argue that Lardy's follow-up letter alleging class-wide or group discrimination should relate back to her underlying charge, filed September 25, 1991. United, however, argues that an amendment outside of the 180-day limitations period should not be able to cure a failure to allege group discrimination in a timely charge because such an approach would allow any time-barred complainant to "cure" her lack of timeliness with an after-the-fact amendment.

Under the EEOC's regulations, "[a] charge may be amended to cure technical defects or omissions, including . . . to clarify and amplify allegations made therein. Such amendments . . . will relate back to the

[32] Each charge alleges that United discriminated against the charging party based on her status as a U.S. citizen and indicates that: "She was terminated [April 3, 1991] upon transfer of Pan Am route sale to United Airlines. Her position was replaced by a D-1 applicant." See Lardy, Compl., Ex.2 [each complainant's charge].

date the original charge was filed." 29 C.F.R. § 1601.12(b) (1992); Philbin v. General Electric Capital Auto Lease, Inc., 929 F.2d 321, 323 (7th Cir. 1991). See also Kammer v. NBC, 37 Fair Emp. Prac. Cas. 1293, 1296 (S.D.N.Y. 1984) (letter written by counsel may serve as an amendment). Although OSC does not have a similar regulation explicitly permitting amendment of a charge, the statute itself clearly provides that charges and complaints may be amended. See 8 U.S.C. § 1324b(d)(3) (providing that IRCA's prohibition against filing a complaint regarding "any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel . . . shall not prevent the subsequent amending of a charge or complaint" under § 1324b(e)(1)). I therefore construe Lardy's follow-up letter as an amendment to her charge, clarifying and amplifying her claim to allege group-wide discrimination against all of the former London-based Pan Am flight attendants United did not hire who were U.S. citizens or otherwise authorized to be employed in the United States. I also hold that the amendment relates back to September 25, 1991, the date Lardy filed her charge.

ii. Lardy's Follow-Up Letter Sufficiently Indicates that United Allegedly Discriminated Against More Than One Person So as to Invoke IRCA's Single-Filing Rule

Complainants argue that Lardy's supplemental information which she facsimiled to OSC on October 4, 1991, nine days after she and the other two Lardy complainants filed their charges, adequately alleges a class claim. I disagree as IRCA does not authorize class claims. I conclude, however, that Lardy's follow-up letter essentially apprised OSC that Lardy had expanded her claim to allege that United had discriminated against numerous qualified London-based Pan Am flight attendants who were U.S. citizens or green-card holders in favor of "foreign workers."

Therefore, under the preamble to OSC's regulations, those former Pan Am London-based flight attendants whom United did not select for flight attendant positions who allegedly were discriminated against within 180 days of the date of Lardy's charge, filed on September 25, 1991, can piggyback on Lardy's charge. See 52 Fed. Reg. at 37405-06.

iii. Respondent's Claimed Lack of Notice of a "Group-Wide" Claim is Not Sufficient to Disallow a Group-Wide Claim

Respondent argues that because it lacked notice of a group-wide discrimination claim, Complainants should not be allowed to piggyback on Lardy's charge. That argument is not persuasive.

A. OSC Should Have Notified United of the Broadened Scope of Lardy's Charge

The purpose of the EEOC's charge-filing requirement is to provide an opportunity for the EEOC to resolve the conflict between the employer and the employee before litigation. Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 126 (7th Cir. 1989); see 29 U.S.C. § 626(d) ("Upon receiving . . . a charge, the Commissioner shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.").

In contrast to the EEOC's statutory duty both to notify employers of the contents of a charge and to engage in conciliation efforts, OSC merely has a statutory duty to notify employers of the contents of the charge. See 8 U.S.C. § 1324b(b)(1) (providing that "[t]he Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged unfair immigration-related employment practice) on the person or entity involved within 10 days.").[33] OSC, however, is required to settle cases, if possible, pursuant to an executive order which directs all government litigation counsel to "mak[e] a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement" before filing a complaint initiating civil litigation." Exec. Order No. 12,278, 56 Fed Reg. 55195 (1991).[34]

I find that OSC had the duty to notify Respondent that Lardy's charge had been amplified to allege that United had discriminated against a large group of U.S.-citizen or U.S.-worker former London-based Pan Am flight attendants whom United decided not to hire subsequent to its

[33] The regulations provide similarly. See 28 C.F.R. § 44.301(e) (1993).

[34] I infer that OSC made no attempt at conciliation because the Special Counsel believed that he had no jurisdiction over Complainants' claims. I disagree with OSC's conclusion as to jurisdiction, however, as § 1324b covers the employment decisions at issue in this case. See Lardy Order, at 14-33.

purchase of Pan Am's London flight operations. No copies of Lardy's follow-up letter were sent to United or its counsel. I conclude that OSC did not comply with its statutory and regulatory duties under IRCA.

Because OSC clearly did not consider Lardy's follow-up letter an amendment to her charge, OSC failed to inform United of the broadened scope of the charge. Thus, United had no notice of its contents. A charging party, however, should not be penalized for OSC's errors. See Albano v. Schering-Plough Corp., 912 F.2d 384, 388 (9th Cir. 1990) (internal quotation marks omitted) ("claimant's right to pursue a civil action is not to be prejudiced by the EEOC's failure to properly process a grievance after it has been filed"); Russell v. American Tobacco Co., 528 F.2d 357, 365 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976) (because "[a] Title VII complainant is not charged with the [EEOC's] failure to perform its statutory duties," the court permitted suit where, after a valid charge was filed, the EEOC completely neglected to inform the defendant that the charge had been filed).

I construe the OSC charge primarily as an impetus to OSC investigation and settlement, not a pleading giving notice to the employer. See Albano, 912 F.2d at 388; Brown v. Puget Sound Elec. Apprenticeship v. Training Trust, 732 F.2d 726, 730 (9th Cir. 1984), cert. denied, 469 U.S. 1108 (1985). Furthermore, even recognizing the role of the OSC charge in placing an employer on notice of the claims against it, the charging party is not responsible for the absence of notice in circumstances such as these. It is OSC, not the claimant, who is responsible for notifying the employer of the claims alleged in the OSC charge. 8 U.S.C. § 1324b(b)(1).

I therefore will not penalize Complainants for OSC's failure to notify Respondent that Lardy's charge had been amplified to include group-wide discrimination. See Albano, 912 F.2d at 387 (9th Cir. 1990) (equitable considerations may excuse a claimant's noncompliance with the scope requirement (limiting the scope of a civil action alleging discrimination by the charge filed with the EEOC), and resulting failure to exhaust administrative remedies, when the EEOC improperly refuses to amend the claimant's timely EEOC charge).

B. Respondent Was Not Prejudiced By its Lack of Notice of a Group-Wide Claim

Respondent contends that it has been prejudiced by lack of notice of a group-wide claim. That contention is not persuasive, however, based on the following. First, the proceedings in this case were stayed until

January 11, 1994, the date I decided in Lardy that I had jurisdiction over the complaint because IRCA does not need to reach extraterritorially to apply to United's hiring decisions regarding flight attendants at its London base. See Lardy Order, at 14-33.

Second, because the Special Counsel determined that he had no jurisdiction over any of the Walker complainants' charges, it appears that OSC neither attempted to investigate nor conciliate the charges against United. I therefore infer that even if OSC had notified United of a group-wide claim, OSC likewise would not have attempted to conciliate as the Special Counsel would have made the same determination that it lacked jurisdiction over the charges.

I therefore conclude that Respondent is not prejudiced by lack of notice that it was subject to discrimination claims for its London-base hiring decisions by more than the three Lardy complainants.

2. Respondent's Contention that Lardy's Charge Was Not Timely Filed is Not Persuasive

Respondent argues that Complainants' claims are time-barred because Lardy received unequivocal notice that United had not selected her for a flight attendant position at the latest, March 12, 1991--at least 197 days before she filed her charge with OSC on September 25, 1991. Resp.'s Mem.4 at 11. In Lardy, I denied Respondent's motion to dismiss for lack of timeliness, which I construed as a motion for summary decision. In resolving that motion, I viewed the evidence in a light most favorable to the complainants and found that Joan Lardy had received unequivocal notice that United had not selected her for a flight attendant position on the date she received United's rejection letter, which I found to be March 30, 1991. As Lardy filed her charge on September 25, 1991, 179 days after receiving the rejection letter, I concluded that her charge was timely filed. See Lardy Order, at 39-45.

Respondent asserts, however, that it recently obtained new evidence in Gantchar v. United Air Lines, Inc., No. 93-C-1457 (N.D. Ill. October 1, 1993) which was not before me at the time I decided the motion for summary decision in Lardy.[35] Respondent contends that its new

[35] Gantchar is a related civil lawsuit in which the plaintiffs, all former Pan Am flight attendants, allege that United discriminated against them on the basis of age, national origin and sex when it refused to hire them in early 1991. That case, alleging violations of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of (continued...)

evidence indicates that all three complainants' charges in Lardy were themselves time-barred, notwithstanding the complainants' claimed dates of receipt of United's rejection letters, because the complainants had notice of their non-selection by United before those claimed dates of receipt and outside the 180-day limitations period. See Resp.'s Mem.3 at 3 n.3. Because I found that Lardy's supplemental charge amended only her own charge, see supra part III (D)(1)(a)(i), I will address only whether I should consider new evidence regarding when she received unequivocal notice.

a. Complainants Cannot Invoke the Doctrine of Collateral Estoppel To Foreclose United From Relitigating the Date Lardy Received Unequivocal Notice as Denial of a Summary Decision Motion Does Not Forever Bar the Parties or the ALJ From Revisiting That Issue in a Related Proceeding

Complainants argue that under the doctrine of collateral estoppel, United should be foreclosed from relitigating the factual issue of when Joan Lardy received unequivocal notice that United had rejected her for a flight attendant position because United has not presented a valid excuse for resurrecting the timeliness issue after the extensive briefing and argument it received in Lardy. Compls.' Mem.3 at 6-7.

The doctrine of collateral estoppel precludes relitigation of issues in subsequent proceedings when the following criteria are met: (1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on its merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are identical. Kunzelman v. Thompson, 799 F.2d 1172, 1176 (7th Cir. 1986). The essence of the doctrine of collateral estoppel "is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies." 1B Moore's Federal Practice ¶ 0.441(2), at 3777 (2d ed. 1974). For purposes of applying the doctrine, a final judgment includes an adjudication "sufficiently firm to be accorded conclusive effect" or a decision that is not "avowedly tentative." Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). The doctrine is equitable as the interests of finality and judicial economy are weighed against the possible gains of fairness or accuracy from continued

[35](...continued)
1964, as amended ("Title VII"), is pending before the Honorable William T. Hart.

litigation of the issue previously considered. See Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979).

Complainants argue that United should be precluded from relitigating the date that Lardy received unequivocal notice of her rejection by United because United has failed to explain (1) the reasons Lardy's letters to United supervisor Fields and United physician, Dr. Fernandez could not have been presented to support United's motion to dismiss for lack of timeliness in Lardy and (2) the reasons Fields or Dr. Fernandez (United employees at the time of the London acquisition and to the present) could not have provided evidence about these letters earlier.

Complainants' argument is not persuasive. In Lardy, I denied Respondent's motion to dismiss for lack of timeliness, construing it as a motion for summary judgment because I looked outside the pleadings. Viewing the evidence in a light most favorable to the non-moving parties, I concluded that each complainant received unequivocal notice of her nonselection on the date she received United's rejection letter. Lardy Order, at 42. I also found that Joan Lardy received her rejection letter from United on March 30, 1991. Id. at 44-45. I therefore ruled that Joan Lardy's charge was timely filed, as she filed it 180 days after receipt of that letter. Id. at 45.

Those findings, however, were interim rulings, subject to modification based on new evidence. As Respondent discovered new evidence in Gantchar, Complainants cannot invoke the doctrine of collateral estoppel to preclude relitigation of the date Lardy received unequivocal notice of her nonselection. Cf. Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1120-21 (10th Cir.), cert. denied, 444 U.S. 856 (1979) (a denial of a motion to dismiss or a motion for summary judgment does not bar subsequent consideration of the same issue based on new evidence); Kirby v. P.R. Mallory & Co., Inc., 489 F.2d 904 (7th Cir. 1973) ("If good reason is shown why a prior denial of a motion for summary judgment is no longer applicable or should be departed from, the trial court may, in the exercise of sound discretionary power, consider a renewed motion for summary judgment, particularly when the renewed motion is based on an expanded record"); 6 Moore's Federal Practice ¶ 56.14[2] (1994).

b. The New Evidence Regarding Lardy's Receipt of Unequivocal Notice Does Not Change My Preliminary Finding in the Lardy Case as to the Date She Received Unequivocal Notice of Her Nonselection

United contends that Lardy's own letters and sworn testimony show that she received unequivocal notice on or before March 12, 1991, at least 197 days before she filed her charge with OSC. Specifically, United asserts that Lardy's own sworn testimony establishes (1) that she learned of her rejection through Ann Ransley, a Pan Am supervisor, in late February or early March of 1991 and that Ransley was acting as United's agent for purposes of this communication; and (2) even if Complainants' argument that unequivocal communications to Lardy made through Pan Am supervisors on United's behalf fail to satisfy the notice standard as a matter of law were correct, Lardy's own sworn testimony and conduct establish that she had clear and unequivocal notice, directly from United on March 12, 1991 as on that date (a) Lardy was told of her non-selection by United's Flight Attendant Employment office and (b) she confirmed her clear and unequivocal knowledge of that decision, in writing, both to Fields and to Dr. Fernandez. See Resp.'s Mem.4 at 8.

i. Ransley's Communication to Lardy Did Not Constitute Unequivocal Notice That United Had Rejected Lardy for a Flight Attendant Position because Ransley Was Not United's Agent For Purposes of That Communication

United asserts that Lardy knew that the Pan Am supervisors were communicating information regarding United's hiring decisions from and on behalf of United. To support this assertion, United relies on Lardy's description during discovery in Gantchar of the Pan Am supervisors' role:

> United also used Pan Am Management to communicate information to us from them. These included, Mike Sullivan, Beverly Elliott and Ann Ransley that I spoke with about job offer, 'B' Scale wage of $1039 and no seniority, no purser position, probation, transfer to United, acceptance forms, DOT submission, closure of the base, Bermuda Bilateral authority for Heathrow, United's lists of F/As, interview & physical dates and appointments.

Goldberg Aff.3, ¶ 7, Ex. D at 9a.

Complainants assert that there is nothing in Lardy's deposition testimony to support the claim that she was aware that Ransley was authorized to officially communicate United's decision to her. Complainants note that United has not introduced any foundation for Lardy's knowledge as to whether United intended its official communications to come from Pan Am. I conclude that Lardy's belief as to Pan Am's authority to inform her of United's decision not to hire her for employment is irrelevant. It is Pan Am's actual authority that is determinative of whether Ransley or any other Pan Am supervisor was officially

authorized to communicate United's hiring decisions. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 449 (7th Cir. 1990).

Complainants argue that Pan Am supervisors were not authorized by United to inform individuals United decided not to hire of United's decision and, therefore, Complainants did not receive unequivocal notice of their nonselection until they received United's March 13, 1991 rejection letter. Before any adverse personnel action is taken, a discrimination claim has not accrued and the statute of limitations has not begun to run. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 449 (7th Cir. 1990). See also Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (the filing limitations period commences at the time the personnel decision is made and communicated to the charging party).

I agree with Complainants that there is no evidence in the record that Ransley or any other Pan Am supervisor was officially authorized to communicate United's hiring decisions. I therefore conclude that regardless of whether notice to Lardy that she was not on a list United allegedly gave Pan Am of individuals who had passed United's medical examination constitutes notice that she would not be hired, that Ransley communication to Lardy that she was not on that list fails to satisfy the unequivocal notice standard of Ricks and Cada as a matter of law.

ii. Lardy's Own Sworn Testimony and Conduct Do Not Establish That She Had Unequivocal Notice Prior to Receipt of Her Rejection Letter

United argues that Lardy's own sworn testimony and conduct establish that she had clear and unequivocal notice of her nonselection directly from United on March 12, 1991. United focuses on the telephone call Lardy made to United's training center in Chicago on March 12, 1991. Lardy asserts that she made the call to find out about her training date and a United employee told her that she was "not on the list" of persons scheduled for training. See Lardy July 14, 1992 Decl., ¶ 4. Lardy states in a recent affidavit that "[a]t no time did the personnel in United's Training Center tell me or even hint to me that I would not be employed by United." Lardy Decl., ¶ 7. Lardy further states that she was told only that she was not on the list of individuals scheduled for training and when she asked why she was not on the list, she was told that the information was confidential. Id.; Goldberg Aff.3, Ex. C [Lardy's deposition in Gantchar] at 136.

A. Lardy's March 12, 1991 Letter to Fields

Respondent contends, however, that Lardy was told by United personnel in the March 12, 1991 telephone call that United would not be employing her as a flight attendant, as shown by more reliable evidence in the record. United argues that Lardy's recent statement that United's training center personnel did not even hint to her that she would not be employed by United is contradicted by Lardy's letter to Fields, written March 12, 1991 (following her conversation to United's training center that same date), in which "Lardy admitted that United's Flight Attendant Employment office in Chicago made it clear to her that she was not accepted for flight attendant training and would 'not be employed as a Flight Attendant by United Airlines.'" Resp.'s Mem.5 at 7 (citations omitted).

United, however, either mischaracterizes Lardy's statements or misconstrues the law regarding unequivocal notice. Lardy did not admit, as United has alleged, that "United's Flight Attendant Employment office in Chicago made it clear to her that she was not accepted for flight attendant training and would 'not be employed as a Flight Attendant by United Airlines.'" Rather, Lardy's March 12, 1991 letter to Fields states: "This is to advise you that regretfully, I will not be employed as a Flight Attendant by United Airlines. I learnt (sic) today by phoning Flight Attendant Employment, Chicago that I was not on the list for Flight Attendant training." Lardy Decl., Ex. B.

Lardy did not admit that she was told by United personnel that she would not be hired for a flight attendant position. Rather, I construe Lardy's letter to Fields to indicate her belief that because she was told that her name was not on the list for flight attendant training, she would not be hired by United. As stated above, however, Lardy's belief is not dispositive of the issue of unequivocal notice. See Cada, 920 F.2d at 449 (where an "employee learned his fate before any adverse personnel action was taken, . . . his claim has not accrued and the statute of limitations has not begun to run.").[36]

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[36] Complainants have also argued that by stating to Fields that she would not be employed as a flight attendant,

> Lardy was not indicating that she knew that she had been rejected for employment by United. Rather, she believed that under the United Kingdom Transfer of Undertakings (Protection of Employment) Regulations (1981) she would be offered another position at United. Accordingly, she wrote to Ms. Fields suggesting that she be employed as a security liaison.

(continued...)

Lardy's earlier 1992 affidavit also indicates that Lardy telephoned United's training center in Chicago to find out about her training date and was told that she was "not on the list" of persons scheduled for training. See Lardy July 14, 1992 Decl., ¶ 4. Being told by United personnel that she was not on the list for training, however, does not constitute unequivocal notice that Lardy would not be hired. Lardy's status was not clear, given the undisputed fact that some Pan Am flight attendants who Lardy was told were not on either the first or second list left for training during this time frame.[37] See Compls.' Mem.3 at 4 (citing Lardy Decl. ¶ 6). Lardy's unclear status is further demonstrated by the fact that at the time Lardy wrote to Fields, the only written communication she had received from United indicated she would be hired subject to certain conditions and the only verbal communication she had received from United was from a United employee who twice had told her that she was not on a training list.

As I stated in Lardy:

> whether Complainants believed that they likely would not be hired by United prior to their receipt of the March 13th letter, especially given the mixed signals United gave by agreeing to accept Pan Am flight attendants it had previously rejected is irrelevant. The "relevant inquiry is not on the subjective state of mind of the plaintiff, but rather, on the sufficiency of the notice plaintiff received." Clark v. Resistoflex Co., a Division of Unidynamics Corp., 854 F.2d 762, 765 (5th Cir. 1988).

Lardy Order, at 44. See also Cada v. Baxter Healthcare Corp., 920 F.2d 446, 449 (7th Cir. 1990) ("[t]he statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. Ricks does not hold that the statute of limitations begins to run as soon as the handwriting is on the wall.") (citing Ricks, 449 U.S. 250 (1980)).

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[36](...continued)
Compls.' Mem.3 at 12 (citing Lardy Decl. ¶ 8). Complainant's argument is not persuasive. As a flight attendant position is all that is at issue and all that Lardy had applied for, the fact that Lardy suggested that she be employed in another position is an admission that she believed that United had not selected her for employment as a flight attendant. Lardy's belief that United had not selected her, however, is not dispositive as to whether she had unequivocal notice.

[37] Those Pan Am flight attendants included: (1) Cecilia Monitor and Janine Zyla; (2) junior Pan Am flight attendants who had been furloughed by Pan Am in February; and (3) Maria Confalionieria who went to training without having completed United's medical exam. See Lardy Decl. ¶ 6.

B. Lardy's Deposition Testimony in Gantchar

United further asserts that Lardy's recent statement in her affidavit is also contradicted by Lardy's sworn deposition testimony in Gantchar, in which Lardy "admitted that she sent her March 12, 1991 letter to Fields after she found out that she had been denied employment as a flight attendant. Goldberg Aff.2, Ex. C at 137. Specifically, Respondent relied on Lardy's response to the deposition question, "[A]fter you found out you weren't hired, you also wrote to Sara Fields, didn't you?" Lardy responded, "Yes, I did.". United argues that Lardy's statement is an admission that she had unequivocal notice of her nonselection on or before March 12, 1991. United's argument is not persuasive as Lardy did not admit that United (versus Pan Am) had informed her that she was not hired. Nor did Lardy admit that she was told anything more definitive than that her name was not on a list.

C. Conclusion

Consideration of United's new evidence developed through discovery in Gantchar, leads me to the same conclusion I made in the Lardy case: at no time prior to Lardy's receipt of United's March 13, 1991 letter did Lardy receive unequivocal notice from United that it had not selected her for a flight attendant position.

3. Those Complainants Whom United Allegedly Discriminated Against Within 180 Days of the Filing of Lardy's Charge are Entitled to Protection By IRCA's Antidiscrimination Provisions

Under the preamble to OSC's regulations, those persons who allegedly were discriminated against within 180 days of the filing of Lardy's charge are entitled to be protected by IRCA's antidiscrimination provisions. See 52 Fed. Reg. at 37405-06.[38] Therefore, those former Pan Am flight attendants who were allegedly discriminated against on or after March 29, 1991 (180 days prior to the filing of Lardy's charge September 25, 1991) may "piggyback" onto Lardy's charge.

[38] In the Lardy case, I held that the 180-day period began to run on March 30, 1991 for complainant Lardy, the date she received her rejection letter from United. Lardy Order of January 11, 1994, at 45. As Lardy filed her charge on September 25, 1991, 179 days after receiving the rejection letter, I concluded that her charge was timely filed.

a. Walker's and Harmar's Discrimination Claims are Dismissed for Lack of Timelines

Complainants have stated that Harmar received her United rejection letter March 23, 1991 and that Walker received her United rejection letter between March 23 and 26, 1991. Compls.' Resp. to ALJ's Interrogs. at 3. Because the evidence is undisputed that Harmar and Walker received unequivocal notice of their nonselection prior to March 23, 1991, their claims are dismissed for lack of timeliness.[39]

b. Viewing the Evidence in a Light Most Favorable to Complainants, the Claims of Hainke, Farquharson, Sutherland, Vieux and Vreeburg are Timely

i. Hainke, Farquharson and Sutherland Did Not Receive Unequivocal Notice Prior to Receiving United's Rejection Letter

Respondent argues that Complainants Hainke, Farquharson and Sutherland had unequivocal notice of their nonselection prior to receiving United's rejection letter. See Resp.'s Mem.3 at 2.

A. Hainke

United asserts that it has evidence it obtained in Gantchar which indicates that Complainant Hainke had unequivocal notice of her non-selection by United at the very latest by February 22, 1991. That evidence is a letter sent by Hainke on February 22, 1991 to Sara Fields, United's Vice President of Inflight Services, in which Hainke states that she has been a Pan Am flight attendant or purser for the past 32 years, and describes some of her qualifications to serve in those capacities. Hainke then states "I have just been advised that I was not successfully recommended by the recruiting team in London, and I must confess, it has come as a surprise to realize that I was not meant to be a Flight Attendant after all. I thought I would share this with you." Resp.'s Mem.3 at 5 (citing Goldberg Aff.2, ¶ 10, Ex. G).

Respondent's evidence does not indicate that it was an agent of United that advised Hainke of her nonselection prior to her receipt of

[39] United argues that Walker had unequivocal notice of her non-selection by United prior to her receipt of United's rejection letter and, at the latest, by February 15, 1991. As the date Walker asserts she received United's rejection letter makes her claim untimely, I need not address United's argument.

United's rejection letter. The record therefore indicates that Hainke received unequivocal notice of her nonselection the date she received United's rejection letter.

Hainke received her rejection letter at her residence in a small village, Les Houches, France but she asserts that she does not recall the specific date on which she received it. Hainke Decl. ¶ 1, 3; Resp.'s Mem.2 at 7. She states that she does not have a copy of it because she destroyed the letter upon receipt. Hainke Decl. at ¶ 2. Hainke further states that her experience has been that she receives her mail after other former Pan Am flight attendants who live in Paris receive similar mail. Id. at ¶ 3. She therefore asserts that she believes that she received United's letter "some time after the other Pan Am flight attendants who lived in Paris received similar letters from United." Id.

Respondent asserts that Hainke offers no basis for the belief that she received her letter after other Pan Am flight attendants or what she means by the term "some time after." Resp.'s Mem.2 at 7. Respondent contends that Hainke "tried to align 'her' situation[]" with that of other [c]omplainants in the related Lardy case, who claimed to have received United's letters on March 29 or 30, 1991.[40] Resp.'s Mem.2 at 2. Respondent contends that it has indirect evidence which suggests that Hainke received her rejection letter between March 23 and 26, 1991. Id. at 8. Specifically, Respondent asserts that, "if Walker, a resident of Paris, received her rejection letter between March 23 and 26, 1991, the fact that Hainke lived within a few hours of Paris by car suggests that Hainke likely also received her letter between March 23 and 26, 1991, or perhaps a day later." Id. (footnote omitted).

Respondent has failed to meet its burden of showing an absence of evidence that Hainke received her rejection letter on or after March 29, 1991. The record contains the following evidence: (1) the undisputed fact that Hainke received the rejection letter at her residence in Les Houches, France; (2) my finding in Lardy which I incorporate into this case, that Mary Moore received her rejection letter from United at her residence in Paris, France, on March 29, 1991 (see Lardy Order, at 12 (Moore maintained the envelope in which her rejection letter arrived and, in accordance with her practice to mark envelopes of important mail with the date of receipt, wrote that date, March 29, 1991, on the envelope at the time of receipt) (citing Moore Decl. at Ex. B [a copy of

[40] Respondent likely is referring to Mary Moore, who I found in Lardy had received her rejection letter from United at her residence in in Paris on March 29, 1991. See Lardy, at 45.

the envelope, with 'March 29, 1991' written on it])); and evidence that Walker received her rejection letter in Paris between March 23 and 26, 1991.

Viewing the evidence in a light most favorable to Hainke, I conclude that a reasonable jury could find that she received unequivocal notice of her nonselection by United on or after March 29, 1991.

B. Farquharson

United asserts that it has evidence which demonstrates that Complainant Farquharson received unequivocal notice of her non-selection by United at the very latest by February 25, 1991. Specifically, United states that:

> [O]n February 14 and 15, 1991, United sent letters to Farquharson indicating that, subject to several conditions, she would receive a job offer from United. These conditions included, among other items, successful completion of United's (i) pre-employment physical examination and (ii) flight attendant training program. See Goldberg Aff.[2], ¶¶ 5-6, 9, Exhibits B, C, F. Thereafter, on February 21, 1991, Nancy Grable, United's Manager, Inflight Training, sent a letter to Farquharson containing general information with respect to United's flight attendant training program in Chicago. See Goldberg Aff.[2], ¶¶ 7, 9, Exhibits D, F.
>
> On February 25, 1991, just four days after Farquharson received Ms. Grable's February 21, 1991 letter, Mike Sullivan, a Pan Am supervisor, called Farquharson "to tell [her] that [she] had failed [United's pre-employment] medical" examination and thus was not accepted for flight attendant training. Goldberg Aff.[2], ¶ 9, Exhibit F; see Complaint, dated Jan. 8, 1993, at ¶ 30. Farquharson knew unequivocally from her conversation with Mr. Sullivan that United had rejected her employment application and that she was, in her own words, "not wanted in Chicago!" for training. Goldberg Aff., ¶ 9, Exhibit F. Indeed, Farquharson herself has referred to her February 25, 1991 conversation with Sullivan as an "oral denial of employment." Id.
>
> Having learned that United rejected her employment application for medical reasons, Farquharson then sent a letter on February 26, 1991 to Nancy Grable, United's Manager, Inflight Training, to find out what those medical reasons were. In that letter, Farquharson asks: "was I turned down on the basis of my past medical record, or was I turned down by something your medical department found." Goldberg Aff.[2], ¶¶ 8-9, Exhibits E, F; see Complaint, dated Jan. 8, 1993, at ¶ 30. The above evidence, and particularly Farquharson's February 26, 1991 letter, demonstrates that Farquharson received unequivocal notice of her non-selection by United at the very latest by February 25, 1991, the date of her conversation with Mr. Sullivan.

Resp.'s Mem.3 at 3-4.

Complainants, however, argue that

> United has not produced even a scintilla of evidence that it ever attempted to communicate with the Complainants regarding their employment applications prior to the time it sent them the March 13, 1991 letter. All United alleges is that some of the Complainants had been told by their Pan Am supervisors that they were not on the list of persons selected for training or that they had not passed United's physical. Stripped of its hyperbole, United's entire argument hinges on the remarkably novel legal proposition that the Complainants could receive "unequivocal" notice concerning United's hiring decisions based on second or third hand information from a third party.

Compls.' Mem.2 at 2.

In response, United relies on Ching v. MITRE Corp., 921 F.2d 11, 14-15 (1st Cir. 1990), for the proposition that unequivocal notice can be provided by a third-party who is informed of the decision by the employer and who communicates that information to the aggrieved party. See Resp.'s Mem.4 at 7-8. United, however, misconstrues Ching. In that case, the court held that the statute of limitations began to run on the date "Ching's attorney was told . . . that Ching was going to be terminated." That holding was based on (1) the fact that the attorney was Ching's agent and (2) the court's finding that the notice was unequivocal, even though informal, as demonstrated by Ching's filing of a discrimination complaint with a state agency four days before receiving formal notice. 921 F.2d at 14.

The attorney in Ching, however, was not the employer's agent or a third-party authorized to convey an employment decision on its behalf. Rather, the attorney was Ching's agent. Therefore, unequivocal notice to Ching's attorney of the employment decision constituted unequivocal notice to Ching. That case accordingly does not support United's argument.

Furthermore, Respondent's argument is not persuasive because, as stated above, "[t]he statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. Ricks does not hold that the statute of limitations begins to run as soon as the handwriting is on the wall." Cada v. Baxter Healthcare Corp., 920 F.2d 446, 449 (7th Cir. 1990) (citing Ricks, 449 U.S. 250 (1980)). See part III(D)(2)(b)(ii)(A). There is no evidence in the record indicating that Pan Am was United's agent regarding the employment decisions at issue. Because Sullivan, a Pan Am supervisor was not an agent of United, I conclude that the record indicates that Farquharson did not receive unequivocal notice of her nonselection until she received United's rejection letter.

Farquharson asserts that she believes that she received United's rejection letter at her residence in Andover Hants, England at the end of March, 1991. See Compls.' Resp. to ALJ's Interrogs. at 3; Farquharson Decl. ¶ 1-2. Farquharson claims, however, that she does not recall the specific date on which she received it. Id. Farquharson states that she recalls speaking with Joan Lardy, a complainant in the Lardy case, regarding United's letter about the same time that Farquharson received it and "think[s] that Ms. Lardy had received a similar letter from United at the time [Farquharson] spoke with her about it." Farquharson Decl. ¶ 3.

Respondent contends that Farquharson "tried to align "her situation[]" with that of Lardy. Resp.'s Mem.2 at 2. Respondent also requests that I take official notice, pursuant to 28 C.F.R. § 68.41 (1993), that Andover, Hants is a town approximately 70 miles from London. Resp.'s Mem.2 at 5-6. Respondent asserts that Farquharson does not say what she means by the term "late March" in her statement that she "believes[s] that [she] received United's letter inlate March, 1991." United further asserts that Farquharson does not state the basis for her belief. In addition, United asserts that Farquharson does not state what she means by her assertion that she received United's rejection letter at "about the time" Lardy did. Finally, Respondent argues that Farquharson does not identify the date she discussed her rejection letter with Lardy.

Respondent has failed to meet its burden of showing an absence of evidence that Farquharson received her rejection letter on or after March 29, 1991. The record indicates (1) that Farquharson received United's rejection letter at her residence in Andover Hants, England; (2) that Andover Hants is 70 miles outside of London; and (3) that Lardy received her United rejection letter at her residence in London on March 30, 1991. Therefore, viewing the evidence in a light most favorable to Farquharson, I conclude that a reasonable jury could find that she received unequivocal notice of her nonselection by United on or after March 29, 1991.

C. Sutherland

United asserts that it has evidence which suggests that Sutherland had unequivocal notice of her non-selection by United at the very latest by March 13, 1991. Specifically, United states that:

> [D]uring her deposition in the Gantchar Action, Sutherland testified that prior to March 13, 1991, she was told by Mike Jarnigan, a Pan Am supervisor, that she was not on the list of Pan Am applicants who had been selected by United. See Goldberg Aff.[2], ¶ 11, Exhibit H. Although Sutherland did not identify the date of that conversation, her

> deposition testimony suggests that she received unequivocal notice of her non-selection before receiving United's rejection letter, and even before that letter was mailed to her on March 13 or 14, 1991. Id.

Resp.'s Mem.3 at 5-6.

Complainants contend that United's evidence fails to show that Sutherland had unequivocal notice of her nonselection prior to receiving United's March 13 rejection letter. Complainants note that United (1) has failed to submit copies of the alleged lists that allegedly gave Sutherland and other Complainants their unequivocal notice; (2) has failed to submit any evidence regarding (a) whether United or Pan Am prepared the lists; (b) the contents of the lists; (c) their business purpose; (d) whose names appeared on them; (e) how the lists were actually used; (f) whether they were prepared on United or Pan Am stationery or scratch paper; (g) the names of which Pan Am supervisors had lists; (h) why they had them; and (i) what, if anything, United had authorized Pan Am to do with the lists; and (3) has produced no evidence to demonstrate that the lists were compiled after United made its hiring decisions. See Compls.' Mem.3 at 3-4.

I agree with Complainants that notice to Sutherland from Jarnigan, her former Pan Am supervisor, that she was not on a list of persons selected for training does not constitute the "unequivocal notice" required to start the running of the statute of limitations under Ricks and Cada. Jarnigan was not a United employee; nor is there any evidence in the record that he was authorized to convey United's employment decisions to Sutherland or anyone else.

Furthermore, the record indicates that whenever United wanted to communicate with the former Pan Am flight attendants about their employment status, it did so directly and did not rely on Pan Am to relay that information. See Goldberg Aff.2, Exhs. C, D. In addition, Sutherland testified in Gantchar that United did not contact her between the time she interviewed and the time she received United's March 13, 1991 rejection letter. See King Decl., Ex. A at 175. United has not produced any evidence to the contrary. The record therefore shows that Sutherland received unequivocal notice of her nonselection when she received United's March 13 rejection letter.

Sutherland received United's rejection letter at her residence in Paris, France. Resp.'s Mem.2 at 6; Sutherland Decl. ¶ 2. She claims that she received the letter at the end of March 1991, but does not recall the specific date on which she received it. Sutherland Decl. at ¶ 1. She has provided a copy of the letter and the envelope in which it came as

Exhibit 1. The envelope does not have a postmark. Sutherland states that her experience has been that her mail from the United States is often delivered two or more weeks after it is sent from the United States. Id. at ¶ 3. She asserts that her experience with the delays of transatlantic mail is similar to that of Mary Moore, a complainant in Lardy. Id. Sutherland states that:

> Ms. Moore and I live approximately 3 miles from each other in Paris and are located in the same postal zone. As Ms. Moore received a similar letter from United on March 29, 1991, I believe, based on my experience, that a letter mailed to me by United in Chicago on the same day as Ms. Moore's letter would have been delivered to me on or about the same date.

Id.

Respondent contends that Sutherland "tried to align "her' situation[]" with that of other complainants in the Lardy case, who claimed to have received United's letters on March 29 or 30, 1991. Resp.'s Mem.2 at 2. Respondent further asserts that Sutherland does not explain what she means by the term "on or about the same day" in reference to her assertion that she believes she received United's rejection letter on or about the same day as Mary Moore.

Respondent asserts that it has indirect evidence suggesting that Sutherland received her rejection letter between March 23 and 26, 1991. Specifically, United argues that:

> if Walker, a resident of Paris, received her rejection letter between March 23 and 26, 1991, the fact that Sutherland likewise resided in Paris suggests that Sutherland also would have received her rejection letter between March 23 and 26, 1991.

Resp.'s Mem.2 at 7.

Respondent has failed to meet its burden of showing an absence of evidence that Sutherland received her rejection letter on or after March 29, 1991. The record indicates that (1) Sutherland's experience was that she received her mail two or more weeks after it was mailed from the United States; (2) Sutherland received the rejection letter at her residence in Paris, France; (3) Sutherland and Mary Moore live approximately 3 miles from each other and reside in the same postal zone; and (4) I found in Lardy that Mary Moore received her rejection letter from United at her residence in Paris, France on March 29, 1991 (see Lardy Order, at 12 (Moore maintained the envelope in which her rejection letter arrived and, in accordance with her practice to mark envelopes of important mail with the date of receipt, wrote that date, March 29,

1991, on the envelope at the time of receipt) (citing Moore Decl. at Ex. B [a copy of the envelope, with 'March 29, 1991' written on it])).

Viewing the record and all reasonable inferences drawn from it in the light most favorable to Sutherland, I conclude that a reasonable jury could find that she received unequivocal notice of her nonselection by United on or after March 29, 1991.

ii. Others

A. Vieux

Complainant Vieux asserts that she does not recall when she received United's rejection letter at her residence in London, England. Compl.'s Resp. at 4; Vieux Decl. ¶ 1, Ex. 1. She further states that her experience has been that she receives her mail at about the same time as other former Pan Am flight attendants who live in London receive similar mail. Vieux Decl. ¶ 3. Vieux asserts that she therefore believes that she received United's letter at about the same time as the other former Pan Am flight attendants who lived in London received similar letters from United. Id. Respondent contends that Vieux tried to align her situation with that of other complainants in Lardy, who claimed to have received United's letters on March 29 or 30, 1991. Resp.'s Mem.2 at 2. Respondent purports to refer to Joan Lardy, who claimed to have received United's letter at her London residence on March 30, 1991, and who I found in Lardy to have received it on that date.

United asserts that Vieux offers no support for her belief that she received United's letter at about the same time as the other former Pan Am flight attendants who lived in London. Resp.'s Mem.2 at 5. United further asserts that Vieux does not explain what she means by the phrase "at about the same time of the other former Pan Am flight attendants who lived in London." Id. United claims it has indirect evidence which suggests that Vieux received her rejection letter on March 23, 1991 or earlier. Resp.'s Mem.2 at 5. Specifically, United asserts that it "knows that at least one 'other' former Pan Am flight attendant living in London--Complainant Harmar--received her rejection letter on March 23, 1991 or earlier." Thus, United argues that

> if Harmar, a resident of London, received United's rejection letter on March 23, 1991, the fact that Vieux also lived in London and "received United's letter at about the same time as the other former Pan Am flight attendants who lived in London," suggests that Vieux likely also received her rejection letter March 23, 1991.

Id. (footnote omitted). Respondent further notes that Helene Ostbo, a plaintiff in the Gantchar case, lived in Taplow, Bucks, England, and has admitted that she received her rejection letter on March 18, 1991. See Goldberg Aff.1 ¶ 8, Ex. E. United also requests that I take official notice pursuant to 28 C.F.R. § 68.41 (1993), that Taplow, Bucks is approximately 25 to 50 miles outside of London. See Resp.'s Mem.2 at 5 n.2. Based on that information, Respondent asserts that Vieux may have received her rejection letter even prior to March 23, 1991.

Respondent has failed to meet its burden of showing an absence of evidence that Vieux received her rejection letter on or after March 29, 1991. The record indicates (1) that Vieux received her rejection letter from United at her residence in London, England; (2) that Harmar, a resident of London, received her rejection letter from United on March 23, 1991; (3) that Helene Ostbo, a plaintiff in the Gantchar case, who lived in Taplow, Bucks, England, located approximately 25 to 50 miles outside of London, received her rejection letter from United on March 18, 1991; and (4) that Lardy received her United rejection letter at her residence in London on March 30, 1991. Viewing the evidence in a light most favorable to Vieux, I conclude that a reasonable jury could find that she received unequivocal notice of her nonselection by United on or after March 29, 1991.

B. Vreeburg

Complainant Vreeburg received his rejection letter at his apartment in Seattle, Washington. Vreeburg Decl. ¶ 2. He asserts that at the time, however, he was living with his parents in Seattle, rather than at his apartment. Id. Vreeburg states that he originally believed that he had received the letter on March 28 or 29, 1991. Compl.'s Resp. at 3; Vreeburg Decl. ¶ 2. He asserts that after subsequently reviewing his records, however, he determined that he had actually received United's letter on April 12, 1991. Vreeburg Decl. ¶ 2. He states "[w]hen I went by my apartment on April 12, 1991, I found United's letter among my mail." Id. Vreeburg states that he recalls that he received United's letter on April 12, 1991 because of a note that he wrote to himself at the time he received United's letter. Id. at ¶ 3. That note states "4/12/91 PA-UA must call Joan L. in [London]. . . . UAL rejection letter (recvd. 4/12)." See id. at Ex. 1.

United claims it has indirect evidence which suggests that "Vreeburg's rejection letter was delivered to his Seattle apartment well before April 12, 1991, and most likely arrived by March 17, 1991." Resp.'s Mem.2 at 8. Specifically, United asserts that "the United States Postal Service

estimates that first-class domestic mail is generally delivered within three days of mailing." Id. In support of its assertion, Respondent states:

> During the week of May 15, 1994, I spoke with a representative of the United States Postal Service (the "Postal Service') in Chicago, Illinois. The representative informed me that the Postal Service generally delivers first-class domestic mail within three days of mailing, and sent me a copy of the Postal Service's Service Commitments for zip coded mail.

Goldberg Aff.1, ¶ 11. See also id. at Ex. H [a copy of the Postal Services's Service Commitments for zip-coded mail which indicates that the Postal Service seeks to deliver first-class domestic mail within three days of mailing].

Respondent has failed to meet its burden of showing an absence of evidence that Vreebug received his rejection letter on or after March 29, 1991. The record indicates that (1) even if the letter arrived at Vreeburg's apartment by March 18, 1991, at the time, he was not living at his apartment, but with his parents and (2) as demonstrated by the note he wrote to himself--he picked up the letter April 12, 1991. I therefore conclude that viewing the evidence in a light most favorable to Vieux, a reasonable jury could find that he received unequivocal notice of his nonselection by United on or after March 29, 1991.

4. Conclusion

Accordingly, Respondent's motion for summary decision is GRANTED with regard to the untimely discrimination claims of Complainants Walker and Harmar and is DENIED with regard to the retaliation claims of Complianants Walker and Harmar[41] and all claims of Complainants Hainke, Farquharson, Sutherland, Vieux and Vreeburg.

5. Joinder of Harmar and Walker with Lardy Case for Purposes of Retaliation Claim Only and Joinder of the Five Other Complainants with Lardy Case for All Purposes

a. Complainants' Claims Are Not Barred Because They Did Not First Move to Intervene in Lardy

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[41] Because United has not disputed that the retaliation claims of Walker and Harmar (as well as those of the other complainants in this case) were timely filed (see United's February 10, 1993 Memorandum in Support of Motion to Dismiss, at 21), those claims are not dismissed for lack of timeliness or for failure to state a claim upon which relief can be granted, neither of which Respondent has argued.

United argues that Complainants' claims are barred because they did not attempt to intervene in Lardy prior to filing a separate complaint. See Resp.'s Mem.1 at 14 n.5. Complainants, however, contend that they had the option either to join in the Lardy action or to file a separate lawsuit.

United, in support of its argument, looks to Tolliver v. Xerox Corp., 918 F.2d 1052, 1057 (2d Cir. 1990), cert. denied, 111 S.Ct. 1641 (1991), in which the court stated that the single-filing rule may be used to permit an ADEA plaintiff to file his or her own lawsuit, rather than to join in a previously filed suit, either as a co-plaintiff or intervenor. The court said, "[i]f the single-filing rule is to be available in non-class ADEA actions, we see no reason to limit its use to those electing to join pre-existing lawsuits." Id. The court asserted that limiting application of the single-filing rule in Title VII cases to permit joining a preexisting suit in which at least one plaintiff had filed a timely charge is a "consequence [that] flows from Title VII's requirement that no person may initiate a Title VII suit without obtaining a right-to-sue letter, 42 U.S.C. § 2000e-5(f)(1), which ordinarily requires timely filing of an administrative charge." Tolliver at 1057 (citing Inda v. United Air Lines, Inc., 565 F.2d 554, 559 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978)). The court stated that because "[t]here is no comparable requirement for ADEA suits," there is "no reason to require ADEA plaintiffs seeking to benefit from the single filing rule to join preexisting individual suits." Id.

United argues that IRCA complainants must use the single-filing rule in the first instance to intervene because "IRCA is more analogous to Title VII than the ADEA in this respect because IRCA also requires a complainant to receive a notice akin to a right-to-sue letter from [OSC] before filing a complaint." Resp.'s Mem.1 at 14 n.5 (citing 8 U.S.C. § 1324b(d)(2)). Thus, Respondent argues that the single-filing rule would have permitted Complainants to bring a separate action only if they were unable to join the Lardy case. Id. For support, United relies on Calloway v. Partners National Health Plans, 986 F.2d 446, 450 (11th Cir. 1993), in which the court stated that:

> [A] plaintiff . . . who unsuccessfully moves to intervene in the lawsuit of a plaintiff who has filed an EEOC charge may invoke the single filing rule [in a separate lawsuit], provided (1) the relied upon charge is not invalid, and (2) the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame.

Although OSC in the preamble to its regulations has provided that individuals who did not timely file an OSC charge, in certain circum-

stances, may piggyback on the timely-filed charge of a complainant who filed a timely OSC charge, OSC has not clarified whether the piggybackers must seek to join a previously-filed lawsuit prior to filing their own. Although United correctly notes that IRCA has a mechanism akin to the EEOC's right-to-sue letter, the Complainants received such a letter when OSC sent their counsel a determination letter dated October 21, 1992, stating that the Complainants were "entitled to filed [their] own complaint directly with the Office of the Chief Administrative Hearing Officer within 90 days" after their receipt of the letter. See Compl., Ex. 3 [OSC determination letter]. I therefore reject United's argument that the complaint in this case is barred.

b. Joinder of the Seven Complainants With the Lardy Complainants is More Appropriate Than Consolidation of the Two Cases

Complainants have moved to consolidate this case with Lardy under Fed. R. Civ. P. 42[42] and 28 C.F.R. § 68.16 (1993) and have requested leave to file a consolidated amended complaint naming as complainants the three Lardy and seven Walker complainants. OCAHO's rules of practice and procedure provide that:

> When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the [ALJ] assigned may, upon motion by any party, or on his or her own motion order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made at the discretion of the [ALJ].

28 C.F.R. § 68.16.[43]

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[42] Federal R. Civ. P. 42(a) states:

> **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

[43] The rules of practice and procedure governing § 1324b proceedings provide that "[t]he rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation. 28 C.F.R. § 68.1 (1993). As 28 C.F.R. § 68.16 provides for the consolidation of hearings, I need not look to Fed. R. Civ. P. 42(a) as a general guideline.

In support of its motion to consolidate, Complainants assert that United "will not be prejudiced by the presence of additional parties" as "[e]ach of the individuals which Complainants seek to add to this case are former Pan American flight attendants whom United refused to transfer and/or hire at the time United purchased Pan Am's London routes, air services and operations." Compls.' Joint Motion at 3. Complainants further assert that because "[t]he decision whether or not to hire each of these individuals was made during the same time period as the decision not to hire the Complainants . . . the addition of these individuals will not expand the scope of the litigation." Id.

The regulations provide that consolidation brings together two cases only for the purpose of a joint hearing. 28 C.F.R. § 68.16. Although consolidation of this case with the Lardy case is appropriate based upon the pleadings filed in this case, the ultimate goal of Complainants is to join in as party complainants with the Lardy complainants. Rule 20(a) of the Federal Rules of Civil Procedure provides in relevant part that:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

The policies behind permissive joinder are (1) promotion of judicial economy; (2) avoidance of multiple litigation with potentially inconsistent results; and (3) protection of defendants from the burden of multiple suits involving similar issues of law or fact. See, e.g., League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977); Fair Housing Development Fund Corp. v. Burke, 55 F.R.D. 414, 422 (E.D.N.Y. 1972). "The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." Church v. Consolidated Freightways, Inc., 137 F.R.D. 294 (N.D. Ca. 1991).

In the interests of judicial economy and fairness, Complainants Walker and Harmar shall be joined with the Lardy complainants for purposes of their retaliation claims only and Complainants Hainke, Farquharson, Sutherland, Vieux and Vreeburg shall be joined with the complainants in Lardy for all purposes. Furthermore, the Lardy complainants shall be granted leave to file an amended complaint in that case, naming these five as additional complainants and including any other relevant information in support of their complaint. See 28 C.F.R. § 68.9(e) (1993) ("If and whenever a determination of a controversy on the merits will be facilitated thereby, the [ALJ] may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the

parties, allow appropriate amendments to complaints . . . ."); see also United States v. McDonnell Douglas Corp., 2 OCAHO 351, at 10-11 (July 2, 1991) (the ALJ granted OSC, the complainant in that case, leave to amend the complaint to add "two individuals whose claims were substantially the same as those of the 20 originally named charging parties" but who had not timely filed OSC charges, concluding that the company would not be prejudiced); Galvan v. Bexar County, Texas, 785 F.2d 1298, 1304 (5th Cir. 1986) (court of appeals held that the district court did not abuse its discretion in allowing the filing of a first amended complaint because "allowing [it] did not delay the trial by necessitating additional discovery, nor was the County prejudiced by being surprised by unsuspected claims immediately before trial.").[44]

E. Order

1. Respondent's motion for summary decision is GRANTED with regard to the discrimination claims of Complainants Walker and Harmar and is DENIED with regard to the retaliation claims of Complainants Walker and Harmar and all claims of Complainants Hainke, Farquharson, Sutherland, Vieux and Vreeburg.

2. The motion for joinder with the complainants in Lardy v. United Airlines, OCAHO Case No. 92B00085 shall be GRANTED as to Complainants Hainke, Farquharson, Sutherland, Vieux, Vreeburg, Walker and Harmar and shall be DENIED as to any and all unnamed former Pan Am flight attendants. Joinder of Hainke, Farquharson, Sutherland, Vieux, Vreeburg, Walker and Harmar with the Lardy complainants shall be issued in a separate order in Lardy.

SO ORDERED this 13th day of September, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge

[44] Although I am granting in part Complainants' motion for joinder, I shall issue a separate order in Lardy joining the five remaining Walker complainants, directing complainants to file an amended complaint, directing respondent to file an amended answer, and directing complainants to address its discovery needs.